



EMPLOYMENT TRIBUNALS

Claimant: Mr L Green

Respondent: Airport Bus Express Ltd

Heard at: East London Hearing Centre
On: 2 October 2017

Before: Employment Judge C Lewis (sitting alone)

Representation

Claimant: In person

Respondent: Ms T O'Halloran (Counsel)

RESERVED JUDGMENT

The judgment of the Employment Tribunal is that:-

- (1) The Claimant is entitled to a declaration that the Respondent has unlawfully deducted the sum of £574.24 from his wages contrary to section 23(1)(a) of the Employment Rights Act 1996.
- (2) The Respondent is ordered to pay to the Claimant the amount of £574.24 forthwith, in accordance with section 24(1)(a) of the Employment Rights Act 1996.

REASONS

1 The Claimant brought complaints of unlawful deduction from wages under section 13 of the Employment Rights Act 1996. The issues in the claim were:-

- 1.1 Whether the Respondent had made a deduction of wages under section 13 of the Employment Rights Act 1996; and
- 1.2 Whether any of the excepted deductions under section 14 of the

Employment Rights Act 1996 apply.

2 The Claimant claimed a shortfall in his pay for the period up to September 2016 and also a shortfall in his holiday pay owed to him in his final payment from the Respondent on 27 October 2016.

3 The Respondent disputed that there had been an underpayment of the Claimant's wages. In its Response to the claim it calculated the Claimant had been overpaid the sum of £4,507.66 gross during his employment. The Respondent accepts that it did not pay the Claimant his outstanding holiday pay on termination of his employment but asserts that it was entitled to withhold that payment for the purpose of reimbursement in respect of the overpayment of wages. An exception falling within section 14(1)(a) of the Employment Rights Act 1996.

4 The case had previously come on for hearing on 10 July 2017 before Employment Judge Gilbert. That hearing was converted into a Preliminary Hearing and case management orders were given. A number of disputes were identified in respect of the entitlement to pay, the amount of pay, the calculation of the amounts unpaid, and whether the contract relied upon by the Respondent was in force.

5 At the hearing on 2 October 2017, the Claimant again appeared in person. The Respondent provided a bundle which consisted of some 489 pages and also two witness statements from Izabela Bembenek which set out the Respondent's calculation of the Claimant's hours and the pay that the respondent contended he should have received as against what the Claimant claimed he was entitled to receive and the hours he worked.

6 Mr Green had sent a number of documents to the tribunal and the Respondent which he relied on as setting out his evidence. Those were dated 2 July, 18 June, 15 August and 9 September 2017. The Respondent maintained that there was insufficient clarity in what the Claimant was claiming.

7 At the outset of the hearing the Claimant clarified that his claim was for 10.5 days of outstanding holiday pay, which he claimed at the usual day-time hourly rate of £12 an hour for a 12 hour shift; four days unpaid wages from 8 to 11 August 2016, which he says he worked but which do not appear in the timesheets produced by the Respondent; and two days at the start of his employment namely 19 and 20th November 2015 for which no time sheets have been produced.

8 Ms O'Halloran initially contended that the Respondent was not aware that the Claimant was seeking the payment of four days' pay from August 2016. However, the 8 & 9th August are referred to in the document the Claimant produced on 2 July 2017, the four dates in August are then referred to in the Claimant's letter dated 15 August 2017 in which he explains he has gone through the diary and work sheets again, and then in the letter dated 9 September 2017 at paragraph 4 he sets out his explanation of what he was doing on those 4 dates in August and why they might be missing from the worksheets. He had also claimed numerous other shifts where he was not entered on the timesheets but at the hearing limited his claim to the four nights in August 2016 and two missing days in November 2015. The Respondent was asked whether it wished to adjourn the proceedings in order to meet the claim for the 4 nights in August. Ms

O'Halloran indicated that no application to adjourn was being made.

9 There was some dispute as to whether the Claimant was entitled to be paid for a full 12 hour shift even if the time sheet recorded him as having worked less than 12 hours. The Respondent relied on clause 8.2 of the Claimant's contract which states, "you will only be entitled to be paid for the hours that you actually work". This helps explain how the Respondent came to their calculation of the hours that the Claimant was to be paid for i.e. the actual hours that he worked which were recorded on the timesheets. However given that the Claimant did not dispute the final calculations by the Respondent which were based on the times recorded on the time sheets, the issue I have to decide is whether the Claimant also worked the days claimed in November 2015 and August 2016 that were not recorded on the timesheets and is entitled to be paid for those days/nights.

10 During the course of the hearing before me Ms O'Halloran accepted that there were errors in the calculations put forward on behalf of the Respondent and therefore in the table produced by Ms Bembenek in her witness statement and requested an opportunity to recalculate the amounts outstanding.

11 Following the lunch adjournment Ms O'Halloran helpfully went through the revised calculations that the Respondent now put forward. In summary it was accepted that from month to month throughout the period of Mr Green's employment there were mistakes in the calculation of his pay and that he was variously overpaid and then underpaid. The final figure for the amount the Respondent contended the Claimant was overpaid was £1,856.96. This is considerably lower than the figure of over £4,507.66 previously put forward by the Respondent. It is this overpayment that it seeks to rely upon under section 14(1)(a) of the Employment Rights Act 1996 in respect of the admitted deduction from the Claimant's last pay in respect of outstanding holiday pay. However the amount of holiday owing, the two days in November and four days in August were still in dispute.

12 In respect of his holiday pay the Claimant contended that he had been allowed to carry over four days from the previous year. His contract provided for 28 days entitlement per year. He had started employment in November 2015 and had taken eight days holiday in total by the time his employment came to an end; he had been paid for 9.5 days, (the sum of £1368.00 paid in his final wages on 27 October 2016 i.e. 12 hour shifts x £12 per hour being £144 per day x 9.5= £1368.00), by his calculation he was owed 10.5 days' holiday.

13 The Respondent accepted that the Claimant had outstanding holiday at the end of his employment and that he was entitled to holiday pay. The Respondent also accepted that at the time of the termination of the Claimant's employment he was a night time controller and that the night time rate included an additional premium of £2 for night work and that this should be included in the calculation of his normal pay (see *Dudley Metropolitan Borough Council v Willetts and others* EAT/0334/16) for the purpose of calculating his holiday pay. Its case was that the Claimant had 15 days outstanding for the leave year from January 2016 to 7 October 2016, which, based on the hourly rate of £14 per hour for a normal 12 hour shift equated to £168 per day, or £2520 for 15 days, it had paid £1368.00 in October 2016 which left £1152.00 owing but which it was entitled to deduct from the Claimant's final pay in respect of the

overpayment.

14 Much criticism was made by the Respondent of the Claimant's inability to specify or particularise precisely the deductions from his pay. Having been through the timesheets and the spreadsheets provided by the Respondent it is clear that this was not an easy task for anyone and it is noted that Ms Bembenek had to correct the calculations on the day of the hearing.

Evidence and findings of fact

15 I heard evidence from the Claimant and also from Ms Bembenek.

16 Having heard Mr Green's evidence I accept that he worked two day shifts on 19 and 20 November 2015 respectively for which he was entitled to be paid at £12 an hour for 12 hours each day. The Respondent does not have or has not produced the timesheets from those dates although it accepts his employment started on 19 November 2015. I am satisfied that the Claimant is owed the sum of £288 for those two days.

17 Having heard the Claimant's evidence I also accept that he was asked to attend work on the nights of 8, 9, 10 and 11th August 2016 in order to carry out spot checks on drivers to ensure they were not sleeping on the coaches and to ensure that resold tickets were not being used on the coach. He has entered 8th and 9th August in his diary as overtime but was clear in his evidence that he worked on the 10 and 11th August as well. He recalled that he was asked to work those nights at short notice by his manager, Paul Stephens, to carry out checks on the drivers and it was agreed he would go in on his next nights off. He couldn't do it when he was on duty as he couldn't be in two places at the same time. He was able to identify the dates as it was the next four consecutive nights when he wasn't on the rota. Mr Green accepted that he should have written the shifts on the time sheets when he got to work but didn't as it was close to when he was going away to Australia and all his paperwork was in Bishops Stortford, which is where he had a room where he stayed when he was working nights.

18 I find that the explanation the Claimant gave in his evidence is substantially the same as he set out in his response to the Respondent's request for further information dated 9 September 2017; in answer to question 4 the Claimant stated that:

"The four dates stated were not at Stansted they were in London checking over night drivers making sure they had not gone to sleep as we had problems with drivers not turning up on time my son included in this and checking tickets no one [sic] told about these jobs because the more that knew word spread even from our office I was also checking for tickets that had been resold."

"The reason I forgot about it should have been paid in September as it was missed in August as it was not on the sheets I dare say it was overlooked Paul was dealing with but left and I never got my wage slip before I went away."

The Claimant continues:

"As you only relying on work sheets they were wrong at times even when I was

in the office you made mistakes with peoples money every month we had problems over this.”

19 The Claimant gave evidence that someone called Ray would occasionally carry out the same or similar checks in the day time, using his motorbike to get to the various picking up points. The Claimant was able to use his car to make the journey to carry out the checks at night time. Ms Bembenek was aware that Ray had sometimes carried out checks in this way but she was not aware that the Claimant had also been asked to do the same for the night shift.

20 I found Mr Green to be a truthful witness and found his evidence on this point credible I accept the Claimant’s evidence that he worked those four nights. As those were night time shifts they attracted the night premium. I also accept that those nights were worked as overtime and therefore attracted the overtime premium for nights. It is not disputed by the Respondent that the Claimant was not paid for those nights. They maintained that they were not recorded on the timesheets and therefore he had not worked them. I find that he did work them and is entitled to be paid accordingly, at the rate of £16.10 per hour for each 12 hour shift, £193.2 x 4 shifts = £772.80 which I find is outstanding and owed to Claimant

Holiday pay

21 The Claimant started working for the Respondent on 19 November 2015. The holiday year ran from January to December and his holiday entitlement according to his contract was 28 days a year, (Clause 15 of his contract). The Claimant calculated that by September 2016 he had 28 days holiday entitlement and that he had taken eight days in 2016 leaving him with 20 days. He was paid for 9½ days holiday pay and therefore claims the balance of 10½ days.

22 Clause 15.4 of the Claimant’s contract provides that “Holidays not taken in a holiday year will normally be lost unless there are exceptional circumstances, in which case up to 5 days can be carried over strictly with management’s prior approval.”

23 I accept the Claimant’s evidence that he had been told by his manager that he could carry over four days’ holiday from 2015 into 2016 because he had been unable to take the holiday due to the Respondent needing him to work throughout the Christmas and New Year period.

24 Ms Bembenek’s evidence was that the Claimant was not entitled to carry over any holiday from 2015, but she was unable to refute the Claimant’s evidence that he had been asked to work over Christmas and New Year and told by his manager that he could carry his holidays over in return.

25 The Claimant’s contract provides for 28 days’ paid holiday each holiday year with the holiday year running from 1 January to 31 December. On this basis I calculate that holidays were accrued at 2.33 days per month. Doing the best I can on the evidence before me, I find that the Claimant accrued one day for part of November 2015 (or 0.9 days) and 2.33 days for December being a total of 3.23 days which he was permitted to carry over into 2016. By the time the Claimant’s employment ended on 7 November 2017 he had accrued 20.97 days for the new holiday year together with

the 3.23 days he was allowed to carry over gives him a total of 24.3 days, less the 8 days holiday that Mr Green took in 2016 leaves 16.3 days. The Respondent accepted that his normal rate of pay was £14 an hour for a night shift and a normal shift was 12 hours, which amounts to a rate £168 for each shift x 16.3 days brings a total of £2738.40 in accrued holiday pay. The sum of £1,368.00 which the Respondent paid to the Claimant in respect of holiday pay falls to be deducted from this amount, (although this was originally calculated at the rate of £12 an hour which the Respondent accepts was not the correct hourly rate and therefore does not fully reflect the number of days it was said to have covered). After giving credit for the sum paid I find that the balance of holiday pay accrued and outstanding on termination was £1370.40.

The overpayment

26 It is for the Respondent to establish that there was an overpayment of wages against which it could then make a deduction in order to fall within section 14(1)(a) of the Employment Rights Act and clause 10.1a of the Claimant's contract. The overpayment now contended for by the Respondent is £1,856.96 based on its latest analysis of the timesheets and rates of pay. The Claimant accepts he is not in a position to contest these calculations, save for the missing two days in November 2015 and four days in August 2016.

27 Based on my findings above I find that the difference between the Claimant's outstanding holiday pay (£1370.40) and the Respondent's overpayment (£1856.96) is the sum of £486.56 in the Respondent's favour.

28 However, I have also found at paragraphs 16 and 20 above that the Claimant is owed a further sum of £1060.80 in unpaid wages (£288 + £772.80).

29 No issue was taken by the Respondent in respect of time limits and I am satisfied that given the history of overpayments and underpayments that both of these sums amount to underpayments which were part of a series of underpayments, or deductions, from the Claimant's wages. The Claimant's protest that the Respondent was constantly making mistakes with the wages was borne out by the evidence before me. The Respondent was itself not able to correctly calculate the Claimant's outstanding pay until the day of this hearing, and put forward a series of calculations which demonstrated the fact that the Respondent sought to correct overpayments and underpayments on a rolling basis from month to month. Had I not found that the deductions formed part of a series of deductions I would have been satisfied on the evidence before me, in particular the complicated nature of the calculations, together with the Claimant's lack of access to the underlying documentation on which to base his own calculations and the carrying forward from month to month by the Respondent its outstanding corrections to the calculation of wages, that it was not reasonably practicable for him to have brought his complaint within three months of the deduction and that he brought his complaint within a reasonable period of time, namely within three months of his last payment of wages.

30 I am satisfied that the Respondent is entitled to offset the balance of the overpayment, namely the sum of £486.56, against the deduction under s 14(1)(a). The outstanding balance of £574.25 is owed to the Claimant by the Respondent.

Conclusion

31 The Claimant is entitled to a declaration that he suffered an unlawful deduction from his wages under section 24(1) of the Employment Rights Act 1996 and an order under section 24(1)(a) that the Respondent pay him the sum of £574.25 forthwith. That sum being calculated as follows: £1060.80 unpaid wages, plus unpaid holiday pay £1370.40 = £2431.20 less overpayment of £1856.96 = £574.24.

Employment Judge Lewis

9 November 2017