



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr V Mihailescu

**v Better Life UK Limited t/a Bluebird
Care Ipswich**

Heard at: Watford

On: 4 & 5 January 2018

Before: Employment Judge Laidler

Appearances

For the Claimant: In person (assisted by Interpreter)

For the Respondent: Mr L Clarke (Solicitor)

JUDGMENT

1. The Respondent to pay the admitted sum of £2498.47 gross to the Claimant in respect of his claim for arrears of holiday pay.
2. All other claims brought by the claimant are dismissed.

REASONS

1. On the 26 May 2017, this tribunal determined: –
 - 1.1 The claimant was an employee working under a contract of employment.
 - 1.2 The tribunal therefore had jurisdiction to determine complaints requiring employee status
 - 1.3 In the alternative, the tribunal would have found the claimant to be a “worker” and entitled to bring claims under the Employment Rights Act 1996 requiring that status

- 1.4 A preliminary hearing to be listed to clarify the claims and list the full merits hearing.
2. That preliminary hearing took place on 25 August 2017 when this hearing was listed for October but required to be postponed by the tribunal.

Relevant findings from the decision on status

3. That the parties entered into a contractual agreement dated 30 April 2015.
4. That pursuant to clause 10 of that contract the claimant was employed under a zero hours' contract. This expressly provided that there was no obligation to offer work and no guarantee of work, or minimum hours under the contract.
5. The contract contained clauses about holiday pay and notice pay.

Preliminary hearing 25 August 2017

6. This preliminary hearing was listed to clarify the issues the decision on status having been delivered to the parties. The following matters were clarified at that hearing: –

Claims not being pursued

- 6.1 The claimant confirmed that he is not pursuing an unfair dismissal claim or a claim that he was paid in breach of the National Minimum Wage.

Claims in relation to which the Tribunal does not have jurisdiction

- 6.2 In his recent correspondence, the claimant seemed to be asserting claims under the Data Protection Act 1998 and Health and Safety at Work Act 1974. It was explained that the Tribunal does not have jurisdiction to deal with such matters.

- 6.3 The Tribunal does not have jurisdiction either to deal with issues concerning the claimant's P60 and/or P45. Any concerns the claimant has with regard to his tax treatment must be raised directly with the Inland Revenue.

Claims of Breach of Contract

- 6.4 These can be subdivided as follows: -

- 6.4.1 That the claimant is owed wages from the 9th June 2016 to 1st August 2017 (ongoing) calculated by the claimant at £45,024.76.

- 6.4.2 Failure to pay contractual wages:-

(i)	30 th April to 19 th July 2015,	£5,456.38.
(ii)	20 th July 2015 to 14 th May 2016,	£17,650.68.
(iii)	15 th May 2016 to 9 th June 2016,	£2,196.64.

6.4.3 Non-payment of overtime hours worked - £13,346.36.

Compensation for loss of earnings since the 9th June 2016

6.5 The claimant now seems to suggest that his employment contract has continued and that he has been ready and willing to work. Consequently, he is claiming loss of earnings for breach of contract from the 9th June 2016.

6.6 The Judge drew his attention to the witness statement he filed in support of his claim that he was an employee and which was taken into account when the Tribunal reached the decision that he was. In that statement the claimant clearly stated: -

"I worked for Bluebird Care until 9th June 2016 when I was informed by Mrs Violeta Badan that the company no longer required me."

Despite the fact that the Tribunal also found the claimant was on a zero hours contract and has not worked since that date the claimant is attempting to recover over £45,000 for loss of earnings he says he has suffered since the 9th June 2016.

6.7 It is in relation to this claim in particular that the respondent asked whether a Deposit Order could be made. It was made clear to the respondent that that could not be dealt with at this hearing but would need to be the subject of a separate application if the respondent pursued such an application. The claimant was however reminded that the Tribunal does have power to order payment of costs where it finds that a party has in the bringing or continuing with the proceedings acted unreasonably and/or the claim had no reasonable prospects of success. The claimant is urged to give careful consideration to the claims that he is bringing and seek advice if he is able to do so.

6.8 In relation to the other contractual claims, the claimant has set out attached to his letter of the 21st August 2017 how he has calculated these claims. Mr Clarke for the respondent had only just seen these calculations and will now take instructions on them. In the event that the respondent requires further information it will raise a request directly with the claimant.

Holiday Pay

6.9 The claimant also claims that he has not been paid the correct holiday pay and has calculated this at £4,861.85.

Failure to provide pay slips

6.10 The claimant has claimed a monetary amount in this respect. It was explained to the claimant however that this claim is one under Section 8 of the Employment Rights Act 1996 and the remedies the Tribunal can award if the claim is well founded are as set out in Section 12. These include a declaration, the Tribunal determining the particulars that should have been contained in the pay slips and up to 13 weeks of the unnotified deductions. The claimant has sought to claim 90 days pay and that is not something the Tribunal can award.

6.11 Directions were made for the future conduct of the matter as set out below. The bundle has already been virtually prepared in preparation for the earlier preliminary hearing but will just need to be added to. The claimant anticipates returning to Romania in November 2017 and the hearing was therefore listed at the end of October 2017.

7. It is of particular note in view of the claims that the claimant has attempted to resurrect at this hearing that at paragraph 5 it was confirmed that the claimant was not pursuing an unfair dismissal claim nor a claim that he was paid in breach of the national minimum wage.
8. Further the tribunal has stressed on numerous occasions and this is recorded again at paragraph 7 of that decision that the tribunal has no jurisdiction in relation to tax matters which must be raised directly with the Inland Revenue.

The claimant's witness statement.

9. A witness statement had been filed with the tribunal on 25 October 2017. The claimant had however sent additions on 4 January 2018. He also produced some further calculations in a 3-page document at the outset of this hearing. Although there were objections to those additions being relied on at such a late stage the judge determined that it was only in accordance with the overriding objective as the claimant was a litigant in person and the 3-page document was a "summary" of his claims that this be allowed in. The effect of this therefore was that with the various editions the claimant's witness statement ran to 10 pages.

Zero hours contract

10. At the outset of this hearing when again discussing the issues to be determined by the tribunal it appeared that the claimant was seeking a declaration that various clauses by the tribunal. The tribunal had to explain to the claimant that that was not within its jurisdiction, it already having found that that was one of the terms of the claimant's contract.

Wrongful dismissal claim

11. The claimant seeks to recover wages from the time that he ceased working for the respondents on 9 June 2016 to date. He explained to this hearing

that this was on the basis that his dismissal had been illegal. He had not been paid any notice. It seemed to be the judge that this might be a claim of wrongful dismissal. Although a wrongful dismissal claim had not been set out at the last preliminary hearing a claim for notice pay was in the ET1. The respondent's position is that the claimant was not dismissed, he was on a zero hours' contract and there was no obligation to offer him work. In the alternative, the periods for which notice would have been applicable would fall to be compensated under the zero hours' provisions. It was agreed and the respondents accepted that they could deal with the wrongful dismissal claim and that was added to the list of issues.

Holiday pay.

12. Following the earlier decision on employment and work status the respondent accepts that the claimant is entitled to holiday pay, but not for the amounts claimed. The respondent has calculated that the amount due and payable to the claimant is £2498.47 gross. This has been calculated by taking the average week's pay for the 12 weeks prior to the time the claimant finished work for the respondent as being £423.47 gross. This has then been applied as follows: –
 - 12.1 24.2 days in the holiday year 2015 -16
 - 12.2 5.3 days in the holiday year 2016 -17.
 - 12.3 (The holiday year being 1 April to 31 March).
13. The respondent has pro-rated the annual leave for the years worked on 5.9 weeks on an average week's pay. It accepts no holiday pay was paid.
14. The claimant does not accept this calculation.
15. The tribunal heard from the claimant and Mr Dhir on behalf of the respondent. From the evidence heard the tribunal finds the following facts.

The facts

16. The tribunal when it heard the case on the Claimant's status expressly stated that it did not have in the bundle before it a copy of appendix A to the contract setting out the rates of pay. It had therefore made no findings on it. In the bundle for this hearing appendix A appeared at page 56 of the bundle. It is headed Pay Schedule. It sets out hourly rates for weekdays, weekends, bank holidays, waking night and live in as follows:

Weekdays (7 AM to 20 2 PM).

16.1	Hour	£7.00
16.2	45 minutes	£5.25
16.3	30 minutes	£3.50

Weekends

16.4	Hour	£8.00
16.5	45 minutes	£6.00
16.6	30 minutes	£4.00

Bank holidays

16.7	Hour	£14.00
16.8	45 minutes	£10.50
16.9	30 minutes	£7.00

Waking night (per night).

16.10	Monday to Friday	£56.00
16.11	Saturday and Sunday	£75.00

Live in (per week).

16.12	Live in (Monday to Sunday)	£450.00
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Dictation starts here

17. The claimant's evidence is that he never received this schedule.
18. The evidence of Mr Dyer of the respondent, is that all workers would be given this schedule with the contract when they started. The tribunal is satisfied that this schedule did represent the rates agreed between the parties and at which the claimant was paid. The respondent's records produced for this hearing, showing gross pay advices, all show those rates applied to the work undertaken by the claimant. The claimant does not accept these documents. However, the tribunal is satisfied that although they show they were printed on 13 December 2016 (ie not at the time) that it would have been difficult to falsely prepare these retrospectively. They tally with the work undertaken by the claimant as shown on the booking forms (both the booking forms produced by the claimant and those produced by the respondent) and the tribunal is satisfied that the evidence that appendix A did accurately set out the rates that the claimant was to be paid.
19. There is a further schedule showing that it was updated on 1 April 2016 when the rates slightly increased. These rates were as follows: -

Weekdays (7.00 AM to 22.00 PM).

19.1	Hour	£8.50
19.2	45 minutes	£6.37
19.3	30 minutes	£4.25

Weekends

19.4	Hour	£9.00
19.5	45 minutes	£6.75
19.6	30 minutes	£4.50

Bank holidays

19.7	Hour	£12.75
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Sleep in (per night).

19.8	Monday to Friday	£35.00
19.9	Saturday and Sunday	£35.00
19.10	Bank Holidays	£70.00

20. The claimant produced his booking forms and does not accept that these are the same as those produced in the bundle by the respondents. The tribunal is satisfied that they are and that they do not defer in any material respect. In fact, it would appear that the only difference is that one set has been printed in portrait mode and the other in landscape. As already found these tally with the gross pay advices produced by the respondent. The tribunal is satisfied that they are therefore an accurate record of the bookings made and work undertaken by the claimant.

Wages claimed during the contract 30 April 2015 to 8 June 2016.

21. The amount claimed by the claimant for this period has varied. In his ET1 the claimant had claimed he was not paid the National Minimum Wage but that claim has now been withdrawn. He then stated that from 30 April 2015 to 31 July 2015 and then 1 June to 7 June 2016, he was underpaid for the first period \$4,498.93 and the second period £471.40, again asserting that he had not been paid the National Minimum Wage.
22. The ET1 had been filed on 24 October 2016 but the Citizens Advice Bureau was still acting for the claimant. On 23 November 2016, they filed and served a "Submission of Statement of Remedy". The claim for the period 1 August 2015 to 31 May 2016 was now £5,553.39. In addition, the claimant claimed an estimated underpayment for the period 30 April to 31 July 2015, £4,498.93 on the basis he had not been paid the National Minimum Wage and for the period 1 June to 7 June 2016, £471.40 on the same basis.
23. In calculating the underpayment of wages between 1 August 2015 and 31 May 2016, the claimant produced a schedule C showing the detail of the hours rostered and worked each day. It is of particular relevance to the claimant's case that he records his live-in shifts as the total number of hours he was present at, sometimes 19 and others 24 hours. He then seeks to apply an hourly rate to those hours. This however fails to take account of the fact that in the Appendix A to his contract there were two rates for Night Work, either the Waking Night of £56 per hour, Monday to Friday, or £75 an hour Saturday and Sunday but the Live-In rate was clearly stated as per week being £450 per week.

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25. The claimant's case however, on the monies owed to him, has continued to change since that schedule was filed on his behalf by the Citizen's Advice Bureau. In a statement received by the Employment Tribunal on 10 March 2017, the alleged underpayment had significantly risen. The total for the period of employment had in fact risen to £31,262.31.
26. By the date of this hearing and the witness statement dated 23 October 2017, the figures were as follows: -
- 26.1 30 April 2015 to 19 July 2015 = £17,650.68
26.2 20 July 2015 to 9 June 2016 it appeared no amount was claimed.
27. There were then some additional calculations provided at submission stage. By this time the figures were: -
- 27.1 30 April to 19 July 2015 = £4,549.56
27.2 20 July 2015 to 8 June 2016 = £10,034.18

Wrongful dismissal/claim for notice

28. In the ET1 this was a claim for one month's notice. The claimant had calculated his average working week as over 91 hours a week and had applied the National Minimum Wage to that. He had calculated a claim of £2,813.14 as pay in lieu of notice.
29. That remained the claim when the CAB filed the Schedule of loss.
30. By the time of the claimant's witness statement of 10 March 2017, that claim had considerably increased. The claimant then calculated loss of earnings from 10 July 2016 ongoing. He took his average hours a day in the 12 working days prior to dismissal, as 13.02 and applied National Minimum Wage to that. He brought a claim of £31,262.31.
31. The claimant then filed his statement for this hearing dated 25 October 2017 claiming his loss of earnings from 10 June at £690.60 per week.
32. In the final figures produced at submission stage the weekly figure had become £643.73. As this was being claimed from 8 June 2016, that is approximately 82 weeks, making a claim of £52,785.86.

Holiday pay

33. The claim in the ET1 was £3,141.60 and that was the same in the schedule of loss filed by the CAB. That however was calculated on the assumption that the claimant would have accrued 384 hours in holiday entitlement for

the first year and 79 hours for the second, and applied the National Minimum Wage to those hours.

34. In the claimant's statement filed on 10 March 2017 the underpayment for holiday had risen to £4,861.85.
35. In the witness statement of 25 October 2017, the claim for holiday was £4,773.69.
36. In the final calculation submitted at submissions stage, the claim for unpaid holiday was £4,357.57.

Conclusions

37. The tribunal is satisfied that Appendix A and subsequently the updated appendix was part of the claimant's contract of employment. The tribunal has already found that he was on a zero hours' contract with no guarantee of any hours being provided.
38. The tribunal accepts the evidence of the respondent that the claimant has been paid in accordance with the contract. Their records substantiate that this was indeed the case.
39. The claimant's evidence is not to be accepted. It is not credible. The claimant relies upon something somebody from the CQC told him during an inspection and something he Health and Safety Executive told him. Neither of those entities is responsible for setting the claimant's wages and would not necessarily have information about his contractual position.
40. The claimant's grievance appears to be how his pay was calculated but that was subject of an agreement between him and the respondent. He has withdrawn his National Minimum Wage claim. That is not before this tribunal.
41. The claimant has added in additional claims of failing to be paid overtime and in the schedule of calculations given at the submission stage, he has even sought to claim some further expenses.
42. The tribunal is satisfied there was no entitlement to overtime. There is no evidence of the expenses incurred and the claim in respect of those must fail.
43. It follows that the only amount awarded to the claimant is the figure tendered by the respondent of £2,498.47 gross in respect of holiday pay due.

Employment Judge Laidler

Date:7 March 2018

Sent to the parties on: .7 March 2018....

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For the Tribunal Office