



EMPLOYMENT TRIBUNALS

Claimant: Mr R Downs

Respondent: Waterfall Bathrooms Ltd t/a Gloucester Flooring Centre

Heard at: Bristol

On: 2 February 2018

Before: Employment Judge R Harper sitting alone

Representation

Claimant: In Person

Respondent: Mrs M Roberts, Office Manager

JUDGMENT

1. The claimant was a worker.
2. The respondent is ordered to pay the claimant the sum of £7,840 in relation to holiday pay.
3. The respondent is ordered to pay to the claimant the sum of £700 in relation to the final week's wage.
4. The above sums are expressed to be gross.

REASONS

1. The hearing was convened for the Tribunal to determine his employment status and for the Tribunal to consider the claims of holiday pay and final week's pay.
2. The Tribunal heard evidence on oath from Mr Downs and also from Mrs Roberts the Office Manager. The respondent asserted that Mr Downs was not due a final wage for the following reasons:

“insufficient hours per day carried out as notified to us by the client. Poor workmanship resulting in additional labour having to be placed on the project.

Counter charges to be applied against submitted final invoice as advised to Mr Downs resulting in him withdrawing his labour and removing all his tools from site”.

3. I explained to the parties at the beginning of the hearing that this is a straightforward money claim which is phrased as an unlawful deduction from wages under section 13 of the Employment Rights Act 1996. It is not phrased as a breach of contract claim and in those circumstances it is not possible for the respondent to make a counterclaim and neither is it possible for the respondent to claim set off. The Tribunal has to consider the claim for holiday pay and for unpaid wages in their pure and “undeducted” state.
4. The claimant gave clear evidence in his testimony from the witness stand and also in his handwritten statement that he worked on a regular basis with the respondent. He accepted in his evidence that there were some days when he did not work for the respondent but said that those were few and far between.
5. I am satisfied, and make findings of fact, that he worked only for this Company. He worked under the direction of the Company in the sense that he was told which site to go and work at. Once he went to a site he had a small degree of autonomy as to how he undertook the work.
6. I am satisfied that at the end of each week an invoice would be generated. Mrs Roberts said that she used to type out the invoices for the claimant because he did not produce invoices from an invoice book. Indeed the latter invoices that I have seen are clear and set out the position. All the invoices that I have seen refer to the CITB levy. I suspect that the claimant has misunderstood what that is but the important point is that the invoice also refers to the CIS tax deducted. There were no deductions for National Insurance or contributions towards pension. The claimant has never asserted during the time that he has worked for the respondent that he was entitled to holiday pay or sick pay. It was only when the work came to an end, when the claimant decided to go and work for another Company, that he was alerted by somebody that he may be entitled to holiday pay and duly claimed it. It is unfortunate that he never raised that with the respondent during the time that he had a working relationship with them.
7. The respondent was told by me, when asking questions in cross-examination, that if the claimant had said anything in his evidence that it disagreed with they must ask questions because otherwise I would be likely to accept what the claimant told me as being correct. When the claimant started his cross examination I made precisely the same point to him. It is a curious feature of the respondent’s cross examination of the claimant that, despite being reminded on numerous occasions by me of the need to ask questions, not one question was asked. There were repeated assertions by Mrs Roberts which I then had to turn into a question in order for the claimant to be able to respond to the points. The way in which the claimant

conducted his cross examination of Mrs Roberts was very much how I would expect cross examination to be undertaken ie he asked questions and Mrs Roberts responded to it. It is nonetheless the fact that in relation to the opportunity to cross-examine the claimant, there were a number of areas of his evidence that were not challenged by the respondent. I accept those unchallenged pieces of evidence as the correct version. The claimant's evidence was consistent and cogent and given honestly and openly.

8. There was much, rather irrelevant evidence, given by both parties in relation to the van. It appears that the claimant used to use his own vehicle an estate vehicle for getting to and from work. It seems to be the case that the materials that were used by the workers on site were delivered to the site directly and the claimant would have had to carry would be his own tools. There came a time when that system changed and a van was provided for use by the claimant. The materials that the claimant worked with were provided by the respondent. The tools that he used were by in large provided by the claimant. The respondent provided to the claimant high vis clothing which had the name of the respondent on it for safety and identification purposes on site.
9. I made it clear to the parties, at the commencement of the hearing, that in order to succeed with a claim under section 13 it was not necessarily the requirement that the claimant had to be an employee. A person who is defined as a worker can also bring such a claim. I am satisfied having heard the evidence from the claimant, and I make a finding of fact, that he was a worker. He worked full-time, he worked under their direction, he was paid regular amounts and deductions were made for CIS taxation.
10. I found the evidence of Mrs Roberts to be unconvincing. She was asked in cross-examination about whether there were any benefits to the employer in having people working for the Company who were not employees. I was not impressed with the replies which she made. It is obvious that there are some such benefits to an employer in those circumstances.
11. In terms of the holiday pay claim I am satisfied that, as a worker, the claimant was entitled to holiday pay. It is not for me to construct the case for the claimant but to assess the case that he puts before me for evaluation. He says that he is entitled to 28 days a year holiday. I asked Mrs Roberts how many days holiday the direct employees of the respondent would claim and she told me 32 but that is not the figure that the claimant puts before me for assessment. I find that he is entitled to 28 days holiday a year and that he claims for two years.
12. As a result of recent changes in relation to holiday pay I must be satisfied that there has been a continuing period of deduction because otherwise there is a time limit for bringing such holiday pay claims. I am satisfied that there has been a continuous period of deduction and non-payment of holiday pay without break. Therefore the claimant is entitled to 56 days holiday pay and I am satisfied that the rate that he claims of £140 a day is the appropriate amount and therefore I find that he is entitled to the amount set out above.

13. In relation to the payment for the last week of working, as set out earlier in these reasons, it is not possible for the respondent to counterclaim or claim set off. I find, on balance, that the claimant is entitled to payment for the one week's pay. I was less than convinced that the respondent had a good reason to withhold that money simply because the claimant delayed returning the vehicle. It was very evident in the way in which Mrs Roberts gave her evidence that the delay in returning the vehicle has caused considerable extra work and annoyance to the respondent. It may be that the claimant can be rightly criticised for not returning the vehicle immediately. There was no reason to hold on to it. However, as a matter of law, dealing with an unlawful deduction claim, that issue is completely irrelevant. I find that he was entitled to the money and he was not paid it. There was no justification for not paying it.
14. Even although the respondent does not accept that he is entitled to the number of hours that he claimed it is significant that, having had a considerable period between the issue of this claim and the hearing of this claim, the respondent has not made any effort to pay even for the hours they accept that he had worked. The respondent should, at the very least, have paid the hours they accepted he had worked.
15. I find, therefore, that the evidence of the claimant is far more convincing in relation to this claim than that of the respondent and that the two claims brought by Mr Downs succeeds.

Employment Judge R Harper

Date 20th March 2018

JUDGMENT & REASONS SENT TO THE PARTIES ON

22nd March 2018

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FOR THE TRIBUNAL OFFICE