JJE

EMPLOYMENT TRIBUNALS

Claimant: **Mr V Ukolovas**

Respondent: **National Transport Resources Ltd**

Heard at: **East London Hearing Centre**

On: **23 April 2018**

Before: **Employment Judge C Hyde, sitting alone**

Representation

Claimant: Mrs E Donaldson, legal practitioner
Mrs E Gaybovich, interpreter, Russian/English

Respondent: Mrs R Hodgkin, Counsel

JUDGMENT

The judgment of the Tribunal is that:-

1. The Respondent's application for a reconsideration of the Tribunal's Judgment which was sent to the parties on 15 March 2018 was refused.

2. It was declared that the Respondent had unlawfully deducted the sum of **£4626.14** gross from the Claimant's wages in respect of part-payment for 31.3 days accrued but untaken holiday at the rate of £2500 per month (equivalent to a daily rate of £147.80). The Respondent was ordered to repay the sum of **£4626.14** gross to the Claimant forthwith.

3. It was declared that the Respondent had unlawfully deducted the sum of **£5000** gross in respect of the balance of the Claimant's salary for May and June 2017 at the rate of £2500 per month. The Respondent was ordered to repay that sum to the Claimant forthwith.

4. In respect of paragraphs 2 and 3 above, the Respondent may satisfy the Judgment by paying the amounts net of tax and national insurance deductions to the Claimant, as long as payment of the net amounts is accompanied by

documentary confirmation that the appropriate tax and National Insurance payments have been made to HMRC.

5. The Respondent was ordered to pay the sum of **£1477** to the Claimant under Section 38 of the Employment Act 2002 and Section 124A of the Employment Rights Act 1996, representing two weeks' gross pay at £738.50 per week.

6. The Claimant's application for an adjustment to the award by reason of the Respondent's for breach of ACAS Code was refused.

REASONS

1. Reasons are provided in writing for the above Judgment only to the extent that it is necessary to do so in order for the parties to understand why they have won or lost. Further they are provided only to the extent that it is proportionate to do so.

APPLICATION FOR RECONSIDERATION

2. At the commencement of the hearing on 23 April 2018, counsel for the Respondent Mrs Hodgkin, indicated that the Respondent wished to make an application for reconsideration of this Tribunal's judgment which was made on 12 February 2018 and in respect of which a Judgment and Reasons were sent to the parties on 15 March 2018. In the meantime, on 1 March 2018 the case had been listed but progress could not be made on that date because the Judgment and Reasons from the earlier hearing had not yet been sent to the parties. The Tribunal has acknowledged that this would have caused the parties some difficulty and has apologised for that delay.

3. The reasons sent out on 15 March 2018 were full and set out over some 5 pages, the background, and this Tribunal is therefore not going to repeat it. In the application for reconsideration, a copy of which was sent to the Claimant's representative on 27 March 2018, the Respondent in essence repeated points which had been made on their behalf by Counsel, in the absence of any other representative of the Respondent. The Tribunal considered that despite the obvious difficulties Mr Weiss faced, he had put the case on behalf of the Respondent very competently and in considerable detail at the hearing in February 2018. The Tribunal had not had an opportunity to consider the written application for a reconsideration, therefore Mrs Hodgkin was allowed to make the application with oral representations.

4. The Tribunal spent some time checking the file and electronic records to verify the Respondent's claims in this hearing about documents sent to the Tribunal. I also reviewed my findings about the factual background to the Respondent's failure to serve a Response in time.

5. The Respondent relied on the copy of the reconsideration application dated 27 March 2018 which was sent by Greg Speller, Mrs Hodgkin's clerk, to the East London email address. The copy of the email appeared to have been correctly addressed. I noted that it is usually extremely helpful if the notification of applications is sent to the Tribunal and to

the other side at the same time. This was not done by the Respondent on this occasion. The Tribunal could find no trace of this email having been received at the Tribunal despite the correct email address apparently having been used. In the body of the email, the Tribunal was told that the Claimant's representative had been served with a copy of this application and Mrs Donaldson confirmed that this was the case.

6. In addition, the Respondent relied on an email and witness statement which was apparently sent to the same address prior to the last hearing before me. The authenticity of this email was more questionable. I was told by Mrs Hodgkin, before a copy of this document was printed out, that it had been sent to the Claimant as well. However, the document forwarded to the Tribunal which was printed out contained no indication that it has been sent to anyone else apart from to the East London Tribunal email address. There was no record of this email having been received by the Tribunal either. Before the copy was printed out, the Tribunal was told that it had been sent variously on 5 and 6 February 2018 and a specific time was given. The email which was eventually printed out was dated 7 February 2018. A witness statement was part of it. Before it was sent to the Tribunal on 23 April, we were told that the statement was dated 5 February 2018. The statement produced on 23 April was by Mrs Dementieva and was actually dated 7 February 2018. This was significant because it predated the last hearing before me, yet no reference was made to it by Mr Weiss or in the correspondence he relied on from his instructing solicitors. Mrs Donaldson who compiled a bundle of relevant correspondence for consideration of the late response issue on 12 February 2018 did not include the email and 7 February 2018 email, and her position was that a copy had not been sent to her. She questioned the authenticity of the document produced on behalf of the Respondent.

7. I set out this additional background because as I set out in the earlier reasons, one of the difficulties the Tribunal had in terms of allowing the response to be admitted, was that there were, on the face of things, some discrepancies in terms of the case being put forward by the Respondent. Some of those matters were as yet unresolved – such as the discrepancy in the Respondent's case about the reason for the termination of the employment.

8. Having reviewed the Employment Tribunals Rules 2013, and Rule 71 in particular, it did not appear to me that there were any new grounds being put forward in the application for reconsideration which were likely to lead to a change in the Tribunal's decision, taking into account first of all the legal requirements for consideration of a review and then also the requirements for letting a Respondent put forward a response out of time.

9. The Respondent relied on the 7 February statement of Mrs Dementieva. She was present at the instant hearing. In essence she said that she had done her best to comply with her obligations of responding to the claim, but she had been let down by her previous legal advisors. Even if that were the case, although as far as Mr Weiss is concerned, the Tribunal could not see any basis for any complaint. He covered the ground relied on by the Respondent in the reconsideration application. Further, the Respondent was still in the position where some of the difficulties which the Tribunal highlighted on the last occasion and which were confirmed in the written reasons, remained in place. Thus, for example, there was still formally no draft ET3 and Grounds of Resistance from the company. The document which was sent in referred only to Mrs Dementieva as a Respondent. Second, the grounds of resistance still remained incomplete. It was of concern that counsel indicated that she had not seen a copy of the ET3 form or the grounds on which the

Respondent was purporting to rely until the Tribunal provided a copy halfway through this morning to her.

10. The Respondent's case was to lay considerable blame on previous legal representation but it did not appear to me that the matters being put forward now were really any different from those which had been put forward before. The only new point was the & February 2018 statement and email. Apart from the reservations expressed above about those documents, they added nothing of substance.

11. A point was made about the claim being out of time as a reason for the Response to be permitted. I considered that I could assess whether that was the case or not. It was also said on behalf of the Respondent that Mrs Dementieva does not understand English and had to seek legal representation and thus was not in a position to respond in time. I considered that these were simple claims; claims which she strongly stated that she would defend at a very early stage. I considered that the same could be said about the proposed defence or counter claim about the purchase of cars by the Claimant without authority. These were relatively simple matters which the Respondent ought to have been in a position to have addressed in a more meaningful way. Even now, not a shred of evidence had been produced to the Tribunal to suggest that there was some substance to the defence.

12. Further, in an attempt to rebut the picture of Mrs Dementieva being unable to address the claim due to a lack of competency in English, Mrs Donaldson took the Tribunal to the transcript of an audio recording of Mrs Dementieva in conversation with the Claimant in Russian, but in the presence of her friend who insisted that the conversation should continue in English so that he could understand what was being said. They duly obliged. The transcript of the remaining conversation certainly suggested that Mrs Dementieva was able to express herself perfectly adequately in English. In addition, I had regard to the fact that in this litigation, she was being held up as the Director of a business, which employed staff and who had the authority to instruct lawyers on behalf of the Respondent in these proceedings. None of these matters accounted for the delay in putting forward what would be obvious elements of a defence or counter claim.

13. In summary, I was not satisfied that there were any adequate grounds for me to review the previous decision that I made. Indeed, I was even more pessimistic than previously, about the prospects of the Respondent putting forward an arguable defence and in a reasonable time frame if I revoked the earlier decision.

Determination of the claims

14. In this case, I had to decide claims of unlawful deduction of wages in relation to two months pay, May and June 2017 in respect of £2500 per month; and a claim for unpaid holiday pay. In the Tribunal's previous Judgment, I set out something of the difficult circumstances of this case. The Claimant's representative had very helpfully prepared two bundles referred to in the previous reasons of this Tribunal, one of which contained some ninety documents relating to the issue of liability including transcripts of at least two conversations surreptitiously recorded by the Claimant.

15. I had to decide the claims before me, on the balance of probabilities, having had regard to the various documents before me, the Claimant's evidence; submissions from

Mrs Donaldson on the Claimant's behalf; and from Mrs Hodgkin on behalf of the Respondent.

16. As far as the two months pay is concerned, it appeared to me clear that the entitlement of the Claimant to that salary was contemporaneously acknowledged by the Respondent in a text message to the Claimant. It was agreed that the arrangement for the Claimant's pay was that he, would be paid £3200 per month in total, but that £700 was paid into his bank account and there was paperwork to support that. But in respect of the remaining £2500, this was a payment in cash with no accompanying paperwork.

17. The Claimant was effectively employed as the operations manager of the business and by a letter of 8 June he received notice of the company winding up its operation with effect from 1 July 2017. I have seen and read transcripts of conversations between the Claimant and Mrs Dementieva who is described as the Director of the Respondent, in which it is clear that Mrs Dementieva was saying that outstanding salaries including to the Claimant, would be paid by the Respondent. This for instance appears at page 64 of the bundle.

18. I also saw a payslip issued to the Claimant from the Respondent bearing a date of 31 May 2017 which showed that there were two payments to be made to the Claimant in the sum of £700 and then another payslip of 30 June 2017 which itemised a further payment of £700 plus holiday pay. Having gone through the calculations with Mrs Donaldson and the Respondent, I was satisfied that the holiday pay calculation in that payslip represented the outstanding holiday pay due to the Claimant which had been accrued throughout the whole period of his employment with the Respondent based on the £700 per month part of his salary. There was no evidence before me from the Claimant or anyone else as to when these sums were actually received, although the Claimant accepted that the holiday pay had been received. Further, there was evidence of a text conversation on 3 July 2017 at page 78 in which the Claimant complained to Mrs Dementieva that he was still owed two months' salary and he asked for that payment to be made by the end of that week. There was then a letter before action sent by his current representative dated 29 September 2017 in which the Claimant repeated the assertions to his entitlement to salary for two months. He also contended that he was entitled to be paid holiday pay in respect of the £2500 per month part of his salary.

19. In all the circumstances, I was satisfied, that the Respondent paid the Claimant holiday pay at the end of his employment in respect of the £700 part of salary. They thereby also acknowledged liability for holiday pay for the whole period. I accepted the Claimant's evidence about the payments received by him.

20. In his schedule of loss, the Claimant had indicated that he had taken 6 days leave. Mrs Donaldson submitted that this was an error, and relied on the Claimants evidence to the effect that he had only travelled on business, not on holiday. Further the taking of 6 days leave was not consistent with the Respondent's calculations of his holiday pay on the £700 per month. Finally, the Respondent's calculation of holiday pay on the £700 part of his salary exceeded his Working Time Regulations entitlement in terms of the period of employment. On the balance of probabilities, I was satisfied therefore that the figure, based on the Respondent's calculations for the £700 part of his salary applied and that the Claimant's contractual entitlement to holiday pay was to 31.3 days in respect of the £2500 part of his salary, and that the failure to pay it at the end of his employment constituted an

unlawful deduction of wages/breach of contract. His daily rate was £147.80. This totals **£4626.14** gross.

21. The Respondent raised points about the Tribunal's jurisdiction (time points). The claim was presented on 13 November 2017 and the Respondent submits that the money claims are out of time. The Claimant notified ACAS of the desire to commence early conciliation on 29 September 2017. The ACAS certificate was issued on 12 November 2017. Based on the dismissal letter and the Claimant's evidence which I accepted, to the effect that the dates on which he was paid varied, and the text conversations referred to above, I was satisfied that there was no set date on which the money was due.

22. Obviously when notice expired on 1 July 2017, final payments would be expected by the Claimant and indeed the Claimant's text of 3 July seeking payment by the end of that week was consistent with this. I considered therefore, that it was appropriate and in accordance with the evidence to treat the non-payments of salary as a series of deductions that finally became due on 1 July 2017. The outstanding holiday pay would have been due on the same date. Having regard to the dates of early conciliation, it appeared to me that the claim form presented on 13 November was presented in time. I was satisfied that the non-payments of salary for May and June 2017 were a series of deductions. Therefore, the Claimant is entitled to be paid **£5000** gross in respect of the balance of his salary for those two months.

23. I ordered that the Respondent could satisfy that debt by paying the net amount to the Claimant as long as it was accompanied by documentary confirmation that the appropriate tax and National Insurance payments had been made to HMRC in respect of that pay.

24. As far as the holiday pay is concerned, that is the figure of **£4626.14,** the same applied as far as tax and NI deductions are concerned.

25. Mrs Donaldson then urged the Tribunal to make an order under Section 38 of the Employment Act 2002 read with Section 124A of the Employment Rights Act 1996 in relation to the fact that there had been no statement of terms and conditions given by the Respondent in compliance with section 1 of the Employment Rights Act 1996.

26. There was no dispute that the Claimant was employed from May 2016 but the first request on the evidence by the Claimant for a statement of terms and conditions was in April 2017 and the Respondent's response to that appears to have been that a draft was awaiting collection. I have also taken into account that the Claimant was the manager of the Respondent. However, it is a fundamental obligation on the Respondent to supply the statement and it appeared to me that it was appropriate in all the circumstances to make an order for two weeks' pay. This applies to the total monthly salary of £3200. It was equivalent to a week's pay of £738.50. Two weeks gross pay was therefore **£1477.** I accordingly ordered the Respondent to pay that sum to the Claimant under Section 38 of the 2002 Act and Section 124A of the 1996 Act.

27. Finally, the Tribunal was urged to order an uplift on the awards because the Respondent had failed to comply with the ACAS Code, presumably in relation to dealing with grievances. The Tribunal confirmed that it is possible to make such an order where there has been a successful unauthorised deduction of wages claim and/or a claim under the Extension of Jurisdiction Order i.e. contractual claim in respect of the non-payment of

wages and the holiday pay. This is set out in Schedule A2 of the 1992 Act. However, I was mindful that these matters were initially raised orally but not raised in writing until 20 September 2017; and it is implicit in the Code that matters are dealt with within a reasonable time. I did not consider that in the circumstances it was appropriate to find that there had been a breach of the Code, so the application for the uplift on this ground was refused.

Employment Judge Hyde

1 May 2018