EMPLOYMENT TRIBUNALS

Claimant: Mr D Jones

Respondent: Ensign Building Projects Limited

JUDGMENT ON REMEDY

The claimant's claims for unpaid wages fail and are dismissed.

The Tribunal in its reserved decision of 5 October 2018 already gave judgment in relation to the claimant's other claims against the respondent.

REASONS

1. The claimant brought claims relating to his status as a worker or employee or independent contractor and for unpaid holiday pay and unpaid wages. A hearing took place on 21 June 2018 and the parties were given the opportunity to make written submissions thereafter, which were considered by the Tribunal in chambers. A decision dated 5 October 2018 was issued to the parties and determined that:

    a. The claimant was a worker during his period of engagement with the respondent;

    b. The claimant was therefore entitled to recover holiday pay of £2520 for his period of engagement;

    c. The respondent did not make unlawful deductions from the claimant's wages in relation to van hire and associated charges;

    d. The claimant's claims relating to tax and National Insurance contributions were not within the jurisdiction of the Employment Tribunal and were to be referred to HM Revenue & Customs in the first instance; and

    e. The parties had not provided the Tribunal with sufficient evidence to allow the claimant's claims of unlawful deductions from wages to be

determined. Case management orders were made in the judgment of 5 October 2018 that the parties provide further evidence as specified to allow a determination to be made of this issue without the need for a further hearing.

2. The claimant provided written submissions and documentary evidence on 26 October 2018, the respondent provided the same on 29 October 2018 and the claimant made further written submissions on 30 October 2018 in response and provided further documentary evidence, some of which duplicated that sent on 26 October 2018.

3. The Tribunal determined, in accordance with Rule 60 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1, that it was not necessary for a further hearing to take place to determine this issue. The parties were given the opportunity in the case management orders issued in the judgement of 5 October to request a further hearing if they felt it necessary to do so, but such a request was not forthcoming from either party.

4. The claimant told the Tribunal during the hearing on 21 June 2018 that the respondent had failed to pay him the wages properly payable to him and therefore made unlawful deductions from his pay in relation to the following periods:

a. The week of 4 September 2017;

b. 29 August and 1 September 2017;

c. A thirteen day period between 13 October and 30 October 2017.

5. The Tribunal has carefully considered the documentary evidence and submissions provided by the parties in relation to this issue.

Findings of Fact

6. The Tribunal notes that the claimant has failed to provide any financial or other work records in spite of the Tribunal's case management order that he do so. He has instead produced two sets of written submissions and a series of text messages. The respondent has provided the Tribunal with its bank statements of payments made to the claimant during the period in question, along with a selection of the claimant's time sheets and a selection of text messages, as well as its written submissions.

7. The Tribunal found the respondent's bank statements particularly useful in making the following findings of fact.

8. Mr Jones asserts that he was entitled to £150 per day gross wages during his engagement with the respondent. This matter was already determined in the Tribunal judgement of 5 October 2018, where a finding of fact determined that Mr Jones was entitled to £120 per day gross wages. This is borne out in the further evidence submitted by the respondent for the purposes of this remedy decision, and in particular in the bank statement showing payments to Mr Jones, the majority of which are multiples of £120.

9. In relation to the pay periods in question, the claimant worked a week "in hand", meaning that he was paid one week in arrears. The Tribunal notes that the claimant asserts that he is owed wages in relation to:

a. 28 August 2017;

b. 1 September 2017;

c. 4 September 2017.

10. The issue of the claimant's week worked "in hand" was an issue generating much debate during the hearing and again in the claimant's correspondence. Mr Jones is certain that when the respondent changed the manner in which it paid him (from payment at the end of the week worked, to payment at the end of the following week, that is, "in hand") that he was not paid a week's wages in the changeover. However, despite several opportunities to provide evidence (such as bank statements and an accurate list of days or weeks worked) demonstrating that this was the case, Mr Jones has not been able to assist the Tribunal in pinpointing when this missed week was.

11. It is the respondent's case that Mr Jones was not paid for working week commencing 28 August 2017 (which would have been paid to Mr Jones a week later) because he was unavailable to work during that week. It was the August Bank Holiday and the respondent provided the Tribunal with print-outs of text messages between Mr Jones and the respondent in which he notified them that if there was no need for him to work, he would take that week off. .

12. In relation to the following week (4 September), the respondent provided bank statements and written submissions to show that Mr Jones was paid twice on 22 September 2017. The respondent's evidence, which the Tribunal accepts, is that this double payment was for the week of 4 September (two weeks in arrears) and 15 September (correctly paid one week in arrears). Mr Jones was, they submitted, paid a week late for the work done on 4 September because he did not submit his time sheet on time. This evidence is accepted by the Tribunal. Mr Jones has provided no evidence from which the Tribunal could conclude that he was not paid for 4 September 2017.

13. Mr Jones claims payment for 13 days' work he carried out in the period between 13 October 2017 and 30 October 2017. It is the respondent's case that this period coincided with their compulsory shut-down period, but that exceptionally Mr Jones was authorised to carry out a further four days' work in week commencing 16 October 2017 to complete an existing job. The respondent's written submissions set out that Mr Jones told the respondent that he was working on another job for another contractor and so would not be available for more than four days anyway.

14. However, text messages supplied by both parties demonstrate that Mr Jones worked for most if not all of the two week period. The respondent's managing director Mr Cleary was on holiday during that period and returned to discover that the job was still not finished and that the claimant had worked for most of the two week period. The respondent offered the claimant no further work as of November 2017.

15. Mr Jones now claims payment for 13 days worked during that period. The Tribunal accepts the respondent's evidence that Mr Jones was only offered four days' work and not 13. . The arrangement was referred to in Mr Cleary's witness statement. Mr Jones has provided no evidence to the contrary and did not challenge Mr Cleary's evidence during the hearing on 21 June.

16. The Tribunal accepts that Mr Jones worked for more than four days during that period. It is also accepted by the parties that Mr Cleary made a payment of £500 to Mr Jones, intended to be a settlement of Mr Jones' claim for wages for the 13 day period. The respondent submits that in fact Mr Jones owed the respondent van mileage payments of £400 which have not been deducted, following him being given permission to take the van to the Lake District for a holiday. The respondent supplied a text message dated 14 October 2017 in which Mr Jones told the respondent that he was going to take the van to the Lake District. The respondent therefore submits that Mr Jones has been excused from the £400 he is owed and was paid in full for the 4 days' work that was agreed.

17. The issue to be determined is whether the respondent has unlawfully deducted payment for the remainder of the work done by Mr Jones during that period, and whether the other sums set out in Mr Jones' claim have been unlawfully withheld from him.

The Law

18. Part II of the Employment Rights Act 1996 protects workers and employees from unlawful deductions from their wages.

19. Section 13(3) in particular states:

> *"Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated …..as a deduction made by the employer from the worker's wages on that occasion."*

20. ***New Century Cleaning Co Ltd v Church (2000) IRLR 27, CA***, determined that for a deficiency in payments to amount to an unlawful deduction from wages which could be recovered by a worker from the Tribunal in accordance with section 13 of the Employment Rights Act 1996, the worker must have some legal entitlement to the sums in question. This reflects the wording of s13(3) "*…the wages properly payable by him to the worker on that occasion"*.

Application of the Law to the Facts Found

21. In relation to Mr Jones' claim for payment for the week of 28 August 2017 (including the dates of 29 August and 1 September), he is not entitled to such payment because he did not carry out any work for the respondent in that week.

22. In relation to Mr Jones' claim for payment for the week of 4 September 2017, he is not entitled to any such payment as he was paid for this week by bank transfer on 22 September 2017.

23. In relation to Mr Jones' claim for payment of the entire 13 day period worked between 13 October and 30 October 2017, he was only offered four days' work by the respondent during the two-week shutdown period. Mr Jones is a worker and not an employee. Therefore the respondent was under no obligation to provide Mr Jones with work for the entire two week period, and certainly not in the circumstances of a shut-down of the respondent's business.

24. Mr Jones has not provided any evidence to the Tribunal that he was authorised by the respondent to work for any further days during this period, or that he was offered further days beyond the initial four days and accepted it. The respondent's evidence has consistently been that only four days' work was offered by them and accepted by Mr Jones. Mr Jones therefore has no legal entitlement to payment for any further days worked during this period.

25. Mr Jones' wages properly payable were four days' wages at £120 per day, therefore £480. He has already been paid £500 for this period by the respondent and is entitled to no further payment.

26. This judgement determines the remaining issues between the parties. The respondent is to pay to the claimant forthwith the holiday pay of £2520 awarded in the judgment of 5 October 2018, if it has not done so already.

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Employment Judge Barker

Date____15 November 2018_____

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

21 November 2018

FOR THE TRIBUNAL OFFICE

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number(s): **2404028/2018**

Name of case(s): **Mr D Jones** v **Ensign Building Projects Ltd**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: **21 November 2018**

"the calculation day" is: **22 November 2018**

"the stipulated rate of interest" is: **8%**

MR J PRICE
For the Employment Tribunal Office

INTEREST ON TRIBUNAL AWARDS

GUIDANCE NOTE

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at www.gov.uk/government/collections/employment-tribunal-forms

If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

2. The Employment Tribunals (Interest) Order 1990 provides for interest to be paid on employment tribunal awards (excluding sums representing costs or expenses) if they remain wholly or partly unpaid more than 14 days after the date on which the Tribunal's judgment is recorded as having been sent to the parties, which is known as "the relevant decision day".

3. The date from which interest starts to accrue is the day immediately following the relevant decision day and is called "the calculation day". The dates of both the relevant decision day and the calculation day that apply in your case are recorded on the Notice attached to the judgment. If you have received a judgment and subsequently request reasons (see 'The Judgment' booklet) the date of the relevant judgment day will remain unchanged.

4. "Interest" means simple interest accruing from day to day on such part of the sum of money awarded by the tribunal for the time being remaining unpaid. Interest does not accrue on deductions such as Tax and/or National Insurance Contributions that are to be paid to the appropriate authorities. Neither does interest accrue on any sums which the Secretary of State has claimed in a recoupment notice (see 'The Judgment' booklet).

5. Where the sum awarded is varied upon a review of the judgment by the Employment Tribunal or upon appeal to the Employment Appeal Tribunal or a higher appellate court, then interest will accrue in the same way (from "the calculation day"), but on the award as varied by the higher court and not on the sum originally awarded by the Tribunal.

6. 'The Judgment' booklet explains how employment tribunal awards are enforced. The interest element of an award is enforced in the same way.