



EMPLOYMENT TRIBUNALS

Claimant: Mr D Lenehan

Respondent: Wilson's Advisory Limited

Heard at: Manchester

On: 17 April 2018

Before: Employment Judge Aspden

REPRESENTATION:

Claimant: In person

Respondent: Miss Z Hameed, Manager

JUDGMENT having been sent to the parties on 3 May 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Claims and issues

1. The claimant's claim was for unpaid wages which he said were owing to him, specifically:

- a. Pay for a week in hand, which should have been paid in January 2018, amounting to £232.13.
- b. Pay for the claimant's final month of employment with the respondent (January 2018) amounting to a further £464.26.

2. Miss Hameed, on behalf of the respondent, accepted that these sums were not paid. She relied on the following grounds which she said justified non-payment ie:

- a. The claimant was only entitled to be paid for hours actually worked. He had not worked his full hours in January and so was not entitled to be paid as if he had.

- b. The claimant had been paid additional amounts during his employment over and above what was due to him and the company was entitled to offset those amounts against wages.
- c. The claimant was not entitled to be paid for his week in hand because payment was not due when employment was terminated on performance grounds.

Evidence and facts

3. I heard evidence from the claimant himself and from Miss Hameed on behalf of the respondent. I was also referred to some documents.

4. Based on that evidence I make the following findings of fact.

5. The claimant started work for the respondent company in October 2017 and worked there until his employment was terminated in January 2018. He had a contract which set out the terms of his employment and which I was referred to.

6. The claimant was paid monthly. His pay was calculated by reference to an hourly rate (£6.19).

7. The claimant's contract contained clauses stating as follows:

2. The Employee will commence permanent full-time employment with the Employer on the 31st day of October 2017.

...

16. The Employee's normal hours of work, including break ('Normal Hours of Work') are as follows: 9.00 to 18:00.

17. However, the Employee will, on receiving reasonable notice from the Employer, work additional hours and/or hours outside the Employee's Normal Hours of Work as deemed necessary by the Employer to meet the business needs of the Employer.

...

60. Any amendment or modification of this Agreement or additional obligation assumed by either party... will only be binding if evidenced in writing signed by each party or an authorised representative of each party.

8. The claimant told me he was contracted to work Monday-Friday, 9am to 5pm (although the version of the contract he had signed said 6pm I find this was an error). I accept the claimant's evidence that these were the hours and days it was agreed he would work.

9. The parties agreed that the claimant worked 'a week in hand'. Ordinarily someone who works a week in hand would receive their week's wage the week after it was earned. However, I was told by both the claimant and Miss Hameed that their understanding of the arrangement in this case was that the claimant would be paid

his first week's wages on termination rather than immediately after working it. That seems to me a rather unusual arrangement and it was not one reflected in the contract itself. It was an informal arrangement. It may well have been an unauthorised deduction from wages at the time, but that is not how the claimant has put his case; he is satisfied to contend that he was entitled to the week in arrears when his employment ended.

10. Miss Hameed accepted, and I find, that the claimant was not paid his week in hand, whether on termination or at any other time.

11. During his employment, and notwithstanding the terms of his contract, the claimant was sometimes told not to come in to work. When that happened, the respondent company itself only paid the claimant by reference to the hours he had actually worked, regardless of the fact that he was willing and able to work his full, agreed hours (9-5, Monday to Friday).

12. I accept, based on the evidence of the claimant and the messages that I was shown, that it was the practice of Miss Hameed to top up the claimant's wages to cover the shortfall. Miss Hameed's own evidence, was, and I find, that these payments were made by her personally and not by the respondent company. Nor were the payments made by Miss Hameed on behalf of the company: Miss Hameed said herself that her brother, who controlled the purse strings for the company, would not have authorised the additional payment. I find that the payments made by Miss Hameed were paid by her in a personal capacity. I find that it was never suggested to the claimant that such payments were an advance of wages or payment of the week in hand. If that was Miss Hameed's intention at the time then it was not something that was discussed with the claimant, was not documented, and was not Mr Lenehan's understanding of the nature of the payments. Mr Lenehan simply believed he was being paid for the hours he had agreed to work.

13. During January the claimant worked less than his contracted hours. The claimant's evidence was that the only reason he did not work his full contracted hours was that he was told not to come in to work. The claimant's case was supported by messages which I was shown asking him not to come into work. I accept that the claimant was willing and able to work in January but was prevented from doing so by the respondent.

14. The claimant's employment was ended by the employer in January 2017. Miss Hameed implied that he was dismissed for poor performance. I reject that suggestion which was simply unsupported by any evidence. The claimant was dismissed because the company had to close its operations at that time, as evidenced by a message that I was referred to.

15. The claimant was not paid anything for his employment during January 2017, even for those days which he had worked. This was confirmed by Miss Hameed in evidence.

The law

16. Section 13 of the Employment Rights Act 1996 provides that an employer shall not make a deduction from wages of a worker employed by him unless-

- (a) the deduction is required or authorised to be made by virtue of ...a relevant provision of the worker's contract; or
- (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

17. Section 13 (3) provides that there is a deduction from wages where the total amount of wages paid on any occasion by an employer is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions). The words 'properly payable' refer to a legal entitlement on the part of the employee to the payment (New Century Cleaning Co Ltd v Church [2000] IRLR 27. So long as the employee offers his services and is ready and willing to work, then he is generally entitled to payment of remuneration under the contract – unless there is a specific term (whether express or implied) that provides otherwise.

18. Section 14 provides that section 13 does not apply to a deduction made 'where the purpose of the deduction is the reimbursement of the employer in respect of an overpayment of wages.

Conclusions

19. On termination, the claimant's week in hand pay amounting to £232.13 was properly payable.

20. It is submitted in the response to the claim, and was suggested by Miss Hameed in evidence, that the claimant was not entitled to his week in hand pay under the contract if his employment was terminated for inadequate performance. I reject the submission that the company had any right to withhold pay for poor performance. There is nothing in the contract terms to support that assertion. In any event, the claimant simply was not dismissed for performance reasons.

21. The non-payment of the claimant's week in hand pay amounted to a deduction from wages.

22. So far as pay for January is concerned, it was suggested by the respondent that the claimant was only entitled to be paid for hours he actually worked rather than the full hours set out in the contract. I do not accept that is what the contract says or implies. The agreed terms were that the claimant would work full time hours ie Monday to Friday, 9am to 5pm. The contract refers to the right for the company to ask or insist that the employee works more than normal working hours, but what it does not provide is that the employer could reduce those working hours on a day by day basis or week by week basis, and only pay for hours worked. Those contract terms were not varied.

23. I find it was a term of the claimant's contract that the claimant would be paid if he was ready and willing to work the hours he was contracted to work. That is the proper construction of that contract. Under the terms of this contract the claimant was legally entitled to be paid even when the employer did not have work available for him to do. The fact that the contract provided for hourly pay does not persuade me that that was not the case.

24. It follows that the claimant was entitled to be paid £232.13 for each of the two weeks of his employment in January. The non-payment amounted to a further deduction from wages.

25. The respondent contends that the payments made by Miss Hameed to the claimant in October, November and December to 'top up' his pay should be offset against any wages owed. As I understand it, that submission is put on two alternative bases: either they were overpayments when made or they were, in effect, an advance of wages.

26. I reject that submission for the following reasons:

- a. Even if the payments could properly be viewed as payments on behalf of the company, the payments could not, as suggested by the respondent, be properly construed as 'overpayments' or an advance of wages given that the claimant was entitled to be paid in full for his contracted hours. They simply meant that the claimant received what he was entitled to.
- b. In any event, on the facts of this case I conclude that they were not intended as an advance of wages.
- c. Furthermore, even if these payments had been overpayments or payments by way of an advance, any deduction in respect of them was not authorised by any term of the contract. Nor had the claimant signified in writing his agreement or consent to the making of the deduction. Therefore, any deduction from pay in respect of such payments was unauthorised.
- d. And even if they had been overpayments, section 14, which permits the reimbursement of the employer in respect of overpayments, does not assist the respondent. It is implicit in Section 14, that the 'overpayments' in question were made by or on behalf of the employer. In this case the payments were, in fact, not made by or on behalf of the respondent company. These were payments paid by a third party, namely Miss Hameed,

27. In the circumstances I find that the claimant was entitled to be paid £696.38 in January when his employment terminated. He was not paid and that failure to pay was an unauthorised deduction from wages. Therefore I ordered the respondent company to pay that amount to the claimant.

Employment Judge Aspden

Date 20 July 2018

26 July 2018

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FOR THE TRIBUNAL OFFICE