



EMPLOYMENT TRIBUNALS

Claimant: Mr J Thomas
Respondent: What Money Buys Ltd
Heard at: Cardiff **On:** 20 December 2018
Before: Employment Judge S Davies (sitting alone)

Representation:

Claimant: In person
Respondent: Mr C Merricks, HR Manager

JUDGMENT having been sent to the parties on 21 December 2018 and reasons having been requested by the respondent at the hearing in accordance with Rule 62(3) of the Rules of Procedure 2013:

JUDGMENT

It is the decision of the Employment Judge sitting alone that the following claims are upheld:

- | | |
|---|---------|
| 1. Breach of contract (mileage and PPE expenses) | £276.98 |
| 2. Arrears of wages | £650.00 |
| 3. Arrears of wages (failure to pay NMW – agreed sum) | £162.50 |
| 4. Holiday pay (agreed sum) | £450.00 |
| 5. Failure to provide written terms and conditions | £500.00 |

TOTAL: £2,039.48

The breach of contract claim (food expenses in sum of £19.70) is dismissed.

WRITTEN REASONS

Applications

1. At the start of the hearing the ET dealt with several applications made by the Respondent; firstly, to accept the Respondent's ET3 served out of time; secondly to allow the late disclosure of documents presented just prior to the hearing; and finally, that the Respondent should be permitted to call two witnesses to give evidence in circumstances where they had not exchanged witness statements. The Claimant took a pragmatic approach and made no objections; accordingly, the applications were allowed.

Hearing

2. The ET allowed the Respondent time to write witness statements and heard from Mr Ashleigh White, Director and Mr Christopher Merricks, HR Manager. The Claimant adduced a written statement within a bundle of documents and gave live evidence.
3. During his evidence Mr White volunteered that he had some issues with reading. He was asked to indicate if there was a document that he needed assistance with (this did not prove to be an issue). During Mr White's cross-examination questions were asked about dealings with HMRC and the ET gave Mr White the appropriate warning against self-incrimination; Mr White elected to respond to the question posed.
4. The ET was referred to the bundle of documents prepared by the Claimant and an additional bundle of documents provided by the Respondent on the day (marked R1). The Respondent had not disclosed any documents to the Claimant previously, in breach of the Tribunal's orders.
5. The applications, evidence and submissions were concluded before the lunchtime break.
6. Over the lunchtime break the Respondent attempted to send further documents to the Tribunal. When the hearing recommenced in the afternoon, the ET directed that these additional documents would not be considered as submissions and evidence had concluded; it was too late to accept additional documents into evidence.

Concessions

7. The Respondent conceded in closing submissions that the Claimant was an employee, that he was not given a written contract of employment, that he was owed national minimum wage for the last week of work and he was

owed holiday pay. The following sums were agreed: failing to pay the national minimum wage (£162.50) and unpaid holiday pay (£450).

8. The remaining disputed claims were in relation to wages and expenses.
9. To determine the unpaid wages claim, the ET had to determine: what weekly basic pay was agreed for the Claimant, the status of the payment of £200 made to the Claimant on 1 December 2017 and whether the Claimant worked a period of two weeks in hand.
10. As for the claim for expenses, there was a dispute about whether payment was due for mileage, PPE and food whilst staying away from home.

Credibility

11. Mr Merrick's evidence was of limited relevance as he was not party to the key conversations or exchanges of texts or emails about contract formation.
12. The Claimant's evidence was straightforward, and he was credible in his account. His witness statement was comprehensive, attached relevant documents and provided calculations in respect of his claims. The Claimant provided a coherent version of events and had a good recall of what payments were made to him and when; despite only being given the documents comprising R1 shortly before the hearing, he explained how the documents in R1 tallied with his account and the pay slips he provided. Finally, where appropriate, he made concessions, for example he has always conceded that he owes the Respondent £200 in respect of the payment on 1 December 2017.
13. Mr White's account was less straightforward. Mr White could not recall what some of the payments in R1 were made in relation to; for example, on 15 December 2017 the three payments including one for 'indifference' which he could not break down or explain.
14. As the ET must consider issues of credibility and reliability, I take into account the explanations given for the Respondent's noncompliance with the Tribunal's orders on disclosure and exchange of witness statements. Mr White suggested that a former colleague, Mr Johnson, had conduct of the Tribunal proceedings until recently. Mr Johnson was hospitalised in November 2018, which led to a number of postponement requests to the Tribunal made by Mr White in the weeks leading up to hearing (most recently an application was refused yesterday). Mr Johnson's unfortunate hospitalization in November 2018, cannot account for the Respondent's failure to comply with Tribunal orders for August 2018. I do not accept Mr White's reasons for noncompliance. Mr White's name appears as the contact on the ET3 form and from reviewing the file, it is exclusively Mr

White who corresponded with the Tribunal, on behalf of the Respondent, from 30 July 2018 onwards. These matters affect the assessment of credibility overall and where there is a conflict of evidence between the Claimant and Mr White, the ET prefers the Claimant's account.

Wages

15. The background to this claim is that the parties were previously friendly, having worked together in another company. The Claimant's employment started on 27 November 2017 and ended on 26 March 2018. Initially Mr Thomas worked remotely from home around his caring responsibilities and then latterly travelled to work on site and went to Job Centres to interview new recruits for the recruitment side of the business.
16. No contract of employment was provided to the Claimant. Contracts can be in writing but may also be concluded orally. The Claimant said that emails existed on the Respondent's work email, which would have assisted in construing the contractual terms, but they were not available to the ET as he could not access them, and the Respondent had failed to comply with its disclosure obligations. In the absence of all the relevant documents (the bundle contains only parts of email conversations), determining this claim depends on assessing whose version of events is to be preferred; which depends on witness credibility and reliability.

Sub

17. Shortly after starting work the Respondent advanced the Claimant a sum of £200 (to allow him to attend his nephew's wedding). Although it was initially denied that this was a 'sub', Mr White accepted in evidence that it was, but suggested that at a later stage it was agreed that the sub would stand as the Claimant's first week's salary. The Claimant disagrees that such a conversation ever took place, whilst acknowledging that he did owe the Respondent repayment for the sub. I accept the Claimant's account. Even on the Respondent's own account of weekly pay (it asserts £250 per week was agreed), a payment of £200 would be insufficient to cover one week's pay. There was no agreement that the sub of £200 would stand as his first week's pay.

Basic salary

18. As for what was agreed initially as the Claimant's basic salary, I accept the Claimant's account that initial discussions between him and Mr White included an agreement to pay £600 a week. This sum is reflected in text conversation in screen shots that the Claimant provided; although the text conversation is not conclusive, I accept there was separate email correspondence from Mr White about the terms of his employment (which

was not disclosed by the Respondent). The most persuasive evidence however is the first pay slip which indicates weekly pay of £600; no explanation was provided by the Respondent as to the inconsistency between the pay slip produced at the time and their oral evidence to the contrary.

19. It is agreed that a meeting took place at Gordano Services on 11 December 2017 attended by Mr Thomas, Mr White and Mr Johnson. In light of the company's financial difficulties and a quiet business period, all agreed to take a cut in pay to support the future viability of the company. The Claimant agreed to reduce his weekly pay to £250, there was no explicit agreement as to the date from which that reduction would take place, but the Claimant assumed, understandably, that it would apply to future work rather than work he had already carried out. The Respondent does not explain why there was a need for meeting on 11 December to agree to reduce pay if their case is to be accepted. Logically, the Claimant must have been on higher weekly pay prior to 11 December 2017, otherwise there would have been no need to meet to agree a reduction. The Respondent's evidence lacks coherence.
20. The ET's conclusions are supported by the three payments made to the Claimant on 15 December 2017, which total a net weekly payment of £546.84 plus a payment for expenses. I accept the Claimant's account, that on receiving pay that was lower than expected, he contacted Mr White who made arrangements for the payment to be 'topped up' to the expected level. The payment of 15 December 2017 marked 'indifference' (R1) increased pay to the level the Claimant expected and supports his version of events.
21. The Claimant did not complain about the amount of pay received in the following week's pay, he says because he did not note the discrepancy until preparing the ET complaint. The ET finds that the agreement to reduce pay was in respect of future work after 11 December 2017.

Time in hand

22. From 15 December 2017 onwards, the Claimant was paid on a weekly basis. There is a disagreement between the parties as to the amount of time employees had to work 'in hand' before receiving payment. The Claimant says it was two weeks in hand and this is the information that he gave out to new recruits that he recruited, so he was familiar with explaining the pay system. The Respondent disputes this and contends that all payments due have been made and were made on a weekly basis, (including two payments directly from Mr White rather than the Respondent, made when clients had not paid, and he did not want to see the Claimant out of pocket). I accept the Claimant's account that he worked two weeks in hand before receiving his first pay.

Expenses

Mileage

23. The Respondent resists the claim for mileage expenses, suggesting that mileage was not always payable, but was dependent on whether the client for whom work was being carried out would pay mileage. It is clear that the Claimant received a number of mileage payments during his employment (R1). The ET takes into account the exchange at p.11 of the Claimant's bundle and accepts the Claimant's evidence that he was paid in respect of all previous mileage claims. It is notable that the failure to pay expenses for mileage occurred only in relation to the last week of employment, following which there was a disagreement between the Claimant and Mr White. It seems likely that the parties falling out may explain non-payment.
24. There is no evidence that the Respondent informed the Claimant of the terms of expense claims being dependent on the client's terms of business with the Respondent. There appears to have been a custom and practice built up of payment for mileage expenses and the claim of breach of contract in the sum of £200 is upheld.

PPE equipment

25. Pic. 3 in the Claimant's bundle, is an exchange between the Claimant and Mr White, with the Claimant suggesting he may need to buy steel toecap boots for staff recruited. Mr White responds with "*if we have to get them for them just let them know it's charged back to them*". From this exchange it is entirely understandable that the Claimant would view this as an acknowledgment that he would be repaid. As an employee of the Respondent it should not be incumbent on the Claimant to have to reclaim payment from fellow employees. There was an implied agreement to reimburse the Claimant and the breach of contract claim is upheld.

Food

26. At pic. 4 in the Claimant's bundle, it does not appear to the ET that there was an agreement that expenses would be paid for food. The Claimant asks a question as to whether there was payment for subsistence and Mr White did not agree. The only comment Mr White made was to retain receipts to claim against tax due when an umbrella company was eventually set up (although this has never happened). There was no agreement to pay this expense and the claim is dismissed.

Failure to provide written statement

27. There was no contract of employment and the ET is required to make an award under section 38 of the Employment Act 2002 of either two weeks or four week's pay.
28. The Respondent submitted that the contracts provided for employees generally were zero hours contracts and therefore any payment should be on the basis of zero pay. The ET rejects this submission; it must make an award in respect of what the Claimant was paid. Towards the end of his employment he was paid £250 per week. An award of two week's pay appears appropriate in the circumstances.

Pay slips

29. The Claimant did not pursue a declaration with the regard to the missing pay slips, on the basis that the Respondent's assured the ET that they would resend copies of the missing pay slips to the Claimant.

Employment Judge S Davies
Dated: 4 January 2019

REASONS SENT TO THE PARTIES ON

.....4 January 2019.....

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS