



EMPLOYMENT TRIBUNALS

Claimant

Mr N Taylor

v

Respondent

Computing Need Limited

Heard at: Bury St Edmunds

On: 27 November 2018

Before: Employment Judge Warren

Appearances:

For the Claimant: In person

For the Respondent: Mrs J Bolton, Director

JUDGMENT having been sent to the parties on 14 December 2018 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

Background

1. Mr Taylor's original claim was as Employment Judge James identified at a preliminary hearing on 2 July 2018:
 - 1.1. That he was complaining of the respondent's failure to provide a statement of employment, contrary to section 1 of the Employment Rights Act 1996;
 - 1.2. That there had been an unlawful deduction from his wages contrary to section 13 of that Act;
 - 1.3. That he had been subjected to a detriment contrary to section 48 of that Act, and
 - 1.4. That he had been automatically unfairly dismissed for asserting a statutory right and for seeking pension enrolment.
2. By an email to the tribunal dated 6 November 2018 at 10:29 hours, copied to the respondent, Mr Taylor withdrew his claims of detriment and automatic unfair dismissal leaving live, as he acknowledged in that same email, his complaint of unlawful deduction from his wages and failure to provide written terms and conditions of employment only. Mr Taylor has acknowledged today that his detriment and unfair dismissal claims should be dismissed

upon withdrawal.

3. Both parties have made costs applications for today. The respondent in respect of the claimant's unreasonable conduct in bringing this claim and then withdrawing major aspects of it at the last minute. On Mr Taylor's part, he seeks costs against the respondents for defending his claims of unpaid wages and failure to provide written terms and conditions of employment, which defence he says is misconceived.

Evidence

4. I have had before me today witness statements from Mr Taylor and from Mrs Bolton, Director of the respondent company.
5. I have a paginated, indexed bundle of documents, which runs to page 140. Mrs Bolton's witness statement has 3 further documents attached to it, identified as 'missing item 12', 'missing item 14' and 'missing item 17'.
6. I also have before me written submissions prepared for Mr Taylor, prepared by his solicitors. Mrs Bolton was provided with a copy of those written submissions before the hearing started.

The Relevant Law

7. The Employment Rights Act 1996, (ERA) section 13(1) provides that an employer shall not make a deduction from the wages of a worker unless such deduction is provided for in his contract of employment or otherwise consent has been given in advance, in writing.
8. Section 1 of the ERA provides that within two months of starting employment, an employee must be provided with certain basic information regarding the terms and conditions of their employment. The information required is stipulated at sub-sections 3 and 4. In respect of some of those details, information can be provided in other documents, provided that they are referred to in the original terms and conditions.
9. Section 7A provides that information can be supplied in documents other than the written statement under section 1 of the ERA. The respondent has been much vexed by that section, thinking that it meant that the respondent did not have to provide all of the information listed in section 7A(1)(b). That is not so. The requirement for information is stipulated at section 1(3) and (4) and every employer must provide that information to every employee within two months of employment commencing, either in the terms and conditions document, or in some other document.
10. I make the comment as this is another point which has vexed the respondent: there is no requirement in the legislation for the employee to have had to have asked for the terms and conditions of employment that are required by section 1.
11. Section 38(3) of the Employment Act 2002, provides that where an employee has succeeded in a claim before the tribunal and at the time that those proceedings were started, the employer was in breach of his duty under

section 1 of the ERA, then the tribunal may increase any award by the, “minimum amount” and may, if it considers it just and equitable in all the circumstances, increase the award by the, “higher amount”. The minimum amount is two week’s pay, and the higher amount is four week’s pay. These provisions only apply if the claimant has succeeded in a particular stipulated set of proceedings before the tribunal, which includes claims under section 1 of the ERA.

The Facts

12. Mr Taylor’s employment with the respondent commenced on 13 June 2017. He was retained as a Sales Manager.
13. At document 68 is a letter which was prepared on 12 June 2017, providing certain information with regard to his employment. Mr Taylor says he never received that document, I have no evidence before me that in fact he did receive it. Mrs Bolton says it, “*would have been*” given to him or left for him probably, I think she said by her sister, but I have no evidence before me that it was definitely given to him. I find that it was not. That really does not matter though, because the content of the letter is duplicated in a subsequent email dated 5 July 2017, sent to Mr Taylor. He acknowledged in evidence he had received it by email, which was within the prescribed time frame. The email is set out at pages 69 – 71 and as I say, it duplicates that which was in the letter at 68 and includes further information, on the calculation of his commission / bonus.
14. On 22 February 2018, Mr Taylor was dismissed without notice in circumstances which were controversial but not relevant to the issues before me. Following the termination of his employment, he was not paid at all.
15. On 2 March 2018, Mrs Bolton wrote to Mr Taylor by email in which she says,

“Regarding your final salary payment, this is being held pending legal advice on the following points.

Damaged company telephone, Samsung S8.
Deletion of all telephone and tablet data, (returned to us after being factory reset)
No sales record, (we have to assume these are being withheld;
Deletion of the new company Facebook page”
16. On 5 April 2018, Mr Taylor issued these proceedings.
17. On 17 May 2018, the respondent filed its response to these proceedings. In its narrative, at paragraph 19, (page 31 of the bundle) the respondent says in respect of the claim for unlawful deduction from wages, that it is seeking advice in relation to Mr Taylor having damaged company property and deleted sales records.
18. On 6 November 2018, Mrs Bolton wrote by email to Mr Taylor’s solicitors to say that they had offered to pay his last month’s salary as long as he returned company sales and admin records. The next day, on 7 November, she wrote a further email to Mr Taylor’s solicitors setting out a calculation of

what she says the salary due was, which included deductions for a day's overtaken holiday and deductions in respect of commission for what she said was over paid in respect of June, July and September 2017 and January 2018. She thereby calculated the amount due as being £612.97 and a payment was made to Mr Taylor in that amount.

Conclusions

Wages claim

19. With notice, Mr Taylor, was entitled to his month's pay from February 2017 in the sum of £2,790. He was not challenged about that.
20. I do not accept Mrs Bolton's evidence regarding the deduction of commission having been discovered immediately post dismissal. What she said to me in evidence, is that in calculating Mr Taylor's pay, she had noticed mistakes from the gross margin report. She said that it was the job of someone called Penelope Parker in the main office to update the gross margin reports against purchase orders and purchase invoices, to make sure they are accurate. She says that when she had asked for confirmation of those from Ms Parker, she found that they had not been done and that it became obvious that Mr Taylor's accounts had been put on what she called a Separate Rep Code, they did not appear on standard reports, they required a separate report. She said that she had assumed that Penelope Parker had been doing the reports, but she had not. She then went through them herself and found errors in four of them.
21. There is no reference to this at paragraph 19 of the respondent's defence to these proceedings, (page 31) nor is there any reference to it in the contemporaneous email sent to Mr Taylor on 2 March 2018. In my view, there would have been, if what Mrs Bolton was saying to me was true.
22. Further, there is no evidence before me as to the accuracy of the figures set out in the email of 7 November 2018. Mrs Bolton said that she had some documents with her that she could refer to, but they were not documents which had been disclosed in advance as part of the disclosure process. She also said she wasn't prepared to show them if Mr Taylor was to see them, because they were confidential and contained client's names.
23. I find that there was no overpayment of commission and that the deductions which were purported to have been made from Mr Taylor's wages were those stipulated in the contemporaneous email of 2 March 2018 at page 131. I therefore find that Mr Taylor's claim to have been subjected to an unauthorised deduction from his wages succeeds, for there is nowhere, as Mrs Bolton acknowledged, any authorisation for a deduction either in writing or in a contract of employment.
24. As to the value of that claim, it is a month's pay, £2,790 less that which has been paid, £616.57; the amount due is £2,177.53.

Failure to provide written terms and conditions of employment

25. As for the claim of the respondent's failure to provide written terms and

conditions of employment, I now consider this pursuant to section 38, because Mr Taylor has succeeded in his wages claim.

26. The respondent has failed to comply with the requirements of section 1 of the ERA, as Mrs Bolton acknowledged in evidence, in the following respects:
 - 26.1. There is no statement of the date upon which Mr Taylor's continuous employment began;
 - 26.2. There is no reference to public holidays and whether they are included or excluded from the annual leave entitlement;
 - 26.3. There is no reference to notice periods;
 - 26.4. There is no reference to sick pay arrangements, and
 - 26.5. There is no statement as to his place of work.
27. Mr Taylor's complaint in this respect must therefore succeed.
28. As to the amount of the award, I acknowledge that there has been some attempt to provide written terms and conditions of employment. It is simply a matter of the respondent having failed to comply with the strict requirements of section 1. I can understand Mrs Bolton being perplexed in some respects as to why that might be so.
29. I therefore find that it is just and equitable to award the minimum amount and not the maximum amount. That is two weeks' pay. The calculation is £2,790 times by 12 divided by 52 to arrive at a weekly rate of £643.84. 2 weeks is £1,287.69.
30. To summarise, the award in favour of Mr Taylor in respect of unpaid wages is £2,177.53; in respect of failing to provide written terms and conditions, £1,287.69. The total is £3,465.22.

Cost Application

31. Next, I turn to the cost application by the claimant and the time preparation order application by the respondent.
32. The respondent applies for its costs in respect of Mr Taylor's late withdrawal of his unfair dismissal and detriment claim.
33. Mr Taylor applies for his legal costs in respect of the respondent's defence to the wages and terms and conditions claims, because the defence lacked merit; they had no reasonable prospects of success.
34. It is true that the defence to Mr Taylor's wages and terms and conditions claims lacked merit. However, there was the potential argument over commission, which I had to resolve. Costs are not the norm in employment tribunal proceedings; generally speaking parties are to be free to come to an employment tribunal without fear of a costs order being made against them, unless their conduct is as described at rule 76 i.e. where:

*“(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or
(b) any claim or response had no reasonable prospect of success.”*

- 35. There is authority to say that parties should be encouraged to withdraw claims because otherwise one would create a culture whereby people would fight on and proceed disproportionately with claims, because of a fear of costs.
- 36. In this case, Mr Taylor has withdrawn the major part of his claims, having regard to, as his solicitors have explained in their correspondence, proportionality. The result of that is that a four day hearing has now taken half a day.
- 37. The respondents are unrepresented. Whilst the threshold of the test is the same whether a party is represented or not, it is a relevant factor in exercising my decision, (see AQ Ltd v Holden[2012] IRLR 648). I have taken that into account.
- 38. I have taken no account of either parties' ability to pay, as I may have done if I wished, in reaching my decision.
- 39. The conclusion I have reached is that justice is served if I make no order as to costs either way and I so decide.

Employment Judge Warren
Date:24.01.19.....
Judgment sent to the parties on
.....24.01.19.....
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For the Tribunal office