



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr Joginder Sukhija

v

Loomis UK Ltd

Heard at: Watford

On: 29 November 2018

Before: Employment Judge Bedeau

Appearances

For the Claimant: In person

For the Respondent: Mr C McDevitt - Counsel

JUDGMENT

1. The claimant's claim of unauthorised deduction from wages is declared well-founded and the respondent is ordered to pay him the sum of £792.4 gross.
2. The claimant shall account for any income tax and national insurance contributions on the said sum.
3. The claimant was not entitled to company contractual sick pay.
4. The claimant was not entitled to statutory sick pay.
5. The respondent's application for costs is refused.

REASONS

1. By a claim form presented to the Tribunal on 23 July 2018, the claimant who worked as a driver/guard, claims against the respondent notice pay; accrued unpaid holiday; unauthorised deduction from wages; and other unspecified payments. To these claims the respondent has denied liability.
2. In essence, the claimant's claims are two-fold, firstly, accrued unpaid holiday and secondly, unauthorised deductions from wages.

The Issues

3. The issues for me to hear and determine in respect of the holiday pay/unauthorised deduction from wages claim are:
 - 3.1 What was the holiday year?
 - 3.2 What was the claimant's holiday entitlement during the holiday year?
 - 3.3 Had the claimant taken any holidays in the holiday year?
 - 3.4 Had the claimant carried over any holidays to the current holiday year which is the subject to this claim?
 - 3.5 What was the claimant's entitlement to holiday and holiday pay?
4. In relation to unauthorised deductions from wages:
 - 4.1 Was the claimant entitled to company sick pay during his period of sickness absence?
 - 4.2 If not, was the claimant entitled to statutory sick pay?
 - 4.3 Was the claimant paid contractual sick pay during the period of his sickness absence?
 - 4.4 If not, was he instead entitled to statutory sick pay?
 - 4.5 Was the respondent entitled to deduct from his wages any over-payment made during his period of sickness absence?

The Evidence

5. I heard evidence from the claimant. The respondent did not call any witnesses.
6. In addition to the oral evidence, the parties adduced a joint bundle of documents comprising of 121 pages. References will be made to the documents as numbered in the bundle.

Findings of Fact

7. The respondent provides cash management solutions and services to organisations which handle cash, including financial institutions, retailers and public-sector bodies. It transports cash securely, eliminating opportunities for fraud and analyses a company's cash flow in detail. It also offers ATM replenishment and management services and describes itself as a cash management specialist.
8. The claimant commenced employment with the respondent on 9 October 2017, as a driver/guard. In that regard he was delivering cash to various

establishments. He worked 4 days a week and 10 hours a day. He told me he worked more than 40 hours per week, in practice up to 60 hours a week. However, he did not produce any documents in support of his claim that he worked 60 hours, on average, per week.

9. He requested that the respondent should disclose his time sheets covering the entirety of his employment, but I refused his request. It was apparent from reading the response presented by the respondent on 29 August 2018, that it was disputing all aspects of his case. It was open to him to apply, in good time, for the respondent to specifically disclose his time sheets.
10. He stated that clocking in and clocking out involved placing his index on an electronic reader but, occasionally, the timing on the reader would not be accurate. I saw no documentary evidence in support of this statement.
11. The holiday year ran from 1 January to 31 December. It was not disputed that the claimant was entitled to 248 hours holiday pay during the holiday year. This equates to 4 weeks and 3 days plus 8 days public holidays. (page 71 of the bundle)
12. The claimant and his branch manager agreed that he could carry over in to the year 2018, 7 days as he was unable to take time off by 31 December 2017 due to the busy nature of the respondent's business at that time.
13. Although he told me that there was an agreement to add a further 8 hours annual leave effective from 1 January 2018, there was no document in support of that assertion and the matter was disputed by the respondent.
14. He acknowledged that in 2018 he had 12 days' leave from 5 February to 23 February 2018.
15. In an email dated 10 April 2018, he resigned from his employment and gave the respondent 4 weeks' notice to expire on the 7 May 2018. He was written to by the branch manager who acknowledged his resignation and suggested that he should leave on 5 May 2018 as the 7 May was a bank holiday. He told me that he discussed the matter with his shift manager who said to him that he should be paid up to 7 May 2018.
16. I did not see any documents confirming that the claimant had been working up to the 5 May 2018. I, therefore, accepted that he was entitled to work up to the 7 May and be paid up to that date.
17. On 25 April 2018 at around 10am, he sustained, he said, an injury while at work. He returned to his place of work, spoke to the duty manager and left the premises at or around lunchtime. It was not until 26 May 2018 when he submitted a fit note stating that he was unable to work from 26 April 2018 to 3 June 2018. (page 107)
18. As he told me that he contacted his doctor on 26 April, 3 May and on 26 May 2018, I was satisfied that he had the opportunity of sending to the respondent earlier than on the 25 May 2018, a fit note covering his sickness absence.

19. I was also satisfied, having regard to his copy of the memorandum of agreement, that he was not entitled to company sick pay until he had been continuously employed for one year. The memorandum of agreement also did not provide for payment of company's sick pay based on an industrial injury. (pages 57-94)
20. Mr McDevitt, counsel on behalf of the respondent, took the claimant to a schedule that he had prepared in relation to the claims. The claimant admitted that in relation to his entitlement to holiday pay, he was entitled to the gross sum of £889.48 less an overpayment of £97.07 in July 2018. This gives a figure of £792.41. (page 121)
21. He accepted that the respondent was entitled to be credited for having overpaid him in his salary, the gross sum of £565.09 during his period of sickness absence. That figure had already been deducted from the gross sum that he was entitled to of £1,428.27.

Conclusion

22. As the figures were agreed by the claimant during the course of his evidence although he would have liked to have had the time sheets, I entered judgment in his favour and ordered that the respondent should pay him the sum of £792.41 gross, representing unauthorised deductions from wages alternatively accrued unpaid holiday. He would be responsible for paying any income tax and national insurance on that sum.

Respondent's costs application

23. After giving judgment the respondent applied for its costs on the basis that the claimant had initially accepted on 20 November 2018, the respondent's solicitors' offer of £1,652.95. However, after drafting a COT3 agreement, he became concerned about the wording. There were 3 iterations of the agreement but in the end, he was unable to agree the suggested wording by the deadline of Monday 26 November 2018 at 11am. From that time the respondent incurred counsel's fees.
24. Mr McDevitt submitted that in refusing the offer and in not accepting the advice given by the ACAS conciliator that the wording was standard in a COT3 agreement, the claimant's conduct of proceedings could be described as unreasonable, rule 76(1)(a) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, as amended.
25. I came to the conclusion that the claimant, as a lay person, did not have sufficient time to read the wording of the COT3 document and take appropriate free advice, namely 5 days. He was unable to pay for legal advice. He currently works part time and his wife also works part time. Had he been given about a month to consider the offer and to discuss the terms of a COT3 agreement with those who could assist him, but had unnecessarily delayed and conducted proceeding unreasonably, I would have acceded to the costs application. That was not the case here.

26. I do not conclude that the respondent satisfied the first limb of the test in rule 76(1)(a). I accept that the respondent's legal representatives were acting properly and professionally under the circumstances, but I do not conclude that the claimant's conduct of proceedings can be described as unreasonable. I, therefore, refuse the respondent's application for costs in the sum of £2,752 plus VAT.

Employment Judge Bedeau

Date:24/1/19.....

Sent to the parties on:

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For the Tribunal Office