



EMPLOYMENT TRIBUNALS

Claimant: Mr David Hastings

Respondent: X Markets Group Ltd

Heard at: Croydon

On: 12 December 2019

Before: Employment Judge Nash

Representation

Claimant: In person

Respondent: No appearance

JUDGMENT having been sent to the parties on 3 January 2019 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

The Procedural History of the Claim

1. The claim form was presented against X Markets Group on 7 May 2018 following ACAS early conciliation from 11 April to 1 May 2018. A notice of claim and hearing was sent to the parties on 12 June 2018.
2. The respondent's request for an extension of time to respond was granted until 17 July 2018, but its request for a postponement of the hearing (on the basis that its CEO was away) was refused. The respondent repeated its request for a postponement on 20 July on the basis that its CEO was away and there was no return date.
3. The Tribunal vacated the hearing on 26 July 2018. It was not in dispute that the respondent's correct name was X Markets Group Ltd, and the Tribunal re-served the claim form on the respondent under its correct name on 18 October 2018. On the same date it sent a notice of a hearing for 12 December 2019. The response was submitted on 29 October 2018.
4. The respondent applied for a postponement of the hearing listed for 12 December by way of an email of 7 December 2018 on the grounds that the director was, "currently away". The claimant objected. The Tribunal refused the postponement by way of an email of 11 December 2019.

5. According to the file, the respondent wrote to the tribunal that it had attempted to telephone the tribunal on a number of occasions and that the reason for the director's absence was to, "sort out funding for the company". The respondent informed the tribunal by way of an email sent at 9.44am on the day of the hearing (listed to start at 12pm) that it would not be attending the hearing on the basis that the case was of no merit and Mr Kemal, the Director, had just returned from overseas and was extremely busy. The respondent renewed its request for a postponement.

The Hearing

6. At the hearing the tribunal heard from the claimant on his own behalf and he gave evidence on oath. There were no other witnesses. The respondent did not attend. The tribunal had sight of a bundle of documents provided by the claimant.
7. The Tribunal firstly considered the respondent's re-application for a postponement. The requests for a postponement of 7 and 12 December 2017 were made less than seven days before the date of the hearing, or on the day of the hearing. Pursuant to rule 30A of the amended Employment Tribunal Rules of Procedure 2013, a Tribunal may only order a postponement in prescribed circumstances.
8. The claimant did not consent to the postponement under rule 30A(2)(a). There were no grounds to believe – or suggestion that – the postponement was necessitated by any act or omission of the Tribunal or the claimant, pursuant to subsection (2)(b). Accordingly, the Tribunal considered if there were any exceptional circumstances, pursuant to subsection (2)(c), permitting it to order a postponement. The Tribunal took into account the following factors.
9. The Tribunal reminded itself that it must exercise its discretion under the Rules judicially and in line with the over-riding objective.
10. It considered the prejudice to both parties. The claimant had attended the hearing and was ready to proceed. The respondent had made an express and informed decision not to attend and had not provided a satisfactory reason for its absence. It stated that the Director was no longer overseas but was too busy to attend. The balance of prejudice was therefore on the side of the Claimant.
11. The respondent had been aware of the hearing date from 18 October but made no request for a postponement until five days before the hearing which was refused and renewed this on the day of the hearing. Further, the respondent did not provide a date by which it would be willing to attend a hearing, beyond "new years".
12. Accordingly, the Tribunal found that there were no exceptional circumstances justifying the granting of a postponement and proceeded to hear the case.

The Claims

13. The claims before the tribunal were as follows:
- a. unauthorized deductions from wages contrary to S13 Employment Rights Act 1996
 - b. breach of contract (for expenses incurred and unpaid)
 - c. wrongful dismissal
 - d. holiday pay.

The Issues

14. The Tribunal identified the issues as follows following a discussion with the claimant and taking into account the respondent's ET3: –
- a. Was the claimant an employee of the respondent?
 - b. What was the claimant's salary?
 - c. What if any deductions were made by the respondent from the claimant's salary?
 - d. What if any losses were sustained by the claimant attributable to any deductions pursuant to section 24A Employment Rights Act 1996?
 - e. Had the claimant lawfully incurred expenses in the course of his employment for which he had not been reimbursed? If so, how much?
 - f. To what notice pay was the claimant entitled?
 - g. What if any notice pay was paid to the claimant?
 - h. What if any holiday entitlement had the claimant accrued but not taken at the effective date of termination?
 - i. If the claimant was not provided with a statement of terms and conditions compliant with section 1 Employment Rights Act 1996, should he be awarded the higher or lower amount pursuant to section 38 Employment Act 2002?

The Facts

15. The claimant's evidence was that he received a verbal offer of employment as the respondent's Head of Business Development on a salary of £50,000 a year. This was confirmed by a 30 November 2017 letter from the respondent with a start date of 1 December 2017. The tribunal had sight of this offer letter. The letter referred to a salary and a contract.
16. The claimant duly started work for the respondent. The claimant said that he was described as and understood himself to be an employee.
17. The claimant informed the tribunal that he had on a number of occasions requested a written contract of employment from the respondent, but the respondent had made a number of excuses for the failure to provide a contract, including that it had an outsourced HR function. Nevertheless, the tribunal had sight of uncompleted and unparticularised generic contract from the respondent (not signed by the claimant).

18. According to the claimant, he was provided with pay slips by the respondent's HR without having to request them. The pay slips were in the name of the claimant and the employer was stated to be X Markets Group Limited. The tribunal had sight of pay slips dated 31 December 2017 and 31 January 2017. According to the pay slips, the claimant's gross monthly salary was £4166.67 gross a month. The pay slip showed statutory deductions consistent with employment status. The claimant stated that his salary was not based on or connected to any revenue or commission.
19. The respondent's case was that the claimant was not its employee and its agreement with the claimant was that he would not be paid any salary until revenue was generated.
20. The claimant's evidence was that there was a shortfall in his salary and that he was not paid in February, March and April 2018. As a result, he sustained financial losses, being interest charges and bank charges.
21. The tribunal had sight of a letter of dismissal by reason of redundancy from the respondent to the claimant dated 27 April 2018.
22. The claimant's evidence was that he had not taken any paid annual leave during his employment.
23. The tribunal accepted the claimant's version of events for the following reasons. The claimant attended the tribunal and gave unchallenged evidence on oath. His evidence was internally consistent and consistent with the documents before the tribunal. His version of events was internally credible. The respondent had not provided any documents or other evidence to corroborate its version of events.
24. The respondent stated in its email to the tribunal (not copied to the claimant) that the claimant's references "made them feel uncomfortable" but provided no particulars of this bare assertion. The tribunal accepted the claimant's evidence that he was unaware of any issues concerning his references and that the respondent's assertions to the tribunal were the first he had heard of this.
25. The respondent also made serious allegations against the claimant that he sought to "blackmail" it, and that the claim was "malicious". There was no substantiation of these serious allegations.
26. The tribunal concluded that on the balance of probabilities that because the respondent had failed to provide any substantiation for its significant allegations against the claimant, that there was no merit to these allegations.

Submissions

27. The claimant made brief oral submissions.

The Applicable Law

28. The applicable law concerning unauthorized deductions from wages is found in the Employment Rights Act as follows

13 Right not to suffer unauthorised deductions.

(1) 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 statutory provision or 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.

...

(3) 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 for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

24 (2) Where a tribunal makes a declaration under subsection (1), it may order the employer to pay to the worker (in addition to any amount ordered to be paid under that subsection) such amount as the tribunal considers appropriate in all the circumstances to compensate the worker for any financial loss sustained by him which is attributable to the matter complained of.

29. The applicable law concerning annual leave is found in the Working Time Regulations as follows

Compensation related to entitlement to leave

14.—(1) This regulation applies where—

(a) a worker's employment is terminated during the course of his leave year, and
(b) on the date on which the termination takes effect ("the termination date"), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13(1) differs from the proportion of the leave year which has expired.

(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).

(3) The payment due under paragraph (2) shall be—

(a) such sum as may be provided for the purposes of this regulation in a relevant agreement, or

(b) where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula—

$$(A \times B) - C$$

where—

A is the period of leave to which the worker is entitled under regulation 13(1);

B is the proportion of the worker's leave year which expired before the termination date, and

C is the period of leave taken by the worker between the start of the leave year and the termination date.

30. In respect of breach of contract, the tribunal has jurisdiction under the Extension of Jurisdiction Order for breaches of contract outstanding on termination. The burden of proof in a breach of contract claim is on the party which asserts the breach, here the claimant.

Applying the Law to the Facts

31. The Tribunal had accepted the claimant's version of events for the reasons set out above.
32. The tribunal firstly considered whether the claimant was an employee of the respondent. The respondent disputed that the claimant was its employee on the basis that the parties never signed a contract of employment. However, the claimant relied upon an offer letter referring to a salary and a generic contract of employment. Further, he relied upon payslips showing statutory deductions consistent with employment status. The respondent in its email to the tribunal (not copied to the claimant) stated that its accountant provided pay slips to the claimant, "because he need it for some of his own personal stuff. This was not authorized and... the accountant doesn't know the details of where we stand in terms of actual job offering or signing the official employment agreement. (sic)" The Tribunal was not persuaded by the respondent's bare assertion, in an email, that its accountant unilaterally provided pay slips without authorization. The provision of PAYE information to HMRC is an important matter to a business.
33. The tribunal accepted that the claimant was an employee of the respondent for the following reasons. The tribunal had sight of a letter of offer of employment referring to a salary and contract, to a generic respondent contract and to pay slips showing statutory deductions consistent with employment status and to a letter of dismissal. The claimant gave unchallenged and credible evidence on oath that he had worked as an employee for the respondent. The tribunal found on the balance of probabilities that the claimant and respondent had entered into a contract of employment.
34. Accordingly, the tribunal went on to determine the claimant's salary. The tribunal accepted the claimant's contention that his salary was £4166.67 pm gross for the following reasons. This was the figure on the pay slips and the claimant gave evidence on oath that this was his salary. The respondent's contention that the claimant's salary was calculated solely by reference to his commission or income was not supported by any documentary or other evidence and was inconsistent with the contemporary documents before the tribunal.
35. The tribunal went on to determine the amount of any deductions from the claimant wages. The Tribunal accepted the claimant's account that he had worked as normal but that he was not paid at all for February and March and was owed the sum of £167.67 for April 2018. The Tribunal noted that the claimant limited

his claim for his April salary to £167.67 (rather than a higher sum up to the monthly salary of £4166.67) which indicated that he was taking a conservative approach to the quantum of his claims.

36. The Tribunal accepted the claimant's unchallenged evidence that he had sustained financial losses - being interest charges and bank charges - as a result of the respondent's failure to pay his salary, in the sum of £1,711.44. The tribunal accepted that these losses were attributable to the respondent's failure to pay the claimant his wages timeously or at all during February to April 2018.
37. The Tribunal next considered the claimant's claim for unpaid expenses. The tribunal accepted the claimant's unchallenged evidence that he had incurred reasonable and lawful expenses in carrying out his duties for the respondent in the sum of £169.48. The Tribunal found that it was an implied term of the claimant's contract that he was entitled to timely reimbursement of such expenses.
38. The tribunal next considered the claimant's entitlement to notice pay. According to the documentary evidence before the tribunal and the claimant's unchallenged and consistent evidence on oath before the tribunal, the claimant was dismissed by the respondent and he was entitled to one month's notice of dismissal. The tribunal had not accepted the vague and unparticularized allegations against the claimant and, for the avoidance of doubt, found that the claimant had not fundamentally breached his contract of employment permitting the respondent to dismiss him summarily. The tribunal accepted the claimant's evidence that one month's net pay was £3,064.67 and this was the correct sum due in lieu of notice.
39. The tribunal next considered the claim for holiday pay. The tribunal accepted the claimant's unchallenged evidence on oath that he had taken no paid annual leave during the employment as there appeared to be no dispute as to this and this was plausible. The claimant contended that he was entitled to six days outstanding holiday pay and the tribunal accepted this and awarded him six days wages being £1,250.00.
40. Finally, the tribunal considered whether the claimant was provided with a statement of terms and conditions compliant with section 1 Employment Rights Act 1996. That the claimant was not provided with a written contract of employment was not in dispute. The tribunal accordingly considered whether he should be awarded the higher or lower amount.
41. Sections 38(3) and (5) Employment Act 2002 provide that, unless it would be unjust or inequitable, the lower amount (being two weeks pay) is to be awarded for any failure to comply with section 1 (or section 4) Employment Rights Act. The respondent's failure was complete in that the claimant was provided with no written contract of employment. Further, the respondent had sought to take advantage of its failure by contending that the claimant was not its employee on the basis that there was no written contract of employment. In the circumstances the tribunal found it just and equitable to award the claimant the higher amount of four weeks' pay, being £3,846.15.

Employment Judge Nash

Date 20 March 2019