



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4100323/2019 & 4102768/2019 Hearing at Edinburgh on 5 April 2019

Employment Judge: M A Macleod (sitting alone)

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Grahame Hamilton

Claimant

Baileyfield Garage Limited

Respondents
Represented by
Mr D Blues

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David Blues

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Judgment of the Employment Tribunal is that the claimant is ordered to pay to the respondents the sum of **Five Hundred and Thirty Pounds and Thirty Six Pence (£530.36)**.

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REASONS

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1. The claimant presented a claim to the Employment Tribunal on 20 January 2019, in which he complained that the respondents had unlawfully deprived him of wages, notice pay and holiday pay.
2. The respondents submitted an ET3 resisting the claimant's claims.
3. A hearing was fixed to take place on 5 April 2019. The claimant appeared on his own behalf, and Mr Blues, the second respondent and owner of the first respondent, appeared for the respondents.
- 35 4. Each presented a small bundle of documents for reference by the Tribunal.
5. The claimant gave evidence, as did Mr Blues.

6. Based on the evidence led and the information presented, the Tribunal was able to find the following facts admitted or proved.

Findings in Fact

5 7. The claimant, whose date of birth is 19 November 1969, commenced employment with the respondents on 24 September 2018, as a Vehicle Recovery Technician (VRT).

8. The first respondent is a garage owned and operated by the second respondent. He employs a number of VRTs, which would be called out to the scene where a vehicle had broken down, in order to collect and take it
10 back to the garage.

9. When he commenced employment with the respondents the claimant was given a contract of employment (Respondents' Production F). The contract ran to 4 pages, and was signed by the parties on 24 September 2018.
15 Attached to the contract was a "Working Time Regulations Opt-Out Form", also signed by the parties on 24 September 2018.

10. The contract contained a number of provisions of relevance to this case.

11. At paragraph 2, entitled "Pay", the contract provided:

20 *"You will be paid £9.50 PER HOUR and this will be paid every FOUR WEEKS.*

Starting Salaries will be reviewed after six weeks.

On start of employment 2 week's lying time will apply."

12. At paragraph 3, under "Hours of Work", the contract stated:

"You will normally work a five day week as follows

25 *Monday to Friday 08:00 to 18:00...*

When On Call you will be working one week on call and week off call.

week (added in handwritten form)...”

13. The claimant’s holiday entitlement was 28 days, and the holiday period started from the last week of January until the last week of September.

5 14. Under “End of Employment”, in paragraph 7, the contract provided:

“On termination of employment payment will be made for holidays accrued to date in the current holiday period less holidays already taken.

If holidays have been taken in excess of entitlement then a deduction for excess will be made from the final wages due.

10 *Also any damages caused by you during your employment will be deducted from any final wage due to you or by court action being taken against you to recover these costs...*

15 *You are required to put in writing your termination of employment and ALL STAFF must work a minimum of 4 WEEKS NOTICE unless an agreement has been made to either finish early or finish after this period.*

20 *Any member of staff not working full notice periods will be liable for any costs incurred in the quickly recruiting or hiring temporary staff to cover the period they have failed to give notice for and any of the costs for this will be deducted from any final wage due to you or will mean court action being taken against you to recover these costs.*

All staff work on a basis of two weeks lying time this will mean that once you have finished your notice you will have to return for your two weeks salary known as your lying time and any holiday pay still owed less any Deductions.”

25 15. The “Working Time Regulations Opt-Out Form” signed by the claimant confirmed that if the claimant worked over 48 hours per week, it was his choice to do so.

16. The claimant understood that he would receive overtime payments one month in arrears.

17. On 2 November 2018, the claimant received a payslip from the respondents (produced by the claimant), in which his basic salary was calculated at 200 hours at £9.50 per hour, and his overtime as 41 hours at £12 per hour. His total net pay was recorded in that
5 pay slip as £1,882.56. The respondents paid to the claimant at that date the sum of £1,552.92.

18. On 5 November 2018, the claimant emailed the second respondent (produced in the claimant's bundle) to say:

"Hi Davie,

10 *The payslip says I should've been paid £1882.56 but I was only £1552.92 was paid into my bank (sic), making it short by £329.64."*

19. The claimant received no further payments thereafter from the respondents.

20. The claimant took two days' holiday on 5 and 8 October 2018, for which he received due payment from the respondents.

15 21. The claimant complained that he took two further days' holiday, on 17 and 20 October 2018, for which he was not paid by the respondents.

22. The second respondent accepted that the claimant was not paid his due holidays for these dates, in evidence before the Tribunal.

20 23. However, he insisted that the claimant had been responsible for damage to a vehicle with the recovery lorry, and that the respondents had had to pay for that damage, for which the claimant was not pursued by the business. He also confirmed that he had not continued to pay the claimant because of the lying time, and because he had not given sufficient notice of termination of his employment.

25 24. The claimant notified the respondents on 13 November 2018 that he intended to resign his employment. He did not have his contract of employment available when he did so, and he accepted before me that his contract required him to give four weeks' notice. His employment ended on 16 November 2018, and therefore the claimant did not give the necessary
30 contractual notice of termination.

25. The respondents required to incur expense by hiring a lorry driver from BRS Contracts on 23 November 2018, for £1,000, and a further £1,500 in respect of a lorry driver on 4 December 2018 (Production RA). Both invoices were erroneously dated 2019. Further
5 invoices were also produced by the respondents, including invoices for £74.51 and £124 for advertising on Indeed.com.

Decision

26. There are two claims before the Tribunal in this case. The claimant seeks payments in respect of unlawful deductions from wages; the respondents
10 seek payments in respect of an employers' contract claim in respect of those expenses incurred as a result of the claimant's actions.

27. Dealing with the claimant's claim first, it is apparent that the claimant has received payment for the sum of £1,552.92 in relation to the month of October, but that that payment represents an underpayment (admitted by the
15 respondents) of £329.64. In addition, the claimant was not paid beyond 2 November 2018 for any work which he did, and was deprived of two days pay in relation to holidays taken but not paid in October 2018.

28. As a result, the claimant has been unlawfully deprived, in relation to these two aspects of the case, of the sum of £519.64.

20 29. With regard to the payments for which the claimant claims from 2 to 16 November 2018, the respondents have withheld payment on the basis that he failed to give, and work, 4 weeks' notice in line with clause 7 of the contract of employment. The claimant now accepts that he did fail to give notice. His claim is for £950 in respect of those two weeks' work. The
25 respondents' position is that they were entitled to recover the costs incurred in recruiting or hiring temporary staff to cover the period for which notice has not been given (in terms of clause 7).

30. As a result, the respondents argue that the costs incurred in securing alternative driving cover for the vehicle following the claimant's resignation.
30 The invoice dated 23 November 2019 (meaning 2018) relates to this period, and amounts to £1,000. That covers the outstanding sum due to the

claimant, and accordingly he is not

entitled to the wages which he complains were outstanding, since the withholding of £1,000 was justified by the terms of clause 7 of the contract of employment.

5 31. The balance of the outstanding sum incurred by the respondents in respect of that invoice, £50, must not be overlooked.

32. Before considering the respondents' employers' contract claim, then, the claimant would have been due the sum of £519.64, taking into account arrears of pay for November, and the outstanding holiday pay. However,
10 from that, must be deducted the further sum of £50 under clause 7, in relation to the invoice of 23 November 2018. That leaves an award, before the counter claim is considered, of £469.64.

33. The respondents seek repayment in respect of both the further invoice for the services of a lorry driver from BRS Contracts (dated 4 December 2018)
15 of £1,500. Had the claimant given four weeks' notice from 13 November, his notice period would have expired on 11 December 2018, and therefore, it appears that this invoice is also relevant to the counter claim in that it is a payment in respect of the hiring of a replacement driver for the period of notice.

20 34. The invoices in respect of Indeed.com are less clear, and it is not specified what advertising was being carried out.

35. In addition, the respondents seek recovery of the costs of repairs to a vehicle which the claimant allegedly damaged in the course of his duties. The evidence on this was quite unsatisfactory, however, as it remained unclear
25 as at the Tribunal hearing what losses the business had in fact suffered as a result of this damage. There appeared to be an insurance claim or claims pending due to this incident, in which case the full cost would not be incurred by the respondents, and in light of the lack of clarity of the evidence on this point, I am not prepared to make any award against the claimant in this
30 regard.

36. However, it is clear to me that the claimant's contract of employment provides a contractual basis for the recovery of costs by the respondents in respect of hiring a further lorry for the weeks of 23 November and 4 December.

5 37. I then require to consider what award should be made to the respondents in this regard.

38. The claimant would, in the absence of the employers' contract claim, be entitled to an award of £469.64.

10 39. Against that must now be set the sum which it is appropriate, and just and equitable, to award the respondents in relation to the hiring of a new lorry driver for the period of the claimant's notice period. What is difficult to assess is exactly what that sum should be. The two invoices presented by the respondents are for different amounts. It is not apparent to me what periods these two invoices are said to cover, nor why they are different. It is
15 appropriate that the respondents, as well as the claimant, are seen to act reasonably and to mitigate their losses.

40. Accordingly, I find that the respondents are entitled to recover the sum of £1,000 in respect of the hiring of the lorry driver from BRS Contracts on 4 December 2018, but not £1,500.

20 41. Offsetting the claimant's due amount of £469.64 against this sum of £1,000 leads me to conclude that it is just and equitable to award the respondents the sum of £530.36.

25 Employment Judge: Murdo A Macleod
Date of Judgement: 02 May 2019
Entered in register: 02 May 2019
And copied to parties