



EMPLOYMENT TRIBUNALS

Claimant
Mr B Roy

V

Respondent

Novelmedia Limited
(In voluntary liquidation)

HEARING

Heard at: Watford

On: 1 July 2019.

Before: Employment Judge Tuck
Mrs Watts-Davies

Appearances:

For the Claimant: In person.
For the Respondent: Did not attend.

Judgment

- 1. The claimant's claims of discrimination are all dismissed on withdrawal.**
- 2. The claimant's claim of unfair dismissal is dismissed on withdrawal**
- 3. The claimant's claim for unlawful deductions from wages is upheld and the claimant is awarded a net sum of £11,250.**
- 4. The claimant's claim for holiday pay is upheld and the claimant is awarded the net sum of £2590.91.**
- 5. The claimant's claim for breach of contract is upheld and the claimant is awarded the net sum of £1135 representing the statutory minimum of one weeks' notice.**
- 6. The Respondent failed to provide the Claimant with a contract of employment and it is just and equitable to award the higher sum of four weeks' pay in this regard, a net sum of £5,000.**
- 7. The total of £19,975.91 is awarded, and is payable by the Respondent forthwith.**

The complaints

1. By a claim form presented on 23 January 2018 the Claimant presented complaints for unfair dismissal, discrimination on the protected characteristics of age, religion and belief, disability, unfair deductions from wages, notice pay and holiday pay. An ET3 on 9 March 2018 denied the claims, saying the claimant was a “freelancer”, not treated as an employee and was paid. At a Preliminary Hearing on 5 July 2018 EJ Henry recorded the withdrawal of the Claimant’s claims for unfair dismissal and discrimination, and listed the issues remaining for today.

The issues

2. The issues for determination are as follows:
 - 2.1 Employment status
 - 2.1.1 Was the claimant an employee, worker or self-employed for the purpose of the ERA 1996?
 - 2.2 Unlawful deduction from wages
 - 2.2.1 What was the wage the claimant was entitled to under his contract of employment /contract of engagement?
 - 2.2.2 In accordance therewith, has the respondent failed to pay the claimant such wage so as to amount to a deduction?
 - 2.2.3 Has the claimant signified in writing, his consent or agreement to the making of the deduction?
 - 2.2.4 Has the claimant been paid a wage below the National Minimum Wage?
 - 2.3 Holiday pay
 - 2.3.1 What were the terms of the employment relationship regarding holiday pay?
 - 2.3.2 What was the claimant’s leave year?
 - 2.3.3 How much of the leave year had elapsed at the EDT?
 - 2.3.4 Pursuant to Regulation 13 and 13A WTR how much leave had accrued for the year?
 - 2.3.5 How much paid leave had the claimant taken in the leave year?
 - 2.3.6 How many days remain unpaid?
 - 2.3.7 What was the relevant net daily rate of pay?
 - 2.3.8 How much pay is outstanding to be paid to the claimant?
 - 2.4 Breach of Contract
 - 2.4.1 On the respondent terminating the claimant’s employment, was the claimant entitled to notice on termination?
 - 2.4.2 In breach of contract, has the respondent failed to give the claimant the requisite notice or otherwise make a payment in lieu, in respect of notice?

Evidence.

3. The claimant gave evidence to this tribunal. He confirmed the contents of his ET1 and expanded on that. The claimant said that he had been employed by the Respondent as a Sales Director between 26 June 2017 until he was dismissed summarily on 17 December 2017.

4. During the claimant's interview for the post of Sales Director, he told us and we accept, that the following was discussed in relation to "the job":
 - 4.1 He would be paid a salary of £90,000 per annum giving him a net payment of £5,000 pcm.
 - 4.2 He would be entitled 22 days holiday in addition to the 8 public holidays per annum.
 - 4.3 He would be required to give 4 weeks' notice.
 - 4.4 He would be entered into a pension scheme with the employer paying 1% of his salary into it.
 - 4.5 He would be the beneficiary of a car allowance (though the terms and rates were not discussed)
 - 4.6 His hours of work would formally be – 9am to 5pm, though he would be expected to work the hours required – and in fact he worked around 8.30am until 7.30pm most days.
 - 4.7 He would be provided with an ID card, which was used to access and leave the building
5. Upon appointment the Respondent (which put on his company hierarchy documentation that it has an "investors in people award"), the Claimant was listed as "Director of Sales", and reported to the CEO, Tunku Ousmand. The claimant was listed on the Respondent's website in that capacity.
6. The claimant was given a letter of appointment dated 23 June 2017 which stated that he would be "paid a fee of £5000 per month (pro rata) for your services on a freelance agreement". The claimant said he took little notice of this at the time, and always understood himself to be an employee of the company. He took instruction from the CEO and directed a sales workforce. He repeatedly asked for a contract of employment, or even a draft contract but one was never forthcoming.
7. From the outset the Claimant was not paid regularly: we have seen and accept a schedule of payments received by the Claimant, which are supported by his bank statements. Payments in, were shown on his bank statements as "Novelmedia L Service Charge". The Claimant understands that no tax or national insurance was being paid on his wages, and he made complaint of this. In fact, he said that he saw three lots of bailiffs attend the Respondent's premises in a three month period due to non-payment of the landlord and HMRC among others. The claimant (and it seems other employees) made regular complaint about the lack of payment / late payments and were "fobbed off".
8. On 13 May 2019 the Respondent went into Creditors' Voluntary Liquidation. The Respondent knew about today's hearing and confirmed to the listing clerk last week that they did not intend to attend today.
9. The Claimant said that he understands the same individuals who employed him are now operating essentially the same business, under a slightly different name.

Law.

10. Section 13 of the Employment Rights Act 1996 provides that employers shall not make deductions from wages of a worker employed by him unless it is required

by a statutory provision or provision of contract, or the worker has previously signified in writing his agreement to the making of the deduction.

11. The Working Time Regulations provide at Reg 13 that a worker is entitled to four weeks' annual leave in each leave year. Regulation 13A provides for additional leave of 1.6 weeks. Parties may of course agree to provision in excess of this minimum of 28 days per annum. If employment terminates part way through a leave year, regulation 16 allows for payment in lieu.
12. Section 86 ERA provides for minimum periods of notice to be given to "employees" – where employment has been for less than a year, it is one week's notice. Section 230 ERA defines who is an "employee". To consider this statutory test, we are permitted to look not only at any documentation available, but also to consider the reality of the situation: *Autoclenz Ltd v Belcher and ors 2011 ICR 1157, SC*.

Conclusions on the issues.

The unanimous judgment of the tribunal on the issues set out above is as follows:

12.1 Employment status

- 12.1.1 Was the claimant an employee, worker or self-employed for the purpose of the ERA 1996?

On the basis of the oral evidence given by the Claimant as to the offer made to him, which formed the basis of his acceptance, we conclude that he was an "employee". He was told that he was to be "employed" as a sales director, and discussed terms including holiday entitlement, pension, car allowance and notice required. Such discussions would simply not have been necessary if he really was to have been engaged as a "freelancer" or "contractor". The Claimant was under the direction and control of the Respondent and was expected to, and did, work exclusively for them.

12.2 Unlawful deduction from wages

- 12.2.1 What was the wage the claimant was entitled to under his contract of employment /contract of engagement?

The claimant was entitled to a net monthly salary of £5000. It appears that the Respondent – which failed to produce any pay slips to the Claimant – failed to pay any tax or national insurance on those sums.

- 12.2.2 In accordance therewith, has the respondent failed to pay the claimant such wage so as to amount to a deduction?

We are satisfied that the Respondent failed to pay the claimant £2500 for October, £5000 for November and £4250 for December, amounting to a net underpayment of £11,250.

12.2.3 Has the claimant signified in writing, his consent or agreement to the making of the deduction?

The claimant did not consent to such deductions.

12.2.4 Has the claimant been paid a wage below the National Minimum Wage?

The Claimant was not paid at all for October, November or December. However, he has not presented any claim under the National Minimum Wage provisions.

12.3 Holiday pay

12.3.1 What were the terms of the employment relationship regarding holiday pay?

The claimant was entitled to 30 days paid leave per annum.

12.3.2 What was the claimant's leave year?

The claimant did not receive a contract specifying his leave year.

12.3.3 How much of the leave year had elapsed at the EDT?

The claimant worked for six months.

12.3.4 Pursuant to Regulation 13 and 13A WTR how much leave had accrued for the year?

The claimant had accrued 13.4 days leave during his 6 months of employment.

12.3.5 How much paid leave had the claimant taken in the leave year?

The claimant had taken only 2 days paid leave prior to his EDT.

12.3.6 How many days remain unpaid?

A total of 11.4 days leave remained outstanding.

12.3.7 What was the relevant net daily rate of pay?

The claimant's net daily rate of pay was £227.27.

12.3.8 How much pay is outstanding to be paid to the claimant?

The sum of £2590.91 is outstanding to the claimant.

12.4 Breach of Contract

12.4.1 On the respondent terminating the claimant's employment, was the claimant entitled to notice on termination?

The claimant was not issued with a contract of employment, and we therefore determine that his entitlement to notice was the statutory minimum of one week.

12.4.2 In breach of contract, has the respondent failed to give the claimant the requisite notice or otherwise make a payment in lieu, in respect of notice?

The Respondent failed to pay the Claimant any notice, and we award one week's pay in the sum of £227.27 x 5 = £1135.

13. We have also considered the Respondent's failure to provide the Claimant with a written contract of employment. He has presented claims within schedule 5 of the Employment Act 2002, and therefore under section 38 thereof, we must award the "lower sum" of two weeks' pay, and may award a "higher sum" of 4 weeks' pay. In light of the serious and gross violations of employment and tax legislation, paying the claimant in an ad hoc basis and showing the sums as "attrition" so that it appeared as service charges which had been refunded - we have no doubt whatsoever that it is just and equitable to award the higher sum of 4 weeks' pay.
14. The total net sum due to the Claimant of **£19,975.91** is payable forthwith.

CONSEQUENCES OF NON-COMPLIANCE

1. Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.
2. The tribunal may also make a further order (an "unless order") providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.
3. An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative.

Employment Judge Tuck

1 July 2019

Sent to the parties on:

.....1 July 2019

For the Tribunal:

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