



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr A Kumar

**v Broadway Kitchens and Bedrooms
(Midlands) Ltd & another**

Heard at: Birmingham

On: 8 November 2019

Before: Employment Judge Broughton

Appearances:

For Claimant: Mr R Kumar, brother

Respondent: Ms B Avdia, PA

JUDGMENT

The Claimant's claim for unpaid wages and unpaid holiday succeed in part against the first respondent.

He is owed 1 weeks' unpaid wages	£450.00.
and	
5 days holiday pay	£450.00

His claim for notice pay fails for want of jurisdiction and is dismissed.

The first respondent agreed to provide copies of the claimant's early payslips that he claimed not to have received.

His claims against the second respondent were presented out of time and there was no evidence that it was not reasonably practicable to present them in time.

Those claims, therefore, fail and are dismissed as are his other claims for unpaid wages and unpaid holiday pay and for the earlier period when he was employed by the first respondent.

REASONS

The facts

1. Having not been prepared for the previous listing of this matter both sides produced witness statements and some documents although there were still significant gaps in the evidence and recollections.
2. The claimant initially worked for the first respondent on a self-employed basis. Whilst at one point he appeared to dispute that it became common ground.
3. It was also common ground that the claimant became a full time employee of the first respondent early in July 2017. He was paid £600 gross per week. Tax and national insurance were deducted.
4. The claimant received paid holiday for shutdowns in the summer and over the festive period as well as on bank holidays. He initially denied this but it appeared that was because it had not been fully explained to him or, if it had, he had not understood.
5. Early in April 2018 the claimant was working on a job in Sutton Coldfield where his actions resulted in part of the home becoming flooded. He said he was only doing as instructed but the second respondent, director of the first respondent, denied this.
6. The second respondent told the claimant to return to the office while he attempted to resolve the situation saying he would speak to him on his return. This was agreed.
7. It was the respondents' case that, on his return, the claimant spoke to a colleague and said he was leaving because he could find better work elsewhere and he then left before Mr Kandola returned.
8. The claimant, however, said that he returned but nothing was said to him and he simply continued working over the following days and weeks.
9. The first respondent processed the claimant as a leaver and produced his P45. They also notified NEST that his pension contributions had ceased and they wrote to the claimant a couple of weeks later confirming this.
10. The claimant produced his bank statements which showed that he received no pay from either respondent for the next 3 weeks. He made no complaint about this period of non-payment, nor could he explain it. He appeared to deposit some cash during this period to tide him over which he suggested came from his mother.
11. Those matters support the respondents' case which, as a result, I accept.

12. The respondents suggested that a few weeks later, towards the end of April 2018, the claimant called begging for his job back.
13. Whilst reluctant, the second respondent said that he wanted to help and, as he needed some work done on his home, he offered the same to the claimant on a self-employed basis at £90 per day. The second respondent said that he was not prepared to re-engage the claimant as an employee of the first respondent due to his unreliability.
14. The claimant denied all of this, suggesting that, from his perspective, he remained employed by the first respondent throughout, albeit acknowledging that he was asked to work at the first respondent's home from time to time.
15. For the next couple of months the claimant was paid £450 per week by the second respondent which appears to support the latter's case and so, again, I accept the respondents' evidence.
16. The claimant claimed that he only agreed to this arrangement if the second respondent expressly agreed to be responsible for his tax, national insurance and pension but such a conversation was denied by the second respondent and seems unlikely in all the circumstances. It appears that he needed work and was not in a very strong bargaining position. Moreover, if, as the claimant claimed, there was no change to his working arrangements, there would have been no reason for him to have this alleged conversation.
17. That said the respondents adduced a document allegedly prepared and signed by the claimant in which he purportedly confirmed his self-employed status when working for each of them.
18. They could not produce a signed original and the claimant denied that he had produced it. Moreover, the content and language used was not, from everything I saw and heard, remotely likely to have been written by the claimant. It was purportedly dated at the end of May which, again, made little sense, coming, as it did, on their case, halfway through his work for the second respondent and several weeks before his return to the first respondent. It also had an incorrect postcode with a "2" instead of a "Z", suggesting, perhaps, a transposing error that would not be made by someone who knew it.
19. As a result I had significant reservations about the credibility of all parties. The respondents did, however, also produce several of the claimant's business cards supporting their assertion that he was available, and looking, for other work. They did not seem old enough to reference an earlier period of self-employment several years before.
20. From the first week of July the claimant began being paid by the first respondent again and, on their case, this was because he was permitted

to return on a similar self-employed basis to that which had been offered by the second respondent.

21. There was no suggestion that he worked for, or was paid by, the second respondent after this time. His last work for Mr Kandola on a personal basis was in June 2018 and his last pay from this work was received on 2 July 2018.
22. Again the claimant's case was that there was no change in his status and he believed he remained employed on his original contract. I have already explained why I do not accept that was the case.
23. It seems to me that the claimant would have complained sooner if he had not been paid for a few weeks and then his net pay per week was slightly lower and he was aware he was not receiving pension contributions.
24. Moreover, he took the second week of July off on holiday but, unlike the previous year, this was unpaid and yet there was no complaint at the time.
25. During the following weeks it appears, from his pay at least, that the claimant was largely paid for 5 days at £90 per day but, on occasion, he was only paid for 3 or 4 days. Neither side could fully explain this but I am prepared to accept that it reflected the work done.
26. The claimant suggested that he often worked Saturdays, making six days per week but there was no evidence to support this. The respondent denied it, saying they did not work weekends.
27. I consider it unlikely that the claimant would have continued to work for either respondent if there were such regular under payments. As a result, I again prefer the respondent's evidence.
28. On 6 September 2018 the claimant received his last pay from the first respondent. It was common ground that this was for work the previous week and he received £360, reflecting 4 days' work, doubtless because of the August bank holiday.
29. He worked a full first week of September. He claimed he also worked on the Saturday but, for the reasons already given I do not accept this.
30. On 10 September 2018, the claimant attended the office and asked for copies of his payslips. He was apparently hoping to obtain a mortgage and needed them to support his application.
31. He was given most of those from his time as an employee but was told that there were none for the recent months because of his changed status.
32. The claimant became angry and upset. He said this because he felt the respondents had treated him unlawfully but, it seems to me, it could easily

have been that he simply hadn't realised that the new arrangements would adversely affect his chances of obtaining a mortgage.

33. The claimant then left the premises in the morning and so he did little or no work that Monday.
34. The respondent claimed that he later returned with an axe and caused over £60,000 of criminal damage to their plant, stock and premises.
35. The claimant said that he could not remember this and, as the matter is currently the subject of a pending criminal investigation it is not appropriate for me to make any findings in this regard.
36. As a result, the claimant's notice pay claim, if he were deemed to have been an employee such that the tribunal would have jurisdiction, would be stayed.
37. The claimant was not paid for the last week of work that he did for the first respondent.
38. The claimant claimed that he was dismissed for requesting his payslips, which appears unlikely given that most, if not all, of them, together with his P45, P60 etc were produced. The respondent suggested that it was because of the alleged criminal damage which they said was captured on CCTV.
39. The claimant was in early conciliation against the second respondent from 27 October 2018 until 5 November 2018 although his initial attempt to submit his claim did not include this EC reference and was rejected. It was ultimately accepted on 12 December 2018.
40. As a result, the claimant entered early conciliation in relation to the second respondent over 3 weeks late. The presentation date made him later still and he offered no explanation or justification for the delay.
41. He was in EC in relation to the first respondent from 12 to 19 November 2018 so there was no time issue in relation to his latter period of working for them.
42. That said, if his employment ended in April 2018, all claims leading up to that date were even more out of time with no case advanced regarding why the claims were not raised sooner, nor were there any grounds for an extension.

The issues and the law

43. The claimant's claim for unfair dismissal was dismissed for lack of qualifying service.
44. He claimed unpaid wages in respect of his last week of work (week in hand). He actually claimed this twice and also suggested that he worked two weeks in hand but that was not borne out by the documents.
45. He claimed for a full year's entitlement to statutory holiday and bank holidays even though the records clearly showed he was paid, when on the books as an employee of the first respondent at least, for all bank holidays and office shutdowns in the summer of 2017 and at Christmas that year.
46. He also claimed lost pension contributions and for not receiving payslips as well as for notice pay on dismissal.
47. There was clearly an issue in relation to the claimant's status at all material times and, specifically, whether he was an employee, worker or was self-employed.
48. It was acknowledged that he was only entitled to payslips, pension contributions and notice pay, in the tribunal jurisdiction at least, if he were an employee.
49. He only needed to meet the wider definition of "worker" under the Employment Rights Act 1996 in relation to his other claims.

Decision

50. The claimant was an employee of the first respondent from July 2017 to April 2018.
51. I accept the respondent's evidence that he effectively resigned, following a customer flooding incident, on 6 April 2016 as this was entirely consistent with the external evidence.
52. As that period of employment ended on that date all claims against the first respondent in relation to that period of employment were presented at least 3 months' late and are, therefore, in the absence of any justification out of time, fail and are dismissed.
53. The principal claim for this period was, in any event, in relation to holiday pay, most of which the claimant had received.
54. The respondent's case in relation to the claimant pleading to return a few weeks' later also accorded with the external evidence. The claimant's suggestion that he believed that he had remained employed throughout

lacked credibility as he was not paid for a period of 3 weeks and I accept that he did not work those weeks either.

55. The suggestion that the claimant only agreed to do personal work for the second respondent on condition that he remained an employee and the respondent's took care of his tax, pension and national insurance lacked credibility. If that were the case he would have checked his bank statements and raised the issues and a complaint much sooner.
56. He was notified that he was no longer in NEST.
57. The claimant then worked 2 months for the second respondent and was paid £90 per day by him personally.
58. There was no evidence that this amounted to an employment relationship as it appeared to be common ground that the respondent did not have to offer the claimant work and the claimant did not need to accept it during this period although, when he did work, he had to offer personal service. There was no sickness or holiday or disciplinary provision.
59. The respondent said the claimant was able to work elsewhere and was looking to do so and he was liable for his own taxes. The reduced pay, they said and I accept, was because of the flooding incident and the fact that he had resigned. The respondents felt they were being generous offering him any work at all but, it seems to me, that it was equally likely that they were taking advantage of the claimant's desperation.
60. That, however, is not unlawful. They offered him ad hoc work on a reduced self-employed rate and he accepted that.
61. Nonetheless, the claimant was required to give personal service and so was a worker, as defined, both when engaged by the second respondent in May and June 2018 and by the first respondent thereafter. He took unpaid holiday with his family on his second week back with the first respondent, demonstrating the lack of mutual obligation.
62. His claims against the second respondent were presented late as he last worked for the second respondent in June 2018. He did not suggest that he could not have brought a claim sooner.
63. In any event, as he was not an employee of the second respondent he could only claim unpaid holiday or wages for that period.
64. In relation to unpaid wages, it may well be that the claimant sometimes worked overtime but it was not disputed that he was also sometimes late or took time in lieu. There was, in any event, insufficient detail or evidence to support a positive finding in this regard.

65. The claimant was, however, a worker for the first respondent from July to September 2018. There was no mutuality of obligation as he did not work, nor was he paid for, full weeks throughout.
66. I accept the respondent's rationale for this revised relationship, however distasteful to some, as they said they could not fully trust the claimant. It seems to me that the claimant was aware of, and begrudgingly accepted, this until he realised the potential adverse effect on his mortgage application.
67. As a result I have jurisdiction in relation to underpayments and holiday pay for which I make the awards detailed above.
68. As the claimant was not an employee I do not have jurisdiction to hear his notice pay claim.

Employment Judge Broughton

Date: 12 November 2019