Case Number: 2300498/2019

EMPLOYMENT TRIBUNALS

Claimant: Mr B Abimbola

Respondent: Delta Nursing Agency Limited

Heard at: **Croydon** **On: 4 October 2019**

Before: **Employment Judge Wright**

Representation:
Claimant: **Mr N Caiden - counsel**
Respondent: **Did not attend**

JUDGMENT

It is the Judgment of the Tribunal that the:

> respondent's application for a reconsideration of the decision not to accept the ET3/response form was successful, but not for the reasons the respondent relied upon; and
>
> claimant's claim for unlawful deductions from wages succeeds and the respondent is ordered to pay to the claimant the net sum of £2,488.06.

The Tribunal made an unless order, that **UNLESS** the respondent responds to the claimant's application for a costs order within seven days of receipt of the application, any response from the respondent will not be considered.

> A costs award of £900 is to be paid by the respondent (the paying party) to the claimant (the receiving party).

REASONS

1. On 12/2/2019 the claimant presented a claim form alleging unlawful deductions from wages under s.13 of the Employment Rights Act 1996 (ERA). In total he claims £2488.06.

2. The respondent was advised the response form ET3 needed to be presented by 19/4/2019 (Good Friday). The ET3 was posted (the respondent gave two different dates of posting, but in any event the covering letter was dated 17/4/2019) and received by the Tribunal on 23/4/2019. It was initially rejected on 24/6/2019. The respondent made two reconsideration applications by email, on the same day. The respondent has not made any further enquiry in respect of those applications, despite this hearing having been listed since 23/8/2019.

3. The hearing was due to start at 10am. At 19:04 on the 3/10/2019 the respondent (acting at all times via its solicitors) sent an email to the Tribunal stating:

> 'The parties has reached a settlement waiting for ACAS to draw up the CO3 settlement agreement. The hearing scheduled for 4th October 2019 should be withdrawn or stayed pending the signing of the settlement agreement. We therefore, urge the Judge to stay the proceedings or vacate the hearing' (sic)

4. In breach of Rule 92, the claimant was not copied in on this correspondence.

5. Based upon this correspondence from a firm of solicitors and taking into account the overriding objective, the Tribunal was prepared to postpone the hearing, pending a COT3 settlement being agreed. The Tribunal was surprised therefore to find the claimant was in attendance with his counsel. The Tribunal was even more surprised to hear that according to the claimant, there had been no acceptance of any settlement offer and it was not the case that COT3 terms were in the process of being agreed.

6. The Tribunal accepts the claimant's version of events as it was corroborated by Acas, who said there had been no telephone or email discussions that had led or were leading to a COT3.

7. Furthermore, the respondent had referred to information in its later email which was protected by privileged. Mr Caiden confirmed that at that stage, the claimant did not agree to waive privilege.

8. In view of the circumstances, the hearing went ahead and the Tribunal heard Mr Caiden's submissions. Mr Caiden also took the Tribunal through the bundle of documents.

9. Mr Caiden said the crux of the claim was a claim for unlawful deductions from wages. He said that payslips had been issued and to start with, the corresponding payments were made into the claimant's bank account. For the last six payslips that were issued, no payment into the bank account had been made. It was those sums the claimant was claiming.

10. Mr Caiden took the Tribunal though the payslips and the bank account statement.

11. He also took the Tribunal to internal correspondence which he said showed the respondent admitted the sums were due.

12. The Tribunal makes the following findings.

13. Reconsidering the decision to reject the ET3 as being presented out of time; the application is allowed, for different reasons however than those which the respondent submitted. The Tribunal disagrees with the respondent's calculation of time, which appears to run from the date the ET1 was received, rather than the date it was sent to the respondent by the Tribunal.

14. The Tribunal had specified that the ET3 should be presented on 19/4/2019. This year, that date was Good Friday. Rule 4(2) applies:

> 'Time 4…
>
> (2) If the time specified by these Rules, a practice direction or an order for doing any act ends on a day other than a working day, the act is done in time if it is done on the next working day. "Working day" means any day except a Saturday or Sunday, Christmas Day, Good Friday or a bank holiday under section 1 of the Banking and Financial Dealings Act 1971(18).'

15. The next working day therefore, after Good Friday on the 19/4/2019 was the 23/4/2019, which was the day the ET3 was received. It was therefore received in time.

16. Turning then to the substance of the claimant's claim, having heard from Mr Caiden, having read the claimant's witness statement and considered the documentation, and accepting the same; the Tribunal finds the sum of £2,488.06 was unlawfully deducted from his wages. There are six payslips showing payments due to the claimant, which were not received

by him. It is difficult to see how the respondent can deny the sums are owed to the claimant when it has produced payslips, but has not then paid the sums due to the claimant. The Tribunal therefore finds that the net sum of £2,488.06 was unlawfully deducted from his wages, contrary to s.13 ERA.

17. Mr Caiden then set out the basis of his cost application. He appreciated that the respondent has the right to make its representations, however he wished to set out in outline the application. It was agreed that Mr Caiden would make the application in writing and copy the respondent in. The Tribunal ordered that the application will be dealt with on paper. The Tribunal made an unless order, that unless the respondent objected to the claimant's application within seven days of receipt, any objections will not be considered.

18. After the claimant's costs application was made, there was then a delay, for which the Tribunal apologies.

19. There was no objection from the respondent to the claimant's costs application set out in its letter of 4/10/2019. In short, the claimant made an application under Rules 76(1) (a) and (b) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 for the sum of £900 (Counsel's brief fee) on the basis that the respondent had behaved unreasonably and the response had no reasonable prospect of success.

20. The claimant relied upon the following:

    a. the respondent had failed to engage in the key issue – the unlawful deductions;

    b. there was evidence that the respondent agreed monies were owed to the claimant;

    c. an offer of settlement of £2,000 was repeatedly made to the respondent and the respondent did not reply and a greater sum has now been awarded;

    d. the respondent did not attend the hearing and alleged the matter had been settled, correspondence from Acas confirming this was not the case was produced; and

    e. the respondent was at all times professionally represented by solicitors.

21. The Tribunal has a discretion to make a costs award under the Rules referred to above. In considering exercising its discretion, the Tribunal

finds that the respondent has acted unreasonably. Via its solicitors, the respondent has sought to mislead the Tribunal in respect of the settlement of the case. Furthermore, the respondent did not respond to reasonable settlement proposals made by the claimant, when it appeared from the documents it accepted monies were owed. If for example, the respondent accepted monies were owed, but disagreed with the amounts claimed, it would have been reasonable for the respondent to engage with the claimant and to set out what was in dispute. There was a failure by the respondent to comply with the overriding objective. Having concluded the respondent has crossed the threshold for making a costs order, the Tribunal must then decide whether or not it is appropriate to exercise its discretion to make an award. It is noted that the respondent is only seeking the sum of £900. It is therefore reasonable and appropriate to exercise its discretion in favour of the claimant and to make the award in light of the unreasonable stance taken by the respondent.

22. In the alternative, the Tribunal considers the proposition that the respondent's response had no reasonable prospects of success. The respondent was at all times in receipt of legal advice from solicitors. There was evidence that the respondent accepted monies were due to the claimant and that the respondent had simply failed to engage with the claimant. The claimant was prepared to accept £2,000 in settlement. The Tribunal finds the response did not have reasonable prospects of success. Again, having found the threshold has been crossed for making a costs order under Rule 76(1)(b) the Tribunal has to consider whether it is appropriate to exercise its discretion. The respondent issued payslips which shows that it accepted the sums were due to the claimant, but yet the respondent did not make those payments. Again, it is noted that in the circumstances the claimant is only seeking a modest sum and not his entire costs. The respondent should have assessed its position objectively and realised that it had no reasonable prospects of success.

23. Accordingly, a costs award of £900 is to be paid by the respondent (the paying party) to the claimant (the receiving party).

Employment Judge Wright

6 November 2019