



EMPLOYMENT TRIBUNALS

Claimant: Mr R. Sutton

Respondent: Formel D. UK Limited

Heard at: Birmingham

On: 29 April 2019

Before: Regional Employment Judge Monk

Representation

Claimant: In person

Respondent: Mr G. Khan, Solicitor

JUDGMENT

The Judgment of the Tribunal is that: -

1. The Claimant suffered an unauthorised deduction from his wages and the Respondent is ordered to pay to him the sum of £1,000.77 gross in respect of unpaid wages and £154.44 gross in respect of holiday pay.
2. The Respondent failed to provide full itemised pay statements for the 13-week period preceding the reference to the Tribunal on the 17 January 2019 and the Tribunal declares that the payslips provided do not contain the particulars required by Section 8 of the Employment Rights Act 1996.
3. The Claimant is entitled to the aggregate of any unnotified deductions for the period 18 October 2018 to 17 January 2019. The Tribunal is not able to calculate that amount today given the failure to provide amended itemised payslips for that period. If the parties cannot agree on the sum, they have permission to apply to the Tribunal for a calculation of the amount and a calculation will be done on the papers.
4. In accordance with the provisions of Section 24(2) of the Employment Rights Act 1996, the Claimant is entitled to be paid his financial losses of £270.00.
5. The Respondent failed to follow the ACAS Disciplinary & Grievance Code, the sums awarded above are uplifted by 10% in accordance with s207A TULR(C)A 1992
6. The total award is therefore £1,425.21 uplifted by 10% - £142.52 giving a total award of £1,567.73.

REASONS

1. I heard evidence from the Claimant Mr. Richard Sutton, who represented himself and from Mr. Kuda Matiya, an HR Manager for the Respondent. Both had prepared witness statements which were read out to the Tribunal.
2. There was a bundle of agreed documents which consisted of 422 pages, the bundle had been prepared and collated by the Respondent's representatives, Peninsula and was woefully constructed; pages numbers did not run consecutively, pages were missing from the bundles, some pages were impossible to read because of the format and at least one page had been notated by the Respondent's representatives on a crucial matter of date. Additionally, the Respondent had sent to the Claimant, by email and only very shortly before the Hearing, extra documents, which he had been unable to print off and which put him at some disadvantage.
3. Copies of the additional documents were obtained and page 256(a) was inserted into the bundle (although virtually impossible to read) and pages 390 and 390(a)(b)(c) and (d) were additionally inserted. The Claimant was given the opportunity to look at the other documents, either in the Respondent's bundle or the Witness table bundle. He confirmed he was content with that approach.
4. Mr Sutton had brought with him his diary to which he referred to check dates and payments on occasion.

Issues

5. Mr Sutton complains that the Respondent has, for a period from September 2018 through to January 2019 when he submitted his claim, failed to pay him wages which are properly due. The respondent had contracted out the payroll to a third-party (they have now dispensed with their services) but they acted in such a way that Mr. Sutton says it is extremely difficult to work out what he has been paid and for what periods.
6. In outline his complaints are: -
 - (1) that his holiday pay in that period was paid at the basic rate of £10.50 per hour not his contractual rate of £12.87 per hour.
 - (2) that he has been underpaid wages of £966.00
 - (3) that the Respondent failed to provide itemised amended payslips when additional payments were made to him which

has further added to the confusion and is a breach of his statutory right.

(4) That, because of the haphazard and incoherent manner of payment, he has incurred financial loss, considerable distress and ill-health.

(5) he also seeks an uplift to any award made for failure to follow a proper procedure when dealing with his complaints and grievance.

7. At the start of the Hearing, I clarified with Mr. Sutton the amounts that he was pursuing as there were a number of elements set out on his schedule of loss (page number 24-26 in the bundle) which did not appear to be within the jurisdiction of the Tribunal. He confirmed that he was seeking the following: -

(1) £966.00 for unpaid wages (set out in an email dated the 25 April 2019) resulting from six incidents of underpayment.

(2) payment of £154.44 being the difference between the holiday pay paid at the rate of £10.50 per hour and his entitled contractual wage of £12.87 per hour for the period.

(3) a claim for financial loss incurred as a result of failure to make timely wage payments to him.

(4) He confirmed that he understood that he could not pursue the following :- a claim for a loss of earnings whilst off sick; a claim for injury to feelings and distress; a complaint about the failure to properly account to HMRC for his correct pay nor a claim that pension payments had not been paid over.

8. The Respondent's position was set out in their amended Response which had been accepted. They defended the claim and asserted that whilst there had been discrepancies with pay, they had been resolved and the claimant was not owed any outstanding pay. The amended Response, drafted by Peninsula when they were instructed by the Respondent did not, in terms, respond to the complaint of failure to provide itemised payslips or the claim for financial loss but the Respondent had indicated in their original Response that these claims were also denied.

9. Mr. Khan, for the Respondent, agreed that the unpaid wages claim was as set out in the claimant's email of 25 April 2019, accepted that the claimant was entitled to holiday pay at his contractual rate of pay of £12.87 ; accepted that amended payslips had not been provided when additional payments had been made but required Mr. Sutton to prove the underpayment and any consequential financial loss.

Evidence

10. As I said above, I was not assisted by the way the bundle of documents had been prepared, I was also not much assisted by the lack of clarity in the Respondent's case at the hearing. Mr. Khan took a very confrontational approach in questioning Mr. Sutton and seemed to lack a clear understanding of the Respondent's position. The respondent accepted that there had been discrepancies in pay and there had been enough confusion and inefficiency on the part of the payroll company to warrant the Respondent dispensing with their services.
11. I heard evidence from the Respondent's witness Mr. Matiya. Whilst he was undoubtedly attempting to do his best and I have no doubts about his honesty he struggled to explain the Respondent's position as to whether amounts paid to the Claimant related to the amounts the Claimant said were still outstanding. The Respondent was significantly hampered by the fact that they had not yet finished a review of the problems caused by their former payroll providers and so could not provide wholly conclusive evidence. He was also not assisted by the failure of the Respondent's representative to clearly put the Respondent's case to the Claimant in cross-examination and some confusion in the Respondent's position. However, it was clear that they conceded that holiday pay was properly payable at the £12.87 rate and conceded that if Mr Sutton had not been paid the amounts for the first payments, namely the 11 November, 1 December and 2 December 2018, they were properly payable at the rates claimed. In relation to the second batch of three payments, for the 9 December and the 28 December, they disputed that he had worked those shifts and for the 24 January 2019 they accepted that he had worked but disputed that he was entitled to be paid as he had been covered by a sicknote for that day, so argued it was not lawful, in those circumstances, to make a payment to him.
12. Mr. Sutton, by contrast, was a straightforward and credible witness who had clearly spent an enormous amount of time trying to clarify what payments he had received and to what periods they related, He was assisted by having, early on, started keeping a contemporaneous diary which I found to be an accurate record of the hours worked and where there was any disparity between that and the Respondent's records I preferred his evidence. I have taken a proportionate approach to this hearing and the evidence before me bearing in mind the value of the claim and the time estimate. I have determined the issues on the basis of the best evidence before me.

Findings

13. Turning briefly to the facts, necessary to determine this case, Mr Sutton started working with a company called Global & Partner Limited on the 15 January 2018. He was based working for Jaguar Land Rover in Solihull where he was employed as a shift supervisor. On the 4 August 2018, his employment was transferred (accepted to be a TUPE transfer) to the current Respondent Formel D UK Limited. As was his legal entitlement, he was informed that his terms and conditions remained the same as his original contract.

14. His contract was in the bundle (page 65-82) and we looked at the clauses in relation to pay which set out entitlements to various rates at Clause 6 and entitlements to holiday at basic rate plus overtime and shift allowances at Clause 9. The Respondent did not dispute that the Claimant was entitled to holiday pay at that rate £12.87 ph and that he had in fact only been paid at £10.50 per hour which was only his basic rate. The claimant had been paid for 12 hours holiday pay in the period prior to lodging his claim at £10.50 ph. The Respondent also did not at any point dispute that the rates claimed for pay by the Claimant were wrong or inaccurate, but said it was a question of whether he had received payments already for those hours of work.
15. The Respondent used an external payroll company to administer the company payroll and problems started as soon as the Claimant received his first payslip. The due date for payment was the 10th of the month and when the Claimant received his first pay for the 10 September 2018 it said the date was 30 September. It was immediately apparent that he had been significantly underpaid as he received only £378.00 for the whole of August. This was particularly concerning for the Claimant as he had recently returned from abroad having got married and was faced with the stressful situation of being significantly underpaid.
16. Mr. Sutton raised the issue with Mr Matiya and an additional payment was made on the 11 September but his payslip was not amended to reflect the correct figure. The Claimant initially assumed that it was simply teething problems with a new company, but problems recurred in his payment on the 10 October. He discovered that he was being wrongly taxed at 40%, (He is still in fact in dispute with the company over the information that he had given to HMRC and concerned that incorrect information is significantly affecting his tax situation. He has requested that the Respondent does an early year update procedure)
17. It is not necessary for me to rehearse in detail here the significant problems that Mr Sutton then experienced with his subsequent pay, but it is right to say that problems continued throughout the next several months and the situation became particularly upsetting, culminating in the Claimant going off sick in January 2019 with work related stress. He set out in his witness statement that he was worrying about money because of missing pay, incorrect payslips, being taxed at the wrong rate amount was affecting his direct take home pay as well as having problems with his pension fund apparently not having had contributions paid into it, despite deductions being made.
18. The Claimant's evidence was that there were six outstanding payments due to him for hours that he had worked and for which he had not received payment. Those were as follows: -

11.11.18	6½ hours worked	@shift rate £21.00 p/h	£136.50
1.12.18	12 hours worked	@shift rate £15.75 p/h	£189.00
2.12.18	11 hours worked	@shift rate £21.00 p/h	£231.00
9.12.18	7 hours worked	@shift rate £21.00 p/h	£147.00

28.12.18	12½ hours worked	@shift rate £14.00 p/h	£175.00
24.01.19	9½ hours worked	@shift rate £12.87 p/h	£122.27

The Claimant confirmed from his own records that he had worked all of those dates, the Respondent did not dispute that he had worked for the first three of those dates but said that he had been paid for them when they had made additional payments. Although, Mr. Matiya said that for example a payment of £101.10 which was paid on the 14 November could be the payment for the payment due for the 11 November 2018, he had no way of being certain because he had not yet finished the review and reconciliation.

19 It is the company's position that all the additional payments made more than covered the amount due to the Claimant. But the Claimant confirmed that he had carefully checked all his records and raised numerous complaints each time there were outstanding payments matters and he believed that the £101.10 was attributable to another underpayment. From his records of what he had worked, he confirmed that he was owed payments for the first three payments due, they had not been paid by subsequent additional payments. Whilst the evidence from both sides was not wholly clear I was satisfied with his evidence on the balance of probabilities that the Respondent still owed him £556.50 for the first three payments set out above.

19. In relation to the second three payments, there was a dispute about whether the Claimant had worked those hours. On 9 December 2018, the Respondent said there was no record of the Claimant having signed in for work and referred me to page 398 of the bundle. That was apparently the signing in register for week 49, the relevant week of 2018. Unfortunately, a member of staff at Peninsula, the Respondent's advisers had, apparently, handwritten '*week 49 Red Shift*' on the top of the sheet, the number was also typed in the header although unusually as many of the other staff registers, did not have the week number inserted in them. It meant that the Claimant was immediately suspicious about whether the document was reliable. That showed however that the Claimant had signed in on the Monday, on the Tuesday he had been sick, on the Wednesday and Thursday and Friday he had signed in and it gave his shift times. It did not show him as having been at work on the Sunday, which is when he said he had attended. He explained that he had worked those hours and it was not uncommon not always to sign the register, because it was not always available; a senior member of staff may have locked it away or taken it away. What would happen in those circumstances is that he would ask the senior manager to put it on the planner. He provided me sight of his diary in which he had recorded that he worked from 6am to 1pm 7 hours and based on his evidence, I accepted that he worked those hours.

20. On the 27 and 28 December 2018, Jaguar Land Rover Plant was on shutdown. There had been some initial discussion back in October that the dates of the 27 and 28 December would be holiday. The Claimant explained that a number of staff were still required to work on what was called containment work and that he had worked on the 27 and 28 December. He received payment for the 27 December, but not for the

28 December. His own records show that he had worked 12½ hours, for which he had not received payment.

21. The Respondent relied on page 422 in the bundle, which was apparently an extract from the staff planner, which they said showed that the Claimant was absent on the 28 December, I found that document impossible to read. Unfortunately, this was further confused by the Claimant having previously indicated that he was claiming for the 27 December. I accept his evidence that he had worked both those days and received payment for only one of them and that somewhat understandably, he had confused the dates when earlier claiming, as he was not sure for which date, he had received payment. I accept that he worked 12½ hours on the 28th December for which he was not paid.
22. On the 24 January 2019, the Claimant had worked 9½ hours, the Respondent did not dispute he had been at work that date but said that he was covered by a sicknote and therefore could not be paid. What had happened was at the end of his shift on the 23rd, he had gone to see his GP and had been signed off work with stress. He went into work to give in his fit note but had been unable to find his manager and wanted to give it to him personally. Therefore, he had done a day's work and given the sicknote in at the end of the day. He accepted that he should not have been working, given that he had a sicknote to cover him and that he had been signed as unfit to work through stress. The Respondent said it was unlawful for him to work, therefore he was not entitled to be paid. I did not accept that it was unlawful for the Claimant to have been at work on that day, it may well have caused insurance problems if there had been an accident, but the Respondent did not send the Claimant home, he worked the day and I see no reason why given that he worked he should not receive pay for the work done. The total of the outstanding wages is £1000.77 calculated gross.
23. In relation to holiday pay owed, the Respondent does not dispute the entitlement to an hourly rate of £12.87 the Claimant only in fact received £10.50 and there were 12 hours owed, making a total of £154.44 which was not disputed by the Respondent.
24. The Claimant gave evidence that because of the financial problems arising from the failure to pay him for hours worked in a timely way, the constant changing of his pay and the unreliability of payments, he got into debt and financial difficulties. As a result of which he incurred £270.00 in bank charges. He did not produce any evidence of this, but the Respondent did not dispute his evidence in cross-examination.
25. The Respondent did not dispute that they had failed to provide amended statements when changes had been made to pay and therefore it was not in dispute that the payslips in the bundle did not accurately reflect all the pay made to the Claimant. In accordance with the provisions of sections 8, 11 and 12 of the Employment Rights Act 1996 the Claimant is entitled to any unnotified deductions made in the 13-week reference period preceding the 17 January 2019 which takes

him to the 18 October 2018. I was not in a position to calculate the appropriate award in relation to that, given the lack of accurate payslips and information about pay for that period, but the Respondents will be able to calculate that amount and it should be possible to agree it with the Claimant. If it is not possible to agree it, then both parties should make written submissions to me and I will consider making a further award based on the information before me.

26. The Claimant raised on numerous occasions by email with both HR and the payroll company, before the Respondent dispensed with their services, the problems he was having and the impact on him. In emails on pages 155 and 161 amongst many others, the Claimant made it very clear that he had sought advice and was having to go to ACAS because the Respondent had failed to deal with his complaints. He gave them plenty of warning of his concerns and at no stage did they arrange a meeting to discuss his grievances or offer an apology or meet with him face-to-face. Whilst they made attempts to rectify his pay, at no stage did they meet with him to discuss the situation and offer an apology for the very difficult position in which he had been put. He was therefore left with no alternative but to come to the Tribunal to clarify matters.
27. The Respondent was clearly in a very difficult position given the wholesale failure by the third-party payroll company to properly administer their payroll but chose not to try to resolve the matter informally and did not follow their grievance procedure. Therefore, I am satisfied that the Respondents have unreasonably failed to comply with the ACAS code. In accordance with the provisions of section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 it is just and equitable to award an uplift of 10%.

As set out in my Judgment, the awards are as follows: -

For unauthorised deductions from wages	£1,000.77
For failure to pay holiday pay	£154.44
For the financial costs of the failure to pay wages timeously	£270.00
Giving a total of	£1,425.21
With 10% uplift of	£142.52
Giving a total award of	£1,567.73

Regional Employment Judge Monk

Dated: 24 May 2019