



EMPLOYMENT TRIBUNALS

Claimant
Mr A R Gardner

v

Respondent
Sydney Maurice
Recruitment Limited

Heard at: Bristol

On: 6 March 2020

Before: Employment Judge C H O'Rourke

Appearances

For the Claimant: In person

For the Respondent: Ms K Zakrzewska – litigation consultant

JUDGMENT

1. The Respondent made unlawful deductions from the Claimant's wages, for the period claimed, of 6 February to 8 May 2019, in the sum of £4,569.50.
2. The Respondent failed to pay arrears of holiday pay accrued, but not taken, for the same period of time, in the sum of £492.10.
3. The Respondent failed to provide the Claimant with terms and conditions of employment, compliant with s.1 of the Employment Rights Act 1996 and therefore, subject to s.38 of the Employment Act 2002, the award is increased by two weeks' wages, in the sum of £703.00.
4. Therefore, the Respondent is ordered to pay the Claimant the total sum of £5,764.60.

REASONS

(Having been requested subject to Rule 62 of the Employment Tribunal's Rules of Procedure 2013)

Background and Issues

1. The Claimant was engaged by the Respondent, a recruitment agency and worked as an agency worker for a recycling company called Ubico Limited, based at South Cerney. His employment commenced on 20 June 2018 and at the point he filed this claim (8 May 2019), he stated that he continued to be employed by the Respondent.
2. The Claimant claims unlawful deductions from wages, in the sum of £4569.60 and arrears of holiday pay, in the sum of £492.10, for the period from 7 February 2019, when it seems that his services were no longer required by Ubico Limited, to the date of filing of this claim, a thirteen-week period ('the relevant period').

The Law

3. I referred myself to s.13(1) of the Employment Rights Act 1996 (ERA) which states that:

'An employer shall not make a deduction from wages of a worker employed by him unless –

- (a) the deduction is required or authorized to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or*
- (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.*

4. Regulation 13 of the Working Time Regulations 1998 entitles a worker to four weeks' annual leave in each leave year (which was reflected in the Claimant's contract).
5. Section 38 of the Employment Act 2002 (EA) states:

Failure to give statement of employment particulars etc.

(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule 5.

(2) If ...

(3) If in the case of proceedings to which this section applies—

(a) the employment tribunal makes an award to the employee in respect of the claim to which the proceedings relate, and

(b) when the proceedings were begun the employer was in breach of his duty to the employee under section 1(1) or 4(1) of the Employment Rights Act 1996.

the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.

(4) In subsections (2) and (3)—

(a) references to the minimum amount are to an amount equal to two weeks' pay, and

(b) references to the higher amount are to an amount equal to four weeks' pay.

(5) The duty under subsection (2) or (3) does not apply if there are exceptional circumstances which would make an award or increase under that subsection unjust or inequitable.

The Facts

6. I heard evidence from the Claimant and for the Respondent, from Mr Paul McCombe, its sole director.
7. The Respondent had engaged the Claimant on 20 June 2018, with the intention that he would be assigned to work at Ubico Ltd. He was so assigned and continued working there until an incident arose, on 5 February 2019, following which he left the site. Subsequently, it is common evidence, Ubico Limited indicated that they did not wish him to work at their site thereafter.
8. As accepted by Mr McCombe in cross-examination (and while it may not have been his intention), it is crystal-clear from the contract [19] that it was one 'of service', with specific reference to the Claimant being an employee of the Respondent, at the relevant time. I find, therefore that the Claimant was an employee of the Respondent.
9. While the end-user, Ubico Limited, may have been entitled to dispense with the Claimant's services, as per its contract with the Respondent (which was not before me) that did not necessarily, of itself, affect the contract between the Claimant and the Respondent.
10. That relationship was expressed to be one of employer and employee, with an entitlement for the Claimant to be paid £9.50 per hour, for 37 hours per week. The contract is silent as to any provisions for the termination of that arrangement, either permanently, or until a new end-user could be found, to engage the Claimant. Indeed, the contract contains no provision for termination, by the Respondent, on notice, or otherwise. The Claimant's evidence was that he was available for work throughout, subject to reasonable travelling arrangements. He stated that he was not offered any other engagement and the Respondent

provided no corroborative evidence of such and I therefore accept his evidence on this point.

11. Mr McCombe stated that on starting his business, he had cobbled together a contract, from various sources and had taken no legal advice in respect of it.
12. He accepted that the contract was deficient in several respects, in relation to s.1 ERA, to include terms as to pension provision, an employer's notice clause, a clause setting out the term of engagement, if it was not intended to be permanent and the Claimant's place of work.
13. There is no clause in the contract, or mention elsewhere in writing by the Claimant that the Respondent was entitled to make deductions from his wages.
14. While Mr McCombe contended that the Claimant was nonetheless clear as to the true nature of the relationship, that of an agency worker not employed by the Respondent, the Claimant denied any such knowledge. Indeed, Mr McCombe's own statement said that in respect of this issue that '*following a discussion as to pay arrangements and sickness and absence procedures (of which the Claimant had no recollection) the Claimant did not raise any queries regarding when he would and would not be paid, during this conversation*'. This, however, I find, is to put an employee under an undue onus to make such enquiries, rather than, as is the employer's duty, to make clear to employees the terms and conditions of their employment. The Respondent clearly failed in this respect.
15. Accordingly, therefore, the Respondent was not entitled to make deductions from the Claimant's wages, or to withhold holiday pay accrued for the relevant period, during which time, the contract not having been terminated, he continued to be an employee of the Respondent.
16. On the basis that Mr McCombe accepted that the figures claimed for wages were accurate and he did not dispute the calculations set out for holiday pay [8], I accept those figures, of £4,569.50 and £492.10, respectively.
17. The Claimant, in closing submissions, sought leave to amend his claim, to include losses since 8 May 2019, to date, but I refused that application, for the following reasons:
 - a. It was without notice to the Respondent and is a substantial amendment to the existing claim.
 - b. It was made only after some considerable delay by the Claimant, since he filed his claim ten months ago. No rationale was advanced by him as to why such an application could not have been made earlier.

- c. The relative balance of hardship and injustice falls in the Respondent's favour, as it is being presented with such a substantial amendment, at the end of the Hearing, without the possibility of considering and presenting evidence to counter it, such as, for example, any evidence as to the nature of the relationship post May 2019, or the Claimant's own employment activities elsewhere, since that date.

18. Conclusion. Accordingly, therefore, I find that the Respondent made unlawful deductions from the Claimant's wages and failed to pay arrears of holiday pay, for the relevant period, in the total sum of £5061.60, which sum it is ordered to pay the Claimant.

19. Section 38 EA. Further, I find that the Respondent failed to provide the Claimant with terms and conditions compliant with s.1 ERA and that therefore, on the basis that it was a partial failure to do so, I increase the award by two weeks' pay (£703.00). No submissions or evidence was advanced as to any exceptional circumstances rendering such an award unjust or inequitable.

Employment Judge C H O'Rourke

Dated: 6 March 2020

Judgment sent to the parties on: 11 March 2020

FOR THE TRIBUNAL OFFICE