



EMPLOYMENT TRIBUNALS

Claimant: Mr J Allan
Respondent: Adams Textiles
Heard at: East London Hearing Centre
On: Wednesday 13th May 2020
Before: Employment Judge McLaren

Representation

Claimant: In person
Respondent: Mr I Adams

JUDGMENT

1. The complaint to the Employment Tribunal that the employer has made a deduction from wages in respect of a part paid tax rebate in contravention of section 13 is well-founded and I make a declaration to that effect. All other claims for unlawful deductions do not succeed.
2. The claimant was not paid any holiday pay during his employment and his claim for unpaid holiday for 50.25 days succeeds.
3. The respondent's counter claim for repayment of £835.40 is dismissed
4. I order the respondent to pay the claimant £3,367.07 being
 - (a) The balance of a tax rebate of £50.80
 - (b) Outstanding holiday pay of £3,316.27

REASONS

Telephone Hearing

1. This has been a remote hearing on the papers. The form of remote hearing was by telephone conference call. A face to face hearing was not held because it was not practicable.

2. The case had originally been listed for a final hearing today. The parties had been notified that it would now take place by telephone. I explained this to the parties at the outset of the hearing. It became clear that neither had sent the employment tribunal their witness statements. The claimant had sent the tribunal a series of documents at 1.30 today but this had not been sent to the respondent.

3. I had received the claimant's documents but was unable to open them because they were not in a format that can be read by the tribunal software. The claimant was dissatisfied by the tribunal's responses. He explained that he had been trying to contact the tribunal for a long time to ask when they wanted the documents and, not having heard, he had finally sent them in this afternoon. He had spent a long time working on these, and on his statement and was not happy for the case to be resolved today. He had expected that he would be able to have a face to face hearing even during the pandemic.

4. The respondent was content with a telephone hearing and wished to resolve the case and have a decision today. He objected to any relisting. Nonetheless, on the basis of the claimant's concern about the evidence he prepared not being before me, I agreed with the parties that we would not treat this as a final hearing, but proceed as a case management hearing and see if we can agree the issues.

5. We started to do that and about 15 minutes into that process it seemed to me that in establishing the issues both parties were giving their evidence. I put this to them, and both agreed that in talking about what the dispute was to cover they were in effect rehearsing evidence. The claimant changed his mind and said that he was content for this to be a final hearing done over the telephone. He was happy that it was done without me being able to see his documents and without the benefit of written witness statements because we could continue to discuss each point in turn, and he could give oral evidence.

6. On that basis I asked the parties to affirm that the evidence they would give me was true. Both did so and I dealt with the matter as a final hearing taking evidence from both parties. At the conclusion of the hearing I checked with both parties that they were content they had provided me with all the evidence that they felt was necessary and that neither wished to produce any further documentation or any additional witness evidence. Both confirmed that they were content with the hearing. I also invited both to make submissions to me. Both took up that opportunity

Background

7. The claimant was employed as a sales assistant by the respondent organisation which is a very small family owned business. He worked from the 12 February 2018 until he was made redundant on 9 December 2019. By a claim form dated 8 January 2020 he brought a claim of unpaid wages, this included failure to pay tax rebates and unpaid holiday.

8. In reaching my decision I considered all the evidence I heard. I also took into account the submissions made by both parties.

The issues

- (i) The claim is for unlawful deduction of wages pursuant Section 13 of the Employment Rights Act 1996 (ERA). The claimant asserts that throughout his employment by not adjusting his pay to take account of tax changes and by not passing back to the claimant tax rebates the respondent made unlawful deductions from his wages in the total of £1,412.75
- (ii) The Tribunal is to determine whether the claimant suffered such unlawful deduction of wages in breach of contract and to determine the amount.
- (iii) The Claimant also complains that he has not been paid all outstanding holiday pay. This includes pay for days when the shop was closed and the claimant asserts he was not put on notice of these holiday dates.
- (iv) The Respondent claims that it is entitled to deduct overpaid wages of £835.4

Findings of Fact

Holiday – what was the claimant's entitlement?

9. The Claimant explained that when he joined the respondent organisation, he had a telephone conversation with Mr Adams when he was offered the job. That conversation only talked about the rate he would be paid. On his first day he was told that the rate of £66 a day included £6 pounds for holiday and sick pay. The respondent is now aware that rolled up holiday pay is unlawful and is not seeking credit for the £6 per day that he paid the claimant.

10. The Claimant believes he is entitled to 28 days paid holiday per annum. In the absence of any discussion with him about this he considered that he is entitled to 28 days plus bank holidays. Mr Adams states that the 28 days was inclusive of bank holiday. On the balance of probabilities, I conclude that the entitlement was 28 days including bank holidays. It is unusual for small employers to give more than this and I can see no reason why that would have been the case.

11. Mr Adams, having taken advice from his accountant, had calculated what he thought the claimant was due as 50.25 days, having deducted days the claimant took as holiday including all the days the shop was shut.

12. It was agreed that the business closed for a family wedding on 15 September 2018 and for four Jewish holidays across the two years. The claimant withdrew his claim in relation to the family wedding, but said that as he had not been given formal notice that he had to take the other days as holiday, they should not be included, and he should be paid a day's wages for them. They should not reduce the holiday owed.

13. Mr Adams said that the business was very concerned about losing customers. As they took the unusual step of closing both for bank holidays and for Jewish holidays, they were always very careful to inform all their customers at least a week in advance that was going to happen. Mr Alan disputed that it was a week in advance. He

did accept however that he was always aware of these closures at a minimum of two days before each one-day closure.

Tax rebates and failure to pass to the employee tax cuts

14. Both parties agreed that the claimant was paid £66 a day cash, and this was said to be net in his hand. The respondent would calculate the appropriate tax and national insurance contributions due on that monies, in effect grossing up the net payment, and would pay that money directly to HMRC. The claimant therefore always received his net pay without deduction. The respondent calculated what the gross figure would be and paid that over.

15. The Claimant has three issues which he says amount to unlawful deductions arising from this method. First of all, at the beginning of the employment he was notified of a tax rebate which related to his former employment of £119.20. The respondent stated that it only had to pay £50.80 of this payment because it was entitled to recoup £68.40 tax it paid in the first two weeks of the claimant's employment when in fact no tax was payable.

16. The second issue relates to tax rebates generally. The claimant explained that during his employment a number of tax rebates were paid by HMRC to the respondent in relation to the claimant's tax. In total this was £348.80.

17. The Claimant said he had been advised by many people that a tax rebate must be given to the employee. The respondent is not entitled to retain it. Mr Adams said that he had also taken advice from his accountant and explained that because the claimant is paid net in hand and the respondent pays the employee's tax, in those circumstances any rebate is properly made to the employer and is not passed back to the employee. It is not the claimant's money that has been used to pay the tax but the respondents. This applies equally to the £68.40 that the respondent is seeking to claim back from the tax rebate paid in relation to the previous employment and to all the other rebates.

18. The Claimant's third point is that he did not ever receive his proper wages. The personal allowance fluctuates year to year and so each year the amount that an individual can earn before tax is payable increases. This benefit was never passed of the claimant and he calculates it was worth £155.44 for the tax year 17/18, £601.90 for the tax year 18/19 and £307.21 for the tax year 19/20.

19. Mr Adam's evidence was similar to that for the rebate. The system of paying cash in hand is a very old-fashioned one but it made sure that employees got the same amount every day. The extent that tax rates varied meant sometimes the employer paid more tax, sometimes they paid less. In any event the agreement with the employee was for a set net amount. Variations in the gross amount were not for the employee's benefit or detriment but belonged properly to the employer.

20. There was no written contract for me to determine how the arrangement had been described between the parties. It was common ground, however, that the system was net to gross. On that basis I conclude that the claimant was entitled to £66 net per day and it was the respondent's responsibility to calculate and pay the tax. The claimant did not suffer any negative impacts from increased tax rates and conversely

could not benefit from them. Tax rebates or additional payments were for the employer.

21. The situation is slightly different when the tax rebate relates to previous employment with a different employer. If the £119.20 related to overpaid tax in his former job, then that is not money that the respondent had to pay out. The fact that the respondent had paid £68.42 too much tax for the claimant is a sum it would be entitled to recoup HMRC, but it does not seem to me that it can do so from the payment made in relation to another employment.

Overpayments by the respondent

22. The Respondent had also deducted what it said were overpaid wages. Mr Adam said that he had been advised by the accountant that he was entitled to deduct from the £66 a day employee pension contribution and student loan. He was seeking to do this, and it amounted to £835.40.

23. Mr Adam himself accepted that if the net/gross argument that the respondent was relying on was correct, then the agreement was to pay Mr Allen £66 net any deductions, including these were for the respondent to meet.

Relevant law

Deductions

24. The statutory prohibitions on deductions from wages are contained in Part II of the Employment Rights Act 1996 (ERA). The general prohibition on deductions is set out in s.13 and the exceptions in s. 14

13.— Right not to suffer unauthorised deductions.

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised 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.

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(4) (Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

14 Excepted deductions.

(1) Section 13 does not apply to a deduction from a worker's wages made by his employer where the purpose of the deduction is the reimbursement of the employer in respect of—

(a) an overpayment of wages, or

(b) an overpayment in respect of expenses incurred by the worker in carrying out his employment,

made (for any reason) by the employer to the worker.

25. Any deduction must therefore be authorised, but there can only be a deduction if the amount was properly payable, the question of what wages are 'properly payable' to the worker under S.13(3) is critical to determining whether an unlawful deduction has been made. Deciding whether the employee has a legal entitlement to the payment in question will involve analysing the factual basis of his or her claim.

26. The Court of Appeal in Agarwal v Cardiff University and anor 2018 EWCA Civ 2084, CA, is binding authority that an Employment Tribunal has jurisdiction to resolve any issue necessary to determine whether a sum claimed under S.13 ERA is properly payable, including an issue as to the meaning of the contract of employment.

27. Contract terms may be implied as well as express. Where the express terms of the contract fail to deal with an issue, the court will consider whether a term is implied "in fact" in order to reflect the parties' intentions.

28. In order to make such a presumption, the court must be satisfied that one of the following tests is met

- the term is necessary in order to give the contract business efficacy, that is it must be necessary for the contract as a whole;
- an "officious bystander" would understand that the term is so obvious it goes without saying at the time the contract was entered into, not at the time the dispute arose.

Holiday

29. The Working Time Regulations 1998 provide that a worker has the right to:

- a. be paid during the minimum holiday entitlement conferred by Regs 13 and 13A — Reg 16, and
- b. receive a payment in lieu of unused annual leave on the termination of his or her employment — Reg 14.

30. Dates on which leave is taken is set out in this way

15.—(1) A worker may take leave to which he is entitled under regulation 13(1) on such days as he may elect by giving notice to his employer in accordance

with paragraph (3), subject to any requirement imposed on him by his employer under paragraph (2).

(2) A worker's employer may require the worker—

(a) to take leave to which the worker is entitled under regulation 13(1); or

(b) not to take such leave,

on particular days, by giving notice to the worker in accordance with paragraph (3).

(3) A notice under paragraph (1) or (2)—

(a) may relate to all or part of the leave to which a worker is entitled in a leave year;

(b) shall specify the days on which leave is or (as the case may be) is not to be taken and, where the leave on a particular day is to be in respect of only part of the day, its duration; and

(c) shall be given to the employer or, as the case may be, the worker before the relevant date.

(4) The relevant date, for the purposes of paragraph (3), is the date—

(a) in the case of a notice under paragraph (1) or (2)(a), twice as many days in advance of the earliest day specified in the notice as the number of days or part-days to which the notice relates, and

(b) in the case of a notice under paragraph (2)(b), as many days in advance of the earliest day so specified as the number of days or part-days to which the notice relates.

Conclusion

31. In applying the relevant law to my findings of fact I have already concluded that the claimant's holiday entitlement was inclusive of bank holidays. The next issue is whether the respondent can claim as holiday the days on which the shop was shut. I find that the Claimant was given sufficient notice of these bank holidays and the five days on which the business closed for Jewish holidays. The respondent was therefore entitled to treat these as part of his holiday entitlement. The respondent therefore owes the claimant 50.25 days unpaid holiday in the sum of £3316.27.

32. I have found that the contractual arrangement between the parties was that the claimant received £66 net of tax and any other deductions were for the respondent's account. On that basis it was entitled to rebates on money it had paid out. The rebates were not properly payable to the claimant and so there can be no deduction. On that basis I find that the claimant is not entitled to the tax rebates he referred to, with the exception of the rebate of £119.20 which related to a previous period of employment. The respondent therefore must pay the claimant £50.80 in respect of that rebate, being the balance it withheld.

33. As I have accepted the net to gross basis means that the respondent is liable for tax and the claimant's contractual right is to receive £66 a day, any tax changes cannot impact the claimant's wages. His claim for unlawful deductions for the sums he has claimed based on tax differences does not succeed. These sums are not properly payable to him.

34. As I have found that the claimant is entitled to a specific sum per day it also follows that the respondent is not entitled to make deductions for pension contributions or for the university loan. The sum of £835.14 is properly payable to the claimant.

35. Accordingly, I award the claimant £3316.27 unpaid holiday pay and £50.84 tax rebate.

Employment Judge McLaren

Date: 18 May 2020