



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr A Pereira

v BSCP management Limited

Heard at: Watford

On: 12 December 2019

Before: Employment Judge Allott sitting alone

Appearances

For the Claimant: In person

For the Respondent: Ms L Pearce, Solicitor

JUDGMENT

1. The respondent has made an unauthorised deduction from the claimant's wages and is ordered to pay the claimant the gross sum of £346.22.
2. The respondent has failed to pay the claimant's holiday entitlement and is ordered to pay the claimant the gross sum of £276.93.
3. The claimant's claims for overtime is dismissed.

REASONS

1. The claimant was employed by the respondent on 1 December 2017. The claimant's job title was Property Manager but, in reality, he was a driver and general handyman at Mr Savov's domestic address.
2. The claimant had a written contract of employment. His salary was £45,000 per annum, paid at a rate of £3,750 gross per calendar month.
3. The contract of employment provided as follows:

“6. Hours of work

- 6.1 Your normal hours of work are 45 hours per week, usually Monday to Friday, timings to be agreed with Employer as per their schedule. However, you will be required to work whatever additional hours the

needs of the Employer may require in order for you to properly carry out your duties under the Agreement.

- 6.2 The Employer reserves the right, with your consent, to make alterations to your normal hours of work which may result in changes to your start and end times, the number of hours worked per day, the number of days you will be expected to work and/or the days on which you are expected to work.
 - 6.3 By signing this Agreement, you agree that your working time may exceed an average of 48 hours for each 7-day period and accordingly you hereby agree to opt out from the limit on working time as set out in the Working Time Regulations 1998 (as amended). Either you or the Employer may end this “opt out” agreement at any time by giving to the other not less than 3 months’ written notice.
 - 6.4 There will no additional payment for hours in excess of your normal hours of work.”
4. As regards holiday, the holiday year ran from 1 January to 31 December and the claimant’s holiday entitlement was 28 days per annum, including public holidays.
 5. The claimant was dismissed for gross misconduct on 25 June 2018. He presents claims for holiday pay accrued but unpaid at the time of dismissal, four days unpaid work and a claim for 195 hours overtime.

The holiday pay claim

6. Pro rata, by the date of dismissal the claimant had accrued a holiday entitlement of 13.6 days. On termination of his employment he was paid for 11 days.
7. The claimant accepted that he did not work on the bank holiday 1 January 2018. As regards the four other bank holidays the claimant asserted that he worked as normal. The respondent does not have any form of record of days worked by the claimant and is unable to tell me if the claimant had any days off other than bank holidays. The respondent told me that he thought the claimant would have had bank holidays off as there were no meetings likely to have taken place and his wife and children may have been in the Czech Republic. However, on this issue I am prepared to accept the claimant’s evidence that he worked the four other bank holidays and that he had no other days off on holiday as the respondent has been unable to show me any evidence that he had. Accordingly, there was a shortfall of 1.6 days accrued holiday which at £173.08 per day equates to a sum of £276.93 and accordingly I award that gross sum.

The four days shortfall claim

8. The claimant began work on 1 December 2017. The claimant was paid on 5th of each month in arrears. The claimant has sought to advance a claim that being paid on the 5th of each month he was paid from the 5th of the

previous month and having started his work on 1 December so he must have been four days short. I reject the claimant's argument on this issue. He was paid for each calendar month. Accordingly, I have calculated how many days he worked in June 2018. He worked for 17 days which equates to a sum of £2,942.36. His final wage slip indicates he was paid the gross sum of £2,596.14. That represents a shortfall of £346.22 or 2 days' pay and accordingly, I award that sum.

The overtime claim

9. Obviously enough the contract of employment does not provide for the payment of overtime due to the fact that the claimant was salaried and there was a clause requiring him to work flexibly.
10. The case management order in this case provided as follows:

“The claimant shall by no later than 4 weeks from the date of this letter set out in writing to the respondent what remedy the tribunal is being asked to award. The claimant shall include any evidence and documentation supporting what is claimed and how it is calculated. The claimant shall bring a copy of such evidence and documentation to the hearing.”

11. That case management order does not appear to have been complied with by the claimant.
12. At this hearing the claimant has produced a 5-page breakdown of the hours that he alleges that he worked and those that he worked in excess of 45 per week. The claimant told me that he sent that document to Acas and that his understanding was that Acas had sent the schedule to the claimant's then legal representatives, Messrs Lewis Nedas Law. I have been shown a letter dated 6 September 2018 from Lewis Nedas Law which states:

“Your claim

We have finally received from Acas a breakdown of your alleged claim which you have provided to them on 31 August 2018 and understand that you are claiming for 4 days salary, 1 day's annual leave and 195 hours of overtime amounting to a total of £3,453.27.

You have not provided our client or Acas with a full breakdown of the calculations (for example, how you have calculated 195 hours of overtime and over what period), and indeed you have provided no evidence of the same.”

13. Hence it would appear that Lewis Nedas did not have the schedule of hours that the claimant claims he worked.
14. This full merits hearing was originally listed for 12 June 2019. On 29 April 2019 new legal representatives for the claimant wrote to the claimant requesting that the claimant send them documents that he was seeking to rely on at the hearing. The claimant did not respond to that. A chasing email was sent on 17 May 2019 and it would appear that the claimant did not respond to it.

15. Hence, on the morning of this 1 hour full merits hearing the claimant has produced a 5-page schedule of hours that he alleges that he worked in excess of his contractual hours during the whole course of his employment. He told me that he was only claiming from April because that is when he raised the issue with Mr Savov.
16. I have heard evidence from the claimant and Mr Savov. They fundamentally disagree that any agreement was made to pay the claimant overtime. I find that the respondent has been significantly handicapped in resisting this claim for overtime on the basis that Mr Savov has not had the breakdown of dates and times that the claimant alleges that he worked. Mr Savov told me that he has a business diary as well as potential reference to a domestic diary from which he could have produced evidence as to whether or not the claimant was actually being required to work on various days.
17. The burden of proof is on the claimant. What is clear from the evidence before me is that the claimant was required to work flexibly and that on occasions he had to drive Mr Savov to meetings which would go on into the early hours of the morning. The schedule produced by the claimant claims that, save on occasions when he was asked to work later than 7pm in the evening, he was working regular as clockwork 7am to 7pm. From the evidence that I have heard I doubt whether this is correct. On this issue I accept the evidence of Mr Savov. In my judgment, the nature of the working environment and relationship between the parties was indeed flexible and that the claimant would on occasions work long hours but, equally, on other occasions he would have time off. Accordingly, in my judgment, the claimant has not proved a contractual right to be paid overtime or that he did in fact worked in excess of his contractual hours given the probability that he had time off in lieu after working late. Accordingly, I dismiss that claim.

Employment Judge Alliot
17/12/2019
Date:
03/01/2020
Sent to the parties on:

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For the Tribunal Office