



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr D McDonald

**1<sup>st</sup> Respondent:** Structural Timber Systems Ltd

**2<sup>nd</sup> Respondent:** NE Foundry Ltd

**Heard at:** Newcastle

**On:** 11 March 2020

**Before:** Employment Judge Sweeney

**Appearances:**

**For the Claimant:** In person

**For the Respondents:** No appearance

## JUDGMENT

**Employment Tribunals Rules of Procedure 2013 – Rule 21**

The judgment of the Tribunal is that:

1. The claim of unlawful deductions in respect of arrears of pay against the Second Respondent is well founded and succeeds. The Second Respondent is ordered to pay the Claimant the gross sum of **£103.94**.
2. The claim for payment of outstanding holiday pay against the Second Respondent is well founded and succeeds. The Second Respondent is ordered to pay the Claimant the gross sum of **£295.56**.

3. The Second Respondent is ordered pursuant to section 38 Employment Act 2002 to pay the Claimant **£1,313.60** equivalent to 4 weeks' gross pay at the weekly rate of £328.40.
4. The total amount to be paid to the Claimant is **£1,713.10**.

## **REASONS**

### **Background and history of the proceedings**

5. As judgment was given in the absence of the respondents, full and proportionate reasons are provided below.
6. On 25 October 2019, the Claimant, Mr McDonald presented a complaint against Structural Timber Systems Ltd (the First Respondent) in which he sought payment of arrears of pay and payment in respect of accrued but untaken holiday. The proceedings were properly served on the First Respondent and a response was due by 02 December 2019. The case was listed for a hearing on 03 January 2020.
7. The Respondent did not serve a response by the required date. Accordingly, the Tribunal was considering issuing a judgment against the First Respondent under rule 21 of the Tribunal Rules of Procedure 2013. The Tribunal wrote to the Claimant on 04 December 2019 saying that a response had not been served, that a rule 21 judgment could be issued but that some further information as to what was being claimed was needed. Accordingly, the parties were informed that the case remained listed on 03 January 2020.
8. The Claimant provided further information as requested by the Tribunal and he attended the hearing on 03 January. Part of the documentation provided by the Claimant showed payments by a company called NE Foundry Ltd. Therefore, the Tribunal wrote to the Claimant on 18 December 2019 asking him to bring with him documents from his employment with a view to establishing the correct identity of his employer.
9. It was on that date, 18<sup>th</sup> December 2019, that the Tribunal received contact from Mr Richard Bailey, director of Structural Timber Systems Ltd and also of NE Foundry Ltd. In his letter, Mr Bailey wrote that the claims were fraudulent on the basis that Structural Timber Systems Ltd employed no employees. Mr Bailey did not say who employed the Claimant, simply that he was not – according to him – employed by Structural Timber Systems Ltd.
10. That letter was treated as the First Respondent attempting to enter a response to the claim, albeit late. It was, however, rejected by letter dated 24 December 2019 as it was not presented on a prescribed form as required by rule 16 of the Tribunal Rules of Procedure. Mr Bailey was advised that he must apply to the Tribunal in writing for an extension of time to present his response. The letter clearly set out precisely what Mr Bailey was to do.

11. Mr Bailey then presented a response using the prescribed form on 30 December 2019. He maintained the claims were false and attached the same letter that he had sent on 18 December 2019 only with a different date, that being 30 December 2019. He did not ask for an extension of time, nor did he explain why he had not originally responded in time. Accordingly, the Tribunal wrote on 31 December 2019 to say that the response remained rejected and that he would be permitted to participate at the hearing on 03 January 2020 only to the extent permitted by the Employment Judge who hears the case.

### **The hearing on 03 January 2020**

12. The matter was listed before me on 03 January 2020. Mr McDonald represented himself and Mr Bailey attended to represent the First Respondent. I explained why the Response had been rejected and asked Mr Bailey if he wished to apply for an extension of time. He said that he did. The explanation for not responding was weak. Mr Bailey said that he was busy as he had to cover for someone. However, he said that Structural Timber Systems Ltd was not the company which employed the Claimant.

13. Mr Bailey was extremely reticent to say anything other than that Structural Timber Systems Ltd was not the employer. Eventually, and only through questioning by me, he said that NE Foundry Ltd was the company that employed Mr Donaldson. He said that some payments had recently been made which would satisfy Mr Donaldson's claims. He was also reticent as to whether he had received the Claim Form but eventually said that he had done. I allowed than extension of time to the First Respondent to 31 December 2019 for service of the response and added NE Foundry Ltd as the Second Respondent.

14. The hearing was adjourned to enable the Second Respondent to enter a response, which Mr Bailey agreed would be done by 31 January 2020. Also, in light of the recent payments which had been made to Mr Donaldson, it was hoped that a resolution of the proceedings would ensue. I raised the issue of section 38 Employment Act 2002 and the powers of the tribunal to award 2 to 4 weeks pay in cases where there was a failure, when the proceedings were brought, on the part of the employer to provide written particulars. It was not disputed that the Claimant had never been provided with written particulars of employment. It was not disputed that the Claimant had never been provided with payslips.

15. The Second Respondent served a response by 31 January 2020. It consisted of the prescribed form and an attached letter in which the Second Respondent accepted that the Claimant was owed £229.88. It also had attached to it a 'time sheet' summary and documents which purported to be payslips.

### **The issues to be decided at the hearing**

16. The issues to be determined at the resumed hearing were set out in paragraph 11 of the case management summary of the hearing of 03 January 2020, namely:

16.1. Which of the two respondents employed the Claimant?

- 16.2. What amount of money by way of unpaid wages were outstanding to the Claimant? What was properly payable? Was there a deduction?
- 16.3. How many days accrued but untaken holiday was due to the Claimant on termination of his employment?

17. A notice of hearing was sent to all the parties on 18 February 2020. The matter was re-listed for 10am on 11 March 2020.

### **The Hearing on 11 March 2020**

18. Mr Donaldson appeared again to represent himself. Mr Bailey did not attend. There was no attendance by either respondent. The clerk made contact with Mr Bailey to ask why neither respondent had attended the hearing. The clerk reported back that Mr Bailey had said he did not know about the hearing.
19. I made inquiries of the tribunal office to establish that the notice of hearing had been sent to the respondents at the correct address. I sought Mr McDonald's views as to whether the matter should be postponed or proceed. He did not accept that Mr Bailey was unaware of the proceedings. He pointed out that he, Mr McDonald, was made aware and submitted that Mr Bailey had a track record of obscuring and delaying matters. He wished to proceed.
20. Having considered rule 47 of the Rules of Procedure, I concluded that it was in the interests of justice to proceed with the hearing in that:
  - 20.1. The notice of hearing had been sent to the correct address and not returned to the tribunal;
  - 20.2. There had been significant delay to date and any further delay would be unfair to Mr McDonald;
  - 20.3. There was no dispute that he had not been paid his wages by the time Mr McDonald had commenced the proceedings and the only issue was what he had been paid since then;
  - 20.4. There was no dispute that Mr McDonald was owed holiday pay and the only issue was how much;
  - 20.5. NE Foundry Ltd accepted that it was the Claimant's employer;
  - 20.6. There was no dispute that the Claimant had never received any written particulars of employment from NE Foundry Ltd;
  - 20.7. It would be disproportionate and not in accordance with the overriding objective to delay matters further;
21. I heard from Mr McDonald who took me through the purported pay slips. I say 'purported' because they were only sent to Mr McDonald after the hearing on 03 January 2020. He also took me through the time sheet summary prepared by the Second Respondent.

### **Who employed the Claimant?**

22. Mr McDonald conceded that he was employed by NE Foundry Ltd. This was, therefore, no longer an issue between the parties.

**How much by way of wages had not been paid to the Claimant by NE Foundry Ltd? (unlawful deductions claim)**

23. Having been taken very carefully through the payslips and the time sheet, I was satisfied that the following payments were properly payable and due to Mr McDonald:

23.1. In respect of the pay date 31 May 2019, 2 extra hours overtime at time and a third, totaling **£21.84**. Mr McDonald relied on the evidence produced by NE Foundry, consisting of the time-sheet summary which identified the 2 hours which were not accounted for on the payslip;

23.2. In respect of the pay date 30 June 2019, the payment should have been in respect of 159.50 hours rather than (as appeared on the payslip) 149.50 hours. This resulted in a shortfall of 10 hours x £8.21, or **£82.10**. Once again, Mr McDonald was able to take me to the time sheet summary produced by the Second Respondent and which clearly shows 159.50 hours worked, whereas the pay slip only pays for 149.50 hours.

24. Applying section 13 ERA 1996, I was satisfied that there was a series of unlawful deductions of wages totaling **£103.94** and that there was no authorization to do so by virtue of any relevant provision of the Claimant's contract of employment nor was there any previous written agreement to do so.

**Holiday pay claim**

25. It was established on the last occasion (03 January 2020) that Mr McDonald's claim was for 3.5 days unpaid holiday at £65.68 a day, totaling **£229.88**. However, that was on the understanding that he had in fact been paid for the bank holidays that he had taken. Since that hearing, Mr Bailey, on behalf of the Second Respondent accepted that the Second Respondent was liable for that amount.

26. In fact, as he demonstrated from the payslips and timesheet summary prepared by the Second Respondent, he had not been paid for Good Friday. Therefore, his claim was payment in respect of 3.5 days accrued but untaken and for 1 day taken but not paid.

27. I was satisfied that Mr McDonald had not been paid for the Good Friday bank holiday and that he was entitled to an additional payment of £65.68 and that his claim for holiday pay was under regulation 30(1)(b) Working Time Regulations 1998 in respect of that bank holiday.

28. Therefore, he is entitled to payment in respect of untaken holidays by virtue of regulation 14(3) Working Time Regulations 1998 (**£229.88**). He is also entitled to be paid in respect of the one day holiday which he took but received no payment (**£65.68**) making a total claim under regulation 30 WTR of **£295.56**.

**Section 38 Employment Act 2002 ('EA')**

29. Mr McDonald told me – and it was not disputed in any event – that NE Foundry Ltd never provided him with written statement of particulars, as it is obliged to do under section 4 Employment Rights Act 1996.
30. The claims which Mr McDonald brings are within schedule 5 of the EA. I have found his claims to be made out. I find that the Second Respondent was in breach of its obligations under section 4 ERA at the time the proceedings were brought. I must, therefore, make a minimum award of 2 weeks' gross pay (a week's pay being £328.40) unless it would be unjust and inequitable to do so.
31. In my judgment it would not be unjust and inequitable to make an award against the Second Respondent.
32. I may make an award of a higher amount (up to the equivalent of 4 weeks' gross pay) if I consider it just and equitable to do so. I consider that, in all the circumstances, it is just and equitable to make the higher award in the sum of **£1,313.60**. The arrangements of Mr McDonald's employment have been shrouded in obscurity. It has been quite a challenge even to get the Second Respondent to admit that it employed Mr McDonald. Mr Bailey, as its director, never provided him with any documentation and never provided him with any pay-slips. There has been no attempt at an explanation as to why written particulars were not provided. Mr McDonald told me, and I accept, that the monies deducted by NE Foundry Ltd in respect of his tax and national insurance were never paid to HMRC. I am in no doubt whatsoever that it is just and equitable to make an award of the higher amount as the Second Respondent appears to ignore the most basic requirements and obligations of an employer.

Employment Judge Sweeney  
12 March 2020