EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111872/2019 (V)

Final Hearing held remotely on 30 July 2020

Employment Judge A Kemp

Mr B Marshall	**Claimant** **In person**
Proclean (2017) Limited	**Respondent** **Represented by:** **Ms C Taylor** **General Manager**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. **The claimant had unlawful deductions made by the respondent from his wages for (i) pay for annual leave taken by the claimant in the period 1 – 12 July 2019 under Regulation 14 of the Working Time Regulations 1998 in the sum of £151.42, (ii) pay for annual leave accrued but untaken in the period 1 January 2019 to 14 August 2019 in the sum of £67.30, (iii) a deduction for what was alleged to be excess mileage in the sum of £17.47 in August 2019, and (iv) a deduction for hours alleged not to have been worked in the sum of £98.74 also in August 2019.**

2. **The claimant is awarded the sum of THREE HUNDRED AND THIRTY EIGHT POUNDS FIFTY ONE PENCE (£338.51) payable to him by the**

respondent, subject to any statutory deductions properly due therefrom. In the event of such deductions the respondent shall give written notice thereof to the claimant at that time and immediately remit the deduction to Her Majesty's Revenue and Customs.

3. The remaining claim for unlawful deduction from wages in respect of bonus is dismissed.

REASONS

Introduction

1. This Final Hearing took place remotely by Cloud Video Platform in accordance with the arrangements made at the last Preliminary Hearing. It was conducted successfully, and in accordance with the Practice Direction dated 11 June 2020.

2. The Claim was for unlawful deduction from wages in a number of respects. It was defended, although at the hearing the respondent conceded that in part a further payment for holiday pay was due to the claimant.

Evidence

3. The parties had prepared a Bundle of Documents, which was before me and each of those who attended. It was supplemented at the Hearing by a payslip for July 2019, and a further copy of a document at page 2 which had a spreadsheet not fully legible. Not all documents that might have been produced were. That includes worksheets for customers, referred to below, and emails between the parties, together with a contract of employment shown to the claimant.

4. Evidence was given by the claimant himself, and by Ms Taylor for the respondent.

5. I was satisfied that both witnesses were seeking to give honest evidence to the Tribunal. There were some limited issues of fact which were disputed, addressed more fully below.

Facts

6. I made the following findings in fact:

7. The claimant was employed by the respondent from February 2018 to 14 August 2019.

8. The respondent is a small cleaning business. It is owned by Mr Kevin Gray. His partner Ms Cheryl Taylor became its General Manager in April 2019.

9. In about March 2019 the claimant was shown briefly a document which was contract of employment. He understood that he would receive it for signature, but a further version was not sent to him.

10. The holiday year for the respondent was the calendar year. The entitlement was to holidays under the Working Time Regulations 1998.

11. The claimant worked five days per week from January to March 2019 inclusive.

12. From 1 April 2019 he worked three days per week.

13. The claimant had a basic pay at the rate of £8.50 per hour in 2019.

14. The claimant was also entitled to a bonus of £5 per day worked, provided that (i) there was no absence and (ii) there was no customer complaint.

15. He took two weeks' holidays in the period commencing 1 July 2019. For the claimant that two weeks of annual leave equated to six working days.

16. The claimant was paid on the basis of 30 hours at £8.50 per hour for those holidays.

17. The claimant was paid on a monthly basis. Wages were calculated to the 23rd day of each month, and paid in arrears up to that date. The respondent provided information to its accountants, which then made the calculations and provided payslips.

18. In February 2019 the claimant had a period of absence, and the bonus for that month was not paid as evidenced by a deduction shown on his payslip of £100, being the amount of the bonus otherwise due.

19. The claimant worked the following hours per month and was paid the following sums, in the year 2019:

Month	Hours	Gross Pay (£)	Net Pay (£)
January	121	1,098.50	1,004.42
February	126.5	1,175.25	1,055.04
March	93.25	892.63	804.09
April	90	835	790.60
May	108.75	1,004.38	932.96
June	85.9	805.15	765.50
July	35.95	590.58	568.16
August	70.58	1,023.40	829.89

20. In July 2019 the claimant had been paid, together with pay for hours worked, holiday pay of £255 gross on the basis of the calculation made by the respondent's accountants.

21. In August 2019 the claimant was paid holiday pay of £423.47 gross on the basis of a calculation made by the respondent's accountants of the accrued but untaken holiday entitlement, paid together with pay for hours worked. No bonus was paid in the August 2019 payslip.

22. In August 2019 the respondent made two deductions from the wages of the claimant. The first was in the sum of £17.47 and was alleged to be "excess mileage". The second was in the sum of £98.74 and was on the basis of an allegation that the claimant had worked about 11 hours less than he ought to have, had not attended work on those hours, and was alleged not to be entitled to payment.

23. In late July and early August 2019 a number of customers made complaints to the respondent. Ms Taylor received them. They were addressed by Mr Gray. Credits were provided to the customer concerned, who had complained that work was either not done or not adequately done. That work was the responsibility of the claimant.

24. The respondent used a system that automatically calculated likely mileage taken to travel from one postcode to another when using the respondent's vehicle. In July 2019 the claimant had a total mileage of 429 miles. That exceeded the mileage forecasted by the system by 37 miles. Mileage was charged to a customer at 46 pence per mile.

25. The claimant's employment with the respondent terminated on 14 August 2019. He started work with a new employer on 20 August 2019.

26. On 19 August 2019 the respondent wrote to the claimant inviting him to an exit interview on 21 August 2019. The claimant received that letter on 22 August 2019.

27. The respondent further sent an email to the claimant on 20 August 2019 with regard to the exit interview on 21 August 2019. The claimant did not attend that interview.

28. The claimant sent emails to the respondent after his employment terminated seeking payment for sums he considered due. The respondent did not reply.

Submissions

29. The parties each made brief submissions setting out why they considered that their position was correct.

The law

30. The entitlement to holidays is regulated by the Working Time Regulations 1998 ("the Regulations"). They are made to give effect to the Working Time Directive 93/104/EC and require to be construed purposively in light of that.

31. The Regulations provide for an entitlement to annual leave under Regulations 13 and 13A, which amount to a total of 5.6 weeks per annum, capped at 28 days. For someone who works 5 days per week, the entitlement is to 28 days' leave per annum, which is the equivalent of 2.33 days per month. For someone who works 3 days per week the entitlement

is to 16.8 days' leave per annum, which is the equivalent of 1.4 days per month.

32. The entitlement to pay for leave taken is provided for in Regulation 16, which in turn refers to the provisions for a week's pay in sections 212 – 214 of the Employment Rights Act 1996. Those provisions state, in effect, that where pay varies, the calculation is by an average of the twelve week's pay in the period prior to the holiday taken, provided that some pay is received in each such week.

33. Regulation 14 has provision for the entitlement where a worker's employment starts and/or ends in the leave year, as occurred to the claimant. It is a pro-rata calculation, and sets out the amount that is due.

34. The calculation of the sum due is made on the basis of a week's pay, and for someone with variable pay is for the twelve weeks prior to termination of employment provided that there is pay in each such week.

35. The provisions for an unlawful deduction from wages are found in Part II of the Employment Rights Act 1996. The right not to suffer unlawful deduction from wages is provided for in section 13. There are exceptions provided for in section 14, which include "overpayment of wages", and where the worker signifies consent in writing.

36. The definition of wages is provided for in section 27 and includes "any sums payable to the worker in connection with his employment including (i) any…bonus…., holiday pay….."

Discussion

37. I accepted that both witnesses were seeking to give honest evidence. They both gave evidence in a straightforward and candid manner. I have assessed how the conflict, where it existed, should be resolved below.

38. The claimant denied using the respondent's vehicle other than for work purposes, and disputed that there was any excess mileage. He disputed that there had been any customer complaints, and noted the lack of any written evidence submitted, although Ms Taylor said that company worksheets had those complaints noted on them.

39. Ms Taylor provided, and accepted a calculation from the respondent's accountants that set out a further sum due for holidays. She did not know how the accountants had calculated the sum paid for holidays taken, or the balance said to be due at termination. She confirmed that whatever sum was properly due would be paid, but queried whether the holiday pay for July 2019 affected the calculation of holidays due at termination.

40. She considered that there was evidence that the claimant had not attended work when he said that he had, as customers had complained about that, such that he was overpaid wages for the hours involved, and had an unexplained excess of mileage. She did not know the detail of the provisions on unlawful deduction from wages, but argued that the customer complaints indicated that the claimant had not done the work, and that supported the view that the mileage had been because of other, non-work, use of that van, such that the pay for work not done and excess mileage was properly deducted.

(i) Holiday pay

41. I address the issue of holiday pay for the holiday taken in July 2019 first of all. For the claimant, and for six working days in the first two weeks of that month, the calculation is made from the pay in the preceding 12 weeks. There was no evidence of a breakdown of the monthly pay figures into the constituent weeks available to the Tribunal, and averages must be used because of that. The gross pay in the period April to June 2019 inclusive was £2,644.53. That equates to a weekly figure of £203.42. For two weeks the total due is £406.42. The actual payment made was £255.00. The balance due is £151.42, that being an unlawful deduction of wages under the Employment Rights Act 1996.

42. The next issue is what holidays were outstanding, having accrued, but been untaken, at termination on 14 August 2019. In the first three months the claimant worked 5 days per week, and accrued holidays totalling 7 days. In the period from then until 14 August 2019, when the employment terminated, the accrual was at the rate of 1.4 days per month, and for that period the entitlement was 6.22 days. The total for the period to termination was therefore 13.22 days. Holidays are taken in single days,

and the total is 13, less the 6 taken in July 2019 which were the only holidays taken that year, leaving 7 days outstanding.

43. The calculation for the holidays due is for the 12 weeks prior to 14 August 2019. That calculation is affected by firstly the underpayment for holidays in July 2019 and secondly the payment for holidays made in August 2019 which for these purposes is discounted. The pay for hours worked in August 2019 was £599.93. The pay for July 2019 was £590.58 and to that is added the underpayment for the holidays of £155. The total is £745.58. The figures for June and May are respectively £805.15 and £1,004.38. The total for that period is £3,155.04. The weekly average is £210.34. For a three day week, the daily rate is £70.11.

44. There are 7 days holidays due, at £70.11, which is a total of £490.77. The amount for holidays that was paid was £423.47. The balance is £67.30.

45. The two underpayments are unlawful deduction from wages due under the terms of section 13 of the Employment Rights Act 1996.

(ii) Deductions in August 2019

46. I turn to the two deductions from the August 2019 payslip. The first was for what was said to be excess mileage. It does not appear to me that there was any lawful basis to make such a deduction. It does not fall within the exceptions provided for in section 14. In any event, I do not consider that a difference of actual miles against anticipated of 37, where the total mileage was 429, was sufficient evidence to establish that the vehicle had been used improperly. That is a tolerance of less than 9%. There is inevitable inaccuracy in such systems, and there was no further evidence (save as I shall come to) about the mileage. The only other evidence relevant to the issue was of customer complaints that work had not been done at all, or done badly. But the worksheets for those complaints were not in the Bundle, details of what the complaint was, by which person, when, were not provided. One example for one customer was given, but the evidence for that was very limited indeed. Mr Gray addressed the issue, but he did not give evidence. No photographic or other evidence was provided, such as credit notes to customers, letters, emails or otherwise.

47. I consider that that is not nearly sufficient evidence to establish that the mileage undertaken was not properly undertaken. There was no written document tendered in the Bundle setting out how the vehicle should be used, or about mileage estimates, or any deductions. I was entirely satisfied that that deduction was unlawful.

48. I then considered the issue of 11 hours' pay being deducted, on the allegation that such hours had not been worked. Although that might be an overpayment of wages, although that is not entirely clear, I was satisfied for the same reasons as above that there was not sufficient evidence to establish that the work had not been undertaken. The claimant denied having failed to attend any of the jobs he was tasked to do. Nothing was raised with him during his employment. He was asked to attend an exit interview on 21 August 2019 by email sent the day before, which was not before the Tribunal, and a letter dated 19 August 2019 he said that he received on 22 August 2019. He started a new job on 20 August 2019. I do not consider that any inference can properly be drawn from the failure to attend such an exit interview a week after employment ended.

49. The claimant said also that the respondent had not replied to emails he had sent, which Ms Taylor said may have been caught by a spam filter. I did not consider that the communications each party tried to send to the other affected the decision I required to make to any material extent. Whilst the parties might have resolved matters had they been in better communication, they were now before me and a decision required to be taken to resolve their dispute.

50. In light of that, I consider that the deduction for the 11 hours said not to have been worked was not lawful as it had not been proved that the claimant had not attended work for such hours, there was no overpayment of wages, there was no exception that applied, and there was a breach of section 13 accordingly.

(iii) Bonus

51. I finally turn to the bonus. Whilst the claimant pointed out the absence of written evidence and denied that complaints had been made, he accepted that if they had been a bonus would not have been payable. The issue for

me was whether or not there had been complaints. I was satisfied that Ms Taylor was credible and most likely to be reliable when she said that complaints had been made, she had handled them herself, and spoke convincingly about them. I was therefore prepared to accept her evidence on that although the lack of written evidence to prove it was an issue that could easily have been addressed.

52. I consider however that it is proved by the respondent that there had been complaints, and that because of them the bonus was not payable. There is therefore no unlawful deduction from wages for not paying that bonus, as it was not payable under section 27.

Taxation

53. The sums awarded are calculated on the basis of the gross earnings. In so far as they require to be taxed, the respondent may deduct the sum properly due, provided firstly that notice of that is given in writing to the claimant when that is done, and secondly that the amount deducted is paid to Her Majesty's Revenue and Customs, all as provided for in the Judgment.

Conclusion

54. I award the claimant the sums set out above. The respondent may wish to review its practices in relation to (i) issuing a statement of particulars of employment under sections 1 and 2 of the Employment Rights Act 1996, required after 8 weeks of employment (ii) calculation of holiday pay, in consultation with its accountants and (ii) record keeping.

Employment Judge:	**Alexander Kemp**
Date of Judgment:	**03 August 2020**
Date sent to parties:	**04 August 2020**