



EMPLOYMENT TRIBUNALS

Claimant: Mr. R Ottery

Respondent: Secret Garden Montessori Childcare

Heard at: London South Croydon **On:** 4 February 2020

Before: Employment Judge Sage

Representation

Claimant: In person

Respondent: Mr Chambers Managing Director

JUDGMENT having been sent to the parties on **29 February 2020** and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Requested by the Respondent.

1. By a claim form presented on the 13 August 2019 the Claimant claimed notice pay, arrears of pay and holiday pay. He stated that he had handed in his notice on the 8 April 2019 and had not been paid his wages from the 31 March to the 30 April 2019 or pay in lieu of accrued but untaken holiday pay. He stated that he had been offered minimum wage for the hours he had worked but he refused this. The Claimant claimed the sums of £1205 wages and £440 holiday pay.
2. By a response form the Respondent accepted that the Claimant was contracted to receive £10 per hour and from their records had calculated that the Claimant was owed 114 hours at £10 per hour, which comprised of 90 hours worked and 24 hours holiday pay. The response stated that this sum had been offered to the Claimant but was rejected. It was stated that the Claimant took two breaks per day which were unpaid and the signing in sheets recorded the time that the Claimant arrived and left the premises, not the actual hours of work. Attached to the ET3 was a record of the Claimant's hours and pay periods. The Respondent stated that the pay period ran from the 3 April to the 1 May not as the Claimant claimed from the 31 March

Issues

The issues before the Tribunal are as follows:

3. In relation to his claim for wages and notice – how many hours did the Claimant work and at what rate of pay?
4. It was not disputed that the Claimant worked during the month of April and was not paid.
5. In relation to holiday pay the Respondent accepted that the Claimant had accrued 56 hours. The issue for the Tribunal is therefore how many hours leave had the Claimant taken and what was due to him on termination of employment? The Claimant maintained that he had taken one day's holiday (8 hours) but the Respondent maintained that according to their records he had taken 32 hours of annual leave.
6. Although the Claimant claimed notice pay, it was noted that he worked his notice therefore his claim for wages will fully recompense the Claimant for his notice worked.

Preliminary Issues

7. The Claimant attended the hearing with documents in support of his case including a schedule of monies owed and copies of relevant documents. It was noted that the Respondent had failed to send the Claimant copies of any documents prior to the hearing.
8. On the Respondent's attendance at Tribunal after the hearing had commenced at 10.15am, he stated that he had some documents he wanted to hand up to the Tribunal but had made no copies. The hearing had to be adjourned for a period to photocopy bundles marked R1 and a document marked R2. R1 comprised of the signing in sheets and R2 was a table setting out what the Respondent stated to be the dates of the pay periods. The Respondent asked for all signing in sheets be copied (from the start of the Claimant's employment); this request was refused as the signing in sheets for the period prior to the 29 March 2019 were irrelevant to the issues before the Tribunal. Only the signing in sheets for the month of April were copied by the Tribunal.
9. The Respondent accepted that for the last month of the Claimant's employment, wages were due, but none had been paid.

Findings of Fact

The relevant contractual terms.

10. The Claimant was employed by the Respondent as a Grounds and Maintenance Lead from the 23 December 2018 to the 30 April 2019. The Respondent was a school. The Tribunal saw a copy of the contract which showed that the hours of work were 07.30 to 16.00 but the hours were stated to be flexible and could be changed as needed. The Claimant was contracted to work three days per week (24 hours), usually working on a Sunday and two other days in the week. The contract indicated that he was expected to arrive at the premises at least 10 minutes before the start of work "to allow [the Claimant] to park and receive a briefing on any specific requirements for the day". The Respondent accepted in answers to the

Tribunal that it was admitted in their defence that the Claimant worked, on average, 25.5 hours per week (more than his contracted hours).

11. The rate of pay in the contract was stated to be £10 per hour which would be paid “by credit transfer on the 6th day of each month” and if that fell on a bank holiday “payments are sent the next working day”. The contract was silent on breaks and lunch periods.
12. The contract stated that the Claimant was entitled to 18 days holiday per annum pro rata and the holiday year started on the 1 November and ended on the 31 October.

The Claimant’s resignation and agreed termination date.

13. The Claimant resigned from his role and this was acknowledged by Mr Chambers by an email dated the 8 April 2019; he confirmed that “*your notice of six weeks will commence tomorrow and the last day of your Contract will be Monday 20 May 2019*”. He went on to state that he was happy to agree an earlier departure if this suited the Claimant. It was not disputed that the parties agreed to terminate the contract at the end of April, by mutual consent. The Claimant worked the whole of April but receive no wages for that month or payment of accrued but untaken holiday pay.

Evidence in relation to the dates of the relevant pay period.

14. The first issue for the Tribunal is to establish when the pay period for April began. It was accepted that the document provided by the Claimant showing pay periods up to March and the Respondent’s document marked R2 (which appeared to be a document produced at a later time showing pay periods from February to September 2019) both showed that the pay period for April began on the 30 March. The Respondent accepted the Claimant’s pay period document was produced by them and it was described as a ‘previous iteration’ of R2, which had been provided to the Claimant during his employment.
15. Document R2 stated that “*pay periods to March 2019 (end dates are the last Friday)*”, appeared to corroborate the Claimant’s evidence that the 29 March was the last day of the March pay period. The 29 March was also a Friday, which was consistent with the wording of this document. R2 also stated that “*pay periods April 2019 to September 2019 (end dates are the last day of the month)*” indicating that the only change made to the pay periods was to the end of April going forward.
16. R1 were the Respondent’s signing in sheets for the April pay period and showed that the Claimant had worked from 31 March onwards; these pages were headed ‘April 2019’. Although a line had been drawn above the entry for the 1 April, there was no explanation of when this line was drawn and what it was meant to signify. If it was meant to signify the start of a new pay period, it was noted that it was drawn above the 1 April and not above the 3 April, so it did not corroborate the Respondent’s evidence that the 3 April was the start of a new pay period. R1 appeared to be consistent with the

Claimant's evidence, and with R2, that the April pay period began on the 30 March.

17. Mr Chambers accepted that R2 was his document but was a "previous version in circulation". Mr Chambers referred to what he described as the correct iteration which he appended to the ET3, which stated that the pay period for April started on the 3 April and ended on the 1 May. If the date of the 2 April was the last day of the March pay period, this was a Tuesday and was therefore inconsistent with document R2 which stated that the end date of the March pay period was a Friday. This was also inconsistent with R2 which only changed the end dates of the pay period in April, there was no indication on the contemporaneous documentation that the dates of the March pay period had been changed. The Respondent's evidence given to the Tribunal was inconsistent with their own contemporaneous documents. It was also inconsistent with R1 signing in sheets that were headed 'April' for 31 March onwards.
18. The Claimant's evidence that the March pay period ended on the 29 March was consistent with R2 and the pay period document provided to him at the time by the Respondent. It was also noted that the Claimant had sent a letter before action to the Respondent to settle the matter, this was dated the 29 May 2019. In this letter he stated that his *'last salary payment covered the period until 29th March'*. The Respondent did not respond to the letter even though this would have been an opportunity to put forward their view that the pay period had changed and the claim being advanced was therefore overstated.
19. As the evidence of the Claimant was internally consistent and supported by documentary evidence as compared to the inconsistent and contradictory evidence provided by the Respondent, the Tribunal find as a fact and on the balance of probabilities that the pay period for the month of April commenced on the 30 March.

Evidence in relation to the number of hours worked during the relevant period.

20. It was agreed that the Claimant had to sign in and out every day. In cross examination the Claimant told the Tribunal that sometimes he was unable to sign in as on Sundays there was no one on the premises. The Claimant confirmed that he had two breaks and had half an hour for lunch, which was unpaid. The Claimant stated in evidence that he was only claiming for the contractual hours he worked, and he explained that he took his hours from his diary and then deducted the unpaid lunch break. He confirmed that he was claiming the total of 120.5 hours worked from 31 March to the 30 April 2019.
21. In the ET3 the Respondent stated that according to their records the Claimant had worked a total of 90 hours during the relevant period. The difference in hours appeared, in part, to be due to the different pay periods relied upon by the parties. The Claimant had identified the pay period for the month of April as commencing on the 30 March, therefore he had included the working days on the 31 March, 1 April and the 2 April in his last pay period which amounted to 24 hours and 55 minutes. The Respondent

stated that those three days had already been paid in the March wages as according to their records the pay period for April began on the 3 April not on the 31 March. The Tribunal have made findings of fact about this above.

22. It was put to the Claimant in cross examination that he had claimed for payment when he was on the premises but also for time "*he got organised and time he took to stand down and for lunch breaks*"; the Claimant replied that he had only claimed for the hours he worked. He explained to the Tribunal that he calculated the hours he claimed were due to him by taking the hours of work he had recorded in his diary and deducting half an hour that he took for lunch.
23. As there was a dispute of fact in relation to the number of hours claimed by the Claimant, the Tribunal took Mr Chambers to his signing in sheets and compared this with the Claimant's schedule of hours taken from his diary. Mr Chambers was taken to the Claimant's schedule which showed that for the 31 March he was claiming 8 and a half hours. Mr Chamber's signing in sheet for that day showed that the Claimant had signed in at 7.30 and left at 4.30; which was a total of 9 hours. These figures appeared to be consistent that the Claimant had worked 8.5 hours that day. The Respondent denied this saying that the Claimant "*has two breaks and sometimes three breaks, what he has not done is take out his second break*". The Respondent told the Tribunal that they had not agreed to pay the Claimant when he was "*setting up and standing down*" and the contract did not provide for this. It was noted that the contract made no mention of setting up and standing down time, it was mentioned for the first time in the Tribunal hearing.
24. The Tribunal then compared the figures on the Claimant's schedule for the 1 April where he was claiming 8 hours and fifteen minutes as compared to the Respondent's signing in sheets which showed the Claimant working from 7.30 to 4.30, this showed a total of 8.5 working hours. The Claimant was claiming less than the signing in sheets showed. The Tribunal then compared the Claimant's schedule for the 2 April where 8 hours and 10 minutes was being claimed. The Respondent's signing in sheet for that day showed the Claimant had signed in at 7.30 and had signed out at 4.10, which was eight hours and 40 minutes. After subtracting the lunch break this came to a total working time of 8 hours and 10 minutes. Again, the hours claimed were consistent with the Respondent's documents.
25. The Respondent disputed that the Claimant's claim for hours worked was accurate as he said that the Claimant was claiming for "*setting up and standing down, going to the lavatory and asking for direction. It was a very muddy farm. He would get changed and go to the lavatory; he wouldn't come to the door covered in mud. Then he would sign out and leave. We didn't want mud coming into the school*". It was the Respondent's evidence that the Claimant had not factored in second breaks, setting up and standing down and was therefore claiming for more hours than he had actually worked. There was no evidence before the Tribunal that the Claimant had claimed for more hours than had been worked and no evidence that he had overstated his working hours.

26. It was noted by the Tribunal that the Respondent confirmed in the ET3 that the Claimant worked on average more than his contracted hours. It was stated on the ET3 that the Claimant worked “on average” 25.5 hours. This indicated that at the time the defence was lodged, it was accepted that the Claimant worked more than his contracted hours, not less. Although it was stated in the ET3 that the signing in sheets referred to when the Claimant ‘arrived and departed’ the premises, it was suggested that this did not equate to the hours worked. However, the Respondent provided no credible evidence to suggest that the Claimant had claimed for hours that he did not work or why what was described as setting up and standing down time was not considered to be working time.
27. As there was a dispute on the number of hours that the Claimant worked during this period of time, this has to be decided on the balance of probabilities. The Tribunal conclude that the Claimant’s hours of work in his schedule appeared to be accurate when compared to the signing in sheets as has been referred to above. The Claimant was claiming for hours worked in accordance with his contract. The Claimant’s claim was also consistent with the ET3 where the Respondent confirmed that the Claimant had worked on average more, not less, than his contracted hours. The Respondent’s contention that the Claimant had claimed time he was not entitled to was not corroborated by any consistent or credible evidence presented to the Tribunal.

The hourly rate

28. On the issue of the rate of pay the Claimant was entitled to be paid, the contract stated £10 per hour. It was noted in the ET1 that the Claimant had been told by the Respondent that he was entitled to pay him the minimum wage. The ET3 confirmed that the Claimant’s rate of pay was £10 per hour. This was the rate he was entitled to receive for the work he performed under the contract.

The claim for holiday pay

29. The Claimant confirmed in cross examination that he had taken only one day’s annual leave on the 19 April. Although it was the Respondent’s case that he had taken 3 days over Christmas, the Claimant denied this. He explained that over the Christmas period his working days did not fall on bank holidays. The Tribunal had sight of the Claimant’s payslip for December to January showing that a total of 51 hours had been worked; there was no reference to holiday pay on the payslip. The payslip would have been produced using the hours on the signing in sheets and were likely to be correct. The Tribunal find as a fact and on the balance of probabilities that the Claimant worked his normal hours over the Christmas period and did not take any annual leave during this time.
30. It was the Respondent’s evidence that the Claimant had taken a day’s annual leave on the 3 March 2019. The Claimant stated that he was not on leave that day and his diary showed that he had worked 3 hours and 30 minutes and that week he worked Sunday Monday and Tuesday. In the light of the contradiction in evidence the Tribunal prefer the consistent evidence of the Claimant, which had appeared to be corroborated by the

Respondent's signing in sheets, as we have referred to above. Although we did not see the signing in sheets for the 3 March the Tribunal found the Claimant's evidence to be consistent and credible and it was concluded that the 3 March was not taken as annual leave.

31. The Tribunal therefore conclude that the Claimant had only taken one day of annual leave since joining the Respondent. He had therefore accrued a total of 56 hours (taken from the ET3) and had only taken 8 hours leave from that entitlement.

Closing submissions of the Claimant were oral and were as follows:

32. I believe my figures are correct and they were recorded in my diary. I arrived and got my boots on and went to the door, I recorded my arrival time and someone else recorded it. On a Sunday there was no one around. I took the Respondent on his word that the first three payslips were correct. If I had received payslips, I could have seen it. I tried to sort it out after going to Citizens Advice. I worked my notice and did everything I could have. I say I am owed 44 hours of holiday pay as I have taken one day out of my entitlement.

Closing submissions of the Respondent were oral and were as follows:

33. This is unfortunate. I am not in the business of not paying someone. He caused damage of £1000. We can change the pay dates pending us looking into making a deduction. I took Government advice I was told it may not be lawful. I could retrofit by paying the Claimant the national minimum wage, I didn't but I had the option. I am confident that the hours in the ET3 are fully supported by the signing in sheets. The Claimant would have signed in and out. There were two occasions when he did not.
34. The signing in sheets show he was paid 82 hours and had worked 32 hours of leave. I had intended to action the payment, but I was told I should wait until the settlement was agreed, he chose to go via ACAS. The Claimant did not return my calls. The Claimant accepted that he took breaks. The evidence the Claimant gave showed he felt it was acceptable to take tea breaks.

The Law

Employment Rights Act 1996

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.

Working Time Regulations 1998

14 Compensation related to entitlement to leave

(1) This regulation applies where—

- (a) a worker's employment is terminated during the course of his leave year, and
- (b) on the date on which the termination takes effect ("the termination date"), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13 and regulation 13A differs from the proportion of the leave year which has expired.

(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).

Decision

35. The Tribunal first wish to make some observations about the credibility and consistency of the evidence produced in this case. The Claimant's evidence appeared to be consistent throughout. He produced a schedule of the hours he worked, and the holiday pay he was due. His evidence was corroborated when compared to the signing in sheets provided by the Respondent. His evidence was clear and consistent with the documentation produced by both parties.
36. The documentary evidence produced by the Respondent was limited to documents R1 and R2. The Tribunal did not see the payroll run for the Claimant's short period of employment in this case, also no holiday pay records were produced. Had the Tribunal seen the pay records for December to March the issues above would have been simple to resolve. The signing in sheets were of limited assistance in establishing the correct pay period as has been referred to above. The Tribunal saw no evidence related to issues such as setting up and standing down even though this became an issue for the Tribunal. It was surprising that the Respondent produced none of the usual documents that one would normally expect to see from an employer in a claim for wages and holiday pay. The Tribunal also had no witness statement from the Respondent. This made the fact-finding exercise in this case difficult
37. The Respondent's oral evidence was not consistent on the issue of pay dates or the hours of work. The detailed findings of fact about the pay period were above at paragraphs 14-19. All contemporaneous documents (the Claimant's document about pay dates and his letter before action, R1 and R2) corroborated the Claimant's evidence that the pay date for April started on the 30 March. The schedule attached to the ET3 was the only document that contradicted the Claimant's evidence and the contemporaneous documents. The Tribunal did not find the Respondent's evidence that the pay date had changed to be credible. It was for this reason that the Claimant's evidence was accepted by the Tribunal as consistent and credible, that his pay period for the month of April began on the 30 March.

38. The Respondent's evidence in relation to the hours worked per week were also inconsistent and the findings of fact are referred to above at paragraphs 20-27. It was concluded on the facts that the Claimant's evidence was accurate and corroborated by all the documents before the Tribunal. Despite accepting in the ET3 that the Claimant worked on average more than his contracted hours, it was suggested in Tribunal that the Claimant had claimed for time when he was not working. There was no credible evidence to suggest that this was the case. Although the Respondent also indicated that the number of hours owed to the Claimant should be reduced by deducting what was described as setting up and standing down time and for additional breaks, this was an entirely new point that was not supported by any credible documentary or oral evidence.
39. The Respondent's evidence on the number of hours the Claimant worked in the month of April was internally inconsistent as in the ET3 it was claimed that the Claimant had worked 90 hours however in closing submissions this was reduced to 82 hours. It was difficult to understand why the number of hours had been reduced and this further indicated the unreliability of the Respondent's evidence.
40. It was noted in the Respondent's closing submissions that reference was made to damage caused by the Claimant of £1000 and seeking to change the payment dates to make a deduction from wages. The evidence produced by the Respondent although inconsistent and unreliable was solely focussed on reducing the sums due to the Claimant. If the Respondent had intended to recover this money from the Claimant, attempting to do so in a defence to a claim for wages and holiday pay due was not an appropriate route to take. The oral submission suggested that the Respondent was aware of this as they had been told that to do so may not be lawful (see above at paragraph 33).
41. In the light of the Claimant's consistent evidence that he worked 120 and a half hours at a rate of £10 per hour, the Tribunal awards to the Claimant the sum of £1205. Although in closing submissions the Respondent had also suggested that he could somehow 'retrofit' by reducing the Claimant's pay to national minimum wage, the Tribunal has found as a fact above at paragraph 28 that his contractual rate of pay was £10 per hour and this is the rate of pay he was entitled to receive for the hours he worked.
42. The next issue is in relation to holiday pay due to the Claimant on termination of employment. The Respondent in the ET3 stated that 24 hours were due to the Claimant, however in closing submissions this changed to 32 hours again reflecting the inconsistent nature of the Respondent's evidence to this Tribunal. The Tribunal refer to the findings of fact on this point above at paragraphs 29-31.
43. The dispute in evidence appeared to be largely focussed on whether the Claimant took annual leave over the Christmas period. The Tribunal found as a fact that the Claimant took no leave at this time. The payslip was taken to be accurate as it had been produced by the Respondent using the signing in sheets. The payslip corroborated the Claimant's evidence.

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44. It was found as a fact that the Claimant had only taken one day of annual leave. The Tribunal accepted the Respondent's calculation of the leave that the Claimant had accrued during his employment which came to a total of 56 hours. Having concluded that the Claimant had only taken one day of holiday leave of 8 hours, it is concluded that he is entitled to 48 hours of leave which comes to a total of £480.

Employment Judge **Sage**

Date: 26 May 2020