



EMPLOYMENT TRIBUNALS

Claimant: Mr P R Warters
Respondent: Marquees by Stuart Limited (in voluntary liquidation)

Heard at: Leicester Hearing Centre, 5a New Walk, Leicester, LE1 6TE
Considered on the papers only with the parties' agreement.

On: 21 August 2020

Before: Employment Judge Adkinson sitting alone

Representation

For the claimant: Mr M Bloom, solicitor

For the respondent: No appearance or representations

JUDGMENT

After considering the evidence filed, the claim and the response to that claim, it is the Tribunal's judgment that

1. The claim for unpaid wages
 - 1.1. from the period 21 September 2019 to 25 November 2019 fails; but
 - 1.2. in respect of unpaid commissions succeeds. The respondent has unlawfully deducted those wages and must pay to the claimant **£6,080**.
2. The respondent has failed to pay the claimant's holiday entitlement on termination of employment and is ordered to pay the claimant the gross sum of **£3,351.44**.
3. The respondent has failed to provide to the claimant a written statement of his employment particulars. The Tribunal award 4 weeks' pay (capped at £525 per week). The respondent must pay to the claimant **£2,100**.

REASONS

1. On 7 January 2020 the claimant, Mr Warters, presented a claim to the Tribunal for holiday pay unpaid wages and unpaid commission. He also

alleged that the respondent employed him and had failed to provide him with a written statement of employment particulars in breach of the **Employment Rights Act 1996 section 1**.

2. The respondent denies Mr Warters's claims.

Procedural history

3. The respondent failed to enter a timely response, and therefore on 12 February, 2020 I issued a judgement in default for the amounts that Mr Warters claimed.
4. On 14 February 2020 the respondent applied to set the judgement aside and for permission to present a response out of time.
5. On 4 March 2020 the respondent went into creditors voluntary liquidation. On 18 March 2020 the liquidators said that they intended to "vigorously dispute" Mr Warters's claim, but they were not in a position to incur costs defending the claim. The reality is that other than present a response and make an application to present it out of time, the respondent has played no part in these proceedings.
6. On 11 March 2020 Employment Judge Britton set that default judgement aside and allow the respondents to rely on their proposed response.
7. On 29 April 2020. I gave the directions are set this matter down for a hearing on the papers today. I allowed each party an opportunity to submit further evidence and to submit any written submissions.
8. Mr Warters has submitted a witness statement together with exhibits upon which he relies. The respondent has submitted nothing.
9. In coming to my conclusions, I have taken into account the claim and the details of claim, the response, and the evidence that Mr Warters has submitted. I have also taken into account the contents the Tribunal's file.
10. Although the respondent is in creditor's voluntary liquidation, that does not prevent the Tribunal from hearing and determining the claim against it.

The issues

11. The issues I have to decide are as follows:
 - 11.1. **The Outstanding Commission Issue:** whether the respondent owes commission to Mr Warters that remains unpaid?
 - 11.2. **The Holiday Pay Issue:** whether the respondent has failed to pay Mr Warters his holiday pay?
 - 11.3. **The Unpaid Wages Issue:** whether since 20 September 2019 to his resignation on 25 November 2019 the respondent has failed to pay Mr Warters his wages?
 - 11.4. **The Employment Particulars Issue:** whether the respondents have failed to provide Mr Warters with a written statement of his employment particulars?

Background facts

12. I begin by making the observation that the respondent's assertions in their response are not supported by any evidence. While they maintain that they "vigorously dispute" the claims, in reality, they have not done anything other than present a response.
13. The liquidation does not prevent the respondent from submitting documentary evidence nor witness evidence in support of their position. They may not have the money to instruct lawyers but the respondent was still able to act for itself (even if it meant the liquidators who said they intended to "vigorously dispute" the claims would be unpaid for doing so).
14. Therefore, the fact they have chosen to dispute the claims but then adduced nothing to support their contentions suggests to me that it is likely there is nothing that the respondents have or can adduce that supports what they assert. I have taken this into account when I have had to weigh up competing versions of events.
15. The respondent hired out marquees and tents. The business is naturally seasonal and quieter in winter.
16. The respondent's original director was a Mr Low.
17. The respondents have provided no information about the size or administrative resources that were available to the claimant. I presume in the absence of evidence they were sufficient to enable it to comply with its legal obligations.
18. Mr Warters started to work with the respondent in 2015. It is common ground that he was self-employed at this time.
19. On 21 March 2018 he became an employee of the respondent. I do not accept the respondent's assertion to the contrary.
 - 19.1. The change from self-employment while continuing to work with the respondent seems more likely to me to be a change to employed status than to only worker status.
 - 19.2. I accept that Mr Warters's job title was "manager". I do not see that an inconsistent with Mr Low being the managing director. I have nothing to suggest this might be wrong.
 - 19.3. That is reflective of the work he did helping Mr Lowe to run the business and bring in jobs. It is more likely in my opinion an employee would do this rather than a person who was only a worker.
 - 19.4. Even on the respondent's case, his role was to assist Mr Low with-day-to-day running of the business. That seems inherently unlikely to be the type of casual work the respondent implies it is and even though hours varied is more likely to be the work of an employee.
 - 19.5. He was paid through PAYE and documents show he was provided with a tax code.

- 19.6. His work even on the respondent's case seems inherently unlikely to be the type of casual work the respondent implies it was.
- 19.7. The respondent has adduced no evidence to support the suggestion that Mr Warters had only worker status. They could have done so.
- 19.8. The respondent provided the claimant with a draft contract of employment. While it is not complete, it seems unlikely that the respondent would do that if he were only a worker.
20. There is no evidence that the business ever shut down during e.g. winter despite it being seasonal. I conclude the claimant was expected to work every weekday and worked throughout the year. – even if hours varied. That would be consistent more consistent with is job than otherwise. That is an inherently more likely situation. I would expect the respondent to produce evidence were it otherwise. The respondent suggests only he was a casual worker but has given me no evidence to show that. The wage slips provide no help either way.
21. I have alluded already to the draft contract of employment. It is clearly a template because, for example, where it says "Name of Employee:" instead of Mr Warters' name following there appears "{{employee.fullname}}". Similar things appear elsewhere. It is unsigned by either party. It does not contain any information relating to pay. It does set out the working hours, holiday entitlement, sickness provisions, job title or job description to name but a few things missing. It is ambiguous as to whether it is permanent or fixed term.
22. I note it is dated 22 November 2019, shortly before resignation. I have no explanation for this date but am not satisfied that alone is enough to undermine my conclusion that it is genuine. There are a number of innocent hypothetical explanations as much as dubious ones. It would require me to speculate to conclude that the date is evidence of malevolence. There is nothing else in the case that suggests that is likely.
23. Although the respondent provided Mr Warters with a draft contract of employment, he was never provided with a finalised one.
24. The respondent admits it did not provide a statement of employment particulars to Mr Warters. This was deliberate, because they (erroneously in my judgment) thought he was a worker only.
25. From March to May 2018 the respondent was paying to Mr Warters the sum of £2,000 per month, this increased to £2,500 gross per month in June and July 2018.
26. His pay dropped in October 2018 because the worked tailed off with the season's change. His pay became irregular to reflect the different hours worked.
27. In April 2019 Mr Low fell ill. He passed away in July 2019.
28. Between July 2019 and Mr Warters's resignation on 25 November 2019, the respondent fell to Ms Elliott (Mr Low's partner) to run.

29. There is a dispute about how Mr Warters and Ms Elliott got on with each other, with accusations about each other's conduct on both sides. I do not believe that it assists me to try to resolve the disputes.
30. Whether justified or not, Mr Warters felt that he had not received reassurances he wanted about his employment following Mr Low's death. Therefore he resigned on 25 November 2019. I find as a fact he resigned without notice, because he has not given evidence of any notice period and I would have expected him to do so if it were the case otherwise.
31. During his employment he received commission at the rate of 20% of net invoices for work that he introduced. I have seen his schedule of commission to which he says he is entitled but which is unpaid. I do not accept the respondent's assertion that there was never any such agreement to pay commission. The bare assertion is not supported by any evidence e.g. accounts or other documents that show no such payments were ever made or evidence from which one might infer there was clearly no such agreement. The idea that there was an agreement to pay a commission for work that someone brought into the business seems to me to be inherently plausible. I accept the claimant's evidence and I conclude that there was therefore such an agreement. I also conclude the commission which the respondent owed to the claimant is as set out in the claimant's schedule. The schedule looks plausible and is cross-referenced to the orders that give rise to the commission.
32. There is no suggestion that the due date for the respondent to pay the commission to the claimant arose before his resignation on 25 November 2019. I conclude therefore that his resignation became due date for payment.
33. During his employment Mr Warters did not take any holiday. I find as a fact that the claimant did not ask to take any holiday and was not prevented from doing so. Mr Warters has not given any evidence that suggests that he was prevented from taking leave by the respondent or e.g. because of his illness, because paid leave was not available or that he even asked to do so. I would have expected him to have mentioned it in his evidence if that were the case.
34. There were no contractual terms that provided for a specific leave year.
35. The respondent accepts it owes some holiday pay on termination. They dispute how much. They provide no alternative figures or bases for calculation. It is a bare assertion.
36. The respondent asserts that the respondent overpaid the claimant during his work (and so any holiday pay should be assessed by reference to a lower amount but have not told me what that amount might be). The respondent suggests that Mr Warters' "grossly exaggerated" the hours he worked and that is why he was overpaid. In short the respondent is alleging that Mr Warters was dishonest in a material way that adversely affected the respondent. I would expect to see evidence to support such a serious allegation, rather than a mere bare assertion. There is no such evidence. I reject the respondent's assertion. The respondent paid to Mr Warters what

was due to him and what he had earned. There was no exaggeration by him.

37. Since 21 September 2019 to the date of his resignation Mr Warters' says that the respondent did not pay the claimant his wages that fell due. The respondent says it has paid him everything he was owed. There is no suggestion nor evidence he was put onto "short time" or entitled to a guarantee payment. Indeed, it appears that he was required to work, because he tells me that he was "left to his own devices" to run the business after Mr Low died.
38. However Mr Warters has adduced no evidence to show the work he has done for which he was not paid. That is something plainly within Mr Warter's knowledge. I would expect him to provide the details of the work he did but was not paid for. Therefore despite the lack of evidence from the respondent, I find as a fact that Mr Warters' was paid what he was owed for this period because he has not provided anything that suggests otherwise.
39. The claimant has calculated a week's pay as £1,221.88 based on the past 12 weeks before dismissal. He impliedly asserts this is a fair representation of his pay. I accept his evidence on this point. The respondent has provided nothing to suggest that his evidence is wrong other than a bare assertion.

Law and conclusions on the issues

Commission issue

40. The **Employment Rights Act 1996 Part II** entitles an employee to bring a claim for unpaid wages.
41. **Section 27(1)(a)** defines wages to include commission.
42. Any claim must be brought within 3 months of the date that the respondent should have paid the commission to the claimant: **section 23**.
43. Because the due date for payment was not before 25 November 2019, the claim for unpaid commission is in time.
44. Based on my findings of fact, I am satisfied that the respondent has failed to pay to Mr Warter's the commission that he is owed. The claim therefore succeeds. The respondent owes to the claimant **£6,080**.

The unpaid wages from 21 September 2019 to 25 November 2019

45. The same part of the **Employment Rights Act 1996** entitles an employee to bring a claim for unpaid wages.
46. A claim can only succeed if the wages are properly payable. This is to be determined by ordinary contractual principles (see **Greg May (Carpet Fitters and Contractors) Ltd v Dring 1990 ICR 188 EAT**) and both the expressed and implied terms of that contract: **Camden Primary Care Trust v Atchoe 2007 EWCA Civ 714 CA**.
47. The claimant asserts he is entitled to a weeks' pay calculated under the **Employment Rights Act 1996 section 224** for this period. There is no contractual term that provides for this approach and no statutory basis for that approach on the facts of the case. Therefore, he is entitled only to

wages for the period he has worked and for which the respondent has not paid him when it should have done so.

48. He has adduced no evidence of work he has done for which he has been unpaid. There is no factual or contractual basis to support his assertion he is entitled to 9 weeks' pay. His entitlement appears to be based on an inappropriate statutory calculation.
49. The claim is not made out. I therefore dismiss it.

The holiday issues

50. Under the **Working Time Regulations 1998** an employee is entitled to 28 days leave per leave year. There is no contractual leave year so the respondent is correct therefore when it says the leave year runs from **21 March 2018 to 20 March 2019** and then annually thereafter: **regulation 13(3)**.
51. If an employee is entitled to leave in a given year but does not take it, then he is not entitled to a payment in lieu in respect of that year except on termination of employment within that year: **regulation 13(9)**.
52. The law does allow a payment in lieu in certain circumstances. The only potentially relevant ones here are that the claimant asked to take leave or that the respondent refused to provide paid leave (**King v Sash Windows Workshop [2018] ICR 693 ECJ**) or an effective opportunity to take it (**Kreuziger v land Berlin Case C-619/16 ECJ**). The claimant has adduced no evidence to show those circumstances apply. It appears simply that he did not take leave through his own choice. Therefore, his claim insofar as it concerns the leave year **21 March 2018 to 20 March 2019** must fail.
53. As for the year **21 March 2019 to resignation on 25 November 2019** he was entitled to compensation under **regulation 14**. **Regulation 14** (as in force at the time) provides as relevant:
- “(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).
- “(3) the payment due under paragraph (2) shall be—
- “(a) such sum as may be provided for for the purposes of this regulation in a relevant agreement, or
- “(b) where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula—
- “(a × b) – c
- “where—
- “a is the period of leave to which the worker is entitled under regulation 13 and regulation 13a;
- “b is the proportion of the worker's leave year which expired before the termination date, and

“c is the period of leave taken by the worker between the start of the leave year and the termination date....”

54. Because I concluded he was to work every day, I conclude that his leave year was to be calculated by reference to days worked.

55. Applying the formula in **regulation 14** we get

$$\left(28 \text{ days} \times \frac{250 \text{ days elapsed}}{365 \text{ days in total}}\right) - 0 \text{ days taken} = 19.2 \text{ days}$$

56. I therefore calculate the claimant’s holiday entitlement as

$$\left(\frac{19.2 \text{ days}}{7 \text{ days in a week}}\right) \times \pounds 1,221.88 = \pounds 3,351.44$$

57. I therefore award **£3,351.44** for unpaid holiday pay.

The Employment Particulars Issue

58. The respondent failed to provide a written statement of his employment particulars.

59. Because the claimant has succeeded on claims that fall within the **Employment Act 2002 schedule 5** I must award compensation to the claimant. The amount must be at least 2 weeks’ pay and up to 4 weeks’ pay: **Employment Act 2002 section 38**.

60. I award 4 weeks’ pay. The employer had sufficient resources to produce the statement of particulars. They had a draft of a contract to work from and so had some awareness of the obligation on them. The respondent’s failure has meant that many assertions they made could not be tested. Their failure occurred because they flagrantly disregarded his status as an employee. It was a deliberate decision not to give him a statement of employment particulars. Much of this case may have been easier to resolve if the statement of particulars existed.

61. A weeks’ pay is capped at £525 in respect of this claim: **Employment Act 2002 section 38** and **Employment Rights Act 1996 section 227**.

62. I therefore award $4 \times \pounds 525 = \pounds 2,100$

Employment Judge Adkinson

Date: 21 August 2020

JUDGMENT SENT TO THE PARTIES ON

24 August 2020

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FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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