



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant **Respondent**
Mr Neville McGarry AND Kingsbury Heating & Plumbing Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD REMOTELY AT Plymouth **ON** 17 August 2020
By Cloud Video Platform

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: In person
For the Respondent: Mr R Owen-Thomas of Counsel

JUDGMENT

The judgment of the tribunal is that:

- 1. The claimant succeeds in his claim for accrued but unpaid holiday pay and the respondent is ordered to pay the claimant the gross sum of £807.69; and**
- 2. The claimant's claim for breach of contract is dismissed.**

RESERVED REASONS

1. In this case the claimant Mr Neville McGarry brings monetary claims for breach of contract and for accrued but unpaid holiday pay against his ex-employer Kingsbury Heating & Plumbing Limited. The respondent denies the claims.
2. This has been a remote hearing which has been consented to by the parties. The form of remote hearing was by video, namely Cloud Video Platform. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that I was referred to are in a bundle of 47 pages, and a further bundle in response from the claimant of 15 pages, the contents of which I have recorded. The order made is described at the end of these reasons.
3. I have heard from the claimant. I have heard from Mr Thomas Williams and Mr Richard Davies on behalf of the respondent.

4. There was a degree of conflict on the evidence. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
5. The respondent company is a heating and plumbing business. Mr Williams and Mr Davies from whom I have heard are qualified heating engineers. The claimant Mr McGarry was Mr Williams' father-in-law. In 2017 Mr Williams and Mr Davies decided to leave their former employer Austin Heating Ltd and to run their own business. Mr McGarry had business management and administration skills and joined in the venture. The three of them became shareholders and directors in the respondent company, and there was a quasi-partnership between the three of them. They were all employees of the company. The claimant's employment commenced on 2 October 2017. At one stage Mr Williams and his young family lived with his father-in-law the claimant. Unfortunately, Mr Williams left his family and the relationships soured. Mr Williams and Mr Davies decided to terminate the claimant's employment summarily with effect from 18 March 2019.
6. One dispute which it is important to resolve at the outset of this claim relates to the terms of the claimant's employment, because I have not seen a signed contract of employment which sets out the terms of the claimant's employment by the respondent.
7. The claimant's position is as follows. He asserts that it was agreed that his salary would be at the rate of £40,000 per annum, and that he was entitled to a minimum of two months' notice. He says that these were terms which he previously enjoyed, and he would not have joined the business venture unless the terms were met matched. He claims that a signed contract to this effect has now been destroyed by the respondent, and that a less favourable unsigned contract to which I have been referred is a fraudulent fabrication produced by the respondent for the purposes of defeating his claim in these proceedings. The less favourable terms which are relevant to these proceedings are that the suggested salary is at £30,000 per annum, with minimum notice of four weeks.
8. The respondent's position is as follows. At the outset of the business venture it was agreed that Mr Williams as a qualified heating engineer would receive a salary of £40,000 per annum, and that if another heating engineer was to join then it would be on the same salary, whereas the claimant's salary would be at the rate of £30,000. Mr Davies subsequently joined the venture on a salary of £40,000 as previously planned. The claimant was responsible for all administrative matters which included the preparation of his own contract of employment. One was prepared on these agreed terms but the claimant has failed to disclose the signed version of this because it does not support his current claims.
9. What is clear is that the parties made use of a previous statement of terms and conditions of employment with their former employer and prepared a draft written contract of employment based on this. Each of the claimant, Mr Williams and Mr Davies agreed this contract of employment. I have seen a contract of employment said to be between the claimant and the respondent which adopts these terms and conditions of employment, but I have not seen a signed version. This contract suggests that the agreed salary for the claimant was £30,000 per annum and that the agreed notice period was four weeks. I have also seen a screenshot which suggests that this document was prepared in October 2017, which is coincidental with the commencement of the claimant's employment by the respondent.
10. I have also seen a short financial forecast prepared by the claimant and Mr Williams and a screenshot which indicates that this was prepared in August 2017. The claimant does not suggest that these documents are fabricated. Against the heading "Salaries Tom and Nev" (that is to say Mr Williams and the claimant) the prospective salaries were jointly £70,000. Under the heading "Salaries Tom and Nev +1" the prospective salaries were £110,000. This is entirely consistent with the respondent's suggestion that the claimant agreed to earn £30,000, but that Mr Williams and the subsequent heating engineer would earn £40,000 each.
11. The claimant has not adduced any evidence to support his contention that the respondent has deliberately fabricated the unsigned contract of employment to which I have been referred. The claimant's unsigned contract indicates that his salary was £30,000 per

- annum, and that his notice period was a minimum of four weeks. The weight of evidence is against the claimant. The evidence of Mr Williams and Mr Davies is that the claimant agreed a salary of £30,000 and four weeks' notice on their standard contractual terms which had been replicated from their former employer. The contemporaneous documents also favour the respondent's version. The salary of £30,000 is consistent with the financial forecasts discussed by the claimant and Mr Williams in August 2017. The unsigned contract is consistent with the contract from Mr Williams' previous employer, and the other contracts of employment signed by Mr Williams and Mr Davies.
12. I therefore find that the claimant's agreed terms and conditions of employment were set out in the unsigned contract of employment which I have seen in the trial bundle of documents. Applying this document, I find that the claimant's agreed salary was £30,000 per annum, that his agreed notice period was four weeks, and that his agreed holiday entitlement was 31 days with the holiday year commencing on 1 January annually.
 13. With regard to the claimant's holiday pay claim, the respondent concedes that from 1 January 2019 until 18 March 2019 the claimant's pro rata holiday entitlement was 7 days, and that this has not been paid. At the rate of £30,000 per annum the sum due is £807.69. There is no contractual provision which entitles the respondent to deduct this sum which is otherwise due and owing to the claimant.
 14. The balance of the claimant's claim is for breach of contract in respect of his notice pay and unpaid expenses. In his originating application the claimant claims notice pay of two months based on £40,000 per annum, but in accordance with the agreed terms his notice period was four weeks at the rate of £30,000 per annum (£2,500.00). The respondent concedes that this sum is potentially due and owing to the claimant.
 15. The balance of the claimant's claim is for expenses. In his originating application the claimant suggests that he is entitled to expenses of £6,500.00. The respondent disputes this, but concedes that £1,985.49 of expenses are due and owing to the claimant.
 16. However, the respondent asserts that it is entitled to set off the amounts which the claimant wrongly paid himself at the higher rate of £40,000 against the sums which are otherwise due to the claimant.
 17. Having established the above facts, I now apply the law.
 18. The claimant's claim for breach of contract is permitted by article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 ("the Order") and the claim was outstanding on the termination of employment.
 19. Normal contractual principles apply to claims under the Order, which includes the right of set-off, even in circumstances where the employer has not entered an employer's counterclaim under paragraph 4 of the Order, see for instance Ridge v HM Land Registry [2014] UKEAT 0485/12.
 20. The claimant also claims in respect of holiday pay for accrued but untaken holiday under the Working Time Regulations 1998 ("the Regulations"). Regulation 14 explains the entitlement to leave where a worker's employment is terminated during the course of his leave year, and as at the date of termination of employment the amount of leave which he has taken is different from the amount of leave to which he is entitled in that leave year. Where the proportion of leave taken is less than that which he is entitled, the employer is required to make a payment in lieu of leave in accordance with Regulation 14(3). In the absence of any relevant agreement which provides for payment of accrued leave, then the sum is calculated according to the formula $(A \times B) - C$. For the purposes of this formula A is the period of leave to which the worker is entitled under Regulations 13 and 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.
 21. In the first place the claimant succeeds in his claim for accrued but unpaid holiday pay and the respondent is ordered to pay the claimant the sum of £807.69 for the reasons explained above.
 22. The claimant wrongly paid himself at the level of £40,000 from October 2017 until March 2019, rather than the agreed salary of £30,000, which is a gross overpayment of salary in the region of £15,000 during this period. I make no finding as to whether the claimant is

entitled to expenses of £6,500.00 as claimed (rather than the sum of £1,985.49 conceded by the respondent) because there is no need to do so for the following reason. Applying Ridge v HM Land Registry the respondent is entitled to set off sums otherwise due to it from the claimant, and even if the claimant is entitled to expenses of £6,500.00, together with the agreed notice pay of £2,500.00, this total claim of £9,000.00 can be set off against the gross overpayment of approximately £15,000 which the claimant has received and to which he was not entitled.

23. I therefore dismiss the claimant's breach of contract claims.

Employment Judge N J Roper
Dated 17 August 2020
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