EMPLOYMENT TRIBUNALS

Claimant	v	Respondent
Mr M Abel Dalponte		Kennedy and Kennedy Projects Limited

Heard at: Central London Employment Tribunal On: 29 October 2020

Before: Employment Judge Norris, sitting alone (via CVP)

Representation:
Claimant – in person
Respondent – did not appear and was not represented

Interpreter - Ms A Rouse (Portuguese)

JUDGMENT

(1) The Claimant's complaint of unlawful deduction from wages is well-founded and succeeds.
(2) The Respondent is ordered to pay the Claimant the total sum of £3,735 without deduction.
(3) The complaint of race discrimination and the question of whether to impose an employer penalty on the Respondent is stayed until 15 December 2020.

REASONS

Background

1. The Claimant submitted a claim form on 11 October 2019, claiming his wages between 2 September and 11 October 2019 (38 days). He had received just £200 for the entire period during which he worked as a painter/labourer for the Respondent. The Claimant also claimed race discrimination.

2. A Preliminary Hearing Case Management (PHCM) had taken place before EJ Spencer on 17 June 2020, having been postponed from 31 March 2020 because of restrictions resulting from COVID-19. The Respondent did not attend and it was unclear whether an ET3 response to the claim had been submitted. Subsequently it transpired that an incomplete version of form ET3 had in fact been emailed to the Tribunal on 21 December 2019. EJ Spencer therefore did not enter default judgment but listed the matter for a Full Hearing of the wages claim to take place on 5 August 2020.

3. On 15 July, Mr William Kennedy (whose email footer describes him as "Manager" of the Respondent) emailed the Tribunal to say that "detailed information related

to this case is held in our offices in London and we are not able to get back to retrieve any of these and furthermore my doctor advises me strongly that I do not travel due to my ailments". He also forwarded an email sent on 4 July (though not, it appears, to the correct main Central London ET email address) which said that his secretary was "not working and out of the country" and asserted that his medical records from a Dr Hussein confirmed that he should not travel due to his health. He asked to have the Hearing adjourned as he said he was "planning to have treatment thus allowing me to travel and have documents in hand and handle and defend the case properly". I gather that on 5 August, the Hearing was going to proceed and Mr Kennedy attended but said his audio was not working properly. It was rescheduled for 2 September, but again postponed at the Respondent's request because Mr Kennedy was travelling out of the country.

4. The Hearing was rescheduled for 29 October 2020 and on 5 October the Claimant confirmed that he would be attending. On 8 October, an email was sent by someone called "Jessica", purportedly on behalf of Mr Kennedy. It said Mr Kennedy was in hospital in France with deep vein thrombosis and that he could not move for a month. The email concluded "we don't know how he will be on 29th October and will come back to you nearer the time with a progress update on health". Three photographs were attached. One was of a person's arm, apparently with a tube inserted. The others were documents, in French and not translated. One was handwritten illegibly in blue pen but referred to a Mr Kennedy (following which, someone had added in black pen "Johnstone William" or similar) and appeared to be dated towards the end of September 2020; the other was dated 22 September and appeared to be an appointment for an ultrasound for a Mr Jonathan Kennedy on 10 October 2020. Neither was signed by a Dr Hussein. There was nothing to say that Mr Kennedy (if indeed it was the same Mr Kennedy) was unable to move and/or travel. There was no mention of treatment.

5. In any case, it appears Mr William Kennedy did make a recovery, because on 14 October 2020, he emailed the Tribunal again himself. He claimed to have received a complaint four weeks earlier from a distraught client about issues with their plaster work and said that if the Claimant did not withdraw, he would "seek through other means a legal case" against the Claimant and his partner, a Mr Claudio Venson. Mr Kennedy sought to ascribe the problems to the fact that the Claimant does not speak English, but had told Mr Kennedy he could.

The Hearing before me

6. The Hearing went ahead on 29 October 2020. An interpreter had been arranged for the Claimant, and they both attended by CVP. I was informed that someone from the Respondent had contacted the Tribunal to say that nobody would be attending. No evidence had been submitted by the Respondent at any stage and they had not made contact with the Claimant save in the terms set out above.

7. I considered it was in the interests of justice not to delay hearing the case any further. Mr Kennedy had had ample opportunity to attend himself using remote means or to have a representative attend on his behalf, and to submit any evidence. Despite the indication from "Jessica" that the Tribunal would be updated, nothing had been forthcoming that confirmed he was unable to attend, and it appeared Mr Kennedy is able to communicate at least via phone and email with clients/the tribunal.

8. I heard evidence on oath from the Claimant (via the interpreter) about his work for the Respondent and determine as follows:

    a. I saw evidence of the Claimant's right to work in the United Kingdom and of the guarantee given to him by Mr Kennedy that he would be paid £100

per day ("I can guarantee you a job starting at £100 a day @ 6 days/week"… Work is 100% guaranteed").

b. The Claimant's evidence that he worked between the dates set out above, six days a week for six weeks (Monday to Saturday) plus two Sundays was not challenged and I make a finding to that effect.

c. I saw confirmation of the payment of £200 from the Respondent on 10 October. I accept that the Claimant could no longer afford to work for the Respondent beyond that date and that he therefore attempted to speak to Mr Kennedy on 11 October, but since this was not possible, he ceased working for the Respondent thereafter.

d. For the avoidance of doubt, I also saw a WhatsApp message in which the Claimant informed Mr Kennedy that he does not speak English and I accept that they were using Google translate in the messages between them. However, this was not relevant to the issues before me, in that there was no counterclaim from the Respondent and I therefore considered that there was no reason for me to address the level of the Claimant's performance as asserted by the Respondent in the email of 14 October 2020, or the reasons why it might have been below what was acceptable to Mr Kennedy, even if that was the case. In any event, I also note for completeness that the Claimant produced evidence of work he had finished, which he told me, and I find as a fact, he photographed and sent the photos to Mr Kennedy for his approval on completion. If Mr Kennedy had issues with the Claimant's work, he could have raised it at the time, but he has not done so until a year later and has not produced any evidence in support of his assertions.

The Law

9. Pursuant to section 13 Employment Rights Act 1996 ("ERA"), an employer shall not make a deduction from wages of a worker employed by him unless it is required or authorised to be made by virtue of a statutory or contractual provision, or where the worker has given their written consent to the deduction. A "deduction" includes an occasion where the worker receives less than the amount "properly payable" (section 13(3)).

10. A complaint that such a deduction has been made is brought under section 23 ERA and, if the Tribunal finds the complaint well-founded it may, under section 24(2), order the employer also to pay such amount as the Tribunal considers appropriate to compensate the worker for any financial loss sustained by him which is attributable to the matter complained of.

Conclusions

11. The Claimant was entitled to be paid for a total of 38 days at £100 per day. Therefore I award him £3,800, but I give credit for the amount he has already received of £200 and therefore the Respondent is ordered to pay him £3,600.

12. The Claimant has also had to take time off work on more than one occasion to try to get the money he is owed. He told me, and I find as a fact, that he had lost a day's pay for the Hearing at £135 for the day, and I award him that amount under section 24(2) Employment Rights Act 1996.

13. Accordingly, the total to be paid to the Claimant is £3,735. Although ordinarily it might be expected that a worker in these circumstances would be paid net, it appears the Claimant was never set up on the Respondent's payroll and hence I am ordering that the amount is made gross and the Claimant will have to account

for his own tax and National Insurance.

14. I record that there are two further considerations. One is that the Claimant still has a complaint of race discrimination which has not yet been dealt with. He has repeated, as he said before EJ Spencer, that he will not pursue this complaint if he receives his wages. I have therefore said that the Claimant must inform the Tribunal by no later than 15 December 2020 if he has been paid the amount ordered, and if not, I will list the matter for a further PHCM at which the issue of the race discrimination complaint will be addressed and the matter potentially listed for a further full merits hearing to deal with that point.

15. In addition, I record that I am considering making an employer penalty under section 12A Employment Tribunals Act 1996, because the Respondent has breached the Claimant's rights and I am of the opinion that the breach has one or more aggravating features. It is unacceptable that the Claimant has not been paid the very considerable majority of his "guaranteed" wages, more than a year after he completed the work for the Respondent, and that a thinly-veiled threat to bring proceedings against him should have been made during the course of this case if he did not withdraw the complaint. Again, however, this issue can be addressed at any further PHCM that may be necessary in the matter, since the Tribunal is required to have regard to the employer's ability to pay such a penalty and I have not yet heard any evidence in this regard. If it is necessary, I will send out directions to facilitate the taking of such evidence.

Employment Judge Norris
Date: 1 November 2020

JUDGMENT SENT TO THE PARTIES ON

02/11/2020

FOR THE TRIBUNAL OFFICE