Case Number: 2414961/2019
Code V

EMPLOYMENT TRIBUNALS

Claimant: Mr S Flesh

Respondent: Mr M Brownhill trading as Cheshire Tree and Lawn Care Ltd

FINAL HEARING

Heard at: Manchester (in private; by video conference)

On: 16 October 2020

Before: Judge Brian Doyle (sitting alone)

Representatives
For the claimant: Ms L Fresh, claimant's partner
For the respondent: Mr M Brownhill

RESERVED JUDGMENT

The claim is well-founded. The respondent is ordered to pay to the claimant the total sum of £2,466.02 gross

REASONS

1. The claim contains complaints of (1) unlawful deductions from or non-payment of wages and holiday pay; (2) non-provision of statutory employment particulars; and (3) non-provision of statutory itemised pay statements.

Introduction

2. It was the subject of a written case management summary prepared by Employment Judge Batten on 20 March 2020 and sent to the parties. Although the respondent had not participated in that case management hearing, I consider that the case to be decided was accurately summarised at paragraphs 3-9 of that judicial document. The complaints and issues were set out appropriately at paragraphs 10-15 therein. The claim has not been subject to any case management orders, as far as I am aware from the material available to me at this remote hearing.

3. The remote hearing was conducted via the Cloud-based Video Platform (CVP). There was no difficulty experienced in the parties participating in a remote hearing by those means. However, for logistical reasons I considered it better to reserve my judgment and to promulgate it as soon as possible after the remote hearing had concluded.

4. In addition to the judicial document referred to above, I had before me at the hearing, or immediately after it, the following documents, so far as were relevant to my consideration of this claim: (1) ET1; (2) ET3; (3) a 3 page document from the respondent setting out his response to the case management summary (in black) and a copy of that document annotated by the claimant's lay representative responding to the respondent's comments (in red); (4) correspondence between the parties and with Acas (which I have not had regard to); (5) a screenshot from the claimant's online banking account; (6) a screenshot of the claimant's HMRC income tax account; (7) the claimant's schedule of loss; and (8) 5 printouts of tracker information for a company vehicle, registration NL04 XUP, Ford Transit Connect.

5. I heard evidence from Mr Brownhill and from Mr Flesh. I questioned both witnesses, who also cross-questioned each other (Ms Flesh asking questions of Mr Brownhill and Mr Brownhill asking questions of Mr Flesh). I gave both witnesses an opportunity to add to their evidence if they wished. Mr Brownhill and Ms Flesh summarised each side's position, at which point I reserved my decision.

6. It was agreed that the outset that Mr Brownhill trades as a limited liability company, Cheshire Tree and Lawn Care Ltd. The title of the proceedings is amended accordingly.

7. In many ways this is a typical case involving a dispute about hours of work, the payment of wages and holiday pay, and the provision or non-provision of employment particulars and itemised pay slips. Neither side had the advantage of professional representation and inevitably their respective cases were sometimes put forward in a way that generated more heat than light. I was disadvantaged by the lack of original documentation (itself a matter at the heart of the claim) and by the rudimentary preparation on both sides (there being no hearing bundle or witness statements). I had no assistance from other witnesses who might have brought some non-partisan or independent perspective to the process. Nevertheless, all three participants (Mr Brownhill, Mr Flesh and Ms Flesh) genuinely sought to give me their best evidence and/or their genuinely held view of the rights and wrongs of the matter.

Findings of fact

8. It is against that background that I have sought to make the following findings of fact.

9. The respondent is a small owner-managed company that provides contracted-for landscape services (as its entry in the Companies Register records). The name of the company describes what it does. Mr Brownhill is its sole director.

He employs some 5 or 6 employees at any given time. He engages an accountant to provide payroll services and, no doubt, to prepare his accounts and to give him general advice on tax, contracts, etc.

10. The claimant, Mr Flesh, had previously been employed by Mr Brownhill as a gardener, maybe some 6 or 7 years ago (the parties could not recall the exact period) and it seems that they had known each other for some 18 years or so outside of work. This claim is concerned with the latest period in which Mr Flesh was employed by Mr Brownhill (or more accurately the respondent company) between 8 July 2019 and 22 November 2019.

11. Shortly before this period of employment commenced the two men met at Mr Brownhill's house, seemingly for the purpose of agreeing on what terms and conditions their renewed employment relationship would proceed. It does not appear that their discussion was at all detailed. Neither men could agree at the hearing before me on what was discussed and what was agreed between them. It seems probable that they discussed no more than when Mr Flesh would start, what he would be paid and what would be his hours of work.

12. Despite Mr Flesh asking for a contract of employment on more than one occasion, no letter of appointment or contract of employment or statutory statement of employment particulars has been issued at any stage. No notes or minutes or other record of the meeting were made or kept. Mr Brownhill concedes that. It seems that he was unaware of his obligations in that regard or the wisdom of keeping a written record of his employees' terms of employment. This is how such disputes arise, of course, and why they end up in the Employment Tribunal. He is resolved to seek his accountant's assistance in remedying that state of affairs going forward.

13. It is clear that they agreed on the start date and on the rate of pay. They did not appear to address the question of holidays or holiday pay, leaving that matter to be assumed between them. I am satisfied that there was a discussion of hours of work, but here there is an evidential dispute between them.

14. Mr Flesh believes that he was told that his working week would be 35 hours. However, he also asserts that once he began his employment Mr Brownhill told him that his hours of work were 7.30am to 4.30pm with a 1 hour dinner break. That would amount to an 8 hours working day and a 40 hours working week. When Mr Flesh tried to discuss this with Mr Brownhill it is alleged that the respondent threatened to sack the claimant if he continued to pursue the matter.

15. Mr Brownhill does not accept that account. His belief is that it was agreed (or at least intended) that the working day was 8.00am to 4.00pm, with a 1 hour dinner break, amounting to a 7 hours working day and a 35 hours working week. That is the basis upon which Mr Brownhill paid Mr Flesh wages during the almost 5 months period in which Mr Flesh worked for Mr Brownhill. However, there are no itemised pay statements made available to me to verify that.

16. The matter is complicated by the fact that the working day would start and finish at the respondent's yard, where some 15 minutes or so would be required for loading up the van with tools and equipment for that day's work; then driving to the site at which the employees were to work that day; and then returning to the yard at day's end and unloading the van. The waters are also muddied by Mr Flesh's preference to arrive at the yard at about 7.15am or so in order to avoid rush hour traffic. Mr Brownhill's evidence is that Mr Flesh would sit in the van until commencing work at 8.00am. He relies on vehicle tracker evidence to show that Mr Flesh did not work after 4.00pm. I note that some tracker evidence has been disclosed, but the claimant's request for further such evidence has not been responded to.

17. It also seems that on occasions he collected other employees who lived locally and brought them to the yard. There is a dispute between both parties as to whether Mr Flesh charged his colleagues for that service and whether he also used the company vehicle for his own purposes, such as carrying out "foreigners" (private work for his own clients). Those matters are a distraction from the main question to be determined and it is not necessary for me to become embroiled in that aspect of the dispute.

18. What is in dispute for my determination is the question of holidays. Mr Flesh's evidence is that by September 2019 he had taken 1 day in August 2019 for a funeral and 1 day for the August Bank Holiday. He says that Mr Brownhill said that he would not treat the day for the funeral as part of his holiday entitlement. When Mr Flesh checked his holiday position with Mr Brownhill he was then told that he had 6 days left to the end of the year. Mr Flesh queried this and believed that Mr Brownhill told him that he had changed his mind about the day off for the funeral and was now treating that as part of holiday entitlement.

19. Mr Flesh took 2 days holiday in November 2019. He asked Mr Brownhill how many days he had left and was again told that it was 6 days. Mr Flesh's wife checked the position with an online holiday calculator, as a result of which Mr Flesh believed that, having already taken 4 days, he remained entitled to a further 9.6 days. Again, his evidence was that when he queried this with his employer the implication was that he would be dismissed if he continued to press the point.

20. Mr Flesh's evidence is that at no time during his employment was he provided with an itemised pay slip (or a pay slip of any kind). When he asked about it on a number of occasions Mr Brownhill told him that he would sort it out, but he did not do so. What Mr Flesh is confident about is that his wages paid into his bank account monthly did not vary and that no deduction for a workplace pension appears to have been made.

21. In the result, Mr Flesh's wife advised Mr Brownhill by text message on 22 November 2019 that Mr Flesh would not be returning to work as a consequence of the above matters. This was effectively a resignation without notice.

Discussion

22. Standing back from all this disputed evidence and findings, and taking account of the difficulties created by the quality of the evidence before me, what is to be determined here?

23. Part 1 of the Employment Rights Act 1996 requires an employer to provide a statutory statement of employment particulars. It is conceded that this was not done. The complaint in respect of this matter is thus well-founded. Given the relative shortness of the employment, I consider that an award of 2 weeks' pay is appropriate. The calculation is 40 hours x £9.00 x 2 weeks, a total of £720.00.

24. I consider that, in the absence of written agreement, it is probable that the original oral agreement between the parties was to the effect that the hours of work were 8.00am to 4.00pm, but that that was implicitly referring to the work to be done on site on any given day. No account was made for the need first to attend at the yard to load the van with tools and equipment for the day, and then to drive to any particular site at which work was to be performed that day. Similarly, no account was made for returning to the yard at the end of the day to unload the van.

25. Such arrangements often arise because of an assumption on the part of employers that such "before" and "after" time and "travelling" time between main base and site of work is not part of contractual hours, although essential to the work, and is to be treated as unpaid. There is also an approach, as here, of a degree of "give and take" because on some days work on site would finish early and no objection would be taken to employees returning to base early and then leaving for home.

26. This time, however, is properly to be treated as part of actual working time. All of this is an unfortunate consequence of the respondent's conceded failure to provide any form of employment contractual documentation. On the balance of probabilities, I conclude that (ignoring entirely Mr Flesh's additional preference for arriving at work early) the working day was actually 7.30am to 4.00pm. As a result, there is a breach of section 13 of the Employment Rights Act 1996 in that the consequent underpayment of wages represents an unlawful deduction from or non-payment of wages. That amounts to 20 weeks at 5 hours per week at £9.00 per hour, a total of £900.00 gross.

27. So far as holiday pay is concerned, applying the relevant provisions of the Working Time Regulations, Mr Flesh's holiday year commenced on 8 July 2019 and ended on 22 November 2019. That is a period of 138 days. Only one Bank Holiday fell in that period, for which the claimant was paid. Including the funeral day off, a further 3 days holiday were taken and paid for. The proportionate annual entitlement would have been 138/365 x 28 = 11 days. Accordingly, Mr Flesh is owed 7 days holiday at £72.00 per day (8 hours at £9.00 per hour), a total of £504.00 gross.

28. Finally, although Mr Brownhill asserts that pay slips were prepared by his accountant and handed to employees by Mr Brownhill himself, no pay slips

have been provided in evidence and I have no independent corroboration of Mr Brownhill's contested assertion. It is also clear that Mr Brownhill manages his business somewhat informally and without necessary regard for legal documentation. On the balance of probabilities, I conclude that itemised pay statements were not provided to the claimant and that there has been a breach of the further relevant provisions of the Employment Rights Act 1996. I accept Judge Batten's suggestion that an award of up to £585.00 is appropriate and I adopt that sum as the remedy.

29. The claimant accepts that he must give credit for an unexplained payment into his bank account by the respondent on 6 December 2019 of £192.68.

30. As I explained to the parties, I have no jurisdiction to determine any other matters of dispute between them. That includes the question of whether the respondent has properly paid into a statutory workplace pension for the claimant. From Mr Brownhill's evidence, and in keeping with his somewhat relaxed approach to formal requirements, I am not persuaded that he has. I cannot rule on that matter as it does not fall for determination by an Employment Tribunal. Mr Brownhill indicated that he would ask his accountant to look into the matter.

Conclusion

31. The complaints in respect of non-provision of statutory employment particulars and itemised pay statements, and of unlawful deductions from or non-payment of wages and holiday pay are well-founded. The claim is upheld.

32. The respondent is ordered to pay to the claimant the following sums:

Statutory statement of employment particulars	£720.00
Itemised pay statements	£535.00
Unpaid wages	£900.00
Unpaid holiday pay	£504.00
Less credit for payment made 6 December 2019	*-£192.98*
Total	£2466.02

33. The above sums have been calculated on a gross basis.

Judge Brian Doyle

DATE 21 October 2020

RESERVED JUDGMENT & REASONS

SENT TO THE PARTIES ON

3 December 2020

FOR THE TRIBUNAL OFFICE

Case Number: 2414961/2019
Code V

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: **2414961/2019**

Name of case: **Mr S Flesh** v **Marc Brownhill**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding discrimination or equal pay awards or sums representing costs or expenses), shall carry interest where the sum remains unpaid on a day ("*the calculation day*") 42 days after the day ("*the relevant judgment day*") that the document containing the tribunal's judgment is recorded as having been sent to the parties.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant judgment day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant judgment day" is: **3 December 2020**

"the calculation day" is: **4 December 2020**

"the stipulated rate of interest" is: **8%**

For and on Behalf of the Secretary of the Tribunals