



EMPLOYMENT TRIBUNALS

Claimant: Mr K Omonbo

Respondent: Nella Cutlery South Ltd

Heard at: London South

On: 7th December 2020 **by:** CVP

Before: Employment Judge Clarke (sitting alone)

Representation

Claimant: Mr K Omonbo

Respondent: Dawn Oliver of Peninsula Business Services Ltd

RESERVED JUDGMENT

(1) The Claimant's claim that the Respondent had made an unlawful deduction from the Claimant's wages pursuant to section 13(1) of the Employment Rights Act is unfounded.

(2) The Respondent's counterclaim for overpaid holiday pay is well-founded. The Claimant is ordered to repay the sum of £299.97 to the Respondent.

REASONS

Introduction

1. By a claim form presented on 17th July 2019 the Claimant complained of unfair dismissal, failure to pay notice, and arrears of pay, namely a failure to pay for overtime worked.

2. The Respondent submitted a response form on 17th September 2019. A further, more detailed, response with particulars was sent on 27th September 2019, which, by the Tribunal's order of 23rd January 2020 is treated as an amendment to the Response.
3. The Response resists the Claimants case, in essence saying that the Claimant has been paid all the overtime that was due to him.
4. The Respondent also counterclaims for £399.96, equivalent to 3 days of pay arising from the fact that the Claimant had taken more holiday than he had accrued.
5. By the Tribunal's order of 23rd January 2020, the Claimant's claim for unfair dismissal was struck out.
6. The case has been before the tribunal on 2 previous occasions, on 5th February 2020 when it was listed as a final hearing but was given case management directions as the Claim had not been identified with sufficient precision to proceed. Directions were given and the case was then due to be heard on 14th April 2020 but had to be postponed again due to coronavirus restrictions.
7. The Hearing took place by Cloud Video Platform. The Claimant represented himself and the Respondent was represented by Dawn Oliver of Peninsula Business Services Ltd.

The evidence

8. I had a witness statement from the Claimant dated 28th April 2020 and 2 witness statements from Julie Mannering, the Respondent's HR manager on behalf of the Respondent, dated 4th February 2020 and 27th May 2020. I heard sworn evidence from the Claimant and from Julie Mannering.
9. I also considered documents contained in a 129 page bundle which the parties referred to in evidence and further documents which were provided electronically at the start of the hearing by each party, namely: a Driver Activity Schedule and an annotated sheet of overtime and PCN deduction (produced by the Claimant); and annotated wage slips, a handwritten set of calculations and an excel spreadsheet of driver activity (produced by the Respondent).
10. At the conclusion of the evidence both the Claimant and the Respondent made brief oral submissions and I further had regard to written submission made on behalf of the Claimant in a document entitled "written submissions on behalf of the Claimant for the hearing on 5th February 2020".

Issues for the Tribunal

11. At the start of the hearing, I queried the figure sought by the Respondent in respect of the counterclaim— which was £399.96 on the face of the Response form

and £299.97 in the witness statement of Julie Mannering dated 4th February 2020. I received clarification from the Respondent that the claim was for £299.97, representing 3 days basic pay.

12. The Claimant confirmed what he had previously agreed at the hearing on 14th April 2020, namely that his Claim for notice pay is no longer maintained. Also, that he was no longer pursuing any claim for unlawful deduction of parking fines and/or shortages from his wages. He also confirmed that he had:
 - (i) taken a total of 19 days holiday between 1st January 2019 and 29th April 2019.
 - (ii) carried 1 day of holiday over from his 2018 holiday year entitlement.
 - (iv) been paid £200 by the Respondent on 12th June 2019.
 - (v) been paid a further £147.05 by the Respondent on 20th October 2020.

13. He further agreed that the only claim he pursues today is that for overtime worked but not paid. He told me that he was claiming for 334.13 of overtime at a rate of £25 per hour and totalling £8,353.25 but agreed that he had already received some payments for overtime which should be deducted from this. He was unable to give me a figure for the actual amount that he wished to claim but referred me to the annotated sheet of overtime and PCN deduction which had been generated by the Respondent and showed a figure of £1,802.13 paid to the Claimant by way of overtime during the course of his employment and said that this was the figure which should be deducted from the £8,353.25 he claimed.

14. Having dealt with these points, I agreed with the parties that the issues to be determined by the tribunal were:
 - (i) Whether the Claimant is entitled to be paid for the time it takes him after his last delivery of the day until he arrives home.
The Claimant's case is that he is. The Respondent's case is that this period is in effect "commuting" and is not considered to be working time.
 - (ii) Whether the Claimant has been paid for all the overtime which he has accrued.
 - (iii) If not, how much is the Claimant owed by way of completed but unpaid overtime?
 - (iv) Whether the Claimant took more holiday in the holiday year in which his employment came to an end than he was entitled to;
 - (v) If so, by how many days did he exceed his accrued entitlement and by how much was the Claimant overpaid as a result of exceeding his accrued holiday entitlement?

Relevant Findings of Fact:

15. There was no dispute as to the primary facts in relation to the nature and duration of the Claimant's employment.

16. The Claimant was employed by the Respondent as an International Driver between 28th August 2018 and 29th April 2019, when he resigned with immediate effect. His job entailed him driving a company van and delivering and/or collecting

knives from various customers of the Respondent who required them to be sharpened.

17. His contract of employment was signed on 31st August 2019 and can be found at pages 51-53 of the bundle.
18. At page 51, the Claimant's contract provided that his normal hours of work were to be 6am to 5pm on Mondays, Tuesdays, Wednesdays and Fridays and 6am to 10pm on Thursdays but that this may be varied according to the needs of the business and he may be required to work additional hours "when authorised and as necessitated by the needs of the business". He was entitled to a 30-minute unpaid lunch break.
19. The terms of his remuneration are set out on page 52 of the bundle. They state that he was to be paid at the rate of £9.09 per hour gross on a weekly basis but would be required to do either 1 overnight per week paid at a fixed fee of £25.00 or one late night per week paid at the hourly rate.
20. In asserting that the overtime rate was £25.00 per hour the Claimant relied on his understanding as to what was said during his initial job interview and on the annotated sheet of overtime and PCN deductions. This latter document had typed columns "o/t hours", "@£9.0900 o/t £" and "@£25 overnight o/t" and a figure of 25 in a handwritten calculation. The typed column headings are entirely consistent with the terms of the written contract of employment. The Claimant was unable to direct me to any other document where a £25.00 rate for overtime was set out and told me that he had not read the contract of employment before signing it.
21. There was also an Employees Handbook which related to the Claimant's employment. The handbook set out the Respondent's process for recording working hours under a section entitled "Payment of Wages". This can be found at pages 57-58 of the bundle. Subsection C explains the "Blip" system, an online tracker. It requires employees to scan an OCR code on the wall of the depot on arrival and again on departure.
22. The Claimant used a company vehicle for his deliveries. The vehicle was fitted with a tracker which switched on and off automatically with the engine. The Claimant's practice was to contact his manager when he had seen the last customer of the day and then drive straight home rather than returning to the Respondent's depot. Nothing that I was shown in his contract or the Employees Handbook required him to return to the depot at the end of the day. In the morning he would drive to the depot before starting his daily deliveries/collections. He stated that he did not scan the OCR code at the depot as the handbook indicated that he should. He also told me that he should not be paid for his time spent travelling from his home address to the depot in the mornings.
23. The parties were agreed that the Claimant was expected to contact his manager by telephone at the scheduled end of his shift (usually 5pm) and tell him where he was in his route and whether it was complete. He would then be told either to complete his route or not. If he was told to complete his route and go beyond his contracted finishing time to do so, the additional time would be authorised.

24. The Respondent's spreadsheet records compiled using the van tracker show the start time, the out time (when he left the depot), finish time (last customer) and home time.
25. The Claimant's schedule of overtime showed a total of 334.14 hours of overtime undertaken. The Claimant agreed that the Respondent's spreadsheet accurately recorded the relevant times. He had not kept independent records of his time worked.
26. However, the Claimant adopted an inaccurate approach in calculating the overtime worked. He used the home time recorded by the Respondent but frequently rounded the difference between this and his 5pm contractual finish time to the nearest hour when stating the overtime worked. Accordingly, neither the daily overtime figures on his schedule nor the total overtime figure is accurate. The Claimant was unable to provide an accurate figure for overtime worked.
27. The Claimant's normal basic pay was £499.95 gross for 55 hours work. This can be seen on his payslips - which can be found at pages 110 to 125 of the bundle - and was not disputed.
28. It was also not disputed by the Claimant that he was paid for overtime on a number of occasions - as can also be seen on his payslips. He was paid in respect of overtime at the rate of £9.09/hr when his manager had initialled the hours on the time spreadsheet that went to payroll to confirm that the additional hours had been authorised.
29. The Claimant accepted that he was supposed to contact his manager regarding overtime authorisation in the manner set out in paragraph 23 above. Both parties agreed that when he contacted his manager, it was by telephone and the authorisation he received was verbal. The Claimant made no records to show when he had received authorisation and was unable to provide any evidence of dates on which he had been authorised to undertake overtime but had not been paid for it. He made his claim for overtime worked but unpaid based on the spreadsheet time records provided by the Respondent.
30. The Claimant did not always contact his manager when he was expected to. This was a matter which was raised with him during his probationary review meeting on 1st March 2019 (page 63 of the bundle) and at a further review meeting on 29th April 2019 (page 67 of the bundle).
31. The Claimant worked abroad during the period 14th January 2019 to 22nd February 2019 inclusive. The Respondent would have paid for hotel accommodation during this time, either by allowing him to take the money for the hotel from his route money or by paying the hotel direct. However rather than using a hotel during these weeks the Claimant stayed with a relative who had a spare room instead, in the expectation that he would receive an additional amount of pay equivalent to what the Respondent would have paid for hotel

accommodation. This expectation arose from a conversation which he described but could not say when it occurred or which of his managers it had been with.

32. For these weeks the Claimant was paid a gross amount of £729.93 each week inclusive of his basic pay plus overtime (see an example of his payslips at page 118 of the bundle). On each week this was in excess of the Respondent's contractual obligation, which was to pay him for 4 extra overnight fees at a flat rate of £25.00 per night in addition to his overtime calculated at his usual hourly rate of £9.09 per hour. The excess amount paid was not however equivalent to the hotel accommodation allowance.
33. The Claimant's holiday year runs from 1st January to 31st December each year. His holiday entitlement in each holiday year was a total of 28 days including any public or bank holidays. This is set out in his contract on page 52 of the bundle. The contract also states that "In the event of termination of employment, holiday entitlement will be calculated as 1/12 of the annual entitlement for each completed month of service during that holiday year and any holidays accrued but not taken will be paid for. However, in the event of you having taken any holidays in the current holiday year which have not been accrued pro-rata, then the appropriate payments will be deducted from your final pay."
34. In relation to holiday entitlement, the handbook states at page 59 of the bundle, paragraph 7 "Your holiday pay will be at your normal basic pay unless shown otherwise on your Statement of Main Terms. Due to the nature of our work, public/bank holidays are not recognised and are treated as normal working days."
35. In the 2019 holiday year the Claimant worked from 1st January 2019 until 29th April 2019 and accordingly, under his contract terms had accrued 7 days of holiday by the end of his employment. He had also been permitted to carry 1 day of annual leave over from his previous holiday year, meaning that he had a total of 8 days holiday entitlement. During this holiday year he had in fact taken 19 days holiday in total, comprising the 3 standard bank holidays (which he did not work) plus 16 days between 4th March 2019 to 25th March 2019 inclusive.
36. When his termination pay was calculated by the Respondent, a deduction of £799.92 was made in respect of 8 days of holiday taken in excess of that accrued.

Relevant Law and Conclusions – The Claim

37. Section 13(1) of the Employment Rights Act 1996 confers on a worker the right not to suffer an unauthorised deduction from wages and section 13(3) of the Employment Rights Act 1996 defines a deduction. The effect of this section is that there will have been a deduction where there is a complete or partial failure by the employer to pay what was properly payable on a particular occasion.
38. Section 23 of the Employment Rights Act 1996 gives a worker the right to complaint to the Tribunal in the event of an unlawful deduction.

39. Under section 23(2)(a) of the Employment Rights Act 1996, claims must be presented within 3 months beginning with the date of payment of the wages from which the deduction was made, or where there has been a series of deduction, within 3 months of the last deduction in the series – section 23(3).
40. In this case, the Claimant was an employee of the Respondent and was therefore a worker within the definition of s.230(3) of the Employment Rights Act. He was therefore entitled to the protection conferred by section 13(1).
41. He claims a series of deductions from his wages, in respect of each payment of wages from the commencement of his employment until his final payslip dated 7th May 2019. His claim was presented on 17th July 2019, within 3 months of the final claimed deduction.
42. “Wages” are defined in section 27 of the Employment Rights Act 1996 as being “any sums payable to the worker in connection with his employment”.
43. Under the Claimant’s contract of employment, any hours worked in excess of his contractual hours of 6am to 5pm on Mondays, Tuesdays, Wednesdays and Fridays and 6am to 10pm on Thursday which were authorised by the Respondent were overtime which would fall within the definition of wages in s.27. However, the Claimant had no legal entitlement, under his contract of employment or otherwise, to be paid for any overtime that he worked which was not authorised by the Respondent.
44. Therefore, in order to succeed in his claim that the Respondent has unlawfully deducted from his pay sums in respect of overtime, the Claimant must show that he has worked more hours than his contractual hours AND that he was duly authorised by the Respondent to work those hours.
45. Additionally, he must show that he was not paid by the Respondent for any such authorised hours in excess of his contractual hours.
46. In this case it is not in dispute that the Claimant in fact worked more hours than he was contractually obligated to do. The times recorded by the Respondent and appearing on the recorded times show that the Claimant regularly recorded a finish time substantially beyond his contractual hours.
47. What was in dispute was whether or not all of those extended hours had been authorised by the Respondent and also whether, when authorised, the Claimant was entitled to be paid for the time after his last customer and before he arrived home.
48. So far as the Claimant’s entitlement to pay for the period spent returning to his home after his last customer, the Claimant has not satisfied me that this was. Nothing is said about this within the contractual documents I was referred to. Had the Claimant been required to return to the depot after his last customer, this would clearly have been included in his working time. However, he would then have had to commute from the depot to home –which I did not understand the

Claimant to be saying he would have expected to be paid for. Certainly, the Claimant accepted that he did not expect to be paid for his commute into the depot in the morning. In the absence of any express term relating to this or any other evidence or coherent argument to the contrary, I therefore accept the Respondent's submission that the Claimant's work finished when he completed the last customer and that his journey from there to home was in effect a commute that he was not entitled to be paid for.

49. That some of the additional hours were authorised is apparent. Both the annotated overtime and PCN deductions schedule produced by the Claimant (which shows that a total of 187.97 hours of overtime were authorised during the course of his employment), and his payslips clearly evidence that the Claimant was paid for a significant number of overtime hours. This was not disputed.
50. Nor was it disputed that the Claimant had not been paid overtime in respect of all the additional hours he worked or that he had in fact been paid for those which the Respondent had recorded on the annotated overtime and PCN deductions schedule.
51. The Claimant has also not been able to satisfy me that he was duly authorised by the Respondent to work any of the hours over his contracted work hours other than those that were accounted for on the annotated overtime and PCN deductions schedule and paid by the Respondent. The Respondent asserted that he had been paid for all overtime which his manager had recorded as having been authorised. The Claimant was unable to provide any convincing evidence that he had been authorised on any other occasion. His evidence in relation to authorisation was non-specific and somewhat vague, amounting to him simply stating when he finished (his contractual hours) he called in and was told to continue so he was authorised. However, it is apparent from the review meeting records that he did not always do so and he did not provide any specific dates when he said he had received authorisation as he had maintained no records to show when he had received the authorisation.
52. Nor has the Claimant been able to show that the correct rate of pay in respect of each and every hour of overtime was £25.00 per hour. This assertion is contrary to what is set out in his contract of employment about the rate of payment and is also contrary to what is contained within the typed column headings of the annotated overtime and PCN deductions schedule. The Claimant was unable to direct me to any other contractual document in which a figure of £25.00 was given as the overtime rate or to give me details of exactly when he had been told that the overtime rate was £25.00 per hour for all hours or by whom and in his final submissions, he said he would accept £9.09 per hour for his overtime.
53. I therefore find that the overtime rate was as set out in the contract of employment, namely £9.09 per hour plus £25 flat rate for any additional overnights. I also find that the Claimant has already been paid at the correct rate for all the additional hours that the Claimant worked which I am satisfied that he was authorised by the Respondent to work. The Claimant's claim for an unlawful deduction from his wages is accordingly not made out and fails.

54. In light of my findings and conclusions above, I do not need to go on to consider whether any deduction was authorised or exempt under sections 13(1) or 14 of the Employment Rights Act as I would have been required to do if the Claimant had established that a deduction had been made. Had I been required to do so I would have found that the deduction was neither authorised nor exempt.

Relevant Law and Conclusions - The Counterclaim

55. Under Regulation 4 of Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 an employer is only entitled to make a claim to the Tribunal for sums due to it from the employee that were outstanding at the conclusion of the employment if the employee brings a claim against the employer which includes a claim for breach of contract.

56. In this case, the Claimant's claim as originally brought included a breach of contract claim for notice pay. Although this was subsequently abandoned, it was still live at the time the Respondent brought their Counterclaim. The Respondent was therefore entitled to bring the counterclaim.

57. On the basis of my factual findings at paragraphs 33 - 36 above, the Claimant took a total of 11 days more holiday in the period 1st January 2019 to 29th April 2019 in excess of his accrued entitlement ($19 - 8 = 11$).

58. The Claimant's contract entitled the Respondent to recover the equivalent of his basic pay ($\pounds 499.95 \times 5 = \pounds 99.99/\text{day}$) for each day of holiday taken in excess of his accrued entitlement.

59. When his termination pay was calculated by the Respondent, the deduction of $\pounds 799.92$ covered only 8 days of excess holiday, rather than the 11 days the Respondent was entitled to deduct. This was a miscalculation.

60. At the conclusion of his employment the Claimant was therefore overpaid by $\pounds 299.97$ in respect of 3 days extra holiday taken but not accrued.

61. The Claimant did not actively dispute this. Nor did he suggest that the Respondent was not entitled to be repaid for these days.

62. I therefore find that the Respondent is entitled to an order that the Claimant do repay $\pounds 299.97$ in respect of holiday taken but not accrued.

Employment Judge Clarke
Date: 22nd December 2020