



EMPLOYMENT TRIBUNALS

Claimant: Mr C Nunes Aniza

Respondent: (1) PJ Walsh Butchers Limited
(2) The Secretary of State for Business, Energy and Industrial Strategy

Heard at: East London (by telephone (audio (A)))

On: 19th January 2021

Before: Employment Judge Reid

Representation
 Claimant: Mr Rommer (CAB)
 Respondents: did not attend

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was audio (A). 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 before the Tribunal were the Tribunal file, the Claimant's witness statement dated 18th January 2021 and the electronic bundle to page 130.

JUDGMENT (REMEDY) (Reserved)

First Respondent

1. The Claimant is entitled to a statutory redundancy payment pursuant to s135 Employment Rights Act 1996 of £2,370. 61 calculated as follows (aged 44 at relevant date):

5.5 x gross weekly pay £431.02* = £2,370.61

Less amount already paid (by Second Respondent) £1,896.55

= £474.10 (payable by the Second Respondent – see below)

(* weekly pay at £8.21 per hour (NMW rate April 2019 at relevant date) for 52.5 hours per week)

2. The Claimant is entitled to 4 weeks notice pay (subject to any deductions required by law) calculated as follows:

4 weeks x gross weekly pay £431.02 * = £1,724.08

Less amount already paid (by Second Respondent) £1,379.28

= £344.80 (payable by the Second Respondent – see below)

3. The Claimant is entitled to arrears of wages for the period 1st December 2017 to 1st December 2019 (the period allowed under s23(4A) Employment Rights Act 1996) (subject to any deductions required by law) calculated as follows:

NMW adjusted gross pay at 52.5 hours per week using rate at date of hearing (£8.72 per hour April 2020 rate) = £457.80 for 104 weeks = £47,611.20

Less amount actually paid for 42 hours per week at £8.21 per hour = £344.82 for 104 weeks = £35,861.28 (£112.98 weekly shortfall)

= **£11,749.92**

4. The First Respondent did not issue the Claimant with a written statement which complied with s1(4)(a) Employment Rights Act 1996, containing details of his rate of pay. The Tribunal awards 2 weeks pay pursuant to s38 Employment Act 2002

2 x 431.02* = **£862.04**

5. The First Respondent did not issue the Claimant with itemised pay statements pursuant to s8 Employment Rights Act 1996 and the Tribunal makes a **declaration** to this effect, in relation to the following periods:

1st April 2015 to 28th March 2016

11th June 2019 to 30th July 2019

Second Respondent

6. The Second Respondent is liable to pay the Claimant the outstanding balance of his statutory redundancy payment of **£474.10** pursuant to s166-170 Employment Rights Act 1996.

7. The Second Respondent is liable to pay the Claimant the balance of his notice pay of **£344.80** (subject to any deductions required by law) pursuant to s184(1)(b) Employment Rights Act 1996.

8. The Second Respondent is liable to pay the Claimant 8 weeks outstanding wages of **£903.84** (subject to any deductions required by law) pursuant to s184(1)(a) Employment Rights Act 1996 calculated as follows:

NMW adjusted gross pay at 52.5 hours per week using rate at date of hearing (£8.72 per hour) = £457.80 for 8 weeks = £3,662.40

Less amount actually paid for 42 hours per week at £8.21 per hour = £344.82 for 8 weeks = £2,758.56 (£112.98 weekly shortfall)

= 903.84.

REASONS

The Claimant's claims

1. The Claimant presented his claim form on 1st December 2019 claiming a statutory redundancy payment, notice pay, holiday pay and unpaid wages. In a nutshell, these claims arose because whilst the Second Respondent had paid a statutory redundancy payment and a notice pay payment the Claimant claimed that the correct amounts had not been paid to him because the First Respondent had been underpaying him under National Minimum Wages rates in the light of the actual 52.5 hours per week he worked throughout his employment (as opposed to the 'notional' 42 hours per week stated in his contract). The Claimant claimed that this meant that these payments had been wrongly calculated as a lower amount and also meant he had outstanding wages owed to him from during his employment, being the shortfall between what he was actually paid and what he claimed he should have been paid. The Claimant also claimed about a deduction of £219.42 made by the Second Respondent to his notice pay payment relating to unclaimed benefits.
2. The Claimant also claimed that the written contract which the First Respondent had given him did not contain the details required under s1 Employment Rights Act 1996 and claimed that the First Respondent had not always issued him with itemised pay statements in breach of s8 Employment Rights Act 1996 (in respect of which he only claimed a declaration).
3. The Claimant provided a schedule of loss (page 34) which was updated as regards the amounts claimed on the wages claim in the Claimant's representative's email dated 21st July 2020. At this hearing the Claimant did not pursue his claim that his notice pay should also reflect his NEST pension contributions (ET1 page 25 para 35(c)) or his claim for an uplift to an award for a breach of the ACAS Code of Practice (page 37) and these parts of his claim were withdrawn. The claim specifically for holiday pay (to the extent it was brought as an unpaid wages claim) was not separately pursued in the schedule of loss or at this hearing.
4. The Second Respondent submitted its response (page 48) on 13th March 2020 in essence saying that it had already paid all sums due to the Claimant as a statutory redundancy payment and a notice pay payment and that no further payments were due. It was said that the Second Respondent could not verify the higher amounts claimed. The Second Respondent (page 56 para 12) said that there would be no attendance at any hearing. By the time of this hearing the First Respondent's liquidation was completed (email dated 18th January 2021).
5. The Tribunal issued a judgment under Rule 21 on 30th June 2020 (page 69) (this was a reconsidered version of one made on 10th February 2020 (page 44)). This accepted the listed claims in para 1 as well founded against the First Respondent. One of the changes on reconsideration was to change the reference in para 1.3 from the Claimant's wages claim being brought as a claim for breach of contract to being

brought as a claim for unpaid wages. The claim had been made in both ways in the alternative in the claim form (para 29 page 23). It appears that the change may have been made so that the Claimant's claim for wages sat more squarely within s184(1)(a) Employment Rights Act 1996 as a relevant debt in relation to the Second Respondent. The Claimant's representative at this hearing asked for para 1.3 to be reconsidered again (back to being a breach of contract claim), it having been identified that if claimed only as an unpaid wages claim, the claim could only cover the claimed outstanding wages for the two years prior to the claim; if brought as a breach of contract claim there was no such limitation.

6. The Claimant attended this hearing and provided a witness statement. There was an electronic bundle to page 130 and I was provided with an additional document being a print out of the Claimant's registration for Universal Credit on 12th August 2019.

Relevant law

7. s168 Employment Rights Act provides that the amount of the redundancy payment payable by the Second Respondent under s167 Employment Rights Act 1996 is the redundancy payment which has not been paid (in whole or in part).
8. s182-184 Employment Rights Act 1996 provide that arrears of pay (to a maximum of 8 weeks) and notice pay are recoverable from the Second Respondent.
9. s17 National Minimum Wage act 1998 provides that where the employee has been paid at less than the required NMW rate the rate to be used to assess the shortfall in wages is the relevant NMW rate at the date of determination of the claim. In this case the relevant rate for the unpaid wages claim was therefore £8.72 per hour (April 2020 rate).
10. s38 Employment Act 2002 provides that where an employee has not been issued with a written statement complying with s1 Employment Rights Act 1998 and the employee wins another relevant claim, the award must be increased by 2 weeks pay and may, if just an equitable, be increased by four weeks pay.
11. s12(3) of the Employment Rights Act 1996 provides that the Tribunal can make a declaration if a successful claim is made under s11 regarding the provision of itemised pay statements.

Reasons

12. The amount of the statutory redundancy payment properly payable to the Claimant was the higher amount claimed, based on what he should have been paid at NMW rates for the number of hours he worked (52.5) rather than based on the number hours he was actually paid for (42), because assessing his pay by reference to the actual hours worked brought him below NMW rates. The consequent shortfall is payable by the Second Respondent under s168(1)(a) Employment Rights Act 1996.
13. The amount of the notice pay properly payable to the Claimant was the higher amount claimed, based on what he should have been paid at NMW rates for the number of hours he worked (52.5) rather than based on the number hours he was actually paid for (42) because assessing his pay by reference to the actual hours worked brought him below NMW rates. The consequent shortfall in the notice pay is payable by the Second Respondent under s184(1)(b) Employment Rights Act 1996.

14. The Second Respondent was entitled to make a deduction of £219.42 in relation to the benefits claimed by the Claimant (page 114). The Claimant registered for Universal Credit on 12th August 2019 (print out of entry provided for the hearing) which I have assumed also to be his date of claim because that would be consistent with his first payment of Universal Credit being made on 18th September 2019 (page 107), it being paid by calendar month from the date of claim, in arrears. His first assessment period was therefore 12th August 2019 to 11th September 2019 and the payment made on 18th September 2019 was for that assessment period. The Respondent can make a deduction for any employment related benefits which were claimed or for any such benefits which were not claimed but could have been. Universal Credit has replaced income based JSA. The Claimant had applied for an employment related benefit (Universal Credit) and therefore the Second Respondent was entitled to make the deduction of £219.42 (the Claimant did not dispute the calculation of the amount) because the Claimant received a benefit payable for the period between 11th August 2019 and 7th September 2019 (page 107), although not paid until after that period. It appears the confusion arose because the Second Respondent said that it was a deduction for benefits not applied for rather than saying it was for benefits actually applied for (page 114).
15. The Claimant was owed outstanding wages throughout the period of his employment based on what he should have been paid for the number of hours he worked (52.5) rather than based on the number hours he was actually paid for (42) because assessing his pay by reference to the actual hours worked brought him below NMW rates. I considered the Claimant's application for a reconsideration of para 1.3 of the June 2020 Rule 21 judgement but it had been made outside the usual 14 day time limit for such applications under Rule 71 of the Tribunal Rules 2013, by some 6 months. I therefore did not reconsider the June 2020 Rule 21 judgment. This means that the Claimant's wages claim against the First Respondent was limited to the period of two years prior to the presentation of the claim under s23(4A) Employment Rights Act 1996. It does not affect the period as against the Second Respondent as that is limited in any event to 8 weeks pay.
16. The written statement issued to the Claimant did not comply with s1(4)(a) Employment Rights Act because it did not contain details of his pay (page 91, there being no Appendix 1). An award of two weeks pay must therefore be awarded against the First Respondent. I do not find it just and equitable to increase that to 4 weeks pay because this was not a case where no written statement was provided at all.
17. The Claimant claimed he had not been given itemised pay statements for the following periods: 1st April 2015 to 28th March 2016 and 11th June 2019 to 30th July 2019. I therefore make a declaration to this effect.

Employment Judge Reid
Date 21st January 2021