



EMPLOYMENT TRIBUNALS

Claimant: Mr L Cowling

Respondent: Robinson & Co Developments Ltd

Heard at: Nottingham by Cloud Video Platform ('CVP')

On: 25 January 2021

Before: Employment Judge Ahmed (sitting alone)

Representation

Claimant: Miss Chloe Randall (Lay representative)

Respondent: Mr John Robinson (Director) and Mr Mike Robinson (Director)

JUDGMENT

The Judgment of the Tribunal is that:

1. The Claimant is entitled to a redundancy payment of £1,000.00
2. The Respondent is ordered to pay to the Claimant £871.00 net in respect of an unlawful deduction of wages for unpaid holiday pay.

REASONS

1. By a Claim Form presented to the Tribunal on 17 November 2020, Mr Lewis Cowling brings a complaint of an unlawful deduction of wages in respect of holiday pay and also seeks a declaration as to a redundancy payment.
2. Mr Cowling was employed by the Respondent as a Labourer from 29 October 2015 to 6 August 2020, which was the 'effective date of termination' and the 'relevant date'.
3. In terms of the Claimant's pay, although the ET1 Claim Form states that it was £417 per week gross, the Claimant's witness statement corrects this to £400 per week gross. The Claimant worked five days a week being 37.5 hours. His net weekly pay was £335.00 per week. He was also entitled to the benefit of a Company van for business and private use.

4. The Respondent is a relatively small business with two employees and two Directors. It is mainly engaged in the trade of building and development. Both the Directors joined this hearing remotely by video. Mr Cowling did not join the hearing as he has recently started new employment and did not wish to put his new job in jeopardy by taking time off. He was represented by Miss Randall, a lay representative. Mr Cowling has however produced a written witness statement which I have taken into consideration in coming to my decision. I have attached the appropriate weight bearing in mind that Mr Cowling has not given sworn evidence before this Tribunal. However, his absence makes no difference to the material facts which can be established from the undisputed documents or in some cases the absence of such documents.

5. On 6 August 2020 Mr John Robinson on behalf of the Respondent wrote to the Claimant as follows:

Dear Lewis,

As you are already aware of the present situation as laid out in the previous 2 letters, now we have had 2 large projects cancelled due to the ongoing crisis that is affecting the country.

It is therefore with great regret that we now have no option but to make you redundant with immediate effect.

6. The reference to the 'ongoing crisis' was clearly to the Covid-19 pandemic.

7. In the following weeks, Mr Cowling chased the Respondent in order to be paid his redundancy entitlement. He received no substantive reply or reason for non-payment. These chasers continued through September and into the middle of October.

8. On 23 October 2020 Mr Cowling began ACAS early conciliation. He was issued with an ACAS early conciliation certificate on 17 November 2020. He presented his claim to the Tribunal on the same day bringing claims for a redundancy payment and outstanding holiday pay.

9. The Respondent submitted an ET3 Response on 9 December 2020. They said that they did not dispute the fact of redundancy but queried the Claimant's age at the time of redundancy and thus the amount due to him. They also made reference to an allegation that the Claimant had damaged the Company van whilst it was in his care. They referred to "severe mechanical damage, dents and scratches" but did not specify what this damage was nor what the cost of any remedial work might be. They disputed the amount of holiday pay simply saying that the "dates are wrong". They also made reference to the Claimant receiving a payment of wages during his paternity leave which had been taken some ago and wished to offset this against any liability. There was also a suggestion that the Claimant had been working for a friend at a time in Cumbria whilst an employee for the Respondent.

10. The Respondent was therefore refusing to pay the Claimant both the

redundancy and the outstanding holiday pay for the following reasons:

- 10.1 That the redundancy payment and/or holiday pay has not been calculated correctly and should not be payable due to damage to the Company van caused by the Claimant;
- 10.2 That there was an agreement that Claimant's paternity pay would be offset against payment due to him;
- 10.3 That the Claimant was working in Cumbria for another employer prior to being made redundant and thus he had misrepresented the situation to his employers.

THE LAW

11. The relevant statutory provisions are contained in the Employment Rights Act 1996 ("ERA 1996") and are as follows:

Section 13: Right not to suffer unauthorised deductions.

- (1) An employer shall not make a deduction from wages of a worker employed by him unless—
 - (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
 - (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.
- (2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—
 - (a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or
 - (b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

Section 27: Meaning of "wages" etc.

- (1) In this Part "wages", in relation to a worker, means any sums payable to the worker in connection with his employment, including—
 - (a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise,

...

but excluding any payments within subsection (2).

- (2) Those payments are—
 - [(a) – (c) not relevant]
 - (d) any payment referable to the worker's redundancy,

CONCLUSIONS

12. It is not disputed that the Claimant was dismissed and that the dismissal was by reason of redundancy. If there was any doubt the Respondent's letter of 6 August 2020 and the ET3 Response puts the position beyond doubt.
13. The Claimant was aged 23 at the relevant date, he had been employed for 4 years and his gross pay was £400 per week. His redundancy entitlement is therefore £1,000.00.
14. An employer can make certain deductions from wages pursuant to section 13 ERA 1996 provided that they are firstly, deductions from "wages" and secondly, if there is a relevant provision to make such a deduction or if the worker has previously signified in writing his agreement or consent to the making of the deduction.
15. Redundancy payments are not 'wages' and therefore no deduction from them is possible under the above provisions – see section 27(2) ERA 1996. Any deduction in this case must therefore come from holiday pay due.
16. In relation to the amount of the holiday pay, there does not appear to be any statement or agreement as to how much annual leave the Claimant was entitled to. I have therefore taken the statutory minimum entitlement of 5.6 weeks. It is agreed that the holiday year began on 1 January. By 6 August 2020 the Claimant had therefore accrued 16.8 days of holiday which I shall round up to 17 days. I am satisfied that the Claimant had taken 4 days annual leave within the holiday year. The balance due was therefore 13 days.
17. In respect of the daily rate of pay, the Claimant's net weekly pay was £335.00. He worked 5 days a week. His daily rate of pay was therefore £67 a day. The entitlement to unpaid holiday pay is therefore £871.00, subject to any applicable deduction.
18. I reject the Respondent's contention that it should be entitled to make a deduction for damage to the Company van. No evidence has been provided in support of the contention that there was any damage or that the Claimant was responsible for it. The Claimant was not the only employee who used the van. It was also used by at least one other member of staff. Moreover, this allegation was only made when the Claimant was pressing for his redundancy money.
19. Similarly, there is no evidence whatsoever that there was an agreement that the Claimant would pay back any paternity pay from outstanding holiday pay when his employment ended. The Respondent does not have anything in writing from the Claimant signifying consent to the making of any such deduction.
20. The suggestion that the Claimant may have been working elsewhere prior to his redundancy has no bearing on either the liability to pay redundancy entitlement or outstanding holiday. The annual leave is calculated on the Respondent's date for dismissal.

21. For the reasons given, the Claimant is entitled to a redundancy payment of £1,000. The Respondent has also made an unlawful deduction of wages in respect of holiday pay in the sum of £871.00

Employment Judge Ahmed

Date: 18 March 2021

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

Covid-19 statement

This was a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video. It was not practicable to hold a face-to-face hearing because of the Covid-19 pandemic.

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