



EMPLOYMENT TRIBUNALS

Claimant: Mr T Czaplewski

Respondent: Ms A Kowalik

Heard at: London Central **On:** 29 September 2020
(Remote via CVP)

Before: Employment Judge K Welch

Representation

Claimant: In person

Respondent: Mr Sierant, lay representative

RESERVED JUDGMENT

1. The Claimant's claims for unlawful deductions from wages, holiday pay, notice pay and breach of contract are well founded and shall succeed.
2. The Respondent is ordered to pay the Claimant the total gross sum of £4,988.36 subject to appropriate deductions for tax and National Insurance. This is calculated as follows:-
 - a. £2,778.76 in respect of his unlawful deduction from wages claim for the period 17 July 2019 to 13 January 2020;
 - b. Holiday pay in the sum of £1,557.68;
 - c. Notice pay in the sum of £576.92;
 - d. Lunch payments for the notice period in the sum of £75.00.

RESERVED REASONS

1. This is a claim brought by the Claimant against his former employer for unpaid wages (unlawful deductions from wages), notice pay/ breach of contract and holiday pay relating to his employment, which was terminated on 13 January 2020.

2. The Hearing was a Remote Public Hearing, conducted using the Cloud Video Platform (CVP) under Rule 46. The Tribunal considered it just and equitable to conduct the Hearing in this way.
3. In accordance with Rule 46, the Tribunal ensured that members of the public could attend and observe the Hearing. This was done via notice published on courtserve.net. No members of the public attended.
4. The parties were able to hear what the Tribunal heard and see the witnesses as seen by the Tribunal. From a technical perspective, there were no difficulties.
5. The participants were told that it was an offence to record the proceedings.
6. The Claimant had provided a number of documents to the Tribunal in readiness for the CVP Hearing. These had been read by myself before the Hearing commenced. The Respondent confirmed that it had sent, on the afternoon before, an indexed Bundle of Documents to the Tribunal, which had not at that point been forwarded to myself. I therefore arranged for the clerk to send this to me and had a short adjournment in order to be in a position to have reviewed the additional documents. All parties had access to the documents provided by the Claimant and the Respondent's Bundle and page numbers within this Judgment refer to either page numbers in the Claimant's Bundle or page numbers in the Respondent's Bundle.
7. I heard evidence from the Claimant himself and Ms A Przybylek-Pieza, a third party, who had introduced the Claimant and the Respondent, and the Respondent herself. The evidence was tested by cross-examination and also questions from myself.

Findings of Fact

8. It was agreed between the parties that the Claimant was first introduced to the Respondent by Ms Przybylek-Pieza on 16 July 2019. It was also accepted that he

commenced some form of work for the Respondent the next day, namely 17 July 2019.

9. There is a dispute in evidence as regards the status of that work commencing on 17 July 2019 until 11 November 2019. During this period, the Claimant contends that he was an employee and carried out various tasks for the Respondent during this period. The Respondent considered the Claimant to be an intern and undertaking work experience for her business, and therefore considered that he was not an employee during this period. I am satisfied by the evidence of the Claimant and his witness that he was employed from 17 July 2019. It was clear to me that an agreement had been reached on 16 July 2019 as evidenced by the Claimant's witness such that he was employed from 17 July 2019 and was not, as the Respondent contended, carrying out work experiencing and training in order to become her assistant.
10. I am satisfied that the Claimant was employed as an assistant from 17 July 2019 until his termination on the agreed date of 13 January 2020.
11. There was a further dispute in evidence regarding the agreement concerning the amount of pay the Claimant was entitled to during the period 17 July to 11 November 2019. The Respondent contended that the Claimant was only entitled to £300.00 per week during this period and that this had been agreed with the Claimant due to his financial circumstances. The Respondent contended that she did not have to pay the Claimant as an intern/person undertaking work experience, but that she had done so in order to assist. The Claimant, however, as agreed by his witness, gave evidence that he had agreed with the Respondent prior to commencing employment on 17 July that he would be paid £15.00 per hour for a 40-hour week commencing the next day. I am satisfied that there was clear agreement that the Claimant would be paid in respect of his employment.

12. The Claimant gave evidence, which I accept, that it was agreed that he would receive £2,500.00 per month. The only evidence provided in respect of the £350.00 which the Respondent contended had been agreed, other than the Respondent's oral evidence, was in relation to the schedule of payments which the Respondent had prepared in readiness for the Tribunal Hearing [page 154 of the Respondent's Bundle]. Since this showed that, initially at least, the Claimant was paid £350.00 towards the beginning of his employment. However, the amounts did differ throughout the employment of the Claimant, and the Claimant gave evidence that he had complained about the underpayments to the Respondent orally, although did not have any email or written evidence supporting this. However, on balance, I consider, in light of the evidence of the Claimant and his witness, that it was agreed that he would receive £2,500.00 per month from 17 July 2019.
13. It was also agreed that the Claimant would receive payment for his lunches and this was not disputed by the Respondent.
14. It was not clear from either party of the exact amounts, which were due and outstanding. The Claimant in the Hearing agreed that the balance he had prepared was incorrect (namely £5,375.00). Rather, having calculated that he was employed for 25 weeks and 2 days, at the rate of £576.92 (which was accepted by both parties), this meant that his total earnings for that period should have been £14,653.76, whereas he had received £11,875.00. This left a balance outstanding of unpaid wages of £2,778.76.
15. The Respondent had prepared at page 55 of its Bundle a table showing the gross and net amounts, which both referred to there having been an overpayment of wages. I do not accept this because they are both calculated on the basis of the reduced payments between 16 July and 11 November, which I have found not to be the case.

16. Turning to holiday pay. The Claimant had been provided with a written Contract (pages 41 to 45 of the Respondent's Bundle). The evidence of both parties was that the Respondent had provided the Claimant with this Contract on 30 December 2019. The written Contract was for 40 hours per week at a salary of £2,500.00 monthly.
17. The Contract provided that the holiday year was from 1 January to 31 December. The Claimant was entitled to 28 days per annum (including public holidays), which is the same as the statutory minimum entitlement in the Working Time Regulations 1998.
18. The Respondent contended that, as there was a holiday year ending on 31 December, any holiday accrued prior to 31 December 2019 would have been lost as there were no carryover provisions in either the Contract or the Working Time Regulations, and therefore the only holiday entitlement due was from 1 January 2020 until the Claimant's dismissal on 13 January 2020. I do not accept this. It was clear to me that there had been no agreement prior to the Contract being given to the Claimant on 30 December 2019 that there was a holiday year and therefore his holiday year would run from the start of his employment. Whilst the Claimant had purportedly signed the Contract of Employment on 30 December 2019, the Respondent confirmed that it had never been received from the Claimant. I am therefore happy that the Claimant is entitled to holiday pay from the commencement of his employment, 17 July 2019, until 13 January 2020 when his employment ended.
19. The Respondent in her Witness Statement provided certain dates when the Claimant had not attended work. However, these were disputed by the Claimant, and there was no evidence as to whether these had been taken as holiday or agreed as either paid or unpaid leave. In the absence of any evidence in respect of this, I am not going to deduct these from the Claimant's annual leave entitlement.

20. The employment of the Claimant was dismissed with immediate effect on 13 January 2020 and it was accepted by both parties that the Claimant was entitled to receive one week's notice pay of £576.92 (subject to deductions). The Respondent considered that any overpayment made to the Claimant could be set off against this but, for the reasons set out above, I do not accept this since there were no overpayments and, even if there were, there is no right to deduct from what amounts to damages paid for the wrongful dismissal of the Claimant.

Law

21. I had regard to Sections 13 to 27 of the Employment Rights Act 1996. Section 13 states:

“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.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

(4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

(5) For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.

(6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.”

Conclusion

22. I am satisfied that the Claimant was an employee, who should have received £576.92 a week from the commencement of his employment on 16 July 2019 until his termination without notice on 13 January 2020. Having calculated the amounts due based on the information provided by both parties, I am satisfied that the Claimant is entitled to receive the gross sum of £2,778.76 (subject to appropriate deductions) in respect of unlawful deductions from wages.

23. In addition, I consider that he is entitled to holiday pay calculated pro rata in respect of the period 17 July 2019 to 13 January 2020.
24. Whilst the Respondent in its Response referred to various dates in paragraph 28.b.i, in evidence, the Respondent confirmed that it was not clear whether these days were taken as holiday or not. I am satisfied that the Claimant would have taken holiday on the bank holidays over the Christmas period, namely 25 and 26 December and 1 January. Therefore, I will give credit for three days' holiday having been taken during this period.
25. I therefore find that the Claimant is entitled to receive 10.5 days' holiday pay calculated at £1,557.68, subject to deductions for tax and National Insurance.
26. Finally, in respect of unpaid notice pay, the Respondent accepted that this was due to the Claimant subject to her argument that the amount should be set off against overpayments of salary. I do not accept this for two reasons:
- (i) Firstly, that there was no overpayment of wages and have ordered Judgment in respect of the amount I considered due.
 - (ii) Secondly, even if there had been an overpayment of wages, this could not be offset against pay in lieu of notice where there is no contractual entitlement to do so since this is damages as opposed to wages.
27. I therefore order that the Respondent is also to pay to the Claimant the sum of £576.92 gross (subject to appropriate deductions) together with a payment of £75.00 in respect of unpaid lunches for the notice period.

K Welch
Employment Judge Welch

Date 1 October 2020

JUDGMENT SENT TO THE PARTIES ON

06/04/2021...

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FOR THE TRIBUNAL OFFICE