



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant
Mr V Smeed

AND

Respondent
Dongbang Acuprime Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD REMOTELY
By VHS Video Platform

ON

30 April 2021

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: In person

For the Respondent: Dr J Park, Managing Director of the Respondent

JUDGMENT

The judgment of the tribunal is that:

- 1. The claimant's claim for accrued but unpaid holiday pay has been met by the respondent and is now dismissed on withdrawal by the claimant; and**
- 2. The claimant succeeds in his claim for unlawful deduction from wages and the respondent is ordered to pay the claimant the gross sum of £523.45.**

RESERVED REASONS

1. In this case the claimant Mr Vernon Smeed brings monetary claims for unlawful deduction from wages including accrued but unpaid holiday pay against his ex-employer DongBang AcuPrime Limited. The holiday pay claim has now been met by the respondent and is withdrawn. The respondent denies the remaining claim.
2. This has been a remote hearing on the papers which has been consented to by the parties. The form of remote hearing was by VHS Video Platform. 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 that I was referred to are in two bundles which have been provided by the parties of 34 pages and of 46 pages respectively, the contents of which I have recorded. The order made is described at the end of these reasons.
3. I have heard from the claimant. I have also heard from Dr J Park the Managing Director of the respondent.

4. There was a degree of conflict on the evidence. I have heard the various witnesses give their evidence and observed their demeanour in the witness box. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
5. The respondent is a private company which imports acupuncture and other medical supplies from Korea, China and Japan into the UK and Europe. Dr J Park from whom I have heard is the Managing Director and the proprietor of the respondent company. The claimant was employed as the respondent's UK Account Manager from 3 September 2018 until 23 July 2020.
6. The respondent became dissatisfied with the claimant's conduct and performance, and in a Skype video call on 15 July 2020 Dr Park suspended the claimant on full pay pending further investigations. At that time Dr Park was in America, and the claimant was in the respondent's office in Exeter. That Skype video call was recorded with the agreement of the parties, and it was produced in evidence today and I have seen it. Dr Park made it clear to the claimant that he was suspended with immediate effect pending further investigation, and that this was not a disciplinary sanction. He also made it clear that the suspension would be on full pay and that the claimant's entitlement to accrued holiday pay would continue to accrue. The claimant was required to hand over his keys, his company car, his company telephone, his company laptop, and to leave all the necessary passwords. Dr Park explained that the allegations against the claimant related to the removal of company property, bad faith towards his colleagues, and breaches of his contract of employment. The claimant was shocked and surprised and suggested that he intended to seek legal advice.
7. As explained further below, the respondent formed the view that the claimant failed to do act on Dr Park's instructions to hand over all the relevant information, and the claimant was subsequently dismissed summarily by gross misconduct which was communicated by letter dated 20 July 2020. The claimant received this letter on 23 July 2020, and this therefore was the effective date of termination of his employment.
8. The respondent accepts that it failed to pay the claimant his salary due for the month of July 2020. It is agreed by the parties that the amount of salary which should have been paid gross but which was deducted for the period between 1 July and 23 July 2020 was £1,843.45.
9. The claimant had signed a written contract of employment shortly after the commencement of his employment. Clause 9(c) of that contract provides: "Where any losses are sustained to the Employer's property or monies (or the property or monies of its clients, customers, visitors or other employees) during the course of your employment, this will be investigated. If it is determined the loss was due to your dishonesty, carelessness, negligence, recklessness or breach of the Employer's policies or procedures then you agree that the Employer may deduct the amount lost from your wages."

10. The claimant asserts that he left the respondent's premises as instructed when suspended on 15 July 2020, and that other employees had access to the relevant passwords for his company phone, and company laptop, which in any event had a program which was able to sync the two of them. The claimant denies disrupting the respondent's systems or otherwise losing any data, and he asserts that the respondent always had access to the relevant information, through a cloud storage system if necessary, it was unable to gain access, then the claimant should not be held accountable.
11. The respondent's version is different. The respondent asserts that immediately after being notified of his suspension on the afternoon of 15 July 2020 the claimant deleted the relevant business contacts from the company phone, and he then went on to delete over 5,000 emails on the company laptop. This was valuable commercial information with regard to suppliers, accounts and customers in the UK. This information was lost and the respondent tried to resurrect it, but it was unable to do so.
12. The respondent asked the claimant to assist, given his knowledge of the systems and the passwords. For instance, I have seen a letter dated 30 August 2020 in which Dr Park requests the claimant to assist by stating: "As the new operational system is being established, I would like to offer you another opportunity to assist the company to recover the contacts, files, the emails, and the list of those recoverable, and those not. These will help me to put some closure and plan to move on. I will arrange for you to access the email, phone, and the laptop."
13. The claimant did not agree to do this, and the respondent then engaged a specialist IT investigation company, namely Acronyms Ltd, to investigate and to provide expert assistance to seek to recover the lost information. Acronyms Ltd raised an invoice for this service to the respondent on 23 August 2020 in the sum of £1,100.00 plus VAT totalling £1,320.00.
14. The respondent also claims in paragraph 15 of its grounds of resistance the cost of additional work, being time spent by number of its employees seeking to remedy the position and the total sum of £1,319.63. The respondent asserts that is entitled to deduct the sums from the final July 2020 salary otherwise due to the claimant.
15. Having established the above facts, I now apply the law.
16. The claimant claims in respect of deductions from wages which he alleges were not authorised and were therefore unlawful deductions from his wages contrary to section 13 of the Employment Rights Act 1996.
17. The instructions from Dr Park to the claimant during the Skype meeting at which he was suspended on 15 July 2020 were clear, namely that the claimant was required to hand over the respondent's phone, laptop and other IT related property and to assist other staff to gain access to it, which was to include the use of relevant passwords. It is also clear to me on the balance of probabilities that the claimant failed to do this, because otherwise the respondent would not have spent the time, money and effort which it did

in seeking to retrieve the lost information, which was commercially valuable to it.

18. In my judgment the respondent is entitled to rely upon clause 9(c) of the signed contract of employment and these losses can be said to be caused by the dishonesty, carelessness or negligence of the claimant. I do not accept that the respondent is entitled to deduct the putative cost of work engaged by other employees as set out in paragraph 15 of the grounds of resistance. These people were already employees of the company and in my judgment the time spent was part and parcel of regularising matters after the departure of an employee. However, it is clear to me that the costs incurred by Acronyms Ltd was an additional expense over and above this, and in my judgment the respondent is entitled to rely upon clause 9(c) and deduct this sum from the final salary otherwise due to the claimant.
19. The parties agree that £1,843.45 was initially due. The respondent was entitled to deduct the sum of £1,320.00 from this. This leaves a balance due to the claimant of £523.45 which has not been paid and has been unlawfully deducted from his final salary.
20. The claimant therefore partially succeeds in his claim for unlawful deduction from wages and the respondent is ordered to pay to the claimant the gross sum of £523.45.

Employment Judge N J Roper
Date: 30 April 2021

Judgment and Reasons sent to the Parties: 05 May 2021

FOR THE TRIBUNAL OFFICE