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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4106842/2020

Final Hearing Held by Cloud Video Platform (CVP) on 23 February 2021

Employment Judge Eleanor Mannion

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Benjamin Elkin

**Claimant
In person**

Premier Security Scotland

**Respondent
Not present and not
represented**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the employment Tribunal is as follows:

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- The claimant does not have sufficient length of service for an unfair dismissal claim and so this claim is dismissed;
- The respondent was in breach of contract to the claimant in not making payment of all wages and expenses as well as making wage payments after the contractual payment date. The respondent is ordered to pay £4,591.89 to the claimant;
- The respondent failed to pay the claimant for annual leave and is ordered to pay £912.02 to the claimant;

- The claims for payment of £155 for a uniform refund and £60 for erroneous pay day advances are not well founded and are dismissed; and
- The claim for statutory paternity pay is out of time and so dismissed.

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REASONS

Introduction

1. This was the final hearing of claims contained in an ET1 presented on 27 October 2020. The Claimant was not represented and appeared on his own behalf. A Notice of Claim was sent to the Respondent on 3 November 2020, directing the Respondent to lodge an ET3 by 1 December 2020. An ET3 was not received by the Tribunal office within that timeframe or to date. Issuing a Rule 21 Judgement was considered by the Tribunal but it was decided that the matter should proceed to a final hearing as there was insufficient information to issue a judgement without the need for a hearing.
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2. In advance of the final hearing, the Claimant lodged documentation including pay slips, timesheets, mileage forms and bank statements setting out the monies he believed he was due. He also provided copies of emails as between himself and the respondent setting out his concerns in respect of errors in his pay and a lack of payslips. At the outset of the hearing, he confirmed that he was relying on these documents to support his claim.
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3. At the outset of the hearing, it was agreed that the issues for determination were:-
 - a. Whether the claimant had sufficient service to take a claim for unfair dismissal and if so, whether his resignation amounted to constructive unfair dismissal;
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 - b. If the claimant was due any pay in respect of annual leave either taken or untaken;

- c. If there had been unlawful deductions from his pay, specifically

Evidence

4. The Tribunal heard evidence from the claimant in respect of his claims.

Findings in fact

- 5 5. The Tribunal found the following facts admitted or proved.
6. The respondent is a security company, providing security for licensed premises, hotels, caravan parks, student accommodation, vacant properties, and large-scale events. They have an address at 60 Brook Street, Glasgow, G40 2AB.
- 10 7. The claimant's employment with the respondent began on 7 December 2018. He was employed as a door supervisor, carrying out security duties at a number of premises such as pubs, nightclubs, takeaways and hotels. He worked primarily at night.
- 15 8. The claimant signed a contract of employment in or around February 2019 but was not given a copy of this contract.
9. The claimant was employed on a zero hours basis and did not have set days or hours of work. The length of his shift depended on the premises he was working on and would be anywhere between 4 to 12 hours.
- 20 10. The claimant was informed of his working hours by way of email received from the respondent a week in advance setting out the dates and hours of work as well as work location. From time to time, he would be contacted by telephone requesting that he make himself available to cover a shift that day.
- 25 11. The claimant was required to complete and submit a timesheet every month, setting out the dates on which he worked, the work location, the start and finish time of his shift and the number of hours spent working. He was paid on a monthly basis, on or around 16 of each month and his pay was based on the contents of these time sheets.

12. The claimant's hourly rate of pay was the National Living Wage.
13. The claimant was entitled to mileage expenses paid at 0.25p per mile when transporting other members of staff to their work location. Jury's Inn on Jamaica Street in Glasgow was used as a central pick up and drop off point for transportation. He was also entitled to mileage when working at locations outside of Glasgow such as a caravan park in Rosneath or at student accommodation in Edinburgh.
14. The claimant completed a mileage form and submitted this each month along with his timesheet. This form outlined the date of claim, the start and end points of the journey and number of miles. The claimant was also required to provide receipts of fuel purchases but was not entitled to payment for said fuel purchases. Payslips for February and March 2019 indicates payment for mileage expenses.
15. The claimant was provided with a uniform by the respondent which he was required to wear when on shift.
16. In June 2019, the respondent made a pay day advance to the claimant. This was detailed as £120 on his pay slip. His bank statement evidenced that £100 was paid by the respondent.
17. In September 2019, the respondent made a further pay day advance to the claimant. The payslip details this as a £140 payment but the amount showing on the bank statement is £100.
18. The claimant took a two-week period of statutory paternity leave beginning on the 19 January 2020. He was not paid for his paternity leave.
19. The claimant raised concerns about discrepancies in pay in January 2020 and again in May 2020. He was provided with monthly payslips initially but this stopped in or around May 2019. He believed that there were errors in his pay both in terms of the wages he received and the expenses claims he submitted and brought this to the attention of both Gary McLaughlin, Director of the respondent organisation and Deborah Riggins, Office Manager at the

respondent organisation. He was informed that he could collect his payslips from the office at 60 Brook Street, Glasgow, G40 2AB. This was difficult because of his work followed a night shift pattern.

5 20. On 24 January 2020, the claimant emailed Mr McLaughlin noting that he was speaking to Ms Riggins about issues with his recent pay but that she was on leave. He asked for copies of his pay slips for the previous year and for a meeting with Mr McLaughlin to “go through them to identify any possible errors or miscalculations”. Mr McLaughlin responded on 28 January 2020 noting that he had most of the claimant’s payslips “in a file in my desk”.
10 Reference was made to a meeting between the two but as the claimant was on paternity leave, it was suggested that he spend his time with his family and that a meeting could be organised on his return. A meeting did not take place at that time and he was not provided with his payslips.

15 21. On 18 May 2020, Ms Riggins emailed the claimant asking him to “send me your up to date breakdown of pay that you think you are due” so that she and Mr McLaughlin could investigate this. The claimant responded on the same day providing 4 excel spreadsheets breaking down the pay which amounted to outstanding wages and expenses that he was due.

20 22. A meeting took place between the claimant and Mr McLaughlin in July 2020. The claimant was unable to confirm a specific date. At that meeting he was provided with payslips for the previous 12 months including July 2020. The claimant was not provided with an outcome in respect of the investigations into the errors in pay.

25 23. The claimant did not receive a pay slip for August, September or October 2020.

24. On 24 September 2020, the claimant sent a report to Mr McLaughlin and Ms Riggins setting out discrepancies in his pay for the tax year 2019/2020 up to and including July 2020.

25. The claimant's contractual pay date was on or around the 16th of each month. In September 2020 payments were made to the claimant on three separate dates, £50 on 18 September, £500 on 21 September and £358.24 on the 30 September 2020. In October 2020, he was paid on 30 October. In November 2020, he expected to receive his final salary payment on 16 November. No payment was made by the respondent on that date. The claimant emailed the respondent on the 20 November and again on the 30 November, noting that his pay date was on or around the 16th. The Claimant was ultimately paid on 2 December 2020.
26. The claimant organised payment of his household bills with reference to the payment date of 16th of each month. His direct debits left his account on the 18th of each month. He incurred late payment fees of £10 in respect of his car repayments and £5.50 unpaid transaction fees from the Royal Bank of Scotland. He provided statements evidencing these penalties.
27. During the course of his employment the claimant took annual leave on the following dates: 13 May 2019 to 22 May 2019; 12 August 2019 to 23 August 2019; 15 August 2020 to 21 August 2020. The annual leave year ran from 1 April to 31 March. He was not paid for these periods of annual leave.
28. The claimant resigned from his role in October 2020, due to the failures to address the discrepancies in his pay, providing the respondent with 2 weeks' notice which he worked. The claimant's last day of work was 24 October 2020.
29. As at the effective date of termination, there was a shortfall in pay as follows:
- a. Wages £1,156.39
 - b. Mileage expenses £3,420
30. In December 2018, the claimant worked 30 hours at a rate of £7.83 per hours and expected to receive £234.90. Instead, he was paid £222.40 leaving a shortfall of £12.50.

31. In April 2019, the claimant worked 33.5 hours on door supervision at a rate of £8.45 per hour as noted on his timesheets. As per his payslip, he was only paid for 23.5 hours leaving a shortfall of £84.50. In the same month, he worked 49.5 hours on site supervision at a rate of £8.21 per hour as noted on his timesheets. As per his payslip, he was only paid for 47.5 hours leaving a shortfall of £16.42. The total shortfall for that month was £100.92.
32. In May 2019, the claimant worked 95.25 hours on site and event supervision at a rate of £8.21 per hour as noted on his timesheets. He was only paid for 89 hours leaving a shortfall of £51.31.
33. In July 2019, the claimant worked 189.75 hours at a rate of £8.21 per hour as noted on his timesheets. As per his payslip, he was only paid for 187.3 hours leaving a shortfall of £20.11
34. In August 2019, the claimant worked 122.5 hours at a rate of £8.21 per hours as noted on his timesheets. As per his payslip, he was only paid for 108.5 leaving a shortfall of £114.94
35. In September 2019, the claimant worked 215.5 hours at a rate of £8.21 per hour as noted on his timesheets. His payslip outlined the correct number of hours but he was paid £1,652.26 rather than the expected £1,769.26 leaving a shortfall of £117.
36. In October 2019, the claimant worked 174 hours at a rate of £8.21 per hour as noted on his timesheets. His payslip outlined the correct number of hours but he was paid £1,391.60 rather than the expected £1,428.45.26 leaving a shortfall of £36.94.
37. In December 2019, the claimant worked 195.25 hours at a rate of £8.21 per hour as noted on his timesheets. His payslip outlined the correct number of hours but his pay was £1584.53 rather than the expected £1,603 leaving a shortfall of £18.47.

38. In February 2020, the claimant worked 151.50 hours at a rate of £8.21 per hour as noted on his timesheets. His payslip outlined the correct number of hours but his pay was £1,198.66 rather than the expected £1,243.82 leaving a shortfall of £45.16.
- 5 39. In April 2020, the claimant worked 177 hours at a rate of £8.72 per hour as noted on his timesheets. His payslip outlined the correct number of hours but his pay was £933.04 rather than the expected £1,543.44 leaving a shortfall of £610.40.
40. In September 2020, the claimant worked 110 hours at a rate of £8.72 per hour as noted on his timesheets. He did not receive a payslip but his bank statements shows a payment of £939.28 received from the respondent leaving a shortfall of £19.92.
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41. In October 2020, the claimant worked 61.5 hours at a rate of £8.72 as noted on his timesheets. He did not receive a payslip but his bank statements shows a payment of £527.56 received from the respondent leaving a shortfall of £8.72.
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42. In February 2019, the claimant submitted an expense claim for £103.50 but was only paid £50 by the respondent leaving a shortfall of £53.50.
43. In March 2019, the claimant submitted an expenses claim for £155.50 but was only paid £70 by the respondent leaving a shortfall of £85.50.
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44. For the remainder of his employment, the claimant submitted expenses claims on a monthly basis along with his timesheets but received no pay in respect of these. The outstanding expenses are as follows: April 2019 £30; May 2019 £30.50; June 2019 £60.25; July 2019 £202; August 2019 £114.75; September 2019 £103.50; October 2019 £75; November 2019 £200; December 2019 £210.70; January 2020 £45; February 2020 £211; March 2020 £160; April 2020 £432.50; May 2020 £255; June 2020 £355; July 2020 £275; August 2020 £180; September 2020 £225; October 2020 £135.
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45. The claimant also maintained that he was entitled to a £155 uniform refund as he returned all items of uniform to the respondent on or around the effective date of termination.

46. The claimant contacted Acas and began an Early Conciliation claim on 1
5 October 2020. An Acas Early Conciliation certificate was issued on 27
October 2020. The claimant lodged his ET1 on the same date.

Comment on the evidence

47. The claimant provided significant documentary evidence in respect of his
claim namely, monthly timesheets and mileage sheets for the period
10 December 2018 to October 2020, pay slips from March 2019 to July 2020. He
also provided bank statements for the period December 2018 through to
December 2020 illustrating all payments made by the respondent to the
claimant. In evidence, he went through each month of employment with the
respondent, setting out what the payments he received, and any shortfall in
15 payments which he believed he was due with reference to the timesheets,
mileage sheets, payslips where available and bank statements. He provided
emails as between himself and the respondent wherein he raised concerns
about the level of pay received and the fact that his payslips were outstanding.

The law – discussion and dismissal

20 Unfair dismissal

48. Section 108 of the Employment Rights Act 1996 provides that the right to
claim unfair dismissal as provided for by Section 94 “*does not apply to the
dismissal of an employee unless he has been continuously employed for a
period of not less than two years ending with the effective date of termination.*”

25 49. The effective date of termination in this case was 24 October 2020 and the
claimant accepted in evidence that he did not have sufficient service to make
this claim.

Breach of contract

50. Article 3 of the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 provides that proceedings may be brought before an Employment Tribunal in respect of a claim of an employee for the recovery of contractual sums due and the claim is outstanding on termination of the employee's employment. Non-payment of wages is a breach of contract.

51. As the claim was brought within three months from the date of termination of employment, which is the appropriate time limit, the Tribunal has jurisdiction to consider this claim under Article 3.

52. The pay slips and time sheets set out the hours of work undertaken by the claimant and the payment made in respect of these hours. Bank statements demonstrated the shortfall in pay which occurred on a continuous basis from December 2018 to October 2020. This amounts to £1,156.39.

53. The Tribunal has found, based on the evidence, that the entitlement to payment of £0.25p per mile was a contractual right given that mileage sheets were submitted on a monthly basis and were not challenged by the respondent. The failure to pay the claimant for the mileage undertaken is a breach of contract. This amounts to £3,420.

54. The Tribunal has not found that the claimant had a contractual entitlement to a £155 refund due to a lack of evidence.

55. The claimant had a contractual right to be paid on or around 16th of each month. In September, October and November 2020, payment were not made on time resulting in late payment fees charged by his bank and under his car finance arrangements amounting to £15.50.

Statutory paternity pay

56. The claimant was entitled to receive statutory paternity pay under Section 171ZA of the Social Security Contributions and Benefits Act 1992. While he took the two week period of paternity leave at the end of January 2020, he was not paid.

57. Section 13 of the Employment Rights Act 1996 provides that 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.
58. However, such claims must be brought within three months beginning with the date of the payment of wages from which the deduction was made as per Section 23(2) of the Employment Rights Act 1996.
59. The payment was made on 16 February 2020 while the claim was lodged on 27 October 2020. This claim is therefore out of time. The time limit to raise a claim is strictly applied. The claimant did not suggest that it was "not reasonably practicable" to raise this claim in time.

Annual leave

60. The claimant did not receive payment in his August 2020 pay to reflect the annual leave taken that month, nor did he receive payment in respect of annual leave in his final salary payment. As per Section 13 of the Employment Rights Act 1996, non-payment of annual leave is an unlawful deduction of wages. The claimant is entitled to £912.02 in respect of the non-payment of annual leave for the 2020 leave year.

61. As claims for unlawful deduction of wages must be brought within three months beginning with the date of the payment of wages from with the deduction was made, the claims in respect of unpaid annual leave in 2019 are therefore out of time. As above the time limit within which a claim may be raised is strictly applied. The claimant did not suggest that it was “not reasonably practicable” to raise this claim in time.

10 Employment Judge: E Mannion
Date of Judgement: 29 April 2021
Entered in register: 06 May 2021
and copied to parties