



EMPLOYMENT TRIBUNALS

Claimant: Mr J Mbuoben Ashu

Respondent: Pro-Active Recruitment Services

Heard at: Reading (by CVP) **On:** 1 July 2021

Before: Employment Judge Hawksworth (sitting alone)

Appearances

For the claimant: In person

For the respondent: Mr A Kramer (solicitor)

RESERVED JUDGMENT

1. The claimant has been paid the wages which are properly payable to him. His complaint of unauthorised deduction from wages in respect of pay fails and is dismissed.
2. The respondent has made payments to the claimant under a rolled-up holiday pay scheme which may be set off against his entitlement to holiday pay. His claim for holiday pay fails and is dismissed.

REASONS

The claim and hearings

1. Mr Mbuoben Ashu started his employment tribunal claim on 3 January 2020 after contacting Acas for early conciliation on 30 October 2019 and receiving the Acas certificate on 30 November 2019. He complains of unauthorised deductions from his pay and holiday pay.
2. Pro-Active Recruitment Services ('Pro-Active') did not put in a response to the claim in time and was only permitted to take part in the hearing to the extent allowed by me. At a hearing on 18 June 2021 I asked both parties for their comments on this and decided that the respondent should be allowed the opportunity to ask the claimant questions and make comments on the sums the claimant said he was owed. I decided that this was the fairest way to proceed, because otherwise there was a risk that any amounts ordered to be paid to Mr

Mbuoben Ashu could be wrong. I asked Mr Kramer to ensure that his questions and comments were proportionate.

3. The claim could not be decided at the hearing on 18 June 2021 because, in his evidence, the claimant referred to documents which (in the absence of any case management orders) had not been sent to the tribunal (or the respondent). A new hearing date was arranged and I made case management orders for the parties to exchange and send to the tribunal any documents they wished to refer to at the next hearing.
4. Mr Mbuoben Ashu sent a short statement ('comments') with seven attachments. He sent two further payslips separately. Pro-Active sent a witness statement by Mr Cunha which attached the claimant's timesheets, payslips and some correspondence between the parties. I heard evidence from the claimant. I allowed Pro-Active to call Mr Cunha, as Mr Mbuoben Ashu had some questions he wanted to ask him. Both Mr Mbuoben Ashu and Mr Kramer made short closing comments.

The issues for me to decide

5. I have to decide whether Pro-Active owes Mr Mbuoben Ashu any:

- 5.1. pay; or
- 5.2. holiday pay.

and if so, how much.

The law

Pay (deductions from wages)

6. Section 13 of the Employment Rights Act 1996 says that an employer must not make a deduction from the wages of a worker employed by him. There are some circumstances in which a deduction can be made, this includes where deductions are required by law, authorised in the worker's written contract, or made with the written consent of the worker. Section 13 says:

"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.

....

(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. "*

Holiday pay

7. The Working Time Regulations 1998 give workers a minimum entitlement to paid holiday. The minimum entitlement is to 20 days (4 weeks) paid holiday each year, plus an additional 8 days (1.6 weeks) per year, which can include bank holidays (regulations 13 and 13A).
8. Pay for holiday is calculated in accordance with sections 221 to 224 of the Employment Rights Act 1996. For workers who do not have normal working hours, a week's pay is calculated by reference to an average of hours and remuneration over a 52 week period (or to the total period of employment if that is less than 52 weeks).
9. 'Rolled-up' holiday pay schemes have been considered by the courts. These are arrangements where the employer 'rolls up' the entitlement to holiday pay and makes regular payments to the worker rather than calculating the holiday pay due at the time each period of leave is taken. The Court of Justice of the European Union decided, in a case called Robinson-Steele v RD Retail Services Ltd [2006] ICR 932, that rolled-up holiday pay arrangements are not lawful because they could discourage workers from taking their full annual leave. However, the court said that employers may set off genuine holiday payments paid under a rolled-up holiday scheme against an entitlement to holiday pay at the time when leave is taken, provided those payments have been paid 'transparently and comprehensibly as holiday pay'.
10. On termination of employment, a worker is entitled to receive pay in lieu of any unused annual leave (regulation 14).

Facts and conclusions

11. I have to decide what happened (the facts). I reach my decision about what happened by considering the evidence I have heard and the documents I have been shown, and deciding what I think is most likely to have happened. I then consider the law (summarised above), and then reach conclusions as to whether Mr Mbuoben Ashu is owed any pay or holiday pay and if so how much.
12. I have set out below my decisions about the facts and my conclusions, first in relation to pay and then holiday pay.

Pay

13. The facts relevant to the pay owed are:

- 13.1. Mr Mbuoben Ashu worked for Pro-Active from 10 June 2019 to 24 October 2019 as a Gateline Operative at Maidenhead Station. His terms of engagement said that he would be paid the rate for the assignment for each minute worked during the assignment (paragraph 5.1).
- 13.2. Mr Mbuoben Ashu understood from the job advert and an email he received that his hourly rate of pay would be £10.55. When Mr Mbuoben Ashu began receiving his payslips, he became aware that he was being paid £9.41 per hour. An additional £1.14 per hour worked was being paid into a holiday pay fund.
- 13.3. Mr Mbuoben Ashu raised the question of his hourly rate (and holiday pay) with his employer. Pro-Active accepted that there had been some confusion about his hourly rate and agreed to recalculate his pay based on an hourly rate of £10.55. On 28 August 2020, after his employment had ended, Pro-Active paid Mr Mbuoben Ashu the gross sum of £1,347.37 in respect of his complaints about his pay.
- 13.4. There was another issue as to how many hours Mr Mbuoben Ashu worked for the respondent. The total hours worked by the claimant for the whole period of his employment as set out on his payslips and timesheets were 574.97 hours. Mr Mbuoben Ashu said that he had kept a jotter with a cumulative record of hours worked during his employment, and at the end of his employment it showed that the total hours he had worked were 856.4. He was unable to find the jotter with the cumulative record, although he did have a separate note of the total hours worked by the end of his employment.
- 13.5. Each weekly payslip showed the hours worked that week. These were recorded by Pro-Active using a clock-in/clock-out app on Mr Mbuoben Ashu's phone, and were cross-checked with their client, GWR, to whom Mr Mbuoben Ashu was assigned.
- 13.6. I asked Mr Mbuoben Ashu whether he agreed with the hours recorded on the payslips. He said he did not understand most of them and could not say if they were correct or incorrect. He said the difference between the respondent's total hours calculation and his total hours calculation may have been because he included an additional 15 minute period at the end of his shifts. He was told by managers at the station that although he left at 22.15, he was entitled to be paid until 22.30.
- 13.7. I have to decide what I think is most likely to have happened, based on the evidence I have heard and the documents I have seen. I have decided that it is more likely that Mr Mbuoben Ashu worked 574.97 hours during his employment with the respondent. That is what the timesheets and payslips said using clock-in and clock-out data. There was insufficient evidence to explain how the larger hours total put forward by Mr Mbuoben Ashu had been arrived at.
- 13.8. There was no evidence to support Mr Mbuoben Ashu's suggestion that he was entitled to be paid for an additional 15 minutes after he had left at

the end of a shift. The terms of engagement said that he would be paid for each minute worked.

14. My conclusions as to whether there were any deductions from Mr Mbuoben Ashu's pay are:

14.1. I have decided that Mr Mbuoben Ashu worked 574.97 hours for the respondent. He was paid £9.41 for each of those hours, but the respondent has agreed to pay him £10.55 per hour. The difference owed to Mr Mbuoben Ashu as a result of this agreement is $574.97 \times £10.55$ (£6,065.93) minus 574.97×9.41 (£5,410.47) = £655.46.

14.2. The sum paid to Mr Mbuoben Ashu on 28 August 2020 included this sum. Mr Mbuoben Ashu has therefore received the sum of £655.46 in respect of the difference in the hourly rate for the hours of work he did.

Holiday pay

15. The facts relevant to the holiday pay owed are:

15.1. Mr Mbuoben Ashu accrued one hour's paid holiday for each 8.3 hours that he worked, equivalent to 5.6 weeks holiday over a year. This was set out in the terms of engagement he was given by his employer, at paragraph 7. Paragraph 7 also explained that the holiday year was January to December and that holiday must be taken. The Induction Booklet also included an explanation of the holiday pay scheme. These documents were sent to Mr Mbuoben Ashu on 6 July 2019.

15.2. In practice, the accrual of one hour's holiday for each 8.3 hours worked was achieved by Pro-Active paying 12.07% of the hourly rate of pay into a holiday pay fund for each hour worked. In Mr Mbuoben Ashu's case, Pro-Active paid £1.14 into his holiday fund for each hour he worked (12.07% of the hourly rate of pay of £9.41). The gross sum was paid, no tax was deducted at this point. The amount paid into his holiday pay fund and the total accrued in the holiday fund were included on each of his payslips.

15.3. Mr Mbuoben Ashu asked Pro-Active whether he could just be paid the additional £1.14 per hour, rather than having it paid into a holiday pay fund. Pro-Active said that he could not opt out of the holiday pay scheme, he would have to take annual leave. When Mr Mbuoben Ashu wanted to be paid holiday, he emailed Pro-Active. This resulted in the payslip showing a payment taken from the holiday pay fund, and a corresponding increase in gross total pay on the same payslip. Tax and national insurance was deducted from the holiday pay at this stage.

15.4. Mr Mbuoben Ashu holiday pay in this way, following requests he made. The payslips show his holiday fund building up over time and then being paid to him in response to his requests. In total, Mr Mbuoben Ashu's holiday pay was $574.97 \text{ hours} \times £1.14 = £655.47$.

- 15.5. If Mr Mbuoben Ashu had been paid at £10.55 per hour, the gross hourly rate for his holiday fund would have been £1.27 per hour. In total, his holiday pay would have been $574.97 \times £1.27 = £730.21$. This is an additional £74.74 in holiday pay. A sum of £89.80 in respect of this difference was included in the 28 August 2020 payment to Mr Mbuoben Ashu.
- 15.6. At the end of Mr Mbuoben Ashu's employment, his payslip for 18 October 2019 showed that there was £7.98 accrued but untaken in his holiday fund. The respondent calculated accrued but untaken holiday pay as £13.11. This sum was paid to Mr Mbuoben Ashu as part of the 28 August 2020 payment.
16. My conclusions as to whether Mr Mbuoben Ashu is owed any holiday pay are:
- 16.1. Pro-Active's practice of paying 12.07% of Mr Mbuoben Ashu's hourly rate of pay into a holiday fund was a type of rolled up holiday pay scheme. Mr Mbuoben Ashu's terms of engagement and the induction booklet explained how the scheme operated. It was clear from these documents that the payments to the holiday fund were payments allocated specifically for holiday. The weekly payslips showed how much holiday pay had been allocated to the fund and showed the current balance of the holiday pay. The scheme was transparent and comprehensible and met the requirements set out in the Robinson-Steele case.
- 16.2. The sums paid under the holiday pay scheme can be set off against Mr Mbuoben Ashu's entitlement to holiday pay. It was not suggested that if Mr Mbuoben Ashu's holiday pay had been calculated using an average of his remuneration as set out in sections 221 to 224 of the Employment Rights Act 1996, his entitlement to holiday pay would have been higher.
- 16.3. Mr Mbuoben Ashu's holiday pay accrued at a rate of £1.14 for each hour he worked. If he had been paid £10.55 per hour, his holiday pay would have accrued at a rate of £1.27 per hour. That would have resulted in him being paid an additional £74.74 in holiday pay. The sum paid to Mr Mbuoben Ashu on 28 August 2020 included an amount in respect of this sum. Mr Mbuoben Ashu has therefore received a payment in respect of the difference in the hourly rate of holiday fund payments for the hours of work he did.
- 16.4. Pro-Active paid Mr Mbuoben Ashu £13.11 in respect of holiday pay which was accrued to the holiday fund but untaken at the time he left his employment. This was equal to or more than the accrued holiday pay in the holiday fund when his employment terminated.
- 16.5. I have concluded that Mr Mbuoben Ashu has not established that he has any additional entitlement to holiday pay after the payments made to him under the holiday fund are set off against his entitlement to holiday pay.

Summary

17. In summary, if Mr Mbuoben Ashu had been paid at £10.55 per hour, he would have been entitled to an additional £655.46 in respect of basic pay and an additional £74.74 in holiday pay over the period of his employment. He was also entitled to £13.11 in accrued but untaken holiday at the end of his employment. The total sums due to Mr Mbuoben Ashu resulting from his hourly rate being £9.41 rather than £10.55 were £655.46 plus £74.74 plus £13.11 = £743.31.
18. Mr Mbuoben Ashu was paid £1,347.37 on 28 August 2020 in respect of his pay claim. This was more than the amount due from the increase in hourly rate and outstanding holiday pay. There has therefore not been any deduction from Mr Mbuoben Ashu's wages in respect of pay or holiday pay.

Employment Judge Hawksworth

Dated: 2 July 2021

Sent to the parties on:

23 July 2021

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For the Tribunal:

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