EMPLOYMENT TRIBUNALS

Claimant: **Mr D Orescof**

Respondent: **Marsand Bespoke Furniture Limited**

Heard at: **East London Hearing Centre (by Cloud Video Platform)**

On: **21 July 2021**

Before: **Employment Judge Gardiner**

Representation

Claimant: In person

Respondent: Mr T Obembe, company director

REMEDY JUDGMENT

The judgment of the Tribunal is that:-

The Claimant is entitled to recover the sum of £562.50 from the Respondent by way of unauthorised deduction of wages, contrary to Section 13 Employment Rights Act 1996.

REASONS

1. The Claimant, Mr Orescof, worked for the Respondent for four days on 27, 28, 29 and 30 July 2020. He brings a claim for £562.50 by way of unpaid wages. Since the claim was issued, the Respondent has accepted that the Claimant was entitled to receive £120 for one day's work. The dispute is as to whether the Claimant is entitled to the full amount he claims.

2. On 29 March 2021 I entered Judgment for the Claimant, namely that the Respondent had made an unauthorised deduction of wages, contrary to Section 13 Employment Rights Act 1996. I listed the case for a Remedy Hearing to determine the amount that the Claimant was entitled to receive by way of remedy.

3. At this Remedy Hearing, I have heard evidence from the Claimant himself, and from Mrs Obembe, Mr R Turkiss and the Respondent's Director, Mr T Obembe, on behalf of the Respondent. There was a witness statement from Mr Turkiss, but the other two witnesses gave evidence in response to my questions before answering questions from the Claimant. Each witness who gave evidence answered questions put by the other party. At the end of the case, I reserved my judgment and indicated that I would try to issue my Judgment as soon as possible.

Factual findings

4. The Respondent hired the Claimant to work as a carpenter in its kitchen fitting business. It is agreed that the Claimant worked for four days between 27 July and 30 July 2020. He arrived for work on 31 July 2020 but did not carry out significant work. He does not bring a claim in relation to his time on that fifth day. Because this is only a claim for unauthorised deduction of wages, I do not need to make any factual findings as to the circumstances in which the Claimant's work ended.

5. During the course of the hearing, the Claimant's evidence as to the hours he worked were not specifically challenged. Mr Turkiss accepted that the Claimant may have worked the hours he asserts. The Claimant's evidence was that he finished at 7pm on the first day, at 6pm on the second day, at 5pm on the third day and at 7.30pm on the fourth day. The Claimant's evidence is that he worked for four full days, doing eight hours work from 8pm to 5pm (with an hour off for lunch), and a total of 5.5 hours overtime over the four days.

6. The Claimant's evidence was that the work he carried out on these days was carpentry work, although on the second day he said he was required to carry kitchen units up to the first floor where they were to be fitted. He said that the work was more labouring than carpentry on this day. For most of these four days, he was working alongside Mr Turkiss. On his account, he was not provided with any specific training in how to carry out the work.

7. In his witness statement, Mr Turkiss describes the work carried out by the Claimant in the following terms:

> "Our way of working in the company is whenever a new staff joins us, we take them to site to see their knowledge and skills as they always claim to be professional carpenter, we do know different companies have their ways of boxing their cabinets and our own ways are different too, so we take them to site to show them our ways and they can make their cabinets straight away if they are skilled"

8. Having heard evidence from both Mr Turkiss and from the Claimant, as well as the evidence from Mr Obembe, I find that the Respondent regarded the initial period of employment as a trial period. It was an opportunity for the Respondent to assess the skill level of new starters to make sure that they were as skilled as was hoped. There was no specific training programme. In the Claimant's case, he was expected to carry out work of potential benefit to the Respondent's business right from the start. Therefore, it is not accurate to describe his essential role during the initial period as one in which he was wholly engaged in training. There may have

been an element of showing the Claimant the Respondent's ways of working. That would be the case with any new starter in any organisation.

9. The Claimant's case is that he was entitled to be paid £120 each day for the standard eight hour working day. He had been told about this in a phone conversation with Mrs Obembe before he started work. Mrs Obembe denies that there was a conversation before starting but accepts that there was an exchange of text messages. Those pre-starting text messages have not been produced. I find that there is likely to have been a conversation between the Clamant and Mrs Obembe in which the rate of pay would have been discussed. It is unlikely that the Claimant would have agreed to work without knowing the amount he would receive.

10. In addition, I accept that the Claimant was told by Mrs Obembe that overtime would be £15 per hour. His claim is he is entitled to be paid for a further 5.5 hours work at an hourly rate of £15 per hour. That is how he calculates the sum claimed of £562.50.

11. The Respondent's case is that the Claimant was not entitled to be paid for any time spent working after 5pm because the proper process had not been followed to enable the Claimant to be authorised for working additional hours beyond his standard working day. In addition, the Respondent argues that the Claimant had agreed that the first three days would constitute training and would therefore be unpaid. That is why the Respondent only accepts that the Claimant is entitled to receive £120, which was payment for work carried out on the fourth day.

12. It is true that the paperwork provided to the Claimant contained the following wording, under the heading "Important Information":

> "Each candidate have to go through three days free training unpaid. Any training acquired after been employed in the company, and candidates decides to leave the company within one to six month, training fee shall be deducted from your salary"

13. The Claimant says this document was only provided to him on the second day of his engagement. When he realised that the Respondent was asking him to work for free for the first three days, he refused to continue working unless this standard practice was disapplied in his case. He claims that Mr Obembe agreed that this provision would not apply in his case and he would be paid in full for all the days on which he worked. He then signed the paperwork on this understanding, although there was no amendment made to the wording set out above.

14. By contrast, the Respondent's evidence, provided by Mrs Obembe is that the paperwork was signed on the morning of the first day, not the second day. Her evidence is that the Claimant did not raise any objection to the first three days being unpaid work. She says that Mr Obembe was not present when the paperwork was signed. She also gave evidence that any overtime had to be authorised in advance and could not be authorised by Mr Turkiss. This had to be done by Mr Obembe herself. She did not reveal how such a requirement had been explained to the Claimant, or how it tended to operate in practice.

15. On the Respondent's evidence, Mr Turkiss raised concerns about the standard of the Claimant's work on the second day, but no action was taken to end the Claimant's work until after the fourth day. Mr Obembe told the Tribunal he considered that the Claimant needed to be give a proper opportunity to prove himself.

Conclusions

16. It appears to be common ground between the parties that the Claimant was not told until after he had started work that he would not be paid for the first three days' work. There is no evidence from Mrs Obembe that the Claimant was told this in advance of starting work. In those circumstances, it would be surprising if the Claimant had signed the agreement, agreeing to work for the first three days without pay, without raising any objection. Furthermore, although the month on the paperwork is incorrect, in that it gives the month as month '8' ie August, the paperwork makes it clear that the start date was on the 27th and the agreement was signed on 28th. The month is clearly an error because 27th August, the apparent start date, was a Sunday. Given the different start date to the date of the signature, I find it is more likely that the paperwork was signed on the second day of working, as is the Claimant's evidence, rather than on the first.

17. It likely that the Claimant would have objected when this provision was brought to his attention on the second day. Given that by then he had worked for almost a day and a half, I accept that at that point he refused to continue working unless he was properly paid. I also accept that the Respondent agreed, as the Claimant alleges, to pay him for these three days, notwithstanding the written wording, rather than have him walk off site and for the client work to be understaffed. Text messages support the Claimant's evidence that the Respondent backed down and agreed not to insist on the written provision in the light of the Claimant's objection. A message sent by the Claimant on 3 August 2020 states that when the paperwork was presented to him, he refused to agree that the first three days work were unpaid. The text goes on to say: "I was reassured [ie by the Respondent] that is not my case", thereby supporting the Claimant's evidence that this provision was waived.

18. Therefore, I find that the parties agreed to vary what was stated on the Respondent's form to remove the requirement that the first three days would be unpaid. The agreement between the parties was that the first three days would be paid at the pre-agreed rate, namely £120 per day, plus £15 per hour overtime. There was no particular procedure that needed to be followed in order for the Claimant to be entitled to work overtime. Mr Turkiss was able to authorise such overtime. I find that he did so; and the Claimant worked a total of 5.5 hours of overtime over the four days on which he was engaged to work for the Respondent.

19. Therefore the Claimant is entitled to 4 x £120 for working four full days, plus 5.5 x £15 for work after 5pm = £562.50. The Tribunal understands that the Respondent has already paid the Claimant the sum of £120. In these circumstances the balance owing is £442.50.

20. Even if, contrary to my findings of fact, the Claimant had agreed to the provision he was asked to sign, then it would not have retrospective effect to cover the day on

which the Claimant had already worked, at the rate discussed and agreed with Mrs Obembe.

21. More fundamentally, I find that this section of the Respondent's paperwork would have been void and therefore of no effect. This is because it is to be regarded as an attempt to contract out of the Respondent's obligations to pay the National Minimum Wage. I have found that the first three days were not training, but effectively a trial period. An employer must still pay a worker at least the National Minimum Wage in relation to work carried out during a trial period. Requiring new starters to work for the first three days for free, in order to see if – to use Mr Obembe's words - they were "time-wasters", is a breach of the National Minimum Wage legislation. Whilst workers need not be paid the full standard hourly rate applicable to carpenters during any trial period, they must be paid at least the National Minimum Wage. The Respondent would be well advised to re-examine its paperwork to ensure that it complies with its legal obligations in the future in this regard.

Employment Judge Gardiner
Date: 23 July 2021