



EMPLOYMENT TRIBUNALS

Claimant: Mr N Walker

Respondent: Sascron Limited

Heard: Remotely (by video link) **On:** 3 August 2021

Before: Employment Judge S Shore

Appearances

For the claimant: In Person

For the respondent: Mr A Gloag, Counsel

JUDGMENT

1. The claimant's claim of unauthorised deduction of wages (holiday pay) was well-founded and succeeds. The respondent will pay the claimant 34 days' pay at a gross daily rate of £170.67 = **£5,802.78**. This is a gross figure so shall be paid with the appropriate deduction of tax and National Insurance.
2. The claimant's claim of unauthorised deduction of pay (commission) was not well-founded and fails.

REASONS

1. The claimant was employed as a salesperson by the respondent from 21 September 2018 to 10 December 2019. The respondent is a company that sells vehicles.
2. He started early conciliation with ACAS on 31 January 2020 and obtained a conciliation certificate on 3 February 2020. The claim was presented to the Tribunal on 4 February 2020. The claimant claimed an unauthorised deduction of wages contrary to section 13 of the Employment Rights Act 1996
3. The Tribunal issued a notice of hearing that contained case management orders on 21 November 2020. No list of issues (questions that the Tribunal had to find answers to) was produced. I drafted a list and forwarded it to the parties before the hearing started. It was agreed. The issues in the case were as follows:

Holiday Pay (Working Time Regulations 1998)

1. What was the claimant's leave year?
2. How much of the leave year had passed when the claimant's employment ended?
3. How much leave had accrued for the year by that date?
4. How much paid leave had the claimant taken in the year?
5. Were any days carried over from previous holiday years?
6. How many days remain unpaid?
7. What is the relevant daily rate of pay?

Unauthorised deductions

8. Were the wages paid to the claimant less than the wages he should have been paid?
 9. Was any deduction required or authorised by statute?
 10. Was any deduction required or authorised by a written term of the contract?
 11. Did the claimant have a copy of the contract or written notice of the contract term before the deduction was made?
 12. Did the claimant agree in writing to the deduction before it was made?
 13. How much is the claimant owed?
4. At the outset of the hearing, I ran through the provisions of Rule 2 of the Employment Tribunals Rules of Procedure: the overriding objective.
 5. I then asked Mr Walker to confirm the claims that he was making. He confirmed that he was claiming unauthorised deduction of wages in respect of holiday for the whole period of his employment and underpayment of commission.
 6. Mr Gloag submitted on behalf of the respondent that it was making an employer's contract claim. I did not accept that such a claim had been made in its ET1 or that the Tribunal had acknowledged that such a claim had been made because no response form had been submitted to the claimant.
 7. Further, I found that the claimant had not made a breach of contract claim, so no employer's contract claim could be made.

8. I sought to narrow the issues in the holiday pay claim. Mr Gloag advised that the respondent accepted that the claimant had never been paid for any holidays taken during his employment. He therefore conceded that my task on that claim was only to determine what the relevant daily rate of pay was and how many days' holiday pay the claimant was owed.
9. The parties had produced a bundle consisting of 67 pages. If I refer to a page from the bundle, I will put the page number(s) in square brackets []. The claimant gave evidence in support of his claims from a statement dated 19 April 2021 that ran to 7 paragraphs.
10. Kalem Chodha gave evidence on behalf of the respondent. He produced 2 witness statements. The first was dated 16 July 2021 and ran to 17 paragraphs. The second was dated 1 August 2021 and ran to 3 paragraphs with a further 5 pages of documents appended.
11. In order to reach a decision, I firstly have to make findings of fact that are based on the written evidence (witness statement), oral evidence (answers to cross-examination questions) and the documents produced.
12. All findings of fact were made on the balance of probabilities (which account is the most likely). If a matter was in dispute, I have set out the reasons why I decided to prefer one party's case over the other. If there was no dispute over a matter, I have either recorded that with the finding or made no comment as to the reason that a particular finding was made. I have not dealt with every single matter that was raised in evidence or the documents. I have only dealt with matters that I found relevant to the issues I have had to determine that relate to this preliminary hearing. No application was made by either side to adjourn this hearing in order to complete disclosure or obtain more documents, so I have dealt with the case on the basis of the evidence and documents produced to me. I make the following findings.
13. There were some facts that related to this application which were not disputed. I therefore find that it was undisputed (or indisputable) that:
 - 13.1. The claimant was employed as a salesperson by the respondent from 21 September 2018 to 10 December 2019.
 - 13.2. The claimant was not paid any holiday pay during the entirety of his employment, although he took unpaid leave.
 - 13.3. The claimant was entitled to 28 days' paid holiday per year.
 - 13.4. The claimant was not provided with a written statement of terms and conditions of employment as required by section 1(1) of the Employment Rights Act 1996 or a 'relevant agreement' setting out his holiday year as required by regulation 13(3) of The Working Time Regulations 1998. That means that his holiday year begins on the date that his employment started: 21 September.
 - 13.5. The claimant was paid no holiday pay for the holiday year 21 September 2018 to 20 September 2019, so is entitled to 28 days' pay.
 - 13.6. The claimant was paid no holiday pay for the period 21 September 2019 to 10 December 2019.

14. I find that the evidence did not show on the balance of probabilities that the respondent made an unauthorised deduction from the claimant's wages in respect of underpayment of commission. I make that finding because:
 - 14.1. The claimant's evidence in chief (his witness statement) was brief and did not really engage with the issues in the commission claim.
 - 14.2. The witness evidence of Mr Chodha was not challenged by the claimant on the assertion that the claimant had been overpaid commission in the sum of £5,400, of which £980 had been recouped by the respondent.
 - 14.3. The net overpayment of £4,420 exceed the claimant's claim for unpaid commission.
15. I find that the claimant was employed for a total of 64 weeks by the respondent. I find that in that time, he was paid a total of £60,014.00 gross. This figure was agreed by the parties.
16. I have found that the claimant was overpaid by £5,400.00, which leaves a balance of £54,614. That figure divided by 64 weeks gives a gross average weekly pay of £853.34. On a five-day week, that equates to average daily gross pay of £170.67.
17. I find that the claimant's entitlement to holiday pay for the period 21 September 2019 to 10 December 2019 was 6 days by using the gov.uk website. The respondent therefore owes the claimant 34 days' holiday. 34 days multiplied by £170.67 equals £5,802.78. This figure is gross, so should be paid net of deductions for income tax and National Insurance.
18. I then apply the findings to the issues in the case as follows.
19. The claimant's leave year was 21 September to 20 September.
20. Sixteen weeks of the 2019/2020 leave year had passed when the claimant's employment ended.
21. He had accrued six days' leave for the year by that date. He had accrued 28 days in the 2018/2019 leave year.
22. The claimant taken no paid leave in his employment.
23. Twenty-eight days carried over from previous holiday years.
24. Thirty-four days remain unpaid.
25. The relevant daily rate of pay is £170.67 (gross).
26. The wages (commission) paid to the claimant were not less than the wages he should have been paid in respect of commission. The wages (holiday pay) paid to the claimant were less than the holiday pay he should have been paid.

27. No deduction of holiday pay was required or authorised by statute.
28. No deduction of holiday pay was required or authorised by a written term of the contract.
29. The claimant did not have a copy of the contract or written notice of the contract term before the deduction was made.
30. The claimant did not agree in writing to the deduction of holiday pay before it was made.
31. The claimant is owed £5,802.78 before deduction of income tax and National Insurance

Note: This has been a remote hearing. The parties did not object to the case being heard remotely. It was not practicable to hold a face to face hearing because of the Covid19 pandemic.

Employment Judge Shore
3 August 2021

Sent to the parties on:24/8/2021

N Gotecha
For the Tribunal Office:

N Gotecha

Note

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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