



EMPLOYMENT TRIBUNALS

Claimant: Mr D Roberts

Respondent: GMS Adaptations Ltd

Heard at: London South Employment Tribunal

On: 7 September 2021

Before: Employment Judge A. Beale

Representation
Claimant: Did not attend and was not represented
Respondent: Mr T Goldup, a consultant

JUDGMENT

- 1. The Claimant's claim for breach of contract/notice pay fails and is dismissed.**
- 2. The Claimant's claim for unauthorised deduction from wages succeeds in part.**
- 3. The Respondent is ordered to pay the Claimant £270.17, being the gross sum deducted.**

REASONS

1. By an ET1 presented on 28 July 2019, the Claimant brought claims for breach of contract (failure to pay notice pay), unauthorised deductions from wages and unfair dismissal. The unfair dismissal claim was dismissed on withdrawal in a previous judgment dated 19 February 2021.

Claimant's Non-Attendance

2. This hearing was listed to take place as a hybrid hearing on 7 September 2021, with the Claimant attending in person and the Respondent by video link.
3. The hearing had been listed on five separate occasions before today's date. In January 2020, it was postponed for lack of judicial resource. It was relisted for 4 May 2020, when it was converted to a telephone case management hearing owing to the Covid-19 pandemic. It was listed for a one-day in person hearing on 23 October 2020, which was converted to a CVP hearing on 25 September 2020. On 16 October 2020, the Claimant informed the ET that he was not able to attend an online hearing. The Respondent had not received the notice of hearing owing to an incorrect email address, and wrote on 22 October 2020 to state that it was not able to attend an in person hearing, in particular in view of the new Covid restrictions in the Manchester area. The hearing was re-listed for 19 February 2021, and on 17 February 2021 was again converted to a video hearing, and the Claimant again stated that he was unable to participate in such a hearing. A further telephone case management hearing took place on 19 February 2021, at which the issues were elucidated and case management orders made, and the hearing was listed for half a day on 16 June 2021. Unfortunately, the hearing was again listed as a video hearing, but in any event, the Claimant stated that he was unable to attend because he had received "no paperwork or instruction for tomorrow's hearing" and could not afford to take a day off.
4. The hearing was thus postponed for a fifth time, and on 15 June 2021 both parties were sent a request for dates to avoid. This request was sent to the email address used for the Claimant throughout the correspondence, and from which he regularly replied to the Tribunal. The Respondent sent dates to avoid on 22 June, and the Claimant did not respond. On 15 July 2021, a notice of hearing was sent to both parties (again to the same email address for the Claimant). The Respondent responded on 16 July 2021, copying in the Claimant and noting the hearing date in the text of its email, requesting that the hearing be converted to a hybrid hearing. The Respondent made a further request to this effect on 2 September 2021 (which was ultimately granted), again copying in the Claimant, and the Claimant stated that he had received no prior notice of the hearing. The position was checked and it was confirmed to the Claimant by telephone that the notice of hearing had been sent to his usual email address.
5. On 6 September 2021, the Claimant emailed the Tribunal as follows:

"I appreciate that you say it was sent but I have checked and not found [sic] or received it. I have not given this as a possible date due hearing or confirmed it at any point. Due to suffering with long Covid I have been in and out of work for months and it's continually tricky finically [sic]. As I have said I have no e-mail regarding this date and I have not confirmed that it's possible for me to attend in any form. I've been off work for a fortnight and just started a new job today (Monday 6th September 2021). I am not a company with staff, I am an individual and at no point was I ask if this was convenient. This system has not felt very impartial to me from start to finish I have felt pressure because I

can't afford legal representation. I feel very disappointed regarding this hearing that I will not be able to attend."

6. The Claimant did not in fact attend the hearing. The email of 6 September contains no express request for postponement, but I considered it appropriate to hear representations from the Respondent and consider whether, in all the circumstances, the hearing should proceed. The Respondent made representations in support of proceeding.
7. I have made enquiries of the Tribunal staff, and they confirm that the email attaching the notice of hearing was sent to the Claimant's usual email address (I have also seen a paper copy of the email). The Claimant has clearly been able to receive and respond to other emails from the Tribunal in the past (including, for example, the correspondence converting the 23 October 2020 hearing into an online hearing, and the various other notices of hearing). He has given no explanation as to why the notice of this hearing would not have been received similarly; it was received by the Respondent, and there is nothing to indicate that the Claimant did not receive the Respondent's reply of 16 July 2021, which expressly referred to the date. The Claimant's email of 6 September also indicates that (as he said on 16 June) he was unable to attend owing to work and financial pressures.
8. I have reviewed all of the above points, and taken them into consideration together with the overriding objective. In my view the appropriate course was to proceed with the hearing. The Claimant failed to provide dates to avoid; the notice of hearing was sent to him and there is no obvious reason why he would not have received it, and he appears to have received the Respondent's email a day later explicitly referring to the hearing date. He has made no explicit request for postponement (although I have considered the issue in the light of his email), and the hearing has been postponed on five previous occasions, although I accept that these were not of the Claimant's making. Taking into account also the Claimant's statement on the last two occasions that he would not attend because of pressures of work/finance, and the financial impact on the Respondent of continuing to attend non-effective hearings, I considered it in the interests of justice to proceed in the Claimant's absence.

The Issues

9. The remaining issues were set out in detail in the case management summary from the telephone case management hearing on 19 February 2021.
10. In summary, those issues were as follows.
11. In relation to the breach of contract/notice pay claim:
 - (a) What was the date of the termination of the Claimant's employment and how did it come about. In particular
 - I. Was the Claimant dismissed by the Respondent by text message from Mr Stacey dated 8 April 2019 and/or text message dated 9 April 2019? Or

II. Did the Claimant resign without notice by text message dated 18 April 2019.

III. If the Claimant was dismissed on 8 April 2019, was it with notice?

IV. If so, was the Claimant not entitled to payment on the basis that he was absent without leave during his notice period?

V. If the Claimant is entitled to notice pay, in what sum is he so entitled?

12. In relation to the deduction from wages claim:

(a) Was the Respondent entitled to make a deduction from the Claimant's final wages to recoup the cost of paying a subcontractor to work because the Claimant did not work his notice period? This question only arises if the Claimant resigned on 18 April 2019.

(b) If the Respondent was permitted to make such a deduction, how much should have been deducted from the Claimant's final wage?

Documents

13. I was provided with a bundle running to 89 pages and an additional email attaching a map of the journey the Claimant would have taken had he worked during the week following 18 April 2019.

Witnesses

14. I was provided with a witness statement from the Claimant (which did not include a statement of truth) and a witness statement from Mr Gary Stacey, Director and owner of the Respondent. Mr Stacey attended to give oral evidence via CVP; as noted above, the Claimant did not.

Submissions

15. Mr Goldup made oral submissions on behalf of the Respondent. The Claimant did not provide any submissions.

Facts

16. I make the following findings of fact.

17. The Claimant was employed by the Respondent from 21 January 2019 as a plumber/fitter. The date of termination of his employment is disputed as set out above. The Respondent is a private limited company based in Newhaven which operates across the South East of England, specialising in the design and implementation of extensions, bathrooms, wet rooms, disabled adaptations, access solutions, kitchens and property maintenance.

18. The Claimant was issued with an Employee Handbook containing the following paragraphs:

(a) The Claimant was required to notify his line manager by text message by 6:30 a.m. if unable to attend work and call at 7:30 a.m. to discuss his absent. The handbook states that absence should always be reported personally by telephone and that text message is insufficient. The handbook further states "Failure to abide by the absence reporting procedure will normally be considered unauthorised absence and may result in the employee being liable to loss of pay for the period of absence and to disciplinary action." (bundle page 31)

due (b) The handbook requires medical certificates to be provided for absence to sickness or injury in excess of seven calendar days.

(c)The handbook also contains a "summary of our rights to deduct", which includes the following paragraph (p. 37):

"If you fail to work your notice and we incur a cost in covering your duties, we reserve the right to recover this cost from any monies owing to you.

The above clauses are express terms of your contract."

19. The Claimant was issued with a statement of particulars of employment (p. 38 – 40) which stated that during his probationary period he was required to give one week's notice (once he had more than one month's service) if he wished to terminate his employment. The particulars also state that the Claimant's normal hours of work are 40 per week (Monday – Friday) and that he may be required to work additional hours when authorised, as required by the needs of the business. In oral evidence, Mr Stacey stated that employees could not be compelled to work Saturdays.

20. The Claimant signed to confirm that he had received the statement of particulars, and also that he had read and understood the final section of the employee handbook entitled "Summary of our rights to deduct" and agreed that this section formed part of his contract of employment (p. 40).

21. It is the Claimant's position in his witness statement that he informed Mr Stacey during his interview of his previous mental breakdown, hospitalisation and current mental health issues consisting of deep depression and anxiety attacks. Mr Stacey's evidence was that he was not informed of these issues. The Claimant completed an employee health surveillance form on 4 January 2019 (p. 46). This did not explicitly refer to mental health problems, but did ask whether the employee was on any long-term medication or receiving medical care at the time, and the Claimant stated that he was not. On balance, I find that the Claimant did not refer to any mental health problems in his interview with Mr Stacey, and I note that no such reference appears in the subsequent documents I have before me.

22. I accept the evidence of Mr Stacey that he had a meeting with the Claimant on 15 March 2019, during which he raised with the Claimant concerns about his absences and his failure to follow the absence reporting procedure. I accept that Mr Stacey warned the Claimant that if this situation continued, he would need to take formal disciplinary action.
23. On 8 April 2019, the Claimant texted Andy Thomas, Adaptations Contract Manager, stating *"Still have this flu Andy, not going to make it in today. I'll be in tomorrow."* (p. 50). The Claimant then also texted Mr Stacey (on the same day) stating *"I'm not going to make it in today. Had a flu bug last week and thought I was through the worst but been ill all weekend."* Mr Stacey responded stating *"No problem but that's your lot. I've had enough Darren."* The Claimant responded *"Sorry I don't understand that message Gary. What does that mean?"* Mr Stacey's response was *"I'll tell you when I see you. I'm focusing on the people that aren't absent on 4 – 5 separate occasions during there [sic] trial period this morning. Got jobs and customer to consider. Sorry."* Later the same day, Mr Stacey messaged the Claimant to say *"I'll see you at the yard at 9 am tomorrow. If you're unwell, then let me know and I'll come collect our van. Thanks."* (p. 51 – 2)
24. Mr Stacey's evidence, which I accept, is that the van was required from the Claimant in order to split the Respondent's teams to allow them to carry out the work that had been booked. I also accept Mr Stacey's evidence that he attempted to call the Claimant on 9 April 2019 but received no response.
25. Mr Stacey sent a further text message on 9 April 2019 stating *"I tried to call you regarding your unauthorised absence today but without success. Just to inform you that I have collected the van and will need the key ASAP. Many thanks"* (p. 52). In oral evidence, Mr Stacey explained that he was able to collect the van as he had a spare key. He had attended the Claimant's house to pick up the van and had knocked and, on receiving no reply posted the letter regarding probation referred to below through the letterbox. Had he received a reply he would have asked the Claimant for the key to the van, as he would have done if an employee had been on holiday and the van they used was required during that period.
26. The letter Mr Stacey posted to the Claimant (p. 53) informed him that the Respondent had a number of concerns with the Claimant's performance in his role and invited him to a probationary review meeting on 11 April 2019 at 9 a.m. The letter set out the concerns and warned the Claimant that his probation could be extended or his employment terminated at the review. The Claimant was also informed that if he failed to attend, Mr Stacey would have to make a decision based on the evidence available, and that he would regard any failure to attend to be a breach of reasonable management instruction, and would add this to the matters of concern under consideration.
27. I accept that the Respondent continued to try to contact the Claimant by phone on 10 and 11 April 2019. The Claimant stated at the case management PH that this was not the case and said he could support this using phone records, but no such records have been provided.

28. There is no dispute that the Claimant did not attend the meeting on 11 April 2019.
29. On 12 April 2019, Mr Stacey again messaged the Claimant asking for the key to the van back that day (p. 55). The Claimant responded on the same day, stating *"I've been very ill all week so am down in London staying at my sisters, I will be dropped back Sunday. I too would like back all my tools that were [sic] taken with the van [there follows a list of tools]. As I said, I will be back Sunday when I'm better. Regards"*. Mr Stacey responded *"No problem at all. I'll sort your tools out. I will meet you at the yard on Monday to sort out changeover of tools & keys."* The Claimant texted Mr Stacey on Monday 15 April stating *"Sorry for any inconvenience but I'm still in London today. It's my mum's birthday today, 2 years since we lost her and the family has all gathered. My sister is either dropping me off tonight or early tomorrow."* (p. 57). The Claimant texted again on 18 April stating *"Evening Gary Sorry I've not been back to you, had some real health issues – won't bore you with details. Obviously I need to get this key-fuel card back to you and need to arrange to get my tools back. Your thoughts or options? Thanks Darren"*.
30. Mr Stacey responded that this would be fine *"but I'm not available until Monday 29th now. The van has been cleared out and totally sorted (which took me a day it was so bad) and I have locked the tools away for safekeeping. I am keen to get my key and fuel card back as I'm sure you are your tools, so I'll contact you on Monday 29th to exchange. Hope the health situation has improved. Thanks, Gary"* (p. 58). The Claimant responded in turn stating *"That's fine, I've just got out of hospital today and been advised to rest for at least a few days- so not having to worry about this handover is a relief. I will speak to you on the 29th. I presume you will be able to update me on what money is owed to me for week in hand, week outstanding and holiday outstanding. Thanks."* Mr Stacey responded that he would do so when he got back (p. 59). The Claimant did not provide any medical certificate or other evidence to support his statement that he had been in hospital, and it remains the case that no such evidence has been provided.
31. On 24 April 2019, the Claimant emailed Michelle Stacey asking when he could expect his P45 as he'd been offered another job (p. 62).
32. On 29 April 2019 there was a further exchange between the Claimant and Mr Stacey (p. 63 – 4). The Claimant said he was waiting to pick up his new van, and asked what Mr Stacey's plans were for the day. Mr Stacey said he was out on-site surveys but could be available tomorrow. The exchange continues:

C: I start my new job tomorrow. I need to pick up my tools. I can be at the yard at 7 am tomorrow? I need my pay slip, has that been sorted? I need to know what's coming to me.

GS: I'm not sure yet. You left without notice so I had to get someone in to cover your work. Just sorting it all out with HR. I'll let you know about tools etc

Payslip will be sorted in due course.

C: You didn't give me notice Gary and you just picked up the van without letting me clear it up.

What has getting someone else to cover work got to do with what money is owed to me.

If anything is even slightly off I will seek legal advice.

33. On 29 April 2019, Michelle Stacey wrote to the Claimant to inform him that the Respondent had suffered a financial loss of £720 (the difference between the cost of the sub-contractor and the Claimant's pro-rated salary) as a result of the Claimant's failure to give notice, and stated that this would be deducted from his salary on 30 April 2019. The Claimant was paid a total of £848.02 on 30 April 2019. There is no dispute that this constituted his pay to 8 April 2019, his pay for a week in hand from time worked previously and his holiday pay, and that these sums were in the correct amount, less the £720 previously referred to.
34. At the telephone case management hearing on 19 February 2021, the Respondent acknowledged that the Claimant would have been paid gross £640 for the week had he done the work and thus that its loss was £560, not £720. The Claimant has now been paid the additional £160 gross.
35. I have been taken to documents in the bundle showing that the daily rate for the sub-contractor used, Mr Newman, was £200 (£1000 for 5 days). A roster shows that the Claimant would have worked on 18 – 20 April (Thursday – Saturday) and then on Monday – Thursday (21 – 24 April). It was confirmed in oral evidence that the dates on which the £1200 had been paid to Mr Newman were the Thursday – Saturday and then the following Monday – Wednesday, on which the Claimant had been due to work on the relevant job. Mr Newman was in fact paid £800 per 5 days worked; Mr Stacey explained this was because CIS tax of 20% was deducted at source (p. 60 – 61 and 65 – 68).
36. During the hearing, the Respondent's representative confirmed that employer's national insurance was paid on the Claimant's wages, and that this would have been in the sum of £65.41. He further confirmed that the sub-contractor provided his own van and fuel, and that the fuel costs for the week would have been around £4.76 (on the basis that the Claimant would have been working 3.8 miles from his home).

The Law

Dismissal

37. In determining whether a written communication should be construed as terminating employment, the construction to be put upon it should reflect what an ordinary reasonable employee would understand by the words, and it must be construed in the light of the facts known to the employee at the date he receives the letter (see *Chapman v Letheby & Christopher Ltd*).

Breach of Contract

38. A claim for breach of contract may be brought in the Employment Tribunal by virtue of article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, where the claim arises or is outstanding on the termination of an employee's employment.

Unauthorised Deductions from Wages

39. Section 13(1) of the Employment Rights Act 1996 provides that an employer shall not make a deduction from wages of a worker employed by him unless 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 the worker has previously signified in writing his agreement or consent to the making of the deduction.
40. An employee has the right to complain to an Employment Tribunal of an unlawful deduction from wages pursuant to section 23 of the Employment Rights Act 1996.
41. "Wages" are defined in section 27 of the Employment Rights Act 1996 as meaning any sum payable to a worker in connection with his or her employment, including at subsection (1)(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise.

Conclusions

What was the date of termination of the Claimant's employment and how did it come about?

42. I have carefully reviewed the text message exchanges between 8 and 29 April 2019. Considering the communications from Mr Stacey on 8 and 9 April 2019, I find that on a non-technical construction, and taking into account the facts known to the Claimant at the time, they did not constitute a dismissal. I reach that conclusion for the following reasons:
 - (a) Following the meeting on 15 March 2019, the Claimant was aware that more formal action might be taken against him should he be absent again and fail to comply with the absence reporting procedure.
 - (b) The Claimant immediately sought clarification of the message in which Mr Stacey said *"No problem but that's your lot. I've had enough Darren"*, stating he did not understand it. Mr Stacey responded by saying *"I'll tell you when I see you"* and followed that with a further message stating *"I'll see you at the yard at 9 a.m. tomorrow. If you're unwell then let me know and I'll come collect our van."*

(c)With the clarification, and the earlier warning, those messages do not convey a dismissal, but rather that Mr Stacey wished to see the Claimant to discuss his absence and failure to report. Mr Stacey has explained that collection of the van was common when individuals were sick or on holiday, and the Claimant has not attended to give any contrary evidence.

43. The Claimant was clearly informed that his employment had not yet ended, and that he was invited to a probationary meeting in the letter dated 9 April 2019 which was posted through his letterbox, and which he has not suggested he did not receive. None of the text messages exchanged thereafter on 12 April demonstrate an unambiguous intention to terminate the contract on either side (and neither party has argued that they do).
44. I accept the Respondent's position that the termination of the contract occurred with the text message on 18 April 2019 in which the Claimant asked Mr Stacey to update him on 29 April as to the money owed to him for a week in hand, week outstanding and holiday outstanding. This was clearly a settling up following termination of contract and I find that the Claimant was on that date evincing a clear position that he was no longer employed by the Respondent. I find that the Claimant resigned from his employment on 18 April 2019 without notice.
45. I therefore find that the Claimant was not entitled to any notice pay, meaning the other issues at paragraph 11 above fall away.

Was the Respondent entitled to make a deduction from the Claimant's final wages to recoup the cost of paying a subcontractor to work because the Claimant did not work his notice period?

46. I find that the clause in the Claimant's contract set out at paragraph 18(c) above did entitle the Respondent to deduct from the Claimant's pay the cost of paying a subcontractor to cover his duties in circumstances where he had resigned on 18 April 2019 without giving notice. I consider that to be the natural construction of the clause. The Claimant was clearly aware of the clause, having signed to state that he had received the contract, and explicitly signed to agree that the above was an express clause of his contract.
47. I have considered the question of whether the Claimant should be regarded as having been incapable of work owing to sickness during what would have been his notice period. The Respondent accepts that if the Claimant was incapable of work owing to illness at this time, they would not have been entitled to deduct sums under this clause. However, whilst the Claimant did refer to having been in hospital prior to 18 April and needing to rest for a few days, he provided no medical certificate as required by the Respondent's procedures in view of his absence, and I note further that on 15 April he had referred to gathering with his family to commemorate his mother's death. There is no clear or coherent evidence that the Claimant was unable to attend work owing to illness over this period, and on the balance of probabilities, I find that he was not incapable of work.

If the Respondent was permitted to make such a deduction, how much should have been deducted from the Claimant's final wage?

48. However, I find that the Respondent was not entitled to deduct £720, or indeed £560 from the Claimant's wages.
49. On exploration of the evidence, it appears that the daily rate paid to Mr Newman (before deducting tax) was £200. The Respondent has used the figure of £1,200 on the basis that the Claimant would have worked 6 days in his week-long notice period. However, Mr Stacey's evidence was that the Claimant could not have been required to work Saturdays under his contract, and a Saturday has been included in the sum claimed. I consider the only reasonable construction of the contractual clause set out at paragraph 18(c) above to be that sums could only be claimed in respect of days on which the Claimant could have been required to carry out his duties. The maximum sum that could be claimed was therefore £1000.
50. The Respondent has already accepted that the sum of £640 should be deducted from the amount paid to Mr Newman in respect of duties that should have been carried out by the Claimant. I find that the additional sums that would have been paid had the Claimant worked his notice, namely employer's national insurance contributions (£65.41) and the saved cost of the van (£4.76) should also be deducted. That means the total additional cost of subcontracting to Mr Newman, and thus the total amount that the Respondent was entitled to deduct from the Claimant's salary, was £289.83.
51. The amount actually deducted gross (taking into account the amount repaid to the Claimant already) was £560. The Claimant is therefore entitled to compensation in the sum of £270.17 gross.

Employment Judge A. Beale

Date: 7th September 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 8th
SEPTEMBER 2021

ANDY FROST
FOR EMPLOYMENT TRIBUNALS