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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107653/2020

Hearing Held by Cloud Video Platform (CVP) on 2 & 3 September 2021

Employment Judge Campbell

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Mr Steffan Goodwin

**Claimant
In Person**

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Spray Finishes Scotland

**Respondent
Not present**

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JUDGMENT

The Judgment of the Employment Tribunal is that:

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1. An unlawful deduction was made from the claimant's wages contrary to section 13 of the Employment Rights Act 1996, and the respondent is ordered to pay the claimant the sum of £1,711.60 as compensation;
2. The claimant was entitled to five days of accrued annual leave on termination of his employment for which he was not paid, and the respondent is therefore ordered to pay him the sum of £377.52; and

3. The respondent breached the claimant's contract of employment by failing to give him notice of termination or payment in lieu, and the respondent is ordered to pay the claimant £1,655.94 as damages.

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REASONS

1. This claim arises out of the claimant's employment by the respondent, which began on 6 July 2020 and ended on 21 October 2020 when he was summarily dismissed. The claimant asserts that he was underpaid or not paid at all on a number of occasions, that he was not given notice of termination of employment or payment in lieu of notice, and was not given payment for accrued holidays following the termination of his contract, all as detailed below.
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2. The claimant represented himself at the hearing and gave evidence. The response to the claim had been struck out by way of a judgment of Employment Judge Gall dated 1 September 2021. There was no appearance by the respondent although its solicitor attended as an observer.
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3. The claimant had provided some documents in advance of the hearing. Where relevant those are referred to below. The respondent had not provided any documents, which was part of the reason why the response had been struck out.
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LEGAL ISSUES

4. The legal questions before the Tribunal were as follows:
- 4.1. Did the respondent pay the claimant less than he had earned in the months of August and October 2020?;
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- 4.2. Was the claimant entitled to accrued annual leave for which he was not paid following the termination of his employment?

4.3. Did the respondent act in breach of the claimant's contract of employment by not providing him with paid notice of termination, or an equivalent payment in lieu of notice?

4.4. If yes to any of the above, what is the monetary value of the claim?

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APPLICABLE LAW

5. By virtue of section 13 of the Employment Rights Act 1996 ('ERA') a worker is entitled not to have unauthorised deductions made from their wages. Therefore, subject to specific exceptions provided for in that part of the Act, there will have been an unauthorised deduction if the worker is paid less than they have earned, depending on how their earnings are calculated, or not paid at all for their work. The date of the deduction is deemed to be either the day when less is paid to them than they have earned, or when they would normally have been paid but were not.

6. Examples of lawful deductions would include PAYE income tax properly deducted or a sum which the worker had explicitly consented to having deducted in advance by writing. Section 14(1) ERA expressly states that an employer may recover a previous overpayment from a worker's wages, and this will not be treated as an unlawful deduction.

7. A worker who has suffered one or more unlawful deductions from their wages may submit a claim to the employment tribunal under section 23 ERA. There are detailed requirements as to the timing of complaints to ensure that a tribunal can determine them. In short, if a claim is about a series of deductions, the claim process (initiated by way of commencement of Early Conciliation through ACAS) must begin within 3 months of the last alleged deduction in the series.

8. Under the Working Time Regulations 1998 each worker is entitled to a minimum amount of annual leave. For a full-time worker that entitlement is 28 days per year. The employer can decide when a holiday reference period will

begin and end, provided that period is a full 12 months. Employees generally can request when to use their leave, and they must be paid at their normal rate in full for leave days taken. However, within reason, an employer can refuse a holiday request for a given date or dates, or dictate that workers should use their accrued leave on given dates. Workers should not agree to receive payment instead of taking leave as a rule, but at the point when their service ends they are entitled to be paid for any accrued leave not taken at the same rate. The right to be paid for accrued holidays on termination of employment and the method of their calculation are set out in Regulation 14(2) and (3). If a worker does not receive the pay they are due they can submit a claim to the employment tribunal under Regulation 30.

9. An employee will be entitled to notice of termination of their employment based on the terms of their contract or the provisions of section 86 ERA, whichever is the more generous. Unless the employer brings the contract to an immediate end by reason of the employee's material breach, it must make a payment equivalent to the wages it would have paid had the notice period been served. It is settled law that where an employee commits an act of gross misconduct the employer may be able to treat this as a fundamental breach of contract, and by immediately ending the contract in acceptance of that breach, it is released from the obligation to pay notice.

FINDINGS OF FACT

10. The following findings of fact were made as they are relevant to the issues in the claim.
11. The claimant was an employee of the respondent from 6 July 2020 until 21 October 2020. The respondent's business involves applying finishes predominantly to kitchen units in order to improve their longevity and cosmetic appeal. The claimant was recruited as a Repair Technician along with two other individuals at the same time. On 28 July 2020 his role changed to Spray Shop Supervisor, which was effectively a promotion.

Contractual terms

12. Upon changing role the claimant was given a five-page statement of terms and conditions of employment which was signed and dated by him on 20 September 2020. This was produced and is referred to below as the 'Contract'. His pay rate was latterly £13 per hour. His hours of work were 7am to 4.30pm, Monday to Friday and 7am to 3.30pm on Fridays. In each day he received an unpaid break of 30 minutes, meaning that he worked for 9 hours per day on Mondays to Thursdays, and 8 hours on Fridays. He was paid monthly on or around the 28th day of each month.

13. Under the Contract the claimant was entitled to 20 days of annual leave, to accrue equally each month. The respondent's holiday year was stated to be the calendar year. In addition, he was entitled to a further ten local or bank holidays per year, to be designated as such by the respondent. The claimant was either entitled to be paid when taking one of those days as a holiday, or if required to work he would be paid at his normal rate and given a day of leave back to take at another time. The only local or bank holiday which fell within the claimant's period of service with the respondent was Monday 3 August 2020. On that day the claimant worked as normal.

14. The claimant would receive his monthly payslips by email, usually a day or so before his pay date. The claimant produced payslips covering each of the months in which he was employed by the respondent, i.e. July to October 2020 inclusive. He also produced bank statements covering the period July 2020 to January 2021, which showed the payments made into his account by the respondent.

Claimant's service

15. The claimant's line manager was a Mr Mark Wilson who described himself in correspondence as the respondent's Managing Director. He recruited the claimant. The claimant was based at the respondent's premises in Paisley. Mr Wilson was there infrequently but the claimant was able to reach him when required by mobile telephone, including WhatsApp, or email.

16. The claimant's duties in his latter role involved supervising other staff, dealing with customers, scheduling orders and jobs, dealing with customer payments and performing quality checks.
17. Although not provided for expressly in the Contract, the claimant and his
5 colleagues would at times be required to work beyond their scheduled hours, and would be paid overtime for doing so. Mr Wilson told the claimant and his colleagues at the point they were recruited that if a given job was not completed by its scheduled time the priority was to try to finish it as quickly as possible, including by way of working on if necessary. Provided that were
10 done, overtime pay would be given for the extra time worked and there was no need to seek specific authorisation.
18. The claimant and his colleagues completed weekly timesheets which they would email to the respondent's external accountants. Those would be used to calculate monthly pay. Overtime claimed would be added to the timesheet
15 for the week. The claimant did not ever have a claim for overtime queried or disallowed. Overtime would be paid at the same rate as normal pay.
19. The claimant did not work any overtime in July 2020, but did work overtime from August onwards.
20. The claimant was paid correctly for his work in the month of July 2020, as set
20 out in his payslip for that month.
21. By the beginning of August 2020 the claimant was in his new supervisory role. He worked a combination of basic hours and overtime. His payslip for that month confirms he worked for a total of 226.5 hours at a rate of £13 per hour, which he accepts is correct. The payslip for this month as a whole is correct,
25 showing net pay due to the claimant after deductions of £2,184.68. However, as evidenced by his bank records, the claimant was only paid £1,622.80 on 28 August 2020. The balance of his pay for that month was not transferred to him subsequently. Mr Wilson had on occasion said to staff that he would pay part of their wages for a given month on the correct date and the rest a week

or so later. The claimant thought that the balance would be made up to him. However, it was not.

22. The claimant worked as normal in September 2020, albeit that he had to work from home between 16 and 30 September as he was asked to self-isolate following a confirmed Covid-19 case at his child's school. The claimant raised this with Mr Wilson who said that provided the claimant carried out as much of his duties as he could from home, he would be paid as normal. The claimant therefore went into work to open up the premises shortly before 7am each weekday, returned home to work, and then went back to the respondent's premises to close up at the end of the day. Whilst at home the claimant was in contact with customers to report on their jobs and schedule new work, and dealt with payments.

23. The claimant accepts that his September 2020 payslip is correct and his bank records showed that he was paid the full amount stated to be due to him for that month.

24. The claimant returned to work at the respondent's premises on 1 October 2020, which was a Thursday. He took Friday 2 and Monday 5 October as paid annual leave days.

20 **The claimant's dismissal**

25. The claimant worked as normal up until the morning of Wednesday 21 October 2020. He attended work at 7am that day and around fifteen minutes later was asked by Mr Wilson to attend a meeting between the two. Nobody else was present. Mr Wilson told the claimant that due to low orders and restricted cashflow, he would need to let the claimant go immediately. He had been hoping to secure and start work on a large contract with a customer in Newcastle but it had been delayed for a number of months. He said that if the situation was resolved and the work was secured, he would be happy to have the claimant back.

26. The claimant raised whether it was an option for him to return to his original role but Mr Wilson did not think that was feasible, and was anticipating making other employees redundant also. The conversation was friendly. There was no criticism of the claimant. Mr Wilson made it clear that the claimant's contract was being brought to an end immediately and that he would be paid everything he was due. The claimant left and went home, exiting the premises around 7.28am according to a CCTV screen shot from a neighbouring business which he produced.

27. Using WhatsApp, the claimant asked Mr Wilson later that day whether he could *'put it in writing that my employment has been terminated due to financial stability of the business/ [!] Need it to start claiming.'*

28. Mr Wilson replied minutes later to say *'Yes if it helps you mate then yes as I want to help I will get this done for you.'* He went on a few minutes later to say *'No probs you're a good guy but the figures weren't adding up and only door job will get me out of trouble...'*

29. The claimant had received nothing by the following day and asked Mr Wilson if he had dealt with his request. Mr Wilson asked for his email address which was provided, and then sent an email to the claimant dated 22 October 2020 as follows:

"Hi steffan

Its with regret we had to let you go after working with us for circa 8 weeks, as the company is running at a loss and not making profits in this current climate.

We want to thank you as you have been a good worker and a plesent [sic] guy.

All the best

Spray finishes scotland limited."

30. The claimant assumed everything was in order until receiving his October 2020 payslip on the 27th of that month. It stated that he had worked only 17 hours, and at a rate of £10 per hour. He contacted ACAS who advised him to provide a breakdown of the sums he believed to be unaccounted for.
- 5 31. The claimant also contacted Mr Wilson who changed his position as it had been conveyed previously, saying that the claimant had been dismissed for misconduct and that he was not due pay for the time he was isolating at home.
32. The claimant did not receive any payment of salary at all for October 2020, whether on or around 28 October, or at any date up until January 2021 which
10 was as far ahead as was covered by the statements he produced.

CONCLUSIONS

Issue 1 – deduction from wages

- 15 33. The claimant earned £2,184.68 net in August 2020, as confirmed by his payslip which he accepted was correct. He was only paid £1,622.80 for that month, as evidenced by his bank statement. As such, an unlawful deduction was made from his pay on 28 August 2020, when he was paid less than he had earned. He is therefore due the difference of **£561.88**.
- 20 34. The claimant received no pay for October 2020. He worked as normal up until 21 October 2020, when he was dismissed. An unlawful deduction was made from his wages on 28 October 2020, the date when he ought to have been paid for that month's work. On the basis of his working pattern, Monday to Friday, he worked 12 days of 9 paid hours per day (i.e. Mondays to Thursdays) and 3 days at 8 hour per day (Fridays). This includes 21 October
25 2020. That is a total of 132 hours which at £13 per hour works out at £1,716.00 gross. After deduction of £360.36 of income tax at the rate of 21% and 12% employee National Insurance Contributions of £205.92 that leaves **£1,149.72 net**.

35. An annual salary figure of £29,744 has been used, arrived at by multiplying his gross weekly income of £572 by 52 weeks.

Issue 2 – holiday entitlement

- 5 36. Between the claimant's start date of 6 July 2020 and finish date of 21 October 2020 he accrued 6 days (5.9 days rounded up). He earned a further day back by working on 3 August, making 7 days.

37. The claimant took two days of annual leave while employed by the respondent, Friday 2 and Monday 5 October. This left him with 5 days unpaid at the time of his dismissal. He was entitled to payment for those days but did not receive any such payment.
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38. I have calculated the value of those days as the equivalent of a normal week's pay, which was 44 hours at £13 or £572 gross. Again, the award he is entitled to will be the net value of that after deductions as calculated in the same way as for the wages underpayment, which leaves **£377.52**.

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Issue 3 – notice pay

39. The claimant's Contract entitled him to one month of notice after serving one month. He received no notice. The respondent's position appeared to be that he was dismissed for gross misconduct and therefore lost the entitlement to notice or payment in lieu. If that was true and the dismissal was fair then the respondent may have been entitled not to pay notice.
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40. However it is found on the evidence before the Tribunal that the claimant was not dismissed for gross misconduct, or by reason of his conduct at all. The Tribunal relies on his oral account of his exchanges with Mr Wilson, particularly in the meeting on the morning of 21 October 2020, and the documentary evidence which is consistent with this, such as WhatsApp messages and the email Mr Wilson sent the claimant on 22 October 2020, reproduced above.
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41. All of that consistently points to a redundancy situation, with the respondent having no issue with the claimant's performance or conduct, but simply no longer being able to afford to pay his wages.

5 42. It therefore follows that the respondent was in breach of the contractual requirement to provide notice. The claimant was entitled to one month's notice pay as of 21 October 2020. That would be deemed to start on 22 October and have run until 21 November 2020. I have calculated that on the basis of the claimant's normal working hours and rate of pay to be 17 days at 9 hours and 10 5 days at 8 hours. Applying the hourly rate of £13 this equates to 193 hours at £13, or £2,509.00 gross. The net value is **£1,655.94** after appropriate deductions, calculated in the same way as for the wages underpayment and holiday payments above.

Conclusions

15 43. The claimant's complaints are successful as set out above. The total value of the sums awarded (in bold above) is **£3,745.06** and this is the amount the respondent is ordered to pay.

20 Employment Judge: Brian Campbell
Date of Judgment: 10 September 2021
Entered in register: 28 September 2021
and copied to parties

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