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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111992/2021 (V)

Final Hearing Held by CVP on Thursday 13 January 2022 at 11.00am

Employment Judge Russell Bradley

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Michal Trenogow

**Claimant
In Person
Assisted by his wife
Anna Trenogow**

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Midlothian Utilities

**Respondent
Not Present
Not Represented**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is:-

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1. To declare that the claimant's claim that the respondent has made a deduction from his wages in contravention of section 13 of the Employment Rights Act 1996 is well founded;
2. To order the respondent to pay to the claimant the sum of ONE HUNDRED AND NINETY TWO POUNDS AND SEVENTY PENCE (£192.70) in respect of that deduction;
3. That the claim for accrued entitlement to paid annual leave (due upon termination) is well-founded. The respondent is ordered to pay to the claimant

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the sum of ONE THOUSAND ONE HUNDRED AND NINETEEN POUNDS AND SIXTY PENCE (£1119.60).

REASONS

Introduction

- 5 1. This was the final hearing of a claim within an ET1 presented on 26 October 2021. Early Conciliation began on 3 September. The certificate was issued on 7 October. The notice of claim and of this hearing was sent to the respondent at the above address on 28 October. It is the address provided by the respondent to the claimant in a P45 form. It is the respondent's registered
10 office. The notice advised that a response form required to be received at the Glasgow Tribunal centre by 25 November 2021. No ET3 form was lodged by that date or since. The notice advised that if no received was received by then, and no extension of time has been applied for and given, the claim would proceed undefended. No extension has been sought. The hearing before me
15 therefore proceeded on the basis of an undefended claim.
2. The claimant is a Polish national. His first language is Polish. His spoken English, while comprehensible, was occasionally hesitant.
3. The ET1 (8.1) identified a claim of arrears of pay. In discussion with the claimant about the paper apart to the ET1 prior to hearing evidence, it became
20 clear that his claim was for (i) statutory sick pay for the period from 3 July to 24 August, the latter date being his effective date of termination and (ii) accrued, untaken and unpaid holidays in the period of employment, which began on 5 April 2021. The ET1 paper apart alludes to the claimant's concern that the respondent had not been paying income tax to HMRC on his pay. I
25 explained that the employment Tribunal does not have the power to order payment by an employer of income tax to HMRC.
4. On Tuesday 11 January the claimant emailed to the clerk (i) an email dated 25 August 2021 from the respondent to him, (ii) 8 weekly payslips in the period 4 July to 22 August and (iii) a P45 form issued by the respondent relative to
30 the claimant's employment with it. It became apparent in the discussions prior

to hearing evidence that the claimant had not been able to send to the Tribunal an amount of other documentation. He and his wife undertook to email to the clerk the following:-

- 5 a. Other email communications to and from the respondent about the disputes
- b. Bank statements for the period of employment showing all payments received from the respondent
- c. Screen shots of relevant text or WhatsApp messages to do with his employment
- 10 d. A Facebook advertisement for the role which the claimant accepted with the respondent
- e. Any sick notes from his doctor vouching the reason for his absence in the period 3 July to 24 August.

15 5. I indicated that I would not be able to determine the issues until I had seen the material.

6. On Friday 14 January the claimant emailed to the Tribunal the following:-
- a. A copy of the claimant's bank statements for the period 17 March to 16 August 2021 (5 pdfs)
 - b. A 7 page word document containing the texts of email exchanges with the respondent in the period 15 June to 25 August 2021
 - 20 c. 2 sick notes (dated 5 July and 19 August) (photographed)
 - d. Screenshots of text messages from 7 periods being
 - i. 30 to 31 March
 - ii. 2 April
 - 25 iii. 21-22 April

iv. 26 May

v. 10-14 June

vi. 1 July to 2 August

vii. 23 August

- 5 e. Screenshot of invitation from Lawrie Reynolds looking for ad hoc delivery drivers dated 18 March 2021.

Evidence

7. I heard evidence from the claimant. To the extent relevant he spoke to the material detailed at 4 above.

10 **The issues**

8. It appeared to me that the issues for determination were:-

- 15 a. In relation to a period of sick leave from 3 July to the stated effective date of termination (24 August 2021) did the respondent make unlawful deductions from the claimant's pay in failing to pay him statutory sick pay?
- b. If so to what remedy is he entitled?
- c. What payment if any (being a payment in lieu of accrued and untaken leave in the period of employment) is due by the respondent to the claimant?

20 **Findings in fact**

9. From the ET1, the documents produced before and after the hearing and the claimant's evidence I found the following facts proved.
10. The claimant is Michal Sebastian Trenogow. He is a Polish national. His first language is Polish.

11. On or about 30 March 2021 the claimant received a message from Lawrie Reynolds. The claimant knew Mr Reynolds from previous work they both did as a lorry drivers for Robert Burns Ltd, Broxburn. The claimant understood that Mr Reynolds was looking for the claimant to start work as a lorry driver for the respondent. At that time the claimant understood that Mr Reynolds worked as a driver for the respondent. The claimant telephoned Mr Reynolds. He accepted the offer of an initial shift, a night shift. He began work as a lorry driver for the respondent on 5 April 2021. At that time, the claimant understood that the job involved collecting a tractor unit from the respondent's premises, driving it to the Tesco warehouse at Livingston and then delivering goods from there with a Tesco trailer (as an articulated vehicle) to one or more of Tesco's stores.
12. The respondent has premises at Gorebridge. They are reasonably close to the claimant's home. The claimant is married. He has a three year old son. The role as a night shift driver for the respondent was convenient for the claimant's arrangements with his wife, particularly in relation to the care of their son.
13. In the period between 5 April and 3 July 2021 the claimant usually worked 3 or 4 nights per week. In those nights he ordinarily worked between 10 and 12 hours. He ordinarily started between 5pm and 7pm. His shift usually ended between 4am and 6am. For each nightshift he was paid £120.00. In that period, the respondent did not provide payslips to the claimant. His first pay was paid in early April for his first shift. His worked usually involved; travel from home to Gorebridge; collecting vehicle keys from a shed on the respondent's premises; driving the tractor unit to Tesco, Livingston; collecting goods for delivery and relative paperwork; delivery of those goods to a Tesco store; return to Livingston then to Gorebridge. The Tesco stores to which deliveries were made were around Scotland. They included Aberdeen, Inverness and Glasgow. A shift usually involved delivery to one or two stores. On occasion, he returned refuse for Tesco to a recycling centre at Livingston. The respondent's tractor unit driven by the claimant was initially a Scania, then a Volvo. It carried the respondent's livery.

14. In the period 6 April to 5 July the claimant received payment from the respondent into his bank account 12 payments. For the most part, the payments were weekly. Almost all of the payments corresponded with having worked either 3 or 4 shifts per week assuming a rate of pay of £120.
- 5 15. Neither the respondent nor Tesco provided the claimant with a uniform. Nor did either provide him with any “HiVis” clothing or safety boots. On occasion, he saw others who worked for the respondent at Gorebridge. On one occasion he was asked to show a new colleague what his job involved, which he did.
16. Tesco required the claimant to provide to it information for his shifts. That
10 information included his name and the registration number of his vehicle.
17. On one occasion and while not working, the claimant took his son to Gorebridge in order to show him the claimant’s “truck”. On that occasion, he met Martin Redpath. The claimant believes that Mr Redpath is the owner of the respondent.
- 15 18. In the period 15 to 28 June the claimant exchanged a number of emails with an employee of the respondent, Danielle. In the first the claimant explained that he attached his P45 “as requested by” Mr Redpath. The P45 was from his previous employment. In answer to a question from the claimant and in that exchange, Danielle said that; “all national insurance and tax will be paid”;
20 and his holiday entitlement needed to be clarified with Mr Redpath for her. In that exchange she also sought a photograph of the claimant’s timesheets each Sunday for her to send on to the respondent’s accountant. That process, she said, would allow payslips to be sent to him.
19. The last shift worked by the claimant was in June 2021. On 3 July he had a
25 bicycle accident. As a result he broke an arm. He required surgery. He was in hospital for about two days. As a result of the accident, the claimant was unable to work until about September. On 5 July the claimant’s general practitioner signed a “sick note” on which he recorded that he was unfit for work until 5 August by reason of a distal radius and ulna fracture. On 19
30 August the practitioner signed a “sick note” on which he recorded that he

remained unfit for work for a further four weeks by reason of left forearm fractures.

20. On Sunday 4 July 2021 and weekly thereafter until 22 August 2021 the respondent issued to the claimant a wage slip. All of those 8 wages slips recorded £0.00 as his gross and net pay for the relevant week.
21. In the period 12 July to 9 August, the claimant received in his bank account five payments (weekly) each of £100 from the respondent.
22. In the period 12 July to 25 August the claimant exchanged further emails with Danielle. In those emails Danielle said; the claimant was not entitled to statutory sick pay, but payment of £100 had been made as a gesture of goodwill; that payment would continue on condition that the claimant returned to work when he was fit to do so; and holiday pay was calculated on wages paid to him which information was to be provided to the respondent's accountant. In those exchanges the claimant said, amongst other things that he had not been provided with timesheets to complete, explaining that the method of arranging work was that Mr Reynolds sent to him a start time.
23. On 25 August 2021 Danielle emailed the claimant. Amongst other things, she said, "*We feel the best option at the moment is to end all employment with Midlothian Utilities. I have attached your P45 and wish you all the luck in the future.*" The P45 recorded the claimant's date of leaving as being 24 August.
24. In the period between 5 April and 24 August the claimant took no paid leave from his employment with the respondent.
25. The respondent has denied that the claimant is entitled to statutory sick pay for the period of his absence, 3 July to 24 August.
26. The respondent has indicated that it cannot provide holiday pay on the basis of its complaint that the claimant has not provided it with any timesheets for the period of his work with the respondent.

Comment on the evidence

27. I found the claimant to be both credible and reliable. For the most part he gave evidence by answering my questions. His evidence was considered and direct. He squarely answered questions without unnecessary additional information. He provided some ancillary information which enhanced his credibility. An example was evidence of his meeting with the owner of the respondent.

The law

28. Section 13 (1) and (2) of the Employment Rights 1996 provide that:-

10 “(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*

15 “(2) *In this section “relevant provision”, in relation to a worker’s contract, means a provision of the contract comprised—(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or (b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the*

20 *worker in writing on such an occasion.*

29. Section 13 (5) to (7) of the 1996 Act provide that:-

25 “(5) *For the purposes of this section a relevant provision of a worker’s contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect. (6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a*

deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified. (7) This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting “wages” within the meaning of this Part is not to be subject to a deduction at the instance of the employer.”

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30. Section 23(1) (a) of the 1996 Act provides that:- *“(1) A worker may present a complaint to an Employment Tribunal —(a) that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2))”.*

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31. Section 24(1)(a) of the Act provides that *“(1) Where a Tribunal finds a complaint under section 23 well-founded, it shall make a declaration to that effect and shall order the employer—(a) in the case of a complaint under section 23(1)(a), to pay to the worker the amount of any deduction made in contravention of section 13”.*

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32. Section 27(1)(b) of the Act provides that “wages” includes statutory sick pay under Part XI of the Social Security Contributions and Benefits Act 1992.

33. Section 151(1) of the Social Security Contributions and Benefits Act 1992 provides that *“Where an employee has a day of incapacity for work in relation to his contract of service with an employer, that employer shall, if the conditions set out in sections 152 to 154 below are satisfied, be liable to make him, in accordance with the following provisions of this Part of this Act, a payment (to be known as “statutory sick pay”) in respect of that day.”*

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34. Sections 152 to 154 of the 1992 Act then set out three conditions. They are respectively; the period of incapacity for work; the period of entitlement and *“qualifying days”*. Section 155 of the Act sets out limitations on entitlement.

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35. Regulation 13(1) of the Working Time Regulations 1998 provides that a worker is entitled to four weeks’ annual leave in each leave year.

36. Regulation 13(3)(b)(ii) of the Working Time Regulations 1998 provides that a worker's leave year, for the purposes of an entitlement to annual leave, begins.... where there are no provisions of a relevant agreement which apply ... if the worker's employment begins after 1st October 1998, on the date on which that employment begins and each subsequent anniversary of that date.
37. Regulation 13A of the 1998 Regulations provides that a worker is entitled in each leave year to a period of additional leave which in this case (as per Regulation (2)(e)) is 1.6 weeks.
38. Regulation 14(2) of the 1998 Regulations provides that where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3). Paragraph (3) provides that where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to a formula which is set out in it.
39. Regulation 16(1) of the 1998 Regulations provides that a worker is entitled to be paid in respect of any period of annual leave to which he is entitled under regulation 13 and regulation 13A, at the rate of a week's pay in respect of each week of leave.
40. Regulation 30 (1)(b) of the Regulations provides that a worker may present a complaint to an employment Tribunal that his employer has failed to pay him the whole or any part of any amount due to him under regulation 14(2) or 16(1).

Submissions

41. The claimant made no formal submission. He was content to leave matters based on the evidence that had been heard and the discussion at the outset of the hearing.

Decision and discussion

42. On the claim for holiday pay, having started work for the respondent on 5 April 2021 and with no provision for holidays, the claimant's leave year began on that date. In the leave year to the date of termination of the contract on 25 August 2021 he was not permitted to take paid holidays. The claimant thus worked 4 complete months in that holiday year. Applying the formula contained in Regulation 14(3) (28 days x 1/3, being the proportion of the leave year which expired before termination (4 months)) results in an entitlement to 9.33 days in the period.
43. On the claim for statutory sick pay, the first question is whether the claimant was entitled to receive payment of it. That suggests the question; was he an employee of the respondent? In my view he was an employee. The following factors suggest that he was:-
- a. The P45 issued by the respondent records him as such
 - b. The wages slips issued by the respondent also record him as an employee
 - c. On the occasions of his shifts the claimant provided work for the benefit of the respondent for which it paid him an agreed amount per shift
 - d. On those occasions he was subject to the respondent's direction and control. In particular he was obliged to follow its instructions in collecting keys and driving its vehicle
 - e. The shifts and payment for them suggested a regular working pattern of 3 or 4 nightshifts per week until the point in time of the claimant's accident
 - f. The respondent anticipated that that the claimant would be entitled to holiday pay

g. The respondent told the claimant that it would pay income tax and national insurance contributions relative to the paid work that he did

h. The principle “*tools of the trade*” (the vehicle) were provided by the respondent.

5 44. I had regard to what was said by McKenna J in ***Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance*** [1968] 2 QB 497, [1968] 1 All ER 433 “A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service ...”. In this case it seemed to me that both of the first two conditions were satisfied. The claimant agreed to use his own skill as a driver for the respondent. There is no suggestion that he could send a substitute instead. The claimant agreed that he would adhere to Tesco's delivery schedule for the respondent's benefit. On (iii) the other factors (being those I have identified at paragraph 43 above) are consistent with it being a contract of service. No one factor is dominant. But in the round there was far more to suggest that this was a contract of service and not otherwise.

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25 45. The relevant rate of SSP is £96.35. It appears to me that in the period from 4 July until 9 August by paying the claimant £100 per week in each of those five weeks the respondent discharged its obligation to make that payment, albeit not shown on any wage slip. But the claimant was entitled to receive SSP for the two weeks between 10 and 24 August when the claimant said the contract ended.

Remedy

46. The claimant is entitled to be paid £192.70 SSP for the two weeks in August. The failure to make that payment is an unlawful deduction and I make a declaration and award to that effect.

5 47. The claimant was paid £120.00 per shift (effectively a daily rate). On that basis, his accrued and taken entitlement of 9.33 days equates with the sum of £1119.60 which sum I have awarded to be paid.

10 Employment Judge: Russell Bradley
Date of Judgment: 31 January 2022
Entered in register: 07 February 2022
and copied to parties

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