



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102543/2020 (V)

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Held via Cloud Video Platform (CVP) on 5 October 2020

Employment Judge P O'Donnell

10 **Mr R Eldred**

**Claimant
In Person**

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Painting Maintenance Project Management Limited

**Respondent
Represented by:
Mr J Costello -
Director**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that:-

- (1) The Claimant was employed by the Respondent from October 2019.
- 25 (2) The Respondent has made unlawful deductions from the Claimant's wages contrary to s13 of the ERA in respect of the following matters and the Respondent is ordered to pay the Claimant the following sums:-
- a. Wages for the period from 17 January 2020 to 28 February 2020 amounting to £3562 (Three thousand five hundred and sixty-two
- 30 pounds).
- b. Unpaid bonus of £2000 (Two thousand pounds).
- c. Pay in lieu of 4.8 days' untaken holidays on termination of employment amounting to £556.40 (Five hundred fifty-six pounds and forty pence).

- (3) The Respondent breached the Claimant's contract by failing to pay him expenses and is ordered to pay the Claimant compensation for this breach in the sum of £265.

REASONS

5 Introduction

1. This is the judgment in this case which was heard by way of Cloud Video Platform (CVP) on 5 October 2020.
2. The Claimant has brought complaints relating to unpaid wages and expenses, specifically:-
 - 10 a. Wages for the period from 17 January 2020 to 28 February 2020 amounting to £3562.
 - b. Unpaid expenses consisting of a car payment of £225 and fuel payment of £40.
 - c. Unpaid bonus of £2000.
 - 15 d. Pay in lieu of 4.8 days' untaken holidays on termination of employment amounting to £556.40.
3. The Respondent resists the claims.

Specification of the claim and response

4. At the outset of the hearing, the Tribunal sought clarification from the parties
20 as to their respective positions. In particular, it was not clear from the ET3 the basis on which the Respondent resisted the claim. The ET3 made reference to payments said to be received by the Claimant from another limited company and it was not clear why this was said to mean that the Claimant was not due the sums sought.

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- 25 5. Mr Costello, on behalf of the Respondent, stated that there was some ambiguity as to which company employed the Claimant. On being asked why the Respondent did not clearly know whether or not it employed the Claimant,

he explained that the Respondent did not employ the Claimant and that he was an employee of a different company, Neptis (Media) Ltd ("NM"). He explained that NM had the same owners and management as the Respondent and that the Claimant performed work for both companies with a contribution to the costs of this (for example, wages) being made by the Respondent but that the Claimant remained an employee of NM.

6. The Respondent did not dispute that the Claimant was owed the sums sought but, rather, it was their position that these monies were owed by NM and not the Respondent.
7. The Claimant's position was that, in October 2019, he was asked to leave his job with NM and move over to work for the Respondent. From that point on, he carried out work exclusively for the Respondent and, as he understood it, was paid by them.

Evidence

8. The Tribunal heard evidence the Claimant who also produced a bundle of documents.
9. Within the bundle of documents, the Claimant had produced bank statements belonging to the Respondent. He explained that these were in a box of documents given to him by Mr Costello at a point in time when the Respondent was moving premises.
10. The Respondent made what was, in effect, a challenge to the admissibility of these documents on the basis that they had been improperly obtained. It was put to the Claimant in cross-examination that these documents were not in any box given to him and that these must have been obtained by some third party although no evidence was led by the Respondent in support of this proposition.

11. In response to this, the Claimant stated that if the Respondent had produced documents then he did not seek to rely on them; he had simply produced what was in his possession that he thought might assist in his case.

12. In the event, the Tribunal did not take account of these documents and no reliance has been placed on them in reaching the decision in this case.

13. The Respondent did not lead any oral evidence or produce any documents in support of their position. They challenged the credibility and reliability of the Claimant's evidence by way of cross-examination but did not lead any evidence of their own to rebut what was said by him.

Findings in fact

14. The Tribunal made the following relevant findings in fact.

15. The Claimant started employment with NM in June 2016. He was employed as the operations and business development manager. This role involved winning contracts for NM's call centre business and then running the campaigns involved in those contracts.

16. In October 2019, he was asked by Mr Costello to go to work for the Respondent. Mr Costello is a director of both NM and the Respondent. The Claimant was initially reluctant to move as he liked working in the call centre but agreed to move to work for the Respondent. There was no mention of the Claimant remaining an employee of NM and he understood that he would now be employed by the Respondent.

17. The Claimant considered that he should have received two months' notice from NM in relation to the termination of his employment with them and that he had 17 days' untaken holidays at the end of his employment with NM which was owed to him.

18. The Respondent provides painting and decorating services and does not operate a call centre as NM had done. The Claimant's role with the Respondent was the winning of painting and decorating contracts. In the past, the Claimant had done some work in relation to the business of the Respondent when there was no work in the call centre. From October 2019, the Claimant worked exclusively for the Respondent.

19. The Claimant was replaced at NM by Paul Henderson who took over the role of operations and business development manager.
20. The Claimant did not receive a written contract or statement of terms and conditions from the Respondent. He did not receive any payslips at all in
5 November, December or January. He had received payslips from NM prior to October 2019 but these stopped when he moved over to working for the Respondent. He was told that he would now be paid by the Respondent.
21. The Claimant's place of work stayed the same although he did move to a different desk. He was not often in the office towards the end of his
10 employment as he was at various sites project managing the work being done.
22. In January 2020, the call centre operated by NM ceased operations. The Claimant continued to carry out work for the Respondent after the call centre ceased operations right up to the end of his employment.
23. In January 2020, the Claimant started to have concerns about his
15 employment. He was paid late and did not initially receive his full wage.
24. In February 2020, he was not paid at all. He spoke to Stephen Toye, another director of the Respondent, who told him that he would be paid.
25. The Claimant considered that he could not live without his salary and so he gave notice of resignation on 2 March 2020. He initially spoke to Mr Toye on
20 the phone who asked him to speak to Mr Costello. The Claimant sent Mr Costello an email regarding his resignation on 2 March 2020 and Mr Costello replied to this the same day from an email address containing the name of the Respondent.
26. In March 2020, NM went into liquidation and the Claimant received a
25 voicemail on 27 March 2020 regarding a conference call for NM employees who were being made redundant.
27. The Claimant was subsequently sent a generic email asking him to provide further information in order for a claim to the Redundancy Payments Office to be processed. This information included his name, National Insurance

number, the start and end date of his employment with NM and his job title. The Claimant could not recall whether some of this information was pre-populated in the email. In particular, he thought that the date of 6 January 2020 was given as the end date of employment with NM but could not recall if this was given by him or had been in the email when it was sent to him.

5 28. The Claimant contacted the administrators dealing with the insolvency of NM. The Claimant believed that he was owed 2 months' notice pay and 17 days' pay in lieu of untaken holidays from NM arising from his move to the Respondent. He explained his position regarding the different companies to the administrator and submitted a claim to the Redundancy Payments Office in respect of only the notice pay and holiday pay which he believed were owed by NM.

Claimants submissions

29. The Claimant made the following submissions.

15 30. The timeline of his case and his evidence supports his claim. He has been in limbo as a result of what has happened. The two companies are run by the same people and the Respondent has not produced any evidence or documents.

20 31. All the money which he is owed is owed by the Respondent and not NM. He was told by Mr Costello from the Respondent's email address that he would be sent his P45 and there was no mention of him not being an employee of the Respondent.

32. NM is separate and the Respondent is trying to pay less than what is owed by them.

25 33. He did not have wage slips or his P45. He is in a difficult situation. He realises now that he did not ask enough questions about contracts when he moved to the Respondent.

34. All monies should have been paid by 31 March 2020 and his claim regarding the money owed by NM was not an issue at that time.

35. In rebuttal to points made in the Respondent's submissions, the Claimant submitted that he continued working for the Respondent after the period covered by the claim to the Redundancy Payments Office. He was working after 6 January 2020 and he had explained this to the relevant people. He
5 considers that the submissions about his claim to the RPO is irrelevant.

Respondent's submissions

36. The Respondent made the following submissions.
37. The Respondent feels that it was wrong that evidence obtained by someone external to management was used and this should not prove anything.
- 10 38. The Respondent had been made aware the Claimant made a claim to the Redundancy Payments Office which places him as an employee of NM at that time. If he is not then the claim to the RPO is a fraudulent claim.

Relevant Law

- 15 39. Section 13 of the Employment Rights Act 1996 (ERA) provides that an employer shall not make a deduction from a worker's wages unless this is authorised by statute, a provision in the worker's contract or by the previous written consent of the worker.
- 20 40. Section 27 of the ERA defines "wages" which include any fee, bonus, commission, holiday pay or other emolument referable to a worker's employment whether payable under the contract or otherwise. Section 27(2) (b) excludes the payment of expenses from the definition of "wages".
41. The Tribunal was given the power to hear breach of contract claims by the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994.
- 25 42. Regulations 13 and 13A of the Working Time Regulations make provision for workers to receive 5.6 weeks' paid holidays each year.
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43. Where a worker leaves employment part way through the leave year then Regulation 14 of the 1998 Regulations provides for compensation to be paid to the worker in respect of untaken holidays

Decision

44. The fundamental question for the Tribunal is whether the Claimant worked for the Respondent under a relevant contract at the time when the sums sought were incurred.
- 5 45. The Respondent did not seek to lead any evidence in support of their position that the Claimant remained an employee of NM whilst carrying out work which exclusively related to the business of the Respondent. In this sense, the Claimant's evidence was not contested as there was no competing evidence from the Respondent.
- 10 46. The Respondent did, however, challenge the credibility and reliability of the Claimant's evidence in cross-examination and so the Tribunal does have to assess this.
- 15 47. The Respondent raised two challenges to the Claimant's evidence. The first was that the Claimant is now working for someone who is suing Mr Costello and that the Claimant's claim is malicious. The Tribunal noted that the Claimant denied being in employment at all. In any event, the Tribunal did not consider this is relevant in circumstances where there is no dispute that the Claimant is owed the sums sought in the claim; the Tribunal cannot see how it can be said to be "malicious" for a Claimant to seek payment of sums that it is conceded are owed to him.
- 20 48. The second challenge related to the Claimant's claim to the Redundancy Payments Office in respect of sums owed by NM. The Respondent sought to argue that by making such a claim then the Claimant was accepting that he was employed by NM either at the time that the claim to the RPO was made or at the time that NM became insolvent.
- 25 49. The Tribunal does not consider that the Claimant has accepted that he remained an employee of NM simply by making a claim to the Redundancy Payments Office. The RPO is the government agency which administers payments made by the State to employees of insolvent business who are owed money by their employer. These payments can include statutory
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5 redundancy pay, wages, holiday pay and notice pay. It cannot be said that an individual is accepting that they are an employee of the insolvent business at the time they make a claim to the RPO as it is axiomatic that a significant number of people making such claims will be doing so after their employer has ceased trading and their employment has come to an end.

10 50. Similarly, the Tribunal does not consider that it can draw the inference that the Claimant was holding out that he was an employee of NM at the point it ceased trading or became insolvent. It may have been different if the Claimant had sought a redundancy payment as he would then have been holding himself as having worked for NM and been dismissed by them when they ceased trading. However, this is not the case and he only sought the sums he believed were owed by NM at the end of his employment with that company in October 2019.

15 51. In these circumstances, the Claimant's claim to the RPO is not inconsistent with his evidence about the move from NM to the Respondent and the Tribunal does not consider that this casts any doubt on the credibility or reliability of this evidence.

20 52. The Tribunal, therefore, finds the Claimant's evidence to be credible and reliable and, in circumstances, where there is no evidence to contrary then the Tribunal has made its findings in fact above based on what was said by the Claimant.

25 53. Based on those findings in fact, the Tribunal finds that the Claimant was employed by the Respondent from October 2019 onwards and, in particular, was employed by the Respondent at the time when the sums sought were incurred.

54. The Tribunal makes this finding not only on the basis of the Claimant's evidence as to what was said in the meeting in October 2019 when it finds that the Claimant was asked to work for the Respondent by Castello but also the other evidence in this case.

55. In particular, the Tribunal notes that the Claimant was replaced in his role at NM by someone else. If he was to remain working for the Respondent then it is not clear why he would be replaced. Further, the Claimant's payslips ceased when he moved to the Respondent and if he remained employed by the Respondent then the Tribunal would have expected the payslips to continue as normal. Finally, the Tribunal notes that NM effectively ceased trading in January 2020 when the call centre ceased operations but that the Claimant continued to work providing services exclusively for the Respondent.
56. For all these reasons, the Tribunal finds that the Claimant was working for the Respondent.
57. As noted above, it was conceded by Mr Costello that the sums sought by the Claimant are due to him and there was no dispute as to the amounts sought.
58. In these circumstances, the Tribunal finds that the Respondent has made unlawful deductions from the Claimant's wages contrary to s13 of the ERA in respect of the following matters and awards him the following sums:-
- a. Wages for the period from 17 January 2020 to 28 February 2020 amounting to £3562.
 - b. Unpaid bonus of £2000.
 - c. Pay in lieu of 4.8 days' untaken holidays on termination of employment amounting to £556.40.

59. The expenses sought by the Claimant are excluded from the definition of “wages” in terms of s27(2) ERA but the Tribunal considers that the failure to pay these amounts to a breach of contract by the Respondent and so the Tribunal awards the Claimant compensation for this breach in the sum of £265.

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**Employment Judge:
Date of Judgment:
Entered in register:
and copied to parties**

**P O'Donnell
12 October 2020
09 December 2020**

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