EMPLOYMENT TRIBUNALS

Claimant: Mr A Bee

Respondent: D & H Crane Hire Ltd

Heard at: Croydon (by CVP video) **On:** 16 February 2022

Before: Employment Judge Parkin

Representation
Claimant: In person
Respondent: Mr R Dunn, Director

JUDGMENT

The Judgment of the Tribunal is that:

1) The claimant's breach of contract (notice pay) claim is dismissed;

2) The claimant's unlawful deduction from wages claims are dismissed;

3) The claimant's holiday pay (compensation for accrued paid annual leave) claim is dismissed; and

4) Pursuant to section 38 of the Employment Act 2002, the respondent is ordered to pay the claimant 2 weeks' pay in the sum of £1280.00 for failure to give him a statement of particulars at the commencement of his employment.

REASONS

1. The proceedings

1.1 The claimant presented his ET1 claim form on 22 July 2021 claiming unfair dismissal, notice pay, holiday pay, outstanding wages and other payments relating to his employment as a Crane Operator/Appointed Person with the respondent from 29 March to 21 May 2021.

1.2 In its ET3 response, the respondent resisted all his claims contending the claimant resigned on 17 May 2021, having submitted a doctor's note for a week's

notice and that his pay for a 40-hour week was £640.00 gross, £495.68 net. No Employer's Contract Claim was made at box 7.2 and 7,3 of the response.

1.3 By a Judgment issued on 8 October 2021, the claimant's unfair dismissal claim was struck out for want of two years' continuous service.

2. The hearing

2.1 There was a voluminous bundle of over 400 pages comprising witness statements from the various witnesses, documents from the claimant and from the respondent. The claimant gave evidence as did the respondent's directors, Richard Dunn and Daniel Haynes, and its crane salesperson/coordinator, Nicky Graham.

2.2 There was great heat and feeling in the extensive and elaborate witness statements of the claimant and Mr Dunn, much of which did not touch upon the legal and factual issues. The Tribunal exhorted the parties to stick to those issues, explaining that matters of unfairness or unreasonableness were not for determination nor were questions of whether the claimant had felt pressured to work when properly unfit to do so.

2.3 The Tribunal ultimately concluded that it could not accept in full the evidence of the witnesses except Mr Haynes, mindful that even after the passage of time emotions had not significantly diminished. The claimant and Mr Dunn had lost their sense of proportion in their keenness to pursue the dispute, to downplay their own role and criticise their opponent. For example, the claimant's witness statement ran to 21 pages and 137 paragraphs; although Mr Dunn's statement was more modest at 11 pages and 68 paragraphs, it was still excessive. Even at the date of hearing, the claimant did not acknowledge that he had been paid for bank holidays when he had. The Tribunal did not accept that Ms Graham had made an innocent mistake in failing to tell the directors that she had been messaged by the claimant the previous evening to say he would not be in work as he was attending his doctor; it was inconceivable that, as the crane hire coordinator, she would have not been aware the directors were concerned at the claimant's absence and trying to contact him. Mr Haynes gave evidence clearly and credibly with far less emotion, in particular explaining talking the claimant through the terms of contract document and both of them signing it; he was unshaken in cross-examination on this point.

3. The issues

The Tribunal had to determine:

3.1 What the original terms of the contract of employment to employ the claimant were (and whether he was ever provided with a statement of particulars or contract of employment when he commenced employment);

3.2 What the claimant's effective date of termination of employment was and the circumstances of that termination;

3.3 What the agreed rate of pay was and whether the claimant was underpaid wages for the hours he worked, including whether a normal working day was 8 hours with a 45-minute unpaid break; and

3.4 Whether the claimant was entitled on termination of his employment to additional compensation for accrued paid annual leave in excess of the days he had received holiday pay from the respondent.

The Tribunal explained to the claimant at the outset that he bore the burden of proving his monetary claims and the amount of them. In his statement of remedy, he had set out that he was claiming 2-4 weeks' pay for failing to provide him with a statement of particulars, £354.00 for 14¾ hours work at time and a half rate, £24.00 per hour, that he was owed pay for 4.6 days accrued annual leave plus the 3 bank holidays which he claimed he had not been paid for, additional pay for 45 minutes worked but never paid for on each day he worked, and notice pay for his final week of notice (giving credit for £96.35 Statutory Sick Pay received).

4. The facts

From the oral and documentary evidence, the Tribunal made the following key findings of fact on the balance of probabilities:

4.1 The respondent company was a very small business, with the joint owners and directors Mr Dunn and Mr Haynes having already been engaged together over a long period in their timber frame and timber supply business, D & H Oak Framing Ltd. They recently acquired cranes to carry out crane lifting work which they hoped to build up.

4.2 The claimant commenced employment with the respondent as a crane operator with effect from 29 March 2021, having been interviewed for the post by the two directors on 20 March 2021. The interview went very well and they were delighted to make the appointment to give them a regular operator to build up their crane operation alongside the timber business.

4.3 The claimant began active work on Tuesday 6 April 2021 since for the first 4 days Monday 29 March to Thursday 1 April 2021, leading up to Good Friday, he was on a crane training course.

4.4 He attended for work on Tuesday 6 April 2021, the day after Easter Monday. Early that day, Mr Haynes took him to the office and ran him through a brief document containing the main terms of employment dated 5 April 2021 (133):

"Hi Andy

Pleased to have you on board looking forward to working with you.

Following our interview of Saturday 13th March items agreed are as follows

1. Working day Monday to Friday 8:00 to 4:45 8 hour shift at £16 per hour.
2. Guaranteed 40 hours per week at £16 per hour.
3. Overtime to be reassessed in 3 months to the date of this letter.
4. In the event of any sickness or injury full pay at £16 per hour for 8 hour per day at our discretion.
5. In the event of a further lockdown due to the pandemic full pay at £16.00 per hour for 8 hour per day.
6. Enrolment on the company pension scheme.
7. Any (courses) provided by respondent at claimant's request or to be funded by D&H Crane Hire unless employment for any reason ceases on or before

12 months, such courses and associated fees are to be repaid in full to D&H Crane Hire from the (course) attendee.

Full employment contract to be drafted within 2 months employment start date 29/03/21 for both parties to sign in agreement."

4.5 There was no reference to notice of termination of employment or holidays. The Tribunal found that the document was spoken to briefly by Mr Haynes and signed speedily by the claimant without challenge and by Mr Haynes but then taken by Mr Haynes. No copy of the document was ever given to the claimant during his employment. The date of 13 March 2021 was incorrect since the interview had been a week later, on 20 March 2021.

4.6 The clear intention was that the claimant would work 8-hour days and 5-day, 40 hour weeks and be paid £16.00 an hour, £128.00 gross per day and £640.00 gross per week. There would be a 45-minute unpaid break during the normal day. No agreement was reached about payment for overtime beyond the basic hours since there was uncertainty how much crane hire business the respondent could drum up. Indeed, part of the claimant's duties involved him travelling round in a crane going to garages and other sites touting for business. Mr Dunn would only have been prepared to pay for overtime hours if the claimant had completed 40 basic hours operating the crane first, as distinct from hours working for the respondent.

4.7 The claimant was paid in full for 40 hours in each of his first two working weeks, weeks ending 4 and 11 April 2021, including payment for two bank holidays. His wages then and subsequently were paid through the sister company, D & H Oak Framing Ltd, ordinarily at £640.00 gross, £495.68 net for a 40 hour week.

4.8 Unfortunately, early in week commencing 12 April 2021, he sustained an accident to his chest and ribs causing him to be off sick for much of the next two weeks, probably returning before he was fully fit to do so. Nonetheless he was paid again at the full 40 hour rate of pay for those two weeks, weeks ending 18 and 25 April 2021.

4.9 He returned to work on 21 April 2021, then working all the following 2 weeks, save for the bank holiday on Monday 3 May 2021. He was again paid for the standard 40 hours for weeks ending 2 and 9 May, again receiving payment for the bank holiday.

4.10 Whereas initially the working relationship with the directors and Nicky Morgan went fairly smoothly, by early May cracks were beginning to appear, in particular between the claimant and Ms Morgan with whom he liaised closely about work and work opportunities. There were incidents and personality difficulties which were not entirely appreciated by the directors at the time.

4.11 In particular, there were incidents on 7 May and then 14 May 2021 between the claimant and Nicky Morgan. Following the 7 May incident, early the following week, the claimant raised with Mr Dunn a query about pay and whether he would receive pay for overtime hours he considered he had completed. This was the only time he raised such a query about overtime pay, but Mr Dunn brushed it off as he considered that the claimant was looking to cover his back because he (the claimant) had just acted inappropriately towards Ms Morgan.

4.12 There was no concerted raising by the claimant about his hours of work or payment in general. At the start of employment he completed his time sheets, generally showing 8 hour days covering 8 am to 4.30 pm, i.e. allowing a ½ hour rather than a ¾ hour break but claiming pay for 8 hours work thereby accounting for an unpaid break. Whilst on some occasions he did record the entire time from start to finish as working hours, he only started to do this almost every day from week ending 9 May 2021, for the final two complete weeks of his employment (50,51). He did not spell out to the respondent that he was doing so, such that Mr Dunn only realised this after the employment terminated.

4.13 The claimant had probably never fully recovered from his April accident and aggravated his injury late on Friday 14 May 2021, assisting Nicky Morgan to move a trailer. Before leaving that day, he removed all his personal possessions from the respondent's premises.

4.14 Over the weekend he considered his position and the soreness he still felt. As a result, he messaged Nicky Morgan on the Sunday evening that he was not going to attend work but see the doctor and get another week's sick note the next day.

4.15 On 17 May 2021, the claimant attended his doctor by telephone, obtaining a Fit Note (i.e. unfitness to work certificate) for a chest injury up to 24 which he downloaded and sent to the respondent. He did not attend work. Regrettably, Ms Morgan failed to pass the claimant's message on to Mr Dunn or Mr Haynes.

4.16 On the morning of 17 May 2021, both Mr Haynes and Mr Dunn tried a number of times to contact the claimant by telephone and Mr Dunn texted him. When Mr Dunn reached the claimant, he had seen the Fit Note but questioned it. The claimant was aggrieved to be contacted at all and in express and blunt terms told Mr Dunn that he could "stick his fucking job up his arse" and was "a cunt" and that this could be taken as his notice, and he put the phone down on Mr Dunn.

4.17 Later that morning at 10.55, about an hour after that conversation, Mr Dunn emailed the claimant:

> "Following our phone conversation today 17/05/21.
>
> We were discussing payment days, where you say I have not been paying on time. My records show that you have been paid on time apart from 1 time which was about 18 hours late and I am sorry if this caused any financial hardship if you send me over proof of any bank charges this may have caused I will reimburse you.
>
> The conversation finished that you told me to stick my job … take this as my notice.
>
> I was baffled and upset by this outburst and I feel it was totally uncalled for. Therefore I accept your notice". (36)

4.18 Mr Dunn went on to notify the claimant that he would deduct the cost of the training course the claimant had been sent on from his week in hand and would invoice him for the remainder of the outstanding balance, adding: "As I told you verbally that if you leave D&N Crane Hire before two years from the course date you will be liable for the cost. I trust this is satisfactory." He added in more

conciliatory terms: “If this is a knee jerk reaction from yourself and you wish to discuss employment moving forward, we will of course be willing to listen and clarify any employment issues you have, and therefore consider this email as just a written warning. If you wish to continue as an employee of D&H Crane Hire...”

4.19 The claimant responded to that letter the following day 18 May 2021 at length at 21.33. In his letter, he confirmed in writing his resignation “Due to the fact I was deemed medically unfit for work yesterday 17 May 2021 my last day with D&H Cranes will be Friday 21 May 2021.” He went on to list a number of points of dissatisfaction with the respondent as his reasons for resignation**.** (42-44)

4.20 Final payments of wages were made to the claimant, for weeks ending 16 and 23 May 2021. The claimant was paid for a full 40 hours for week ending 16 May. The respondent did not deduct training costs. It paid the claimant £158.02 for accrued holiday pay with a statutory sick pay payment of £96.35.

5. Closing submissions

5.1 The respondent contended the essential terms of the contract of employment were agreed during the interview on 20 March 2021 (with the document signed on 6 April 2021, although Mr Dunn was unaware of this at the time). In particular a flat rate of £16 per hour with the claimant to be paid for 40 hours whether he worked more or not was agreed which the respondent contended was lawful as long as the claimant was paid more than National Minimum Wage for his hours. There was no shortfall in payments to him; despite the claimant’s version, he was paid for 3 bank holidays and a final holiday pay payment. The claimant knew about unpaid breaks and his early time sheets reflected them and claimed for 8 hours work.

5.2 The claimant disputed the contents of the 6 April 2021 document and that it was his signature on it, contending he first saw it when it was included in the respondent’s bundle. He maintained the time sheets showed he was entitled to be paid for another 10 hours, because he never had the unpaid breaks; and that weeks ending 2 and 9 May 2021 recorded 4 hours and 6½ hours respectively which he had never been paid for.

6. The Law

6.1 The applicable law relating to the various claims is found in different statutory provisions. The claimant’s notice pay claim derives from the Tribunal’s powers under section 3 of the Employment Tribunals Act 1996 and the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 and depends on section 97 of the Employment Rights Act 1996. The unlawful deduction from wages claim falls under part II ERA 1996, especially sections 13 and 23. Non-payment of wages properly due is treated as unlawful deduction. The holiday pay or accrued paid annual leave claim falls under the remedies provision at regulation 30 of the Working Time Regulations 1998, specifically relying on regulations 13, 13A and 14 of those regulations. The burden of proving entitlement to outstanding payments and the amount of those payments remained with the claimant.

6.2 Finally, the Tribunal applied the provisions at part I, ERA 1996, at sections 1-4 in respect of statements of particulars and the Tribunal's powers under section 38 of the Employment Act 2002. The requirement to provide a basic statement of main terms and conditions including the identity of employer and employee (now

worker), start date, basic hours and rate and frequency of pay, holiday entitlement and pay, sick pay and pension, notice requirement and entitlements, has been established for very many years. The requirement has been strengthened more recently such that the statutory obligation is to give a statement of particulars when the employment commences, not a week or more later.

7. Conclusions

7.1 The Tribunal began by determining the terms and conditions agreed between the parties when they embarked on the contract of employment and whether the claimant was given a statement of particulars of the main terms and conditions of his contract when he commenced. Whilst it was satisfied that the document signed on 6 April 2021 did indeed comprise the main terms agreed and was signed off speedily by Mr Haynes and the claimant, little was made of the document at the time and indeed Mr Dunn was even unaware it had been prepared and signed at that time. The Tribunal concluded that no set of or copy of the statement of particulars was ever provided to the claimant; Mr Haynes gave no evidence that he ever gave a copy to the claimant. In any event, a copy provided on 6 April 2021 would not have complied with the statutory obligation to provide a copy of the main statement of particulars on the commencement of employment as is required by the current legislation and the document failed entirely to deal with notice and holiday provisions.

7.2 The Tribunal was satisfied that there was no express agreement about payment for hours worked over and beyond 40 hours in circumstances where the respondent's crane business was in its infancy with no certainty of what business would be drummed up and thus how many hours driving cranes the claimant would carry out, irrespective of hours he spent at work for the respondent. The agreed terms were £16 an hour for a 40-hour week, £128 a day and £640 a week gross.

7.3 The Tribunal next determined when and how the claimant’s employment came to an end. Despite some equivocality in the conciliatory final paragraph from Mr Dunn in his email to the claimant on the morning of 17 May 2021 after the telephone conversation, the Tribunal found the claimant’s words to Mr Dunn in that conversation were wholly unequivocal. This was so even though that he had notified Nicky Morgan the evening before he was unable to attend work and expected to get a sick note (having already removed his possessions from site on the previous Friday). The claimant was furious to be telephoned by Mr Dunn that morning of and let himself down with his clear statement and abuse, in effect proclaiming robustly to Mr Dunn that he no longer wished to be employed by the respondent. The contract of employment was terminated by the claimant’s resignation with immediate effect early on the morning of 17 May 2021. The force of his words meant that he was not giving notice, of a week or any other period, to bring his employment to an end at a future date; he was terminating the employment forthwith. This was readily understood by Mr Dunn, even though the end of Mr Dunn’s email afterwards was conciliatory. The claimant’s detailed letter sent the following evening, including the desire for his actions to be treated as giving notice to terminate on 21 May 2021 did not retrieve this position.

7.4 Starting with the notice pay claim, applying section 97(1)(b) EA 1996, the effective date of termination was 17 May 2021. The Tribunal concludes that the claimant did not prove his claim for damages or further payment in respect of any notice period since he did not give notice but resigned forthwith.

7.5 As to his claims of unlawful deduction from wages, the evidence from the claimant's initial time sheets did not bear out the case he pursued of never being able to take breaks during the day and not having agreed to an 8-hour day at the outset. The Tribunal rejected the claimant's claim to be entitled to pay for the whole times shown on each time sheet, in particular since he failed to account for those unpaid breaks each day which were part of the original terms agreed. When these are taken into account, whether at ¾ hour or only ½ hour per day, the excess hours beyond 40 recorded for some weeks are modest, even in weeks when the claimant worked some very long days such as 6 May and 14 May 2021. The contractual terms were for payment for 40 hours work at £16 per hour, with the future possibility of an agreement to pay at overtime rates after 3 months, if there was more than 40 hours crane driving each week. The claimant failed to prove his claim for 14¾ hours shortfall, or even to explain cogently where those 14¾ hours were identified, especially at the enhanced rate of time and a half pay he claimed. Accordingly, he did not prove any unlawful deduction from wages whether for those 14¾ hours or in respect of not being paid for the ¾ or ½ hours each day regarded by the respondent as unpaid breaks.

7.6 Next the Tribunal deals with the claimant's holiday pay claim. Initially, he failed to give credit for the 3 paid bank holidays he had the benefit of. Making the technical calculation within the 1998 Regulations, the Tribunal concluded that in the relevant leave year commencing on his date of commencement, 29 March 2021 (in the absence of any other agreement between the parties), he was entitled to a period of 3.84 days leave in the period of less than two months which he actually worked up to 17 May 2021, leaving a balance of 0.84, which might be rounded up to 1 day. The respondent made a small final payment of £152.08 gross in addition to the 3 bank holiday days already paid, which was £24 more than a day's gross pay. Accordingly, the claimant failed to establish any shortfall of pay for accrued annual leave and his claim for compensation for accrued paid annual leave is dismissed.

7.7 Finally, the Tribunal considered the matter of a contract of employment or statement of main particulars for the respondent. In fact, the claimant was never given a statement of particulars nor was 6 April 2021 when his employment commenced and the document did not include notice or holiday provisions. Applying section 38(2) of the 2002 Act, the Tribunal awards the claimant 2 weeks' pay for this failure to comply with the statutory obligation. This was short of a complete failure to have regard to the statutory obligation by the respondent since most of the main terms were agreed with and explained to the claimant when he signed the document on 6 April 2021, soon after he commenced employment. His regular week's pay was £640.00 and the respondent is ordered to pay the claimant two weeks' pay in respect of its failure, in the total sum of £1,280.00.

Employment Judge Parkin

Date: 23 February 2022