



EMPLOYMENT TRIBUNALS

Claimant: Mr H Felix

Respondent: Flash Transport Ltd

Heard at: Bristol (remotely by VHS) **On:** 18 March 2022

Before: Employment Judge Leverton (sitting alone)

Representation

Claimant: In person

Respondent: Mr P Smith, Director

RESERVED JUDGMENT

The claim for unlawful deduction from wages under Part II Employment Rights Act 1996 fails and is dismissed.

REASONS

Claim and issues

1. By a claim form presented on 2 March 2021, the claimant brought a claim for unauthorised deductions from wages under Part II of the Employment Rights Act 1996 (ERA). He stated in his claim form that he had never received a written employment contract.
2. A record of a case management hearing that took place on 4 February 2022 states that the parties agreed that the issues to be determined at the substantive hearing were whether the Respondent had made unauthorised deductions from the Claimant's wages and, if so, how much was deducted. It was said that the Claimant relied on three events:
 - a. non-payment of overtime in December 2020;
 - b. non-payment of wages in January 2021;

- c. non-payment of wages for 1 February 2021.
3. The case management record stated that if the Tribunal found in favour of the Claimant in relation to any of the claims for unauthorised deductions, it must decide whether the Respondent had failed to provide the Claimant with a written statement of employment particulars in breach of section 38 of the Employment Act 2002 and, if so, must make an award of two weeks' pay and consider whether it was just and equitable to increase that award to the maximum of four weeks' pay.

Evidence and procedure

4. The case was originally listed for a final hearing to be held remotely by VHS before Employment Judge Lambert on 4 February 2022. At the start of that hearing, it became apparent that the parties had not complied with a previous case management order. There were then technical issues with the VHS platform that necessitated an adjournment. The case was re-listed and a new case management order was issued.
5. The Claimant appeared in person at today's hearing, and the Respondent was represented by its Director, Mr Smith. Both of them gave oral evidence and made closing remarks.
6. The hearing before me was impeded by the fact that the parties had still not fully complied with the case management order issued by Employment Judge Lambert. They had not cooperated to produce a joint bundle of documents, and the Claimant had not provided a witness statement. He explained that this was because English was not his first language.
7. Some documents had been sent to the Tribunal in advance. The Claimant had provided copies of bank statements and payslips, and screenshots of WhatsApp messages concerning his overtime arrangements. Mr Smith had provided a witness statement and a bundle of documents comprising:
 - a. payslips for the period March 2020 to January 2021 ('document 1')
 - b. a spreadsheet showing payments made to the Claimant from 30 March 2020 to 1 February 2021 ('document 2')
 - c. spreadsheets showing hours worked by the Claimant in December 2020 and January 2021 by reference to the times recorded on his tachograph ('document 3' and 'document 4'), and
 - d. a breakdown of holidays taken each month by the Claimant from March 2020 to January 2021 ('document 5').
8. At the outset of the hearing, the Claimant was not audible. It took some time for the problem to be resolved. It then emerged that neither party had had sight of the documents on which the other relied. There was a break in the proceedings to allow the parties to exchange documents by email and to read them.

9. Owing to these issues, the hearing started more than an hour late and there was insufficient time for me to reach a decision and give oral reasons. At the conclusion of the hearing, I therefore directed the Respondent to clarify certain matters in writing and explained that I would issue a reserved judgment.
10. The Respondent then provided a further written statement supported by screenshots of WhatsApp messages and an unsigned copy of the Claimant's employment contract. The Claimant was offered an opportunity to respond in writing; he did not do so.

Findings of fact

11. The Claimant was employed by the Respondent as an HGV driver from 1 March 2020 to 2 February 2021. He worked variable hours and was paid £140 per day (gross), consisting of a basic daily rate of £130 and a £10 bonus. He sometimes worked overtime at weekends, also at a rate of £140 per day.
12. The Respondent normally paid drivers their wages in arrears on the first day of the month. However, the Claimant had cashflow problems and frequently requested, and was granted, advances of wages. This meant that his wages were often paid at irregular intervals, and the payments made each month did not always correspond with the amounts shown on his payslips, making it difficult to ascertain whether he was being paid the correct amount.
13. The problem was exacerbated towards the end of 2020, when there was an error in one of the Claimant's payslips. This was corrected by adjusting his pay in December 2020 and January 2021. The unfortunate result was that the payslips for those two months did not fully correspond with the hours worked and holidays taken by the Claimant.
14. The total net amount shown on the Claimant's payslips for March 2020 – January 2021 is £25,210.36 (see document 1).
15. I am satisfied that the Respondent made the following net payments into the Claimant's bank account during the period December – February 2021:

Date	Payment
7 December 2020	£900
21 December 2020	£150
31 December 2020	£1,022.80
5 January 2021	£900
13 January 2021	£750
1 February 2021	£700

16. These payments were evidenced by copies of the Claimant's bank statements, by a WhatsApp message relating to the final payment of £700 and by a spreadsheet compiled by the Respondent (document 2).

17. I accept the Respondent's evidence that the total net payments made into the Claimant's bank account from 30 March 2020 to 1 February 2021 came to £25,748.80 (see document 2).
18. The Respondent provided spreadsheets showing the hours worked by the Claimant in December 2020 and January 2021 by reference to the times recorded on his tachograph (documents 3 and 4). This information was collected by downloading the Claimant's digital tachograph card. Given that it is a legal requirement for HGV drivers to use a tachograph, I am satisfied that the data downloaded is an accurate record of the shifts that the Claimant worked.
19. On the basis of that evidence, I accept that the Claimant worked 17 days in December 2020, including five days' overtime (see document 3). I find that the Claimant's working days in December 2020 were as follows:

December 2020 (weekdays are shaded)	Status
1-3	not working
4	working (1 day)
5-6	overtime (2 days)
7-8	working (2 days)
9-10	not working
11	working (1 day)
12	overtime (1 day)
14-18	working (5 days)
19	overtime (1 day)
21-25	annual leave/not working
26	overtime (1 day)
28	not working
29-31	working (3 days)

20. I also accept the Respondent's evidence that the Claimant worked 17 days in January 2021, including two days' overtime (see document 4). I find that the Claimant's working days in January 2021 were as follows:

January 2021 (weekdays are shaded)	Status
4-5	working (2 days)
6	not working
7-8	working (2 days)
9	overtime (1 day)
11-15	working (5 days)
18	working (1 day)
19-22	not working (vehicle offroad for MoT)
25-29	working (5 days)
30	overtime (1 day)

21. The Claimant's payslips for December 2020 and January 2021 indicate that payment was due to him for 34 working days for those two months. (It is necessary to aggregate the working days across two months because the December payslip is missing one working day, whereas the January payslip

shows one working day too many.) That corresponds with the total number of working days shown in the two tables above.

22. The Claimant's final day of employment with the Respondent was 1 February 2021. The gross payment of £140 due to him for that date was included in the £700 advance of wages paid to him on 1 February.

Legal framework

23. Section 13 ERA provides, in so far as material:

'(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.'

24. Section 23 ERA provides: *'(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...'*

25. Section 38 of the Employment Act 2002 provides:

'(3) If in the case of proceedings to which this section applies –

(a) the employment tribunal makes an award to the worker in respect of the claim to which the proceedings relate, and

(b) when the proceedings were begun the employer was in breach of his duty to the worker under section 1(1)... of the Employment Rights Act 1996 [duty to provide a written statement of particulars of employment]...,

the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.

(4) In subsections (2) and (3) –

(a) references to the minimum amount are to an amount equal to two weeks' pay, and

(b) references to the higher amount are to an amount equal to four weeks' pay.'

Discussion and conclusions

Unpaid wages

26. The amount earned by the Claimant during his employment was the net figure of £25,210.36 shown on his payslips for the period March 2020 – January 2021, plus £140 (less deductions for tax and national insurance) for his final day's work on 1 February 2021. The total net payments made into his bank account by the Respondent for the same period came to £25,748.80, indicating that the Claimant was paid more in aggregate than he was actually owed.
27. The Claimant said that he was owed two days' wages plus five days' overtime for December 2020. It is apparent from my findings of fact that he worked 17 days in December 2020, including five days' overtime, and was paid for all those days at the appropriate rate. The confusion appears to have arisen because the five days' overtime were not shown separately on the Claimant's payslip and he quite understandably assumed he had not been paid for them. There were also several days that month on which the Claimant did not work, accounting for the alleged shortfall in wages.
28. The Claimant said that he was owed two days' overtime for work done on 9 and 30 January 2021. Again, those days were not shown separately as overtime on the Claimant's payslip but they were included in the 17 working days for which he was paid that month.
29. The Claimant said that he was owed a day's wages for his final working day, 1 February 2021. I am satisfied that he worked on 1 February and that his wages of £140 (less deductions for tax and national insurance) were included in the £700 advance paid to him on that date.
30. The claim for unlawful deductions from wages is unsuccessful and is dismissed.

Failure to provide written statement of employment particulars

31. Because I have not upheld the claim for unlawful deductions from wages, it is unnecessary for me to consider whether the Respondent was in breach of its duty to provide a written statement of employment particulars under section 38 of the Employment Act 2002.

Employment Judge Leverton

Date: 11 April 2022

Judgment sent to parties: 27 April 2022

FOR THE TRIBUNAL OFFICE