EMPLOYMENT TRIBUNALS

Claimant: **Mr T Gent**

Respondent: **Wedgmoor Limited**

Heard at: **Birmingham (via CVP)** **On:** **12 May 2022**

Before: **Employment Judge Edmonds**

Representation
Claimant: In person
Respondent: Miss J Donnelly, Office Manager

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was V, Cloud Video Platform (CVP). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

RESERVED JUDGMENT

1. The claimant's claim for holiday pay succeeds and the claimant is awarded **£2,855.75 gross** (weekly pay of £865.38 multiplied by 3.3 weeks' holiday pay owed). The respondent shall be entitled to make such deductions for tax and national insurance contributions as may be appropriate.

2. The claimant's claim for notice pay fails.

3. The claimant's claim in relation to failure provide itemised payslips in the first four months of his employment fails, however the Tribunal declares that the respondent failed to provide the claimant with an itemised payslip in relation to his July 2021 pay on or before 31 July 2021 as required. However, the Tribunal declines to make any monetary award to the claimant in respect of this failure.

4. The claimant's claim that the respondent failed to make national insurance contributions fails.

5. The claimant's claim for breach of contract and/or unlawful deductions from wages in relation to an alleged failure to pay him a profit share fails.

6. The Tribunal has no jurisdiction to consider any claim relating to compensation for injuries caused by alleged unsafe working conditions and, to the extent the claimant sought to bring such a claim, that claim is dismissed.

REASONS

Introduction

7. The claimant was a director of the respondent, until his employment ended on 30 July 2021. The claimant's employment ended due to his resignation to take up another role in another company, and there is no suggestion that there was any dispute between the parties about the circumstances of his departure, other than the specific issues addressed in this claim. The claimant's claim is centrally about whether there were outstanding sums owed to him on the termination of his employment and whether or not he received itemised payslips.

Claims and Issues

8. The claimant had originally listed the respondent as being Mark Jones, the Managing Director of Wedgmoor Limited, on his claim form, however prior to this hearing it had been clarified through correspondence with the Tribunal that in fact his claims were against Wedgmoor Limited and therefore the Tribunal had updated the respondent's details to be Wedgmoor Limited prior to this hearing.

9. The claimant's claims were as follows:
   a. A claim for holiday pay;
   b. A claim for notice pay;
   c. A claim for alleged failure to provide itemised payslips in respect of the first few months of his employment and then again in respect of his final payslip;
   d. A claim for alleged failure to provide national insurance payments payable to the employee; and
   e. A claim for failure to pay monies allegedly due under a profit share agreement.

10. In addition the claimant sought to claim compensation for stress caused by his wages not being correctly paid: I explained to him that compensation would be limited to financial losses only. He also sought to claim compensation for injuries he said he suffered due to unsafe working conditions: I explained that this would be a personal injury claim and was not something that the Employment Tribunal had the ability to consider.

11. We agreed that the issues were as follows:

Holiday pay

a) What was the holiday year?
b) What date did his employment end?
c) Had any holiday been carried forward from the previous holiday year and, if so, how much?
d) How much holiday had been taken by the termination date?
e) Was there any accrued but outstanding holiday at the termination date?
f) What was the rate of pay?

Notice pay

a) What was the notice period?
b) Did the claimant work his notice period? If not why not?
c) Was any notice pay payable to the claimant?

Failure to provide itemised payslips

a) Was the claimant provided with itemised payslips?
b) If so, were they provided at or before the time at which any payment of wages or salary was made to him?
c) If not, were any unnotified deductions made during the period of 13 weeks immediately preceding the date of the claimant's claim (plus any early conciliation period)?
d) If so, should the Tribunal order any payment to be made to the claimant?

Unlawful deductions from wages (national insurance and profit share claims)

a) Was the claimant a worker within the meaning of section 230(3) of the Employment Rights Act 1996?
b) Is the claim in respect of wages?
c) Has the respondent made a deduction from wages?
d) If so, was that deduction entitled to be made?
e) If a sum is due to the claimant, how much?

Breach of contract (profit share claim)

a) Was there an agreement (verbal or written) made in connection with employment entitling the claimant to any profit share?
b) If so, has the respondent breached that agreement?
c) If so, what damages are payable to the claimant?

Procedure, documents and evidence heard

12. I heard evidence from the claimant on his own behalf, and from Miss Donnelly and Mr Mark Jones (Managing Director) on behalf of the respondent. The claimant had not prepared a witness statement, however we agreed to use a document containing the details of his claim (which had accompanied the claim form) as his evidence. The respondent had prepared a statement: although it was not specific to

either Miss Donnelly or Mr Jones, they both agreed to adopt its contents as their evidence.

13. There was no agreed file of documents: the claimant had provided 18 attachments by email and the respondent had prepared a file of documents which had been sent to the Tribunal as three attachments. The majority of the claimant's documents were contained with the respondent's file and therefore references to documents within these Reasons are to the respondent's documents (separated into Files 1, 2 and 3) unless otherwise stated. On discussions with the parties at the start of the hearing, it transpired that the parties had not shared their documents with each other, and therefore we had an adjournment before the hearing commenced to allow the parties to read each other's documents. I explained to the parties that I would only consider those documents which the parties referred me to specifically.

14. At one point during proceedings, the parties referred to discussions with ACAS. I explained to the parties that these discussions were confidential, that they should not refer to them and that I would not take into account anything that they said about them.

Findings of fact

15. The claimant was employed as a Director of the respondent (File 2 page 32**)** between 1 April 2019 and 30 July 2021. Early conciliation started on 23 September 2021, ended on 3 November 2021 and the claim form was submitted on 12 November 2021.

16. The claimant was employed under the terms of an undated written employment contract. It contained a holiday provision entitling the claimant to 20 days paid leave per annum in addition to the 8 normal bank and public holidays in each year. The holiday year runs from 1 January to 31 December in each year. The contract makes clear that the claimant was not allowed to carry holiday forward from one calendar year to the next without the permission of the company, but that any holiday accrued but not taken would be paid on termination of employment.

17. The claimant's basic salary was £45,000 per annum, and salary was paid on the last working day of each month. He alleged that he had also entered into a profit share arrangement with the respondent.

The first few months of employment

18. The claimant says that he did not receive payslips in the first few months of his employment, although accepted that (with the exception of his final payslip, to which I turn below), he did then receive future payslips. He said that he still had not received the payslips from those first few months of his employment. However, the respondent's position was that the payslips are placed in a tray in their offices and that although the claimant was not in those offices every day, he knew that they were there and available for him (File 2, page 3). Having seen a picture of this tray, I accept the respondent's evidence that all payslips were placed in a tray (both in their current office and in a previous office at which they were

based at the outset of his employment) and that the claimant's payslips would have been included with these.

19. The claimant also said that during the first 4 months of his employment he was overtaxed by a significant amount due to not having been registered as working for the respondent, resulting in the respondent taxing him at a higher rate than should have been the case and subjecting him to additional national insurance contributions. In evidence the claimant explained that HMRC believed him to still be employed by his previous employer during this period. He explained that, in relation to national insurance contributions, he couldn't say categorically that the respondent had not made the appropriate payments, but in the absence of his payslips he could not say. He calculated the amount owed to be £700 to £750, which he said he had calculated using the government website, but that this was not an exact figure.

20. The respondent's position was that the claimant was properly set up on the company's payroll and submissions to HMRC done through their accountant. They were aware of an issue whereby the claimant said that he had been taxed incorrectly in his previous job and that he said it happened again at the respondent. On their accountant's advice, they instructed the claimant to contact HMRC directly. Miss Donnelly said in evidence that the company was making national insurance contributions from the outset of his employment and I accept that to be the case.

Profit Share

21. During the course of 2019, the claimant and Mr Jones had discussions about a potential new arm to the respondent's business, resulting in Wedgmoor Automation Limited becoming incorporated. This company was intended to carry out more specialised electrical works and I find that Mr Jones did indicate to Mr Gent that a profit sharing arrangement would take place whereby Mr Gent would receive a 20% shareholding in and 20% of the profits for any electrical works carried out by Wedgmoor Automation Limited. The claimant however remained employed by the respondent. Whilst the aspiration was for Wedgmoor Automation Limited to trade, in fact it never did so and I accept the respondent's evidence at the hearing that this company is in fact dormant. I was shown a copy of Wedgmoor Automation Limited's balance sheet as at 31 October 2021 (File 3, page 15) and it supported this finding.

22. During his employment, the claimant's email signature stated "Wedgmoor Automation" underneath his name rather than "Wedgmoor Limited" and the claimant said that shows that the work he did was for that company rather than the respondent. However, it was the claimant who had chosen his email signature and, whilst the respondent would have been aware he was using that email signature and did not stop him, I do not find that this was sufficient to mean that he was actually trading as Wedgmoor Automation Limited: the claimant accepted in evidence that it had not traded as a company in itself.

23. The claimant argued that he had done some work for one particular client to a value of around £3,000 and that Mr Jones had suggested to him that the profit share on this would be paid. However, I saw no evidence to suggest that this job had been carried out by Wedgmoor Automation Limited and I find that this was not the case.

Annual Leave

24. On 25 November 2020 the claimant emailed Mr Jones (File 1, page 37) about his annual leave. He said:
"I still have 29 days due for this year and understand given the workload that it conflicts the interest of the company to meet current deadlines. Understanding that we will have a shutdown at the end of December, however that will still leave me with a large chunk of holidays remaining. Could you please confirm that I will be able to carry what is not taken over to next year or how do you want to handle this?"
The claimant explained in evidence that he had 29 days because he had also carried some holiday forward from the 2019 holiday year too.

25. The claimant then sent a further email to Mr Jones on 27 November 2020 (File 1, page 39), stating:
"For clarity purposes, and as per our conversation yesterday you have agreed to carry any of my leave not taken to day over to next year."
Mr Jones did not reply to that email.

26. The claimant relied on those emails and argued that he was permitted to carry over 22 days' holiday because his workload had not permitted him to take holiday before the end of the year. The respondent on the other hand submitted that the discussions about holiday were in fact prompted by the claimant becoming aware that he would require some time off in the new holiday year to look after his wife who was due to have an operation, and that the respondent allowed him to carry forward only 5 days. There is therefore considerable difference between the parties' accounts. The claimant's calculations were supported by a spreadsheet detailing his accrued holiday (File 1, page 47) however the respondent asserted that this was prepared by the claimant himself, was not approved by the respondent and that in reality the calculations were as per an email dated 10 September 2021 (File 3, page 11). The respondent stated that the claimant had taken 17 days' holiday in 2021 (breakdown in File 3, page 9), which the claimant accepted was correct, and that he had accrued 16.2 days during this period. The respondent's position was therefore that the claimant's accrued but outstanding holiday on termination was simply the 5 days' carried forward from the previous year, which it said it had paid to him.

27. Although I accept that the amount of holiday carried forward is more than would usually be the case in both 2019 and 2020, I find that the claimant did in fact carry forward the 22 days which he stated. His request to carry forward holiday was clear that the reason for his request was related to his workload and that accords with the evidence he gave at the hearing. The fact that his request referred to 29 days but he stated that only 22 days' in fact carried forward also demonstrated that he did keep records

and account for any additional days' taken. The key point however is that he clearly emailed Mr Jones on 27 November 2020, confirming his understanding, and Mr Jones did not reply to say that he had misunderstood the position or correct him in any way. The claimant was clear in that email that he would be permitted to carry forward any outstanding leave not taken, not merely 5 days. If the agreement was only for 5 days, I find that Mr Jones would have replied to clarify that. The fact that the claimant then kept a spreadsheet referencing the carry forward also supports that he genuinely believed this to be the agreement reached.

The claimant's resignation

28. The claimant decided to leave the respondent's employment and emailed his resignation on 7 July 2021 to Mr Jones. He then sent a copy of that resignation to Miss Donnelly on 13 July 2021. Although the claimant's notice period in his contract of employment was only one week, the claimant to remain in employment until Friday 30 July 2021.

29. Miss Donnelly accepted in evidence that, because the claimant would no longer by attending the office by the time his final payslip was produced, it would not have been placed in the payslip tray. Instead the claimant was sent his final payslip by email although this was after his final salary would have been paid to him, however he said that he could not open this because it was password protected. The respondent's position is that the same password had been used on previous occasions when documents had been sent to the claimant and that he would therefore have had it, although the claimant said that this password did not work for him on this occasion. The respondent also said that the original payslip would have been posted to his home address, albeit after his employment had ended. The claimant said that he finally received the payslip in around October 2021. However there was an email in the file (File 2, page 5) showing that a payslip was sent to the claimant on 24 August 2021: I find that this would have been that July payslip and the claimant's reference to October will have been because he could not open this one due to the password issue.

Law

Holiday Pay

30. Workers are entitled to a minimum of 5.6 weeks' leave in each leave year under Regulations 13 and 13A of the Working Time Regulations 1998 ("WTR"). During the first year of employment, this accrues on a pro rata basis (Regulation 15A, WTR).

31. Where a worker's employment ends during the leave year, a payment in lieu of any accrued but untaken statutory leave must be made (Regulation 14, WTR).

Unlawful deductions from wages

32. Section 13(1) of the ERA provides that:
"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."

There is no qualifying period for this type of claim: it can be made from the first day of employment or appointment.

33. Section 27 of the ERA details what amounts to wages: this includes salary, holiday pay, commission any other emoluments referable to employment, amongst other things. However it also specifies that the wages must be "sums payable to the worker".

34. Section 13(3) of the ERA provides that:
"*Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion."*

35. A deduction will be authorised if it is made under a statutory provision, under a "relevant provision" of the worker's contract, or the worker has consented in advance to the deduction in writing (section 13(1) of the ERA).

Breach of contract (notice pay and profit share claims)

36. The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 grants employment tribunals the power to deal with breach of contract claims, provided that the breach was outstanding when employment ended and subject to a cap of £25,000. Contracts between employers and employees may be written or verbal. Where a tribunal finds that a breach of contract has taken place, a declaration shall be made to that effect and damages may be awarded to put the claimant back in the position that they would have been in had the breach not happened.

37. Under section 86 of the Employment Rights Act 1996 ("ERA"), an employee is ordinarily entitled to notice of termination of employment. The statutory minimum period under that section for an employee with under two years' service is one week's notice. If there is a contractual provision for greater notice, that will take precedence, and in the absence of any contractual provision, the employee will be entitled to "reasonable notice". The notice period required to be given by an employee who has been continuously employed for one month or more to terminate his contract of employment is not less than one week (but the contract of employment may provide for a longer period) .

38. A failure to pay the required amount of notice due under the contract of employment will be a breach of contract, known as wrongful dismissal, unless the employee has fundamentally breached the contract i.e. committed an act of gross misconduct. In accordance with *Jackson v Invicta Plastics Limited [1987] BCLC 329*, the conduct must be so serious as to strike at the root of the confidence which must exist for the contract of employment to be effective.

39. In considering a claim for wrongful dismissal, the reasonableness of the employer's actions is irrelevant: the question is whether the contract of employment has been breached: this is a factual question for the Tribunal to determine: was the employee guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the employer to terminate it without notice? (*Enable Care and Home Support Ltd v Pearson EAT 0366/09*).

Failure to provide itemised payslips

40. Under section 8(1) of the ERA all workers are entitled to itemised pay statements. There is no qualifying period. The pay statement must be:

a) Written;

b) Given;

c) At or before any payment is made.

41. Where there is an accompanying claim for unlawful deductions from wages, section 26 of the ERA makes clear that the total sum awarded across both claims must not exceed the total amount of the deduction, i.e. it prevents a worker from recovering twice.

42. Under section 11(4) of the ERA, an employment tribunal
"shall not consider a reference under this section in a case where the employment to which the reference relates has ceased unless an application requiring the reference to made was made –

(a) before the end of the period of three months beginning with the date on which the employment ceased, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the application to be made before the end of that period of three months."

43. Section 12 of the ERA states that:
(3) Where on a reference under section 11 an employment tribunal finds –

(a) that an employer has failed to give a worker any pay statement in accordance with section 8, or

(b) that a pay statement or standing statement of fixed deductions does not, in relation to a deduction, contain the particulars required to be included in that statement by that section or section 9,

the tribunal shall make a declaration to that effect.

(4) Where on a reference in the case of which subsection (3) applies the tribunal further finds that any unnotified deductions have been made (from the pay of the worker during the period of thirteen weeks immediately preceding the date of the application for the reference (whether or not the deductions were made in breach of the contract of employment), the tribunal may order the employer to pay the worker a sum not exceeding the aggregate of the unnotified deductions so made.

(5) For the purposes of subsection (4) a deduction is an unnotified deduction if it is made without the employer giving the worker, in any pay statement or standing statement of fixed deductions, the particulars of the deduction required by section 8 or 9.

Conclusions

Holiday Pay

44. The claimant's holiday year ran from January to December in each year. His employment ended on 30 July 2021 and based on an entitlement of 20 days exclusive of bank and public holidays, the claimant had accrued 11.67 days' holiday in that holiday year at the point of termination (and not 16.2 as calculated by the respondent as that included bank and public holidays). He had taken 17 days' holiday that year (excluding bank and public holidays). He had therefore taken 5.33 days' in excess of what had accrued in that holiday year.

45. However, I have found that he had carried forward 22 days' holiday from the previous holiday year. This meant that, when his employment ended, he had accrued 16.67 days' holiday which had not been taken. His contract of employment made clear that accrued but untaken holiday would be paid on termination of employment, and therefore I find that there has been a failure to pay holiday pay in respect of 16.67 days' holiday, which equates to 3.3 weeks' holiday based on a five day working week.

46. The claimant's annual salary was £45,000 gross. His weekly rate of pay was therefore 45,000 / 52 = £865.38. 3.3 weeks' pay would therefore be 3.3 x £865.38 which equates to a total of £2,855.75 gross. I therefore order the respondent to pay the claimant £2,855.75 gross, from which it shall be entitled to make such deductions for tax and national insurance contributions as may be appropriate.

Notice pay

47. This is not a case where the employee was dismissed by his employer, but one where he resigned. In accordance with his contract of employment, the claimant was required to give one week's notice of termination of employment.

48. The claimant resigned by email on 7 July 2021. He could therefore have ended his employment on 14 July 2021 but agreed with the respondent that he would work until 30 July 2021 and therefore he worked his notice period between 7 July and 30 July 2021. I have been presented with no evidence to suggest that the claimant was not paid in full for the period up to 30 July 2021 and therefore I conclude that there has been no failure to pay notice pay.

Failure to provide itemised payslips

49. There are two separate periods of time which need to be considered here: first of all the first four months of the claimant's employment, and then his final month of employment.

50. In relation to the first four months of the claimant's employment, I conclude that there can have been no failure to provide an itemised payslip as they would have been placed in the tray specifically designated for that purpose by the respondent and therefore they were provided as required by law.

51. However, in relation to the final payslip, Miss Donnelly did not place it into the usual payslip tray and instead emailed it to the claimant. However that email was not sent to the claimant until some time after the claimant's employment ended – on 24 August 2021 by email. Whilst the claimant said that he could not access this due to the password and therefore did not receive it until October, I conclude that the sending of the payslip in August was a valid method of delivery and the claimant was used to receiving password protected payslips. If for any reason the password he had did not work he could have requested information about the password and I was taken to no documents suggesting that he had done so.

52. As this payslip was not provided to the claimant at or before the time the wages were paid (i.e. by the 30 July 2021), I declare that there has been a failure to provide the claimant with a written itemised pay statement in respect of his pay for July 2021.

53. In these circumstances, and given that the claimant commenced pre-claim conciliation with ACAS within thirteen weeks of that failure, the tribunal has the power to order the respondent to pay a sum to the claimant not exceeding the aggregate of any deductions made in that pay period, but is not obliged to do so. In this case I decline to make any order for payment to be made. This is because the respondent did provide an itemised payslip, albeit late, and I conclude that the failure to provide it earlier was because the respondent did not appreciate that it had a legal obligation to do so rather than because of any deliberate decision to breach the legal requirements. Whilst this does not fully

excuse the respondent's conduct, given their small size and limited resources, I conclude that it would be disproportionate to order that a financial sum should be awarded to the claimant.

National insurance

54. It is clear that the claimant has a concern as to whether the right amount of national insurance contributions (and also tax) was paid to HMRC in respect of the first few months of his employment. However, from the evidence I heard, it is clear that the claimant is not himself sure of the position, only that he is worried that cannot be certain the right figures were paid, and it is also clear that at least some of the issues stem from his previous employment.

55. Even if insufficient sums had been paid to HMRC in respect of national insurance contributions, it is my view that this is not a matter upon which the Tribunal would have the ability to award compensation for unlawful deductions from wages. This is because section 27 of the Employment Rights Act 1996 makes clear that wages are sums "payable to the worker". National insurance contributions are not in fact payable to the worker, but rather payable to HMRC and are as such not covered.

56. In any case, given the lack of clarity about what amounts should have been paid to HMRC and/or what amounts were in fact paid to HMRC, and the reasons for any shortfall, the claimant has not in any case shown that any specific sums of money were payable. For an award of compensation to be made, it would need to be possible to calculate the sums that were owed to the claimant, and I do not believe that the claimant has demonstrated that (a) there was a shortfall in the payments made, or (b) the amount of such shortfall.

57. I therefore make no award in respect of national insurance contributions.

Profit share

58. There was no written agreement between the claimant and respondent entitling him to any profit share. However, I conclude that the verbal conversations between the claimant and Mr Jones would have been sufficient to conclude a binding verbal contract, given that clear parameters were set as to when profit share would be payable and at what percentage.

59. However, that profit share agreement was specific to profits made by Wedgmoor Automation Limited, and not the respondent. In the first instance, it must be noted that Wedgmoor Automation Limited is not party to these proceedings and therefore it would not be possible in any case for me to make an award in respect of breach of contract against Wedgmoor Automation Limited. In addition, a breach of contract claim in the Employment Tribunal can only be made where the company in question employs the individual: that is not the case here.

60. I also conclude that Wedgmoor Automation Limited did not in fact make any profit or even trade at all (despite the claimant using that organisation on his email signature) and therefore even if the Tribunal had jurisdiction to make an award in this case, there has been no breach of contract where there is no profit share to be awarded. In addition, there can have been no failure to pay wages where there were no sums properly payable to the worker.

61. The claimant's claim for profit share therefore fails.

Employment Judge Edmonds

Date **28 May 2022**