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EMPLOYMENT TRIBUNALS

Claimant: Mr K Milne
Respondent: Shoppar Ltd (in liquidation)
Heard at: East London Hearing Centre
On: 30 May 2022
Before: Employment Judge Illing

Representation

Claimant: In person
Respondent: No attendance, no representation

JUDGMENT

The judgment of the Tribunal is that: -

1. The Respondent's name is substituted to Shoppar Ltd.
2. The claims by the Claimant were brought within the required time limits.
3. The Claimants claim for unauthorised deductions of wages and holiday pay are upheld.
4. The Respondent is to pay the following gross sums to the Claimant. The Respondent is responsible for ensuring that the payments are paid to the Claimant net and that the required deductions for tax and National Insurance are made. The awards are as follows:
 - a. Unauthorised deduction of wages: £24,519.21
 - b. Holiday pay: £1,634.60
5. The Claimant's claim for notice pay is not upheld.
6. The Claimant's claim for redundancy pay was withdrawn at the start of the Hearing and is dismissed upon withdrawal.

REASONS

This has been a remote hearing, which has not been objected to by the parties. The form of remote hearing was A: audio only. A face to face hearing was not held because it was not practicable and all case management issues could be determined in a remote hearing.

Procedural history

1. The Claimant was an employee of Shoppar Ltd. This is admitted by both Parties.
2. The Respondent defends the claim on the basis that the Claimant has issued the claim against the wrong Respondent and that the claim is out of time. In addition to the claims as made by the Claimant, the Tribunal will consider the issues of whether the Respondent should be substituted to Shoppar Ltd and whether the claims have been brought in time.
3. The Claimant issued the Early Conciliation against Shoppar Ltd on 19 October 2021 but issued the claim on 15 November 2021 against Mr Peter Ville Ward. The Respondent responded in the name of Shoppar Ltd.
4. During the course of the administration of the case, the Tribunal substituted the name of the Respondent for Shoppar Ltd. I will address this point below.
5. The issues for the Tribunal to consider were discussed with the Claimant at the outset of the hearing. In summary these are:
 - 5.1. Name of the Respondent
 - 5.2. Time limits
 - 5.3. Unlawful deduction of wages
 - 5.4. Notice Pay
 - 5.5. Holiday pay
 - 5.6. Redundancy pay; this claim was withdrawn by the Claimant as he does not have the continuity of employment to bring this claim.

The hearing

6. Bundle of 7 pages
7. I heard evidence from the Claimant.
8. No one from the Respondent or the liquidator attended the hearing. I therefore considered the ET3 and the attached Grounds of Resistance as the Respondent's evidence to defend the claims.

Findings of fact

9. The Respondent is a company that carries out software analysis.
10. The Claimant commenced employment on 1st April 2020 as the Head of Data. His annual salary was £85,000. The Claimant's role was a combination of data analysis and software engineering.
11. The Claimant worked from both the office and remotely throughout the period of his employment.
12. The Claimant was paid on or about the 30th of the month by bank transfer. Whilst there is evidence that the Respondent had, on occasion, missed a payment, I am satisfied that the Claimant expected to be paid on or about the 30th of each month.
13. The last date on which the Claimant received payment was 30th June 2021. Any payment due for the month of July 2021, was expected on 30th July 2021.
14. It is the Respondent's position that the Claimant's employment was terminated with notice on 30th June 2021.
15. It is the Claimant's position that his employment was continuing until his decision to seek alternative employment on 21 October 2021.
16. The evidence within the bundle includes bank statements. These show regular payments to the Claimant [pages 1 and 3] from Shoppar Ltd. The Claimant received a net payment of £4,336.66 each month.
17. The Claimant was aware that Shoppar Ltd was having difficulty with its financial position. The Claimant gave evidence to state that he had not been told that his employment was ending or would be coming to an end following a period of notice. He also gave evidence that it was agreed between himself and Peter Ward (Director and majority shareholder) that he would receive 50% of his July salary at the end of July and the balance as soon as possible afterwards. This is evidenced in the WhatsApp screenshot dated 2nd September 2021 [page 5] and 4th October 2021 [page 7]. I am satisfied that the Claimant was expecting to be paid 50% of his salary on or about 30th July 2021.
18. The Claimant gave evidence that he continued to work throughout July, August, September and into October 2021. In October he chose to seek alternative employment following the Respondent failing to make the salary payments due to him.
19. The WhatsApp screenshots on pages 4, 5, 6 and 7 show discussions in relation to work the Claimant was completing on behalf of the Respondent and discussion in relation to ongoing work by a colleague and the efforts the Respondent was making to obtain a R&D rebate and further funding. I am satisfied that these discussions show that there was an ongoing employment relationship between the Parties after the 30th June 2021. There is no evidence from the Respondent to support its assertion that the Claimant's employment was terminated with notice on 30th June 2021.
20. In evidence the Claimant explained that he did not receive the sums due to him and did not receive a response to his messages on 6th October 2021 and 14th

October 2021 for payment. The Claimant gave evidence stating that because of this he chose to seek alternative employment and to start early conciliation with Acas.

21. I find that the Claimant continued to be employed from 1st April 2020 and that his effective date of termination was 14th October 2021 being the last date on which the Claimant contacted the Respondent.
22. The Claimant gave evidence that he had a contract of employment. There was no evidence from the Respondent to identify any relevant provision of this contract to allow it to make any deduction from the Claimant's wages. Nor did the Respondent refer to any relevant Statutory provision.
23. From the evidence before the Tribunal, the evidence of the Claimant chasing the Respondent for payment of monies due to him indicates that there had not been an agreement to not pay the Claimant. I am satisfied that whilst the Claimant agreed to receive 50% of his salary for July, he was expecting to be paid the outstanding 50% as soon as possible and to be paid for the time spent working for the Respondent.
24. The Claimant gave evidence that it was his expectation to receive 1-month of notice. The Respondent denies that notice is due. Neither party has produced any documents to identify the agreed notice period.
25. The Claimant gave evidence that he did not know when the leave year started. He confirmed that he was able to take holiday during the course of his employment, but he had chosen not to request it. The coronavirus pandemic had not prevented him from taking holiday. This evidence is in contradiction to the Claimant's Particulars of Claim, in which he states:
 - 25.1. "At the start of July Pete said he may not be able to make payroll that month. He verbally guaranteed us at least 50% pay at the end of the month and the rest later. Because of this, we agreed to work for half the month and take the rest as holiday."

The law

Name of the Respondent

26. In the case of **Selkent Bus Company Ltd v Moore [1996] ICR 836** the Employment Appeal Tribunal set out the test to be applied by a Tribunal in deciding whether to exercise its discretion to grant an amendment. In taking into account all of the circumstances of the case the Tribunal should balance the injustice and hardship of allowing the amendment against the injustice and hardship of not allowing the amendment. These **Selkent** factors include:
 - 26.1. The nature of the amendment including whether it is a minor amendment against a substantive alteration.
 - 26.2. Whether there is a new cause of action that creates an issue in relation to time limits.
 - 26.3. The timing of the application.

Time Limits

27. S.23 Employment Rights Act (ERA)

23 Complaints to Employment Tribunal

(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

(2) subject to subsection 4 an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with –

a. in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made

(3) Where a complaint is brought under this section in respect of –

a. A series of deductions or payments,

The references to subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

S.207B ERA

S.207B Extension of time limits to facilitate conciliation before the institution of proceedings

(1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a relevant provision)

(2) In this section –

(a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of s 18A of the Employment Tribunals Act 1996 (requirement to contact Acas before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and

(b) Day B is the day on which the complainant or applicant concerned receives, or if earlier, is treated as receiving the certificate issued under subsection (4) of that section.

(4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.

Unlawful deduction of wages

28. S.13 Employment Rights Act 1996 (ERA)

13 Right not to suffer unauthorised deductions

(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 workers contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(3) 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.

Notice Pay

29. If there is no expressly agreed period of contractual notice, there is an implied contractual right to reasonable notice of termination. This must not be less than the statutory minimum period of notice set out in s.86 ERA. For someone who has been employed for at least one-month but less than two-years, as in the Claimant's case, this would be one-week.
30. A claim of breach of contract must be brought within three-months beginning with the effective date of termination, subject to any extension provided by early conciliation.

Holiday Pay

31. S.13 Working Time Regulations (WTR)

13 Entitlement to annual leave

(1) Subject to paragraph (5), a worker is entitled to four weeks' annual leave in each leave year.

(3) A workers leave year, for the purposes of this regulation, begins –

(a) on such date during the calendar year as may be provided for in a relevant agreement, or

(b) where there are no provisions of a relevant agreement which apply –

(ii) if the workers employment begins after 1st October 1998, on the date on which that employment begins and each subsequent anniversary of that date.

(9) Leave to which a worker is entitled under this regulation may be taken in instalments, but

(a) it may only be taken in the leave year in respect of which it is due, and

(b) it may not be replaced by a payment in lieu except where the worker's employment is terminated.

13A Entitlement to additional leave

(1) Subject to regulation 26A and paragraphs (3) and (5), a worker is entitled in each leave year to a period of additional leave determined in accordance with paragraph (2)

(2) The period of leave to which a worker is entitled under paragraph (1) is –

(e) in any leave year beginning or after 1st April 2009, 1.6 weeks.

(4) A worker's leave year begins for the purposes of this regulation on the same date as the workers leave year begins for the purposes of regulation 13.

(6) Leave to which a worker is entitled under this regulation may be taken in instalments, but it may not be replaced by a payment in lieu except where –

(a) the worker's employment is terminated.

Submissions

32. The Claimant submitted that there was never any correspondence or any message stating implicitly or expressly that the Respondent was terminating his employment. He submitted that the Respondent continued to provide him with work, and he continued to complete it. He was aware that the company had financial issues but not that his employment had been brought to an end.
33. The Claimant submitted that he had made an error in the name of the Respondent when issuing the claim, although the conciliation had been in the name of the Company. As soon as this was brought to his attention, he emailed the Tribunal to correct the error.
34. For the Respondent, there were no submissions as neither the Respondent nor the liquidator attended the hearing. The Grounds of Resistance were taken into consideration.

Conclusions

35. Taking each issue in turn, with the time limits being considered against each head of claim, I find as follows:

Name of the Respondent

36. The Claimant initiated early conciliation against Shoppar Ltd on 19 October 2021, which concluded on 21 October 2021. The claim was issued in time against the director of the company being Peter Ville Ward as dated 15 November 2021.
37. The Respondent filed the ET3 and Grounds of Resistance in the name of Shoppar Ltd on 14 December 2021.
38. In considering all of the circumstances, I find that the amendment of the name from Peter Ville Ward to Shoppar Ltd is a minor amendment. The Respondent has responded in the company name and there is no apparent injustice or hardship for the Respondent to be amended to Shoppar Ltd.

Unlawful deduction of wages

39. A claim for an unauthorised deduction of wages must be presented to an employment tribunal within three-months beginning with the date of payment of the wages from which the deduction was made. I find that the date of the payment from which the deduction was made was 30th July 2021, being the expected pay date for the Claimant's July wages. The time limit for the presentation of this claim is therefore 29th October 2021, by which time the Claimant had initiated early conciliation.
40. In considering the time limits and early conciliation, the conciliation ended on 21st October 2021 and had lasted 3-days (19 – 21 October 2021).
 41. Day A is 19th October 2021.
 42. Day B is 21st October 2021.
 43. The relevant provision for the time limit for a claim of unlawful deduction would expire on 1st November 2021 taking into account the extension provided by the 3-days of conciliation. The 1st November 2021 is less than 1-month after Day B, therefore s.207B(4) ERA extends the limitation period to institute this claim to 1st December 2021. The claim was issued on 15th November 2021 and is therefore in time.
44. Having regard to the evidence as given by the Claimant by means of witness statement and orally, and the 7 pages of documents, I am satisfied that the Claimant was not given notice that his employment had been terminated on 30th June 2021 as asserted by the Respondent. I find that the Claimant continued to work throughout July, August, September and into October. Following the continued non-payment of his wages, the Claimant's employment was brought about by his decision to seek alternative employment. I find that the Claimant resigned from his employment with the Respondent with immediate effect and that the Effective Date of Termination (EDT) was 14th October 2021.
45. I find that the Claimant continued to work for the Respondent until the EDT and that wages are properly payable to him for this period.
46. I have considered whether the deduction was required or authorised by statute, and I find that it was not.
47. I have considered whether there was a written term in the contract to authorise the deductions, and I find that there was not.
48. I have considered whether the Claimant expressly agreed in writing to the deduction before it was made. I find that whilst the Claimant agreed to receive 50% of his salary for July and for him to take the balance of the month as holiday, he did not expressly agree to the non-payment of his wages. The expectation was that the Claimant would be paid for the month of July 2021 on or about the 30th July 2021.
49. Having considered the evidence, I accept that the Claimant remained in employment until the EDT of 14th October 2021 and did not receive payment for this period.

50. The Claimant received payment by way of salary only. His annual salary was £85,000. This equates to the following:
- 50.1. Gross monthly salary of $(£85,000 / 12) = £7,083.33$
 - 50.2. Gross weekly salary of $(£85,000 / 52) = £1,634.61$
 - 50.3. Gross daily salary of $(£1,634.61 / 5) = £326.92$
51. I find that the Claimant is due salary for the months of July, August and September. This equates to the gross sum of $3 \times £7,083.33 = £21,249.99$.
52. I find that the Claimant is due salary for 1st October 2021 until 14th October 2021 a period of two weeks. This equates to the gross sum of $2 \times £1,634.61 = £3,269.22$.
53. In total, I find that the Respondent has unlawfully deducted the sum of £24,519.21 gross. This is to be paid by the Respondent to the Claimant net of tax and National Insurance deductions.

Notice Pay

54. With regards to notice pay, I find that the Claimant resigned with immediate effect on the EDT. In resigning immediately, this was a choice by the Claimant to enable him to seek alternative employment. I find that there was no notice of termination by the Respondent and therefore there is no notice pay outstanding.

Holiday Pay

55. The right to be paid in lieu of accrued but untaken holiday takes effect upon the termination of employment. The EDT is 14th October and therefore the Claimant had 3-months less one day after this date in which to bring his claim, being 13th January 2022. This claim is therefore in time.
56. The Claimant was paid an equal amount monthly.
57. The Claimant is entitled to 5.6-weeks of holiday in accordance with regulations 13 and 13A of WTR. The Claimant worked a 5-day week and would therefore accrue 28-days of holiday per year.
58. There was no evidence of details for a leave year and therefore I find that the Claimant's leave year ran from 1 April – 31 March each year.
59. With an EDT of 14th October 2021, the Claimant is entitled to be paid in lieu of accrued but untaken holiday from 1st April 2021 – 14th October 2021.
60. The total amount of holiday that would accrue is as follows:
- 60.1. Holiday accrual per month = $28 / 12 = 2.33$
 - 60.2. Holiday accrual per week = $28/52 = 0.54$
61. The Claimant is not entitled to carry over holiday from the previous leave year and the exceptions in relation to coronavirus do not apply.
62. The period of 1st April 2021 – 14th October 2021 is 6-months and 2-weeks. I find that the Claimant accrued $(6 \times 2.33) + (2 \times 0.54) = 15$ -days of holiday.

63. The evidence as given by the Claimant today in relation to holiday pay is contrary to the details in the Particulars of Claim. I find that the Claimant did agree with the Respondent to take holiday for half of the month of July 2021. Having regard to a calendar for July 2021, I find that the Claimant agreed to take 2-weeks of holiday, being 10-days. The balance of 5-days of holiday remains outstanding and are to be paid to the Claimant in lieu.
64. The gross sum due to the Claimant is $5 \times \text{£}326.92 = \text{£}1,634.60$, which is to be paid to the Claimant by the Respondent less deductions for tax and National Insurance.

Judgment and Remedy

65. It is the Judgment of the Tribunal that:
- 65.1. The Respondent's name is substituted to Shoppar Ltd.
 - 65.2. The claims by the Claimant were brought within the required time limits.
 - 65.3. The Claimants claim for unauthorised deductions of wages and holiday pay are upheld.
 - 65.4. The Respondent is to pay the following gross sums to the Claimant. The Respondent is responsible for ensuring that the payments are paid to the Claimant net and that the required deductions for tax and National Insurance are made. The awards are as follows:
 - 65.4.1. Unauthorised deduction of wages: $\text{£}24,519.21$
 - 65.4.2. Holiday pay: $\text{£}1,634.60$
 - 65.5. The Claimant's claim for notice pay is not upheld.
 - 65.6. The Claimant's claim for redundancy pay was withdrawn at the start of the Hearing and is dismissed upon withdrawal.

Employment Judge Illing

Dated: 31 May 2022