



EMPLOYMENT TRIBUNALS

Claimant: Nicolas Jon Wicken

Respondent: Community Advice Works

Heard at: London South (Remotely by CVP)

On: 12 May 2022

Before: Employment Judge Kumar

Representation

Claimant: In person

Respondent: Ms J Linford (Counsel)

RESERVED JUDGMENT

1. It is the judgment of the tribunal that it does not have jurisdiction to consider the Claimant's claim for unlawful deduction of wages having regard to the applicable statutory time limits

REASONS

Preliminary

1. The claimant is Nicolas Jon Wicken. The respondent is Community Advice Works, an independent advice charity.
2. The claimant appeared in person and the respondent was represented by Ms Linford of counsel.
3. On behalf of the claimant I heard evidence from the claimant himself and from Ms J Mowat, a freelance accountant who undertook work for the respondent. I heard evidence on behalf of the respondent from Ms J Sturridge, a trustee of the charity.

4. In addition to the claimant's document entitled 'overview of claim' that accompanied his ET1, the schedule of loss and accompanying 'supporting documents and evidence', the ET3 and accompanying 'grounds of resistance' I read the written statements of the claimant, Ms Mowat and Ms Sturridge. I was taken to pages within the bundle during the evidence.

Claims and Issues

5. The claimant claimed unlawful deduction of wages for additional hours worked between 1 February 2020 and 31 January 2021. The claimant sought a preparation time order.
6. The respondent denied overtime was 'properly payable' within the meaning of section 13 (3) of the Employment Rights Act 1996. The respondent asserted that the claimant's claim was in any event out of time.
7. The issues for the tribunal were discussed and agreed at the start of the hearing as follows:
 - i) Was the claim in time?
 - ii) Were the wages paid to the claimant less than they should have been?
 - iii) Should the tribunal make a preparation time order?

Background

8. The respondent is a charity that provides independent advice on welfare benefits, housing, debt, employment and immigration. The claimant was employed by the respondent as a manager from 13 January 2020 until 29 April 2021. The claimant was employed to work 28 hours a week, over 4 days, on a pro-rata salary of £26,000. The salary for the full-time role based on a 35-hour week was £32,500.
9. Between 1 February 2020 and up to 31 January 2021, the claimant worked additional hours. The respondent was aware that the claimant was working additional hours.
10. On 26 January 2021 the claimant resigned by way of letter. Within that letter he invited the trustees to discuss how the additional hours would 'be addressed'.
11. On 10 March 2021 in the claimant's management report to the trustees the claimant again raised the issue of the additional hours he had worked and asked for his hours from 1 February 2020 to 31 January 2021 to be regarded as full-time and for him accordingly to receive additional pay of £6,500.
12. On 11 March 2021, the respondent sent an email to the claimant, refusing his request for a payment of £6,500. The respondent offered the claimant an additional month's salary as a goodwill gesture.

13. On 27 March 2021, the claimant raised a formal grievance in respect of the respondent's refusal to make the payment he sought. A grievance meeting took place on 9 April 2021 and the respondent provided a formal response by email on 10 April 2021. The respondent did not uphold the grievance. On 11 April 2021 the claimant received notice from the respondent that he would be put on gardening leave.
14. On 14 April 2021 the claimant sent an email appealing the outcome of the grievance meeting. The claimant's appeal was heard on 28 April 2021 and on 29 April 2021 the respondent confirmed by email that the claimant's appeal had been unsuccessful.
15. ACAS received the claimant's early conciliation notification on 24 May 2021 and the Early Conciliation Certificate was issued on 5 July 2021. The claim was presented on 2 August 2021.

Findings of fact relevant to the issues

16. Having considered all the evidence I find the following facts.

Contractual Rights

17. The claimant was not provided with a written contract of employment upon commencement of employment. However he was contracted to work 28 hours a week on an annual pro-rated salary of £26,000. This is confirmed by a document headed 'New employee details' which was signed by the claimant on 10 March 2020.
18. The claimant was provided with a copy of a document headed Staff Induction Pack, a copy of which appeared within the bundle, upon commencing employment. The claimant confirmed his signature on the second page of the copy of the document contained within the bundle. The third page of the document within the bundle had been signed by someone other than the claimant. The claimant expressed some uncertainty as to whether he had received the complete document upon commencing employment but I find it more likely than not that he did. In any event the claimant during his time as manager of the charity was responsible for staff inductions and would have been aware of the contents of that document for this reason.
19. The staff induction pack stated :- "*HOURS AND TIMEKEEPING Each worker keeps a daily record of their hours and holidays taken. Any flexitime accrued should not exceed more than 10 hours.*"
20. There was no reference to an overtime policy within the staff induction pack.

Additional hours/Overtime

21. The claimant worked at least 332.35 hours additional to his contracted 28 hours a week over the period 1 February to 31 January 2021. The respondent did not substantially challenge the quantum of additional

hours the claimant asserted he worked beyond identifying that the claimant did not submit timesheets and that there was a degree of speculation. The claimant evidenced his hours by providing copies of emails which showed that he was working outside of his usual hours. Ms Mowat in her evidence also confirmed that she worked with the claimant late into the evenings as well as on many Saturdays. I accept the claimant's evidence on this point.

22. The claimant was not required to work overtime by the respondent, nor was he asked to. The claimant however saw it as a necessity to work additional hours. The claimant was a conscientious employee who did what he thought was necessary to ensure the effective running of the charity. The claimant worked additional hours initially to remedy serious defects in the workings of the charity caused by mismanagement prior to his arrival. Thereafter, and as a result of the Covid 19 pandemic, the claimant worked additional hours to ensure that the charity continued to offer its services. The claimant's dedication to his role was recognised by the respondent in the minutes of a Management Committee meeting that took place on 14 December 2020 which recorded,

“Great thanks were given to JW. Everyone agreed that he has been doing a sterling job. Against many odds, he is putting the organisation at a much better place.”

23. I find that there was no overtime policy in place, generally or specifically in respect of the claimant. There were exceptional circumstances in which certain staff members were paid for overtime but this was always approved by the trustees in advance.
24. The claimant did not seek to negotiate to be paid for overtime in advance. He asked the respondent to take into account his additional hours for the first time in his resignation letter of 26 January 2021 and sought payment for the additional hours for the first time in his grievance dated 10 March 2021.

Time off in lieu

25. The claimant raised concerns with the respondent about the lack of clarity there was about the charity's time off in lieu policy. He raised such a concern in February 2020 in his manager's report raised. He went on to highlight the absence of a written time off in lieu policy at a management committee meeting that took place on 9 March 2020. The claimant accepted that subsequently a written time off in lieu policy dating back to 2019 was located but that the policy was thereafter not included in the charity's handbook when it was updated in 2020 as the trustees were giving further thought to staff structuring.
26. Other staff took time off in lieu. The claimant did not feel able to take time off in lieu as there was no one to cover his work. Accordingly the claimant did not seek time off in lieu in respect of the additional hours he worked.

27. I conclude that the claimant considered the time off in lieu policy imperfect and problematic but that nevertheless there was a policy and he was aware of it.
28. The claimant did not seek time off in lieu in respect of the additional hours he had worked in his resignation letter of 26 January 2021. In his formal grievance dated 10 March 2021 he confirmed that he sought payment for his additional hours rather than time off in lieu.

Time limit for bringing claim

29. The claimant was aware that there was a 3-month time limit for bringing a claim for unlawful deduction of wages. He accepted that he had first contacted ACAS in March 2021 and that he had been advised throughout and been made aware of the time limit. The claimant did not consider that he could bring his claim until he had been through the grievance process and appeal and accordingly delayed bringing his claim.
30. The claimant worked additional hours from 1 February 2020 to January 2021. The claimant received payment in arrears on the 18th day of the calendar month. If overtime had been payable the last payment would therefore have been due on 18 February 2021.

The law

31. Section 13(1) ERA provides that an employer shall not make unlawful deductions from the wages of a worker unless the deduction is required or authorised by statute or the worker's contract, or the worker has given written consent to the making of the deduction.
32. Section 13(3) ERA provides: -
"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".
33. Section 23 ERA provides that: -
"(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 series or deductions or payments... the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series...
(4) Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the

complaint if it is presented within such further period as the tribunal considers reasonable.”

Conclusions

Was the claim in time?

34. The claimant's claim related to a series of deductions with the last deduction made from his February 2021 pay. The relevant date is 18 February 2021. The claimant was required to commence Early Conciliation within 3 months less a day from the date of the last deduction. He therefore needed to commence Early Conciliation by 17 May 2021. ACAS received the claimant's Early Conciliation Notification on 24 May 2021 and the claim was presented on 2 August 2021. It is therefore out of time.

35. I am satisfied that it was reasonably practicable to present the claim in time. The claimant chose to proceed with the internal grievance procedure rather than bring a claim to the tribunal. He was aware that there was a time limit for bringing a claim and was advised by ACAS throughout. It is acknowledged that the claimant's mother has dementia and that his father was in a care home and since bringing the claim has sadly died. However the claimant did not advance this as the reason why he did not bring his claim in time but rather relied on the fact that the internal grievance procedure was delayed by the respondent.

Were the wages paid to the claimant less than they should have been?

36. If the claim were in time I in any event would dismiss it on the grounds that the payment sought by the claimant was not properly payable. There was no contractual entitlement to be paid overtime. The claimant did not obtain agreement to work paid overtime in advance and the respondent at no time required the claimant to work overtime or agreed to pay him for overtime worked. There was no legal entitlement to be paid overtime.

Should the tribunal make a preparation time order?

37. Having dismissed the claim it is not appropriate for the tribunal to make a preparation time order.

Employment Judge Kumar

Date 25 June 2022