



EMPLOYMENT TRIBUNALS

Claimant: Mr P Erskine
Respondent: Weston Communications Ltd

Heard at: Bristol Employment Tribunal – by remote hearing
On: 13 May 2022

Before: Employment Judge Youngs

Representation
Claimant: In person
Respondent: Ms Ramsay, Director of the Respondent

RESERVED JUDGMENT ON REMEDY

1. The Respondent has unlawfully deducted £1,621.92 from the Claimant's wages.
2. The Claimant is owed holiday pay by the Respondent in the sum of £174.66.
3. Accordingly the Respondent is Ordered to pay to the Claimant the total gross sum of £1,796.58.

REASONS

1. At a preliminary hearing on 2 September 2021, it was determined that the Claimant was a worker of the Respondent within the meaning of section 230 of the Employment Rights Act 1996 and was owed wages and holiday pay.
2. The issues for me to determine were therefore how much the Claimant is entitled to by way of
 - 2.1. wages;
 - 2.2. holiday pay;both of which it was agreed would be determined by the number of hours the Claimant is found to have worked for the Respondent.
3. It was not disputed that there were amounts owing to the Claimant. The only dispute

between the Claimant and the Respondent was how much the Claimant was due to be paid.

4. The Claimant had prepared a Schedule of Hours that he claimed that he worked for the Respondent. The Respondent prepared a Counter Schedule of Hours.
5. I heard evidence from the Claimant and from Ms Ramsay for the Respondent.

Findings of fact

6. At the time of the Claimant's engagement by the Respondent, the Respondent business managed 7 properties for short term (holiday) lets.
7. The Claimant and the Respondent initially intended that the Claimant would become a business partner of the Respondent's owner, Ms Ramsey. In the event, this did not work out. However, the Claimant was personally invested in ensuring that the Respondent business was a success.
8. The Claimant therefore commenced working for the Respondent on 10 June 2020.
9. The Claimant also had his own business, which he continued to run whilst working for the Respondent.
10. Ms Ramsay and the Claimant had a general discussion at the outset of the Claimant "coming on board", but Ms Ramsay did not require or direct the Claimant to work a specific number of hours and she did not know the extent of the activity carried out by the Claimant during his engagement.
11. The Claimant did not keep the Respondent updated as to the number of hours he was working and the Respondent has no record of hours worked by the Claimant. The Claimant did not keep a contemporaneous record of the hours that he worked. His Schedule of Hours represents his best estimate after the event, produced for the purposes of his Tribunal claim.
12. The Claimant was not required by the Respondent to work all of the hours contained within the Claimant's schedule of hours in any event.
13. The relationship between the Claimant and the Respondent broke down, with the Claimant last carrying out work for the Respondent on 23 September 2020.
14. As set out above, it was not disputed that the Claimant is owed wages by the Respondent. The Respondent is prepared to accept that the Claimant worked 186 hours in the period 10 June 2020 to 23 September 2020, based on the concessions made in the Respondent's Counter Schedule of Hours. However, the Respondent does not admit that all of these hours were required to be worked or that 186 hours is accurate. In other words, the Respondent's admission is not an admission as to the accuracy of the Claimant's records.

The law

15. In respect of the claim for unlawful deduction from wages, 71. Section 13(1) Employment Rights Act 1996 provides that an employer shall not make a deduction from wages of a worker employed by him unless 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 the worker has previously signified in writing his agreement or consent to the making of the deduction. A worker has a right to complain to an Employment Tribunal of an unlawful deduction from wages pursuant to Section 23 Employment Rights Act 1996.

16. In respect of holiday pay, the Working Time Regulations 1998 provide for minimum periods of annual leave and for payment to be made in lieu of any leave accrued but not taken in the leave year in which the employment ends. The Regulations provide for 5.6 weeks leave per annum. The leave year begins on the anniversary of the start of the claimant's employment, unless a written relevant agreement between the employee and employer provides for a different leave year (which is not applicable in this case). As of 6 April 2020, where a worker has worked irregular hours, their holiday pay per week is calculated using a 52 week reference period, or, where the worker has worked fewer than 52 weeks, the total number of weeks in which they worked shall be used as a reference period for calculating an average week's pay and therefore a week's holiday pay. A worker has the right to complain to an Employment Tribunal that their employer has failed to pay them their holiday pay under Regulation 30 of Working Time Regulations 1998.

Conclusions

17. The Respondent has agreed to pay the Claimant for the hours set out in the Respondent's Schedule of Hours, and therefore I have focused below on the disputed elements and my conclusions in relation to those hours.
18. I heard evidence from both parties, neither of whom can confirm with any accuracy what hours the Claimant worked. However, it was clear that Ms Ramsay, who is representing the Respondent, was completely unaware that the Claimant could be devoting as much time as he says he was into the Respondent's business. The Respondent did not think that the number of hours was necessary to manage the Respondent's business, and it was not required by the Respondent.
19. The hours the Claimant claims he worked each day are not broken down by activity, so there is no accurate data as to how many hours the Claimant attributes to each activity claimed for.
20. There are some clear examples, however, of the Claimant's estimates being inaccurate. For example:
 - 20.1. The Claimant claims pay for 8 hours on 21 July 2020, which includes time he says he spent providing training to a cleaner. However, the cleaner cancelled that day. The Claimant was also given a private job by the Respondent (which he undertook through his own, separate, business). The Claimant cannot have worked 8 hours this day.
 - 20.2. The Claimant claims pay for 7 hours on 30 July 2020 for time he says he spent tasking providers, monitoring and adding COVID 19 firebreak to bookings, attending a lockup to stock shelves, visiting a property for inspection, and sorting out a stock problem. In other entries, the Claimant has specified which property and what sort of problem. He has not done so here. Further, he sent a text message to Ms Ramsay that day with a photo of a job he was working on through his own business). It is unlikely that the Claimant worked seven hours for the Respondent this day.
 - 20.3. The Claimant claims pay for 7 hours on 3 August 2020 for time he says he spent

tasking providers, monitoring and adding COVID 19 firebreak to bookings, sourcing / arranging a photographer, attending the lockup to check linen level, and ordering linen. However, the Respondent sent the Claimant a text message asking whether the Claimant was in a particular area that day, as if so there was a job to be done (which the Respondent was going to otherwise do). The Claimant replied saying "My van is in the garage", indicating that he was not able to go anywhere. On the balance of probabilities, therefore, he did not attend the lockup and cannot have worked 7 hours that day.

- 20.4. The Claimant claims pay for 7 hours on 10 August and 6 hours on 11 August 2020. However, he sent a text message to Ms Ramsay on 8 August confirming that he was not feeling well and said, at 10.41, that he had "just got up". Ms Ramsay replied to "take it easy". The following day, the Claimant sent a text saying that he was "Spending another day in bed". This suggests that the Claimant had, at least mostly, stayed in bed the day before as well, indicating that he had been unwell and in bed on both 10 and 11 August 2020. Accordingly, on the balance of probabilities, the Claimant did not work a total of 13 hours for the Respondent over these two days.
21. Further, on the balance of probabilities, the Claimant continued to run his own business throughout this period. In the small number of text messages before the Tribunal, there is reference to at least three jobs undertaken by the Claimant through his own business: one small £85 job, one £30,000 job, and a job at Sandbanks.
22. Other examples of a lack of detail and accuracy include:
 - 22.1. The Claimant has claimed an hour marketing a property that the Respondent has not heard of;
 - 22.2. It appears that the Claimant is claiming in the region of two or more hours a day on each day that the Claimant says he was "tasking providers", with an increase for days in which he says he was sourcing providers and further increases for interviewing providers. Mrs Ramsay had managed the business herself prior to the Claimant becoming involved and disputes that there is this amount of work required to source or task providers for the number of properties in her portfolio. However, it is not clear what this involved or why it took this length of time given the small portfolio of properties.
 - 22.3. The Claimant has recorded around 11 hours for marketing, including to prospective landlords, who were contacts or clients of the Claimant in his own business. It is not clear what the Claimant was doing in this regard for the Respondent.
23. The Claimant accepts that in producing the Schedule of Hours he has gone through his diary and done his best to estimate how many hours he would have worked. I do not find that he is dishonest and make no criticism of the Claimant. However, given that his Schedule of Hours is an estimate, and taking into account my findings that there are clear mistakes in the Schedule of Hours, I am not satisfied on the balance of probabilities that the Claimant's Schedule of Hours can otherwise be relied on. I find that it is likely that the Claimant has over-estimated the number of hours that he has spent working in the Respondent's business.
24. That being the case, I conclude that the Claimant is entitled to be paid for the hours of work as set out in the Respondent's Counter of Schedule of Hours. I am not satisfied on the balance of probabilities that additional hours are due to be paid.

25. It is agreed between the parties that the correct rate of pay was the National Minimum Wage which at the relevant time was £8.72 per hour. The Claimant is therefore entitled to be paid for 186 hours at £8.72 an hour, which is a total of £1,621.92.
26. The Claimant is also entitled to be paid in lieu of annual leave accrued during his period of working for the Respondent. Every worker has an entitlement to 5.6 weeks' annual leave in a full year. The Claimant worked for the Respondent over 16 weeks. Based on working 186 hours in that period, this is an average of 11.625 hours and £101.37 a week. Having worked in each week over the 16 week period, the Claimant's annual entitlement is pro-rated accordingly to 1.723 weeks' annual leave (being $16 \div 52 \times 5.6$). At £101.37 a week, therefore, the Claimant is owed £174.66 in holiday pay.
27. The parties' attention is drawn to Rule 66 of the Employment Tribunals Rules of Procedure 2013 (as amended) which says as follows:
66. A party shall comply with a judgment or order for the payment of an amount of money within 14 days of the date of the judgment or order....

Employment Judge Youngs
Date of Judgment: 9 August 2022

Judgment sent to parties: 22 August 2022

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