EMPLOYMENT TRIBUNALS

Claimant: Mr K Guinnane

Respondent: DSB Flooring Specialists Limited

HELD AT: Manchester (via CVP) **ON:** 12th August 2022

BEFORE: Employment Judge Anderson
(sitting alone)

REPRESENTATION:

Claimant: In person

Respondent: Mr Southward, Director

JUDGMENT having been sent to the parties on 16th August 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. By his ET 1 dated 3rd February 2022, the Claimant, Mr Guinnane claims against his former employer DSB Flooring Specialists Limited. He makes claims of unlawful deduction from wages in the form of pay and holiday pay. He also asserts that he did not have a written statement of terms and conditions.

2. The Respondent submitted an ET 3 in this matter, but did so out of time and it was rejected, it being made clear that no application for an extension of time had been received. No subsequent application for an extension of time was made.

3. Therefore, this matter came before me as a Rule 21 hearing.

Procedural Matters

4. The hearing took place by way of CVP.

5. The effect of the absence of a validly submitted ET 3 is contained within Rule 21(3) of Schedule 1 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 which provides:

   "The respondent shall be entitled to notice of any hearings and decisions of the Tribunal but, unless and until an extension of time is granted, shall only be entitled to participate in any hearing to the extent permitted by the Judge"

6. At the outset, I sought to establish with Mr Southward the extent to which the Respondent sought to participate in these proceedings. From my exchanges with Mr Southward, I gained the impression that he was not particularly familiar with the procedural history of the case and it was necessary for me to try and explain in different ways that the Respondent had not submitted a valid ET 3 (defence) to the claim within the relevant time limit and had not sought reconsideration of that decision. Ultimately, the position that Mr Southward adopted was that he wanted to 'just get on with it'.

7. I took the view that having regard to the overriding objective, taking into account the fact that this was a claim for wages listed for two hours via a video link and that each party was self-represented, whilst the Claimant would give evidence via affirmation, I would adopt a more inquisitorial approach in an attempt to establish the facts. This would include my asking questions of Mr Southward to establish his position on any relevant point and permitting Mr Southward to address me as to the position of the Company on any given point. Mr Southward was able to inform me of any point of disagreement and I ensured that it was put to the Claimant.

8. The hearing proceeded. The Claimant took the affirmation. The Claimant had previously submitted a schedule of loss and a narrative document that I treated as his witness statement and was taken as read. I was provided with a small bundle of documents by the Claimant. Both parties were given the opportunity to address me on their respective positions in the case.

Facts

9. I made the following findings of fact on the balance of probabilities. The burden of proof is on the Claimant to prove his claims.

10. Whilst it initially appeared that there were significant disputes of fact between the parties at the outset of the hearing, in reality, whilst there was a point of principle that was in the background, much of the hearing resulted in common factual background. For example, there was ultimately no dispute over the dates on which the Claimant was paid or the rate of pay.

11. The Claimant commenced employment with the Respondent on the 27th February 2021. The Claimant was employed as a floor layer.

12. The Claimant's uncontradicted evidence was that he was always paid a week in hand. By this, the Claimant articulated that he was not paid at the end of the first week of work.

13. The Claimant worked consistently for the Respondent from his start date. The Claimant would work a five day week, Monday to Friday. He was required to work personally and was required to attend work. He was not able to refuse work. There was mutuality of obligation and the Claimant was subject to the control of the Respondent.

14. The Respondents position is that it only employed the Claimant from September 2021 onwards and that in the earlier period, the Claimant was not formally an employee. Other than the label which the Respondent asserted was applied to this period, no other evidence to support this contention was placed before me.

15. In evidence the Claimant accepted that he had been paid for five bank holidays, the last one being the August 2021 bank holiday. No other properly paid leave was taken by the Claimant.

16. Around the December period, it was apparent that there was a lack of work to undertake. The Respondent informed the Claimant that he would be continued to be paid, even if there was no work on. This is corroborated by the text messages that I have seen.

17. In any event, there was no written contract and no term relating to lay off or other term that would cover this situation. Even on the Respondents position, it accepts that the Claimant was an employee at this point in time. There was mutuality of obligation. The oral terms such as they were entitled the claimant to be paid £350 weekly.

18. The parties agreed that the Claimant was paid on the 6th December, 13th December, 20th December and 24th December.

19. On the 7th January 2022, the Claimant was told that he no longer had a job. This was the effective date of termination.

20. None of the earlier text messages to the Claimant amounted to a dismissal. There are numerous text messages and it is not possible to replicate them in full in this Judgment.

21. The later text messages involve the Claimant chasing his pay when he has not been paid. The Claimant was not on holiday in this period and remained available to work as required by the Respondent. There was a possibility that the Claimant could be required to work in this period. It is evident that retrospectively, the Respondent felt that the Claimant had been sufficiently

paid given the lack of work offered to the Claimant. This was the reason for non-payment.

22. Following his dismissal, the Claimant was paid the sum of £350 on the 10th January 2022. There is some suggestion that the sum was £340 but during the course of the hearing, the parties agreed that £350 was the correct figure. The Respondents position is that this sum was to represent one week of gross pay. The Claimant also accepts that this is the correct gross figure. On this basis, I have proceeded on the basis that £350 represents one week of gross pay. It was not stated at the time whether this sum was wages or a payment in lieu of notice. As set out below, I have treated it as a payment in lieu of notice.

23. No sum was paid to the Claimant on termination of his employment in respect of accrued holiday pay.

The Law

24. S.1 Employment Rights Act 1996 contains the right for a worker to receive a set of employment particulars. As amended, the legislation requires that the statement must be given prior to or at the point at which the worker commences work. Some elements of the statement may be given within two months of the commencement of work.

25. S.38 Employment Act 2002 provides that where an employer has been found liable in respect of one the matters listed in Schedule 5 of the Act and at the relevant time, the worker did not have a written statement of terms and conditions that complied with s.1 Employment Rights Act 1996, the Tribunal must unless there are exceptional circumstances make an award of two weeks pay and may if it is just and equitable make an award of four weeks pay.

26. S.13 Employment Rights Act 1996 contains the right not to have sums deducted from pay, including holiday pay. Section 13(3) 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.

Conclusions

27. I deal with each of the claims separately below.

Unpaid Wages

28. This was a relatively straightforward claim to determine once the basic facts were established.

29. Having been last paid on the 24th December 2021 and having dismissed on the 7th January 2022, I find that the Claimant is owed two weeks pay for the period leading up to his effective date of termination, bearing in mind that the Claimant worked a five day week.

30. I find that the Claimant is entitled to a further weeks pay because of the way he was paid in arrears. The Respondent did not dispute the fact that the Claimant was paid in arrears.

31. This was an ongoing series of deductions that lasted to the effective date of termination. No issue of time limits or jurisdiction arises.

32. The parties are agreed that the Claimant was paid £350 per week. Accordingly, I award the Claimant the sum of £1050.

Unpaid Wages – Holiday Pay

33. There was no set holiday year. Accordingly, I treated the holiday year as commencing at the start of the Claimant's employment in accordance with Regulation 13(3)(b)(ii) of the Working Time Regulations 1998.

34. The Claimant's annual entitlement was 5.6 weeks which for someone who works five days per week amounts to 28 days. However, this needs to be pro-rated as the Claimant was not employed for a full year.

35. I proceeded on the basis that ten months of holiday had accrued. I did so on the basis of Regulation 15A(2A) of the Working Time Regulations 1998 which provides that during the first year of employment leave accrues at a rate of 1/12 on the first day of the month. This resulted in a pro-rated entitlement of 23.33 days.
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36. On enquiry, I established that the Claimant did not work and was paid for the Easter bank holidays, the two May bank holidays and the August bank holiday. This totalled five days of paid leave that had been taken.

37. I accept the Claimant's evidence that no other paid annual leave was taken. This was not contested by the Respondent.

38. Once the five days are taken from the 23.33 days, that results in an entitlement of 18.33 days annual leave that was outstanding on termination and had not been taken or paid.

39. The Claimants daily rate of pay was £70.00. I multiply this by 18.33 days which results in £1283.10.

40. Accordingly, the outstanding amount of holiday owing was £1283.10.

41. The Respondent contends that from February 2021, the Claimant was not initially engaged as an employee and that his formal employment commenced only in September 2021. For the reasons I set out below, nothing turns on this point, though for the sake of completeness, I find that the Claimant was employed by the Respondent throughout his engagement as defined in s.230(1) Employment Rights Act 1996. Every single factor in respect of the test for employment status – mutuality, personal service, control all indicate only one answer. Other than the label that the Respondent chose to put on this initial period, there are no contrary factors.

42. Even if the conclusion that the Claimant was employed by the Respondent from February 2021 were incorrect, the Claimant still undertook work personally for the Respondent in that period and would clearly be a worker within the meaning of s.230(3)(b) Employment Rights Act 1996. The Claimant was not in business on his own account. Workers are entitled to holiday pay and nothing turns on this point.

43. This was an ongoing deduction. No issue of time limits or jurisdiction arises.

s.38 Employment Act 2002

44. At no time throughout his employment did the Claimant receive written terms and conditions in compliance with s.1 Employment Rights Act 1996. The Respondent was on notice of this point and was asked to provide mitigating factors.

45. I award the sum of two weeks pay. There is the fact of the breach and the extent of the breach. Arguably, the absence of clear terms at the start of employment is an aggravating factor in parties ending up in disputes over pay. There are no exceptional circumstances.

46. By way of mitigation, I accept the Respondents submission that it is a small business and should not be treated as being as aggravating as a large business with significant resources. Weighing up all of the competing points, I award the minimum sum of two weeks pay.

Notice Pay

47. In order to avoid double counting, I dismiss the Claimants notice pay claim.

48. In terms of the payments made to the Claimant, either the final payment covers the notice pay, in which there is a weeks deficiency in the wages owed or it covers wages, in which case there is one weeks notice owing.

49. I have chosen to treat the final payment received as covering notice pay, payable as one weeks pay under s.86 Employment Rights Act 1996. Therefore, there is a deficiency in the wages owed to the Claimant, which I have dealt with above. If this conclusion regarding the Claimant's wages were to be wrong then the notice pay claim would need revisiting as a change in the finding regarding wages may result in the Claimant not being paid the correct sum in lieu of notice.

Summary

50. Therefore, the Claimant is entitled to:

    a. An award in respect of unpaid wages of £1050 (£350 x 3)
    b. An award in respect of unpaid wages (holiday pay) of £1283.10 (18.33 x 70)
    c. An award under s.38 Employment Act 2002 of £700 (£350 x 2)

51. The above sums have been calculated on a gross basis and the Claimant will need to account to the revenue where appropriate.

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Employment Judge Anderson

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Date 13th September 2022

REASONS SENT TO THE PARTIES ON

20 September 2022

FOR THE TRIBUNAL OFFICE