



THE EMPLOYMENT TRIBUNAL

Claimant: Mr Garczynski

Respondent: Affordable Home Improvements London Limited

Heard at: London South Employment Tribunal (video hearing)

On: 14 September 2022

Before: Employment Judge Robinson

Representation

Claimant: In person via a Polish interpreter

Respondent: Mr Rasul, Director

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The Claimant's claim for a statutory redundancy payment under section 163 of the Employment Rights Act 1996 is not well founded and is dismissed.
2. The Respondent made an unauthorised deduction from wages by failing to pay the Claimant in lieu of accrued but untaken holiday. The Respondent is ordered to pay the Claimant the gross sum of £2,622.04.
3. The Respondent made an unauthorised deduction from the Claimant's wages by failing to pay the Claimant in the last 6 weeks of his employment. The Respondent is ordered to pay the Claimant the gross sum of £1,114.02 in respect of the amount unlawfully deducted.
4. The Respondent is ordered to pay the Claimant additional compensation of £371.34 pursuant to section 38 of the Employment Act 2002 for failure to provide the Claimant with a written statement of employment particulars.
5. Each of these sums is a gross amount and the Respondent will need to account for any tax and national insurance to be deducted from them.
6. No award is made in relation to costs.

REASONS

7. The Claimant worked for the Respondent as a window fitter until his resignation by letter dated 24 August 2021.
8. ACAS early conciliation started on 13 September 2021 and ended on 25 October 2021. The claim form was presented on 23 November 2021. The response form was received on 24 June 2022.

Claims and Issues

9. At the outset of the hearing, the Claimant confirmed that he was not claiming unfair dismissal and this was a mistake on the Claim Form. He explained that his claims were for:
 - a. Redundancy pay
 - b. Holiday pay
 - c. Pay for the final 6 weeks of his employment when he was laid off.
10. The parties were able to agree that the issues for the Tribunal to consider were:
 - a. The duration and nature of the employment relationship, in particular whether there was continuity of service given the change of employer.
 - b. Whether redundancy pay is due and, if so, how much?
 - c. How much holiday pay is due (the Respondent accepted that the Claimant was entitled to *some* holiday pay)?
 - d. Whether payment is due for the 6 week period from 12 July to 24 August during which the Claimant was not given any work and, if so, how much?

The correct Respondent

11. Before considering the list of issues, it is necessary to deal with a preliminary point: the identity of the Respondent. The parties agreed that there was no written contract of employment, which would have helped with this question.
12. The Claim Form was issued against Mr Rasul personally. The Claimant explained that he did that because he was unsure about the correct identity of his employer because the company had changed names. The Respondent completed the Response Form citing Affordable Home

Improvements London Limited (“AHIL”) as the correct Respondent.

13. It is clear from the Claimant’s pay slips and P60 that he was paid by AHIL and I therefore find that the correct Respondent is AHIL.

Procedure, documents and evidence heard

14. The Claimant submitted the following documents as evidence:
- a. WhatsApp messages log from December 2018 to July 2021.
 - b. Medical evidence regarding his back pain.
 - c. A 12 July 2021 letter from the Respondent to the Claimant explaining that, due to financial difficulties, the Respondent was suspending current operations and not taking on any new work.
 - d. The Claimant’s resignation letter of 24 August 2021.
 - e. Pay slips from April 2018 to March 2019 and from September 2020 to June 2021.
15. Mr Rasul on behalf of the Respondent submitted no evidence other than the ET3 Response Form. However, he accepted the contents of the bundle as accurate.
16. I heard oral evidence from the Claimant and from Mr Rasul (Director) for the Respondent.
17. I have carefully considered the documentary evidence provided, together with the parties’ oral evidence and closing submissions.

Fact findings

18. I have made the following findings of fact on the balance of probabilities having heard the evidence and considered the documents. These findings of fact are limited to those that are relevant to the issues listed above, and necessary to explain the decision reached.

The nature and duration of the employment

19. The Claimant stated in oral evidence that he started working for the Respondent informally at the end of 2016 and it became a more permanent arrangement in 2017. The Claimant was not able to provide written evidence of a start date in 2017 nor of having done work in that year. The WhatsApp exchanges and pay slips instead suggest that the employment relationship began in 2018. The first pay slip is from April 2018. I therefore find that the Claimant’s employment began on 1 April 2018.

20. The parties agreed in their evidence that the date the employment relationship ended was 24 August 2021 – the date of the Claimant’s resignation letter. The total duration of the employment relationship was therefore 3 years, 4 months, 3 weeks and 2 days.
21. The Claimant was laid-off by way of a letter from the Respondent dated 12 July 2021.
22. On the same day as his resignation letter, the Claimant’s also set out his intention to claim redundancy pay having been laid-off for more than four consecutive weeks.

Continuity of service – a change of employer

23. The Respondent asserted that the Claimant was only employed for 9 months because the Claimant only started working for the company known as AHIL on 1 November 2020. The pay slips do show that from April 2018 to March 2019 the employer was Affordable Lofts & Extensions Limited (“ALE”). The pay slips from October 2020 to June 2021 state the employer as being AHIL.
24. The Respondent gave evidence during the hearing explaining the history of the two companies. Although ALE is still active, it essentially stopped operating during the Covid-19 pandemic. In November 2020, the Respondent explained that he transferred the Claimant from ALE to AHIL on the same terms and conditions as he was on at ALE, because AHIL was to carry out the operations side of the business going forward.
25. From the Claimant’s perspective nothing changed, other than the name of the employer on his pay slip. I accept the Claimant’s evidence that he was not informed about the company name on his pay slip changing but, because he was receiving his work instructions from the same person (Mr Rasul) and was being employed on the same terms and conditions, he did not question it. I therefore find that the Claimant was continuously employed by the Respondent from 1 April 2018 to 24 August 2021.

A weeks’ pay

26. For the last year of his employment (25 August 2020 to 24 August 2021), the Claimant was only able to provide pay slips for 10 months. For that 10 month period, his total gross pay was £8,046. This amounts to an average monthly pay of £804.60 and an average weekly pay of £185.67. That weekly amount is calculated by taking the average monthly pay (£804.60), multiplying it by 12 to give the yearly amount, and then dividing it by 52 to give the weekly amount.

27. The pay slips show that the Claimant's hourly rate was £8.72 initially, but rose to £9 per hour on 1 November 2020.

The hours worked

28. Neither party was able to provide any evidence of days or shifts worked, or any rotas. Both parties agreed in evidence that the work was allocated each morning whereby the Respondent texted the Claimant telling him if he was needed to work that day and where he was to go.
29. The Respondent respected the Claimant's health problems related to his back, such that the Claimant often took a supervisory role of other workers so as not to do any heavy lifting himself which would hurt his back. The Claimant did often state that his back pain was so bad that he could not even come to work to perform that supervisory role. This flexible approach to the work being allocated and performed, suited both parties.
30. The Claimant stated in evidence that some days he worked 5 days per week and other times 1 or 2 days. His pay slips were just an average calculation and, in the final 8 months of employment were always either 86.6 hours or 104 hours per month. The Claimant accepted that that calculation of hours, and the pay, was correct and he was content with those amounts.
31. Adding the hours worked in the 10 months' pay slips that were available, leads to a total of 900.8 hours (or an average of 90.08) for that 10 month period. This is based on the Claimant being paid for 86.6 hours for 8 of those months and for 104 hours for 2 of those months. This amounts to average weekly hours of 20.79. That weekly amount is calculated by taking the average monthly hours (90.08), then multiplying by 12 to give the yearly amount, and then dividing by 52 to give the weekly amount. I have calculated 20.79 hours per week to be approximately 2.5 days a week on average.
32. The parties agreed that the Claimant had never been paid for any annual leave during his employment. Given the Claimant's start date of 1 April 2018, his leave year runs from that date each year.
33. In the absence of a written contract, and based on the oral evidence of the parties, I find that there was no verbal contractual agreement for the Claimant to be laid off without pay. It is notable that the Claimant's pay slips in the last 8 months of his contract show a fixed hourly rate of £9 per hour and a fixed number of hours per month of 86.6. Given this consistent

level of pay, I find that the Claimant's remuneration was not based on the amount of work being given to him each month.

Relevant Law

TUPE

34. In relation to the Claimant's transfer from ALE to AHIL, the following provisions of the Transfer of Undertakings (Protection of Employment) Regulations 2006 are relevant.

"Regulation 3. — A relevant transfer

(1) These Regulations apply to—

(a) a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity;

...

(2) In this regulation "economic entity" means an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.

...

Regulation 4.— Effect of relevant transfer on contracts of employment

(1) Except where objection is made under paragraph (7), a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee."

Redundancy by reason of being laid off

35. Section 135(1)(b) of the Employment Rights Act 1996 ("ERA") provides:

"An employer shall pay a redundancy payment to any employee of his if the employee ... is eligible for a redundancy payment by reason of being laid off or kept on short time."

36. Sections 147-155 of the ERA provide for the right to a redundancy payment by reason of lay-off or short-time. An employee has been laid off for a week under section 147(1) if:
- a. The terms of their employment contract provide that whether or not they are paid depends on their employer providing them with the work they are employed to do.
 - b. They are not entitled to any remuneration that week because their employer does not provide work for them.
37. These provisions also require that, in order to claim, the employee must:
- a. have two years' continuous service (section 155),
 - b. have spent four or more consecutive weeks on lay-off (section 148(2)(a)),
 - c. serve written notice of their intention to claim, stating that they are claiming a redundancy payment in respect of lay-off (section 148(1)(a)),
 - d. That notice must be served on the last day of the last week of lay-off on which the employee relies; or within four weeks of that last day (section 148(2)),
 - e. have terminated their contract in accordance with section 150.

Amount of redundancy pay

38. Section 162(2)(a) provides that for employees over the age of 41, the appropriate amount of redundancy pay is 1.5 weeks' pay for each year of employment.

Holiday pay

39. Regulations 13, 13A and 14 of the Working Time Regulations 1998 ("WTR") give workers a statutory right to 5.6 weeks' paid holiday per year, *and* a right to payment in lieu for any outstanding holiday entitlement when the employment relationship ends.
40. Regulation 13(5) provides for pro rata accrual where the Claimant has only worked for part of the year.

41. Regulation 14(3)(b) provides a formula for calculating the payment due under regulation 16 where there is no written contract of employment.
42. Regulation 30 provides that a worker has the right to bring a claim if they are denied the entitlement to paid holidays.
43. In *Smith v Pimlico Plumbers Ltd 2022 IRLR 347*, the Court of Appeal confirmed that a worker can carry over a right to payment for four weeks' annual leave into subsequent leave years if they have been prevented from taking annual leave, or have only taken unpaid annual leave. The Court suggested that the following wording be read into regulation 13:

“Where in any leave year an employer

- (i) fails to recognise a worker’s right to paid annual leave and*
- (ii) cannot show that it provides a facility for the taking of such leave,*

the worker shall be entitled to carry forward any leave which is taken but unpaid, and/or which is not taken, into subsequent leave years.”

44. Regulations 16(3A) and (3B) of the WTR require sections 221-224 of the ERA to be read as if references to 12 weeks were references to 52 weeks for the purpose of calculating holiday pay. Where there are insufficient weeks on which to calculate a weeks' pay in accordance with the above provisions, an amount that fairly represents a week's pay can be used, having regard to the following considerations in section 228(3):

- any remuneration received by the worker in respect of the employment,
- the amount offered to the worker as remuneration in respect of the employment,
- the remuneration received by other persons engaged in relevant comparable employment with the same employer, and
- the remuneration received by other persons engaged in relevant comparable employment with other employers.

Unauthorised deduction from wages

45. Section 13 of the ERA sets out the right not to suffer an unauthorised deduction from wages:

“(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 worker’s 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.”

Failure to provide a written statement of particulars

46. Where a Tribunal finds:

- a. in favour of an employee in an unauthorised deduction from wages claim, and
- b. that the employer has failed to provide the employee with a written statement of employment particulars,

section 38 of the Employment Act 2002 provides that the Tribunal must award the employee an additional two weeks’ pay.

47. However, if there are exceptional circumstances which would make that unjust or inequitable, the Tribunal may, if it considers it just and equitable in all the circumstances, order the employer to pay an additional four week’s pay.

Conclusion

48. In relation to each of the issues I make the following conclusions.

Continuity of service

49. By operation of the provisions of TUPE, the Claimant was transferred from ALE to AHIL. He therefore has continuous service of more than 3 years.

Whether redundancy pay is due and, if so, how much?

50. The Claimant has not satisfied the requirements of sections 147-155 (as

summarised in paragraphs 35-37 above) in order to be able to claim redundancy by reason of lay-off. This is because I have found that his monthly pay amounts were so consistent that the employment contract was in reality not based on him only being paid if the Respondent provided him with work. He therefore does not fall within the definition of lay-off as set out in s.147(1)(a) and is not entitled to a redundancy payment.

Whether holiday pay is due and, if so, how much?

51. All workers are entitled to 5.6 weeks leave per year, but the Claimant worked part time hours. He is therefore entitled to a pro-rata amount. In the absence of any evidence of shift patterns, I have used the available pay slips to average the working week as 20.79 hours (equivalent to 2.5 days) per week. This entitles the Claimant to 116.4 hours per year for his usual leave year, which runs from 1 April to 31 March.
52. In his final leave year (1 April 2021 to 24 August 2021), by the time of his resignation, the Claimant had only worked part of the leave year. He is therefore entitled to a pro-rata amount for that period in accordance with the formula set out in regulation 14(3)(b) of the WTR. This amounts to 46.6 hours. At the Claimant's hourly rate of £9, this equals **£419.40**.
53. Following the ruling in *Smith v Pimlico Plumbers Ltd 2022 IRLR 347*, the untaken and unpaid annual leave in previous leave years can be carried forward. However, this only applies to the 4 weeks of EU-derived leave under regulation 13 of the WTR; not the additional 1.6 weeks of additional leave under regulation 13A. Therefore instead of 116.4 hours per year, the Claimant can only carry 4/5.6ths of that amount i.e. 83.14 hours.
54. This means the Claimant is entitled to the following for each of the full leave years he worked for the Respondent:
 - a. For 1 April 2018 to 31 March 2019 - 83.14 hours at a rate of £8.72 per hour. This equals **£724.98**.
 - b. For 1 April 2019 to 31 March 2020 - 83.14 hours at a rate of £8.72 per hour. This equals **£724.98**.
 - c. For 1 April 2020 to 31 March 2021 – 83.14 hours, but at a rate of £8.72 for the first 7/12ths of the year (48.5 hours) up to 31 October 2020. This equals £422.92. The remaining 5/12ths of the year (34.64 hours) are payable at the increased rate of £9 per hour to reflect the fact that the Claimant's pay increased as of 1 November 2020. This equals £329.76. The total for that leave year is

therefore **£752.68**.

55. Combining the totals in bold above means the Claimant's total award for holiday pay is £2,622.04.

Whether the Claimant is entitled to payment during the period he was laid off and, if so, how much?

56. From the oral evidence of both parties, it is clear that the overall verbal contract and the reality of the working arrangements meant that the Claimant had the status of an employee. There was a large degree of flexibility around the Respondent's offer of work, and the Claimant's ability to refuse it depending on the state of his back pain. That flexibility was mutually beneficial to the parties.
57. However, given the last 8 months of the Claimant's employment were paid at the exact same rate and for the exact same number of hours, I conclude that the Respondent was not entitled under the verbal contract that existed between the parties to simply stop paying the Claimant. The exceptions in s.13(1)(a) and (b) of the ERA have not been satisfied because the contract did not permit the deduction and neither did the Claimant give his agreement to the deductions from his wages.
58. I therefore find that the Claimant's claim for pay during the final 6 weeks of his employment is well-founded and succeeds.
59. The Respondent made an unauthorised deduction from the Claimant's wages of 6 weeks which, at the average weekly rate of £185.67, totals £1,114.02. The Respondent is ordered to pay the Claimant the gross sum of £1,114.02 in respect of the amount unlawfully deducted.

Failure to provide employment particulars

60. The Claimant has succeeded in his unauthorised deduction from wages claim. An award of additional pay under section 38 of the Employment Act 2002 is therefore possible.
61. I concluded that the Claimant was an employee of the Respondent. He was therefore entitled to a written statement of employment particulars by not later than the beginning of his employment. Both parties agreed that the Claimant was never given a written statement of employment particulars. The Respondent did not provide any justification or explanation for that. I find no reason why it would be unjust or inequitable to order the Respondent to pay an additional amount for this failure.

62. The Respondent is ordered to pay an additional two weeks' pay (2 x £185.67) = £371.34.

The P60

63. The Tribunal does not have jurisdiction to order the Respondent to provide the Claimant with a P60. The Claimant should make enquiries of HM Revenue & Customs.

Costs

64. In relation to the Claimant's claims for a costs order against the Respondent, such claims are only made in certain exceptional circumstances where the other party has behaved in a way that is "*vexatious, abusive, disruptive or otherwise unreasonable*" (Rule 76(1)(a) of the Employment Tribunal Rules of Procedure 2013).
65. I do not consider that the Respondent has behaved in such a way and I make no award in relation to the Claimant's costs.

Employment Judge Robinson

10 October 2022
