EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr D Gardner **v** Eleciserve Electrical Limited

RECORD OF A PRELIMINARY HEARING

Heard at: Bury St Edmunds (CVP) **On:** 14th October 2022
Before: Employment Judge R Wood

Appearances
For the Claimant: Mr C Umezuruike (Solicitor)
For the Respondent: Mr C Khan (Counsel)

RESERVED JUDGMENT

1. The claim is allowed in relation to unpaid holiday entitlement. In all other respects, the claim is dismissed.

2. The respondent is ordered to pay to the claimant the sum of £958.25 which is a gross payment. The respondent is liable for the payment of any tax and national insurance contributions.

REASONS

Background

1. The claimant brings a number of claims for unlawful deductions from wages. In all three aspects of the claim, he places reliance upon the provisions of section 13 of the Employment Rights Act 1996. In the first instance, the claimant seeks a sum in relation to non-payment of part of his notice pay. Secondly, he seeks to recover unpaid holiday entitlement. Thirdly, the claim is for arrears of pay which relate to the non-payment of what is alleged to have been an increase in the claimant's wages in or around July 2021.

2. The respondent denies that any sums are owed. It submits that there was no increase in the claimant's wages, but rather a understanding that if the claimant successfully completed a certain project, and did so at a profit, he would be given an increase in his wages. It is said that these circumstances never arose. In relation to the claim for notice pay, the respondent asserts

that the claimant did not attend work, and that if he was too sick to attend work (as alleged), he did not comply with the company's sickness policy. In relation to unpaid holiday entitlement, there is agreement that, at the conclusion of his employment with the respondent, the claimant had accrued 5 days of untaken holiday. However, the respondent withheld those payments under clause 4.3 of the terms and conditions of the claimant's employment. In short this permitted the respondent to withhold payment if the claimant left his employment before the expiry of his notice period, causing the respondent to incur loss.

Hearing

3. The claim was listed for final hearing on 14th October 2022 at Bury St Edmund's Employment Tribunal. The case was heard remotely by CVP. I heard from Mr Gardner, the claimant, who was represented by Mr Umezuriuke. The respondent was represented by Mr Khan. I heard from Mr Prendeville, managing director of the respondent; and Mr Perry, a technical director at the respondent. Each witness adopted the content of their respective witness statements, and confirmed that the contents were true to the best of their knowledge and belief. At the conclusion of the hearing, I reserved my judgment.

Findings and Reasons

4. The claimant began working for the respondent on 18th January 2021 as a project manager. His contract of employment appears at pages 29-36 of the bundle. The claimant was responsible for overseeing certain of the respondent's projects. In particular, he was required to supervise the 'Hanover Square' project ("the project"), which was the fitting of electrics to part of a hotel. The claimant's starting salary was £42,000 per annum.

5. It is common ground that the claimant's wages were increased in April 2021, at the instigation of Mr Prendeville. He had been impressed by the claimant's work ethic and felt that he was being underpaid if the starting salary was not improved. After an un-minuted meeting on 17th March 2021 between the claimant and Mr Prendeville, his wages were increased to £46,000. There is nothing in writing to record this decision, save for an email from Mr Prendeville to payroll [37], and the amended wageslips which first appear on the April payslip [91]. I find that the claimant was not promoted. There is no documentary evidence of a promotion, just a pay rise. This is not an important issue in the context of the claims.

6. On 21st June 2021, the claimant was assigned to the project. It had previously been under the supervision of James Perry. The project was not performing well, which was the reason for the change in manager. Shortly after, in early July all are agreed that a meeting took place to discuss the project. Mr Prendeville asserts that Mr Perry was present, along with himself and the claimant. The claimant suggests that Mr Perry was present. On this issue, I have preferred the evidence of Mr Prendeville, whose testimony was supported by that of Mr Perry himself. Mr Perry gave very brief evidence

before me. He recalled that he was present because his previous management of the project had been the subject of considerable criticism, which he remembered had made him feel very uncomfortable. This had more than a ring of truth about it. I accepted his evidence that he was present at the important July meeting.

7. This meeting was important because it is when the claimant asserts that he was given a pay rise of a further £8,000. Mr Gardner states that there were no preconditions attaching to this offer, and that it ought to have taken effect immediately, in the same way as the April pay rise. Mr Prendeville denies this. He states that he offered the claimant what he described as a "targeted incentive", which was to coincide with the successful conclusion of the project at a profit.

8. On this issue, I preferred the evidence of Mr Prendeville. I found his evidence to be consistent and in keeping with the Tribunal's understanding of the day to day reality of running a business like the respondent. It is right to say that there was nothing at all in writing as to the content of this meeting. Mr Prendeville told me that no minutes were taken, and that this was not unusual for him. He said he was a man of his word. I note that the April pay rise had been approached in the same way, it having been agreed at an informal and un-minuted meeting. It was only when the need arose to notify pay roll that anything was put into writing.

9. Furthermore, I accepted Mr Prendeville's evidence that there was no business reason to give the claimant a further unconditional and immediate pay increase. He had received one in April. The claimant's other projects had stalled, and so there was no performance justification to be found there. As for the Hanover Square project, it was underperforming. It was why it's management had been transferred to the claimant. Mr Prendeville explained that the only reason he had made the offer, was to try and turn the project around. I find this evidence compelling and logical. The suggestion of a conditional offer is also supported by Mr Perry, who I also find to be a credible witness, for the reasons already set out.

10. I find Mr Gardiner's evidence to be more problematic. In a broader sense, I find that the claimant's evidence was sometimes unrealistic, vague and inconsistent. I will return to some of these issues below. However, on the question of the alleged pay rise, the claimant's oral testimony differed quite significantly from his witness statement. In the latter, he suggested that there had been a team meeting, but before hand he had been spoken to Mr Prendeville alone, when he had told him that he would be receiving a pay rise to bring his salary closer to the other contract managers.

11. At the hearing, the claimant explained that a few weeks before the July meeting, he had had separate meeting with Mr Prendeville, when he had been offered a bonus, which he said was nothing to do with the pay rise. The bonus was contingent upon the project being turned round. He went on to state that no figure had been mentioned for the bonus. When I asked him about this, the claimant stated that he had not mentioned the bonus in his

witness statement because he had not thought it important. I was not satisfied by this explanation. It is such a relevant aspect of his testimony that it is difficult to see how it could reasonably have been excluded. In my judgment, it was a fundamental inconsistency which undermined the credibility if his evidence as a whole.

12. Mr Prendeville was asked about the issue of parity with other project managers. He explained that he had three other project managers who had each been with the company for 3-5 years. He felt that if he had brought the claimant's wages into line with the other contract managers, that it would have had the effect of undermining them. They had all delivered numerous projects and were much more experienced. Parity was not a concern. I accepted this evidence.

13. It is correct that there was a chain of correspondence between the claimant and the company, which in part did evidence that he had sought to chase the non-payment of the alleged wage increase. These appear at pages 59-65 of the bundle, and are sent at the very end of September 2021, into the beginning of October. However, the focus of these emails was not, in my view, on non-payment of a wage increase, but rather the reimbursement of expenses. On reflection, I think Mr Khan was correct when he suggested that the use of the word "reimbursement" in the emails were a reference by the claimant to expenses, and not a pay raise. I find it surprising that expenses would have been the focus here, if as alleged, the claimant genuinely believed that he was entitled to another significant pay increase, and given the relative financial significance of the issues. In fairness to the claimant, the question of an unpaid wage increase was again raised in his resignation letter [73].

14. In short, and taking matters in the round, the claimant fails to satisfy me that he was awarded a pay rise in July 2021. He may have misunderstood what was said in the meeting. This is one of the problems created when important discussions are not minuted. Notwithstanding, I am satisfied that the claimant was not contractually entitled to a pay increase. I find that the offer was conditional, as alleged by the respondent, and that such preconditions did not arise.

15. Moving on, concerns about the progress of the project continued. The deadline for the project was October 2021. I was told (and accept) that this deadline was not met. The project is still not concluded even today. It was not challenged that the project stands to lose between £65,000 and £80,000. In September 2021, I was told there were concerns about the claimant performance at work. I do not need to go into this for the purposes of the these claims.

16. However, on 8th November 2021, the respondent received a letter from the claimant whereby he gave notice of his termination of his employment. He gave one month's notice per his contract. He gave no specific reason for his resignation in the letter. The claimant told me that he had felt intimidated and bullied, and was suffering from stress. The letter did indicate an intention to

bring proceedings in the county court for “losses”, which were listed in the letter. His resignation was accepted.

17. The claimant’s last day was to be 8th December 2021. Mr Prendeville was quite clear at the hearing that he had no evidence that the claimant had not worked under his contract prior to 2nd December 2021. It is fair to say that he had his suspicions, but he could not support these suspicions with evidence.

18. However, from 2nd December 2021 to 8th December 2021, it is common ground that the claimant did not work. His case is that he was sick due to stress related symptoms. He did not attend his GP, and does not have any medical evidence to support his lack of fitness to work. At the time, he emailed the respondent each day with the words “I am off sick today” [81]. There was no further explanation or any other attempt to communicate with the respondent. I accept that the respondent tried on several occasions to contact the claimant during this period, but without success. This included sending members of staff to his house. The concern was that the company needed certain information important to the handover of projects under the claimant’s control, which as I understand it, were largely kept on a laptop in the possession of the claimant.

19. The respondent’s sickness policy appears at clause 10 and 11 [32]. I do not repeated them here. Clause 11.1 makes it clear that on the first day of any sickness absence, an employee must ensure that their line manager is informed by telephone at the earliest opportunity. The member of staff should provide details of the illness and the day on which it is expected he/she will return to work. It is agreed by the claimant that none of this was done, on any of the days of his sickness absence. Accordingly, it is accepted that he was in breach of the respondent’s policy.

20. I am afraid I found the claimant’s evidence on this point to be unsatisfactory. He maintained that it was acceptable to have sent such brief emails to the respondent. This was the way he had dealt with sickness absence in the past, and no one had taken issue with it. He told me that he had taken 3 other isolated days of sickness in the past, for reasons such as migraines. However, in my view, this situation was significantly different. He was on the verge of leaving the company, and still held important information which needed to be handed over. The projects over which he had control were in difficulties. In my judgment, it should have been wholly apparent that more was required than the emails he sent, which were completely inadequate. I find that the claimant’s evidence on this point was unreasonable and unrealistic.

21. I do not accept that the claimant feared engaging with the respondent for fear of further bullying. He has failed to satisfy me that there such bullying, or that he had suffered any psychological symptoms as a result, which might have caused him to react in this way. In particular, he told me that he found the visit to his house to be intimidating. However, it transpired that one of the men that visited was some one with whom the claimant had socialised. The

claimant was very reluctant to engage in questions about this man, or about the extent of the 'friendship'. I was not satisfied that the claimant was trying his utmost to be helpful at this point in the hearing.

22. In my judgment, the relationship between the respondent and the claimant had broken down, for whatever reason. I cannot say where the fault lies for this. However, I am satisfied that the claimant took the view that, in effect, he would use purported sickness as a reason not to see out his notice period. I find that his absence between 2nd and 8th December 2021, was in breach of the respondent's sickness policy, unauthorised, and not genuinely on the grounds of sickness. In effect, the claimant's conduct was such that the respondent was entitled to find that he had left his employment as of 2nd December 2021. Accordingly, under clause 4.3, the respondent was not entitled to pay wages for that part of the notice period i.e. between 2nd and 8th December 2021. I therefore dismiss this aspect of the claim.

23. Clause 4.3 has an impact on the remaining part of the claim. In the circumstances where the claimant leaves his employment during the notice period without permission, it states that "*the company shall also be entitled as a result……to deduct up to a day's pay for each day not worked during the notice period, provided always that the company will not deduct a sum in excess of the actual loss suffered by it as a result of your leaving at short notice…*".

24. In purported reliance on this clause, the respondent deducted the 5 days of accrued holiday entitlement form the claimant's wages to cover the cost of the replacement member of staff engaged in response to the claimant's absence. Rather late in proceedings (on the day of the hearing), the respondent adduced an invoice for such expenses dated 17th December 2021, in the sum of £1485.90. It relates to work carried out by a Mr Tony Oval. It claims to represent payment for 7 days work during the week ending 12th December 2021, at a rate of £250 a day. There were some other expenses.

25. At the hearing, I was told that the respondent had anticipated that the claimant might not serve out his full notice, and had taken steps to recruit a replacement. This has started on 30th November. Mr Oval had been interviewed on the same day, and employed. He replaced the claimant, and continues to work for the respondent as a project manager. He was offered a permanent contract in February 2022, and is paid £51,500 per annum.

26. In my view, it is difficult to see the causative link between the engagement of Mr Oval and the early departure of Mr Gardner. Firstly, I find that the claimant worked until 2nd December. Yet Mr Oval was recruited on 30th November. Moreover, the respondent made it clear that the claimant would have to be replaced. Given the need for an effective handover, it is my view that it was likely that his replacement would have been engaged before 8th December in any event. Accordingly, clause 4.3 is not engaged for the purposes of this head of loss. I therefore find that the claimant's accrued holiday entitlement of 5 days was unlawfully deducted from his final wage slip.

27. In calculating the claimant holiday pay entitlement, I have taken his gross basic monthly salary which is £3833.33 (after the pay increase in April). I have divided this by 4 to get a week's pay. It is my understanding that the claimant worked a 5 day week. Therefore, the loss is a week's wages which is £958.25.

28. Therefore the claim is allowed in the sum of £958.25.

Employment Judge R Wood

19th October 2022

Sent to the parties on:

3 November 2022

For the Tribunal Office: