EMPLOYMENT TRIBUNALS

Claimant: Mr C Kilgour

Respondent: EPH Energy Limited

HELD AT: Manchester **ON:** 16 December 2022

BEFORE: Employment Judge Holmes

REPRESENTATION:

Claimant: In Person
Respondent: No attendance

JUDGMENT

It is the judgment of the Tribunal that:

1.The respondent made unlawful deductions from the claimant's wages:

a) in the sum of **£2,745.00** , which sum the respondent is ordered to pay the claimant , in respect of overtime worked but not paid between 24 August 2020 to 6 September 2021;

b) in the sum of **£509.12** , in respect of two weeks pay in respect of the period June to July 2021, when the claimant was not paid in full as the respondent changed from fortnightly to monthly payments.

which sums the respondent is ordered to pay the claimant.

2.The respondent failed , in breach of contract to reimburse the claimant expenses in the total sum £189.00, and , further to pay half the cost of stolen equipment, in the sum of £150.00, a total of **£339.00**, which sum the respondent is ordered to pay the claimant as damages for breach of contract.

3.All the said payments are to be made without any deductions for tax and national insurance. In respect of the award at para. 1(a) above, if any tax and national insurance is due upon the said sum, it is the claimant's responsibility to account to HMRC for any sums due, and the respondent is to pay the whole sum due to the claimant . In respect of the award at 1(b) above, this is a net sum, in that it is likely

that the respondent has already made deductions from this sum, and the respondent shall account to HMRC for any tax and national insurance due upon that sum. The award at para. 2 above shall be paid without any deductions, as this is damages for breach of contract, and not likely to be subject to any liability to tax and/or national insurance. The responsibility for any tax and national insurance due, in any event, rests with the claimant , and the said sum is payable in full by the respondent.

REASONS

1. By a claim form presented to the Tribunal on 5 January 2022 the claimant brings claims for unlawful deductions from wages against his former employer, arising from his employment as plumber between 1 March 2019 and 13 October 2021. The claims are in three parts, unpaid overtime, unpaid "spends" – expenses, and unpaid wages for two weeks when the wages payment period was changed.

2. The respondent responded to the claim on 9 March 2022. In short , the response in respect of the overtime claims was that the claimant had not followed the contractual procedures for having overtime authorised, and was therefore not entitled to claim these sums, in response to the expenses claim, similarly that he had not followed the expenditure claims process, and thirdly, that no such sums are owing.

3. The Tribunal by letter of 19 April 2022 made directions that the parties exchange documents and prepare a bundle, and also exchange witness statements.

4. The claimant duly complied, and has disclosed documents , and made and exchanged a witness statement.

5. The respondent was represented by an HR consultancy, who appear to have prepared the bundle, but who have not appeared for the respondent. No witness statement has been made or exchanged by the respondent. No one participated for the respondent. Luke Ellis had been provided with the necessary link to the CVP by email on 15 December 2022, and it is likely that Cube HR had been in touch with him to point out that they would not be representing the respondent at the hearing.

6. No communication from the respondent was received , so the hearing proceeded. The Employment Judge could have exercised his powers under rule 47, to strike out the response by reason of the non – attendance of the respondent, but in the light of the fact that a response had been served, he nonetheless went through the claims with the claimant , and examined the potential merits of the defences that the respondent had advanced in the response. There was also, as will be seen, a jurisdictional issue to consider.

<u>Part 1 : the overtime claim.</u>

7. As observed the claimant's claims are in three parts. The most significant is that for overtime. The claimant kept a record of the hours he worked. During his employment he kept asking for, and was on occasions was paid, for this overtime. His employment ended on 13 October 2021. Soon afterwards he prepared a comprehensive list of all the hours of overtime he had worked, and he sent this to the

respondent by email on 1 November 2021 (pages 26 to 28 of the bundle). This document shows a total entitlement to £5665.00 (after deduction of £150 for stolen equipment, which is a different type of claim). The respondent had paid £2920.00, leaving a balance of £2745.00.

8. The respondent has never challenged the hours that the claimant has claimed to have worked, and the Tribunal accepts that he worked them.

9. The only defence raised to these claims , in the response, for the respondent has adduced no evidence, nor has any oral evidence been given, is that there was a "process" whereby overtime had to be authorised before it was worked. The claimant has , it is contended, not established that the overtime that he is claiming for was so authorised, and hence the claimant was working this overtime "at his own discretion" ("at his own risk" would be a better term).

10. The claimant denies that this was the case, and points to the fact that the respondent has actually made payments of overtime during the claimant's employment, and raised no issue about prior authorisation.

11. The Employment Judge has considered this defence , despite the absence of any evidence from the respondent. He considers that it amounts to a contention that it was a condition precedent to the claimant's entitlement to be paid for any overtime that he worked that it was pre-authorised.

12. Firstly, there is no evidence that there was such a condition, as an express term of the claimant's contract, but , even if there was, the Tribunal is quite satisfied that this condition was waived. The communications between the parties during and after the period of employment clearly show this. Mr Ellis of the respondent made a number of promises to pay, and did indeed pay a substantial part of the overtime claimed. He never once in these exchanges raised the contention that any of this overtime was not payable because it had not been pre-authorised. Indeed, the opposite was the case, he made repeated promises to pay.

13. The respondent's defence to this aspect of the claims accordingly fails, and the Tribunal is quite satisfied that the claimant is entitled to be paid for all the overtime that he worked, as set out in pages 26 to 28 of the bundle, in total £5665.00, of which £2920 has been paid, leaving a balance due of £2745.00.

<u>2.The "spends" – expenses and stolen equipment claims.</u>

14. These aspects of the claims fall into two parts. The first is the claim by the claimant for what was termed "spends", but was in reality expenses, in that the claimant seeks reimbursement of sums that he expended in the course of his employment on materials and tool hire , which were required to complete the work that he was doing.

15. His case is that the respondent agreed to pay him such sums, and actually did so on several occasions. There remained however, some £189.00 still due to the claimant for these expenses, which the claimant has not been paid.

16. The respondent's answer to this head of the claim is similarly that the claimant "did not follow the expenditure claims process". Again there is no evidence of any term in the claimant's contract which made payment of these expenses conditional upon the adherence to any particular process. Again, perusal of the exchanges between the claimant and Luke Ellis contained in the bundle shows that there was no such process being applied in practice. "Spends" were paid, without the need for the claimant to follow any such process.

17. In relation to the claim for £150, this is in respect of an angle grinder and battery that belonged to the claimant , which was stolen whilst he was working for the respondent. He alleges, and the respondent has not denied this, that the respondent agreed to pay half of the replacement cost, £150.00.

18. No defence, other than the requirement that the claimant follow some procedure for claiming such expenses, has been raised, and the Tribunal is quite satisfied that there was an agreement to pay the claimant £150.00 for his stolen equipment.

19. Whilst the Tribunal is satisfied that both these claims succeed, in that the claimant has demonstrated that he was contractually entitled to these sums, they cannot be recovered as unlawful deductions from wages claims, as expenses are excluded from the definition of wages under s.27(2)(b) of the Employment Rights act 1996. They are, however, the Tribunal considers, recoverable as damages for breach of contract, and the Tribunal, whilst changing the legal basis from that upon which the claimant advanced these claims, as he is unrepresented , and this is simply a matter of legal labelling, does make these awards on the basis of breach of contract.

3.The salary adjustment claim.

20. The third element of the claim was for £700, in round figures. The claimant contends that the respondent changed the payment system in June 2020 , from fortnightly to monthly. He claims that he was underpaid in this period, to the tune of around £700..

21. The respondent's response to this claim is simply that no such sums are due. The point is made that the claimant had not raised this issue until his employment ended. It is first mentioned in his email of 1 November 2021.There were no documents in the bundle to support this claim. The claimant has, however, subsequently submitted his pay slips and bank statements for the relevant period.

22. A further difficulty, however, arises for the claimant. As a deduction from wages claim, which this must be, the relevant time limit, by s.23(2) of the Employment Rights Act 1996 , for presenting such a claim is three months from the date that the deduction (or if more than one, series of deductions) was made. The latest that any such deduction was made must be 31 July 2020. The claimant did not present these claims until 29 January 2022. That is almost 15 months after the date when they should have been presented. The Employment Judge explored with the claimant why he did not present these claims within the relevant three month time limit.

23. He explained that he had raised this issue verbally with Luke Ellis of the respondent at the time, and that he had agreed that it would be "sorted". Rather like the payment of the overtime due, and the "spends", which were paid intermittently , Luke Ellis generally (as can be seen from the email and other messages) would assure the claimant that he would be paid, and everything would be "sorted". The claimant took this to mean that at the latest, when he left the respondent, any such outstanding amounts would be paid.

24. The Employment Judge considers that the correct analysis is this. Whilst the wages for the missing two weeks were originally due in or about July 2020 the claimant then agreed to defer them. He could have insisted that they be paid, but instead he agreed to leave them in abeyance, and did not press for them . He therefore waived the right to have them paid when they were originally due, but they then became due upon his leaving of the respondent. That was on 13 October 2021. Thus the relevant time limit did not start to run until then, and the claims in this regard are accordingly in time.

25. In this regard, as in all the other aspects of the claims, the respondent has never actually disputed the amounts claimed, it has merely sought to raise procedural defences. There is, however, no defence to this claim, and it also succeeds.

26. The claimant's claims in this regard also succeed. It has been sightly difficult to ascertain precisely what sum is due under this head of claim from the wage slips, and bank statement that the claimant has provided. The former cover the period from 11 April 2020 to 31 August 2020. The change from fortnightly to monthly pay can be seen on the last of these, all of the preceding slips being fortnightly.

27. It appears from these that the claimant was earning £509.12 per fortnight in this period. That was net, the respondent making deductions for tax an national insurance payments. On that basis, the Tribunal assesses the amount of the relevant deductions for two weeks pay at £509.12. That will be the award that the Tribunal makes.

<u>Summary.</u>

28. The Tribunal's awards are accordingly:

a) the sum of **£2,745.00** , in respect of overtime worked but not paid between 24 August 2020 to 6 September 2021;

b) in the sum of **£509.12** , in respect of two weeks pay in respect of the period June to July 2021, when the claimant was not paid as the respondent changed from fortnightly to monthly payments.

c) damages for breach of contract in the total sum of **£339.00**,

29. As set out in the Judgment, all such payments are to be made without deductions, the claimant being responsible to account to HMRC for any tax and national insurance that may be due upon any of the said sums.

Postscript.

30. Whilst it is not the Tribunal's function to become involved in enforcement of its awards, the claimant ought to be aware that a proposal has been recently made to have the respondent struck off the register of companies, which, if carried out, would result in the dissolution of the respondent, in circumstances which would not amount to an insolvency. The claimant will doubtless seek advice or information as to his position.

Employment Judge Holmes
Dated : 5 January 2023

JUDGMENT SENT
TO THE PARTIES ON
6 January 2023

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990 ARTICLE 12

Case number: **2400507/2022**

Name of case: **Mr C Kilgour** v **EPH Energy Limited**

Interest is payable when an Employment Tribunal makes an award or determination requiring one party to proceedings to pay a sum of money to another party, apart from sums representing costs or expenses.

No interest is payable if the sum is paid in full within 14 days after the date the Tribunal sent the written record of the decision to the parties. The date the Tribunal sent the written record of the decision to the parties is called **the relevant decision day**.

Interest starts to accrue from the day immediately after the relevant decision day. That is called **the calculation day**.

The rate of interest payable is the rate specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as **the stipulated rate of interest**.

The Secretary of the Tribunal is required to give you notice of **the relevant decision day**, **the calculation day**, and **the stipulated rate of interest** in your case. They are as follows:

the relevant decision day in this case is: 6 January 2023

the calculation day in this case is: 7 January 2023

the stipulated rate of interest is: **8% per annum**.

Mr S Artingstall
For the Employment Tribunal Office

GUIDANCE NOTE

1. There is more information about Tribunal judgments here, which you should read with this guidance note:
   www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

   If you do not have access to the internet, you can ask for a paper copy by telephoning the Tribunal office dealing with the claim.

2. The payment of interest on Employment Tribunal awards is governed by The Employment Tribunals (Interest) Order 1990. Interest is payable on Employment Tribunal awards if they remain wholly or partly unpaid more than 14 days after the **relevant decision day**. Sums in the award that represent costs or expenses are excluded. Interest starts to accrue from the day immediately after the **relevant decision day**, which is called **the calculation day**.

3. The date of the **relevant decision day** in your case is set out in the Notice. If the judgment is paid in full by that date, no interest will be payable. If the judgment is not paid in full by that date, interest will start to accrue from the next day.

4. Requesting written reasons after you have received a written judgment does **not** change the date of the **relevant decision day**.

5. Interest will be calculated as simple interest accruing from day to day on any part of the sum of money awarded by the Tribunal that remains unpaid.

6. If the person paying the Tribunal award is required to pay part of it to a public authority by way of tax or National Insurance, no interest is payable on that part.

7. If the Secretary of State has claimed any part of the sum awarded by the Tribunal in a recoupment notice, no interest is payable on that part.

8. If the sum awarded is varied, either because the Tribunal reconsiders its own judgment, or following an appeal to the Employment Appeal Tribunal or a higher court, interest will still be payable from **the calculation day** but it will be payable on the new sum not the sum originally awarded.

9. The online information explains how Employment Tribunal awards are enforced. The interest element of an award is enforced in the same way.