



EMPLOYMENT TRIBUNALS

Claimant: Mr A Smith

Respondent: Alan Warwick T/A All Counties Electrical

AT A FINAL HEARING

Heard: Remotely by CVP (Nottingham) **On:** 20 January 2023

Before: Employment Judge Clark (sitting alone)

Appearances

For the claimant: Did not attend and was not represented

For the respondent: Mr Warwick in person

JUDGMENT

1. It is **declared** that the claimant (a) was entitled to a statutory redundancy payment upon the termination of the employment and (b) in the sum of £4500. This sum has been paid to the claimant and **no further sums are payable.**
2. It is **declared** that the claimant suffered an unauthorised deduction from wages in the net sum of £1582.68 but that that sum was paid to the claimant after the date it was properly due and **no further sums are payable.**
3. The claimant (or his representative) has conducted these proceedings unreasonably from 28 October 2022. The claimant shall pay the respondent the sum of **£168** for his preparation time.

REASONS

1. The identity of the respondent

1.1. The claim was presented against an unincorporated trading name only. Mr Warwick accepted that he was the claimant's employer personally and traded as All Counties Electrical. I have amended the title of the proceedings accordingly.

2. The Claimant's Non-attendance

2.1. The claimant did not attend the hearing. The tribunal clerk was able to make contact with him by telephone. He informed the clerk that he hasn't heard anything for two months and was at work and unable to attend. After the hearing he sent an email confirming he had been in contact with his union as recently as November 2022, which satisfies me his representation was properly arranged. In neither communication did he ask for the hearing to be postponed or relisted. In view of the information on the tribunal file, I decided that it was not proportionate to postpone and I could proceed to decide the matter.

3. The claims

3.1. Mr Smith claims a statutory redundancy payment and outstanding wages. The latter of which he calculated at "approximately one month's wages". His ET1 stated this was £1718 net for a complete month. It is common ground the employment terminated on 27 June 2022 on ground of redundancy. The employer is Mr Warwick. The claimant was his employee. This is as small a business as can possibly appear before the employment tribunal. The two were previously work colleagues and close friends. Mr Warwick offered Mr Smith short term employment after he was dismissed from a previous employer. That turned into the 6 years employment that then two worked together. It was not economically viable and had not been for some time but Mr Warwick maintained the claimant in employment to his own cost until his accountant's advice hardened. He explained to Mr Smith that he could not afford the final payments at the termination date. That was not an indication that he was not honouring them. I find Mr Smith knew that Mr Warwick was going to have to raise the money and in fact that he did so by way of a personal loan. I do not accept the claimant's suggestion in his ET1 that Mr Warwick has refused to engage in any attempts by the claimant to contact him. I find the opposite to be true. Mr Warwick has demonstrated prompt and conscientious engagement with these proceedings throughout and I accept his evidence that it was him that engaged with ACAS fully, and that Mr Smith failed to tell them that the outstanding sums had in fact been paid.

3.2. Mr Smith presented his claim on 30 September 2022. He named Andy Shaw of Unite the union as his representative. He gave full contact details for Mr Shaw which the tribunal has accordingly used in the many points of contact that have occurred since. First, on 6 October 2022, he was sent confirmation of the claim, notice of today's listing and the case management orders to be complied with in preparation for today. The claimant has not complied with those orders. Next, on 7 December 2022 he was sent a copy of the respondent's defence filed in time on 28 October 2022. That defence did not defend the claim as such as it was accepted that the claimant was owed some money but stated that it had been paid. It also explained how Mr Smith was refusing to return Mr Warwick's work van and contents. Due to a misplaced sense of legal obligation, Mr Warwick has continued to tax and insure this vehicle for the last 6 months, has been without its use and Mr Smith has been freely using it without the owners permission. Had there been an explicit breach of contract claim before me, the facts may well have been sufficient to accept an employer's contract claim (counter claim) for the loss he has suffered but there is not and Mr Warwick will have to take that matter to the civil courts or the Police as he may be advised.

3.3. I have seen evidence which I accept that the respondent paid the claimant £4500 as a redundancy payment and outstanding wages of £1582.62. This was not paid until 28 October. The reason for the delay was the need to raise funds but I am satisfied that Mr Smith's own conduct in refusing to return the vehicle played a part in delaying the timely resolution of this matter. The information on the ET1 shows the statutory basis for calculating a statutory redundancy payment arrives at the same figure of £4500 actually paid.

3.4. The third contact was on 15 December when Mr Shaw was copied into email correspondence between the tribunal and the respondent which was not returned as undeliverable. That correspondence identified that a small sum may possibly be outstanding. Mr Warwick explained today, and I accept, that this related to questions over previous wages that his accountant had advised him might be owing. He explained today that it was not clear if that was in fact owing, even though he was prepared to pay it to get his van back. Without Mr Smith or Mr Shaw here to explain the claim, I cannot determine if there is any remaining claim and conclude, on balance, that there is no such claim nor any consequential losses from the late payment.

3.5. On 6 January 2023, Employment Judge Ayre wrote to the parties in respect of recent correspondence from the respondent reminding the parties of the purpose of today, the need to comply with case management orders and that the criminal allegations in respect of the van was not something this tribunal could deal with. It prompted no reply from the claimant and no email bounced back in a way that would indicate it had not been delivered to Mr Shaw.

3.6. The fourth contact was on 10 January when Employment Judge V Butler wrote to the parties. On this occasion the claimant was expressly required to explain the outstanding sums of wages said to have been owed to him, by reference to the sums queried by the respondent's accountant. Again, it prompted no reply from the claimant by the deadline of 12 January 2023 and no email bounced back in a way that would indicate it had not been delivered to Mr Shaw.

3.7. Today Mr Warwick has attended the hearing. Neither Mr Shaw nor Mr Smith have attended.

4. Conclusions

4.1. I could simply dismiss the claims under rule 47. I am not satisfied that the claimant's non-attendance is with good reason. There may be issues as between him and Mr Shaw which explains a breakdown in communication but he has named Mr Shaw as his representative and the tribunal has properly corresponded with him at the correct addresses. Mr Smith's email contact today confirms there has been continuing contact between them after the claim was presented, indeed after the outstanding payments were paid.

4.2. However, it is clear on the information in Mr Warwick's own response that the agreed sums had not yet been paid at the time the claims were presented. I am satisfied that, at the time, Mr Smith understood the reason for that and that Mr Warwick was looking to raise the money to pay what was owed. I have also rejected Mr Smith's suggestion that he could not

make contact with Mr Warwick. The evidence leads me to a conclusion that Mr Smith was not trying to contact him and was, and still is, happy to abuse Mr Warwick's naivety about the van and have the free use of a vehicle and its contents at Mr Warwick's expense. That may prove to cost more than the outstanding wages in the long run after these proceedings have concluded.

4.3. Despite that, there was a legal claim that could properly be brought as at 30 September 2022. Whatever the moral or equitable position the parties were in, that claim was properly made in law. It was, however, swiftly settled in the way that had always been intended. For that reason, it is appropriate to dispose of the claim on its merits. That means declarations can be made about the claimant's rights, but that no further payments are due to him.

4.4. I have decided, however, that a payment will be due from the claimant to the respondent to reflect the preparation time incurred in dealing with this claim but only from the time its conduct became unreasonable.

4.5. I have put to one side the fact that Mr Smith has brought a claim when he must have known he had no right to retain the vehicle and, more particularly, that the money for the payments he was due was being raised by loans and would be paid upon him returning the vehicle which he still has not done. Whilst that puts him in a poor position morally, it does not deprive him of the legal right to bring these claims as the sums were outstanding. That cannot therefore be unreasonable in law.

4.6. What has been unreasonable conduct is the failure to engage with the tribunal proceedings since the payments have been paid in full. There have been numerous occasions when there was opportunity to withdraw the claim or to explain why he felt there was anything remaining outstanding has been ignored. At no stage has any of the correspondence been addressed by the claimant or his representative. The respondent, however, has engaged with the tribunal at all stages and has properly dealt with the issues arising. Since the filing of his ET3 response, nothing that followed was at all necessary for Mr Warwick to have to spend time worrying about if Mr Smith or Mr Shaw had taken the simplest of steps to engage with this litigation.

4.7. Adopting the tests in rule 79, I have accepted Mr Warwick's modest explanation of the time that he has had to devote to this claim. There was at least an hour to fill out the ET3 and file that but at that time, I am not satisfied it can be said that Mr Smith's bringing or conducting the proceedings was unreasonable. Since then, however, there have been 3 matters of correspondence from the tribunal to consider, two of which prompted substantial responses from Mr Warwick which I accept will have taken substantially longer than the 2 hours I arrived at as a reasonable figure for all interlocutory matters. He has had to take out half a day from work to attend this hearing but I cannot make a preparation time order for the hearing itself under rule 75(2). I do, however, accept that he has spent time to review the papers, engage with his accountant and prepare what he was going to say and do at this hearing which I accept is reasonable to assess at 2 hours of preparation. In total I have allowed 4 hours since the point when the claim has been conducted unreasonably.

4.8. I do not have Mr Smith here to assist with the question of his ability to pay but I can see on the papers that he obtained new employment within 3 weeks of his redundancy dismissal and at a higher rate of pay. He has in the meantime received over £6000 from Mr Warwick. I take that into account in deciding whether to make, and in setting the level of, the preparation time order.

4.9. The rate for preparation time orders increases from 6 April each year by £1 from a 2013 base of £33. It is currently at £42 per hour. The amount the claimant must pay the respondent is therefore £168 (4 x £42).

EMPLOYMENT JUDGE R Clark
DATE: 20 January 2023

JUDGMENT SENT TO THE PARTIES ON
2 February 2023