



EMPLOYMENT TRIBUNALS

Claimant: PETER BARRETT

Respondents: RUTH & LLOYD ARMISHAW

Heard at: Exeter (by VHS) **On:** 6 December 2022

Before: Employment Judge Oldroyd (sitting alone)

Appearances

For the Claimant: Mr Barrett (in person)

For the Respondent: Mr Lewis-Bale (Counsel)

REASONS

1. Following a hearing lasting one day and by way of a Judgment dated 6 December 2022, I made an Order that the Claimant's claims for unlawful deduction of wages and breach of contract were to be dismissed, as were the Respondents' counterclaims.
2. I gave oral reasons for this Judgment.
3. The written terms of the Judgment were sent to the parties by the Tribunal Office on 10 January 2023 and by e mail dated 16 January 2023 the Claimant requested written reasons. These written reasons are set out below.

Introduction

4. By way of ET1 that was lodged on 8 February 2022, the Claimant brings a claim against his former employers and Respondents, Mr & Mrs Armishaw.

5. The Claimant alleges an unlawful deduction from his wages and / or breach of contract. These claims arise out of a failure to pay:
 - a. overtime in the sum of £1,482.57; and
 - b. holiday pay, on account of the Claimant saying that he took only 2.5 out of 16 days due to him at the time his employment ended; and
 - c. expenses in the sum of approximately £811.
6. The Respondents deny the claims for the following reasons.
 - a. The Respondents allege that the Claimant cannot evidence the overtime that he now claims and that he was in fact, if anything, overpaid.
 - b. In respect of holiday pay, the Respondents maintain that the Claimant had a right to 6.5 days of holiday at the date of the end of his employment and in the relevant holiday year but that any holiday that was due was taken in lieu of notice.
 - c. As far as expenses are concerned, the Respondents say that these were not authorised and not evidenced by way of receipts.
7. The Respondents also counterclaim in two respects:
 - a. On the basis that the Claimant only worked 51 hours of overtime and was paid for 110 hours, the Respondents counterclaim in the sum of £605.34.
 - b. Upon his resignation, the Respondents says the Claimant was obliged to provide two months, notice, but gave one. The Respondents thus counterclaim in the sum of £2,400 being the costs of obtaining employment cover for one month, less the Claimant's own salary.

Representation and evidence

8. The Claimant appeared in person. The Respondents were represented by Mr Lewis-Bale of Counsel.
9. In terms of witnesses, the Claimant relied on his own evidence set out in ET1 and a witness statement. The Respondents' evidence was given by Mrs Ruth Armishaw (who is a Respondent alongside her husband), her son David and also by Mr Ridout. Mr Ridout is the Respondents' land manager and a partner in Symonds & Sampson.
10. The Claimant, Mrs Armishaw, David Armishaw and Mr Ridout gave oral evidence.
11. The parties also prepared a bundle that ran to 288 pages.
12. Both parties produced skeleton arguments.

The law

13. The law for the purposes of this claim is not disputed.
14. Section 13 ERA 1996 enshrines the right of a worker not to suffer an unlawful deduction from wages. It is accepted that the Claimant is a worker for the purposes of the Act and that his claim in respect of overtime and holiday pay are for wages within the meaning of the Act.
15. In terms of the claim for expenses, it was not disputed that the Claimant was contractually entitled to be reimbursed for expenses reasonably incurred by him.

Contractual background

16. The Claimant was employed by the Respondents as a farm manager from 12 April 2021 until 16 December 2021, following his resignation.
17. The Claimant's duties involved caring for cattle and sheep, farmed by the Respondents, and he was provided with onsite accommodation.
18. The Claimant's employment contract contained terms that are relevant:

- a. The contract provided for the Claimant to work 45 hours each week, working between 7.00am and 5pm with an hour for lunch that was not paid.
- b. In respect of overtime, the contract provided: "*Additional overtime at certain times is a requirement and must be worked if offered*". To this end, the nature of farming was such that out of hours work was inevitable; be it working on a 6th or 7th day of the week or working additional hours during busy periods (such as silage making). Mrs Armishaw, in her evidence, readily accepted this.

The contract did not specify how or when overtime should be claimed or paid. In evidence, though, Mrs Armishaw said that the Claimant was provided with a pro forma timesheet at the outset of his employment that he was instructed to complete in order to claim overtime. The proforma was intended to document overtime incurred on a more or less an hour by hour basis as well as the specific task to which the overtime in question related. The Claimant denies receiving these forms at the outset of his employment but accepts receiving them from about October 2021.

- c. In terms of holiday, 28 days a year was provided for (inclusive of public holidays) by the contract. The contract provided for payment in lieu of holiday upon termination. The holiday year was to run from 1 April to 31 March. The Respondents say that, at the outset of his employment, the Claimant was provided with holiday request forms that he was supposed to complete in order to book holiday.
- d. In terms of notice, the contract provided that the Claimant was obliged to give two months' notice of the termination of his employment.

The overtime claim – facts and findings

19. Mrs Armishaw says that at about the end of June 2021, she had noted that the Claimant had not claimed or been paid any overtime and she says that, at this time, she asked the Claimant to complete the proforma timesheets to which I have referred but that he did not do so. I accept Mrs Armishaw's evidence in this regard which I have no reason to doubt. It appears logical to me that as the proforma timesheets plainly existed, they would have been provided to the Claimant at this time if not earlier.
20. In the event, the Claimant did not complete timesheets at this time.
21. It is apparent to me, from his evidence, that the Claimant considered the detail that he was being asked to complete in these timesheets (documenting every hour of his overtime) was 'over the top' to the point of being insulting. The Claimant plainly regarded the timesheets as unnecessary and he resisted completing them. I note in this context that, even after his employment ended, the Claimant resisted in providing a detailed breakdown of the overtime that he was claiming.
22. The Claimant instead preferred to deal with the payment of overtime in a less formal manner and he himself described how he orally raised his request to be paid overtime with the Respondents' son, David for the first time in August 2021. The Respondents and Claimant both accept that a conversation about overtime payments then took place (although there is very little evidence as to what was discussed at that time). What is clear, though is that whatever discussion took place did not lead to resolution of what overtime payments should be made to the Claimant.
23. The Claimant subsequently raised matters with Mr Ridout who acted as something of an honest broker between the parties. Mr Ridout was a partner in Symonds & Sampson and the Respondents' land agent.
24. Mr Ridout arranged for a meeting between the Respondents and the Claimant on 20 September 2021 and a second meeting on 4 October 2021.
25. Again, there was little evidence of what transpired at either meeting. However, the output from the second meeting was that the Claimant would provide details of the overtime he was claiming and indeed certain expenses that he was claiming as well.
26. The Claimant duly submitted his claim for overtime by e mail dated 5 October 2021 (a document that the Claimant described having first seen in August after his discussion with the Respondents' son) (the **October Claim Document**).
27. The October Claim Document, at page 95 of the bundle, relates to the period April – October 2021 and it documents an overtime claim totaling 220 hours. It is this document that the Claimant confirmed in evidence is the basis of his claim for overtime, although his claim also relates to overtime worked after this time as well.

28. There are three observations I have about the October Claim Document:
- a. It lacks the specificity that the Respondents' proforma time sheets required. It records overtime hours worked by week, not by the day let alone the hour and it does not specify the tasks that were carried out. It is a document which, if it is to have any value for the purpose of assessing the overtime that was worked by the Claimant, must be taken on absolute trust.
 - b. On its face, the October Claim Document is a retrospective one. It was produced in October 2021 (or possibly August) but it records time that was incurred as long ago as April. This presumably explains its vague nature.
 - c. The Claimant, in evidence, described how the October Claim Document was based upon calendar entries that the Claimant says that he maintained on a daily basis throughout his employment. The calendar entries are at pages 201-206 of the bundle and do indeed show the time worked on a daily basis. However, the calendar provides very little detail of the particular tasks carried out on any given day. Further, the hours set out on the calendar far exceed those that the Claimant came to claim in the October Claim Document. The Claimant says that this was because he retrospectively "*self-edited*" the time he actually claimed and reduced it to reflect things such as tea breaks or period of casual conversations for which he accepted he could not claim to be genuine overtime.

In light of these observations, my conclusion in relation to the October Claim Form Document is that it cannot be relied upon as accurate record of the overtime that was worked by the Claimant.

29. Upon the October Claim Document being submitted by the Claimant, Mrs Armishaw said in evidence that she reviewed it. Accepting that *some* overtime was due, she authorised payment 110 of the 220 hours claimed, being half of it. This was done even though Mrs Armishaw's own records, made in her diary, suggested that the Claimant may only have worked 51 hours of overtime.
30. In evidence, Mrs Armishaw addressed the question of why she paid half of the overtime that was being claimed at this time. Mrs Armishaw said that she had always accepted that *some* overtime was due, but owing to the lack of detail provided for in the October Claim Document (and the fact that the nature of the Claimant's work was such that he sometimes worked alone) the precise amount that was properly payable was (in her words) "*a stab in the dark*". However, not wishing for the Claimant, an employee on whom she heavily relied upon, to be out of pocket, she decided that payment that reflected 110 hours of work would be fair and reasonable.
31. In my judgment, the payment made by Mrs Armishaw represented her best view of what was reasonable at the time by reference to the overtime work that she knew the Claimant had carried out and other work he had probably carried out.
32. I also find that in making a payment that reflected 110 hours work that Mrs Armishaw was erring on the slightly generous side as it was plain that the

Claimant was, at this time at least, an employee whom she wished to retain. The fact that the payment was on the generous side is consistent with Mrs Armishaw's evidence that her actual records showed the Claimant to have only worked 51 hours.

33. After the overtime payment was made to the Claimant in October 2021, the Respondents began insisting again that their proforma timesheets were completed. I accept Mrs Armishaw's evidence that she subsequently actively encouraged the Claimant to complete these proformas (and that the Claimant resisted).
34. This culminated in a request that time sheets be completed being made in writing on 8 November 2021.
35. The Claimant certainly completed and submitted one such timesheet on 8 November 2021 documenting 8.75 hours of work, but that is the sole timesheet that has been disclosed in these proceedings . I accept Mrs Armishaw's evidence that no others were submitted. Although the Claimant may have completed them, as he says he did, it is clear to me that the Claimant did not go far as submitting them. This is consistent with my finding that the Claimant resented having to complete time sheets and having his work being the subject of scrutiny in that way.
36. The Claimant's reluctance to fill in time sheets or else the Respondents insistence that he did, led to a souring of relations between the parties and, ultimately the Claimant's resignation and these proceedings.
37. The Claimant now claims that he is owed overtime of 131.5 hours being the 110 hours not paid by reference to his October Claim Document and a further 21.5 hours claimed after the date of that claim (including the hours documented on the time sheet dated 8 November 2021). The Claimant urges me to accept that this represents a valid claim because:
 - a. It is based on his calendar.
 - b. There is self-editing but downwards self-editing in favour of the Claimant.
 - c. There was always an expectation of overtime and the Respondents do not dispute that some overtime was worked. On the Respondents' own case, the Claimant worked 51 hours of overtime.
 - d. There was no contractual requirement to supply the proforma time sheets.
38. The Respondents say that, on the balance of probabilities, the Claimant cannot evidence the overtime claimed. They point to these factors:
 - a. There are inconsistencies between the October Claim Document and , the calendar on which it was based and indeed a subsequent spreadsheet produced for these proceedings. The Claimant points to specific inconsistencies of note. Purely by way of example:

- i. On 7 September 2021, the Claimant says that he worked all day and yet he was photographed with his camera, and not working.
- ii. On 18 July 2020 the Claimant recorded a 10.30pm finish. The Respondents' son, David Armishaw, states that he was in the field in which the Claimant was working at the time and that by 9.56pm work had ceased. There is a photograph in the bundle that was taken at this time.

I should say that the Claimant cast doubt on the evidential value of these particular photographs and I agree that their value is limited. It seems to me that these photographs only capture a moment on time but are not reliable evidence that the Claimant was working.

- b. The Claimant was generally reluctant to hand over his calendars and at an early stage refused to do so stating that *"My calendar and diary contain personal information so I am hardly going to give that to you am I"*. The Respondents suggest that this reluctance flows from the Claimant's acceptance of the inconsistencies that they reveal.
- c. Mrs Armishaw's own diary entries suggest that the Claimant may only have worked overtime of 51 hours.

39. The essential issue I must decide is the amount of overtime that the Claimant is able to establish, on the balance of probabilities, that he worked and whether the Claimant was then properly paid in respect of it.

40. The task is made difficult by the absence of cogent documentary evidence of the hours worked on a daily basis and the tasks that the hours related to.

41. On the evidence available, I am satisfied that the Claimant worked the overtime for which he has been paid (namely 110 hours) but no more than that. I reach this view for these reasons:

- a. The Claimant's own record keeping is, it has been said, poor and cannot be safely relied upon. On the Claimant's own evidence the calendar entries were not accurate and required self-editing to ensure accuracy. The calendar lack specificity as to the tasks carried out. The records relied upon are not always contemporaneous either.
- b. By the same token, the Respondents' record is unreliable also. Their record of the Claimant working 51 hours is based largely on Mrs Armishaw's diary and yet Mr Armishaw readily conceded that his mother's diary would only have recorded larger jobs on the farm, and not the smaller ad hoc jobs that the Claimant would have performed. The diary was not intended to be and was not a timesheet *per se*.

42. Absent cogent documentary evidence, I have found that Mrs Armishaw believed that her payment in respect of 110 hours of overtime was a fair estimate of the overtime worked by the Claimant (albeit on the generous side) and this seems to me to be the best evidence of the overtime that was therefore actually worked. The fact that Mrs Armishaw may have made a modest overpayment in respect

of hours is offset by the fact the Claimant probably worked some overtime after his October claim was submitted (albeit there is little documentary evidence of this) and the Claimant has suggested that the overtime he was paid was a slightly reduced rate.

43. Consequently no further overtime is due and this aspect of the claim must fail.
44. It follows to that, as the Claimant was entitled to overtime of 110 hours for which he was paid, the Respondent's counterclaim (that the Claimant was overpaid overtime) does not succeed and is so dismissed also.

The holiday pay claim – facts and findings

45. The Claimant was employed between 12 April 2021 (the day the Claimant accepts he started actual work) and 16 December 2021; a period of 8.1 months. Contractually, it was agreed that the Claimant was entitled in that time to 19 days of his annual 28 day entitlement in that period.
46. The actual holiday taken by the Claimant is disputed and there is very little documentary evidence of what holiday was taken. To this end, the Claimant says that the Claimant was supposed to complete holiday forms before taking holiday but he did not do so. By the same token, these forms do not seem to have been insisted upon.
47. Even during the course of these proceedings, neither party was able to present cogent evidence of what holiday was and was not taken.
48. The Respondents say that the Claimant took, according to their own records, 6.5 days up to the point of his resignation. This arises from Mrs Armishaw noting the Claimant's absent days in her diary (as recorded at paragraph 14 of her statement and pages 187 – 192 of the bundle).
49. The Claimant says he took only 2.5 days of holiday up to his resignation.
50. This issue I must decide is whose records are more reliable. I am satisfied that the Respondents' records are more reliable (save in the limited circumstances set out below). I reach this conclusion because:

- a. I accept that the Claimant was provided with holiday request forms at the outset of his employment. As I have found in respect of the proforma overtime sheets, the holiday request forms plainly existed and it is logical that the Claimant was provided with them at the outset of his employment. In spite of this, the Claimant did not submit any holiday request forms.
- b. Generally, I find that the Claimant's record keeping was poor (in light of my findings in respect of the October Claim Document) and often based upon retrospective recollections. It is more likely than not that the Respondents' records, based on her contemporaneous diary, are more accurate.

51. However, the Claimant has cast doubt on the accuracy of Mrs Armishaw's records and her diary in two respects that I accept. The Respondents' records

that relate to 24 April and 13 June suggest that the Claimant had been on holiday. The Claimant argues that the suggestion that he was on holiday on those days is contradicted by photographs in the bundle that show the Claimant to be seemingly working and the fact that one entry appears relate to a non-working day, a Sunday. Although I have suggested that photographic evidence of this nature can be unreliable, it seems unlikely to me that if the Claimant was on holiday here would be any evidence of him working at all on these days at all. I thus accept the force of what the Claimant says, certainly in respect of these two days and it is more likely than not that these days were not actually taken as holiday.

52. In light of that, I find the Claimant took 4.5 days of holiday.
53. On the basis that the Claimant's allocation of holiday was 19 days, that meant that the Claimant was entitled to take 14.5 days of holiday following his resignation but before his termination date.
54. On the evidence before me, though, I am satisfied that to the extent that there was additional holiday due to the Claimant, he took it prior to the end of his employment such that no obligation to make a payment in lieu arises. To this end:
 - a. when the Claimant resigned, his resignation letter itself proposed reducing his notice period by using holiday accrued but not yet taken. Subsequently, the Claimant accepts that in return for his notice period being reduced from two months to one, he agreed to work for one week and then take two weeks of holiday. This accounts of 10 days of the holiday due to the Claimant.
 - b. the fourth week that the Claimant was due to work was fully paid but the Claimant did not attend to workplace and it was described as "*gardening leave*" (in a letter sent to the Claimant on 7 December 2021 by David Armishaw). It is clear to me, though, that this effectively amounted to holiday and in circumstances where the parties were not clear on what holiday had been taken and had not been taken to it has simply been misdescribed as gardening leave. This accounts for a further 5 days of holiday due to the Claimant.
55. Consequently, this aspect of the claim is also dismissed.

The expenses claim – facts and findings

56. The Claimant says that he has incurred out of pocket expenses in respect of which the Respondents are contractually liable to reimburse him. At page 94 of the bundle there is a list of expenses that totals £811 dated 5 October 2021 that the Claimant submitted to the Respondents and in respect of which he requested payment
57. Whilst the Respondents paid those expenses on this list where receipts were provided, they have not paid the remaining ones owing to the fact that they were not authorised and they were not evidenced by receipts.

58. The written contract is silent on the issue of expenses. However, as I have already set out, it was agreed by the parties that the Respondents was obliged to reimburse any expenses that had reasonably been incurred by the Claimant.

59. In this context, it seems to me that an expense will have been reasonably incurred by the Claimant if it:

- a. was incurred with the consent of the Respondents (be it express or implied); and
- b. is suitably supported by an appropriate receipt (which would allow the Respondents to validate the expense both for the purpose of being satisfied it was incurred and for its own financial audit purposes).

60. I am satisfied that:

- a. There is no evidence that the Respondents approved the expenditure that is now claimed and it is reasonable for them to only be liable for approved expenditure. The Claimant could not point to any express authorisation and there was no evidence of expensed having been implicitly authorised either.
- b. There are, the Claimant accepts, no receipts to justify the expenditure that is claimed in terms of amount.

61. On this basis, I am satisfied that the Respondents are not obliged to reimburse the Claimants in respect of the expenses now claimed and the claim in respect of them is dismissed.

The counterclaim in respect of short notice

62. The Claimant handed in his notice on 22 November and so his contractual notice expired on 22 February 2022 but his employment actually ended on 16 December 2022, a month earlier.

63. The Respondents says the shortened notice meant that they were obliged to pay for additional labour in the sum of £4,500 (from which they reduce sums that would have been paid to the Claimant). The Respondents counterclaim in this respect.

64. I see no merit in the counterclaim. It is clear to me that upon the resignation the Claimant met the Respondents and Mr Ridout and a shortened notice period was agreed. This was documented by Mr Ridout in a note dated 22 November 2021 (at page 104). Mr Ridout confirmed this was agreement reached for the convenience of both parties.

65. This agreement amounted to a variation of the contractually agreed notice period.

66. The counterclaim is thus dismissed.

The Claimant's additional claim

67. At the outset of the hearing and in a skeleton argument lodged in the lead up to the hearing, the Claimant indicated that he had discovered a new cause of action in that he had been underpaid £1,000 a month as a matter of course.
68. Although the Claimant says that this issue was raised with the Respondents' solicitor before this hearing, there was no disclosure relating to it, no witness evidence and no formal application to amend was made. The cause of action was not explored in evidence either.
69. In these circumstances, I do not deal with any claim that the Claimant may have in relation to this cause of action in this Judgment.

Employment Judge Oldroy

Dated: 28 January 2023

Reasons sent to the parties: 17 February 2023

For the Tribunal