EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105029/2022 (V)

Held at Aberdeen on 21 November 2022

Employment Judge J M Hendry

Mr G McDonald	**Claimant** **Represented by** **Mr W J Craig,** **Kincardine & Mearns** **CAB**
Skye Highland Adventures Ltd	**Respondent** **Represented by** **Mr D Brady**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claims are well-founded and that the respondent shall pay the claimant the following sums:

1. The sum of Four Thousand Pounds (£4,000) being unpaid wages for the months of May and June 2022;
2. The sum of Fifty-Four Pounds and Forty-Five Pence (£54.45) being mileage incurred by the claimant on behalf of the business;
3. The sum of Three Hundred and Fifty Pounds (£350) being accrued holidays at the date of termination of the employment.

REASONS

1. The claimant lodged an ET1 on 8 September 2022 seeking payment of various sums from his former employer Skye Adventures Ltd. The proceedings followed the usual ACAS early conciliation process.

2. At the hearing on 21 November the Tribunal was contacted by Mr D Brady, a Director of the respondent company. He indicated that he was unaware of the proceedings and that he had only become aware of the proceedings on return from two weeks' absence discovering a letter from the Employment Tribunal. At the outset of the hearing, I advised him that he could seek a postponement of the proceedings. He could also ask to lodge an ET3 (a defence to the claim) late. I allowed Mr Brady to make submissions in relation to both these matters.

3. Mr Brady's position was that he never received the claimant's Tribunal application. He had not received correspondence from the Employment Tribunal and was unaware until this morning that the proceedings were taking place. I asked him what his defence to the proceedings were. He indicated that the claimant was due to repay training costs to him and that he had left his employment to work for a competitor.

4. In the course of the discussion Mr Brady indicated that he did not live at the registered office but a short distance away in Kyleakin. He accepted that the local postman would normally deliver anything he couldn't deliver to the registered office to his address but he maintained that the ET1 had not been received by him.

5. Exploring his defence I advised him that the claimant had lodged a copy of some Whatsapp messages that bore to be between him (Doug) and the claimant. One of the texts to stated: "*We will be paying people this month for sure but as to how much future work we have I really don't know right now.*"

Other texts from Mr Brady read: "*I won't take the piss and try to nock you at all, you will be paid for sure but it will be in dribs and drabs at this rate.*" A further text dated 15 August 2022 reads: "*I will pay you if the company survives.*" I suggested that these appear unambiguous. He could offer no satisfactory explanation suggesting that he had been stressed when he wrote them.

6. I asked Mr Brady to advise me where in the written contract there was an obligation to repay or recoup the cost of any training. He was unable to do so. He explained he didn't have access to the contract. I took him to the contract lodged by the claimant. Mr Brady said he did not recognise the contract from the description I gave of it explaining that these matters were dealt by his HR Manager. I advised him that if he had a claim for recoupment against wages that had been earned it would have to be in the contract. Further if this was his defence to payment then I suggested that he would have been aware of the terms of the contract on which he said he was relying. In the course of this discussion, he indicated that the training costs were £2,000. He said that one trainer had been sourced to give training to five or six employees. I queried how a proportionate cost of this training which would only be £500 or £600 could offset the entire sum being claimed by the claimant for wages. Mr Brady was not able to give a satisfactory explanation for this.

7. I advised Mr Brady that I was not prepared to postpone the proceedings, nor was I prepared to allow the lodging of a late ET3. I did not regard the explanations given to me as credible or candid nor did I regard the proposed defence either fully covered the sums sued for or in general was arguable given the information before me. I advised Mr Brady, however, that he could remain in the hearing, listen to the evidence and ask questions of the witnesses. I indicated that following the issue of the Judgment he could seek a reconsideration of the Judgment. In the event Mr Brady stayed for part of the proceedings despite adjourning for half an hour to allow him an opportunity to re-join.

8. The hearing concluded. I made the following findings in fact after hearing evidence from the claimant Gregor McDonald. I found Mr McDonald a straightforward consistent witness who I regarded as having his account corroborated at important points by the messages and written contract produced. He was credible and reliable.

Facts

9. Mr McDonald has a keen interest in outdoor pursuits. He and his partner Adele Fraser heard about work on Skye with the respondent company. They were interviewed by telephone by Mr Brady and offered positions with the company as Activity Guides on salaries of £24,00 per year which they accepted.

10. Mr McDonald and Ms Fraser moved to Skye to take up their positions.

11. The claimant started work on 1 May 2022. Prior to his employment he was sent a digital copy of his employment contract. It runs to some 74 paragraphs. He signed it digitally and returned it to the respondent's HR Manager "Kelly". He did not receive a copy of the finalised employment contract but understood the agreement he had signed contained the contract terms of his employment contract with the respondents. Along with that document he was sent various other documents such as a policy in relation to the use of vehicles, a confidentiality agreement and a data protection policy.

12. The claimant started work as agreed. It became clear that the business was not busy. The claimant had agreed a salary of £24,000 per year. This was reflected in the written contract he had signed. He was also entitled to paid holidays. At the end of the first month the claimant was surprised that no wages were paid into his bank account the details of which he had been asked to supply. He challenged this and was told that he would not be paid for the first month and that it was a "lie" month. The claimant was unaware of this and had not agreed to it. This was not reflected in the written contract

made or in the other documentation supplied to him. Nevertheless, the claimant continued to work on being reassured he would be paid in due course.

13. Further difficulties occurred in June. It was clear that the business was struggling. Various promises were made by Mr Brady that the salary would be paid.

14. Mr Brady insisted that the claimant's partner Adele Fraser use her vehicle for moving equipment. The vehicle was small and unsuitable for this purpose. Although his partner agreed to use her car on a number of occasions in mid-June she advised Mr Brady that she was no longer prepared to do so. In addition, both the claimant and Ms Fraser had been told to lodge claims for mileage in using the vehicle for those purposes. They used the AA rate of 45p per mile and made a couple of claims. These were not queried by the respondent company. Mr Brady and the office manager had told them to set out the appropriate mileage and information and lodge the claims with the office. This they did but no payment was forthcoming.

15. At the end of June it was clear that the company was in financial difficulties and would be unable to pay the claimant his wages at the end of the month. The claimant indicated that he was leaving the company because he was not being paid.

16. Mr Brady subsequently argued that he was not due to pay the claimant his wages because of training costs. There had been no agreement reached between the claimant and Mr Brady in relation to the recoupment of any training costs. The claimant understood that attendance at training was voluntary and the claimant chose not to attend the one training event that had occurred because he was told that the company could not pay him for his attendance.

17. In order to try and obtain payment from the respondents the claimant agreed to lodge an invoice detailing his daily/half daily rates for payment. This did

not result in any payment. Mr Brady texted the claimant and other staff on 17 June in relation to training. He wrote:

"*So group meeting at 12, if you want to learn to canyon then the training is not paid in anymore. We can't afford it. So it's not compulsory.*"

18. In the group chat following Ms Fraser raising concerns about the company's ability to pay Mr Brady wrote:

"*We will be paying people this month for sure but as how much future work we have I really don't know right now.*"

19. On 1 July Mr MacDonald asked for his wages. Mr Brady responded:

"*Hey mate sorry it's been a while I'll be paying you guys for what you did but unfortunately we haven't had any bookings now for nearly 7 days…….I won't take the piss……You'll be paid for sure but it will be in dribs and drabs at this rate.*"

20. On 15 August Mr Brady messaged: "*I will pay you if the company survives!*"

Discussion and Decision

21. An employee is entitled to be paid their earned wages unless the employer is entitled to deduct sums from those wages. The circumstances in which an employer can make deductions from wages is restricted and governed by Section 13 of the Employment Rights Act 1996. The Section is in the following terms:

"***13 Right not to suffer unauthorised deductions.***
(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."

22. In the present case the employer has no right to withhold the claimant's wages. They had no authority and certainly no written authority as required

by 13 (1)(b) to deduct training costs even if he had a contractual right to recoup these which I have determined they did not.

23. The claimant worked for two months and his salary was agreed at £24,000 per year which is reflected in the written contract. He is due to be paid £4000 plus £350 for unpaid but accrued holidays. I also determined that he was entitled to be reimbursed for his mileage. He had no obligation to use his partner's vehicle for work and only did so because of assurances he would be reimbursed for that. He lodged claims which were based on the AA recommended rate for mileage. These were not rejected or queried and the respondent business continued to ask the claimant and his partner to use their vehicle and to submit claims throughout May and up until mid-June.

24. The other claims made such as for an uplift under the ACAS Code were not well founded. The Code applies to disciplinary dismissals and this was not a dismissal nor a disciplinary dismissal. While sympathetic to the other heads of claim essentially for damages I do not regard the Tribunal as having the power to award these.

Employment Judge Hendry

Dated: 28 November 2022

Date sent to parties: 28 November 2022