EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr P Lomax	v	Ruddy Joinery Limited

Heard at: Cambridge **On:** 2 December 2022

Before: Employment Judge Tynan

Appearances:
For the Claimant: In person
For the Respondent: Mrs Simpson, Counsel

JUDGMENT having been sent to the parties on 3 January 2023 and written reasons having been requested on 14 January 2023, by the Claimant, in accordance with Rule 62(3) of the Employment Tribunal Rules of Procedure 2013, the following reasons are provided:

REASONS

1. By a claim form presented to the Employment Tribunals on 31 March 2022, following ACAS Early Conciliation between 31 January and 2 March 2022, the Claimant claims that the Respondent made unlawful deductions from his wages. He estimates that he is owed in the region of £10,000. His claim is resisted by the Respondent.

2. In his claim form the Claimant asserts that he was paid at the rate of £11.14 and, subsequently, £11.36 per hour, whereas he was entitled to be paid at the rate of £12.67 and, subsequently, £12.99 per hour, in accordance with the provisions of the Construction Industry Joint Council National Agreement. The claim form does not identify the relevant periods in respect of which the Claimant asserts that the two higher rates of pay should have been paid. The Claimant's estimate that he is owed in the region of £10,000 is said to be based *"on two years' worth of pay"*.

3. The claim having been presented to the Tribunal on 31 March 2022, by virtue of s.23(4)A of the Employment Rights Act 1996 ("ERA"), the Tribunal has no jurisdiction to consider any complaint where the date of payment of the wages from which the alleged deduction was made, was before the period of two years ending with the date of presentation of the complaint. The Tribunal is concerned therefore with any wages paid to the Claimant after 31 March 2020. The Claimant's claim is further limited

insofar as he left the Respondent's employment on 8 November 2021. Save for any final payment of wages made after that date, his claim extends over a period of approximately 20 months.

4. Notwithstanding the claim form refers to the Claimant having been paid at a rate of £11.14 per hour, it is in fact now common ground between the parties that the Claimant's pay increased to £11.36 per hour in February 2020.

5. Where a dispute arises between a worker and their employer regarding the amount of wages properly payable to the worker, the Tribunal's role is to interpret the contract between them. Its construction is a question of law. It is not the Tribunal's function to re-write the contract for the parties, for example, if it considers that one party struck a bad bargain as a result of inexperience or because it otherwise regards the contract as somehow unfair.

6. Subject to mandatory legal requirements, including for example, an employer's obligation to pay the national minimum wage and adhere to working time limits, if the employment contract wording is clear and unambiguous, that is an end to the matter. However, where the wording is ambiguous the Tribunal can look to the surrounding circumstances as an aide to interpretation. And, ultimately, where any ambiguity cannot be resolved having regard to the surrounding circumstances, the Tribunal may resort to the contra proferentem rule, namely that any residual ambiguity should be resolved against the party who put forward the wording.

7. The Claimant was not issued with a written contract of employment as such, rather he received a written offer of employment, a copy of which is at pages 2 and 3 of the Hearing Bundle (the "Offer Letter"). Amongst other things, it states,

> *"Working Rule Agreement applies, accept where varied by this letter".*

It is not in dispute between the parties that the reference to the Working Rule Agreement is to the Building and Allied Trades Joint Industrial Council, Constitution and Working Rule Agreement (the "Working Rule Agreement"). I was given to understand by the parties that the Working Rule Agreement is re-issued annually. The copy in the Hearing Bundle is from 2021 / 22. It contains a series of Working Rules that cover many aspects of the working relationship, including standard rates of wages. The 2021 / 22 copy in the Bundle comprises of 25 Working Rules, the first of which (Working Rule 1) sets out a range of weekly and hourly rates of pay according to a worker's qualifications, experience and skills.

8. At one level, the wording of the Offer Letter could be said to be unambiguous, in so far as it states that the Working Rule Agreement applies, except where varied by the letter. However, the question arises in this case whether, if the standard rates of pay in Working Rule 1 were varied by the Offer Letter, this variation only applied to the Claimant's rate of pay at the time he was recruited or extended more generally throughout his employment with the Respondent. In this regard, the Offer Letter

might have stated, but did not state, that Working Rule 1 would not apply throughout the Claimant's employment with the Respondent, alternatively that it would only apply for a specified period or until a specified event (for example, until the successful completion of the Claimant's Apprenticeship).

9. I accept the Claimant's evidence in two material respects: firstly, that his rate of pay when he commenced his employment with the Respondent as an Apprentice Joiner was in accordance with the applicable wage rate specified at that time in Working Rule 1; and secondly, that his wages were adjusted with immediate effect in or around 2013 when he raised with his Line Manager that he was not being paid at the relevant specified rate. This evidences to me that the Working Rule Agreement was not varied by the Offer Letter. If so, that would be conclusive of the matter in the Claimant's favour.

10. However, I have looked beyond the Offer Letter to see whether there are other relevant surrounding circumstances that might aide interpretation, particularly as regards the parties' respective rights and obligations beyond the Claimant's initial six month trial period or as he gained more experience and his pay increased? It seems to me that the relevant circumstances are as follows:

    a. As set out already, on commencing his Apprenticeship, the Claimant's rate of pay was in accordance with Working Rule 1 and immediately adjusted in or around 2013 when it was identified that he was not being paid at the relevant specified rate;

    b. In the Offer Letter, the section dealing with the Claimant's holiday entitlement, headed 'Holidays' is stated to be *"All as Working Rule Agreement".* One possible inference from the fact this wording was not replicated in the preceding two sections dealing with 'Working Hours' and 'Rates of Pay' is that they were outside the ambit of the Working Rule Agreement, though that begs the question why this was not expressly stated to be the case. The alternative explanation is that the words included in the 'Holidays' section were otiose, particularly given the primary wording already referred to above;

    c. The Claimant's rates of pay from 2015 / 16 onwards were not in accordance with Working Rule 1 yet were not challenged by the Claimant;

    d. Other workers were, I accept, paid by the Respondent at different rates of pay according to ability and / or performance, at rates both above and below those specified in Working Rule 1. They were also paid a special bonus as a reward for their loyalty during the Coronavirus pandemic which was not prescribed by the Working Rule Agreement; and

    e. In 2020 the Claimant's pay was varied in February rather than in June as specified in Working Rule 1.

11. I am, of course, primarily concerned with the terms and effect of the contractual arrangements agreed between the Claimant and the Respondent rather than with its wider workforce. I find that the Claimant was passive in the matter of his pay and conclude that his lack of action during his employment, namely his failure to raise with the Respondent any concerns that he was not being paid in accordance with the Working Rule Agreement, reflected, as he said in his evidence at Tribunal, a desire to keep his head down rather than an acceptance on his part that he was being paid at the correct hourly rate.

12. In my judgement, none of the factors identified above resolves any ambiguity or uncertainty in the wording of the Offer Letter. The question remains whether the Respondent's failure to spell out the Claimant's pay arrangements more explicitly, in circumstances where the Working Rule Agreement was adopted in relation to holiday, means that Working Rule 1 was dis-applied in relation to the Claimant for all time and all purposes. The difficulty I have with the Respondent's position is that, read literally, if the Offer Letter had the effect of dis-applying Working Rule 1, it would mean that the Claimant would only have been entitled to be paid at the rate of £4.35 per hour throughout his employment with the Respondent, since as expressed it is only the Offer Letter itself that is effective to vary the terms of the Working Rule Agreement. Ultimately, in my judgement, it is not pure happenchance that the Claimant's wages as an Apprentice Joiner were paid at the rate specified in Working Rule 1 of the Working Rule Agreement. Indeed, that was confirmed by Mr Ruddy in his evidence to the Tribunal. Of course, the Respondent may still say that this was at its discretion rather than pursuant to the Working Rule Agreement as such. Nevertheless, I have come to the conclusion that the rates of pay specified in Working Rule 1 were not varied by the Offer Letter rather they were honoured by the Respondent. I conclude that they were specified in the Offer Letter so that the Claimant would have certainty regarding his pay rather than having to cross-refer to the Working Rule Agreement to find out what he would be paid if he accepted the Respondent's offer of an Apprenticeship.

13. Although it is not necessary that I do so, had the Working Rule Agreement been varied by the Offer Letter, I would have said that any variation was limited to the Claimant's rate of pay during his six month trial period and that his rate of pay was otherwise to be determined in accordance with Working Rule 1.

14. In my judgement, the Claimant was entitled throughout his employment with the Respondent to be paid at the rates of pay prescribed in Working Rule 1 of the Working Rule Agreement.

15. As noted already, the Tribunal's jurisdiction is limited to deductions from the Claimant's wages after 31 March 2020.

16. In terms of Remedy, the Claimant is qualified at NVQ Level 3, meaning that with effect from 22 June 2020 the specified hourly rate of pay was £13.37 per hour. There is no information available to me as to the specified hourly rate from 21 June 2021. I accept the Claimant's evidence that the specified hourly rate prior to 22 June 2020 was £12.99 per hour. I

further accept his evidence that he worked on average 6.5 hours' overtime per week and that this overtime was paid at a rate of time and a half. It is not in issue that the Claimant's basic weekly hours were 39 hours per week.

17. Between 1 April 2020 and 1 May 2020, the Claimant was on furlough leave, and entitled to 80% of his basic pay. Given my findings above, the shortfall in his hourly rate of pay in this period (and ongoing until 19 June 2020) was £1.63 per hour (£12.99 minus £11.36), or £63.57 per week. The Claimant is entitled to 80% of that shortfall during his furlough leave. I calculate that he was furloughed for a period of 4 weeks and 3 days, giving rise to a shortfall in his pay of £233.94.

18. The Claimant is entitled to a further £63.57 per week for the period 4 May 2020 to 19 June 2020, namely £444.99 (7 x £63.57).

19. The shortfall in the Claimant's rate of pay from 22 June 2021 was £2.01 per hour, or £78.39 per week, totaling £4,076.28 to 20 June 2021. In the absence of any information as to the applicable hourly rate of pay from 21 June 2021, I have used the same figure of £78.39 to calculate the amount of the ongoing unauthorised deductions from the Claimant's wages for the period 21 June 2021 to 8 November 2021, namely a period of 22 weeks. The total amount of this further unauthorised deduction from wages is £1,724.58.

20. Regarding overtime, I am concerned with a total period of 74 weeks, giving rise to an unlawful deduction from wages of £1,450.40 (6.5 hours x 2.01p per hour x 1.5 = £19.60 per week x 74 weeks).

21. In summary, the total sum that the Tribunal will Order the Respondent to pay to the Claimant in respect of the various unauthorised deductions from his wages, will be £7,930.18 gross.

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Employment Judge Tynan

Date: 8 March 2023

Judgment sent to the parties on

14 March 2023

For the Tribunal office