



EMPLOYMENT TRIBUNALS

Claimant: Rynhardt Mannel
Respondent: Selene Marine
Heard at: East London Hearing Centre (by CVP)
On: 6 & 7 December 2022 and 24 January 2023
Before: Employment Judge F Allen

Representation

Claimant: in person
Respondent: Mr Nathan Gray, Solicitor, from Backhouse Solicitors

JUDGMENT having been sent to the parties on 15 February 2023 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

Introduction

1. The claimant is an employee who started work for the respondent Selene Marine as a Marine Electronics Engineer on 1 December 2020, subject to satisfactory completion of a probationary period of 6 months. The claimant resigned with notice on 21 January 2021. The notice period is one week. Early conciliation was started on 31 January 2022 and ended 2 March 2022. The claim was presented on 9 March 2022.

The Hearing

2. The hearing was held over 3 days, 6-7 December 2022 when evidence was taken and the 24 January 2023 when both parties made submissions. After submissions I took time to deliberate before giving an oral judgment with reasons.
3. The claimant had some IT issues with joining the hearing on 6 December 2022 and 24 January 2023, but these issues were resolved and did not affect the claimant's ability to participate fully in the hearing on all three days.

4. Before starting the hearing on 6 December 2022, I checked that I had the correct documents which were:
 - Respondent's bundle of 236 pages
 - Claimant's bundle of 121 pages
 - Claimant's additional bundle of 28 pages
 - Witness statement of Prasath Segaran
 - Claimant's witness statement
 - Claimant's addendum response to the respondent's counter claim
 - Claimant's chronology and schedule of loss.
5. I heard sworn evidence from the claimant Mr Mannel and Mr Segaran for the respondent. Both had provided witness statements which they adopted.
6. For the hearing on the 24 January 2023 the claimant provided written submissions with additional documents amounting to 21 pages. Mr Gray was given time to read these submissions and confirmed that he was ready to proceed.

Claims and Issues

7. In the ET1 the claimant made a claim for notice pay, holiday pay, arrears of pay and other payments and expenses. The claimant also raised an issue as to the correct overtime rate but said at the beginning of the hearing on 6 December 2022 that this was not being pursued.
8. In their response the respondent said that according to their records the January 2022 salary has been paid as had the overtime up to and including December 2021. Overtime for January 2022 had not been paid but the work carried out is not correct and the claimant has not submitted the required service report and time sheet. The respondent accepted that some holiday pay is outstanding but resisted the claim for unpaid expenses.
9. The claimant brought a breach of contract claim in respect of wages not paid or not paid in full, notice pay and unpaid expenses. In response the respondent raised a counter claim stating that the claimant has not worked pursuant to his contract and is holding office equipment worth £20,000. Additionally, the respondent claims for training expenses of £5237.03 and £8000 for inability to perform their day-to-day work. In an addendum response to the counterclaim dated 13 November 2022 the claimant denied that he owes the respondent for training costs of £5237.03.
10. There was a useful discussion at the beginning of the hearing in respect of the issues and areas of agreement. It is agreed that the reasons for leaving the employment are not relevant to the issues to be decided and the respondent has provided the final salary slip for January 2022 at page 49 of the respondent's bundle.

Findings of Fact

11. It is agreed that the claimant was employed under an employment contract which was signed on 1 December 2020. The contract sets out that the place of work shall be the Chelmsford office or such other location as the company may require. It is clear from both the contract and the email exchanges between the claimant and the respondent at pages 89- 91 of the respondent's bundle that the place of work is the Chelmsford Office.
12. It was agreed by both parties that the claimant's basic salary is £38,000 per annum and paid on or around 20th of each calendar month. Basic hours are 40 hours per week 8-5 Monday to Friday or 9am – 6pm and overtime is set out at paragraph at 4.5 of the employment contract and email at page 85 of the respondent's bundle. It was additionally agreed by both parties that during the probation period, notice is one week (see paragraph 9.1 of the employment contract).
13. The claimant accepts that he has retained equipment belonging to the respondent.
14. The respondent accepts the following:
 - 14.1 Shortfall of £329.14 in expenses payments.
 - 14.2 Shortfall of £42.48 but the claimant said he could not reconcile this amount with his figures and did not want this to be paid to him.
 - 14.3 That there have been cash payments of £1810.00 received by the claimant which consist of £1000 for expenses and £810 for overtime but these figures do not appear on any payslips. The net figures will have to be accounted for in the final figures and the respondent will be liable for any payment of tax and/or national insurance which is payable.
 - 14.4 That some salary is owed.

The Law

15. Section 13(1) of the Employment Rights Act 1996 (ERA) provides that an employer shall not make a deduction of wages of a worker employed by him unless 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 the worker has previously signified in writing his agreement or consent to the making of the deduction. An employee has a right to complain to an Employment Tribunal of an unauthorised deduction of wages pursuant to Section 23 ERA.
16. The definition of wages in section 27 is widely defined and includes at section 27 (1) of the ERA 1996 "any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise" but excludes any payment in respect of expenses incurred by the worker in carrying out his employment (section 27(2)).

Conclusions

17. There were references to ACAS discussions at paragraphs 55, 67 and 68 of the claimant's witness statement and also emails at pages 51-53 of the claimant's bundle. I have not considered these paragraphs or pages when reaching my findings and conclusions.
18. I have carefully considered the contents of all the statements, evidence that I was referred to and the submissions of both parties. In my reasons below I have not referred to each point raised or to every document referred to, but I have dealt with the points and evidence that are relevant to the issues that I must decide.

Underpayment of salary for February 2021

19. The claimant says that he was underpaid £83.86 in February 2021. The respondent argues that this claim is out of time and that it does not form part of a series of deductions as between February 2021 and August 2021 the claimant was paid his wages in full.
20. I find that it is clear from the payslips that payments for overtime and expenses were often in arrears and combined together in one payment. For example, overtime was not paid in full from January 2021 and the payment in August 2021 was to cover the fact of previous non payments. It is not that there was a gap, as suggested by the respondent between March 2021 and August 2021 when the claimant was being paid the correct amount each month that was payable to him.
21. I find therefore that the February 2021 underpayment of wages is part of a series of unlawful deduction from wages and the claim is in time.
22. I find that the underpayment in February 2021 is part of a series of deductions and the Claimant is owed £83.86.

Salary for January 2021

23. The respondent has now provided the final salary slip. The respondent accepted in evidence that the claimant should be paid until 31 January 2021.
24. The claimant is owed his basic salary of £3166.67.

Failure to pay overtime

December 2020

25. The next issue is whether the claimant is owed £810.70 for overtime in December 2020. No time sheet has been provided to show that this overtime is owed and the amount. There is reference in emails to an amount outstanding from December 2020 but nothing to say how much and no specific response from the respondent in respect of the amount. The claimant says that he has no access to this time sheet but the remaining time sheets from January 2021 onwards have been provided. If the claimant no longer has the December 2020 time sheet in his possession then he could have asked the respondent to provide the missing December 2020 time sheet.

26. Service reports have been provided at pages 5-11 of the claimant's additional bundle. Although pages 5-10 are stamped, page 11 is not and it is not clear how the figure of £810 being claimed as overtime has been calculated with reference to these service reports. Additionally, it has not been shown that these service reports have been sent to the respondent, together with a time sheet, for approval and payment.
27. In the absence of any evidence of any time sheet, the amount owed and that the time sheet and service reports were sent to the respondent I find that the claimant has not discharged the burden of proof on him that the respondent has made an unlawful deduction of wages by not paying £810.70 for overtime in December 2020.

January 2022

28. The claimant claims overtime for January 2022 amounting to £1530.00. There was no dispute initially that this money may be owed but further to an email received from the respondent's client, the respondent argued that the claimant did not attend the ship (Dubai Galatic) and is not, therefore, owed this overtime.
29. Paragraph 16 of Mr Segaran's statement says that no service report for Dubai Galatic was provided and queried whether the claimant attended the ship and carried out the work. However, Mr Segaran, in evidence before me, accepted that the claimant did attend the ship. This acceptance means that the email the respondent received from their client was incorrect and the claimant did attend the ship although Mr Segaran now queries what the claimant did when he was on the ship.
30. I find that the signed service reports were provided on 24 January 2023 to the claimant who then provided them to Larissa Garth. I find that Larissa Garth was an employee of the respondent at the relevant time and an individual who dealt with overtime and time sheets. I find this as Mr Segaran has himself cced Larissa Garth into his email of 2 February 2022 with a subject heading January timesheet and salary, overtime balance sheet (page 141 of the respondent's bundle).
31. I find, on the balance of probabilities, that the claimant was on the ship, Dubai Galatic working as there is no other reason for him being onboard and that the stamped and signed reports were sent to the respondent as required after being received from the Captain of Dubai Galactic (claimant's additional bundle page 23).
32. I find that that the claimant is owed his January 2022 overtime of £1530.00.

Danger money

33. It is accepted by the respondent that the danger money, although not specified in the contract, is owed. The issue is whether it is £165 per night for 12 nights and therefore £1980.00 or £160 per night for 12 nights and so £1920.00. I find that it is £165 per night. This is the figure given on the time sheet and also the amount stated in the email from Mr Alejandro Diaz on

November 11 at 9.47 (page 130 of the respondent's bundle). The email from Mr Segaran at page 85 of the claimant's bundle although stating £160 refers to the time sheet (which says £165) and I find that the reference to £160 is a typo. My reason for this finding is that the email from Mr Segaran does not challenge the amount per night as set out in the timesheet.

34. I find that the claimant is owed 12 nights at £165 per night and the correct amount payable to the claimant is £1980.00.

Holiday Trade Agreement

35. The claimant sent to the respondent overtime sheets for November 2021 and December 2021 which include holiday trade amounting to £854 for November 2021 and £1899 for December 2021.

36. The claimant said in evidence that there is a holiday trade agreement which was discussed over the telephone and confirmed in an email at pages 120-121 of the respondent's bundle. The email says that holiday booked for 15-26 November 2021 could not be cancelled as too late and so agreed daily hours of 8am -1700 and normal overtime and that 14 -24 December 2021 could be transferred to the following year. I do not find that this email amounts to an agreement or variation of the claimant's employment contract such as to amount to an agreement for the respondent to pay an additional daily amount on top of the claimant's basic salary which would include holidays taken plus any overtime which he worked. If his holiday was cancelled, then for November 2021 and December 2021 he should have been paid his full months wages and any overtime due on days when he worked out of hours. The burden of proof is on the claimant, and he has not shown me to the required standard of proof that he is entitled to additional payments of 10 days wages for each of the days 15 November to 19 November 2021 and 22 November to 26 November 2021 whether he worked or not. The same is true of the holidays taken in December 2021 as page 25 of the claimant bundle shows that the claimant was working those days and the agreement was for these holidays to be carried over.

37. I find looking at the time sheets that 3 days 15-17 November 2021 were taken as leave (the timesheet does not say working from home and there is no evidence of work undertaken by Mr Mannel) and a further 4 days on 22 November and 24-26 November 2021. A total of 7 days holiday was taken in November 2021 and the claimant was paid in full in his November 2021 pay slip.

Holiday pay

38. I find that 9 days holiday from December 2021 were carried over and a further two were added to January 2022 which made a total of 11 days owed. Six days were taken during the notice period and so five days holiday pay remained owed as per the claimant's schedule of loss of 5x144.00 =£720.00

Outstanding expenses of £590 for hotel bill

39. My reading of the email at page 48 of the claimant's bundle is that the expenses of £1780.33 include both the hotel and millage as the email refers to the total amount of the claim and is simply asking for further information to be able to confirm the amount owed.
40. The claimant challenged this interpretation of this email during the oral judgment saying that his additional evidence, at pages 11-13 showed that the hotel expenses were not included in this amount. This additional evidence was submitted with the claimant's written submissions and after evidence had finished. I explained that I have not been specifically referred to this evidence and the information contained within the table and its provenance has not been explained.
41. Mr Gray's confirmed that his instructions were that the hotel expenses of £590 are included in the £1780.33.
42. Mr Mannel accepted that the email at page 48 of the claimant's bundle could be interpreted as stating that the hotel expenses were included, and I maintained my decision that the expenses of £1780.33 includes the hotel bill of £590.00.

Counter claim

43. The claimant accepts that he has retained equipment belonging to the respondent and has never disputed that this equipment has a value of 20,000. The claimant accepted in evidence that he was required to return the equipment to Chelmsford but argues that his retaining of this equipment is not a breach of contract as when he finished work for the respondent he was not at the office. The claimant says he only goes to the office on an ad hoc basis and so the equipment stays with him until he goes to the office to drop it off and he was on holiday his last week of work.

44. I find that the contract is quite clear at paragraph 17.1 and states:

7.1 On request and in any event of termination of your employment for any reason you are required to return to the Company all Company property including but not limited to any Company credit card or charge cards, your security passes, all keys, computer hard and software and all documents in whatever form (notes and minutes of meetings; customer lists; diaries and address books; computer printouts; plans; projections etc.) together with all copies (irrespective of by whom and in what circumstances such copies were made) which are in your possession or under your control.

45. I find that the claimant is in breach of contract for failing to return company equipment to the respondent as he is required to do under the terms of his employment contract. I find that the claimant was aware that he was required to return these goods as he said in an email to the respondent on, I believe the 2 February 2022, (Page 145 of the respondent's bundle) "As already discussed on Monday there is no issue returning the goodies once you pay outstanding monies...It would be foolish of me to return the goodies without monies paid"

46. The claimant said in evidence that he had kept a further £4000 of the respondent's property.
47. The respondent says that further losses have been incurred because the claimant has retained this property. These further losses have not been quantified and no evidence submitted to support this contention and I cannot make any finding either way on this.
48. I do not find that the claimant should repay any training costs as there is nothing in the employment contract to suggest that the costs of any training provided during probation should be paid back if probation is not passed. This can be contrasted with the position for relocation at paragraph 22 of the employment contract which specifically provides for repayment in certain circumstances. If such repayment is said to be part of the employment contract, then I would expect there to be a specific term, there isn't and I find no basis for implying one.
49. The fact that the claimant has retained company property is not a reason for the respondent not to pay any monies due to the claimant but the amount of these goods of £24,000 may be offset against any money that I have found is due to the claimant.

Judgment

50. The claimant's claims for unpaid wages for January 2022, 5 days holiday pay and 12 nights in Israel at £165 per night succeeds.

51. The amount owed is as follows:

Wages for January 2022 - £3,166.67
Overtime for January 2022 - £1,530.00
5 days holiday pay - 5 x £144 = £720
12 nights in Israel - 12 x £165 = £1,980.00.

Gross amount of £7396.67.

52. The claimant's claims for underpayment of wages for February 2021 of £83.86 and for August 2021 of £329.14 succeeds. The claimant is also owed personal expenses in the sum of £1,780.33. This comes to a total of £2193.33 which less agreed deductions of £1,810.00 leaves a net sum of = £383.00.

53. To ensure the claimant receives the correct amount that he is owed the net sum has been grossed up to account for the payment of tax and national insurance which will be the responsibility of the respondent.

£383.00 x 20% = 76.60.
£383.00 + 76.60 = Gross amount of £459.60.

54. The respondent is ordered to pay the total gross sum of £7396.67 + £459.60 = **£7856.27**. This is a gross amount, and respondent is entitled to make any deductions which are due for tax and national insurance contributions before

payment is made to the claimant.

55. The claimant's remaining claims for overtime for December 2020, holiday trade for November 2021 and December 2021 and hotel expenses of £590 are dismissed.
56. The claimant withdrew his claim for £160 of personal expenses and this part of the claim is dismissed.
57. The respondent's counter claim succeeds, and the claimant is ordered to pay the respondent the sum of **£24,000**.
58. Following discussions, the Tribunal understands that the parties have agreed the following process to discharge the Respondent's successful counterclaim. By the 10 February 2023 the claimant is to return to the respondent the company property which he retained at the end of his employment. The property, at the time of the end of the claimant's employment is estimated to have a value of £24,000.
59. On receipt the property will be subject to an inspection for damage (affecting the value of the property) by an independent valuer agreed by the parties. If the parties cannot agree an independent valuer, then the inspection will be carried out by the initial manufacturer of each item.

Employment Judge F Allen
Dated: 6 April 2023