



EMPLOYMENT TRIBUNALS

Claimant: Mr N Draghici

Respondent: Atalian Servest Limited

Heard at: Leeds Employment Tribunal

On: 6 April 2023

Before: Employment Judge Wilkinson

Representation
Claimant: in person
Respondent: Mr A Sendall (counsel)

JUDGMENT

1. The claimant has been paid for all hours worked and all accrued but untaken holiday. Accordingly the claims are not made out and shall be dismissed.

REASONS

Introduction

1. This is Mr Draghici's ("the claimant") claim for unpaid wages and unpaid accrued holiday pay against his former employer, Atalian Servest Limited ("the respondent").
2. The claimant is a litigant in person. He has had the assistance of an interpreter booked by HMCTS. The respondent is represented by Mr Sendall of counsel.
3. The hearing has taken place in person.
4. I have considered the bundle of documents totalling 116 pages. I have also read the witness statement of Mr O'Brien, Operations Manager for the respondent. I also heard oral evidence from the claimant and from Mr O'Brien and heard submissions from both parties.

5. At many times throughout the hearing the claimant queried elements of the tribunal process. I spent some time explaining to him both at the start of the hearing and during the course of it about how the tribunal hearing worked. I gave him the opportunity part way through the hearing to consider Mr O'Brien's statement with the assistance of the interpreter as the respondent had only served it upon him on 5 April 2023. In all of the circumstances I am satisfied that this has been a fair hearing.

The claims, the parties' positions and the issues

6. The claimant brings the following claims:
 - a. For unpaid wages – he says limited to the period between 1 and 14 May 2022 and including overtime which he undertook; and
 - b. Accrued but untaken holiday pay outstanding at the end of his employment.
7. The respondent says that it has paid the claimant all sums owed. It accepts that money both for hours worked and for accrued holidays were outstanding but asserts that these were paid both in July 2022 and again by a final payment made on 5 April 2023. Accordingly the respondent says there are no outstanding sums owed.
8. The respondent takes issue with the claims being in time. The claimant had two periods of employment with the respondent. It is in respect of the first of these (which ran from 26 April 2022 to 15 June 2022) that he claims unpaid wages. Early conciliation commenced on 20 September 2022 and the claim form was presented on 3 November 2022. Therefore the claims relating to the first period of employment are on the face of matters out of time. The respondent therefore asserts that the tribunal has no jurisdiction.
9. The claimant is frustrated that it has taken so long for the outstanding payments to be made. In the course of his closing submissions he suggested that he ought to be awarded compensatory damages of £2,500 as a result of losses he has suffered. This was not something he has raised before either in his ET1 claim form, at a hearing before EJ Moxon on 3 March 2023 or indeed during the hearing before me today. He has not particularised or quantified how he reached that figure and appeared to have reached it arbitrarily. It is not supported by any evidence of loss.
10. The issues before the tribunal can be summarised as follows:
 - a. Has the claimant been paid for all of the hours that he worked?
 - b. If not, how many hours has he worked and not been paid for?
 - c. In respect of the holiday pay claim, has the claimant accrued holiday pay and not been paid for it?
 - d. If so, how many hours of accrued but untaken holiday pay are outstanding.

The legal provisions

11. The applicable law is relatively straightforward. The following principles are engaged. I summarise them only as neither party sought to address me on the legal issues in this case in any detail:
- a. An employee has a right not to have an unauthorised deductions from his wages save for limited circumstances (neither of which apply in this case) – section 13 of the Employment Rights Act 1996.
 - b. Any claims under section 13 of the Employment Rights Act 1996 must be brought within a three month period from the date of the deduction (or last deduction), although a tribunal can extend the period if it is satisfied that it was not reasonably practicable for the claim to have been brought within three months and that the complaint was presented within such further period as the tribunal considers reasonable – section 23 of the Employment Rights Act 1996.
 - c. In respect of the holiday pay claim, this is governed in this case by the contract of employment. The normal rules of contract law apply; namely the tribunal has to consider whether there has been a breach of the contract by the employer by failing to pay accrued but un-taken holiday entitlement.
 - d. I remind myself that the burden of proving the claims rests upon the claimant who makes the assertions of an unlawful deduction from his wages and of a breach of a contract.
 - e. I remind myself that the standard of proof that I need to apply is the balance of probabilities – or the civil standard; namely in respect of any disputed fact I must consider whether it is more likely than not to have occurred.

Relevant facts and findings

12. As with any claim such as this there are a number of factual matters. Some are relevant to the issues that I need to decide and others are not. Of those issues some are agreed between the parties and some are in dispute. Within these reasons I limit my findings to those facts which are probative to the issues that I need to decide. Where a fact is in dispute I indicate that and give reasons for preferring one parties' case over the other.
13. The claimant worked as a cleaner for the respondent. He had two periods of employment:
- a. From 24 April 2022 until 15 June 2022; and
 - b. From 26 June 2022 until 12 August 2022
14. Both of those time periods are agreed. They are supported by two separate contracts of employment and two separate letters confirming the ending of the claimant's employment with the respondent.
15. The claimant worked on shifts of four days' on followed by four days' off. His usual

working pattern was for 12 hour days from 06:00 to 18:00. Additionally he completed overtime at various intervals.

16. The claimant says, and this is supported to some extent by copies of text messages between him and his manager at the time, that he initially resigned in mid-June 2022 because of a dispute around unpaid wages that he had to request on more than one occasion. The claimant told me, and I have no reason not to accept his evidence about this, that he resumed his employment due to repeated assurances that the outstanding wages would be paid to him in future payslips.

Unpaid wages claim

17. The wages for employees of the respondent were calculated as follows:
- a. The employees' hours were recorded both on an internal system 'Timegate' and by way of signing-in and signing-out times on a daily basis on the 'Fire Register'. I have seen copies of both of these records for the entirety of the claimant's employment period.
 - b. The employees were paid on a monthly basis on the 14th of each month for the entirety of the previous calendar month. For example, in this case the claimant commenced his employment on 24 April 2022. He therefore received his first payment on 14 May 2022 which was for the hours worked from 24-30 April 2022 inclusive. His second payslip was on 14 June 2022 which was for 1-31 May 2022, and so on.

In respect of this matter the claimant was unclear. His evidence was that his manager, Ben, had told him that he would be paid his first payment on 14 May 2022 for all hours worked from 24 April 2022 up to 14 May 2022. This was not the evidence given by Mr O'Brien who I found to be clear and accurate in his recollection. Moreover when Mr Sendall questioned the claimant he spent some time taking him through the hours recorded in the Timegate and Fire Register records and comparing them to the payslips which were in the bundle for the 14th day of each month. The hours worked for each calendar month matched with those recorded as having been paid each monthly payslip.

Accordingly I am satisfied on the balance of probabilities that the situation as described above by the respondent is accurate in respect of how it pays its employees' wages.

18. On 15 June 2022, so the day after receiving his wage slip for the month of May 2022, the claimant raised with Ben that he believed that he had been underpaid. Importantly in my judgment he raised at the time that he had been underpaid just 12 hours and no more.
19. It was accepted by the respondent that it had in fact underpaid the claimant for those 12 hours. The respondent's position, supported by Ben's replies to the claimants in text messages that I have seen, was that these would be re-paid in the June payment – i.e. the payment received on 14 July 2022.
20. I have seen the payslip for 14 July 2022. It records as follows:
- a. 128 hours of work (for June 2022) paid at £10.50 per hour and totalling £1,344.00. These hours matched those hours recorded in both the Timegate and Fire Register records as the claimant having worked in June 2022 and there was no dispute that they were accurate. I am satisfied they were.

- b. Leaver holiday pay at 4 days (relating to the claimant's first period of employment) at a rate of £126.00 per day and totalling £504.00 (I shall return to this figure later).
 - c. An item described as 'backpay' for 12 hours at £10.50 per hour and totalling £126.00.
21. In respect of item (c), above, the respondent asserts that this is the 12 hours' of unpaid wages for May 2022 which was missing from the 14 June 2022 payslip. I am satisfied that this is correct. I am satisfied for the following reasons:
- a. The 14 July 2022 was for work done in June 2022. The figure of 128 hours is the total number of hours worked for June 2022 as supported by the Timegate and Fire Register records and so accounts for the work done in June 2022.
 - b. The description 'backpay' suggests it is for unpaid wages.
 - c. The text message conversation between the claimant and Ben suggests that the unpaid wages for May 2022 would be re-paid in July 2022.
 - d. The amount of 'backpay' is for 12 hours which is what the claimant asserts he was underpaid in his text messages to Ben.
22. Subsequent to that and during the course of these proceedings the respondent had further considered its position. When comparing the hours recorded on the Timegate system and the hours recorded on the Fire Record the respondent became aware that there was an additional 12 hour discrepancy. I have been provided with an unchallenged calculation prepared by the respondent. This calculation matches the records from Timegate and the Fire Record within the bundle and sets out as follows:
- a. The Timegate system recorded that the claimant had worked a total of 619 hours.
 - b. Including the back-payment from 14 July 2022 the claimant had been for 595 hours of work.
 - c. This left an outstanding amount of 12 hours' of unpaid work which was owed to the claimant at £10.50 per hour, totalling £126.00.
23. On 5 April 2023 the claimant received a payment from the respondent. I have seen the payment confirmation which was included in the bundle. That records the following:
- a. Backpay for 12 hours at £10.50 per hour, totalling £126.00; and
 - b. Holiday arrears totalling 3.50 days at £126.00 per day, totalling £441.00.
 - c. After deductions for tax the claimant was paid £453.60.
24. In respect of that payment the claimant accepted that he had received a payment totalling £453.60. He told me that he was not aware of how that figure had been broken down because due to the close proximity of time he had not received the payment confirmation document that was included in the tribunal bundle.
25. I am satisfied therefore that those payments were received by the claimant. Indeed I am satisfied, because it recorded in the payslips and not disputed by the claimant, that all of the money owed as recorded in the payslips was in fact paid to the

claimant as asserted by the respondent.

26. The claimant in his evidence appeared at points to concede that he had been paid for the 24 hours in total of unpaid wages that had been identified by the respondent. The claimant however asserted that he had still be underpaid. However I found his evidence on this point to be less than clear or convincing:
- a. Firstly, the claimant was unable to identify what dates and how many hours he claimed that he had not been paid for. The claimant did not challenge the accuracy of the Timegate or Fire Records logs. The claimant failed, despite two orders of the tribunal directing him to do so, to particularise his claim. I gave him significant opportunity to do so in this hearing but he was unable to do so.
 - b. The claimant repeatedly told me that the only time period that he had been underpaid for was between 1 and 15 May 2022. He was very clear that there was no additional period of time that he claimed for. However when Mr Sendall carefully cross-examined the claimant about this, it was clear that (i) both the Timegate and Fire Records for this period matched; and (ii) that the claimant had received remuneration for all of his recorded hours as recorded in a combination of the 14 June 2022 payslip plus the 'back-pay' in the July 2022 pay-slip.
 - c. When the claimant was faced with this he changed position and suggested that there was overtime that he had not been paid for; however a look at the records reflected that the claimant had been paid for overtime. Additionally it was Mr O'Brien's evidence, which I accept, that any overtime would be recorded and paid in the normal manner – i.e. by the two record keeping systems and paid on the 14th of the following month.
27. An issue arose as to an agreement that the claimant said that he had with his manager about payment for overtime. The claimant asserted that Ben had often agreed that the claimant could work for, say 10 hours, but that he would be paid for 12. Mr O'Brien's evidence was that Ben would not have had the authority to do this; however a brief comparison between the Fire Records (i.e. the claimant's sign-in and sign-out times) and the Timegate records (i.e. the official log of hours) showed that on more than one occasion the claimant had seemingly been paid for more hours than he actually worked. The claimant attempted to suggest that Mr O'Brien was therefore lying to the tribunal. I do not accept this. Mr O'Brien is a national Operations Manager. He would have had no working knowledge of the completion of such records and was giving evidence as to company policy. It appears that the claimant may have been correct as to the arrangement that he had reached with Ben. If this is the case then the claimant has benefitted insofar as he was paid for hours that he didn't in fact work. It certainly does not support the claimant's assertion that he was not paid for hours that he has worked.
28. I remind myself that the claimant brings this claim and has the burden to show that he has not been paid for hours that he has worked. In the circumstances I am not satisfied that the claimant has discharged that burden. He has been unable to set out which hours he says he worked which were not paid or indeed that he was underpaid anything over the 24 hours identified by the respondent and for which he has already been paid. I therefore find that the claimant has been paid for all of the hours that he worked and that his claim for unpaid wages cannot succeed.

Unpaid holiday pay

29. Turning to the claimant's claim for unpaid but accrued holidays, the claimant's contract entitled him to 5.6 weeks of annual leave. The annual leave year ran from 1 January to 31 December. Holidays were calculated on a pro-rata basis for

employees who started or left their employment part way through that calendar year. I have seen the contractual terms.

30. Again the claimant has failed to particularise this limb of his claim. On 3 March 2023 EJ Moxon directed that full information was to be provided by 16 March 2023. On 15 March 2023 the claimant said the following in an email to the respondent: 'regarding the holiday pay (*sic*) I am able to estimate a minimum of £800'. In his evidence to the tribunal today he was unable to give further particulars.
31. The respondent has calculated that on a pro-rata basis the claimant was entitled to 4 days of holiday pay for the first period and a further 3.5 days of holiday pay for the second period. When asked questions about this the claimant accepted those figures. On the balance of probabilities I accept the calculations carried out by the respondent.
32. Accordingly the claimant was entitled to 7.5 days of accrued but un-taken holiday pay at a rate of £126.00 per day. This gave a total of £945.00 gross. Again those figures are not challenged.
33. The claimant's case in respect of holiday pay before me today was that he did not believe that he had in fact been paid that amount.
34. I have already referred to the payslip from 14 July 2022 and the pay advice for the payment made on 5 April 2023. They set out as follows:
 - a. 14 July 2022 leaver holiday pay at 4 days - £504.00 (gross)
 - b. 5 April 2022 holiday arrears for 3.5 days - £441.00 (gross)
35. That gives a total of £945.00.
36. As I have already found, the claimant does not dispute that the payments into his bank account have been made. Accordingly I am satisfied that the claimant has been paid for the accrued but un-taken holiday pay for which he was entitled. I am not satisfied that the figure is greater than that for which he has been paid.
37. Accordingly I am satisfied that the claim for holiday pay cannot succeed.

Additional matters

Additional damages sought by the claimant

38. The claimant invited me in the course of his closing submissions to make an award of £2,500 'in damages' due to the delay in receiving the money that was owed to him. This was the first time he raised this issue. I did not hear any arguments in response from Mr Sendall.
39. In any event this argument did not form part of the claimant's claim. It was an unparticularised figure which he seemingly arrived at arbitrarily. It is unsupported by any evidence. The tribunal has limited jurisdiction to award damages and the claimant has failed to properly plead this case or indeed claim it at all until his final oral submissions. Accordingly I am not prepared to make any such award as it has no basis nor evidential support.

Time limit

40. As I indicated during the course of the hearing the evidence that I heard focussed upon the merits of the claim generally. In his closing submissions Mr Sendall did not press me to determine the time limits point as a preliminary matter nor was it

pursued with vigour in cross-examination.

41. For the reasons that I have already given the claim must fail on its merits in any event; however I observe that the claimant's sole complaint in respect of unpaid wages related to the period of 1-14 May 2022. He was very clear that thereafter there were no outstanding wages which he said he was owed.
42. The claimant suggested that he was not aware of the time limit provisions and that he had delayed in bringing the tribunal claim based upon assurances from his manager that he would be paid the money. Against this background it is highly likely that I would have found against the claimant on this matter if I had to make a full decision upon it; however I base my decision in dismissing the claims upon the merits given that this was the way in which the parties approached the issues before me.

Conclusion

43. For all of those reasons the claimant's claims cannot succeed and are therefore dismissed.

Employment Judge **Wilkinson**

Date: 6 April 2023