



EMPLOYMENT TRIBUNALS

Claimant: Yacine Haliti

Respondent: Sismek Limited

Heard at: Manchester (by CVP)

On: 13th March 2023

Before: Employment Judge Cline (sitting alone)

Representation

Claimant: In-person

Respondent: Mr Mohamed El-Ouardy (service engineer)

JUDGMENT having been sent to the parties on 15th March 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

The Hearing and the Parties

1. This matter proceeded by way of a video hearing on 13th March 2023. The Claimant, Mr Yacine Haliti, appeared in person. The Respondent, a limited company, was represented by Mr Mohamed El-Ouardy, a service engineer employed by the Respondent. The Claimant and Mr El-Ouardy were the only witnesses to give oral evidence during the course of the hearing.
2. As requested in the ET3 response form, Mr El-Ouardy was provided with an Italian interpreter during the hearing. We discussed at the outset the level of assistance he required, which was not continuous translation but assistance with certain English words and phrases as needed but with Mr El-Ouardy speaking mostly in Italian. I was satisfied that Mr El-Ouardy was

able to participate in the hearing without any difficulty and he indicated at the end that he agreed with this.

Background

3. By way of an ET1 claim form dated 1st December 2022, the Claimant brought a claim for unpaid holiday pay. Within the claim form, he set out his dates of employment with the Respondent as 15th June to 30th September 2022, during which time he worked as a field service engineer with a gross monthly income of £1,680 (being £1,469 net of tax). Within the box in the claim form containing the details of his claim, the Claimant asserted that the Respondent had refused to pay any of his holiday pay on the basis that he had been given one week's notice before dismissal which, he said, had nothing to do with the question of holiday pay. No other claim for compensation was made.
4. In their ET3 response dated 16th December 2022, the Respondent provided different dates of employment, which they put as 28th June to 22nd September 2022. It was said that the Claimant's contract of employment indicated a start date of 28th June and that his last working day was 21st September as per the dismissal letter sent at 6am on 22nd September. In any event, it was asserted that the Claimant had been paid all holiday pay that was due to him. The Respondent put the Claimant's working hours as 168 hours per week (which was presumably intended to mean per month), with a gross monthly income of £2,127 (being £1,901 net of tax).
5. It was also asserted in the ET3 that the Claimant had only worked 8 days in September but had been paid his "full salary" for that month as per the relevant payslip. In relation to holiday pay, the Respondent asserted that the Claimant had been paid a total of 15 days of holiday during his employment period of 28th June to 21st September 2022, namely:
 - a. 7 days from 22nd September to 30th September, which were considered to be "both holidays and notice"; and
 - b. 8 days in the June payslip, with 84 hours being paid in June, consisting of 24 hours of "normal salary" even though his starting date was 30th June and the remaining 70 hours as agreed "anticipated holidays" (which is clearly incorrect as that would come

to a total of 94 hours, not 84); however it is of course right that 84 (or 94) hours could obviously not have been worked in the last 3 days of June alone.

6. For the avoidance of doubt, no employer's contract claim was intimated by the Respondent in the ET3 response form. There were no separate grounds of resistance.
7. For the purposes of the hearing, the Tribunal was provided with a 21-page bundle which consisted of the following documents:
 - a. The ET3 response form;
 - b. The Claimant's contract of employment dated 22nd June 2022;
 - c. Payslips for June to September 2022 inclusive;
 - d. Dismissal letter dated 22nd September 2022;
 - e. Letter of 3rd January 2023 from the Claimant to the Respondent setting out his entitlement to £883.33 of unpaid holiday pay; and
 - f. Witness statements of Mohamed El-Ouardy and Omar Ait Lhaj on behalf of the Respondent.
8. At the start of the hearing, the Claimant confirmed that he wished to adopt the letter of 3rd January 2022 (noted at paragraph 7(e) above) as his witness statement for the purposes of his claim. Mr El-Ouardy confirmed that Mr Lhaj would not be attending the hearing and I noted that I would therefore be placing only the appropriate weight on his witness statement in the circumstances. In any event, the statements of Mr El-Ouardy and Mr Lhaj were effectively identical in content and simply repeated the factual contents of the ET3. Both the Claimant and Mr El-Ouardy gave evidence under affirmation during the course of the hearing.

The Evidence

9. The Respondent is a small company which, at the time of the hearing, consisted only of Mr Lahj (the sole director), Mr El-Ouardy and a third, unnamed, employee. The Claimant was employed for a short period as a field service engineer.

10. Within the hearing bundle was a contract of employment dated 22nd June 2022 and signed by the Claimant and Mr Lhaj. The commencement date was recorded as 28th June 2022 and the end date of the contract was 30th November 2022. Fairly standard terms and conditions were included but, specifically, the following terms were relevant:

- a. Working hours of 8am to 7pm with one hour for lunch (so 10 hours per day);
- b. 17 standard working days per month; *“you will be notified of the dates based on customer`s requests, You will still be paid your full monthly salary, even if your services will be used for fewer days”*;
- c. Basic gross salary of £20,160 per annum, which is £1,680 per month;
- d. Standard hourly rate of £10, payable in monthly instalments on or before the 10th day following the month worked;
- e. A holiday entitlement which is, unfortunately, totally unclear: *“Twenty-eight (30) working days including UK bank holidays”*; and
- f. The parties both being required to *“give the statutory minimum amount of notice before terminating this contract”*.

11. Also within the hearing bundle was a termination letter dated 22nd September 2022. This letter gives the “contractual” one-week notice period to the Claimant on the basis that his skills are “different from those we need” in relation to communication and “the ability to work in a team”. Full and final pay for September would be provided by 5th October 2022.

12. By way of a letter dated 3rd January 2022 (which, as noted above, was adopted by the Claimant as his witness statement for the purposes of this hearing), the Claimant set out to Mr Lhaj what he believed he was owed. He refers to an employment period of 15th June to 30th September 2022 and asserts that, under the “Employment Rights Act 1996 and Holidays with Pay Act 1938”, he is entitled to 30 days of holiday per year and one week’s notice of termination. He goes on to say that, during his period of service, he did not use any of his holiday entitlement and, as he has worked 3 months and 15 days and has a holiday entitlement of 30 working days, he is owed payment for unused annual leave of 8.83 days. As such, he claimed a total

of £883.33. Although not specified in the letter, this must be a gross figure given the terms of his contract and I take it to be such.

13. In his oral evidence, the Claimant confirmed that, in his view, he had not been paid any holiday pay at all and asserted that his payslips show that this is the case. When it was suggested to the Claimant that he had been paid holiday pay and that this could be seen from the payslips, he said that this was money from a previous agreement which meant that he was paid for half a month in June before the commencement of his contract. When this assertion was explored further, the Claimant said that, although the start date in his contract was 28th June, that was the start of the relevant project but he had not noticed it at the time and his start date was in fact 15th June. When asked if he had any proof that he had worked for the Respondent prior to 28th June, the Claimant said that he had WhatsApp messages and a calendar that would show this but he did not realise that he needed to provide them. He also asserted that the June payslip shows that he was paid for half a month and that this had been agreed verbally despite the contractual start date of 28th June.
14. During the course of the hearing, I allowed the Claimant the opportunity to provide the WhatsApp messages he had mentioned as he suggested that it would support his assertion that he had started work earlier in the June. In the event, when he did produce a copy of the messages, they only showed a revised start date for the relevant project of 29th June being discussed but did not show anything more by way of work being done before then. Upon further questioning of the Claimant, he agreed that he had in fact not done any work for the Respondent prior to the last few days of June and instead said that he was simply relying on the terms of his contract which, in his view, said that he would be paid for the whole of June even if he only worked for the last few days of June.
15. When Mr El-Ouardy gave evidence, I asked him to explain why the June payslip showed a payment of £837.75 if the Claimant's employment had only commenced on 28th June. He told me that negotiations with the Claimant had started several months earlier, in February, for work that ended up being moved back continually such that his employment was postponed until June. He said that the contract was signed on 22nd June

with the first effective date being 30th June but, as the contract had 28th June as the commencement date, the Claimant was owed 3 days' pay even when he was not working as this was, as Mr El-Ouardy put it, the Respondent's responsibility. In explaining the June payment of £837.75, Mr El-Ouardy told me that the Claimant was paid more than his contracted days in June as part of an advance that was agreed verbally on 22nd June when the contract was signed; furthermore, the payslips for the whole of the Claimant's period of employment simply show zero for holidays available, taken and remaining (and therefore zero paid) because this was all effectively rolled up into the verbal agreement for an advance.

16. In light of his account, I asked Mr El-Ouardy if there was any documentary evidence of the purported agreement in relation to an advance and he said that there was not. I then asked him to explain why the payslips show no holiday pay being paid to the Claimant and he repeated his assertion that the holiday pay was rolled up into the agreed advance payment which was paid in the June and that this is confirmed by the fact that the Claimant was paid for 84 hours of work when he in fact only worked for a few days at the end of June. On further questioning, he conceded that there was "no proper system" in place for recording holiday pay and that it was based on "what we say amongst each other".

Findings

17. It will no doubt be clear from the above summary why I formed the view that neither party's evidence was satisfactory given the issues to be determined by the Tribunal.
18. The Claimant asserted initially in his oral evidence that he had started working for the Respondent earlier in June than the commencement date in his contract but was unable to provide any evidence of this even when given the opportunity to produce the WhatsApp messages (which should really have been provided in advance of the hearing in any event). The Claimant then appeared to change his case and said that he relied on the wording of his contract of employment, which said that he would still be paid his "full monthly salary" even if he did not work the full number of contracted days. Given the commencement date of 28th June, only 2 days before the end of

the month, and the absence of any other clear agreement (whether written or verbal), I was not persuaded that the proper interpretation of the contract supports the notion that the Claimant is entitled to paid for the whole of June. Furthermore, the letter sent by the Claimant on 3rd January 2023 setting out what he believed he was owed makes no mention at all of being entitled to pay for the whole of June; in any event, the Claimant ultimately said in his evidence that he agreed with the Respondent that there had been a separate verbal agreement when the contract was signed but that his version of this agreement was that he would be paid for half of June (hence the June payment of £837.75), even though he had not referred to that in his ET1 or in his witness statement or during the initial stages of his oral evidence.

19. Put simply, I found the Claimant's evidence to be internally inconsistent, changeable when challenged and unsupported by any independent evidence beyond his own assertions.
20. The Respondent's evidence was, in my judgment, equally unsatisfactory. There was no evidence provided to support their version of the separate verbal agreement, namely that the Claimant was paid an advance which included his entitlement to holiday pay. Not only was there no evidence of this but the very notion of it is difficult to accept. In effect, the Respondent told me that, at the very start of a 5-month contract, the Claimant was paid an advance for no clear reason which included some or all of the holiday pay to which he would be entitled over the next 5 months as long as he did not actually take those holidays. I found this highly improbable and rejected it as the likely terms of any agreement reached. Furthermore, if it were correct, it seems to me that there would have been far more than 84 hours paid in June in order to generate this payment, given that there would have been at least 3 days (and therefore 30 hours) of work done during the last 3 days of June, which only leaves the equivalent of 5.4 days on top of that.
21. The Respondent was also unable to provide a cogent explanation for why the payslips showed no holiday pay at any stage, despite accepting that the Claimant had not taken any holiday whilst he was employed. Mr El-Ouardy told me, quite candidly, that this was due to the payroll system not being adequate. Whilst he had little choice but to accept the deficiencies in the

payroll evidence given the obvious gaps, I found it highly unimpressive that an employer was, in effect, defending a claim for unpaid holiday pay whilst, even on their own account, being unable to provide any evidence that such payments had been made as they asserted.

22. In the circumstances (and reminding myself that the Claimant bears the burden of proof in asserting his entitlement to unpaid sums), I was unable to make any material findings on the basis of the evidence put forward by the parties during the course of the hearing, most notably in relation to the purported verbal agreement which was made at the same time as the written contract was signed. Not only was it difficult to accept the assertions made by either side but there was no documentary evidence to support either side's account and, indeed, both parties' accounts consisted of elements that were either internally inconsistent or simply not credible. As such, I had little choice but to resort to the best documentary evidence available to me, this being a combination of the contract of employment, the Claimant's payslips for the relevant period and the letter of termination. On that basis, I made the following findings:

- a. The Claimant was employed by the Respondent for 3 months, this being from 28th June (the commencement date in the contract) to 29th September 2022 (one week after the date of the termination letter giving one week's notice);
- b. The Claimant was entitled to 30 days of holiday per year; given the unhelpful and wholly ambiguous terms of the contract (which entitled him to "*twenty-eight (30) working days of holiday*"), I took the view that I must give the benefit of that doubt to the Claimant;
- c. The Claimant took no time off work during his period of employment and was therefore entitled to payment of his full holiday entitlement;
- d. The Claimant was not paid any accrued holiday pay;
- e. As the Claimant worked for 3 months and was entitled to 30 days' holiday per year, he was entitled to 7.5 days of holiday pay;
- f. The Claimant's daily gross salary was £100; and
- g. The Claimant is therefore entitled to £750 gross of unpaid holiday pay.

The Applicable Law

23. There appeared to be no disagreement as to the law that must be applied in this claim but neither party referred to it. For the avoidance of doubt, I reminded myself of the relevant provisions of the Employment Rights Act 1996 which, so far as relevant, read as follows:

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.

...

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

27.— Meaning of “wages” etc

(1) In this Part “wages” , in relation to a worker, means any sums payable to the worker in connection with his employment, including—

(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise

Disposal

24. For the reasons set out above, the Respondent is ordered to pay to the Claimant the gross sum of £750 by way of unpaid accrued holiday pay.

Employment Judge Cline

Date: 17th May 2023

REASONS SENT TO THE PARTIES ON

1 June 2023

FOR THE TRIBUNAL OFFICE