



EMPLOYMENT TRIBUNALS

Claimant: Mr J Kaczmar

Respondent: Marl Pits Garden Centre Ltd

Heard at: Manchester by CVP

On: 6th April 2023

Before: Employment Judge Farrelly (in person sitting alone)

REPRESENTATION:

Claimant: In person

Respondent: Ms G McGrath, Consultant.

RESERVED JUDGMENT

The judgment of the Tribunal is as follows:

1. The complaint of breach of contract is well founded. The claimant is entitled to £1730 net in respect of holiday pay.
2. The complaint in respect of unauthorised deductions from pay is upheld: the respondent is not authorised to deduct £400 from the holiday pay due. The claimant acknowledges indebtedness of £120 and this shall come out of the total awarded.

REASONS

Introduction

1. In a claim received on 17th January 2023 the claimant sought arrears of pay. He quantifies this at £1730, being 17.3 days of holiday entitlement multiplied by his daily rate of pay, £100.
2. The respondent acknowledges that he had annual leave accrued, put at 13.8 days. This totals £1380. The respondent seeks to deduct from this figure £125 in respect of property belonging to the respondent. The claimant acknowledges

indebtedness of £120. The respondent also claims he was overpaid £400 in September 2022 because of four days unauthorised absences. He has been paid £855, the amount after these deductions, and according to the respondent there now is no outstanding indebtedness.

3. Two issues arise. The first is when he started his employment. The start date affects his entitlement to holiday pay. The second is whether his employer was entitled to set off wages relating to several days when they say he was absent from work without authorisation.

The Evidence.

4. The parties produced a bundle of documents. The first bundle consisted of 105 pages. The claimant gave oral evidence. He also produced a series of screenshots and text messages from his phone. These were reproduced in the supplementary bundle which were provided at a late stage. I admitted them because they were relevant and whilst they should have been provided earlier the content did not take long to follow. In admitting the document I was conscious that the claimant was unrepresented and the procedural rules states that overriding object is to deal with cases fairly and justly. The respondent relied upon the Witness Statement of Mrs Nelson who works in the business. Her husband is a director and also works in the business. She also gave oral evidence.

Fact finding

5. The claimant had his own business which due to Covid and various other factors failed. He was declared bankrupt. He knew Mr Nelson through visits to the garden centre he ran and Mr and Mrs Nelson's visits to his business when it was operational. The claimant obtained employment with the respondent at its garden centre. The business operates through a limited company. The director is Mr Michael Nelson. He worked on site. His wife Laura worked part-time, primarily on the bookkeeping. Her husband dealt with the daily running of the business.

6. He said he saw a position advertised and telephoned and spoke to Mr Nelson. They had known each other before. He said there was an informal interview. He claims that he was told to start the next day on a one-day trial. He dates that at around mid-February and later referred to the 21st of February 2022. He said he received his first payment on 26 February which was paid into his husband's account. He did not have confirmation of this. The claimant says he was never offered a written contract of employment.

7. For the first couple of weeks monies were paid into his husband's bank account as he, being a bankrupt, could not have his own account. Some of his earnings were paid in cash. Then, from the middle of March 2022 onwards the monies were paid directly into his husband's account. He said he received electronic payslips but this ceased from July 2022.

8. The claimant has provided emails from his phone between himself and Mr Michael Nelson. The first communication is dated 25 February 2022. It is from Mr Nelson to the claimant, apparently referring to stock. I have no reason to doubt the accuracy of the dates given. There is an email dated 26 February 2022 at 18.54 stating: 'thank you for taking a chance on me' The response is '... See you on

Monday.' There is another email dated 27 February 2022 from Mr Michael Nelson stating '... I would like you to work at the garden centre tomorrow with....' There is then a text from the claimant to Mr Nelson which includes 'what time and doing what tomorrow?' There is a text from the claimant dated 3 March 2022 which appears to relate to the pricing of a job off-site.

9. The respondent states he began work on 14 March 2022, three weeks later . It is denied he is owed holiday pay and it is asserted that all payslips had been provided. It is stated that his employment ended on 4 October 2022, a day later than the claimant states. It is also stated that all of his wages were paid into his husband's bank account and none in cash.

10. At hearing Ms Nelson adopted her statement . She agreed she and her husband had known him from his attendance as a customer and their visits to his business. In oral evidence she said the claimant came to their premises in early March unannounced and had a conversation with her husband about work. She said he started doing work that day and subsequently with no specific agreement. He was paid in cash and also in kind by way of plants.

11. She stated that as this was a quiet season he was advised there were no opportunities for employment at that time but there would be when things picked up in the spring. She said there can be a flurry of activity around Christmas time and then things quieten and they virtually close in January and February. In March they start to get ready for the spring season .

12. She said that every Thursday she did up the wages. She arranged to have a contract available for the appellant but this was never signed. She said he appeared on the payroll for the week commencing Monday, 14 March which she takes as the start of his employment. She acknowledged that the claimant had asked to be paid in cash but said it was paid into his husband's account. She also states that he refused to sign the contract document.

13. There is a letter dated 16 March 2022 to the claimant from Mr and Mrs Nelson which purports to confirm the claimant's work with the respondent company. The contract is to commence on 16 March 2022. He is described as an operative as well as a marketing and online supervisor. His hours of work are given as 8 am to 5.30 PM, five days per week, with the company varying the pattern as required. He was to be paid £100 per day. It states the leave year runs from 1 April 2022 to 30 March 2023 and he was entitled to 28 holidays inclusive of statutory holidays. The holiday pay was to be calculated on the same basis as if he had been at work. The letter ends by stating that if the claimant is in agreement with those terms and conditions he was to sign the letter. The letter provided is not signed by the claimant. There is a handwritten note on the document which appears to read 'Returned regretted April 2022'.

14. There is another plain piece of paper which states 'Joe first official day and then 'Joe started on 14th . At the bottom of the note is 'absence 26/27/28/29 Sept'. There is a handwritten letter from the claimant containing the date 3 October 2022 which states, 'please accept this letter as formal notice of my immediate resignation... I acknowledge that the immediacy of my departure may cause some minor inconvenience, but personal circumstances dictate my departure.' He then goes on to state 'please let me know by reply email when to expect my 13.3 days of

accrued holiday entitlement..’ It is indicated he will return company property over the coming days.

15. There is then a follow-up email from the claimant to Mr Michael Nelson stating ‘there appears to be a delay in receiving my holiday pay and corresponding payslips. I’m sure this is a simple oversight.’ The letter is dated 1 November 2022. There is then a further email from the claimant to Mr Michael Nelson dated the 2 November 2022 where he acknowledges he has company T-shirts which he will return.

16. There are payslips for the appellant, the earliest of which refers to a payment date 31 March 2022 and the taxable pay is £1400. It refers to month 12. The next payslip is for 30 April 2022 and refers to payment period month 1. The net basic is for £2550. The next payment slip is dated 31 May 2022 and refers to month 2. The pay again is £2500 gross. The next pay slip is dated 30 June 2022 and refers to month 3. The pay is £2250 . There is then payment given as 31st of July 2022 with the taxable pay of £2400. The next is dated 31 August 2022 and refers to month five. The total gross pay is £2100. There is a payslip for 30 September 2022 described as month 6. The next payslip jumped forward to 20 February 2003 in respect of month 11. It says the total taxable pay was £855. Under the heading ‘additional information’ is inserted 13.8 days holiday, minus £125 plants, minus £400 overpayment September 2022.

The law.

17. Subject to certain conditions and exceptions not relevant here, the Tribunal has jurisdiction over a claim for damages or some other sum in respect of a breach of contract which arises or is outstanding on termination of employment if presented within three months of the effective date of termination (allowing for early conciliation): see Articles 3 and 7 of the Employment Tribunals (England and Wales) Extension of Jurisdiction Order 1994.

18. The right not to suffer unlawful deductions from pay arises under Part II of the Employment Rights Act 1996. Section 13(3) deems a deduction to have been made on any occasion on which the total amount of wages paid by an employer is less than the amount properly payable by him. That requires consideration of contractual, statutory and common law entitlements. Such a deduction is unlawful unless it is made with authority under section 13(1) or exempt under section 14.

The application of the law and the findings of fact to the issues

Conclusions on the dates of employment

19. I find as a fact that the appellant was employed as an employee by the respondent since 21 February 2022 until he left. On the balance of probabilities I find more reliance can be placed upon the evidence of the claimant in this regard than that of Ms Nelson.

20. There is an absence of documentary evidence about when the employment began. In particular, there should be documentary evidence to support the claimant’s account but he has not produced this. For instance, he refers to an advertisement for the position but this is not provided. He also said that his first payment on 26 February 2022 was paid into his husband’s bank account. He is not provided

confirmation of this. These are shortcomings and it is for the appellant to prove his case. Nevertheless, I am satisfied from the totality of the evidence I can accept his claim .

21. The letter provided by Ms Nelson suggesting it commenced on 16 March 2022 is unsigned. Significantly, the note provided contains the reference to 'Joe first official day.' There is then reference to a note referring to absences 26/27/28/25. I take this to be a reference to the claim he did not work. It is my conclusion that this is not a contemporaneous record. Rather, I believe it is Mrs Nelson trying her best to think out and recollect events. This would be evidenced by the references to what appear to be the disputed absences in September. The reference to the claimant's first date in my view is Mrs Nelson seeking to work backwards and recollect. It cannot be an immediate report because of the references to the days of absence which were subsequent.

22. I believe the claimant and Mrs Nelson gave their evidence to the best of the recollection. I saw no evidence they were intending to mislead intentionally. However, I have not had the benefit of hearing from Mr Nelson who was the one mainly dealing with the claimant. I found this to be a weakness in the respondent's defence of the claim.

23. I am significantly influenced by the screenshots the claimant has provided. These would indicate a very good relationship between himself and Mr Nelson. The tone goes beyond that of a formal relationship and would suggest a friendship and that the arrangements began on an informal basis. I find the appellant did work when he says but in the early stages he was paid either in cash or kind. It was at a later stage that Ms Nelson sought to put the relationship on a more formal basis by obtaining a draft contract and starting to issue wage slips. I find the reference to it being his first official day in the note very telling and suggests there was an earlier period when work was done. This indicates to me that there was work before that and the relationship was not on a formal basis. The appellant's subsequent emails about his holiday pay early on support he had started work in late February and was due holiday pay.

The unpaid leave

24. The appellant was paid £400 at £100 per day for the four days from the 26 to 29 September. The respondent states they subsequently learnt he did not work on those days. They seek to offset this in their calculation of indebtedness.

25. The appellant's account is that he was given a three-week period to promote Christmas products, such as Christmas trees and wreaths and so forth. To this end he prepared a brochure and identified potential business customers. He said he prepared a spreadsheet in relation to this work. He had a personal Mac computer and because of compatibility issues he used the computer belonging to his employer on their premises. However, with the other demands on the business and his own approaching holiday he truncated the intended three-week campaign to several days. On those days he said he would go out his own car. He said for part of the day he would do work in the garden centre. He said that his employers indicated they would sort out the petrol costs later.

26. Against this, Ms Nelson said that their business could not have accommodated a three-week period as described and would have done this work over a five-day period. In any event, Ms Nelson maintains the appellant never did this work. Consequently, no orders came into the business. She added that from her enquiries with 300 shops no one could recall the claimant attending to sell trees. She also refers to two employees, Ann and Chris, whom she says did not see the claimant on those days. She said the business had several vans with logos which employees use .She added that if the claimant worked part of a day he could not then be presentable to seek out new business.

27. Again, I go back to the content of the emails produced by the claimant and find he was enthusiastic about his work and had ideas of his own. Although he did not provide the spreadsheets he described I conclude he did engage with a Christmas campaign. Regarding the claim he was not at work, the evidence put forward is of limited probative value . There is reference to two employees to the effect they had not seen the claimant. However, they have not attended nor do I have statements from them. Furthermore, the fact orders were not received does not necessarily mean the claimant was not trying to obtain sales.

28. There was a factual dispute as to the mode of transport. The claimant said he took his own vehicle whereas Ms Nelson said there were a series of vans available. It does not mean however that the claimant had to use the vans and there is no suggestion he was carrying samples. He indicated that when canvassing for work he would have to appear smartly dressed and will be out of his work clothes. Again, on the balance of probabilities I find that the claimant did work as he claimed. I did not hear evidence to indicate he was required to always attend at the centre before going to seek orders. His reference to using his own vehicle and being smartly dresses would suggest he went from home. This may also explain why the other employees had not seen him.

29. In summary, I find he is entitled to the monies he claims. Regarding deductions, in light of my finding that he did work for the four days there can be no reduction in this regard. The claimant acknowledges that he is indebted to the tune of £120. The respondent puts this at £5 pounds more. I have no itemisation. In the absence of further detail I would proceed on the figure quoted by the claimant of £120.

Decision

30. The complaint of breach of contract is well founded. The claimant is entitled to £1730 net in respect of holiday pay .The complaint in respect of unauthorised deductions from pay is upheld: the respondent is not authorised to deduct £400 from the holiday pay due. The claimant acknowledges indebtedness of £120 and this shall come out of the total awarded.

Employment Judge Farrelly

Date: 29th May 2023.

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON 8 JUNE 2023

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.



NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990 ARTICLE 12

Case number: **2401539/2023**

Name of case: **Mr J Kaczmar** v **Marl Pits Garden Centre Ltd**

Interest is payable when an Employment Tribunal makes an award or determination requiring one party to proceedings to pay a sum of money to another party, apart from sums representing costs or expenses.

No interest is payable if the sum is paid in full within 14 days after the date the Tribunal sent the written record of the decision to the parties. The date the Tribunal sent the written record of the decision to the parties is called **the relevant decision day**.

Interest starts to accrue from the day immediately after the relevant decision day. That is called **the calculation day**.

The rate of interest payable is the rate specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as **the stipulated rate of interest**.

The Secretary of the Tribunal is required to give you notice of **the relevant decision day**, **the calculation day**, and **the stipulated rate of interest** in your case. They are as follows:

the relevant decision day in this case is: 8 June 2023

the calculation day in this case is: 9 June 2023

the stipulated rate of interest is: **8% per annum**.

Mr S Artingstall
For the Employment Tribunal Office

GUIDANCE NOTE

1. There is more information about Tribunal judgments here, which you should read with this guidance note:

www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

If you do not have access to the internet, you can ask for a paper copy by telephoning the Tribunal office dealing with the claim.

2. The payment of interest on Employment Tribunal awards is governed by The Employment Tribunals (Interest) Order 1990. Interest is payable on Employment Tribunal awards if they remain wholly or partly unpaid more than 14 days after the **relevant decision day**. Sums in the award that represent costs or expenses are excluded. Interest starts to accrue from the day immediately after the **relevant decision day**, which is called **the calculation day**.
3. The date of the **relevant decision day** in your case is set out in the Notice. If the judgment is paid in full by that date, no interest will be payable. If the judgment is not paid in full by that date, interest will start to accrue from the next day.
4. Requesting written reasons after you have received a written judgment does **not** change the date of the **relevant decision day**.
5. Interest will be calculated as simple interest accruing from day to day on any part of the sum of money awarded by the Tribunal that remains unpaid.
6. If the person paying the Tribunal award is required to pay part of it to a public authority by way of tax or National Insurance, no interest is payable on that part.
7. If the Secretary of State has claimed any part of the sum awarded by the Tribunal in a recoupment notice, no interest is payable on that part.
8. If the sum awarded is varied, either because the Tribunal reconsiders its own judgment, or following an appeal to the Employment Appeal Tribunal or a higher court, interest will still be payable from **the calculation day** but it will be payable on the new sum not the sum originally awarded.
9. The online information explains how Employment Tribunal awards are enforced. The interest element of an award is enforced in the same way.