



EMPLOYMENT TRIBUNAL

Claimant: Mr Graham Leslie Buckley

Respondent: Hawk Developments Ltd

HELD AT: Birmingham (Cloud Video Platform)

ON: 12 May 2023

BEFORE: Employment Judge Kelly

REPRESENTATION:

Claimant: In person

Respondent: Not appearing

ORDER

1. It is declared that the claimant is entitled to a redundancy payment in the total sum of £5,280.
2. The respondent must pay to the claimant, by 4pm 19 May 2023, the following sums:
 - a. the sum of £5,280 in respect of his redundancy payment;
 - b. the sum of £3,840 in respect of unpaid wages less any tax and national insurance due;
 - c. the sum of £3,840 in respect of his notice entitlement less any tax and national insurance due; and
 - d. the sum of £1,280, being a sum of compensation by way of the respondent's breach of the requirement to provide written particulars under s.1 of the Employment Rights Act 1996.

REASONS

1. The claimant seeks an award for (a) unpaid wages for the period unpaid, believed to be, from 12 October 2021 to 31 March 2022, (b) unpaid notice pay, and (c) a redundancy payment.
2. The claimant was a labourer employed by the respondent since 15 August 2010 and was dismissed, without notice, by reason of redundancy (the respondent went into liquidation) on 31 May 2022. This is 11 complete years at the date of dismissal.
3. The claimant lodged at ET1 with brief grounds of complaint which were explored in the hearing. There was no appearance on behalf of the respondent company, which is now in liquidation, and although the liquidator submitted an ET3, that submission was out of time and rejected as there was no application for an extension of time or any explanation as to why the ET3 was late.
4. Although the claim is therefore uncontested, the tribunal must still be satisfied that it is proper to make an award for the sum claimed by reference to the facts relied upon by the claimant.
5. The ET3 lodged referred to Mr Buckley effectively working on a zero-hours contract and that as there had been no pay made to him in a period exceeding 12 weeks, that he would therefore be entitled to nothing. That is a bad point in law for reasons I address below, despite not having to do so, given that the claim is one that is effectively not resisted.
6. There was no apparent suggestion by the liquidator that the claimant was not an employee, and indeed, given the evidence I have heard from him today, I am satisfied that he was an employee.
7. The claimant explained that he had worked for the respondent for c. twelve years. For the last nine years or so, he has been working four days a week, sometimes, he said, doing extra hours as the respondent might request, with him being paid for those additional hours. The claimant has never provided with a written contract of employment and has never received a payslip, contrary to the requirements of ss. s.1 and 8 of the Employment Rights Act 1996.
8. The claimant is 74 years of age. He explained that he had been working for the respondent for eight hours each day, four days a week, Monday to Thursday, with Fridays typically not being worked although his non work day could be switched by agreement and sometimes was. On occasion, however, he would work additional hours, on Fridays and other days as the respondent required.
9. I am satisfied that there was an obligation for the employee to work those times and indeed, for the respondent to pay for that work. He therefore had normal working hours and a minimum contractual commitment to work 32 hours per week.
10. The claimant provided a breakdown of his payments received over the period 25 February 2021 to 28 September 2021, these being said to be furlough payments. The claimant

explained that he was never provided payslips, but that he believed his hourly rate was £10. At 32 hours a week, £10 per hour, this equates to £320 per week. This is broadly in line with furlough payments referenced, which initially at least, were broadly 70% contribution from the state, with 10% from an employer of the usual wages paid. Although the furlough figures are a little under what would be expected applying these percentages to the £320 per week said to be due to the claimant, absent payslips and written particulars, both of which the respondent was mandated to provide, and absent any challenge to the figures even in the rejected ET3, I can do little more than carry out a rough assessment as to the credibility of the claimant's evidence by reference from the payments referenced, which broadly speaking, are about right. As such, I accept the claimant's evidence that he was entitled to a minimum sum of £320 per week, based on eight hours over four days at £10 per hour (i.e. 32 hours a week).

11. As such, a week's pay is calculated by reference to s.222 of the 1996 Act. As this would increase, beyond the £320 figure from time to time, I should take account of this in the calculation of a weeks pay, over a twelve-week period, save that the claimant is unable to say what extra time he might have worked and so, I cannot do so.
12. By s.223 of the 1996 Act, periods where there has been no payment are not to be taken into the calculation of the weekly pay for purposes of a redundancy payment. Had the liquidator thus have appeared to progress that argument, it would have failed.
13. To the extent that pay was received on furlough, the effect of the Employment Rights Act 1996 (Coronavirus, Calculation of a Week's Pay) Regulations 2020 SI 2020/814, is that the appropriate figure to take for the purposes of determining a week's pay over the preceding 12 weeks is the reference rate for the application to the scheme. Absent any material from the employer, any payslips or other material, I accept that the figure used for the job coronavirus job retention payments is £320 per week, which as I say, is broadly in line with the figures provided in the furlough period by the claimant.
14. I am satisfied that the claimant is entitled to a redundancy payment and that the correct sum of that, is comfortably the figure he has calculated with the assistance of the Government's redundancy calculator, based on 11 complete years as at the date of dismissal.
15. The sum due to the claimant therefore from the respondent for his redundancy payment is therefor £5,280.
16. In addition, the claimant was not paid his twelve-week notice period, a period of notice recognised in correspondence dismissing the claimant, and accordingly, he is due the sum of £3,840 gross is awarded. If any deductions for tax and national insurance are to be made from such payments, they will need to be made.
17. There is then the unpaid element of the claimant's work, which although limited to three months in his ET1, would in all reality be greater if he was unpaid for work he was committed to undertaking in the period 12 October 2021 to 31 March 2022. Accordingly, I am satisfied he should be awarded his unpaid pay for the twelve-weeks that he claims, which is the sum he seeks, of £3,840 gross. Again, if deductions need to be made for tax and national insurance, they will need to be made.

18. Furthermore, these proceedings raise the question as to whether the claimant is entitled to a redundancy payment under Part 8 of the Employment Rights Act 1996. References to the tribunal for determination as permitted under s.163 of the 1996 Act. By s.38 of the Employment Act 2002, a tribunal must award compensation to a worker where, on a successful claim under any of the jurisdictions set out in Schedule 5 of that Act, it becomes evident that the employer was in breach of its duty to provide full and accurate written particulars of under s.1 of the ERA 1996. References to the tribunal to determining an entitlement to a redundancy payment appears within Schedule 5 and, accordingly, given that I accept Mr Buckley's evidence that there was never a written contract of employment, I must award compensation where I find in favour of the worker. I may award either two or four weeks pay.
19. Given that no written particulars or payslips have been provided in almost twelve years, and no payslips have been provided for such a long period, this is a complete flouting of the requirement of employment law designed to offer some protection to employees. It is a case deserving on four-week award, of £1,280 and that is the award made.
20. Therefore, the total sum awarded overall is £14,240, less any tax and national insurance that might be due in relation to the unpaid wages and notice pay elements of the claim.

Signed electronically by
Employment Judge Kelly
12 May 2023