



EMPLOYMENT TRIBUNALS

Claimant: Mr Ross Mansion

Respondent: Change Hospitality Hub Ltd

Heard at: Birmingham via CVP

On: 6 July 2023

Before: Employment Judge Bennett

Representation

Claimant: in person

Respondent: no attendance

JUDGMENT having been given orally on 6 July 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 Claim

1. The Claimant's claim is for the following:
 - a. Failure to provide itemised pay statements under s8 ERA;
 - b. Unnotified deductions in respect of amounts taken from gross pay;
 - c. Accrued but unpaid holiday allowance for the first 3 months of employment;

- d. Compensation under the Agency Worker Regulations 2010 in respect of:
 - i. hourly pay;
 - ii. accrued but unpaid holiday allowance.

The Respondent

2. The Respondent had failed to file any response to the claim. The Respondent had failed to engage with ACAS in connection with early conciliation. The Respondent did not attend the final hearing and was not represented.
3. Having reviewed the Tribunal's file and heard oral evidence from the Claimant I was satisfied that the Respondent was aware of the claim and of the final hearing but had elected not to participate.
4. Consequently, aside from indicating to the Claimant in an email on the day prior to the final hearing that the Respondent did not accept that the Claimant was owed any payments, the Respondent has not put forward any substantive response or challenge to the claims lodged by the Claimant.

The Claimant

5. I found the Claimant to be a meticulous witness. He provided thorough and careful evidence supported by explanation and reasoning and I found that this was fully consistent with the documentation in the bundle. I note that the Claimant on occasion corrected himself where he felt that something he said may have been misleading, especially where he felt that this would have been to misrepresent his claim to his own advantage. In particular I note his honesty and openness about his realisation (after submitting the ET1) that his calculations in respect of annual leave did not take account of the fact that he was not a full time worker and so may need to be amended.
6. I take the unusual approach of saying at the outset that I accept the Claimant's evidence in its entirety and I found him to be a wholly credible and accurate witness.
7. Given my findings regarding the accuracy of the Claimant's oral and documentary evidence it is not necessary for me to go further. I accept his case as pleaded. Nonetheless I proceed to consider each of his heads of claim in brief.

Failure to provide itemized pay statements / Unnotified deductions from wages

8. The Claimant worked for the Respondent for 38 weeks. The Claimant has taken me to the Excel extract in his bundle which consists of information which the Claimant says, and I accept, he downloaded from the 'Commensura' payment portal which gives details of working times and dates.
9. The Claimant was paid weekly in arrears.
10. The Claimant only received pay statements in respect of 7 weeks of his employment. These appear in the bundle at pages 101 – 106. In making this finding I have taken account of the Claimant's oral evidence and the various emails from the Claimant to the Respondent in the bundle requesting payslips.
11. The last of the 7 payslips provided to the Claimant relates to the week ending 26/5/22, which can be seen at page 106 of the bundle. No payslips were received after that date.

Relevant Law

12. Under s12 ERA If a Tribunal finds that a worker has not received a pay statement, or that the worker has received one but it does not contain the required particulars, it must make a declaration to that effect. Where the Tribunal finds that any unnotified deductions have been made during the 13 weeks immediately preceding the tribunal application, it may also make a monetary award to the worker under s.12(4). The maximum award is the aggregate of unnotified deductions made during those 13 weeks.
13. The Claimant has calculated the amount of (gross) pay that he was due during the 13 weeks immediately preceding his Employment Tribunal claim. He arrived at this figure using the Excel document at page 256. Due to the claim being brought 3 weeks after the termination of his employment he took figures for the most recent 10 weeks of employment.
14. The figure for gross pay was found by calculating the 'total units' (which is the number of hours worked each week) by the rate of pay at the time (£10.47). As the Claimant rightly pointed out in his witness evidence, this 'real' figure is the correct one to use because the issue of underpayment is being addressed under a separate head of claim.
15. This gives total gross amount of pay for the 13 relevant weeks prior to claim.

16. The Claimant then calculated the total net amount that he had been paid by referring to the payments from the Respondent into his bank account for the relevant period.
17. The total unnotified deductions is therefore the 'Total gross sum minus the total net sum'. This gives the figure of £395.58.

Claim for unpaid holiday allowance during first 3 months of employment

18. It is the Claimant's evidence that he did not take any paid holidays during his employment. This is corroborated by his emails with Respondent in which he states on a particular occasion that he would rather save his paid holiday and take unpaid leave. I accept he took no paid holiday.
19. The Claimant did not receive pay for accrued but untaken holiday pay on termination of employment.
20. A five-day-a-week worker has a minimum statutory annual leave entitlement of 28 days.
21. Under the Claimant's contract he was entitled to 1.88 days holiday per full month worked. He was not entitled to paid bank holidays. This contractual entitlement is less than the statutory entitlement and therefore the statutory entitlement overrides. The Claimant's contract states that he will be paid in respect of untaken but accrued holiday on termination (page 75).
22. A full time worker would accrue 2.33 days per month according to the minimum statutory entitlement.
23. The Claimant is entitled to pay in respect of 2.33 days per month x 3 months x 84% which is the percentage of hours that he worked compared to the hours that would have been worked by a full-time employee.
24. This amounts to 5.87 days of holiday that the Claimant accrued during the first 3 months.
25. 5.87 days x 7.25 (which is the number of hours worked by Claimant each day) = 42.56 hours. At the Claimant's rate of pay at the time of £9.77 gross this amounts to a sum of £415.81
26. The Claimant is entitled to a sum in lieu of accrued but unpaid holiday in this amount.

Agency Workers Regulations 2010 (AWR)

27. The Claimant was employed by the Respondent. The Respondent hired the Claimant out to Nuneaton & Bedworth Borough Council. The start date

of employment was 5 April 2022 and employment terminated on 23 December 2022.

28. The Claimant's 12 week qualifying period with the Council finished on 28 June 2022. After this time regulation 5 of the AWR applied. This states that after 12 weeks an agency worker is entitled to the same basic working and employment conditions as he would be entitled to for doing the same job had he been recruited by the hirer:

- a. Other than by using the services of a temporary work agency; and
- b. At the time the qualifying period commenced.

29. Regulation 6 of the AWR states that relevant terms and conditions include, so far as is relevant for current purposes:

- a. Pay; and
- b. Annual leave.

30. In the event of a breach of the AWR the Claimant is entitled to compensation that is '*just and equitable having regard to infringement or breach; and any loss attributable to the infringement*'. This must not be less than 2 weeks' pay.

Hourly pay

31. The Claimant received £10.47 for hours worked after the 12 week qualification period.

32. In December 2022 the Claimant's (permanent) colleagues at the Council received a pay-rise backdated to April 2022. If the Claimant had been employed directly by the Council he would have been paid the rate of £11.18 per hour.

33. I consider it just and equitable to award the Claimant a sum in respect of the difference between what he was actually paid and what he should have been paid for weeks of employment following 28 June 2022.

34. It is the Claimant's evidence that he worked 826 hours of employment after 28 June 2022. I accept his calculation is accurate.

35. The difference between the amount paid to the Claimant (£10.47) and permanent employees (£11.18) is 0.7128 pence per hour. 0.7128 pence per hour x 826 hours = £588.77.

Holiday pay

36. Permanent Council employees received a total of 35 paid days holiday per annum – I have had regard to the emails between the Claimant and his manager at the Council (Gav Orton) and Ruth Bartlett (Head of HR for Council) which appear in the bundle at page 183.
37. The Claimant should also have accrued 2.91 days of leave per full month worked after his first 12 weeks.
38. The Claimant has set out how he calculated the amount owed in respect of claims. His workings are shown in his bundle and are clear and sensible. I note in particular the calculations on the page 'item 001' of the bundle. I agree with these calculations.
39. According to his hours worked as a percentage of full-time hours, the Claimant worked 88% of full time hours in the 5 month period after 28 June 2022.
40. $2.91 \times 5 \text{ months} \times \text{£}81.08 \text{ daily rate of pay} \times 0.88\% = \text{£}1038.14$
41. I also take account of other miscellaneous posting, printing costs that the Claimant incurred in connection with his AWR claim and I estimate these to be in the region of £50.

Preparation time order

42. I have decided to make a costs order in favour of the Claimant. I have had regard to rule 76(1)(a) of the ET Rules of Procedure. I find that the Respondent has acted unreasonably in the conducting of proceedings by, in particular:
- a. not engaging in any way with the Tribunal in relation to the Claimant's claim;
 - b. in correspondence with the Claimant by telling him (in relation to the Claimant's separate claim for unpaid wages) to go via a court process to recover sums due;
 - c. in their email to the Claimant the day before the Tribunal hearing in which the Respondent states "Don't matter what anyone says you was paid correct fact"; yet
 - d. by failing to attend the final hearing or to acknowledge the claim.
43. In view of the above I also conclude that the response has no reasonable prospect of success and costs are also merited under rule 76(1)(b)

44. Rule 79 requires a Tribunal to decide the number of hours in respect of which a preparation time order should be made. This assessment must be based upon:

- a. information provided by the receiving party in respect of his or her preparation time — rule 79(1)(a), and*
- b. the Tribunal's own assessment of what is a reasonable and proportionate amount of time for the party to have spent on preparatory work, with reference to such matters as the complexity of the proceedings, the number of witnesses and the documentation required — rule 79(1)(b).*

45. The Claimant says he spent 22 hours preparation time excluding attending the final hearing and excluding time spent on the concurrent proceedings to recover his week's pay. I accept that this is a true reflection of the time spent and I further consider that it is reasonable and proportionate in accordance with the relevant test.

46. The Claimant has been measured and reasonable throughout his dealings with the Tribunal. He has produced a bundle with all relevant information and nothing that is clearly irrelevant. His estimate of time spent appears modest in the circumstances.

47. The current rate for preparation time, as of 6 April 2023, is £43 per hour. 22 hours x £43 = £946.

Employment **Judge Bennett**

10 July 2023