



EMPLOYMENT TRIBUNALS

Claimant: Mr JE Aristizabal Montoya

Respondent: Elysium Construction Ltd

Heard at: London Central, via CVP **On:** 11th December 2023

Before: Employment Judge Moxon

Representation

Claimant: In person

Respondent: Ms Grossman, counsel

JUDGMENT having been sent to the parties on 11th December 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

These reasons are supplied at the request of the Claimant.

Introduction

1. The Respondent is a construction company and employed the Claimant as a commercial manager from 3rd October 2022 until dismissal on 6th February 2023.
2. During the course of his employment, the Claimant was given access to a company laptop and mobile telephone.
3. By claim form, the Claimant claimed unlawful deduction of wages, breach of contract and accrued and unpaid holiday pay. The issues were identified during a preliminary hearing before Employment Judge Singh on 7th July 2023 and were further narrowed at the outset of the final merits hearing.
4. The claim was opposed in full by the Respondent. It accepted that it had withheld some of the money owed to the Claimant as he had failed to return the laptop and mobile telephone, but that this was permitted by the terms of the contract of employment.

Background

5. The Respondent's head office was based at Avon House in London. It had customer sites in Scotland and in Slough.
6. The Claimant was offered a role and provided with an employment contract, dated 3rd October 2022, which stated that his job title was "*Commercial Manager*" and his salary was £75,000 per annum.
7. Under "*Place of Work*" it stated the following:

"You will be site (Site Office, Slough, SL1 4ST) and office based (Avon House, Avonmore Road, London, W14 8TS)"
8. By iMessage, dated 5th October 2022, the Claimant contacted Mr Bajrakurtaj, thanking him for the contract but stating "*...I cannot accept it without amendment*".
9. An amended contract was sent to the Claimant by email on 6th October 2022. That stated that the salary was £80,000 per annum and removed the Slough address as a place of work. It said that he would be based at Avon House.
10. Under the heading "*Remuneration and benefits*" it detailed the benefits that the Claimant was entitled to, including:

"Mileage reimbursement (excluding to and from Head Office) as per Employee Handbook".
11. Under the heading "*Other terms and conditions*" it stated:

"You are referred to the contents of the Employee Handbook, which together with this statement form part of your contract of employment unless specified otherwise"
12. The Claimant signed the contract, under the statement:

"I acknowledge receipt of this statement and accept the conditions as stated".
13. The handbook therefore formed part of the written terms of the contract.
14. Within the handbook, under the heading "*Company property*", it stated that the Claimant may be held responsible for the cost of replacing company property and that the Respondent may deduct from any monies due to him if there is loss or damage. It also provides that property must be returned upon termination of the employment.
15. Under the heading "*Expenses*" it stated that mileage would be paid:

"....if you are required and authorised to use your own vehicle for Company business".

16. The Claimant worked from the Slough site. He submitted expense claims for the cost of mileage from his home address to that location. The first claim, submitted on 1st and 2nd November 2022 was rejected by Adelina Tugusheva on 2nd November 2022 but was then approved by her on 4th January 2023. It was, however, never paid.
17. Subsequent expense claims for mileage from the Claimant, dated 1st December 2022, 19th December 2022 and 3rd February 2023 were neither rejected nor approved. They were not paid.
18. During a meeting on 3rd February 2023 the Claimant was told that his employment was to be terminated for his failure to satisfactorily complete his probationary period. I did not consider the rights or wrongs of that decision in light of the issues that require my determination.
19. The Claimant was sent a letter from Mr Bajrakurtaj, dated 6th February 2023, which stated that following the meeting on 3rd February 2023 it had been concluded that the employment would be terminated with effect from 6th February 2023 and that the Claimant would be paid one month's notice in lieu. In a further letter he was asked to return company property. By letter dated 8th February 2023, the Claimant stated to Mr Bajrakurtaj that he had not been paid his mileage and he provided a breakdown. He also provided eBay adverts for a laptop and mobile telephone similar to those that he had not returned to the Respondent, on sale for £1,099.99 and £60 respectively.
20. By letter dated 13th February 2023 from Mr Elson Bajrakurtaj, Managing Director, to the Claimant it was stated that the Claimant had chosen to work in Slough and that his role did not require him to do so. The Claimant responded by writing on 13th February 2023 to say that it was a condition of his appointment that he would be paid mileage for travelling to Slough and that this was why the initial draft of the employment contract was amended.
21. Invoices for the costs of the laptop and mobile telephone detail that they were bought for £1,475 and £629.99 respectively. The Claimant has provided eBay evidence of how much the items would cost second hand and those adverts state £1,099.99 and £60 respectively.
22. The Claimant accepted that he has not returned the items and that the cost can therefore be deducted from his wages, pursuant to his written particulars of employment. He does not know exactly where the items are as they are now in storage.

Issues

23. The issues were agreed during the preliminary hearing as follows:

- 1. Wrongful dismissal / Notice pay**

- 1.1 What was the claimant's notice period? The parties agreed that the amount of pay in lieu of notice that the claimant was entitled to was £1,538.46.

- 1.2 Was the claimant paid for that notice period?
- 1.3 If not, was the claimant guilty of gross misconduct? / did the claimant do something so serious that the respondent was entitled to dismiss without notice?

2. Holiday Pay (Working Time Regulations 1998) 2.1 What was the claimant's leave year?

- 2.2 How much of the leave year had passed when the claimant's employment ended?
- 2.3 How much leave had accrued for the year by that date?
- 2.4 How much paid leave had the claimant taken in the year?
- 2.5 Were any days carried over from previous holiday years?
- 2.6 How many days remain unpaid?
- 2.7 What is the relevant daily rate of pay?

3. Unauthorised deductions

- 3.1 Were the wages paid to the claimant for the period 1st January 2023 to 10th February 2023 less than the wages she should have been paid?
- 3.2 Was any deduction required or authorised by statute?
- 3.3 Was any deduction required or authorised by a written term of the contract?
- 3.4 Did the claimant have a copy of the contract or written notice of the contract term before the deduction was made?
- 3.5 Did the claimant agree in writing to the deduction before it was made?
- 3.6 How much is the claimant owed?

4. Unauthorised deductions- Travel

- 4.1 Was the claimant entitled to be paid for his time travelling to the Slough Site between October 2022 and February 2022?
- 4.2 If so, was the claimant paid that amount? The respondent agrees that the claimant was not paid for any travel time.
- 4.3 If not, did the respondent make a lawful deduction from wages? The respondent is not claiming that any lawful deduction was made.
- 4.4 If not, how much is the claimant owed?

5. Breach of Contract

- 5.1 Did this claim arise or was it outstanding when the claimant's employment ended?
- 5.2 Did the respondent do the following: 5.2.1 Fail to reimburse the claimant for mileage expenses as set out in section 8.2 of the ET1.
- 5.3 Was that a breach of contract?
- 5.4 How much should the claimant be awarded as damages?

24. However, at the outset of the final merits hearing those issues were narrowed further by the Claimant.

25. He withdrew his claim for unpaid holiday as he accepted that he had been paid what he had been owed. He accepted that he had been paid the accurate amount of pay in lieu of notice, save for the deductions that he claims were

unauthorised. He accepted that he did not have a valid claim for travel time to work. He did not maintain a claim for unpaid expenses, save for mileage, or for overtime, as he accepted that the other expenses had been paid. His concessions and withdrawals were reasonable and sensible in light of the documentary evidence relied upon by the parties.

26. The Claimant helpfully confirmed that his claim could be split into three issues:

- a. Breach of contract, in relation to the failure of the Respondent to pay his mileage to travel to the Slough site;
- b. Unauthorised deduction of wages by failing to pay him for his work on 27th January 2022, 30th January 2022 and 6th February 2022; and
- c. Unauthorised deduction of wages by deducting the cost of the laptop and mobile telephone that was greater than their worth.

The Hearing

27. It was confirmed at the outset of the hearing that I had all of the documents being relied upon by the parties, namely:

- a. A 126-page joint bundle compiled by the Respondent;
- b. A 190-page bundle compiled by the Claimant;
- c. A copy of EJ Singh's CMO, dated 7th July 2023;
- d. 15-page witness bundle; and
- e. Claimant's witness statement, dated 15th September 2023;

28. At the start of the hearing the Respondent sought to rely upon the invoices in relation to the laptop and mobile telephone that had not been returned by the Claimant. The Claimant did not oppose the late submission of those documents. Subject to rules 2 and 29 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, and notwithstanding the lack of reasonable explanation for the delay in providing documentation that would have been readily available earlier, I was satisfied that it was in the interests of justice to allow late reliance. The documentation showed irrefutable evidence of how much the items had cost. There was no objection to its admission.

29. I heard oral evidence from the Claimant and Mr Bajrakurtaj and closing submissions.

30. I gave my judgment and reasons orally to the parties upon conclusion of the hearing and subsequently the Claimant has requested written reasons.

The law

31. A claim for unauthorised deduction of wages is pursuant to section 23 of the Employment Rights Act 1996, which provides:

“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”*

32. The Respondent argued that the deduction for the cost of the laptop and mobile telephone was lawful by virtue of a relevant provision in the Claimant’s contract. The Claimant accepted that this was correct but disputed the amount of the deduction.

33. The Respondent argued that the Claimant was not paid for 27th January 2023 and 30th January 2023 as he had not worked on those days. That was disputed by the Claimant who contended that he was working from home due to the weather conditions. The Claimant claimed that he was not paid for 6th February 2023, whereas the Respondent contended that he was paid for that day as part of his payment in lieu of notice.

34. Section 24(1)(a), as amended, provides that where a tribunal finds a complaint under section 23 well-founded, it shall make a declaration to that effect and shall order the employer to pay to the worker the amount of any deduction made in contravention of section 13.

Findings of fact

Breach of contract

35. I am satisfied that it was agreed between the Claimant and Respondent, and therefore a term of his contract of employment, that the Claimant was to be paid mileage for travelling between his home address and the Slough site.

36. I have the benefit of the paper trail of the formation of his contractual terms.

37. The Claimant claimed that he was both required and authorised to attend Slough and that it was agreed that he would be paid the appropriate mileage.

38. That is evidenced by the fact that on 5th October 2022 he contacted the Respondent to say that he was unable to accept the terms of the contract without amendment.

39. Two amendments were subsequently made: firstly, to the salary and secondly to remove Slough as a place of work. I find it far more likely than not that changing the place of work was to reinforce the oral agreement between the parties that the Claimant could claim mileage when travelling to Slough.

40. In fact, during his oral evidence, Mr Bajrakurtaj accepted that reference to Slough had been removed from the Claimant’s contract to allow him to claim travel to Slough and that he should have been paid the mileage expenses claimed in November 2022.

41. The fact that the Claimant continued to submit the expense claims indicates that he believed that they were payable. It supports his evidence that he was told that it would be payable. The fact that they were not paid does not defeat the claim given the relatively short period of time and the explanation that there was a delay whilst the Respondent sought to understand the tax implications, namely whether tax should be deducted. It is notable that the Respondent has not provided any communications to the Claimant rejecting the expenses or seeking clarification as to why they were being submitted.
42. I did not find the Respondent witness to be reliable. He sought to differentiate the role of commercial manager and quantity surveyor when asked about the requirement of the Claimant to attend the Slough site. He said that the role was changed on the second draft of the contract, but that is contradicted by the fact that both versions of the contract state that the role was that of commercial manager.
43. There is no good explanation given as to why Slough was not included in the second contract as the place of work other than an acceptance by the Respondent that the Claimant could claim mileage when travelling to Slough.
44. Mr Bajrakurtaj initially stated that there had been no discussion about the tax consequences, but when it was suggested that there may be emails, he changed his account to say that there was a discussion. He was therefore neither a constant or reliable witness.
45. In essence, there is little dispute about the evidence. It is agreed that Slough was removed as a place of work to allow the Claimant to claim mileage when travelling to Slough. It is also agreed that Slough was agreed to be the place where the Claimant would conduct his work.
46. It is therefore not in dispute that the Claimant was authorised to work from Slough.
47. The balance of the evidence indicates that he was also required to do so. I accept the Claimant's evidence that he needed to be on site to ensure that the customer's needs were met. Again, I found Mr Bajrakurtaj's evidence to be unclear in relation to how often the Claimant would need to be present on site, as demonstrated by him indicating that as a quantity surveyor he would have been required to attend the site more often than a commercial manager but that his job title had changed, despite the fact that there had been no change in job title.
48. In any event, I am satisfied that there was an agreement between the Claimant and the Respondent, that forms part of the employment contract, that he would be paid mileage to travel to Slough. I must consider all of the circumstances in the round and, even had the written contract not supported the Claimant's case, which it does, I would have nevertheless found that it had been amended by the oral agreement between the Claimant and Mr Bajrakurtaj on behalf of the Respondent.

Unauthorised deduction from wages – days worked

49. It is accepted that the Claimant did not attend work premises on 27th and 30th January 2023. However, he contends that he was working from home due to the weather conditions.
50. I do note that he has not provided evidence, no doubt available from the work laptop that he has never returned, to show that he was working that day. He knew from September 2023 at the latest that those were the dates for which his wage had been deducted. I do not accept he had a good reason for not obtaining evidence and serving it late or seeking a hearing to determine whether late evidence could be relied upon.
51. However, there is little evidence by the Respondent. The documentary evidence from Radu that he sought to contact the Claimant on those days is sparse. It is contained within WhatsApp messages that are barely legible. There is no evidence from Radu or anyone else that is said to have tried but failed to contact the Claimant on 27th and 30th, or any evidence as to how much effort was made to contact him. No unreplied or unread emails to him have been provided. Mr Bajrakurtaj could not say whether he had tried to contact the Claimant on those days and in his evidence indicated it was three days later.
52. The best evidence before me as to whether the Claimant worked on those days is from the Claimant who gave oral evidence to me. I accept him to be a reliable witness and his evidence tips the balance in his favour that he was working on those days from home.
53. In relation to 6th February 2023, I accept that the Claimant was verbally notified of his dismissal and given one week's notice and that this was followed by a letter of confirmation on 6th. Whilst that letter says that the dismissal was from 6th, I note that the required 5 days' notice was 6th, 7th, 8th, 9th and 10th. I am therefore satisfied that he was paid in full the notice in lieu owed which included 6th February.

Deduction from wages – laptop and phone

54. It is not in dispute that the Claimant did not return those items to the Respondent and that, contractually, their value could be deducted from his wages. The issue is what their value is.
55. I am surprised that it took the Respondent so long to provide invoices for the valuation but I am satisfied that the late production of that evidence has not prejudiced the Claimant who pragmatically did not object to their inclusion.
56. The Respondent deducted £1,475 for the lap top and £629.99 for the mobile phone. The laptop was new when given to the Claimant, as the invoice date is October 2022, and the mobile telephone had been bought in 2020. The Claimant has provided evidence of the cost of those items second hand.
57. I find that deducting the cost of the items, as first purchased, was reasonable and justified. I accept the argument that a company would not buy second hand

laptops or smartphones to replace company items as there may be security and virus risks. Whilst they may pass on such items between employees, once an item is not returned, a brand new one has to be purchased. I am therefore satisfied that there was a lawful deduction of wages in the amount of £2,104.99.

Conclusion

58. I find as a fact that the Respondent breached the contract of employment by failing to pay the Claimant mileage for his travel to Slough. There has been no dispute as to the quantum of the mileage claim, which used the mileage rates as prescribed by the contract, and so I award the £2,116.60 as claimed.

59. I am satisfied that the Claimant did work on 27th and 30th January 2023 and that failure to pay him his daily rate for those days constituted an unauthorised deduction from wages. There was no dispute that his daily rate of pay was £307.69 and therefore there was an unauthorised deduction of wages of £307.69 x 2 = £615.38. I am satisfied that the Claimant was paid for 6th February 2023.

60. I am satisfied that there was not an unlawful deduction of wages in relation to the deduction from the Claimant's wage of the cost of the laptop and mobile telephone, which was permitted by the written particulars of employment. Deducting the cost as new was reasonable and proportionate and so his wages were properly deducted by the sum of £2,104.99.

61. The claim therefore succeeds to the extent that the Respondent shall pay to the Claimant £2,731.98.

Employment Judge **Moxon**

Date: 18th December 2023

SENT TO THE PARTIES ON

.18/12/2023

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