



EMPLOYMENT TRIBUNALS

Claimant: Mr A Quadrano

Respondent: Onriver (UK) Limited

Heard at: Reading **On: 12 December 2023, 15 January 2024**

Before: Employment Judge Gumbiti-Zimuto

Appearances

For the Claimant: In person (assisted by an Italian Interpreter Bianca Mazza)

For the Respondent: Mr Z Cheng

JUDGMENT

1. The respondent has made an unauthorised deduction from the claimant's wages. The respondent is ordered to pay to the claimant £4,640.41. This is the gross amount. If the respondent pays the tax and national insurance due to HMRC, payment of the net amount will meet the judgment debt.
2. The claimant's claim for holiday pay is not well founded and is dismissed.

REASONS

1. In a claim a claim form presented on 11 January 2023 the claimant made complaints about holiday pay and arrears of pay. The claim form purports to make a complaint about redundancy pay however there is no entitlement to a redundancy payment in this case because there was no redundancy and in any event the claimant has not got the qualifying employment to claim a redundancy payment. The employment tribunal did not accept the redundancy claim and, in any event, if it had been accepted such a claim would have been dismissed for the stated reasons.
2. The respondent was required to respond to the claim by 16 February 2023 but failed to do so. A response was eventually produced on the 23 March 2023. There was a request for the response to be accepted out of time and an explanation given:
"The Respondent apologises for the delay in submitting its ET3 response. As solicitors for the Respondent (Russell-Cooke

LLP), we have been seeking instructions for the instructing director at the Respondent, Mr Zhengmao Cheng. Mr Cheng's first language is not English and accordingly it has taken some time for us to obtain comprehensive and complete instructions from Mr Cheng so that we could prepare a response to the claim. In the circumstances, the Respondent would ask the Tribunal to exercise its discretion and consider its ET3 and grounds of resistance beyond the initial deadline."

The response was accepted by the Tribunal on 6 June 2023. The respondent denied the claimant's complaints stating that the claimant had been paid all that he was due.

3. The case was listed for a final hearing on the 10 November 2023, the employment tribunal made directions for the parties to provide each other copies of documents by the 8 August 2023 and witness statements by 22 August 2023. At the hearing on the 10 November 2023 the Employment Judge recorded as follows:

"Unfortunately, at the hearing it was apparent that the claimant, who is Italian, doesn't speak much English and was relying on his friend to help him with the translation. Both the claimant and the friend were trying to conduct the hearing from a coffee shop. Mr Cheng was representing the respondent and the connection on his computer had intermittent problems. In addition it became clear that the claimant had a number of documents relevant to the claimant which were not in the bundle and which the Tribunal had not had sight of."

The Judge made the decision for the case to be postponed so that it could be a hearing in person, and further orders that an official interpreter to be provided for the claimant, the claimant to send copies of his additional documents to the respondent and for the respondent to prepare a hearing bundle for the final hearing.

4. The matter came before me on the 12 December 2023. I heard evidence from the claimant and Mr Z Cheng on behalf of the respondent. English is not the first language for either of them. The claimant was assisted by an interpreter; however he had not produced a witness statement as required by the employment tribunal's order. I asked Mr Cheng if he objected to me taking the claimant's evidence orally, and his response was that he wished to proceed with the hearing today. I understood this as indicating that he was happy to go ahead notwithstanding that the claimant had not produced a witness statement.
5. Having heard evidence from both parties I decided that I would give them both the opportunity to present a statement of their positions in this case. I did this because I was concerned that they had perhaps misunderstood each other and at times I may have misunderstood them.
6. The claimant told me that he was owed £6011.78 by the respondent. He arrived at this by his calculation that he was due to be paid for holiday

which had not been paid and that he was also owed wages for November and December 2023.

7. The respondent relied on the evidence of Mr Cheng which was set out in his witness statement.
8. On the 19 December 2023, the respondent sent to the employment tribunal a further statement and some accompanying documents, some of which were in the hearing bundle produced at the 12 December 2023 hearing, but some were not, namely proof of a payment made on 7 November 2022 and a revised copy of the 5 December 2022 payslip.
9. I came to the following conclusions.

Unpaid wages

10. The parties agree that the claimant gave notice of termination of his employment on about 5 November 2022. The claimant and the respondent have not produced a pay slip for the pay period at this date. The claimant states that he was not paid and the respondent states that the claimant was paid. I have been provided with a record of a payment made to the claimant on the 7 November 2022 by the respondent in the sum of £2861.94. This would appear to me to be payment for the pay period up to the end of October 2022. I do not understand the claimant to complain of unpaid wages (other than holiday pay) in the period prior to October 2022.
11. The claimant was to work his period of notice. There is a dispute between the claimant and the respondent as to how much of the notice period the claimant actually worked and in respect of the period he did not work what was the reason he did not work. The claimant says that he worked until 6 December 2022 and only stopped working when the respondent had employed a replacement head chef and the claimant was told that he was no longer required. The respondent states that the claimant was expected to work his full notice period but that he failed to attend work after the 1 December 2022.
12. The parties agree that the claimant was not paid his wages for November and December 2022. The parties agree that the claimant was paid £1000 on account of his wages. The respondent says that nothing further is due after deductions for tax etc and taking into account the claimant's failure to attend work after the 1 December 2022.
13. The WhatsApp / text messages provided by the respondent show that the claimant was not at work on the 5 December 2022, they refer to the claimant calling and saying, "*he will come to the restaurant every day until he gets his money.*"¹ The claimant accepted that he did not a work after the 5 December because by then there was a dispute about pay.

¹ Copy of WhatsApp / Text message attachment to email 19 December 2023.

14. I am of the view that the claimant has shown that he worked throughout November. The evidence appears to me to show that the claimant was at work on the 29 November 2022 and both parties accept that he worked until 30 November at least. There is also clear evidence that the claimant was not at work on the 5 December 2022 and as I understand it both parties agree that the claimant was not at work after that date. I am satisfied that the claimant worked through to 4 December 2022 at the latest. The email correspondence shows that the claimant was recorded as working 232 hours in November and 17 hours in December for which he should have been paid. This amounts to a gross pay figure of £3,991.47. I note that the original pay slip for period 8 dated 5 December 2022 showed the claimant entitled to gross pay of £3983.58 and the revised pay slip £4256.09 gross pay.
15. I accept the evidence that has been given by the claimant and I am satisfied that he was entitled to gross pay of £4,640.81 comprising salary up to 5 December £3991.47, tips and gratuities of £583.75, business expenses of £65.59.
16. In the respondent's response and Mr Cheng's witness statement there is no mention of a company loan. In his oral evidence to the Tribunal Mr Cheng did not make reference to a company loan. The claimant denied that he was ever in receipt of a company loan. There is no other reference to the company loan other than in the second pay slip of 5 December. I am not satisfied that the respondent has shown that they were entitled to deduct any sums from the claimant's wages in respect of a company loan.

Holiday Pay

17. The evidence of Mr Cheng was that the respondent does not make a separate payment or record in respect of holiday pay and that the claimant would receive his usual pay when he went on holiday. The claimant however states that he was not paid holiday pay when he went on holiday, that he has never been paid holiday pay as follows:
October 2021 to August 2022- 81 hours
September 2022 to 6 December 2022- 71 hours
I have found the evidence on holiday pay unsatisfactory.
18. The claimant's initial account in respect of holiday pay does not appear to be made out by the evidence, his own evidence appears to contradict his original position that he had not taken holiday or been paid for it. The claimant accepted that he was in fact on holiday for much of August and accepts that he has a pay slip which shows he was paid 17 hours holiday pay in August 2022.
19. The respondent's evidence is also unsatisfactory. The respondent states that the claimant was in fact paid holiday whenever he took holiday. The respondent goes on to say that the fact that there is no reference to holiday pay is because the claimant was in fact paid his normal pay when

he went on holiday so there is never any discrete reference to holiday pay on the pay slips. This appears to be wrong in respect of August 2022 at least which shows 17 Hours holiday.

20. The claimant has the burden of proof in respect of showing that he was owed holiday pay. I am not satisfied that on the evidence presented to me it has been shown that the claimant is entitled to a further award in respect of 152 hours of holiday pay. The claim for holiday pay is not well founded and is dismissed.

Amount due

21. The respondent has made payment to the claimant in the £1000 in respect of the relevant pay period.
22. The respondent is ordered to pay to the claimant the sum of £4,640.41 to the claimant. This is a gross sum. If the respondent pays the tax and national insurance due to HMRC, payment of the net amount will meet the judgment debt. The respondent should also be given credit for the payment of £1000 already made.

Employment Judge Gumbiti-Zimuto

Date: 15 January 2024

Sent to the parties on: 7 February 2024.

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For the Tribunals Office

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