



EMPLOYMENT TRIBUNALS

Claimant: Mr Paul Wilkins

Respondent: JAVA Art Limited

Heard at: Midlands West Employment Tribunal (by CVP)

On: 3 November 2023

Before: Employment Judge Chivers

Representation

Claimant: Mr Sam Roxborough (Counsel)

Respondent: Mr Nick Turner, Director

JUDGMENT having been sent to the parties on 7 November 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

1. Following a Case Management Preliminary Hearing on 9 June 2023 the parties agreed that there were 3 claims being pursued –
 - 1.1 Unpaid wages,
 - 1.2 Failure to pay holiday pay; and
 - 1.3 Failure to provide a written statement of terms of conditions.
2. The Orders issued following the Case Management Preliminary Hearing recorded that the respondent had sent to the claimant copies of all documents relevant to the issue and the claimant was then required (by 30 June 2023) to send to the respondent copies of any other documents relevant to the case.
3. As part of the proceedings at this hearing, I reviewed a bundle of documents of 155 pages. Witness statements were received from the Claimant and from Nick Turner, a Director of the Respondent.
4. The Respondent also produced a further statement – from Mr R Lucas dated 28 September 2023. Mr Lucas was not in attendance at the hearing. His statement is marked “To whomever it may concern”. There is no statement of truth contained in the statement and the purposes for which the statement has been put together are not clear. In any event, the statement does not comment on the contentious issues in dispute in the case. For these reasons, I have disregarded Mr Lucas’ statement.
5. I heard evidence from the Claimant and Mr Turner.

ISSUES

6. At the outset of the hearing, I discussed with the parties the issues in dispute and the parties agreed they remained as set out in the Preliminary Hearing Case Management Discussion of 9 June 2023.
7. In terms of the unpaid wages, the claimant is claiming the sum of £532. This is made up of the £690 wages he says he was owed for the work the claimant carried out for the respondent from 9 May to 18 May minus the sums he has already received. The respondent says no sums are owing.
8. In terms of the holiday pay, the parties have agreed the claimant accrued holiday pay during the time he worked for the respondent and further agreed the sum of £84 is payable.
9. In terms of the written statement of particulars, the claimant is claiming £1380 - being 4 weeks' pay (based on £345 a week). The respondent accepts that a written statement of particulars was not provided to the claimant but considers there to be mitigating circumstances for this failure.

FINDINGS OF FACT

10. I decided all the findings on the balance of probability, having considered all the evidence given by the witnesses during the hearing, together with documents referred to by them. Any failure to mention any specific part of the evidence should not be taken as an indication that I failed to consider it. I have only made those findings of fact necessary to determine the issues. It has not been necessary to determine every fact in dispute where it is not relevant to the issues.
11. The claimant responded to a Facebook post published on 8 May 2022 where the respondent requested help to unload a container. The claimant already had a role with the Royal Mail when he responded to the post.
12. The claimant undertook work for the respondent on 9 May 2022. Mr Turner requested that the claimant provide an invoice for this work but the claimant confirmed in a text message that he was not registered as self-employed and so would not be able to provide an invoice. The respondent paid the claimant the sum of £78 for the work the claimant had done on 9 May by bank transfer and the monies arrived in the claimant's account on 9 May.
13. Mr Turner and the claimant exchanged texts on 9 May with a view of the claimant undertaking further work for the respondent and the claimant worked again for the respondent on 10 May.
14. The respondent's accountant handles payroll arrangements for the respondent. Having spoken to his accountant on 10 May, Mr Turner suggested that the claimant be engaged as a casual employee. Mr Turner's accountant forwarded a HMRC Starter Checklist for these purposes to Mr Turner with the intention that the claimant be asked to fill the form in and the claimant could then be set up on the respondent's payroll. This HMRC Starter Checklist was never sent to the claimant whilst he was employed by the respondent.
15. After working for the respondent on 10 May, the claimant worked for the respondent again in the period 11 May - 18 May. He was not provided with a statement of main terms and conditions at the start of his employment or subsequently. The respondent was not aware of the existence of this obligation.
16. Employees of the respondent are paid monthly. The respondent does not ordinarily pay staff cash advances. The respondent uses an accountant for payroll purposes. Payroll details would be provided by the respondent to the accountant prior to the end of the month and payment of salaries would then be made to employees at month end.
17. On Friday 13 May, Mr Turner says that he gave the claimant a cash advance of £312 for the 26 hours the claimant had worked that week. By this stage, the claimant in a text of 10 May had requested that he be paid an advance for the hours he worked that week.

18. On Wednesday 18 May, Mr Turner says he gave the claimant a further payment of £300 for the 25 hours the claimant had worked that week. Mr Turner described both payments (the one on 13 May and the one on 18 May) as cash advances – Mr Turner saying that the intention was that tax and National insurance would then be deducted from wages that the claimant would earn for work the claimant would do later in the month.
19. Ultimately, the last day of the Claimant's employment with the respondent was to be 18 May 2023. In total the claimant worked 57.5 hours for the respondent in the period 9 May – 18 May.
20. The respondent says that the claimant was paid £690 for the hours he worked. This represents the claimant's full gross pay for the 57.5 hours he worked at the agreed rate of £12 per hour.
21. The claimant disputes that the entirety of the £690 was paid to him. The claimant's position is that in addition to the £78 paid for the first day of work (which both parties accept was paid), he was paid 2 further payments totalling £80 – a £30 payment made on 13 May and a £50 payment made on 18 May 2022. So, there is a difference of £532.
22. After the employment has ended, there is an exchange of texts about sums owed during which Mr Turner requested that the claimant provide the claimant's email details so that he can forward the HMRC Starter Pack to him. In a text of 20 May, Mr Turner states that this is to enable his accountant to calculate the Claimant's PAYE and holiday entitlement. There is then a text of 20 May in which the claimant states that the respondent did not pay "*my tax and you haven't given me any holiday pay*".
23. On 31 May 2022, the claimant contacted the respondent by email in a document headed "*Grievance Letter*". This email refers to being owed holiday pay and refers to a failure to provide written particulars and makes other assertions. It states that it is written "*in an effort to resolve the issues*" the claimant had whilst he worked for the respondent.
24. I find that the respondent paid the claimant the sum of £30 on 13 May and £50 on 18 May 2022. These payments were made by the respondent in response to the claimant's request to be paid wages in advance (as opposed to at month end when wages were to be paid). The respondent did not pay the claimant his full wages in response to this request but instead paid the claimant these smaller sums to tide him over. The respondent paid these sums to the claimant in cash.
25. I find that the claimant did not receive full wages for the hours he worked for the respondent. In making this assessment, I have had regard to the fact that other than the witness statement of Mr Turner, there is no evidence that payments of £312 on 13 May or £300 on 18 May were made. These are significant sums – far higher than the £78 sum which was paid by the respondent to the claimant for the work the claimant did on 9 May (for which there is documentary evidence). The payments did not go through payroll. There was no bank transfer of these sums. There is no payslip or anything akin to a payslip evidencing them. There is no receipt for them from the claimant. There is no documentation or evidence from the respondent's accountant who is responsible for all payroll matters.
26. I have had regard to the content of the text from the claimant of 20 May and email of 31 May. The text of 20 May was sent 11 days prior to the end of the month. At that point – given the respondent paid wages at month end – it was not clear that there had been a non-payment of wages. By 31 May, the wages had still not materialised, but the claimant does not refer to this in his email. He raises various issues but makes it clear that the issues he has are not limited to what is stated in his email. The email is stated to be an attempt to resolve matters between the claimant and the respondent. My assessment is that the absence of a reference to non-payment of wages in both the text of 20 May and the email of 31 May is not confirmation that wages have been paid.
27. At the point of termination, the claimant had not taken any holiday and did not receive any payment for accrued but untaken holiday.

LAW

28. Section 13 of the Employment Rights Act (“ERA”) provides that a worker has the right not to have their employer make an unauthorised deduction from their wages. Under section 27 ERA wages are defined as “*any sums payable to the worker in connection with his employment*”
29. Under the Working Time Regulations 1998 (“WTR”) workers have a right to a minimum of 5.6 weeks paid annual leave. This is made up of the right under the Working Time Directive to a minimum of four weeks’ annual leave each year (regulation 13 WTR) and the right to an additional 1.6 weeks’ annual leave each year under regulation 13A WTR. During the first 12 months of employment, the amount of regulation 13 WTR and 13A WTR leave entitlement that the worker can take at any given time is governed by Regulation 15A WTR. This provides that leave accrues at the rate of 1/12 of a full year’s entitlement at the beginning of each month.
30. Employers are required to provide employees and workers with a written statement of particulars under section 1(1) ERA. The right to receive a section 1 statement applies to all employees and workers. For those starting work on or after 6 April 2020, there is no minimum service requirement for an employee or worker to be given a section 1 statement.
31. Under section 38 Employment Rights Act 2002 where a Tribunal finds in favour of an employee in a complaint referred to in schedule 5 Employment Rights Act 2002 and finds that the employer has failed to provide the employee with a written statement of employment particulars, the Tribunal must award the employee an additional 2 weeks’ pay unless there are exceptional circumstances which would make that unjust or inequitable and may if it considers it just and equitable in all the circumstances order the employer to pay an additional 4 weeks’ pay.

CONCLUSION

32. In the light of my findings of fact, I find that the claimant did not receive £532 and was not therefore paid wages for the days he worked. His unlawful deduction of wages claim is well founded and succeeds.
33. In terms of holiday pay, the respondent accepted that no holiday pay has been paid to the claimant and the parties have agreed that the sum of £84 is payable.
34. Furthermore, the respondent has also accepted that there was a failure to provide a written statement. The claimant was entitled to receive these particulars from day 1 and there was a clear breach of this. I acknowledge that the respondent is a small business, and the breach arose from being unaware of the existence of this obligation, but this obligation has been in place for some time and I am not of the view that the respondent’s reasons for failure to comply constitute exceptional circumstances which would mean an award of 2 weeks’ pay is unjust or inequitable. I therefore award the claimant an additional sum of 2 weeks’ pay of £690.

Employment Judge Chivers
8 December 2023