EMPLOYMENT TRIBUNALS

Claimant: Mr Balal Ahmad

Respondent: Breathe Services Limited

Heard at: Manchester (by CVP) **On:** 13 December 2023

Before: Employment Judge McDonald
(sitting alone)

REPRESENTATION:

Claimant: In person
Respondent: Not in attendance

JUDGMENT

The judgment of the Tribunal is that:

Wages

1. The complaint of unauthorised deductions from wages by the respondent failing to pay the claimant commission for May and October 2022 is well-founded.

2. The respondent is ordered to pay the claimant £2,200 which is the gross sum deducted. The claimant is responsible for payment of any tax or national insurance.

3. The complaint of unauthorised deductions from wages by failing to pay the claimant overtime is not well-founded and is dismissed. The claimant had no legal entitlement to overtime.

Written itemised pay statements

4. The respondent failed to give the claimant written itemised pay statements as required by section 8 of the Employment Rights Act 1996 in the period 1 April to 31 October 2022.

Failure to provide a written statement of employment particulars

5. When the proceedings were begun the respondent was in breach of its duty to provide the claimant with a written statement of employment particulars under s.1 of the Employment Rights Act 1996. There are no exceptional circumstances that make an award of an amount equal to two weeks' gross pay unjust or inequitable. It is just and equitable to make an award of an amount equal to four weeks' gross pay in accordance with section 38 of the Employment Act 2002. The respondent is ordered to pay the claimant the sum of £2284.00 without deduction.

Total amount payable

6. The respondent is ordered to pay the claimant £4484.00, being the total of the amounts ordered under paragraphs 2 and 5 above

REASONS

Introduction

1. This was the final hearing of the claimant's claim. The respondent did not attend. The Tribunal did not have a contact number for the respondent. The contact numbers which the claimant had for the directors were invalid numbers.

2. The respondent had emailed the Tribunal in August 2023 to ask for an extension of time for filing its response to the claim. It had also filed a holding ET3 response form. However, when the Tribunal used the email on that response form in September 2023 to email directions to the parties, the email had bounced back indicating the email address could not be reached. Since September 2023 the Tribunal has sent correspondence about the case to the respondent by post.

3. The notice of this hearing was emailed to the respondent in August 2023. That email did not receive a "bounce back" message indicating that it had not been received. A search of Companies House indicated that there were proposals to strike off the respondent company but those had been suspended following an objection.

4. Since the Tribunal had not received a bounce back to the email sending the notice of hearing I was satisfied that the respondent had received notification of this hearing. In those circumstances I decided it was in accordance with the overriding objective to proceed with the hearing in the respondent's absence.

5. Employment Judge Ross had ordered that the claimant supply a witness statement and a bundle of documents and a Schedule of Loss for this hearing. The claimant had not prepared a witness statement as such but had sent the Tribunal a document setting out the claims he was making. He had also supplied copies of WhatsApp messages with the respondent. The claimant said that those were the only documents he had. The respondent had failed to provide a written contract of employment or any payslips and the claimant had lost access to his emails at the respondent's workplace.

6. I decided it was in accordance with the overriding objective to proceed with the hearing today. The claimant gave sworn evidence about his case. I asked him questions to gather the evidence I needed to decide the case.

7. During the hearing it became apparent that there was one piece of information which the claimant did not have and which I needed to give judgment in the case. That was the difference between the gross pay which the claimant said he was entitled to per month and the net pay he was actually paid. The difference between the two was the amount deducted each month by the respondent. I needed that figure in order to be able to award remedy, particularly in relation to the failure to provide itemised pay statements. I asked the claimant whether he would be in a position to provide that calculation if I allowed him a break during the hearing. He explained that he would need to go back through his bank statements and so would need more time.

8. I therefore directed that the claimant provide that information by 9 January 2024 (subsequently extended to 26 January 2024). I reserved my judgment so that I could take into account that information. The claimant had not at the date of this judgment provided the additional information ordered.

Findings of Fact

9. Based on the witness evidence given by the claimant, I find that he was employed by the respondent from 1 April 2022 until he was dismissed on 31 October 2022. That dismissal was without any formal disciplinary process or investigation.

10. I find that the claimant was employed on a basic salary of £25,000 which increased to £27,000 in September 2022. In addition, the claimant was entitled to commission. The respondent provided debt advice. The claimant's commission was based on the number of Individual Voluntary Arrangements ("IVAs") he managed to get signed up in a month. The claimant's targets were set at the start of every month but there was no written confirmation of how much commission would be paid at the end of the month. Instead, the claimant would be told orally what commission he was due. He was not able to confirm the amount of commission due except for the months of May 2022 and October 2022. No commission had been paid at all for those months and I accept his evidence that he was owed £1,100 per month.

11. The claimant confirmed that he had been paid salary and commission for the months he worked for the respondent apart from May and October 2022. However, he said that the respondent had made deductions for tax and national insurance from each monthly payment. When the claimant had contacted HMRC they told him that no tax or national insurance had been remitted to them. The claimant did not have a figure for the amount which had been deducted. I ordered the claimant to provide that information by 9 January 2024 (subsequently extended to 26 January 2024).

12. I find that the claimant did not receive a payslip or any other kind of itemised pay statement for any of the months he worked for the respondent. Although the respondent in its holding response suggested this was because of a problem with HMRC systems, it provided no evidence to substantiate that.

13. The claimant did not receive a written contract of employment or any other statement of his terms and employment in writing.

14. The claimant included a claim for overtime. The claimant's evidence was that ACAS had told him he was entitled to payment for hours worked. I accept his evidence that he worked 1½ hours over and above his normal working hours every day. Those normal working hours were 10.00am to 7.00pm Monday to Thursday and 10.00am to 3.00pm on Friday. The claimant would come in early at around 8.30am and would occasionally also stay late. He had been given a key to the office premises from which the respondent initially worked. He did not have a key for the church premises to which the respondent moved later, which had resulted on at least one occasion in his being locked in.

15. The claimant confirmed there had been no discussions about whether overtime was payable. He was not aware of anyone else receiving overtime. He was aware that some of the other workers doing the same job as him were employed on a self-employed and therefore invoiced for all hours worked. He confirmed that the job was in essence a commission sales based job. He confirmed that he had never raised the issue of overtime with the respondent during his time working for it.

Relevant Law

16. In relation to a claim for deduction from wages, s.13(1) of the Employment Rights Act 1996 ("ERA") says:

> **"(1) An employer shall not make a deduction from the wages of a worker employed by him unless-**
>
> **(a) the deduction is required or authorised to be made by virtue of a statutory provision of 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."**

17. S.27(1) of ERA says:

> **"(1) In this Part 'wages', in relation to a worker, means any sums payable to the worker in connection with his employment, including-**
>
> **(a) Any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise"**

18. S.13(3) of ERA says:

> **"Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion."**

19. In **New Century Cleaning Co Ltd v Church 2000 IRLR 27, CA** the majority of the Court of Appeal held that a worker would have to show an actual legal, although not necessarily contractual, entitlement to the payment in question in order for it to fall within the definition of "wages".

20. When it comes to the relevant test in deciding the terms of a contract, Lord Clarke explained the relevant principles in this way in **RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH [2010] UKSC 14; [2010] 1 WLR 753**, para 45:

> "The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. "

21. In ***Blue v Ashley*** **[2017] EWHC 1928** Leggatt J noted that where the court is concerned with an oral agreement, the test remains objective but evidence of the subjective understanding of the parties is admissible in so far as it tends to show whether, objectively, an agreement was reached and, if so, what its terms were and whether it was intended to be legally binding. Evidence of subsequent conduct is admissible on the same basis.

22. When it comes to implied terms, The courts will not imply a term simply because it is a reasonable one. Nor will they imply a term because the agreement would be unreasonable or unfair without it. A term can only be implied if the court can presume that it would have been the intention of the parties to include it in the agreement at the time the contract was made. In order to make such a presumption, the court must be satisfied that:

a. the term is necessary in order to give the contract business efficacy: In **Ali v Petroleum Co of Trinidad and Tobago 2017 ICR 531, PC**, Lord Hughes explained that: “A term is to be implied only if it is necessary to make the contract work, and this it may be if…..it is necessary to give the contract business efficacy.……The concept of necessity must not be watered down. Necessity is not established by showing that the contract would be improved by the addition. The fairness or equity of a suggested implied term is an essential but not a sufficient precondition for inclusion. And if there is an express term in the contract which is inconsistent with the proposed implied term, the latter cannot, by definition, meet these tests, since the parties have demonstrated that it is not their agreement.”

b. it is the normal custom and practice to include such a term in contracts of that particular kind: the custom in question must be reasonable, notorious and certain (see, for example, **Devonald v Rosser and Sons 1906 2 KB 728, CA**, and **Sagar v H Ridehalgh and Son Ltd 1931 1 Ch 310, CA)**. This means that the custom must be fair and not arbitrary or capricious; that it must be generally established and well known; and that it must be clear cut. But it should be borne in mind that neither custom and practice nor any of the other legal bases for implying terms into a contract permits the courts to displace specific express terms that deal fully with the same subject matter as that on which a party is seeking to imply a term.

c. an intention to include the term is demonstrated by the way in which the parties have operated the contract in practice, including all the surrounding facts and circumstances. This approach may demonstrate that the contract has been performed in such a way as to suggest that a particular term exists, even though the parties have not expressly agreed it, see **Mears v Safecar Security Ltd 1982 ICR 626, CA**.

d. the term is so obvious that the parties must have intended it (known as the 'officious bystander' test). In **Shirlaw v Southern Foundries (1926) Ltd 1939 2 KB 206, CA**, **affirmed by the House of Lords in Southern Foundries 1926 Ltd v Shirlaw 1940 AC 701, HL** held that a term could be implied in a situation where 'if while the parties were making their bargain, an officious bystander were to suggest some express provision for it in the agreement, they would testily suppress him with a common "oh, of course"'. In practice, this means that a term will be implied if it can be said that it is so obvious that it goes without saying.

23. Under section 8 of the ERA an employee has the right to be given by his employer "at or before the time of which any payment of salary or wages is made to him, a written itemised pay statement". The legislation says the statement should include particulars of any variable and fixed deductions and the purposes for which they are made. S.11 of the ERA provides that where an employer does not give an employee a statement as required by section 8 an employee may make a reference to an Employment Tribunal to determine what particulars ought to have been included.

24. Under section 12(3) of the ERA, where an Employment Tribunal finds that an employer has failed to give an employee any pay statement it shall make a declaration to that effect. Section 12(4) provides that where a Tribunal finds that any unnotified deductions have been made from the pay of the employee during the period of 13 weeks immediately preceding the date of the application for the reference, the Tribunal may order the employer to pay a sum not exceeding the aggregate of the unnotified deductions. A deduction is an unnotified deduction where it is made without the employer giving the employee particulars of the deduction in a pay statement.

25. Section 1 of the ERA requires an employer to give a worker a written statement of particulars of employment not later than the beginning of the employment. S.1(3) provides that the statement shall include particulars of the name of the employer, and worker, the date when employment began and (in the case of a statement given to an employee) the date when their period of continuous employment began.

26. Where an employer fails to comply with that requirement, s.38 of the Employment Act 2002 states:

> **"(1) This section applies to proceedings before an employment tribunal relating to a claim by a worker under any of the jurisdictions listed in Schedule 5….**
>
> **(3) If in the case of proceedings to which this section applies—**

> **(a) the employment tribunal makes an award to the worker in respect of the claim to which the proceedings relate, and**
> **(b) when the proceedings were begun the employer was in breach of his duty to the worker under section 1(1) or 4(1) of the Employment Rights Act 1996 …,**
> **the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.**
>
> **(4) In subsections (2) and (3)—**
> **(a) references to the minimum amount are to an amount equal to two weeks' pay, and**
> **(b) references to the higher amount are to an amount equal to four weeks' pay.**
>
> **(5) The duty under subsection (2) or (3) does not apply if there are exceptional circumstances which would make an award or increase under that subsection unjust or inequitable."**

27. The right to an award under s.38 is not a free-standing right and an award can only be made if the claimant succeeds with a claim of the kind listed in Schedule 5.

28. A tribunal cannot make an award under s.38 if the required particulars are provided before proceedings are begun even if not provided within the timescale required by s.1 of ERA (**Govdata Ltd v Denton 2019 ICR D8, EAT**).

29. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("s.207A") gives the Tribunal a power to adjust compensation where there has been an unreasonable failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures. Compensation can be increased where it is just and equitable but by no more than 25%. That provision applies where the proceedings concern a matter to which the Code relates.

Conclusions

Unlawful deduction of commission for May and October 2022

30. I am satisfied that the claimant was entitled to be paid commission of £1,100 for each of May and October 2022 and that the respondent failed to pay it. This was an unauthorised deduction from wages.

31. I order that the respondent pay the claimant the gross amount of £2,200 in relation to these unlawful deductions.

Unlawful deduction of overtime

32. In the absence of a written contract, I need to decide whether the claimant can show a legal entitlement to be paid overtime. There are two possible bases on which this was payable. The first is that there was a contractual entitlement to overtime. The claimant's own evidence was that there was no express agreement about the payment of overtime. There was no evidence that any other employed colleagues carrying out the same work as the claimant were paid overtime and so I do not find that there are grounds for implying a right to overtime based on custom or practice.

33. I have also decided that it was not necessary to imply such a term using the officious bystander test. In this case the claimant was paid an annual salary (rather than being paid on an hourly basis). It was a commission-enanced job with the claimant having control of when he worked. In the circumstances I do not find that it is necessary to imply a right to overtime into the contract.

34. The claim based on an implied term in the contract giving the claimant a right to overtime therefore fails.

35. The second basis on which the claim for overtime is brought is that if the overtime was not paid the claimant would have been paid less than the National Minimum Wage rate applicable to him. I find that the relevant National Minimum Wage rate was £9.50.

36. Based on the claimant's evidence I have found that he worked an average 1½ hours extra per day. Adding that to the normal working hours of 10.00am to 7.00pm Monday to Thursday and 10.00am to 3.00pm on Friday gives a total working hours per week of 48½ hours per week. Even taking the lower of the claimant's basic salary, which is £25,000 per annum, that works out at a weekly salary of £480.77. At 48.5 hours per week that equates to an hourly salary of £10.02 which is more than the £9.50 national minimum wage at the time. The claimant was not therefore paid below the minimum wages at the time even before the pay rise to £27,000 basic and commission is taken into account.

37. On that basis the claim to be entitled to overtime because the claimant would otherwise be paid at less than the National Minimum Wage also fails.

38. There was therefore no legal entitlement to overtime so it was not an unauthorised deduction from wages for the respondent to fail to pay it. The claim relating to overtime fails.

Failure to provide itemised payslips

39. I find that the respondent did fail to provide itemised payslips for the whole of the claimant's employment with it. The respondent has still not provided any itemised pay statements.

40. I make a declaration that the respondent has failed to give to the claimant any pay statements in accordance with section 8 of the Employment Rights Act 1996.

41. Under section 12(4) Employment Rights Act 1996 I may order the respondent to pay to the claimant the aggregate of unnotified deductions made during the 13 weeks before he made his claim to the Tribunal. The claimant has failed to provide the information necessary to calculate the aggregate of unnotified deductions. In addition, the claimant made his claim on 20 February 2023. 13 weeks prior to that date is 21 November 2022. The claimant left employment on 31 October 2022. That means he was not employed at all during the period of 13 weeks prior to starting his claim. Section 12(4) only allows me to order the respondent to pay the aggregate of unnotified deductions during that period. Because the claimant had left employment the aggregate deductions during that period were zero. I do not make an award under s.12(4).

Failure to comply with the ACAS Code of Practice

42. I can increase the awards for unauthorised deductions by up to 25% if section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 applies, i.e. if there was an unreasonable failure by the respondent to comply with a provision of the Code. Section 207A applies where it appears to the Tribunal that:

> "The claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies."

43. Although it does seem to me that the claimant in this case was dismissed without any proper disciplinary proceedings being brought, none of the claims to which these proceedings relate to that dismissal. On that basis I find that section 207A does not apply and I do not have power to increase the compensation in this case for failure to comply with the ACAS Code.

Failure to provide written terms and conditions

44. S.38 of the Employment Act 2002 applies because the claimant's claim of unauthorised deduction has succeeded in relation to his commission payment. I do find that the respondent failed to provide the claimant with written terms and conditions. It did not provide them prior to these proceedings starting and has still not provided them.

45. In those circumstances I consider that there are no exceptional circumstances which mean I should not make an award of two weeks' pay. The complete failure to provide those particulars or of any effort to do so mean that I find it is just and equitable to award four weeks' pay for this.

46. In calculating the claimant's weekly gross pay taking into account his commission entitlement I have to do my best with the information I have in the absence of the further information ordered from the claimant. Given my findings about his basic salary and commission I find that the claimant's gross weekly pay would have exceeded the then applicable statutory cap of £571 per week.

47. In those circumstances I order that the respondent pay the claimant the sum of £2284.00 for its failure to provide a written statement of employment particulars.

Dissolution of the respondent

48. I explained to the claimant that the Tribunal does not have a role in enforcing the awards it makes. The claimant had noted that the respondent had been under threat of being struck off the Companies House register. I explained to the claimant that if the respondent is dissolved there will be no legal entity against which the Tribunal's Judgment can be enforced. The proposal to strike off the respondent has currently been suspended. The claimant should take care to ensure that the strike off proposals are not re-activated resulting in the respondent being dissolved.

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Employment Judge McDonald

Date: 15 February 2024

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

28 February 2024

FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990 ARTICLE 12

Case number: **2402858/2023**

Name of case: **Mr B Ahmad** v **Breathe Services Limited**

Interest is payable when an Employment Tribunal makes an award or determination requiring one party to proceedings to pay a sum of money to another party, apart from sums representing costs or expenses.

No interest is payable if the sum is paid in full within 14 days after the date the Tribunal sent the written record of the decision to the parties. The date the Tribunal sent the written record of the decision to the parties is called **the relevant decision day**.

Interest starts to accrue from the day immediately after the relevant decision day. That is called **the calculation day**.

The rate of interest payable is the rate specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as **the stipulated rate of interest**.

The Secretary of the Tribunal is required to give you notice of **the relevant decision day**, **the calculation day**, and **the stipulated rate of interest** in your case. They are as follows:

the relevant decision day in this case is: 28 February 2024

the calculation day in this case is: 29 February 2024

the stipulated rate of interest is: **8% per annum**.

For the Employment Tribunal Office