



EMPLOYMENT TRIBUNALS

Claimant: Ms C Browning

Respondent: Nica Design Ltd

Heard at: London Central (by CVP)

On: 23 February 2024

Before: Employment Judge Leonard-Johnston

REPRESENTATION:

Claimant: Ms. L Caller (solicitor)

Respondent: Mr. Peter Sas, In person

JUDGMENT

The judgment of the Tribunal is as follows:

1. The complaint of unauthorised deductions from wages is well-founded. The respondent made an unauthorised deduction from the claimant's wages in relation to the period of 1 to 10 August 2023. The respondent must pay the claimant **£1920**, which is the gross sum deducted. The claimant is responsible for the payment of any tax or National Insurance.
2. The complaint in respect of holiday pay is well-founded. The respondent failed to pay the claimant for holidays accrued but not taken on the date the claimant's employment ended. The respondent must pay the claimant **£3540**. The claimant is responsible for the payment of any tax or National Insurance.
3. The complaint of breach of contract is well-founded in part. The respondent was in breach of contract by:
 - a. Deducting pension contributions from the claimant's pay and failing to pay this into the claimant's pension scheme. The respondent must pay the claimant the amount of **£2495**.

- b. Failing to reimburse the claimant for travel and subsistence expenses. The respondent must pay the claimant the amount of **£2525**.
4. The claim that the respondent was in breach of contract by failing to pay the claimant commission owed under contract does not succeed.
5. The claim of wrongful dismissal is dismissed upon withdrawal.

REASONS

The hearing

1. The parties attended the hearing by CVP and I am satisfied that they were able to fairly participate in the video hearing. The claimant was represented by Ms Caller and gave evidence under oath as well as providing a witness statement and a bundle of evidence running to 86 pages.
2. The respondent filed an ET3 but failed to comply with the directions to provide any documentary or witness evidence. This is despite the claimant's representative having sent the respondent numerous emails relating to the hearing. As a preliminary issue, I asked the respondent why he had not provided any documentary evidence or a witness statement. He said that he had been having trouble receiving emails with some emails going into his junk folder. I asked him if he had received the notice of the hearing along with the directions contained therein. He admitted that he had received the notice of hearing and accepted that he had failed to properly read the directions of the Tribunal. He said he would be able to provide documents, for example records from his accountant, if he was given more time, but he did not seek an adjournment of the hearing. He did not have the evidence to hand but said that he could obtain it. I did not consider his assertion that he had problems receiving emails to be a good reason for failure to comply with the directions, because he had received the notice of hearing and directions. Even taking into account that the respondent is a litigant in person, I was not satisfied that it was in the interests of justice, or in line with the overriding objective, to allow the respondent to provide late evidence. The failure to engage with the requirements of the Tribunal was a matter of his own choice and late evidence would impact unfairly on the claimant and would delay the hearing. I explained to the respondent that he would be entitled to defend the claim but that it was too late to provide evidence. I explained to the respondent the difference between evidence and submissions and that any assertions of facts he made would be treated as submissions and given limited weight accordingly.
3. During the hearing the claimant's representative confirmed that she was withdrawing the wrongful dismissal claim to avoid double counting of the wages

from August 2023, and would pursue only the claim of unlawful deduction of wages.

ISSUES

4. I must determine the following issues:
 - a. Did the respondent unlawfully deduct wages from the claimant by failing to pay her for 9 days worked in August 2023?
 - b. Did the respondent fail to pay the claimant holiday pay accrued but not taken at the end of her employment?
 - c. Did the respondent breach the employment contract by:
 - i. Failing to pay contractual commission earned during employment;
 - ii. Failing to reimburse the claimant for reasonable expenses;
 - iii. Failing to pay pensions contributions deducted from the claimant's salary throughout her employment?

FINDINGS

5. It is for the claimant to establish each of her claims, and the standard is the balance of probabilities.

Unlawful deduction of wages

6. It is not in dispute that the claimant was given notice of her dismissal on 10 July 2023 by phone and by letter. The letter stated that the Claimant's effective date of termination would be 7 August 2023. The claimant wrote to the respondent on 10 July 2023 stating that as required under her contract she was entitled to one month notice and that therefore her termination date should be 10 August 2023. The claimant chose to work her notice period, and her last date of work was 11 August 2023.
7. I find that the claimant was entitled to one calendar month notice under her contract of employment. I find that the claimant was entitled under her contract to be paid from 1 August 2023 until the 10 August 2023. Whilst the claimant worked on 11 August 2023, she has not established that she was entitled to be paid for that day, it being outside of her notice period and there being no documentary evidence that the respondent agreed to pay her an extra day.
8. The respondent asserts that the claimant was paid her notice pay, including the August dates, in full. He has provided no evidence of this. The Claimant provided evidence that she was paid her June 2023 salary in several instalments. On 30th June £200 was paid. On 4 July 2023 £1000 was paid. On 6 July 2023 £500 was paid. The remaining balance of £1957.63 was paid on 7 July 2023. The respondent accepted that the June salary was not paid on time because the respondent had cash flow issues and that it was paid in instalments.

9. The claimant received her full July salary on 31 July 2023. She claims that was her last payment from the respondent and that she therefore was not paid for the remainder of her notice period. I accept that the 31 July payment was the last payment she received from the respondent. I do not accept the respondent's assertions that the claimant was paid her full notice period including August wages. Mr. Sas was not credible on this point and I found him to lack credibility overall and to exaggerate facts to suit his position. It is not credible that the 31 July payment covered the full notice period. Salary was paid at the end of the month, and the payment on 31 July was clearly for one month salary only (£5000 gross). It did not cover the remainder of her notice period wages.
10. I find that the respondent has failed to pay the claimants wages from 1 August 2023 until 10 August 2023, being 9 days. The claimant has assessed her daily wage at £240 per day, gross. The respondent provided no evidence to dispute that daily rate. Accordingly, I find that the respondent has made an unlawful deduction of wages in the amount of **£1,920**.

Holiday pay

11. The respondent did not dispute that the claimant was owed holiday pay, he just disputed the amount. In the ET3 the respondent accepted that she was owed £3230. The claimant provided a break down in her ET1 of the days accrued and not taken, totalling 14.75 days. At the daily rate of £240 this amounted to £3540. The respondent could provide no explanation as to why he did not agree with either the daily rate or the number of days owed, only that it was the calculation he and his accountant had come up with. I allowed the respondent a short break to find the information on which he had based his calculations and he could not. There was accordingly neither evidence or submissions before me as to why the claimant's calculation of her holiday paid is incorrect. Accordingly, I find that the claimant is owed **£3540** in unpaid holiday pay.

Commission

12. I find that the document at page 18 of the claimant's bundle entitled "Commission Structure" represented the agreement between the parties in relation to commission. It was divided into two commission systems. First, aluminium sales. The document clarifies that the commission would be "calculated from margin on product only" and that the rate would be 10% for new business with trade clients and 5% for second business onward with trade and private clients. The claimant claimed commission on two aluminium sales of new clients, one for £16,126 and one for £3,307. In evidence the claimant clarified that the amounts she was claiming represented the value of the contracts, that is, the value of the products sold.
13. I find that the claimant was entitled to claim commission for 10% of the profit margin on the product, not the value of the contract itself. As the claimant has

admitted that the amounts claimed do not represent the margin on product, I am not satisfied that she has established she is entitled to 10% of that figure.

14. The second part of the commission related to timber sales. That stated that:

“Annual target is £250,000

Commission rate will be 5% of target paid if target is met or surpassed.

Rate will be 2.5% if between £200 and £249k is achieved.

Rate is 0% below £200k

* Commission is paid on the base value of all products. For example, if a project consists of non standard glass or ironmongery where the cost of this increases the supply price to the client, the rate of commission will not be applied to this increased cost.”

15. The timber commission structure did not state that commission would be calculated on margin on product only. It is calculated on the value of the products sold. The claimant’s position is that she made at least three sales on which she should have been paid commission. One was for Langley Construction/Griggs Homes for £206,575. One was for Kate Tagge for £8016 and the final was to Claire Temple for £15,220. Because she says she made sales between £200,000 and £249,000 she says she is entitled to 2.5% of these sales. The respondent submitted that the claimant was not entitled to any commission because she did not reach the minimum target of £200,000. Mr Sas submitted that the Langley Construction sale was for approximately £70,000 and that if it had indeed been a £200,000 sale the business would not have had such cash flow issues and he would not have terminated the claimant’s employment.

16. It is unfortunate that no documentary evidence was before me as to the exact details of this particular sale, because the issue turns on whether the sale amounted to £200,000 or £70,000. That is primarily the result of the respondent failing to provide disclosure of relevant documents. Without any documentary evidence I must take into account the evidence of the claimant who was under oath and who provided a witness statement and balance this against the assertions of Mr Sas. It is for the claimant to establish that it is more likely than not that she made a sale of £200,000. Even taking into account that the claimant’s evidence can be given more weight than the assertions of Mr Sas, I am not persuaded on the balance of probabilities that there was an order for £200,000 of which the customer paid 50% in June, as suggested by the claimant. It appears unlikely that the respondent would have wholly failed in his obligations to pay salary and other entitlements as he did, if the business had received that kind of deposit in June 2023. Accordingly, I find that the claimant has not established that she met the £200,000 minimum sales target in order to qualify for commission.

Expenses

17. It is not in dispute that the claimant has not been paid for any expenses incurred during her employment. The key issue in dispute is whether the claimant was entitled to claim her costs, primarily mileage costs, in commuting from her home in Kent to the respondent's offices in Ealing. The respondent disputes that there was an agreement with the claimant to pay her commuting costs, but the respondent agrees that she was entitled to claim expenses for travel to client meetings, and does not in the ET1 dispute her claim that subsistence expenses would be reimbursed.
18. There is no documentary evidence that the respondent agreed to pay the claimant's commuting expenses. Again, the respondent provided no evidence to dispute the claims. On balance, I am satisfied that it is more likely than not that the agreement was as described by the claimant. I prefer the claimant's version of events on this point. The claimant initially turned down the position on the basis that the commute was too far. She was persuaded to take the job on the basis that she would spend the first week in the office and thereafter work from home; an agreement that Mr Sas unilaterally changed. I am satisfied that the claimant's primary place of work was agreed to be her home and I accept the claimant's evidence that the respondent agreed to pay her reasonable travel and subsistence expenses as part of this agreement. Accordingly, I find that the claimant is entitled to the entirety of her expenses claimed, totalling **£2525**.

Pension contributions

19. The claimant alleged in her claim form that the respondent deducted employer and employee pension contributions from her pay each month but failed to pass them on to her pension fund. She was employed for 9 months and her monthly contributions were £146.76 employee contributions plus £146.76 employer contributions. The respondent admitted that there had been a failure to pay her pension contributions, but asserted that following her claim they had been paid, although he could not provide dates or amounts to clarify this assertion. I found Mr Sas to be unreliable on this point and disingenuous to suggest to the Tribunal that the claimant's pension contributions had since been paid. Overall, I did not find him to be credible and I find that he exaggerated facts. The claimant checked her pension fund account during the course of the hearing and discovered that there had been one payment only of \$146.76, paid on 3 November 2023. Over the 9 months of employment the amount that should have been paid into her pension fund was £2641.68. I find that the respondent deducted £2641.68 in pension contributions from the claimants pay, in breach of the employment contract and his legal obligations as an employer, and only passed on £146.76. The respondent must pay **£2495** in damages for breach of contract.

**Employment Judge Leonard-
Johnston
26 February 2024**

Judgment sent to the parties on:

6 March 2024

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For the Tribunal:

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