



EMPLOYMENT TRIBUNALS

Claimant: Mr R Baseby
Respondent: S.K. Landscapes and Maintenance Limited
Heard at: London South Tribunal via Cloud Video Platform
On: 26 February 2024
Before: Employment Judge Brewer

Representation

Claimant: In person
Respondent: Mr S Kirkaldie, Owner

JUDGMENT

The judgment of the Tribunal is:

1. the Tribunal does not have jurisdiction to hear the claimant's claim for unfair dismissal, which is dismissed,
2. the claimant's claim for unauthorised deductions from wages succeeds.
3. The respondent shall pay to the claimant the sum of £1, 682.23 less deductions for taxation.

REASONS

Introduction

1. This case came before me for a final hearing. The claimant represented himself. He produced a witness statement and gave oral evidence. The respondent was represented by one of its owners, Mr Kirkaldie. He

produced witness statements for himself and Mrs Kircaldie and both gave oral evidence. I was presented with a bundle of documents of 85 pages, and I have taken into account those documents I was taken to by the parties along with the pleadings in the case.

2. In his claim form the claimant claimed unfair dismissal and unpaid wages.
3. Having considered the claim form it became apparent that there was a jurisdictional issue with the claim for unfair dismissal.
4. The claimant started employment on 22 April 2021. The effective date of termination of his employment was 3 April 2023. Thus, the claimant did not have sufficient qualifying service at the effective date of termination to bring an unfair dismissal claim.
5. Having determined that matter the hearing went on to consider the claim for unpaid wages.

Issues

6. If the claim is dealt with as one of unauthorised deductions from wages, the issues are as follows:
 - 6.1. Were the wages paid to the claimant on the relevant dates less than the wages they should have been paid?
 - 6.2. Was any deduction required or authorised by statute?
 - 6.3. Was any deduction required or authorised by a written term of the contract?
 - 6.4. Did the claimant have a copy of the contract or written notice of the contract term before the deduction was made?
 - 6.5. Did the claimant agree in writing to the deduction before it was made?
 - 6.6. How much is the claimant owed?
7. If the claim is pursued as a breach of contract, the issues are as follows:
 - 7.1. Did this claim arise or was it outstanding when the claimant's employment ended?
 - 7.2. Did the respondent do the following fail to pay the claimant the wages due to him under his contract?
 - 7.3. Was that a breach of contract?
 - 7.4. How much should the claimant be awarded as damages?

Law

Unauthorised deductions from wages

8. In relation to a claim for unlawful deductions from wages, the general prohibition on deductions is set out in section 13(1) Employment Rights Act 1996 (ERA), which states that:

'An employer shall not make a deduction from wages of a worker employed by him.'

9. However, it goes on to make it clear that this prohibition does not include deductions authorised by statute or contract, or where the worker has previously agreed in writing to the making of the deduction (section 13(1)(a) and (b)).

10. In order to bring an unlawful deductions claim the claimant must be, or have been at the relevant time, a worker. A 'worker' is defined by section 230(3) ERA as an individual who has entered into or works under (or, where the employment has ceased, has worked under):

- 10.1. a contract of employment (defined as a 'contract of service or apprenticeship'), or
- 10.2. any other contract, whether express or implied, and (if express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.

11. Section 27(1) ERA defines 'wages' as:

'any sums payable to the worker in connection with his employment'

12. This includes *'any fee, bonus, commission, holiday pay or other emolument referable to the employment'* (section 27(1)(a) ERA). These may be payable under the contract 'or otherwise'.

13. According to the Court of Appeal in **New Century Cleaning Co Ltd v Church** 2000 IRLR 27, CA, the term *'or otherwise'* does not extend the definition of wages beyond sums to which the worker has some legal, but not necessarily contractual, entitlement.

14. Finally, there is a need to determine what was 'properly payable' on any given occasion and this will involve the Tribunal in the resolution of disputes over what the worker is contractually entitled to receive by way of wages. The approach tribunals should take in resolving such disputes is that adopted by the civil courts in contractual actions — **Greg May (Carpet Fitters and Contractors) Ltd v Dring** 1990 ICR 188, EAT. In other words, tribunals must decide, on the ordinary principles of common law and

contract, the total amount of wages that was properly payable to the worker on the relevant occasion.

Breach of contract

15. The law here relates to the construction of the terms of the contract between the parties.
16. In **Arnold v Britton and ors** 2015 AC 1619, SC, Lord Neuberger summarised the general principles that apply to the interpretation of express contractual terms thus:

‘When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to “what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean” to quote Lord Hoffmann in **Chartbrook Ltd and anor v Persimmon Homes Ltd and anor** 2009 1 AC 1101, HL, and it does so by focusing on the meaning of the relevant words... in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the [contractual agreement], (iii) the overall purpose of the clause and the [agreement], (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party’s intentions.’

17. Although the **Arnold** case concerned the interpretation of a service charge clause in a holiday lettings agreement, Lady Wise confirmed in **Campbell v British Airways plc** EATS 0015/17 that Lord Neuberger’s observations applied equally to the interpretation of pay terms within an employment contract.
18. In short, normally one considers only the written terms. However, the Supreme Court in **Autoclenz Ltd v Belcher and ors** 2011 ICR 1157, SC, acknowledged that employment contracts are an exception to ordinary contractual principles as the circumstances under which they are agreed are often very different from those under which commercial contracts are agreed, with employers largely able to dictate the terms. The Court held that:

‘the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part’.
19. In **Adams and ors v British Airways plc** 1996 IRLR 574, CA, the Court of Appeal confirmed that an employment contract should not be interpreted in a vacuum and that, when resolving any ambiguity in its express terms, it is proper to have regard to the factual setting in which the contract was made.

Findings of fact

20. I make the following findings of fact.

21. The claimant was employed by the respondent as a Team Leader. He was employed between April 2021 and April 2023.

22. On 18 May 2021 the claimant was provided with a written contract of employment. The following are the material clauses of the contract:

Hours of Work

Your basic hours of work will be 7:30 AM - 4:30 PM, Monday to Friday with half an hour for lunch daily. Punctuality is extremely important so it is essential that you notify Sean in the morning if you are running late.

Timesheets must be completed fully and handed in promptly by the following Monday morning each week. Hours worked over and above a 42.5 hour week will be paid as overtime at time and half.

Rates of Pay

Your gross starting salary will be £23,205.00 per annum paid at the rate of £10.50 per hour for all hours worked. Payments will be made two weekly in arrears; i.e. You will receive 26 payments per annum. Salaries are reviewed annually taking full account of performance. However if there is a change in your job role during the course of the year or you gain additional qualifications your salary will also be reviewed at this time.

Contract Variation

SK landscapes and maintenance limited reserves the right to vary any of the terms and conditions of this contract. Any such variation will, of course, be notified to you. You will receive four weeks written notice of any variation which will become effective only after the expiry of that notice.

23. That contract included a job description amongst other things, and I find as a fact that the job description was incorporated by reference into the contract.

24. The contract was signed by the claimant and on behalf of the respondent by the owners.

25. The job description contains the following material terms:

On contracts where the allocated time is excessive and you are unable to undertake additional maintenance tasks (i.e. there are no extra jobs that needed doing) contact Sean/Karen or make a note of the situation within the client's file. Do not leave the contract early.

Occasionally during periods of poor weather additional work practises might be undertaken, (e.g. garden clearance projects, cleaning/painting tools, decorating and painting properties etc.) so as to maintain full employment. This is subject to availability.

26. The way that the claimant worked was that the respondent has a number of contracts under which they provide various landscaping and maintenance services and employees will be allocated work under those contracts. Each contract would have allocated a period of time for the work to be done. So, for example, it may be that a client has agreed to pay for four hours work each week for the respondent to undertake garden maintenance.
27. As indicated in the contract of employment, the claimant provided weekly timesheets of the work he had done in the previous week.
28. The claimant's pay slips indicate that his actual pay reflected the hours in the timesheet he presented and on a regular basis his pay fell below the amount expected for the 42.5 hours per week referred to in the contract.
29. I accept the respondent's evidence that all staff are paid for the hours they work. I have not, of course seen anyone else's contract.
30. The short but important point between the parties is whether the claimant's contract is to be construed in the way contended for by the respondents, which is that employees were paid per hour and therefore only paid for the hours they worked, or the way contended for by the claimant, which is that he had an annual salary and should have been paid each week for 42.5 hours.

Discussion and conclusion

31. The key wording is that contained in the clauses i have quoted above.
32. The claimant's starting hourly rate was £10.00 and a simple multiplication shows that this rate multiplied by the 42.5 hours per week set out in the contract gives the gross annual salary set out in the contract.
33. Without more, this contract could easily be construed as providing the claimant with a annual salary and the reference to an hourly rate is only to take account of the fact that overtime is payable at time and a half and therefore it is necessary to work out an hourly rate in order to pay for overtime worked. In other words the reference to an hourly rate of pay does not without more indicate that the claimant is an hourly paid employee as opposed to a salaried employee with a gross annual rates of pay.
34. The respondent relies on the words "for all hours worked" as indicating that the claimant would only be paid for the hours he in fact worked.
35. The difficulty with this argument is that it was for the respondent to allocate work to the claimant and the contract of employment, incorporating as it does the job description, makes it clear that staff should not leave any job early. In other words, if the claimant is given 42.5 hours work per week the

expectation would be that he would be on the job for 42.5 hours per week subject of course to an inability to work outside because of bad weather, although to cater for that the contract does allow for staff to be given other work.

36. There was no evidence that despite concerns about the quality of the claimant's work, there were concerns about time keeping And of course the respondent had a running total of the exact number of hours the claimant was working because he was submitting timesheets regularly.
37. On the question of timesheets, the respondent suggested that this is evidence that staff were paid on an hourly basis otherwise what would be the need for timesheets? But the answer to that is obvious. Given that overtime paid at a premium rate, it is necessary for the respondent to know the precise number of hours staff have worked in order to know when overtime is being worked and when the premium rate becomes payable. Furthermore the provision of timesheets is a way the responder can check that staff of actually worked on the contracts which they were rostered to work on.
38. The provision of timesheets does not in my judgment indicate that staff are hourly paid.
39. I turn them to the key clause dealing with the rate of pay. The entire wording is significant. The clause says:

“your gross starting salary will be... paid at the rate of...per hour for all hours worked.... Salaries are reviewed annually taking full account of performance. However if there is a change in your job role during the course of the year or you gain additional qualifications your salary will also be reviewed at this time.”

40. If the word “worked” was removed, the clause would still make perfect sense. The clause when broken down to its constituent parts reads as followed:
- 40.1. the claimant is to receive a gross annual salary,
 - 40.2. there is an annual salary review,
 - 40.3. there is a salary review if the claimant changed roles,
 - 40.4. there is a salary review if the claimant gained further qualifications.
41. In my judgment, and based on my experience, hourly paid staff would have a rate review not a salary review.
42. In the context of hourly paid staff, a salary review is meaningless and yet in this clause salaries can be reviewed on three bases. In my judgment that is not how hourly paid employees are treated. One might expect a review of

the hourly rate payable to everyone whereas this clause in is individualised that is to say the claimant can increase his salary by, for example, gaining qualifications. That is not the same as only paid staff receiving an hourly rate increase.

43. The inclusion of the word “worked” or the words “for all hours worked” does not lead me to conclude that the claimant was hourly paid. The entire thrust of the drafting relates to a salaried employee. The only ambiguity is the word “worked” and if it was the intention to create a contract under which the employee, in this case the claimant, is hourly paid, that in my view has failed. The reference to hours worked is not sufficient to displace the clear drafting in what is otherwise a perfectly sensible clause under which an annual salary is paid.
44. I do not think it is an answer to the question as to whether the claimant has suffered loss of pay to say that he has been paid in the same way that all other staff are paid because it may be that all staff been erroneously paid if they all have the same contractual terms as the claimant.
45. In my judgement the claimant was entitled to receive an annual salary which is calculated by multiplying an hourly rate of pay by 42.5.
46. In the circumstances I find that the claimant has suffered unauthorised deductions from pay or in the alternative the respondent acted in breach of contract in failing to pay him correctly.

Remedy

47. The material facts for the remedy are as follows:

- 47.1. the claimant’s starting salary was £23,205.00 ($£10.50 \times 42.5 \times 52$),
- 47.2. in June 2021 his annual salary increased to £24,310.00 ($£11.00 \times 42.5 \times 52$),
- 47.3. in September 2021 his annual salary increased to £25,415.00 ($£11.50 \times 42.5 \times 52$), and
- 47.4. in May 2022 his annual salary increased to £28,730.00 ($£13.00 \times 42.5 \times 52$).

48. These figures give gross weekly pay as follows:

- 48.1. until May 2021, £446.24,
- 48.2. from June 2021 to August 2021, 467.50,
- 48.3. from September 2021 to April 2022, 488.75, and
- 48.4. from May 2022, 552.50.

49. The claimant was underpaid in the following months, for the following number of hours, by the stated amount:

- 49.1. June 2021, 4.75 hours @ £10.50 per hour = £49.87,
- 49.2. June 2021, 2 hours @ £11.00 per hour = £22.00,
- 49.3. July 2021, 0.25 hours @ £11.00 per hour = £2.75,
- 49.4. August 2021, 7.4 hours @ £11.00 per hour = £81.40,
- 49.5. September 2021, 3.75 hours @ £11.50 per hour = £43.12,
- 49.6. October 2021, 6 hours @ £11.50 per hour = £69.00,
- 49.7. November 2021, 16.8 hours @ £11.50 per hour = £193.20,
- 49.8. December 2021, 3.75 hours @ £11.50 per hour = £43.12,
- 49.9. January 2022, 4.25 hours @ £11.50 per hour = £48.87,
- 49.10. February 2022, 11 hours @ £11.50 per hour = £126.50,
- 49.11. March 2022, 10.5 hours @ £11.50 per hour = £120.75,
- 49.12. April 2022, 6 hours @ £11.50 per hour = £69.00,
- 49.13. May 2022, 9 hours @ £11.50 per hour = £103.50,
- 49.14. July 2022, 12 hours @ £13.00 per hour = £156.00,
- 49.15. August 2022, 10 hours @ £13.00 per hour = £130.00,
- 49.16. October 2022, 1.25 hours @ £13.00 per hour = £16.25
- 49.17. November 2022, 1.3 hours @ £13.00 per hour = £16.90,
- 49.18. January 2023, 22.75 hours @ £13.00 per hour = £295.75,
- 49.19. February 2023, 3 hours @ £13.00 per hour = £39.00, and
- 49.20. March 2023, 4.25 hours @ £13.00 per hour = £55.25.

50. The total shortfall is the gross sum of **£1, 682.23**. The claimant is entitled to receive, and the respondent shall pay him the net amount due based on that gross sum.

Employment Judge Brewer

Date: **27 February 2024**

JUDGMENT SENT TO THE PARTIES ON
13 March 2024

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FOR THE TRIBUNAL OFFICE

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