

RM



EMPLOYMENT TRIBUNALS

Claimant: Mr Kelvio Goncalves Esteves

Respondent: ASB-MCM UK Construction Ltd

Heard at: East London Hearing Centre

On: 25 July 2023

Before: Employment Judge Jones

Representation

Claimant: no attendance

Respondent: Ms E Afriyie, Senior Litigation Consultant

JUDGMENT

The application for reconsideration was successful in part.

The Tribunal varies the judgment to rescind the declaration that the Respondent failed to provide the Claimant with a written statement of particulars of employment.

The Respondent is to pay the Claimant the sum of £2,320.00 (£2,040 + £280.00).

REASONS

1. The Claimant brought a claim on 6 October 2021 of unlawful deduction of wages, failure to pay holiday pay and a failure to provide written terms and conditions of employment.
2. The Tribunal apologises to the parties for the delay in the production of this written judgment and reasons. The judgment was given in court on 25 July and these reasons and the written judgment is now produced.
3. The claim was served on the Respondent on 15 October 2021. In the Notice of Claim the Respondent was informed that if they wish to defend the claim, they must complete response form and submit it so that it is received by the

Tribunal Office by 12 November 2021. The Respondent failed to serve an ET3 Response as advised by the Tribunal.

4. By notice of hearing dated 3 November 2021, the parties were notified that the matter would be heard by telephone on 25 April 2022.
5. As there was no response to the claim, the matter was referred to a Judge, in accordance with Rule 21 of the Employment Tribunal Rules of Procedure 2013. That rule states as follows:
 - (i) *Where on the expiry of the time limit in rule 16 no response has been presented, or any response received has been rejected and no application for a reconsideration is outstanding, or where the Respondent has stated that no part of the claim is contested, paragraphs (2) and (3) shall apply.*
 - (ii) *The Tribunal shall decide whether on the available material (which may include further information which the parties are required by the Tribunal to provide), a determination can properly be made of the claim, or part of it. To the extent that a determination can be made, the Tribunal shall issue a judgment accordingly. Otherwise, a hearing shall be fixed Where the Tribunal has directed that a preliminary issue be determined at a hearing, a judgment may be issued by the Tribunal under this rule after that issue has been determined without a further hearing.*
 - (iii) *The Respondent shall be entitled to notice of any hearings and decisions of the Tribunal but, unless and until an extension of time is granted, shall only be entitled to participate in any hearing to the extent permitted by the Judge.*
6. The matter was referred to EJ Jones and a Rule 21 judgment was issued on 2 February 2022.
7. On 14 February 2022 the Respondent applied for written reasons. The Tribunal replied on 24 February to notify the Respondent of the history of the matter and that as it was undefended, they were not entitled to written reasons. The employment tribunal penalties office wrote to the Respondent on 13 May 2022 how to apply for reconsideration. They failed to do so until March 2022.
8. The Respondent submitted Grounds of Resistance on 28 July 2022. The Respondent submitted that they never received the claim, that the Claimant had been self-employed and that he had been paid all monies owed to him. The Claimant disputed that he was self-employed and was adamant that he had not been paid money owed to him. He also attached copies of text messages between himself and Gareth McMahon, director of the Respondent in which he asked to be paid and was told that it will be sorted out.
9. Although the Respondent's application for reconsideration was made outside of the statutory time limits, the Tribunal set this matter down for a

reconsideration hearing. It was initially listed for 24 February 2023. The hearing was postponed due to lack of judicial resources. It was re-listed for 1 March 2023.

10. On 1 March 2023, the Claimant attended the CVP hearing. The Tribunal had arranged a Portuguese interpreter to assist the Claimant. Mr Miloso, interpreter attended the hearing. Mr McMahon attended on behalf of the Respondent and was represented by Mr Maratos, Consultant from Peninsula. As the Claimant had difficulties logging on to the hearing with a device on which he could be seen and heard, it was decided that it would be proportionate, fair and just to both parties to relist the matter for an in person hearing at London East Employment Tribunals. The matter was re-listed for 1 day on 16 June 2023.
11. In the minutes of the hearing on 1 March, the Tribunal set out clearly the matters that would be considered on 16 June. They were:
 - a. *The Respondent's application for a reconsideration of the judgment issued under Rule 21 of the Employment Tribunal Rules 2013 dated 11 January 2022, on the basis that it had not been served with the ET1 claim form and because it has a defence to the claim;*
 - b. *If the reconsideration is granted, the Respondent's contention that the Claimant was not an employee but had been a self-employed contractor. The Tribunal will also consider whether the Claimant had been a worker, in the legal sense, for the Respondent;*
 - c. *If he was an employee or worker, whether the Respondent owes the Claimant wages and/or holiday pay;*
 - d. *Whether the Respondent has breached the duty to provide written terms and conditions of employment and if so, what remedy is due to the Claimant.*
12. The minutes also recorded the evidence the Tribunal had before it at that time, which was a statement from Mr McMahon for the Respondent and evidence from the Claimant, which had been submitted on 30 September 2023.
13. The Respondent was ordered to prepare a joint bundle of documents for the hearing on 16 June.
14. On 16 June the Claimant attended the Tribunal. The Respondent was represented by Mr A Williams for Peninsula. Unfortunately, as the Tribunal was unable to attend either in person or remotely, the hearing had to be postponed again. The Claimant informed the Tribunal that he lives in Italy. He would be unable to give evidence from Italy as Italy had not yet signed the protocol to allow him to do so. He would therefore be required to travel

to East London again for the hearing. The hearing was listed for today, 25 July.

15. The Tribunal was presented today with the Respondent's documents. Mr McMahon did not attend the hearing. The witness statement from Mr McMahon was signed by Ms Sharmila Bholanath, on his behalf. Ms Bholanath had previously corresponded with the Tribunal on 28 July to dispute the claim and to deny receipt of the claim. She stated that she was a director of the company. Neither Mr McMahon nor Ms Bholanath attended today's hearing.
16. The Claimant was unable to attend today's hearing. He provided documents to the Tribunal which showed that he had booked a flight from Italy to attend the hearing but that at the last minute the flight was cancelled. The Claimant's email to inform the Tribunal that he was unable to attend was not given to the judge until after the hearing.

The claim

17. The Tribunal then went on to consider the matters in dispute in this claim and to decide the claim as follows: -
18. The first matter was whether the Respondent had been properly served with the ET1 and other documents:
 - a. The Claimant's response to the Respondent's documents was that the address given on the claim form was the correct correspondence address of the Respondent at the time. The Claimant attached a Google search that he did of the company before issuing the claim which confirmed that 118A High Street, Epping was the company's address. The Respondent has since changed its address to 116 High Street, Epping. This change of address form was received at Companies House on 28 January 2022. The registration stated that '*The change in the Registered Office does not take effect until the Registrar has registered this form. For 14 days, beginning with the date that a change of Registered Office is registered, a person may validly serve any documentation on the company at its previous Registered Office*'.
 - b. Ms Sharmilah Bholanath's business, Epping Beauty Clinic Ltd is now registered at 118A High Street, Epping. It had been registered at 116 High Street. A request to change the registered address to 118A High Street, Epping was lodged at Companies House, also on 28 January 2022. Both addresses have the same postcode of CM16 4AF.
 - c. The Respondent's case is that its registered office at the time the claim was served was 4 Capricorn Centre, Cranes farm Road, Basildon, Essex SS14 3JJ. In his witness statement, Mr McMahon states that the registered office address was changed to 116 High Street, Epping on 1 December 2021.
 - d. The Tribunal concludes from this evidence that the Respondent was properly served with the documents, including the ET1 and the forms

for filing their Response to this claim, the ACAS Certificate, the Notice of Hearing by telephone dated 15 October 2021. The Respondent was properly served with the claim when these documents were sent to the Respondent on 15 October 2021.

- e. It is likely that the Respondent did not respond to the claim because they did not take it seriously. In the letter dated 30 December 2021, which was received by the Tribunal but not put before a Judge, Ms Bholanath stated that '*when we got it..we did not believe it was serious*'. She referred to the claim as a joke and a prank and described the claim for holiday pay as '*ridiculous*'. It is highly likely that the claim was properly served but the Respondent did not take the claim seriously and that is more likely to be why no response was filed within the statutory time limit.
19. The Tribunal considered the law on service of documents. In the case of *Anthony v Dyson Ltd* UKEAT/0080/19 (13 June 2019, unreported) it was noted that Rule 15 of the Employment Tribunal Rules 2013, does not require service at the registered office of a corporate Respondent, and to read in such a requirement would be entirely unjustified (not least in light of the fact that under the Civil Procedure Rules there is no obligation to serve a company at its registered office) (see CPR 6.9(2) which provides that where the defendant is a company registered in England and Wales, a claim form is to be served on 'the principal office of the company; or any place of business of the company within the jurisdiction which has a real connection with the claim'). Whilst the EAT did not rule out the possibility that, on the facts of a specific case, service at the registered address might be what is required in order to comply with r 15, it considered that in many other cases a requirement that the ET1 be sent to the registered office of a corporate respondent introduces a degree of formality that is simply unnecessary. Should there be an alleged failure to comply with Rule 15, the EAT indicated that what was required was a common-sense evidence-based enquiry as to what happened in order to determine compliance with the requirement to send the documents to the respondent. The test is whether the documents were sent to an appropriate address and addressed in a manner such that it was apparent that they were sent to the respondent.
20. It is therefore this Tribunal's judgment that the Respondent was properly served with the documents in this case at their correspondence address at 118A high Street, Epping. The Claimant was not provided with details of the registered office address when he worked for the Respondent. He did his best to find out what the address was and the Google search result shows that this address was one of the Respondent's addresses, if not the company registered address. It is likely that the Respondent received the claim but did not take it seriously. This Tribunal's judgment is that the documents were received by the Respondent when they were served. The Tribunal refuses to grant the Respondent's application for reconsideration.

Any evidence from the Respondent which goes to remedy?

21. Where a Respondent has failed to present a response in time, in breach of the Tribunal Rules, Rule 21(3) of the Employment Tribunals Rules 2013, states as follows: -

The respondent shall be entitled to notice of any hearings and decisions of the Tribunal but, unless and until an extension of time is granted, shall only be entitled to participate in any hearing to the extent permitted by the Judge.

22. The Tribunal allowed the Respondent to present any information it had regarding remedy.
23. The Respondent is adamant that it paid the Claimant all wages due to him. However, although both parties have provided copies of WhatsApp messages between the Claimant and Mr McMahon in which outstanding wages are discussed, there is no evidence of any payment made to the Claimant once the working arrangement ended. In an email to the Claimant on 17 June, Mr McMahon stated that he *will 'look into this on Monday and pay you what for the hours that have been works'*. In a WhatsApp message on 12 June 2021 to the Claimant, Mr McMahon stated *'Hi, I will get them to pay you over the next couple day I will go through the hours later please give uniforms to geroge or one of them.'* The Claimant agreed to return the uniforms that day. He messaged Mr McMahon later that night to ask for his payment.
24. The Respondent's representative told the Tribunal today that her instructions were that the Claimant had been paid all money due to him on 2 July 2021. However, the Tribunal was not given any receipt, signed acknowledgment of payment or any other evidence that a payment was made to the Claimant on 2 July 2021 or at any other time following those WhatsApp messages.
25. In the WhatsApp messages the Respondent does not dispute the amount owed. It is this Tribunal's judgment that the Claimant has been subject to unlawful deduction of wages and that the Respondent owes the Claimant outstanding wages. The sum claimed is £2,040. This judgment is confirmed.

Holiday pay

26. The Claimant is not in court to give evidence of his employment status with the Respondent. It is clear from the documents that the Respondent did not give him written terms and conditions of employment. The Claimant worked regularly for the Respondent and was paid on an hourly rate basis. He had to provide the Respondent with the number of hours worked, to be paid. It is likely that the Claimant was a worker and not an employee. As a worker the Claimant is entitled to holiday pay.
27. The Tribunal confirms the judgment that the Respondent has failed to pay the Claimant his holiday entitlement as set out in Regulations 13 and 16 of the Working Time Regulations 1998. The Respondent is to pay the Claimant the sum of £280.

Breach of section 1 Employment Rights Act 1996

28. Sections 1 Employment Rights Act 1996 gives every employee the right to written statement of terms and conditions of employment. The Claimant has not provided documents to lead the Tribunal to conclude that he was an

employee. It is likely that he was a worker. The contents of the Claimant's WhatsApp messages with Mr McMahon do not suggest that he was self-employed. They do not suggest mutuality of obligations as the Claimant was unsure whether he was required to attend on the following day. The Claimant did enquire of Mr McMahon on 1 June what documents he needed to provide in order to be registered with the Respondent. It is likely that he is referring to this message when he says that he did enquire after a contract of employment. The list of dates he provided to Mr McMahon on 5 June 2021 shows that he did not work every day and did not work the same hours every day. He worked 28 May from 8am to 5pm, 29 May from 8am to 5pm and 31 May but not again until 3, 4 and 5 June. The following 4 weeks were full weeks, 7 – 12 June and 14 – 19, 21 – 26 and 28 June – 3 July.

29. The Tribunal had insufficient evidence to conclude that the Claimant was an employee and that there was mutuality of obligations between him and the Respondent. The Claimant is therefore not entitled to a payment under section 124A Employment Rights Act 1996.
30. The Claimant is entitled to the following:
 - a. Outstanding wages of £2,040
 - b. Outstanding holiday pay of £280.
31. The Claimant is entitled to a payment of £2320.
32. The Respondent is to pay the Claimant the total sum of £2320.

Employment Judge Jones

18 March 2024