



EMPLOYMENT TRIBUNALS (SCOTLAND)
Case No: 4100554/2024

Held by Cloud Video Platform (Glasgow) on 12 and 26 April 2024

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Employment Judge M Robison

Mr S Bogie

**Claimant
In Person**

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Queensberry Event Hire Ltd

**Respondent
Represented by:
Mr W Duncan
Director**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claimant's claims under the Employment Rights Act 1996 are not well-founded and are dismissed.

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REASONS

1. The claimant lodged a claim in the Employment Tribunal on 30 January 2024 claiming arrears of pay. The respondent entered a response resisting the claims.
2. At the outset of the final hearing we discussed the outstanding claims for determination by the Tribunal. The claimant seeks underpayment of hours which he states relate to time off in lieu which he accrued but did not take and was not paid for on termination of his employment. After some discussion, the claimant clarified that he was claiming holiday pay in respect of holidays accrued during those hours only. The claimant also seeks payment of commission which he claims he was due but not paid, although he had not referenced this in his ET1.
3. After further discussion, the claimant confirmed, since this Tribunal does not have jurisdiction to hear such claims, that he was not pursuing his claim for

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employers' pension contributions, interest or compensation for the time he has spent preparing this case.

4. The respondent's employer's contract claim was not accepted, because such claims can only be accepted (in this Tribunal) where the claimant has lodged a claim for breach of contract, rather than a claim for unlawful deduction from wages under the Employment Rights Act 1996, which is the basis for this claim.
5. At the final hearing on 12 April 2024, the claimant gave evidence, and he called Mr Micheal Corbett, a former worker with the respondent. Mr Will Duncan, sole director of the respondent company, gave evidence for the respondent.
- 10 6. They referred to two separate volumes of documents which were lodged by each party, referred to either as C with the page number or R with the page number in this judgment. All of the claimant's pay slips were lodged during the course of the hearing.
- 15 7. It was not possible to complete all of the evidence on 12 April 2024 and accordingly a second day was listed when the Tribunal heard evidence from Mrs S Duncan, Mr Duncan's wife who assists with the running of the office side of the business; as well as submissions from parties.

Findings in fact

8. On the basis of the evidence heard and the documents lodged, the Tribunal finds the following facts admitted or proved.
- 20 9. The respondent hires out marquees for weddings and events and operates a wedding venue at the Dalswinton Estate. The organisation is run principally by the sole company director, Mr William Duncan.
10. Following interview, the claimant was offered the position of marquee hire event foreman in an e-mail dated 27 May 2021, to commence 7 June 2021. (C4). A contract was attached.
- 25 11. That contract (pages C6 and 7) confirmed the start date of 7 June 2021, and stated that the annual salary would be £24,960 based on 40 hours per week.

12. The contract stated that "overtime worked during busy period (April – October) shall be reimbursed as time in lieu of payment or at hourly rate....time in lieu cannot be used between April-October and must be agreed with the company director". No such agreements were reached or recorded.
- 5 13. The contract stated that the salary was subject to an annual performance review, and that performance would be reviewed during an annual meeting with the director. No such reviews took place.
- 10 14. Under key performance indicators and targets and bonus, the contract stated that there was a requirement to "achieve a minimum of 720m² of marquee bookings per week during April-October (completed to standard); £25 per commissionable job (216m² marquee and above) done to schedule and standard between April-October as agreed with Director. Paid in November annually upon review". No such agreement was reached or recorded.
- 15 15. The claimant kept his own notes about the hours that he worked, and completed spreadsheets on the company computer from notes on his phone. Mr Duncan completed spreadsheets based on the work that he was doing recording the claimant's hours on the basis of the hours when he worked alongside him. There was however no formal system for recording hours, or for hours being signed off by the director, and there was no cross checking between the claimant and Mr Duncan about hours worked.
- 20 16. The claimant was paid a salary, that is he was paid a flat rate per month based on calculations made by the respondent's accountants.
- 25 17. Although the claimant's contract provided for commission, such commission would only be payable if certain conditions were met and if such commissionable jobs were confirmed by the director. No such jobs were confirmed as commissionable by the director. Although payment was due to be made in November, no payment was made and no such request was made by the claimant in November 2021.
- 30 18. In March 2022, the respondent had decided to engage a number of new staff. This was because the staff whom the respondent had used in previous summers, generally students, had graduated from university and were no

longer available to work for the respondent. The respondent was anticipating a very busy year because many bookings were re-bookings following those cancelled because of the pandemic. There were additional bookings too because the pandemic had meant that weddings could not take place so there 5 was a backlog of people wanting to book marquees for weddings that summer.

19. The claimant was involved in engaging additional staff, both labourers and team leaders. The claimant drafted contracts for the staff and these were adjusted by Mr Duncan. These staff were all paid on an hourly rate.
- 10 20. At this time the claimant's contract was re-negotiated, and a new contract of employment issued, with a commencement date of 1 March 2022 (C31 -35). Under this new contract, the claimant's job title changed to "site manager". This was to reflect the fact that the claimant was to have a role in supervising the new staff. The claimant's hours were increased to 45 hours per week. His pay was increased to £29,250 per annum.
- 15 21. The contract stated that the claimant would be entitled to the following benefits: company pension; 28 paid days holiday per year; week-end rate of 1.5 of hourly rate; fully paid travel to sites.
- 20 22. The claimant's key performance indicators were adjusted at this time also. There was no reference to commission in this contract. The contract states that the claimant would achieve HGV licence in 2022. The claimant obtained an HGV licence during 2022, the cost having been paid for by the respondent.
23. That contract of employment includes the following paragraphs:
 1. "Your hours of work will be 45 hours per week. If you work in excess of those hours, you will not be entitled to overtime payments (unless this is a weekend) but additional hours will be banked and put towards your reduced working hours (30 minutes per day will be deducted for a break at work). All hours worked must be entered in our payroll support system, there will be support from the senior team until there is a comprehensive understanding use, you're T'n'A" (paragraph 7);

2. "In this role you will be entitled to 28 days of annual leave per annum. Annual leave must be booked in advance through your line manager...you are expected to take all your leave in the holiday year which runs from January 1st to December 31st. It will only be in exceptional circumstances you will be permitted to carry leave forward to the next holiday year" (paragraph 8); and
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3. "If you decide to leave the organization you are required to give 30 days notice. Should you leave before the agreed leave date time in lieu accrued may be sacrificed to find alternative support" (paragraph 12).
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24. The claimant worked during the summer of 2022, which was the respondent's business ever year. The claimant worked during the winter of 2022/23 when there were no marquee hires.
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25. The claimant was paid a salary each month, that is he was paid the same each month. The claimant would be paid expenses. He would intimate any expenses paid to Mrs Duncan with receipts by the 30th of each month, and these would be paid by the 5th of the next month.
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26. The claimant was paid no overtime, was paid no commission, and was not paid for any additional hours worked. The claimant made no request for payment for any overtime hours, commission or additional hours.
27. On 10 August 2023, the claimant advised Mr Duncan of his intention to resign. He followed this up with a text in which he stated (C23), "thanks, it's nothing personal. I've had enough. I need to enjoy work and life, and it's a long time dead. Like I said I won't leave you in the shit, I'll cut back what I am doing and be there when I need to be. I'll talk dates when I've been able to go through things with my family. After the oyster festival, I'll call it a day. I'm intending on having 4-6 months of personal time. See how I feel after that...."
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28. An agreement was reached between the parties that the claimant would continue to assist on certain jobs in the diary for August and September. An agreement was reached that the claimant would be paid his full salary for August and September notwithstanding.
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29. The claimant assisted as agreed, including at the Oyster Festival up to 18 September 2023. That was his last day of work.
30. The claimant then e-mailed the respondent requesting payment for expenses paid and hours due (R3). Under the hearing "hours worked, holidays and hours saved for the winter reduced working hours", the claimant stated: August 2023 – 155.75 hours worked; 2023 holiday accrued and not used 158 hours; 2022/23 hours saved for winter 56.75; 2022 holidays not used 27 hours; sub total 397.2 hours. August salary paid 195 hours; balance remaining 202.5 hours; Katherine Kelly up 12.5 hours; Oyster festival up 27 hours; oyster festival down 12 hours. Total 254 hours to be paid. 2022/23 annual salary 29.250/52 weeks & 45 hours per week equivalent to £12.50 per hour worked".
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31. The claimant was paid his full salary for August and September, notwithstanding the reduction in the number of hours he worked.
32. On 12 October 2024, the claimant sent a text to Mr Duncan as follows, "Bonjour William, Thank you very much for the time with you at Queensbury, I really enjoyed the time and learning a lot of the industry. Had some great laughs and made some memorable times with the original Queensbury team and some of the others that were involved over my time. Mostly getting to know you along with your family. I wish to every success with both new ventures, I won't be a stranger and will come and see you when I can. Expenses and salary of 195 hours received. There is a balance of 59 hours for 2022/23 outstanding".
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33. The claimant commenced new employment on 16 October 2023.
34. The claimant intimated early conciliation with ACAS on 16 November 2023.
35. On 4 December 2023, Mr Duncan invited the claimant to meet him to discuss any outstanding wages he claimed were due.
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36. The claimant received an EC certificate on 28 December 2023.
37. The claimant lodged an ET claim form on 30 January 2024. In that claim form he stated that he was due to be paid for 199 hours. He made no mention of commission.

Relevant law

38. Section 13 of the Employment Rights Act 1996 states that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is authorised by a statutory provision or a relevant provision of the worker's contract or he has the worker's consent.
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39. Section 23(1) states that a worker may present a complaint to an employment tribunal that his employer has made a deduction from his wages in contravention of Section 13.
40. Section 23(2) states that an employment tribunal shall not consider a complaint unless it is presented before the end of the period of three months beginning with the day of payment of the wages from which the deduction was made.
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41. Section 23(4) states that where the employment tribunal is satisfied that it was not reasonably practicable for a complaint to be presented before the appropriate date, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.
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Tribunal deliberations and decision

42. There was conflicting evidence in this case. The key conflicts related to the number of hours which the claimant stated that he had worked each day, and the hours which the respondent said that the claimant had worked each day; whether the claimant had been issued with a new contract of employment; and whether the claimant was or was not due commission. I consider each of this issues in turn.
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Contract of employment issue

43. One key area of dispute relates to whether a new contract of employment was issued to the claimant in March 2022. It was a matter of agreement that the claimant had commenced employment on 7 June 2021, and that he had been issued with a contract of employment at that time. The claimant's position is that this was the only contract of employment with which he was issued, so that it alone determines his terms and conditions of employment.
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44. Mr Duncan argued that a new contract had been issued in March 2022 and that the claimant's terms and conditions were updated at that time.
45. Based on the evidence that I heard, I accepted that a new contract was issued in March 2022. That was not least because the claimant's salary increased and his hours increased. The reason his hours were increased was because he was then engaged as a supervisor of the various new members of staff which the claimant had assisted to engage for what was going to be a very busy year. I accepted that he had drafted their contracts, and I accepted that that had been used as the basis for the amended contract which was issued to the claimant.
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46. That contract references the claimant, the start date, the new hours, and the salary increase, all of which were implemented. This new contract of employment updates the key performance indicators, which includes "undergo management, sales and leadership training when provided", and states "achieve HGV in 2022", which the claimant did, at the respondent's expense.
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47. The claimant claims that he did not sign it, and although a signed copy was not lodged, I did accept that this contract was issued in respect of the changes which were made to the claimant's contract.
48. The claimant suggested that he would not have signed the contract because of a paragraph which he would not have agreed to, specifically paragraph 12. Mr Duncan's evidence was that it was the claimant who had put that clause in and it was the claimant who had explained the contractual terms to the staff. I do not in any event accept that as supporting the claimant's contention that he did not sign this contract. This clause operates if you leave before the agreed leave date, and I do not accept that a member of staff would anticipate doing that so that they would not be anticipating or expecting to lose their time off in lieu on termination.
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49. I accordingly conclude that for the period from 7 June 2021 to 28 February 2022, the claimant was on the "old" contract of employment (C6-C7). For the period from 1 March 2022 until the termination of the claimant's employment
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on 30 September 2023, the “new” contract of employment was in place(C30-C34).

50. This impacts on my conclusions in relation to other claims pursued by the claimant.

5 Number of hours worked issue

51. There is also a dispute about the number of hours the claimant had worked from year to year. The claimant’s evidence was that he kept a record of his hours which he said he had recorded in his phone, and then transferred the information to the respondent’s computer. Mr Duncan said that he was not aware of that but that he had kept a record of hours worked on a “mastercopy” on the computer. When I asked why he kept a record of hours when the claimant was to be paid a salary, he said it was to keep a general eye on it because they worked a very irregular working pattern and that each year was different.

15 52. What is clear is that no formal records were kept. The claimant did not submit his hours to Mr Duncan on a weekly or monthly basis. No party complained about that. There was no cross checking or sign off by Mr Duncan of the hours worked.

20 53. The claimant made no claim for unpaid hours until after he resigned. As at 12 October 2023, the claimant believed there to be 59 hours outstanding to be paid. Only later did he increase that. This tends to confirm that the claimant did not keep accurate records of the hours which he worked.

25 54. I could not accept that the recording of hours, either by the claimant or by Mr Duncan, was accurate, there being no record of sign off and no cross checking.

55. It is clear from the contracts and the actions of both parties that the claimant would be paid a salary, notwithstanding the number of hours worked in summer or winter because it was expected that these would even out over the course of the year.

56. The claimant was engaged not on an hourly basis but on an annual salary basis. I came to the conclusion then that the claimant was engaged on a salaried on a salary and required to work when needed.
57. That conclusion is based on the wording of the claimant's contract and on the basis of what actually happened in practice. Although the claimant's contract said that "overtime worked during busy period (April-October) shall be reimbursed as time in lieu of payment or at an hourly rate", no overtime was paid, and no application was made by the claimant to be paid overtime.
58. Mr Duncan stated that the model of taking on full-time permanent staff is difficult for the marquee industry, because they are very busy in the summer and very quiet in the winter. This approach of paying a year round salary is therefore an entirely plausible approach given the likelihood, as supported by the evidence here, that the summer months would be very busy with many marquees being hired and the winter months would be very quiet, with little or no marquees being hired.
59. Even on the claimant's information, there were few, if any, marquees being put up in the winter. Although he suggested that he would work 9 to 4 in the winter, I accepted Mrs Duncan's evidence that in the winter months he would go to the gym before coming to work and he would often leave early. I accepted her evidence that there was limited work for the claimant to do since he was a marquee events manager and few if any marquees were hired out in the winter; and that he was often permitted to leave early with Mr Duncan's approval.
60. I also took the following into account when coming to this conclusion:
1. That this was the agreement that was reached is confirmed by the fact that no formal hours were recorded or signed off;
 2. No application was ever made for any overtime at the end of the month;
 3. No application for overtime or TOIL was made even at the end of the year: the claimant never made any request to be paid additional hours either in November (when commission was said to be due),

or at the end of the calendar year (which co-incided with the holiday year) or at the end of the financial year in April;

4. The claimant did apply for and was repaid expenses each month;
5. The claimant was himself not aware what hours he believed he was due to be paid at the end of his employment, giving inconsistent numbers of hours outstanding – after he was paid in September, he said there was 59 hours due; and then this increased in the ET1 to 199 hours and then increased in the claim made to the Tribunal to 229 hours.

- 10 61. This conclusion impacts on time limits.
62. Even if it could be said that the claimant was due to be paid for hours worked over the contractual hours of 45 hours per week, averaged out over the year, the law requires a claimant to lodge a claim within three months of the date of the last deduction.
- 15 63. The claimant made no claim for sums due until after he had resigned. However, having resigned on 10 August, and on his own evidence not having completed his contracted hours for August and September, but having been paid for them, the last date that sums may have been due, on his account, was July 30 when he was paid for that month.
- 20 64. The claimant did not contact ACAS until 16 November 2023, which would already have been out of time, so that he would not benefit from any ACAS extension.
65. When I asked the claimant why he had not lodged the claim until he did, he said that the reason he had delayed in lodging a claim in respect of monies he says he is due is that he prioritised other matters, and in particular he was dealing with his father's ill-health.
- 25 66. On the evidence I heard, I could not accept that it was not reasonably practicable to have lodged his claim in time due to his father's illness, no other reason having been advance. This was not least because he e-mailed Mr

Duncan on 12 October 2023, and obtained new employment on 16 October 2023.

The commission issue

67. I have accepted that a new contract of employment was issued effective 1
5 March 2022 when the claimant's hours and salary increased. There is no
reference to commission in that contract.
68. It is clear however that there is a reference to commission in the initial contract
of employment (C7). That stated that commission however would only be
payable if certain conditions were met. It is stated that commission would be
10 paid at £25 per "commissionable job" – "done to schedule and standard" "as
agreed with Director". No such agreements were reached.
69. In any event, Mr Duncan's position is that this was a failed attempt to
encourage staff to get it right first time, because he often had to return to the
site (which could be throughout Scotland and North England) because of
15 errors, omissions or problems with the setting up of the marquees. He said
that after only a month or so of the experiment it was clear that it was not
having the desired effect, and that the scheme was never implemented. He
believed that the claimant was party to a discussion regarding his decision not
to implement any commission scheme. In any event, he never signed off any
20 jobs as being either commissionable or done to schedule and standard, so
nothing was agreed with the director. Thus no jobs were approved for
commission. No commission was ever paid.
70. The claimant said that there had been discussions about the payment of
commissions in or around November 2021 and November 2022. His evidence
25 was that the issue of payment of commission came up in November 2021 and
November 2022 but he was told the company could not afford it – in November
2021 because Mr Duncan had just got a loan from a relative and in November
2022 because he had just got a big bill in from HMRC.
71. However, even if he did raise this informally, the claimant never made any
30 formal request for commission and he made no reference to it in his original
ET1.

72. I came to the view, not least because there was no documentary evidence to support it, that the claimant had accepted that no commission was payable. Even if the claimant was theoretically entitled to commission for any period of time, I find that no authority was ever given by the director to pay commission
5 because the conditions were never met.
73. Furthermore, there was no claim for commission until the claimant made preparations for this hearing. Such a claim was not mentioned in the ET1 and no formal application to amend the claim was made by the claimant. This supports that there was no expectation that commission would be payable.
- 10 74. But even if it were to have been accepted that he was due commission, then that was payable in November 2021, and the claimant would have been out of time to claim commission for both November and even November 2022. Even if it could be said that commission continued to be payable under the new contract of employment and that these were two annual payments which
15 were two of a series of deductions, the claimant would have been due commission in November 2022, but he did not lodged a claim in the employment tribunal until 30 January 2024. Even if he was entitled to commission, any claim would be out of time.

Conclusion

- 20 75. I therefore find that the claimant was paid a salary and that there was no unlawful deductions from that salary. The claimant only claimed holiday pay on unpaid hours he claims were due, so that means that no holiday pay is due either. I also find that the claimant was not entitled to be paid commission.
76. There is no unlawful deduction from wages so this claim must be dismissed.

25 **Employment Judge:** M Robison
Date of Judgment: 10 May 2024
Entered in register: 14 May 2024
and copied to parties