



EMPLOYMENT TRIBUNALS

Claimant: Mr M L Darboe

Respondent: Miracle Care Limited

Heard at: by CVP from the Bristol Tribunal **On:** 24 May 2024

Before: Employment Judge Woodhead

Appearances

For the Claimant: Representing himself

For the Respondent: Mrs A Acheampong (Litigation Consultant)

JUDGMENT

Wages

1. The complaint of unauthorised deductions from wages is well-founded. The Respondent made an unauthorised deduction from the Claimant's wages in the period 25 September 2023 to 6 November 2023.
2. The Respondent shall pay the Claimant **£2,096.25**, which is the gross sum deducted. The Claimant is responsible for the payment of any tax or National Insurance*.

Notice Pay

3. The complaint of breach of contract in relation to notice pay is well-founded.
4. The Respondent shall pay the claimant **£419.25** as damages for breach of contract. This figure has been calculated using gross pay to reflect the likelihood that the Claimant will have to pay tax on it as Post Employment Notice Pay*.

Holiday Pay

5. The complaint in respect of holiday pay is well-founded. The Respondent made an unauthorised deduction from the Claimant's wages by failing to pay the Claimant for holidays accrued but not taken on the date the Claimant's employment ended.

6. The Respondent shall pay the Claimant **£419.25**. The Claimant is responsible for paying any tax or National Insurance*.

Redundancy Payment

7. The Claimant, not having two years' service with the Respondent with drew his claim for a statutory redundancy payment and I dismissed it on withdrawal.

***NOTE: It appears to the Tribunal (but if in doubt the parties should take independent advice) that income tax and national insurance contributions are payable in respect of some or all of the awards above. If so, provided that the Respondent makes appropriate deductions and account therefor to the proper authorities, payment to the Claimant of the 'net' sum will represent a valid discharge of this judgment.**

THE ISSUES

8. The Claimant was employed by the Respondent which provides health and social care services and supported living services. The Claimant commenced employment on 23 November 2022 and at the hearing it was accepted by the Respondent that the Claimant's employment ended on 6 November 2023.
9. The Claimant brought claims for arrears of pay, notice pay (it was agreed that the Claimant had an entitlement to one week's notice), holiday pay and a statutory redundancy payment. At the hearing the Claimant accepted that he did not have the necessary length of service to claim a redundancy payment, withdrew this claim and it was dismissed on withdrawal.
10. In March 2024 the Claimant sent the Respondent a witness statement which included reference to a mileage claim in respect of approximately 1600 miles which he said should have been paid at the rate of 0.25 pence per mile. At the hearing he accepted that this was not part of the pleaded claim and sought to add it by way of amendment at the hearing.

THE HEARING

11. This claim was listed for a hearing of two hours. There was some delay at the start of the hearing due to technical issues.
12. At the start of the hearing I was provided with:
 - 12.1 A bundle of 49 pages;
 - 12.2 A witness statement for Ms Petra Omoruyi (Director for the Respondent since 1 January 2022);
 - 12.3 A witness statement for the Claimant which referred to the following exhibits:
 - 12.3.1 A – a contract of employment;

- 12.3.2 B – text message from the Claimant to the Respondent dated 18 October 2023;
- 12.3.3 C – an email from the Respondent of 6 November 2023 making the Claimant redundant;
- 12.3.4 D – an email from the Respondent dated 3 December 2023;
- 12.3.5 E – an email from the Claimant’s manager dated 15 February 2024.
13. The Respondent started the hearing saying that it wanted a consent judgment because it was agreed that the amounts were due to the Claimant. Time was lost because it became apparent that the amounts were not in fact agreed as per the Claimant’s witness statement.
14. Ms Omoruyi was not in attendance at the hearing and I made clear that on that basis I could give less weight to her witness statement.
15. The Claimant swore his evidence and was cross examined by the Respondent. I also asked him questions. Mrs Acheampong tried to take instructions on the Claimant’s amendment application to include a claim for mileage but was unable to reach her client and opposed the application to amend.
16. In light of the time available, I chose to reserve my decision.

THE LAW

Breach of Contract

17. The Claimant’s claim for breach of contract is permitted by article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 (“the Order”) and the claim was outstanding on the termination of employment.

Unlawful deduction from wages

18. The Claimant also claims in respect of deductions from wages which he alleges were not authorised and were therefore unlawful deductions from his wages contrary to section 13 of the Employment Rights Act 1996.
19. Under section 24(2) of the Act, where a Tribunal makes a declaration that there has been an unlawful deduction from wages it may order the employer to pay such amount as a Tribunal considers appropriate in all the circumstances to compensate the worker for any financial loss sustained by him which is attributable to the matter complained of.

FINDINGS OF FACT ANALYSIS AND CONCLUSIONS

20. Having considered all the evidence, I find the following facts on a balance of probabilities.

Rate of pay and hours of work

21. It was agreed by the parties that the Claimant was contracted to work 39 hours per week. There was a dispute as to his rate of pay.
22. The Respondent referred to the rate of pay in the contract of employment of £10.50 per hour. [36-37]. The Claimant said his hourly rate of pay was £10.95 and referred me to a payslip of 31 October 2023 [42] which included a wage rate of £10.75 and a night rate of £11.00.
23. The Claimant was unclear on when he said his rate of pay increased to £10.95, initially saying it was sometime in January or February 2023 and then saying it was later in April or May.
24. Given the proximity of the payslip at page 42 to the termination of his employment and the fact that the Claimant has not claimed that previously he was not paid at the correct rate, I find on the balance of probabilities that he was paid at the rate of £10.75.

Arrears of pay

25. The Respondent accepted at the hearing that the Claimant was owed arrears of pay for the period between 25 September 2023 and 6 November 2023. It accepted the Claimant's calculations of the number of hours of pay:
 - 25.1 25 September 2023 to 24 October 2023 = 156 hours of pay.
 - 25.2 25 October 2023 – 6 November 2023 – 39 hours of pay.
26. Accordingly the Respondent owes the Claimant 195 hours of pay at £10.75 per hour which totals **£2,096.25 (gross)**.

Holiday pay

27. The Respondent accepted that (POWS8) that the Claimant was owed £1,892 in holiday pay. However, although it was not calculated, this was presumably based on an hourly rate of pay of £10.50 and therefore equates to 180 hours of pay.
28. The Claimant said that he was due 176 hours of holiday pay. I find on the balance of probabilities that the Claimant is owed 176 hours of holiday pay at the rate of £10.75 totalling **£1,892 (gross)**.

Notice pay

29. The Respondent accepted that the Claimant is owed 1 weeks notice, which had been agreed to be paid in lieu [10, 40]. The parties agreed that this equated to 39 hours of pay. Accordingly the Claimant is owed **£419.25 gross** (39 x £10.75).

Mileage

30. The Claimant sought to add a claim for unpaid mileage saying he was owed approximately for 1,600 miles at £0.25 pounds per mile = £400.00.
31. The Respondent did not address this claim in its witness statement.
32. In deciding whether a particular allegation or legal complaint already forms part of a claim form, the claim form as a whole should be examined and it should be construed generously: **Ali v Office for National Statistics [2005] IRLR 201; Mechkarov v Citibank UKEAT0019/17.**
33. I concluded and the Claimant accepted that this was not pleaded in his claim form. He had not ticked the 'other payments' box at 8.1 of the claim form [8] and did not otherwise mention mileage in the claim.
34. Any change to the text of the claim form is an amendment for which permission is required. This includes correction of typographical errors, additional information or further particulars, and the amendment by substitution of new grounds of claim. It can also include clarification of a case orally at a case management hearing.
35. Exercising the discretion whether to permit an amendment is done pursuant to the overriding objective in Rule 2, applying the principles set out in **Selkent Bus Company v Moore [1996] ICR 836**. There is no express provision under the rules dealing with such amendments. Factors relevant to the exercise include the nature of the amendment, the applicability of time limits, and the timing and manner of the application. The paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. This means balancing the prejudice to the Claimant if permission is refused against that to the Respondent if it is granted.
36. I also referred to the decision of the EAT in **Vaughan v Modality Partnership UKEAT/0147/20/BA** and other relevant authorities (including, **Abercrombie and others v Aga Rangemaster Ltd [2014] ICR 209 (CA)** Underhill LJ, **Galilee v Commissioner of Police for the Metropolis UKEAT/0207/16/RN**).
37. Time limits must be taken into account – i.e. the date on which the application to amend was made.
38. If the time limit issue relates to an extension of time, the Tribunal should be able to evaluate the likelihood of the Claimant being granted such an extension had the claim been presented as a new claim.
39. An amendment application seeking to add facts or claims is treated as a case management order made under rule 29.
40. There is a distinction to be drawn between amendments that involve correction of errors, the addition of some facts to an existing cause of action, or re-labelling of the cause of action in respect of already pleaded facts (where amendment is more likely to be in the balance of justice) and amendments where a 'wholly new' claim is being sought to be added and where the time limit for bringing a new cause of

action has expired at the time of the application (where the balance of justice may not favour the granting of leave to amend);

41. In this case the claim form was presented on 15 December 2023 and the dates of early conciliation were Day A: 13 December 2023 and Day B: 6 November 2023. The Claimant's employment terminated on 6 November 2023.

Balance of injustice / hardship

42. I took into account that the Claimant is a litigant in person and that:

42.1 Page 42 of the bundle (a payslip) indicated that, at least in October 2023, he had been paid £211.81 in mileage allowance and there was a deduction of -£162.20 (referenced as "Mileage Allowance No");

42.2 The Claimant said that he had written down his mileage but had not presented any documentation to the hearing evidencing the mileage incurred and could only be approximate in the amount of mileage he claimed;

42.3 The Respondent's representative had sought to get instructions on this element of the claim but had been unable to (but no witness for the Respondent had attended the hearing);

42.4 The Respondent had not addressed any claim for mileage in the witness statement that was submitted because the Claimant's submission of his witness statement was the first reference by him to that amount and the claim form did not refer to it.

43. I considered that the balance of prejudice was against allowing the amendment application because it had been made so late and, although the Respondent had not brought a witness to the hearing, I did not consider that they had had a fair opportunity to address the amendment that the Claimant sought to make and the Claimant had also not been able to provide documentary evidence of the mileage claimed and, on his own evidence, said that it was approximately 1600 miles. His evidence was also imprecise as to the rate at which mileage was paid. In evidence he said he was entitled to 0.35 pounds per mile but had based his calculation on the rate of 0.25 pounds per mile.

Employment Judge Woodhead

Date 24 May 2024

Sent to the parties on:

15 June 2024 By Mr J McCormick

For the Tribunals Office

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/>