



EMPLOYMENT TRIBUNALS

Claimant: Mr Chun Ho Tam
Respondent: Sapiat Limited
Heard at: East London Hearing Centre (by CVP)
On: 16 May 2024
Before: Employment Judge Brewer

Representation

Claimant: In person
Respondent: Mr P Vallon, Solicitor

JUDGMENT having been sent to the parties on 31 May 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. This is a claim for unauthorised deductions from wages is brought by the claimant who represented himself. The respondent was represented by Mr Vallon, a solicitor.
2. The day before this hearing Mr Vallon had applied for a postponement which had been refused. He renewed that application before me. The basis of his application was that his only witness did not wish to, or for some unspecified reason was unable to attend. But that was the position yesterday and given that nothing had altered it was not for me to amend another judge's decision and I refused the application.
3. At that point Mr Vallon asked for some time to contact his witness to see if he would now attend. We adjourned for around 20 minutes at which point Mr Vallon advised me that his witness would not attend. The case proceeded.

Issues

4. The issue before me was whether the claimant suffered unauthorised deductions from wages as set out in the evidence and this also entailed a discussion and findings about whether and when the claimant's employment terminated.
5. I had a witness statement from the claimant and a bundle of relevant documents.

Law

6. The law, in brief, is as follows.
7. In relation to a claim for unauthorised 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.'
8. 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)).
9. In order to bring an unauthorised 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):
 - 9.1. a contract of employment (defined as a 'contract of service or apprenticeship'), or
 - 9.2. 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.
10. Section 27(1) ERA defines 'wages' as:

'any sums payable to the worker in connection with his employment'
11. 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'.
12. 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.

13. 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.

Findings of fact

14. I make the following findings of fact.
15. The claimant was employed by the respondent as a software engineer. His employment commenced on 19 August 2019.
16. Until August 2022 the claimant received his pay without any difficulty.
17. August 2022 was the first month when the claimant's salary was unpaid. The claimant was told that the issue was one of liquidity, in short, the respondent said that one of the clients refused to pay and the claimant was told that the respondent would take them to court, and the matter would be "resolved soon".
18. In the following few months, the claimant was also not paid, and he was told to be patient as the respondent was securing funding to resolve the issue.
19. In the event the claimant was paid once in late December 2022 which he says was payment for the unpaid August salary.
20. Later in February 2023, the claimant received the payment for the unpaid September 2022 salary. The claimant was able to substantiate what these payments related to because they matched the salary he was paid after deduction for the first couple of months for which he was owed pay, instead of the latest months.
21. The claimant received further pay in April 2023. This payment was for was pay for March 2023.
22. In May 2023 the claimant was paid three months' salary, which he says, and I accept matched the aggregate of what should have been salary received for October, November and December 2022 salaries (after deductions).
23. At the end of May 2023, the claimant was paid his April 2023 salary, and this was the last time he was paid by the respondent.
24. Pay slips were usually issued to the claimant even if he was not paid. However, he did not receive pay slips for either of June or July 2023.

25. So, at the date of the hearing, the claimant believes he is owed pay for the following periods:
- 25.1. 1 January to 28 February 2022,
 - 25.2. May 2022,
 - 25.3. 1 January to 31 August 2023, and
 - 25.4. September 2023 to 13 January 2024.
26. As well as the absence of the above salaries, the claimant asserts that although the respondent deducted from his pay his pension contributions, they did not in fact pass that on to the pension provider and this is corroborated by the information he has from the pension provider itself.
27. The respondent asserted and put to the claimant in cross examination that he was in fact paid in full, but the claimant refutes this and there was no evidence
- that but for a short period he was anything but fit and able to work. Furthermore, the respondent asserted that at points the claimant was unable to work but again looking at the contemporaneous documents this is not correct.
28. The respondent also asserted that the non-payment of wages to the claimant from May 2023 indicated that his employment had been terminated. I find that this was not the case.
29. Those then are the brief findings of fact.

Discussion and conclusions

30. I shall deal first with the termination question.
31. Mr Vallon relied on two cases:
- 31.1. **Kirklees Metropolitan Council v Radecki** [2009] EWCA Civ 298, and
 - 31.2. **Sandle v Adecco UK Ltd** 2016 IRLR 941, EA.
32. In my judgment neither case assists the respondent.
33. In **Radecki** the basic proposition is that stopping pay can, in the right factual matrix indicate dismissal has occurred. But in this case the factual matrix included periods where the claimant was not paid followed by what I might term catch up payments, so there was nothing unusual about the non-payment of pay from May 2023. Nothing else indicated that the claimant had been dismissed.

34. In **Sandle** the position was confirmed that an employer's unequivocal decision to dismiss had to be communicated to the worker in a way that would be understood by the objective observer. Again, given the factual matrix in this case the cessation of pay in May is far from an unequivocal decision to dismiss, it was rather 'business as usual' from the claimant's perspective'.
35. Beyond that the respondent cannot contest the non-payment of wages from May 2023. It does dispute the earlier allegations on the basis that catch-up payments had been made.
36. I prefer the evidence of the claimant. Looking at the pay slips and comparing g the various payments made, once the matching exercise is completed it is quite clear that the claimant did not receive what was properly payable under his contract and that he suffered unauthorized deductions from his wages as follows.
37. The claimant was paid on average £1,100 net per week.
38. He was not paid for the following periods:
 - 38.1. 1 January to 28 February 2022, a period of 8 weeks and 2 days
 - 38.2. May 2022, a period of 4 weeks and 5 days,
 - 38.3. 1 January to 31 August 2023, a period of 13 weeks, and
 - 38.4. September 2023 to 13 January 2024, a period of 19 weeks.
39. This is a total period of 45 weeks at £1,100 per week net totaling £49,500.
40. Further, given the evidence, although in theory the respondent had authority to deduct from the claimant's pay his pension contributions, in my judgment that was authorisation either expressly or impliedly for that sole purpose and the failure to pay those contributions into the pension scheme makes the deductions unauthorised. The loss occasioned by this is 20 months at £146.76 per month, a total of £2,935.20.
41. Judgment is given in favour of the claimant in the above sums.

**Employment Judge Brewer
Dated: 18 June 2024**