



EMPLOYMENT TRIBUNALS

Claimant: Mr L Stephens
Respondent: Rapid Response Telecoms Ltd

Heard at: Sheffield by Video **On:** 10 October 2023

Before: Employment Judge Miller

Representation

Claimant: In person
Respondent: Mr G Lomas, tribunal representative

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that:

1. The complaint of unauthorised deductions from wages is well-founded. The respondent made an unauthorised deduction from the claimant's wages on 31 May 2023 in respect of:
 - a. Failure to pay wages during the claimant's notice period of 2 – 15 May 2023
 - b. Failure to pay wages for work done on 1 May 2023
 - c. Making a deduction of 228.90 for damage to a van in February 2023
 - d. Failure to pay contractual holiday pay outstanding on termination of employment.
2. The complaint of unauthorised deductions from wages in respect of on call payments is not well founded and is dismissed.
3. The complaint of unauthorised deductions from wages in respect of a deduction from wages on 30 November 2022 is presented out of time and it was reasonably practicable for that complaint to be brought in time. That claim is dismissed.

4. The respondent shall pay the claimant the total sum of **£2707.70**, which is the gross sum deducted. The claimant is responsible for the payment of any tax or National Insurance.

REASONS

Introduction

1. The claimant was employed from 1 August 2022 until 15 May 2023 as a senior fibre engineer. He submitted his resignation on 2 May 2023 and his employment ended on 15 May 2023. During his notice period the claimant was put on gardening leave.
2. The claimant then undertook early conciliation with the respondent from 14 June 2023 to 26 July 2023.
3. On 27 July 2023 the claimant submitted a claim to the Employment Tribunal making claims for notice pay, holiday pay and arrears of pay.
4. In the claimant's claim he also said that he was making a claim for unpaid pension contributions. On discussing that with the claimant it had transpired that what he wanted to claim was the employer's contributions that were due to his pension scheme. I explained that the Tribunal does not have the jurisdiction to consider that, and that claim was not pursued.
5. The claimant attended the hearing and represented himself. The respondent was represented by Citation, and they produced witness statements from a Miss Zoe Sharman who attended and gave evidence. Miss Sharman is a business support specialist at the respondent who also deals with HR matters.
6. At the start of the hearing I clarified the claimant's claims with him. They are claims for
 - 6.1. notice pay during his period of notice from 2 May until 15 May 2023;
 - 6.2. payment of wages for work that he did on a 10 hour shift on 1 May 2023;
 - 6.3. payment of wages from November 2022;
 - 6.4. payments of underpaid call out payments; and
 - 6.5. payment of untaken holiday pay throughout his period of employment,

Findings of Fact

7. I make only the findings that are necessary to decide the claim. Where facts are disputed, I have made my decision about which evidence I prefer on the balance of probabilities.
8. When the claimant started his job he was appointed on a salary of £32,000 per year and he received £150 for on call shifts. From 1 November 2022, which is the period which this claim concerns, the claimant was promoted to senior fibre engineer. His salary was increased to £34,000 per year and the on-call rate increased to £200 per day.
9. In November 2022, the claimant was entitled to an annual salary of £34,000. At the end of that first month in this job, being November, the claimant received a pay statement which said that he had been paid gross pay of only £738.60. This is obviously less than a month's pay on a salary of £34,000 which ought to be

more like £2,800. I find that the claimant did not receive that payment and the respondent recognised at the time that, at the very least, there had been a substantial shortfall in his wages. It is agreed that £2,500 was transferred from the director of the respondent to the claimant in November.

10. The claimant says that in calculating his wages the respondent had wrongly concluded that he had received all of his wages for November 2022 because he had received the sum of £738.60 and the sum of £2,500. The respondent's view was that together, the sum of £738.60 and £2,500 was the correct amount of the claimant's wages for November 2022.
11. I find that the claimant only received £2,500 for November and he did not receive the sum of £738.60. The claimant asserts that he has been underpaid that amount of £738.60 for November 2022 and, on the basis that the respondent considers that those two sums together would amount to the claimant's wages for November, I find that the claimant was underpaid by £738.60 in November 2022.
12. Chronologically the next relevant finding is that the respondent's holiday year under the claimant's contract of employment runs from 1 January to 31 December. In January 2023 the claimant was allowed to carry forward two days' holiday from the previous holiday year, and during the remainder of his employment up until 15 May the claimant took a further six days' holiday. The claimant was entitled to a total of 28 days holiday for each leave year. It is also a term of the claimant's contract of employment, which it was agreed he had received and was bound by, that

"During your first year of service, however, your entitlement to take holidays will accrue on the first day of each month of that year at the rate of 1/12th of the annual entitlement. Where the current accrual includes a fraction of a day other than a half-day, the fraction will be treated as a half-day if it is less than a half-day and as a whole day if it is more than a half-day".

13. The contract then goes on to say
"On termination of employment holidays will be calculated in proportion to the full entitlement. If you have taken less than this entitlement surplus holiday pay will be added to your final pay. If you have taken more than this entitlement the excess holiday pay will be deducted from your pay."
14. It was agreed that the claimant's daily rate of pay was £138.80 per day for a 10 hour day.
15. The next relevant finding relates to 1 May 2023. This was the claimant's last day of actual work for the respondent and I find that he did work on that day. It is relevant to refer again to the claimant's contract of employment. Under the section headed "Timesheets" it says
"You are required to complete time sheets on a daily basis to confirm the number of hours worked. These must be submitted to a director no later than Monday of each week for the previous week's work. Failure to adhere to this procedure will affect wages paid for that week, as an estimate will be made based on a minimum number of hours. Any shortfall will only be corrected at the next pay period following production of a valid time sheet."
16. The claimant agrees that he had not submitted a time sheet for work done on 1 May 2023 but that he was looking for payment only for the standard 10 hours,

namely £130.80. He said that during the early days of his employment with the respondent he had sometimes forgotten to do his time sheets and then he was reminded by Miss Sharman to send them in. The claimant very fairly acknowledged that Miss Sharman did prompt the claimant when it appeared that he had underclaimed or was likely to be underpaid for his wages.

17. Miss Sharman did not, on 1 May 2023, remind the claimant about submitting his timesheet or ask the claimant for a timesheet. Ms Sharman also did not estimate the pay that the claimant was entitled to based on a minimum number of hours. It is also fair to note that the claimant did not write and send in, by email or otherwise, a timesheet and he agreed that he could have done so. Consequently the claimant did not receive any pay for 1 May 2023. Miss Sharman said, and I accept, that she was simply not aware that the claimant had worked on that day.
18. I address next the position with the claimant's on call payments. This is rather confusing, and I will address it by reference to the spreadsheets produced by the respondent.
19. In their spreadsheet, the respondent sets out for each month from August 2022 to May 2023 the number of on call days for which the claimant was due to be paid an on-call fee, and the number that they say were paid.
20. On none of the months from November 2022 to April 2023 is the number of days for which payment is said to be due by the respondent, the same as the number of days for which the respondent says they have made payment.
21. Having regard to the data provided by the respondent in the spreadsheet, it appears to me that there is probably something like an ongoing reconciliation from month to month in respect of the on-call days. For example, the claimant was paid for seven on call days in November 2022 and he actually worked seven on call days in October 2022. The other months are not as easily explainable. However, doing the best I can, it appears that throughout the period from November 2022 up to April 2023, overall the claimant was paid for slightly more days than the respondent says he was entitled to for those periods. There was a discrepancy in the respondent's calculations but ultimately the parties agreed that the claimant had been overpaid for 13 days during that period.
22. Although the claimant pointed out that he was paid at the pre-November rate (being £150) in November he did not actually work any days in November and the seven days that the pre-November rate would accord with are the seven days that he actually worked in October. Having checked the other figures from December 2022 to April 2023, the claimant was actually paid for the on-call days at the higher rate (£200 per day) from and including December 2022.
23. On the basis therefore that there was an ongoing reconciliation from month to month in respect of various variable figures including the on call rate, and doing the best I can with the figures with which I have been provided, I find that the claimant was not underpaid for any on call periods from November 2022 to April 2023. It might be that he was overpaid on some occasions but equally it might be that there was an ongoing reconciliation for the whole of his employment and I am not in a position to make any findings about that. I find therefore as a fact that the claimant was not paid less on any occasion in respect of his payments of on call allowance than he ought to have been.

24. Finally, the claimant received a pay slip for his pay on 31 May 2023 which was, or ought to have been, his final pay date. The payslip for that date appears to include only a payment for overtime coming to £228.90. It is for reasons which have never been made clear recorded in the payslip as an advance. That pay slip also records a deduction of the whole amount of £228.90, so that the net pay the claimant received on 31 May 2023 was zero. That deduction the respondent says relates to damage to the claimant's work van which occurred in February 2023.
25. Having heard the claimant's evidence and seen the documents including photographs of the damage, I find that in February 2023 the claimant's van was damaged resulting in a scrape down the side. The claimant then, on return to the yard, reported this to his supervisor who told him to tell the workshop manager, Aaron, in due course but said that there was no rush. The claimant did do so and Aaron replied that the matter could be dealt with quite easily and that the damage could be rubbed out. The damage appears to be one long black line down one side of the upper part of the van. The claimant says that someone told him it looked like a scrape from a passing lorry's wing mirror and that would certainly not seem to be an unreasonable conclusion.
26. The respondent did not seek recovery of any money for the damage to the van at that time. It is part of the respondent's handbook that
"If you have an incident involving a vehicle whether or not personal injury or vehicle damage occurs you must make a full written report of the incident. All driving accidents will be investigated and if an investigation shows you to be at fault you will be subject to disciplinary action. The company also reserves the right to recover the insurance excess from you or the cost of the repairs if this is less than the excess."
27. The claimant agreed that he did not submit a written report. Miss Sharman was unable to explain to the claimant in evidence how the report should have been produced, what information should have been provided, in what format, whether there was a standard document or anything like that. I refer also at this point to another term of the claimant's contract which says as follows:
"Deduction from pay"
If during or on termination of your employment, and after investigation, it is deemed reasonable for you to reimburse the company for financial losses incurred, you agree that the company has the right to deduct this sum from your pay or any other monies owed to you. By signing this contract you expressly consent to any such deductions pursuant to Part II of the Employment Rights Act 1996. Examples of deductions which may be made by the company include but are not limited to
...
cost of replacement or repair of equipment or uniform not returned, lost, stolen or damaged due to negligence during or after your employment."
28. There was no investigation into how the damage had occurred. The claimant was not given the opportunity to explain formally in disciplinary proceedings or otherwise how the damage had occurred and the respondent, Miss Sharman agreed, had no reasonable way of knowing or concluding that the claimant had

caused the damage at all and certainly not whether he had caused the damage negligently.

29. The respondent has identified the full cost of the damage as being £2,132.01. It seems to have been put, from the respondent's case, that the sum of £228.90 represented the insurance excess but on reflection it might have been that this was just the whole of the claimant's last wage as far as the respondent had calculated so that they chose to withhold that amount. I have not seen anything which says how much any insurance excess might be and certainly not whether it is more or less than the £2,132.01 that the respondent first informed the claimant on 1 June 2023 was the value of the repairs.
30. I find as a fact, therefore, that the respondent had no reasonable basis for concluding that the claimant had acted negligently and that his negligence resulted in damage to his work van.

Law

31. The claims are all brought as claims for unauthorised deductions from wages under part II of the Employment Rights Act 1996.
32. An employer is generally not entitled to make deductions from a worker's wages unless that deduction is authorised in writing by the claimant or otherwise allowed under statute. Specifically, an Employer is entitled to make deductions from a worker's pay under section 13 (1) of the Employment Rights Act 1996 if, as far as is relevant, the deduction is authorised by a relevant provision of the worker's contract. A relevant provision means
- “a provision of the contract comprised—
- (a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or
- (b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion”.
33. A deduction is made where a worker is paid less on any occasion than they are properly entitled to.
34. An employee is entitled to be paid their full wages if they are ready, fit and able to work for the employer.
35. Wages includes payment of wages during a notice period and holiday pay under s 27 Employment Rights Act 1996.

Conclusions

Notice

36. Firstly, considering payment during the claimant's notice period.
37. The claimant was not summarily dismissed, he resigned with notice and was told not to do any work in the period of his notice from 2 May 2023. The claimant remained employed until 15 May 2023.
38. On his May pay date (31 May 2023), the claimant was not paid anything. His payslip records an amount for overtime of £228.90 which was not, in any event, paid (and that is dealt with below). He was therefore paid less than he was, on

the face of it due. There is no suggestion that the claimant authorised the deduction.

39. The period of notice included 10 working days from 2 – 10 May 2023. For that period the claimant was paid less than was properly payable. The daily rate was £130.80 so that the claimant was entitled to be paid during his notice period the sum of £1,308 and I award that sum.

Holiday pay

40. I consider next holiday pay.
41. The terms of the contract are reasonably clear. During the first calendar year of the claimant's employment his pro rata holiday entitlement accrues on the 1st of each month. This means that for each month or part thereof that he worked during the first year of his employment the claimant accrued 1/12 of his total holiday entitlement. This is 1/12 of 28 days which is 2.33 days per month.
42. This means that by 1 May 2023 the claimant had worked for five months in that holiday year (from 1 January 2023) during which he accrued holiday amounting to 11.67 days. In accordance with the contract of employment, this is rounded up to 12 days. The claimant had therefore accrued 12 days contractual holiday as at the date of his resignation and as at the date of the termination of his employment on 15 May 2023.
43. The claimant also carried forward two days from the previous year which he was entitled to do under his contract so that he had a total of 14 days holiday to use by 15 May 2023. The claimant took six days holiday in the relevant holiday year. This means that there were eight days untaken holiday for which he was entitled to be paid at the end of his employment.
44. There was no suggestion that the claimant had authorised the deduction. To the extent that the respondent might argue that they were entitled to make deductions from holiday pay to recover the cost of the damage to the van, the same principles apply as set out below. Namely, they have not complied with their contractual obligations so that no deductions are authorised by the claimant.
45. I consider, briefly, in the alternative, the claimant's entitlement to statutory holiday pay under the Working Time Regulations 1998. They provide that any untaken holiday accrued on a pro rata basis and untaken at the end of employment must be paid in lieu.
46. By 15 May 2022 134 days of the claimant's leave year had elapsed which equates 0.37 years. This would entitle the claimant to 10.28 days holiday (being 0.37 of the statutory 5.6 weeks (or 28 days) holiday) rounded up to 10.5 days. As this is less than the claimant was entitled to under his contract of employment the contractual provision prevails.
47. I therefore find that the claimant was owed eight days holiday pay on termination of his employment and he was not paid that.
48. I therefore award the claimant the sum of 8 x £130.80 which is £1,040 gross.

1 May 2023 pay

49. Next I consider the payment in respect of 1 May 2023. Again the first thing I have to consider is what sum was properly payable and then consider whether it has been paid. The sum properly payable in my judgment is one days' basic

wage at £130.80. This was payable in the May 2023 payment on 31 May 2023 but the claimant was not paid for this day's work.

50. The reason for this is that the provisions of the claimant's contract say that if he does not put in the time sheet then the respondent will estimate the daily work on the rate of a basic day. The respondent did not do that and there was no good reason for them not to do so. The claimant does agree that he did not submit his time sheet and it would have been preferable had he done so, but under his contract it was not strictly necessary for him to do so. The contract merely says that if a time sheet is not submitted, the pay for the day will be estimated. The consequence for the claimant was a risk in being paid for fewer hours than he actually worked by getting the basic day's rate rather than any additional hours.
51. The claimant did work on 1 May 2023 and I therefore find that there has been an unauthorised deduction from the claimant's wages in respect of 1 May 2023 in the sum of £130.80 and I award that sum as compensation.

Deduction for damage to the van

52. Next I consider the deduction of £228.90 in relation to the damage to the van from the claimant's pay on 31 May 2023.
53. The respondent seeks to rely on the part of the contract set out above that allows deductions where there has been negligence by the worker and for recovery of the cost of damage to the van in February 2023. In my judgment, the provision only authorises the deductions where all of the requirements in the contractual provision have been complied with. That is to say that the claimant authorised deductions, provided that the respondent had followed the contractual process for determining his liability. That process is, in this case:
- 53.1. That there has been an investigation. This must mean a reasonable investigation. There has not been one – there was simply no basis, on the findings I have made, from which the respondent could reasonably conclude that the claimant was either responsible for the damage to the van, or had been negligent;
- 53.2. That it was deemed reasonable for the claimant to reimburse the company. Again, there is no basis on which a reasonable conclusion could have been reached for the same reasons. The respondent has simply not applied their mind to this question.
54. As the respondent has not complied with their obligations under this provision, no deductions in respect of damage to the van were authorised by the claimant's contract.
55. The respondent purported to deduct a sum in respect of the damage to the van from the claimant's final pay on 31 May 2023. There has therefore been a deduction from the claimant's wages in the sum of £228.90 on 31 May 2023. That deduction was not authorised by the claimant and specifically was not authorised under the terms of his contract of employment and the respondent shall pay the claimant the additional sum of £228.90.
56. For the avoidance of doubt, I find that the respondent has no right to recover the cost of damage to the van under the claimant's contract of employment with them.

57. For the sake of completeness, I do not place any weight on the fact the claimant did not provide a written report. He did tell both his supervisor and the workshop manager about the accident and there is clear contemporaneous evidence that the workshop manager knew about this. Neither of them told the claimant to fill in the report and there was plenty of information for them to go on and conduct an investigation. The respondent clearly failed to conduct an investigation or satisfy themselves that the claimant negligently damaged the van.

On call payments

58. In respect of the alleged deductions in respect of on call payments, the claimant agreed that overall he appears to have been paid slightly more or for slightly more on call days than he ought to have been, even though it was clear that the respondent had made a mistake in their calculations.
59. Even by the claimant's calculations, however, there was still a net overpayment. It is not within my power to order the claimant to repay those. The claimant has not brought claim for breach of contract and there is consequently no employer's counter claim for breach of contract before me. All I can say is that there has been no deduction from wages because the claimant was overall in the period from November 2022 until May 2023 been paid all that he should have been paid for the on-call payments. I have found as a fact that there was an ongoing accounting of underpayment and overpayments in respect of the on-call payments and that might easily be explained by the fact that these vary from month to month and was subject to reconciliations and time sheets.
60. In my view, therefore, it is correct to look at the whole of the period in respect only of the on-call payments in so far as those are the matters that are before me to determine whether the claimant was paid all that he should have been. I find that he was and therefore there was no deduction in respect of that claim and that claim is unsuccessful.

November 2022 wages

61. Finally, I consider the underpayment in November 2022. The parties are agreed that had the claimant received the additional sum of £738.60 that the respondent said the claimant received in addition to the £2,500 he would have received his full entitlement for his wages in November 2022.
62. The claimant did not receive that sum. In order to determine whether there has been a deduction from wages I must first determine what amount was properly payable. I conclude on the basis of the evidence presented and the parties' respective positions that the additional sum of £738.60 was properly payable to the claimant for November 2022 and that was due on 30 November 2022 (the date identified in his payslip).
63. This amount was not paid and there is no suggestion that the deduction of this amount was authorised in or under the claimant's contract of employment or otherwise.
64. I address, however, the time limits in respect of the alleged deduction from November 2022. This was not raised before me but nonetheless the application of time limits for bringing a claim to the Tribunal are a jurisdictional issue and I am obliged to consider them.

65. The time limit for bringing a claim for unauthorised deduction from wages is three months plus any time for early conciliation. In respect specifically of the underpayment in November 2022, the claimant clearly has brought his claim out of time.
66. The two caveats to this are firstly that where there has been a series of deductions, time starts to run from the last of those deductions and secondly I can extend time to allow the claimant to bring a claim outside of the three months' period where
- 66.1. it was not reasonably practicable for the claimant to bring a claim within that time and
- 66.2. the claim has been brought within such further period as I consider reasonable.
67. The claimant's case was that he had been trying to resolve these matters since his employment ended and he had been struggling to get information from the respondent about this. However the deduction in November was a discreet deduction. It was not part of anything to do with on call payments or holiday pay or notice pay. It was a one-off mistake which the respondent recognised very quickly and consequently sought to pay the claimant what they thought he was owed, which was £2,500.
68. In the hearing I neglected to ask the claimant for any further information about why he delayed in putting in his claim, but it is clear that the claimant did know about it at the time. I cannot reasonably find that the one-off incident in November 2022 was part of an ongoing series of deductions, albeit that the respondent clearly has had difficulty keeping on top of their payroll from time to time.
69. Equally I cannot reasonably find that it was not reasonably practicable for the claimant to bring a claim for unauthorised deduction from wages in respect of his November pay within the three months – namely by 29 February 2023. There is nothing in the claimant's evidence or the surrounding circumstances from which I could infer that there were any mitigating circumstances or that could support an argument that it was not reasonably practicable for the claimant to present a claim for unauthorised deductions from wages in November 2022 by 29 February 2023. I therefore find that this claim is out of time and is dismissed.

Employment Judge Miller

Date 3 November 2023

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