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EMPLOYMENT TRIBUNALS

Claimant: Mr MF Malik

Respondent: Khans Solicitors (A firm)

Heard at: East London Hearing Centre

On: 13 February 2019

Before: Employment Judge C Hyde (sitting alone)

Representation

Claimant: In person

Respondent: Mr R Singh (Employment Consultant)

JUDGMENT

The judgment of the Employment Tribunal is that: -

1. It is declared that the Respondent unlawfully deducted the sum of £278.20p gross from the Claimant's wages and the Respondent is ordered to repay that sum to the Claimant forthwith. That sum was made up of:
 - a. the sum of £70.20 gross, representing a shortfall in payment of wages below the National Minimum Wage; and
 - b. the further sum of £208 gross (in respect of 4 days' pay from 6 December 2016).
2. All other claims (failure to provide written contract of employment, failure to provide itemised pay statements, other claims of unlawful deduction of wages, failure to pay commission payments, and unfair dismissal) were not well founded and were dismissed.

REASONS

Preliminaries

1. Reasons are provided in writing for the above Judgment pursuant to a written request by the Claimant dated 19 February 2019. Reasons are provided only to the extent that the Tribunal considered it necessary to do so in order for the parties to understand why they had won or lost; and only to the extent that it was proportionate to do so.
2. Further, all findings of fact were reached on the balance of probabilities.
3. Mr Malik had presented a claim form on 26 April 2018. He alleged that various sums of money were due to him which had not been received and also that various formalities attached to his employment with the Respondent had not been complied with. The Respondent disputed that they were liable to him, and submitted a response and grounds of resistance to that effect on 4 June 2018.
4. Sadly, in this case the levels of animosity and bitterness were even more marked than usual. It was also sad that the parties in this case were people who were normally meant to be working in pursuance of the administration of justice.

Evidence Adduced

5. I heard evidence from four witnesses live: from Mr Malik; and three on behalf of the Respondent. I also read a witness statement which had been prepared by his wife Ms Iqbal. As, in the event, the Respondent did not wish to cross-examine Ms Iqbal, she did not give evidence.
6. The witness statements produced were as follows: from Mr Malik [C1]; from Ms Iqbal [C2]; from Mr Mohammed Omar Khan [R3]; from Mr Shahid Khan [R4]; and from Mr Bilal Warraich [R5].
7. In addition, the Tribunal had a bundle of documents [R1] which had been prepared when this case was first due to be heard in December 2018. It consisted of around 80 pages. Then, it was agreed that on 14 December 2018, when the case was previously before the Tribunal, the Claimant had produced some further documents. These consisted of a further 43 pages and were included in the bundle put before me but were numbered from the beginning again. I therefore gave that bundle a separate exhibit number which was [R2].
8. The witness statements had also been prepared for the last hearing.
9. In addition to that, during the course of the evidence of one of the Respondent's witnesses, the Tribunal asked some questions about the Claimant's claim that he had been employed from 6 December 2016. There was one document in the bundle about this and a WhatsApp or text message and the Respondent was able to provide some further documents about that matter which were added to [R1]. We all received copies of these and the parties were able to see the full documents on their phones and

emails.

10. Contrary to my usual practice I made some observations about the quality of the evidence presented. I did not consider that either party's case bore the hallmark of credibility. The evidence of Mr Warraich emerged as credible and reliable. Having said that, the Tribunal had to decide these matters on the balance of probabilities, and did not take a blanket approach to determining the reliability of the evidence of the Claimant or the witnesses for the Respondent. The starting point for my findings of fact was consideration of the contemporaneous documentation and any evidence which was consistent with either that contemporaneous documentation or at least which appeared to be consistent within itself. There were various aspects of the case put forward by each side which I rejected as incredible.

11. For example, the Claimant was unable to produce credible contemporaneous evidence to support his contentions about the amount of work done by him for the Respondent on a monthly basis between December 2016 and March 2018.

The Issues

12. Unusually in a case such as this which did not involve discrimination or similar allegations, the parties had appeared twice before at the Tribunal. The first was before my colleague Employment Judge Tobin on 16 August 2018 at an Open Preliminary Hearing, and latterly they attended on 14 December 2018 before Employment Judge Burgher at what had been intended to be the final hearing. The hearing did not go ahead on 14 December 2018 because an interpreter had not been organised for Ms Iqbal, who was due to give evidence on the Claimant's behalf. However, when postponing the hearing and fixing the new date, Employment Judge Burgher took the opportunity to define the issues, and these were set out in the Order and summary which was sent to the parties on 19 December 2019.

13. At the hearing on 13 February 2019, the Claimant raised for the first time since the previous hearing, a further issue which he wished to have determined. I considered, consistent with case law on this issue, that a List of Issues is meant to be of assistance to the parties and the Tribunal. If the Tribunal, despite having invested considerable resources in trying to divine and/or define the issues, does not for whatever reason capture all the claims which are live and the parties have failed to pick up on this and bring it to the Tribunal's attention, the position was clear - the question is whether a complaint is in the claim form. If it is, subject to ensuring that there is a fair hearing of that issue, it should be determined by the Tribunal. This is how the Tribunal proceeded in this case, and all additional issues were dealt with by the Tribunal.

14. It was highly regrettable however, especially as the parties in this case were either solicitors or engaged in the provision of legal services to the public, that the omission of a head of claim from the List of Issues had not been noticed before the beginning of the hearing.

15. An additional issue was whether the Claimant was entitled to further pay in respect of a start date on 6 December 2016, not 12 December 2016, as the Respondent contended. The issue of the disputed start date had been referred to in

the List of Issues only in the context of the failure to provide a written contract of employment/statement of terms and conditions, not in respect of the failure to pay wages from the earlier start date.

16. The issue of whether the Claimant had been paid the national minimum wage at all times was considered, as were other complaints concerning the calculation of the payments made to the Claimant as set out in the reasons below.

17. The issues as defined by EJ Burgher are set out below (with an agreed amendment to the start date alleged by the Claimant in the paragraph below).

Failure to provide written contract of employment

18. Whether the Respondent has failed to provide the Claimant with a written contract of employment contrary to section 1 and/or 4 of the Employment Rights Act 1996. The Claimant stated that he commenced employment of 6 December 2016 (not 2017 as set out in error in EJ Burgher's summary).

Failure to provide itemised pay statements

19. Whether the Respondent has failed to provide the Claimant with itemised pay statements, pursuant to section 8 of the Employment Rights Act 1996 in respect of the following month's work.

- a. 6 January 2018 (In respect of work 6 December 2017 to 5 January 2018);
- b. 6 February 2018 (In respect of work 6 January 2018 to 5 February 2018);
- c. 6 March 2018 (In respect of work 6 February 2018 to 5 March 2018).

Unlawful deduction of wages

Unpaid wages

20. Failure to pay wages in respect of the following hours.

- a. 6/12/2016 – 5/1/2017. Alleged 200 hours worked. £1440.00 claimed;
- b. 6/1/2017 – 5/2/2017. Alleged 232 hours worked. £1670.40 claimed;
- c. 6/2/2017 – 5/3/2017. Alleged 239 hours worked 232 hours worked. £500 paid. £1220.80 claimed;
- d. 6/3/2017 – 5/4/2017. Alleged 252 hours worked. £550 paid. £1264.40 claimed.
- e. 6/4/2017 – 5/5/2017. Alleged 280 hours worked. £1000 paid. £1100 claimed.
- f. 6/5/2017 – 5/6/2017. Alleged 187 hours worked. £1402.50 claimed.
- g. 6/6/2017 – 5/7/2017. Alleged 224 hours worked. £1100 paid. £611.00 claimed.
- h. 6/7/2017 – 5/8/2017. Alleged 189 hours worked. £1069 paid. £348.50 claimed.

- i. 6/8/2017 – 5/9/2017. Alleged 179 hours worked. £1069 paid. £273.50 claimed.
- j. 6/9/2017 – 5/10/2017. Alleged 180 hours worked. £1069 paid. £281.00 claimed.
- k. 6/10/2017 – 5/11/2017. Alleged 177 hours worked. £1069 paid. £258.50 claimed.
- l. 6/11/2017 – 5/12/2017. Alleged 186 hours worked. £1069 paid. £326.00 claimed.
- m. 6/12/2017 – 5/1/2018. Alleged 174 hours worked. £1646.80 paid. £341.80 overpaid.
- n. 6/1/2018 – 5/2/2018. Alleged 175 hours worked. £1050 paid. £262.50 claimed.
- o. 6/2/2018 – 5/3/2018. Alleged 170 hours worked. £1050 paid. £225.00 claimed.
- p. The Respondent paid further sums to the Claimant of £1047.00 on 8 March 2018 and £845.00 on 8 June 2018 as alleged reconciliation payments.

Commission payments

21. The Claimant alleges he is entitled to commission payments in the following sums.
- a. £1100 in respect of a referral client, Mr Tausdeeq Khan;
 - b. £600 in respect of referral client Mr Rasheed Khan.
 - c. The Claimant stated that he had an agreement with Mr Omar Khan, partner to receive 65% of the billed fees but when it was more than 65% there was separate agreement with Mr Khan to pay the specified sums to the Claimant.
22. The Respondent disputes the hours alleged to be worked by the Claimant and disputes that the Claimant is entitled to the commission payments claimed.

Unfair dismissal

23. Whether the Claimant is an employee to be able to bring an unfair dismissal claim.
24. If the Claimant is an employee, whether he has been dismissed for asserting a statutory right to payment of wages. The Claimant also alleged that he was dismissed for complaining of harassment and bullying but was unable to identify the statutory right engaged for this [claim].

Facts Found and Conclusions

25. The first matter was the issue of the Claimant's employment status. Determination of this issue affected the complaints of unfair dismissal, failure to provide a written contract of employment, and itemised pay statements.
26. It was agreed by the Respondent that from 12 December 2016 to 15 November 2017, the Claimant was an employee working under a Contract of Internship. The Claimant alleged that his employment started a few days earlier than that namely on 6 December 2016. I had to decide this on the balance of probabilities. The only really relevant evidence on this issue was the

contemporaneous evidence of communications between the parties. Having heard evidence in particular from the Claimant and from the self-employed consultant (Mr Warraich) who works with the Respondent I was satisfied that the text message which was in the bundle which showed the Claimant doing some work on a file prior to 12 December 2016, was in relation to a contact who had been brought to the firm through Mr Warraich. Although he was abroad at the relevant time and could not shed any light on the extent, if any, of the Claimant's employment with the Respondent, it was evident that there was no other likely reason why the Claimant would have been doing work on that file. There was a suggestion during the Respondent's case that perhaps the client concerned had been a contact of the Claimant's, tending to support the firm's case that the Claimant was not working for the Respondent, on the firm's business, at the time. That was flatly contradicted by Mr Warraich who gave credible evidence about the client being a longstanding contact of his, and he gave a good deal of background context to this assertion. He had referred to work to the firm, but had not directed who should carry out the work. He did not know the Claimant or of his employment at the time, as Mr Warraich was abroad. I accepted Mr Warraich's evidence unreservedly on this. This led to my finding that on the balance of probabilities the Claimant was, as he claimed, working for the Respondent prior to 12 December 2016, having started on 6 December 2016.

27. The point was made by Mr Singh that the Claimant signed an agreement saying that he started work with the Respondent on 12 December 2016. The Tribunal found, sadly in this case, that there was a healthy disregard for documentation and its import. Thus, for example, the Respondent authorised the issue of a series of payslips which did not reflect on their face the payments actually made to the Claimant or the dates on which, or timeframes in which, payments were made.
28. In all the circumstances, I was not satisfied that the start date on the Contract of Internship was accurate and I found that it should have stated 6 December 2016 as the Claimant contended.
29. The pay details which were relied on by the Respondent used 12 December as the first day in respect of which the Claimant was paid. There would therefore be a shortfall in relation to the first four days of work from 6 to 10 December 2016. The Claimant was subsequently, as is very clear from the Respondent's Schedule at page 49A, paid on an extremely irregular basis and appeared to have been paid less than what he was entitled to, at least up to July 2017, on an ongoing basis.
30. I was further satisfied that it not reasonably practicable for the Claimant to have brought a claim sooner about that shortfall, and that he brought the claim as soon thereafter as it was reasonable for him to do so, in the claim form. I therefore declared that the Respondent unlawfully deducted a sum equivalent of four days' pay in relation the period from 6 to 9 December 2016 and the Respondent should repay that sum to the Claimant forthwith.
31. The next issue was in relation to the failure to pay itemised pay statements. Mr S Khan accepted and acknowledged when he gave his evidence, what I would suggest was extremely obvious by that point, namely that the Claimant had

established that he was also an employee after 15 November 2017. That was the date on which it was agreed that the second internship contract came to an end. The undisputed evidence was that after that date, the Claimant continued working as before with no difference. That evidence from Mr Khan was consistent with the payments which, it was agreed were made to the Claimant, which showed that there was no material difference between the payments that the Claimant received under the second internship contract and in the period after 15 November 2017. There was a difference of maybe £20.00.

32. In deciding the issues of reasonable practicability and of the actual start date, I took into account the respective bargaining positions of the Claimant and the Respondent, and the fact that at all times the Claimant needed immigration sponsorship by the Respondent in order to be entitled to work legally with them. The Tribunal took into account that the senior partner of the Respondent firm of solicitors had had something approaching forty years' experience as a solicitor. The unequal bargaining positions was evidenced, for example, by the delayed payments made to the Claimant at the start of his employment. These were: £500.00 in the middle of February 2017, that was the first payment made; £550.00 at the beginning of March 2017; a payment at the end of April 2017 of £1000.00; and the payment in the middle of June 2017 of £1100.00, before the payments settled into some sort of regular pattern. The Respondent's case was that the Claimant had agreed to defer receipt of his wages. No reason was put forward as to why someone in receipt of such low pay in any event would agree to the payments being deferred. The Tribunal rejected the contention that this was an agreed course.
33. As stated above, the payslips did not reflect the amounts the Claimant was paid for a substantial period of time. They falsely represented that the Claimant was paid £764.93 net on 5 January 2017 and was then being paid £1028.06 net from 5 February 2017 (p63) and that was clearly not the case. Nor were the payslips issued on the dates stated.
34. The unequal bargaining positions was further demonstrated when Mr S Khan stated that his understanding was that at one point "a small sum of £845.00" was owing to the Claimant.
35. In any event, the Respondent accepted during this hearing that they should have paid the Claimant the sum of £1028.06 net per month. I was satisfied that there had been a failure to provide itemised pay statements. I was also satisfied that the Claimant continued as an employee from the middle of November 2017 through to the end of his employment on 5 or 6 March 2018.
36. The next issue was what, if any, remedy was available in respect of these breaches by the Respondent. I considered that there were not free-standing claims that could be brought in respect of the failure to provide a written contract of employment/statement of terms and conditions of employment or failure to provide itemised pay statements. However, I considered that the only 'remedy' was a potential adjustment to any award that was made in respect of unlawful deduction of wages. Further, the complaint that the Respondent had failed to provide a written contract of employment was also related to the Claimant's contention that

the internship contract he was given was inaccurate in terms of the start date. I certainly found there was that inaccuracy, but could see no legal basis for concluding that this amounted to a breach of the statutory duty, such that the Claimant would thereby be entitled to an adjustment of the unlawful deduction of wages award. Neither party made submissions to that effect.

37. I then turned to the unlawful deduction of wages complaints. These formed the main part of the case, by reference to the sums claimed. The Tribunal cannot make awards on the basis of guesses. Our findings have to be based on evidence which would substantiate a claim that is being made.
38. The Claimant put forward a Schedule which was captured in the order of Employment Judge Burgher at Section 6 in relation to unpaid wages. His argument was that he worked far more hours than the payslips reflected thus, that he worked far more hours than he was paid for.
39. The difficulty in relation to this part of the case was that the Claimant first gave details of this claim in the second half of 2018, and for the first time during his oral evidence he stated that he was able to calculate the figures for the hours worked based on his contemporaneous notes of the hours worked. There had been no previous reference to that contemporaneous evidence. No such evidence was put forward in the additional disclosure the Claimant gave in December 2018 and the Tribunal found it unlikely that the Claimant would have been able to recollect in the tail end of 2018 what hours he had worked, going back to December 2016 onwards. For example, he alleged in this case that in that first month he worked 200 hours. That claim could not be substantiated on the balance of probabilities.
40. In support of his case, he cross-examined about the fact that he may have been in the office over Christmas 2016 etc. I did not consider that that could establish with sufficient accuracy and clarity that he had worked the additional 200 hours that he claimed to have worked in that month.
41. So, on the balance of probabilities, I rejected that contention both in relation to December 2016 and the other months he claimed for. There was absolutely no corroboration of his claim.
42. The Tribunal similarly did not have sufficient evidence before it to find that the claim for unpaid commission was substantiated.
43. In relation to the unpaid wages claim, the Claimant raised the issue of whether the Respondent had complied with the national minimum wage. The Tribunal considered that it should bear this in mind during the hearing. This appeared to have been overlooked in one respect, namely whether the contractual pay rates under the two agreements that the Claimant signed were compliant with the national minimum wage. His initial rate of pay was compliant. However, the national minimum wage increased, by 30p per hour, from 1 April 2017 and that covered the period up to the end of his employment. However, the second internship contract which came into effect on 12 May 2017, provided for pay at a rate which complied with the new national minimum wage. I considered therefore, that there was a period of about six weeks or so when the Claimant was actually

not being paid the appropriate rate under the national minimum wage from 1 April to 11 May 2017.

44. The Tribunal could remedy that by way of making an order in respect of unlawful deduction of wages for the shortfall and it did not appear to me there was any reason why I should not do that, subject to calculation. The Tribunal did not have any power to go any further and impose penalties under the legislation. That may be a matter for the HMRC.
45. A further point arose in relation to the national minimum wage issue. The Claimant brought a claim for unfair dismissal, but as the Respondent submitted, he was not entitled to bring a complaint of "ordinary" unfair dismissal under section 98(4) of the Employment Rights Act 1996 because he did not have two years of service. He did not appear to be arguing to the contrary. However, with a liberal interpretation of what was recorded by EJ Burgher when the issues were identified, his argument was basically that he believed that he was entitled to bring an automatic unfair dismissal claim and that was in some way related to not having been paid the national minimum wage. The Tribunal noted the terms in which this issue was recorded and the failure by the Claimant even in this hearing to identify any statutory basis for an automatic unfair dismissal complaint.
46. There was certainly no evidence about this placed before this Tribunal which would support a finding that the Claimant had been dismissed by reason of asserting a statutory right to payment of the national minimum wage. He had therefore not established facts on which he could base an automatic unfair dismissal claim which did not require two years' service.
47. There were two further points raised by the Claimant in relation to the calculations of the money that he was paid. He that the Respondent has brought into account two sets of payments which are not valid. The first is in relation to commission payments and he refers to two payments of £600.00 and £1100.00 made to him in June and December 2017 and he argued that he was entitled to a commission in respect of any referrals that he made at the rate of 65% of the fees charged to the Client. I have no doubt that there was some sort of side arrangement to reward the Claimant for bringing in referrals. However, I am not satisfied that the rate was 65% as he alleges. Not least because it does not fit with the figures that are agreed as to what came from the client. The Claimant quite rightly referred to the proposed contract which the Respondent put to him which he rejected in March 2018 which had a feature or an element of a commission payment and I agree that would tend to corroborate his argument that there was such an agreement prior to that. However, as I said before in relation to the hours claim, it is not for the Tribunal to speculate about a figure and impose it on the case. It is a matter needs to be based on evidence and there is no evidence which is credible before me as to what the rate of the award was so, I therefore rejected the suggestion that the two payments rather of £1100.00 and £600.00 were in respect of commission and should not be put towards wages.
48. A further point made by the Claimant was that he had paid the Respondent at the beginning of his employment for a sponsorship fee of £900.00 and that the Respondent had very belatedly reimbursed him by cheque in the sum of £845.00

on 7 or 8 June 2018. The fact of the payment was not in dispute. The reason for it was not. Here again, unfortunately the Claimant put forward no evidence apart from his assertion that he paid the initial £900.00. The Respondent's case was that this (£845) was a payment in respect of wages. Thus, given that the burden is on the Claimant to establish any deduction I was not able to accept that he had proven that this was a shortfall in terms of a reimbursement to him. On the balance of probabilities, I found that the figure of £845.00 was a payment of wages.

49. The Respondent also initially sought to sustain the argument that all the payments made to the Claimant after 15 November 2017 were ex gratia payments and that he was somehow unable to commit to regular working. The Tribunal would have rejected this argument as unlikely, even if Mr Khan had not conceded that the Claimant was clearly working on the same basis after the end of the second internship contract (i.e. as an employee).
50. In addition, the Claimant made a claim for holiday pay. He had given particulars of this in his Schedule of Loss but he gave general overall figures and no evidence was adduced in support of his claim. Further, no questions were put to the Respondent's witnesses about his entitlement to the sums claimed. In all those circumstances, on the same basis as I had rejected the claim for payment for additional hours worked, I rejected the claim for holiday pay.
51. The Tribunal awarded the sum of £208.00 gross, in respect of four days that the Claimant had not been paid for, at 36 hours per week, at £7.20 per hour.
52. The next award was in respect of the six and half weeks at which the Claimant was under paid under the national minimum wage by 30p per hour, times 36 hours per week equals £70.20 gross.
53. The Tribunal endeavoured to carry out a reconciliation of the sums that the Claimant should have been paid, if he had been paid properly by the Respondent and compared this to the sums that he received. It appeared that although the Claimant should have been paid the sum of £17,112.60 gross. This was equivalent to the net sums that he actually received. The process was made more difficult by the absence of relevant payslips. There was no apparent shortfall overall.
54. Further, although the Tribunal investigated whether there was a power to adjust the award because of the failure to provide payslips, it appeared under section 38 of the Employment Act 2002 that there is no power to adjust the award when the breach by the Respondent is a failure to provide itemised payslips under section 8 of the Employment Rights Act 1996.
55. The Respondent indicated that they would make the relevant payment to the Claimant within fourteen days.

Employment Judge Hyde

1 April 2019