



EMPLOYMENT TRIBUNALS

Claimant: Mr Malcolm Ward

Respondent: Kevs Cars & Coaches Ltd

Heard at: Birmingham ET (by CVP video hearing) On: 1 September 2023

Before: Employment Judge Hena

Representation

Claimant: In Person (wife present as support)

Respondent: Mr Hill, Non-legal Representative

RESERVED JUDGMENT

The Tribunal's findings in respect of this claim are:

- 1. The claimant's claim for unlawful deduction of wages pursuant to s.23(1)(a) of the Employment Rights Act 1996 succeeds. The respondent is to pay £1,600.00 gross (£400x4 weeks) to the claimant and deduct the appropriate tax and national insurance.**
- 2. There is a 10% ACAS uplift on these sums of £160 due to the respondent failing to deal with the claimant appropriately when he tried to enquire as to no work being available and submitting a grievance which is not legal support.**

3. **The claimant's claim for itemised pay slips pursuant to s.8 of the Employment Rights Act 1996 fails.**
4. **The claimant's claim for interest cannot succeed in such claims.**
5. **The total sum owed by the respondent to the claimant is £1,760.**

REASONS

Preliminary Matters

1. The matter had been listed for a morning hearing by CVP, but the listing was based on the issue only being wages and there being 2 witnesses. However, it became apparent there would not be sufficient time to determine the case as well as the respondent had two witnesses, in addition to the claimant. Neither party had notified the Tribunal of the number of witnesses and the respondent said they received no notification of the hearing until the morning of the hearing, but that they were happy to proceed.
2. It was explained that we would try and get through the evidence but that the judgement would most likely be reserved.
3. The respondent also expressed that they were not happy with the way the evidence has been presented. As the respondent was not legally represented, they were not aware that it was usual practice for the respondent in such matters to prepare one bundle working with the claimant. But they confirmed that they received all the documentation in advance of the hearing.
4. The Tribunal did offer the respondent time to consider the evidence before cross examining the claimant.
5. The respondent's bundle at page 25 has included 'without prejudice' correspondence between the parties which I have not considered as it should have been disclosed to the Tribunal.

Claims and Issues

6. Both parties confirmed the issues for the hearing which were:
 - 6.1 Unpaid wages; and
 - 6.2 No Itemised wage slips after 9 July 2022.

Evidence

7. The evidence of the claimant can be summarised as:

- That during the summer period he was told by Emma that no work, he accepts that there may have been work for him to do, but that's not what he was told.
- The claimant produced all the calls during that period to the respondent.
- The claimant did have the Directors phone number, Mr Nind, but did not call him as told by Emma that there was no work. If that was not the case, he would have expected Mr Nind to call him.
- He has a face-to-face meeting with Emma when she told him there was no work and that he asked for her to put what she said in writing.
- The claimant did not accept that Emma had no authority to tell him there was no work. He expected she would as she is held a managerial role.
- The claimant agreed wage slips produced and left in building to collect. But they are not always received weekly.
- The claimant said his supervisor was Darren, he was not aware of what Emma had told the claimant until the claimant told him.
- The claimant states that he was legally entitled to the itemised payslips and never received them from the respondent for that period he was not in.
- He believes he raised the issue of not having itemised phone bills – he explained them as calls he made to Darren who was his supervisor about being told there was no work for him and asking for it in writing.
- The claimant says in all the calls that he made, including one where Emma said there was an error and he would be paid despite not coming to work, no one asked why he was not at work.

8. The evidence of Director Ms Wendy Nind can be summarised as follows:

- In addition to adopting her witness statement she confirmed that she was not aware that Emma had a face-to-face meeting with the claimant as all meetings are logged. Also, she would not expect the claimant to have a meeting with the claimant as she does not have that position with the respondent.
- Emma's role was limited to dealing with holidays, bookings, wages, dealing with accountants, deals with drivers, but not really dealing with claimant as Darren is his supervisor.
- The witness feels as if the meeting did not take place between Emma and the claimant.
- Did note the claimant had not come in to work and wondered why, ordinarily would have called him to find out, but due to a fire things were not as they usually would be.
- However, it was felt that the employee's responsibility to call regarding job, which is in their contract.

- The witness conceded evidence the claimant had made calls but that he should have spoken to someone senior not his supervisor Darren.
 - It was said that the claimant should have called Emma or Kevin and come in to speak to them.
 - Whilst it was accepted that the claimant made one call to Emma, it was said it was to her number and not that he spoke to her.
9. The evidence of Office Manager Ms Emma Ayres, can be summarised as follows:
- Ms Ayres adopted her witness statement.
 - She did recall speaking to the claimant week 2 of him not attending work, but she assumed he was on leave and then taking unpaid leave.
 - She did not ask him on that call why he was not at work and cannot remember what was said.
 - She does not recall a face-to-face meeting with the claimant on 18 July '22.
 - She knows that she would not say to anyone there is no work over summer period, as plenty of work.
 - The witness was aware that the claimant was calling his supervisor Darren, as Darren informed her, he was asking him if there was any work, as far as she was concerned there was.
 - As the claimant was asking if work was available, the witness expected that he would come in to work.
 - The witness does not know if action was taken by Darren to inform the claimant there was work, just that he was asking and as far as she concerned there was.
 - She did not ask Darren about what he said to the claimant as he is no longer the claimant's supervisor but he is still employed by the respondent.
 - She confirms itemised payslips were provided but that as the claimant did not come in, he did not receive them, she can only post them if the claimant gives her permission to do so and requests this.
 - The witness does not know why the claimant's Subject Access Request was not actioned, but CCTV for the date of the meeting would not have been kept that long.
 - The witness accepted the claimant submitted a grievance in December but that it was delayed until after the claimant returned off sick leave, but was never dealt with when he returned.

Fact Findings

10. The Tribunal found the following in relation to each issue relating to the claim;
- (a) *Was the claimant told by the respondent not to come into work or go AWOL?*

11. As part of my consideration if the respondent failed to pay the claimant during the summer, I need to have consideration of whether the claimant had gone AWOL as described by the respondent or whether he was told there was no work.
12. I found the respondent's evidence problematic, the evidence of Director Ms Nind failed to address that the claimant was contacting his supervisor Darren and was alleged to ask if there was work for him over summer. This was said by Ms Ayres, which was relayed to her as Office Manager, but that she does not know what action was taken with regards to his query. It is not known if Ms Nind was informed of this, but she did wonder where the claimant was, but it appears she took no action to find out.
13. Whilst I accept that an employee must take some responsibility there is also responsibility to check on their employees when they are missing. Even if it is to ask other employees as to his well being and why he has not come in – such as his supervisor. If basic enquiries had been made Ms Nind would have known there was an issue as to whether there was work or not. I make this finding despite my sympathy that the respondent was not dealing with the aftermath of a fire.
14. I found it troubling that Ms Nind on one hand said the claimant should not be speaking to or accepting direction from Ms Ayres but should approach his supervisor, Darren. But then gives evidence about the claimant's calls he made to the respondent, that he in fact should not have been speaking to his supervisor Darren, but someone senior like Ms Ayres or Kevin.
15. I find that Ms Nind cannot have it both ways it cannot be said the claimant should not take direction from Ms Ayres as she has no authority and then when discovered he was contacting his supervisor about work, told that he should be speaking to someone more senior like Ms Ayres. If Darren was the claimant's supervisor, then it seems entirely appropriate for him to contact him and it is Darren then who should go higher up the chain of command. It appears from Ms Ayres that he did do so, but that she took no further action, including following up if he relayed to the claimant that there was sufficient work. It would have been helpful if Darren had given evidence about these calls given that he was the claimant's direct supervisor.
16. I also find Ms Ayres evidence problematic in that she admits that a call was received from the claimant, she has no recollection of what was discussed but thought the claimant was on leave so did not ask where he was. If the claimant had been on leave as presumed, to have called Ms Ayres there must have been a pressing issue, especially as she is not his supervisor. I would have also expected Ms Ayres as an Office Manager who is not the supervisor of the claimant to have made a note of the conversation, this then to be passed on to the claimant's supervisor.

17. It is the evidence of Ms Ayres that she was aware from Darren that the claimant had called him asking if there was work. This is clearly indicative that the claimant believed there was no work for him. This in itself should have prompted someone more senior to become involved and to ensure Darren, the claimant's supervisor, communicated that there was work for him. But instead, the evidence was that it was presumed Darren had explained there was work and no follow up was carried out.
18. It appears from the evidence there was a lack of procedure when it comes to employees problems and how and who should deal with them. Even a small organisation at a minimum should have some procedures particularly when a member of staff is expressing whether there is any work available for them. Ms Ayres evidence raises issues again as to procedure when she confirms that the claimant's grievance was not dealt with at all even when he was no longer on sick leave and his SAR was not actioned at all.
19. None of the witnesses for the respondent gave evidence that the claimant was asked why he was not at work, even when he spoke to them, there is no evidence to say this was someone who went 'AWOL'. If he had there would be some corroborative evidence from the respondent documenting their surprise the claimant had just gone off without informing them.
20. I accept the claimant's evidence that he was indeed told by Ms Ayres there was no work for him. He followed this up by informing his supervisor Darren and then calling him about the issue. The claimant was consistent about what happened and corroborates this with phone logs. He attempted to take action as to the instruction there was no work for him, but the respondent took no action to clarify the position there was in fact work for him.

(b) Did the respondent fail to pay the claimant wages? If so for what period?

21. Given my findings above as to the claimant being told there was no work for him, I find that the respondent failed to pay the claimant his wages. The claimant did not attend work due to the respondent's actions and he was prepared and ready to work those three weeks had someone actually told him there was work.
22. Given he was not made redundant or dismissed the period he was told not to attend work should be paid to him.
23. At the beginning of the hearing there was discussion about what the claim period was, the respondent ended in say it was a claim for 3 weeks unpaid wages as the claimant had paid 2 weeks holiday. The claimant said it was set out in the witness statement as the claimant was specifically told not to work

from a certain date. In Ms Ayres witness statement, it is said that during the summer the claimant was paid 2 weeks holiday pay until the end of 30 July 2022 and then 13 August 2022.

24. I find that from 18 July 2022 Ms Ayres had told the claimant there was no work for him over summer, so it would not be correct that the respondent used holiday pay to cover two weeks of that period, unless the claimant used his holiday leave during that period.

25. The grievance in the claimant's bundle at page 28, where he says prior to the school holidays he was told there was no work for him, and he had been calling his supervisor since then to get this in writing. He said each time he was told a letter would be sent to him, however, no letter was forthcoming. He also expresses that there have been attempts to change his contract to a term time one so that he is not paid during holidays. He is on a full-time contract which means work must be provided over the holidays.

26. However, at page 38 of the appellant's bundle there is an email exchange between parties where the claimant does say that he booked 2 weeks holidays as he was told he would not be paid over summer. He felt holiday pay would cover this period partially as it had been so unexpected that he would not be paid. It is then said that the holiday pay was paid at the wrong time and did not align with when he requested holiday.

27. I find that the claimant did use holiday due to the situation and the respondent incorrectly paid this for the period he was told there was no work from him – the last week of July and second week of August. Regardless of the respondent's inconsistencies it was holiday that the claimant had chosen to use. I note from the respondent's evidence that from 5 September 2022 the claimant started sick leave.

28. I calculate the unpaid wages from:

Week ending 6th August '22
Week ending 20th August '22
Week ending 27th August '22
Week ending 03 September '22

29. It is not in dispute that the claimant received £400 pay per week before tax.

(c) No Itemised wage slips after 9 July?

30. I accept Ms Ayres evidence that there was itemised wage slips but that they remain in the office and will not be posted until requested by an employee. However, in this case the claimant was not coming into the office, everyone knew he was not in. Whether they thought he was on leave or gone AWOL his wage slips should have been forwarded on to him.
31. I find that they were, however, available and I could see no evidence of the claimant asking for them to be sent to him. Whilst I find that the respondent should send payslips where someone is on extended leave or sick leave, without expecting them to call and ask for them to do this, I do not find that the payslips were not produced and unavailable to the claimant.

(d) Claimant's claim for interest

32. The claimant's claim for interest cannot succeed as interest cannot be paid on unpaid wages claims.

Employment Judge Hena

Date: 07 December 2023