EMPLOYMENT TRIBUNALS

Claimant: Ms L Redmond

Respondent: Hewitt Homes Limited

Heard at: Central London Employment Tribunal (By CVP)
On: 2 March 2023

Before: Employment Judge Keogh

Representation
Claimant: In person
Respondent: Did not attend

JUDGMENT

1. The respondent's name is amended to 'Hewitt Homes Limited'

2. The respondent's application to extend time to present the response is dismissed.

3. The claimant's claims for unlawful deductions from wages and for holiday pay are unsuccessful and are dismissed.

REASONS

1. A decision in this matter was given orally to the claimant at the hearing. She made a request at the hearing for written reasons to be provided.

2. The claimant's claim is for unlawful deductions from wages and failure to pay holiday pay. The claimant is seeking £5,000 for 10 days' work at 15 hours per day, holiday pay of £416.67, and travel expenses of £49.80.

3. At the outset of the hearing it was discussed that the ACAS certificate in this matter had been brought against Hewitt Homes Ltd whereas the claim had been brought against the director of Hewitt Homes Ltd, Ms Shrelle Mattis, citing Hewitt Homes' address. Ms Mattis has said in correspondence to the Tribunal that the correct respondent is Hewitt Homes Ltd. The claimant

confirmed this morning that she was working for the company. Although it is a defect under Rule 12(1)(f) where a different respondent is named on the ACAS certificate and the claim form, the claim can proceed where it is in the interests of justice to do so. Given both parties agree who the correct respondent is and it is clear from the ACAS certificate and the claim form which company is being referred to, I found it was in the interests of justice to proceed and to amend the name of the respondent to 'Hewitt Homes Limited'.

4. I then considered the respondent's application to extend time to present the response. An application had been made to extend time by 14 days, with a draft ET3 attached. No explanation was given as to why the response had not been presented in time. The respondent did not attend the hearing, although clear directions had been given for the respondent to attend. In the circumstances I did not allow the application and did not take into account any information presented in the response. It should be noted that after the hearing concluded an email was received (which had been sent around 10.22am) from Ms Mattis indicating that she could not log on to the hearing. As the parties were asked to log on at 9.40am it is not clear why Ms Mattis did not make earlier contact with the Tribunal.

5. That being said, it is still necessary for the claimant to prove to the Tribunal that she is entitled to the sums she claims.

6. The issues were identified at the outset of the hearing as follows:

   (1) Is the claimant a 'worker' within the meaning of section 230 Employment Rights Act 1996 and under Regulation 2 of the Working Time Regulations 1998?

   (2) If so, what work did the claimant do and for which business?

   (3) Is the claim for wages quantifiable?

   (4) Can the claimant recover sums in respect of expenses?

   (5) If the claimant is a worker, how much holiday was she entitled to for the 10 day period and at what value per day?

7. Section 13 Employment Rights Act 1996 provides:

   (1) An employer shall not make a deduction from wages of a worker employed by him unless—

   (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
   (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

8. Section 27(2)(b) excludes from the definition of "wages" 'any payment in respect of expenses incurred by the worker in carrying out his employment'.

9. “Worker” is defined in section 230 as follows:

   (3) In this Act *“worker”* (except in the phrases “shop worker” and “betting worker”) means an individual who has entered into or works under (or, where the employment has ceased, worked under)—

   (a) a contract of employment, or
   (b) any other contract, whether express or implied and (if it is 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;

   and any reference to a worker's contract shall be construed accordingly.

10. The same definition appears in Regulation 2 of the Working Time Regulations 1998 in respect of claims for holiday pay.

11. In her ET1 the claimant states she was approached by Ms Mattis to buy the claimant’s company. She was asked to do some work for Ms Mattis on both businesses until the sale of the business went through. It was said verbally that she would be paid for the work, but she has not received anything. She states she is happy to be paid 10 hours (this should read ’10 days’) pro-rata of the £65,000 the claimant would have been paid as a Director, alternatively on a consultancy basis at £3,000 per day. The period of work was 17 October 2022 to 26 October 2022.

12. I heard oral evidence from the claimant and read a short statement that she provided. I also considered documents provided by her. She confirmed that the plan was for the respondent to purchase the business and for her to work as a quality director. She would have been a director of the business with shares and a salary of £65,000.

13. In around the second week of negotiations Ms Mattis had a telephone conversation with her and asked her to undertake 15 hours of work per week getting more service contracts. The claimant also needed to tidy up the business for sale. She estimated she did 95% work for the respondent and 5% work on her own business.

14. When asked what was agreed between her and Ms Mattis in respect of the work, the claimant says that Ms Mattis said ‘Oh, I’ll pay you.’ No payment terms were discussed. The claimant confirmed that normally when she does this type of work, it would be on a consultancy basis for which she charges £3,000 per day, as she has 25 years’ experience.

15. The claimant could not explain how she reached the sum of £500 per day as a pro rata of £65,000 or how the figure for holiday pay was calculated. She used online tools for this.

16. The first question to consider is whether the claimant is a worker. I find that she is not. She was running her own business on her own account at the time she undertook the work and was in negotiations with the respondent's business for her business to be taken over. The work undertaken appears to be work which was preparatory to the anticipated sale of the business and to the claimant becoming a director of the respondent's business. There was no contract of employment entered into. The oral undertaking to carry out work was not a complete contract. No terms were negotiated for payment. The claimant further confirmed that this is the type of work she would do on a consultancy basis. If so, that would make the respondent a client of the claimant's independent business which takes the claimant outside of the scope of section 230(3)(b) and Regulation 2.

17. On that basis the claimant's claims must fail. I would also note however that in any event the claim for wages is unquantifiable. No sum was agreed in payment for the work done, and the claimant appears to be seeking what she considers is reasonable for the work carried out, which is somewhere between what would be 10 days pro rata with an annual salary of £65,000 (which works out at £178.08 per day) and her normal consultancy rate of £3,000 per day. Claims of this nature fall outside the jurisdiction of Part II of the Employment Rights Act 1996 (*Abellio East Midlands v Thomas* [2022] EAT 20).

18. Expenses are not recoverable by virtue of section 27(2)(b).

19. In the circumstances the claimant has not proven her claims and they are dismissed.

Employment Judge Keogh

Date 2 March 2023

JUDGMENT & REASONS SENT TO THE PARTIES ON

07/03/2023

FOR THE TRIBUNAL OFFICE