



EMPLOYMENT TRIBUNALS

Claimant: Mr A Thickett

Respondent: Mr A Evans T/A Glazeit

Heard at: Cardiff (by CVP)

On: 25 April 2024

Before: Employment Judge R Brace

REPRESENTATION:

Claimant: In person

Respondent: Did not attend

JUDGMENT

The judgment of the Tribunal is as follows:

Wages

1. The Claimant was an employee of the Respondent at the relevant time i.e. for the period 13 May 2022 to 24 October 2023.
2. The complaint of unauthorised deductions from wages in respect of tax, national insurance and pension contributions is not well-founded and is dismissed.
3. The complaint of unauthorised deductions from wages in respect of non-payment of wages is dismissed on withdrawal by the Claimant.

Holiday Pay

4. The complaint in respect of holiday pay is dismissed on withdrawal by the Claimant.

Written Itemised Pay Statements

5. The Respondent failed to give the Claimant written itemised pay statements as required by section 8 Employment Rights Act 1996 in the period 13 May 2022 to 24 October 2023.

Written reasons

1. The Claimant has attended today with his witness, Mr Marcus Lyndon Thomas. Both witnesses had provided and relied on written witness statements and a schedule of loss has been provided by Mr Thickett. Mr Thickett confirmed that he was not relying on any documentation.
2. The Respondent did not attend, but this was not unexpected as the Respondent has also failed to properly submit an ET3 and had been informed that under the Employment Tribunal Rules of Procedure 2013, that he may only participate in any hearing to the extent permitted by an employment judge. He had also failed to attend the preliminary hearing on case management that had taken place on 12 March 2024 before Judge Randall.
3. Following that hearing, Judge Randall had sent out case management orders which had included a List of Issues.

Claims

4. Early conciliation had started on 29 November 2023 and ended on 1 December 2023. The Claim form was presented on 7 December 2023.
5. In that ET1 claim form it appeared to me that not only had the Claimant brought claims of unlawful deduction from wages in respect of the failure by the Respondent to account to HMRC for PAYE tax and NICs, as had been reflected in a list of issues prepared by Judge Randall at case management on 12 March 2024, but that he was also complaining of a failure by the Respondent to make employer pension contributions and complained that he had not received 'pay slips'. Today, he also indicated that he has not been paid in respect of around three days' work towards the end of his employment and unpaid, accrued holiday pay.
6. Whilst not at the outset of the hearing, but during his evidence, I discussed with the Claimant what jurisdiction the employment tribunal had to determine claims for unlawful deductions from wages and its ability to make declarations in respect of failure to provide itemised pay statements, both claims appearing to me to be included in the ET1 claim form despite the latter not being reflected in the List of Issues.
7. The Claimant confirmed that his concern was not about recovery of monies owed to him by the Respondent, due to personal concerns held by the Claimant

regarding his ability to recover such monies from the Respondent even if he did get judgment in his favour, but that his main concern was the failure by the Respondent to account to HMRC for tax and NICs.

8. The Claimant gave evidence by way of affirmation and questions from the Tribunal. I accepted the witness statement of Mr Thomas and Mr Thomas was not questioned by the Tribunal apart from seeking his full name and address. I made the following findings of fact based on the evidence before me, namely the oral evidence of Mr Thickett and on balance of probabilities.

Facts

9. From 13 May 2022 to 24 October 2023, the Claimant worked for the Respondent, working on site installations for customers of the Respondent, installing glass balustrades and balconies and the like. He was directed by the Respondent as to which jobs to work on and when. Whilst he did use his own vehicle to get to jobs, repairs on the vehicle were paid for by the Respondent. He was unable to provide a substitute if he was unable or did not wish to work or if he was unwell.
10. The Claimant agreed with the Respondent that he would be paid weekly through direct payments to his bank account in the sum of £500 per week. It was agreed that this would be the net salary after tax and national insurance had been deducted by the Respondent and paid to the relevant authority through pay as you earn (PAYE).
11. The Claimant had asked the Respondent if he would have payslips. He was told that none of the boys working for him had them. The Claimant told the Respondent that he would need copies of payslips eventually. He did not receive any payslips from the Respondent during the whole of the time working for the Respondent.
12. The Claimant tells me that he has calculated that the tax and NIC he believes has been left unpaid by the Respondent to HMRC, as amounting to around £9,728.00. He also confirmed that he has not been pursued by HMRC for this amount and therefore has currently personally suffered no financial loss but he is concerned that the Respondent has not accounted to that third party for the tax and NIC payable.
13. Despite being informed repeatedly that the Tribunal had jurisdiction to deal with unpaid holiday pay that had accrued on termination of employment in respect of untaken annual leave, the Claimant indicated his wish to withdraw a claim for such unpaid annual leave. Despite giving evidence that he had not been paid for around three days' work towards the end of his time working for the Respondent, he also withdrew any complaint in respect of unpaid wages for hours worked. I confirmed that those claims would be dismissed on that withdrawal by the Claimant.

The Law

14. In respect of unlawful deductions from wages the relevant provisions are as follows:

15. S.230 Employment Rights Act 1996 (“ERA 1996”)

(1) An ‘employee’ means an individual who has entered into or works under (or, where the employment has ceased, worked under a contract of employment.

(2) A ‘contract of employment’ means a contract of service or apprenticeship, whether express or implied (and if it is express) whether oral or in writing.

16. S.13 Employment Rights Act 1996 (“ERA 1996”) Right not to suffer unauthorised deductions.

(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

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of wages properly payable by him to the worker on that occasion (after deductions,) the amount of the deficiency shall be treated for the purposes of [Protection of Wages] as a deduction made by the employer from the worker’s wages on that occasion.

17. S.14 ERA 1996 - Excepted deductions.

(3) Section 13 does not apply to a deduction from a worker’s wages made by his employer in pursuance of a requirement imposed by the employer by a statutory provision to deduct and pay over to a public authority amounts determined by that public authority as being due to it from the worker if the deduction is made in accordance with the relevant determination of that authority.

18. S. 27 ERA 1996 Meaning of “wages” etc.

(1) In this Part “wages”, in relation to a worker, means any sums payable to the worker in connection with his employment, ... but excluding any payments within subsection (2).

(2) Those payments are.....

(c)any payment by way of pension, allowance or gratuity in connection

with the worker's retirement or as compensation for loss of office.

Conclusions

20. In an oral agreement, made between the Claimant and the Respondent, it was agreed that the Claimant would work for the Respondent as a fitter for the Respondent's business of supplying and installing balustrade products and that in return for the Respondent providing the Claimant with work as a fitter and paying the Claimant, weekly, a net sum of £500.00 direct into his bank account, the Claimant would provide work. It was also agreed that the Respondent would account to HMRC for any tax and national insurance due in respect of such employment. Any repair work to the Claimant's vehicle was also paid for by the Respondent. I made no other findings regarding the terms of the contract of employment save that the Claimant was unable to provide a substitute.
21. I therefore concluded that there was mutuality of obligation i.e. an obligation on the Respondent as the employer to provide work and pay a wage or salary to the Claimant, and a corresponding obligation on the Claimant as an employee to accept and perform the work offered. In essence, mutuality of obligation, one of the first of the three conditions for a contract of service identified in **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance** [1968] 2 QB 497, 515C, (as confirmed in **Autoclenz Ltd v Belcher and Others** [2010] IRLR 70 CA and [2011] UKSC 41) often described as a 'wage/work bargain', had been met.
22. In addition, having found that:
- a. the Claimant provided his own work and skill in exchange for a wage or other remuneration and was not able to provide a substitute if he did not wish to work or was unable to do so; and
 - b. that the Respondent had agreed that tax and NI would be deducted at source
- I concluded that the Claimant was an employee for the Respondent for the period 9 May 2022 to 24 October 2023 and that the terms of the contract were agreed orally between the Claimant and the Respondent.
23. However, I further concluded that whilst the Claimant was an employee and was entitled to bring a claim in respect of unlawful deduction from wages and in respect of unpaid holiday pay due on termination of employment, the claims in respect of unpaid tax and NIC could not be said to be 'properly payable' by the Respondent as employer, to the Claimant as the worker under s.13(3) ERA 1996
24. An employer is obliged to make PAYE deductions and NICs from an employee's income. Whilst HMRC may well determine that there is unpaid tax payable for a tax year by the Respondent, I concluded that the word 'deductions' set out in

s.13(3) ERA 1996 includes statutory deductions such as tax and NICs and therefore were not wages that were 'properly payable' to the Claimant.

25. I also concluded that sums in respect of PAYE and NIC did not fall within the definition of 'wages' in any event because s.27(1)(a) ERA 1996 means any sums 'payable to the worker' in connection with the worker's employment, it does not mean payments to HMRC for tax and/or NICs on the worker's behalf.

26. In those circumstances, any claim in respect of such deductions was not well founded and was dismissed.

27. I also concluded that a claim of unlawful deductions from wages, in respect of employer's pension contributions, did not fall within the definition of wages as contributions to a pension provider on the worker's behalf were not sums 'payable to the worker' in connection with the worker's employment. On that basis any claim in respect of employer pension contributions was not well founded and that too was dismissed.

28. Claims in respect of unpaid wages and holiday pay were also dismissed on withdrawal by the Claimant.

29. I had found that the Claimant had not received itemised pay statements at all for the duration of his employment and made a declaration to that effect.

Employment Judge R Brace
25 April 2024

Judgment sent to the parties on 30 April 2024

For the Tribunal Mr N Roche

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