



EMPLOYMENT TRIBUNALS

Claimant:
Mr Karl Gardner

Respondent:
Grade3 Ltd

Heard at: Hull

On: 04 October 2019

Before: Employment Judge R S Drake

Representation:

Claimant: In Person
Respondent: Mrs D Kurtz (HR Manager)

JUDGMENT

1. The Claimant not established that he was entitled to allegedly unlawfully withheld/unpaid wages of £1,644.40 and therefore his claim is dismissed.

REASONS

2. The Claimant gave oral evidence and referred to a number of documents in support of his claim. The Respondents contested his claim in their Response and gave oral testimony via Mrs Kurtz their HR Manager and Mr Paul McDermott their Group Safety Manager who heard a grievance raised by the Claimant which he dismissed. They also relied on a number of documents which I considered. I refer to documents below by reference to their page numbers in a bundle prepared by the respondents, and thus with the prefix RP. I preferred the evidence of the Respondents in all respects relevant to the issues to be determined and find accordingly for the reasons set out below.

Facts

- 3 On the basis of the oral evidence I have heard a consideration of all of the documents produced before me I find that the Claimants employment commenced on or around 24 June 2009 with a company associated with

the Respondent and in effect transferred to the Respondent in 2013. His terms were governed by a written Statement of Particulars signed by him and dated 24 June 2009 (RPs 34 119) coupled with a number of specific written policy statements about the treatment of sick pay. In all respects the written terms provide only for the right to Statutory Sick Pay (“SSP”) rate and no other more beneficial or generous contractual rate. They also provide for recovery of over-payments by way of deductions.

- 4 The Claimant asserts that his brother, when MD of the Respondents, agreed with him when he became a contacts manager (and thus changed his position) that he would be paid sick pay at contract rather than SSP rate. The brother’s testimony is limited to an unsworn brief statement which is unsupported by oral testimony as it is challenged today and therefore carries little weight. In any event it is not supported by any contemporaneous confirmation of changes of a kind which could disturb the existence of an existing written signed contract.
- 5 The Claimant relies on custom and practice to support his argument supported by brief email messages from other employees attesting to oral agreement in their cases, but again without formal sworn testimony or oral statement capable of being cross examined, I attach little weight to such evidence.
- 6 In any event the testimony given by other employees like the Claimant don’t show the circumstances in which contract rates were paid to them if at all, and the Respondent’s case supported by cross examined testimony of Mrs Kurtz (which is therefore more reliable than untested absent oral testimony) is preferred to the extent I find that individual circumstances applied in other people’s cases. In short, I find that discretion was exercised in their cases but not in the case of the Claimant when he found that the sum of £1,664 had been withheld from his final payment on termination of his employment.
- 7 In spring 2019 the claimant was absent from work because of sickness for several days. Because his monthly salary payment was calculated and paid very soon thereafter, he found he was paid at contract rate whereas the respondents argued that his rate of pay during his period of absence should have been at SSP rate. Therefore, when his employment ended later in the year, they deducted the difference between contract and SSP rate which they argued, and I find amounted to an overpayment.
- 8 The Claimant has not established he is entitled to what in effect he claims as contractual sick pay and therefore full pay accrued and withheld or not received in respect of such entitlement over the last two years and upto and including the notice period given.

Law and its Application

9 Section 13 ERA 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 workers contract, or
- (b) the worker has previously signified in writing his agreement or consent to the making of a deduction ...”

10 Section 14 ERA provides that: -

“(1) Section 13 does not apply to a deduction from a workers wages made by his employer where the purpose of the deduction is the reimbursement of the employer in respect of –

- (a) an overpayment of wages ... “

11 No provisions in the ERA provide for any requirement on the part of the Respondent to notify an intention to make a deduction so that it can be challenged so as to make the deduction permissible in law under either Section. However, provisions exist in the contract which the Claimant signed which come within Section 13(1)(a) ERA which therefore applies.

12 The Respondent has established a valid basis and grounds for making a deduction from the Claimant’s final pay by way of reimbursement of an overpayment already made. Section 14 ERA applies.

13 The Claimant asserts he can rely on an oral agreement changing clear written terms, but he cannot point to any compelling evidence of any contractual basis for such change nor any written record save by what he says is implied in the treatment of other employees.

14 I find that the evidence of how others were treated is not of general application sufficient to cover him but is more likely than not to be indicative of specific discretions exercised by the Respondents in favour of those others and not evidence of general application covering the Claimant. Therefore, his claim must fail and is therefore dismissed.

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Employment Judge R S Drake

Date 10 October 2019