



EMPLOYMENT TRIBUNALS

Claimant: Mr P Breden

**Respondent: Persimmon
Homes Ltd**

v

Heard at: Reading by telephone **On: 14 December 2020**

Before: Employment Judge Milner-Moore

Appearances

For the Claimant: In Person

For the Respondent: Ms Marsland

JUDGMENT

1. The respondent did not make unauthorised deductions from the claimant's wages.

REASONS

Form of hearing

1. A face-to-face hearing was not practicable given the pandemic and given that the claimant now resides in Cornwall. The case was originally listed for a video hearing via CVP but was switched to a telephone hearing at the claimant's request. The claimant maintained that he was not technologically capable of conducting a hearing via CVP and was not in a position to get any assistance to enable him to do so. I considered that all issues in the case could be determined in a telephone hearing and the respondent raised no objection to the case being heard by phone. The hearing was conducted fully remotely in that none of the participants were present at Reading Tribunal. In order to satisfy the requirement that the hearing take place in public an open line to the hearing was made available for any member of the public who wished to observe the hearing. The open line was set up in an office, but I had instructed that a notice be placed on the door so that any member of the public who wished to observe the hearing could do so.

Claims and issues

2. The claim being brought is that, contrary to section 13 of the Employment Rights Act 1996, the respondent has made an unauthorised deduction from the claimant's wages and to determine whether:
 - 2.1. The claimant is owed any wages for 13 or 14 May 2019

2.2. The claimant is owed any wages in respect of his notice period.

3. The claimant's case is that he worked on 13 May 2019 but was not paid for that day, he attended for work on 14 May 2019 but was not admitted to the building and later that day he was told that his contract was being terminated. The claimant did not consider that, having terminated his contract, the respondent was contractually entitled to require him to work his notice but he maintained that he was entitled to a week's notice pay.
4. The respondent's case is that it has paid the wages that are properly payable to the claimant. It has paid by cheque what it considers to be the appropriate net sum to the claimant in respect of his wage for 13 May 2019. The respondent denies that the claimant is owed any wages for 14 May 2019 on the basis that the claimant failed to attend for work on that day. The respondent maintains that, during a phone call on 14 May 2019, there was a mutual agreement that the claimant's employment would terminate on the basis that he would receive a week's notice but would be expected to work his notice period. The respondent maintains that the claimant refused to attend work during his notice period and so is not entitled to any wages for that period.

Procedural history and preliminary matters

5. The claimant was ordered to produce a schedule of loss setting out the amounts claimed, which he has done. The schedule of loss sets out a claim of £1269.43 as follows:
 - 5.1. 13th May – 8.5 hours at £14.42 per hour = £122.59
 - 5.2. 14th May – 8 hours at £14.42 per hour = £115.38
 - 5.3. 1 weeks' notice pay = £576.92
 - 5.4. Accrued holiday pay= £86.54
 - 5.5. Travel expenses in relation to attendance at the interview and travel to and from work = £368 (representing two 460 mile journeys at 40p per mile.)
6. The claimant subsequently indicated that he would not pursue his claims for travel expenses (these would not have fallen within the statutory definition of wages).
7. The parties had been ordered to exchange copies of any relevant documents and to exchange statements setting out the evidence of any witness who was to give evidence at the hearing. The claimant has failed to do so. An order was made by EJ Lewis on 21 November 2020 requiring the parties to exchange statements by 4pm on 7 December 2020 failing which they "will not be permitted to rely on witness evidence except the contents of the Et1 and ET3". The claimant failed nonetheless to produce a witness statement. The claimant was therefore permitted to affirm as to the truthfulness of the material set out in the ET1 but not to adduce any further evidence.

8. Ms Marsland had made an application for the claim to be struck out on the basis that, absent evidence from the claimant, it could have no reasonable prospects of success. In the alternative she applied for a strike out on the basis that there had been unreasonable conduct or failure to comply with the Tribunal's orders or a failure actively to pursue the claim. I considered that the claimant could, consistently with EJ Lewis's order, give evidence in support of his claim provided that this was confined to the matters set out in the ET1, this would not cause any injustice to the respondent and so a fair trial remained possible. On that basis, Ms Marsland did not pursue the applications for strike out.
9. The documents that I was referred to are in a bundle of 48 pages. The claimant was allowed to confirm the truthfulness of his evidence in the Et1 and schedule of loss but not to adduce further evidence. The respondent called as a witness Damian Seddon, the respondent's divisional commercial director.

Facts

10. In light of all the evidence, both oral and documentary I made the following factual findings:
 - 10.1. The claimant was offered employment by the respondent on the terms set out in a letter of 29 April 2019. He was engaged as a maintenance operative on a gross salary of £30,000 per annum (a gross daily rate of £115.40) and with a holiday entitlement of 23 days per annum (plus public holidays). He was to have the use of a works van to perform his role. The contract was silent as to the manner in which holiday would accrue during employment. The contract provided that, during the first six months of employment, the contract could be terminated by the respondent's giving one week's notice.
 - 10.2. The claimant presented for work on 13 May 2019. He spent some time in the respondent's offices and then visited a site. There is a note from the claimant in the bundle that records that no van or equipment was available for him on the first day. Mr Seddon accepts that this was the case but says that it was usual for new starters to be office based for their first few days whilst such matters are sorted out.
 - 10.3. There is a dispute of fact about what happened on 14 May 2019. The claimant says that he attended for work at 7.30 and buzzed to be let in but that no one answered the door, although he could see that people were in the building. He therefore left to get breakfast and did not return. At some point he telephoned Claire Fisher (an administrator) to say that he had been unable to get in and to propose that, as the respondent did not appear to be ready for him, he should start the following Monday. Claire Fisher later called back to say that the contract had been terminated. In evidence the claimant accepted that, although his ET1 made no mention of this, he had also spoken to Mr Seddon by phone on 14 May 2019. His evidence was that during that call he had raised no objection to his contract being terminated (not as Mr Seddon asserts) because the job was not what he had expected but because he regarded the respondent's approach as a bit

aggressive. He said that he had taken it that he would get his notice pay because of the costs that he had incurred in driving down from Cornwall, first for interview and then to attend work. He did not, however, suggest that he had been specifically assured of this by Mr Seddon.

10.4. Mr Seddon's evidence is that the respondent's office is a busy workplace with visitors and deliveries arriving from early in the morning. Had the claimant buzzed at 7.30 someone would have heard him and let him in. He also confirmed that, had the claimant returned after 9 o'clock, the receptionist, who was located by the entrance, would have been present to buzz him in. He said during the course of 14 May that he was made aware by Clare Fisher that she had called the claimant because he had not been in work. The claimant had made no mention to her of being unable to access the office but had said that the job was not what he had expected and had been rather agitated during the call. After that, Mr Seddon had rung the claimant back. His impression was that claimant was frustrated that he had not been out and about in a van from day 1 and he recalls the claimant saying that he did not want to be paid to sit about. Mr Seddon considered that, during this call, he and the claimant had agreed that the contract would be terminated on a week's notice, that this was by mutual agreement but that he made clear that the claimant was expected to work his notice. He recalled the claimant saying that he would be there at 7.30 am sharp the next day.

10.5. In resolving this conflict of evidence, it is relevant to look at the email communications which took place between the parties immediately afterwards.

10.6. On 14 May at 16.54pm the respondent sent a letter to the claimant as an email attachment which stated that "*It is with considerable regret that we must confirm that due to your failure to attend work and your agreement that the role is not suited to you we have no alternative but to terminate your employmentYou will be paid your normal salary to an including Tuesday 21 May 2019. As per your Appointment Letter you are currently serving a probationary period and are entitled to one weeks' notice, you will be required to work your notice period*". The letter went on to say that the claimant had a right of appeal against the decision. The claimant replied to the email later that evening to say "*I cannot access your attachments. I am happy to accept Damian's offer to terminate the contract. Just to confirm, I am owed 8.5 hours for Monday and 8 hours for Tuesday and 40 hours as per contract. So unhappy it has not worked.*" The claimant did not attend for work on 15 May and so at 9.04 am Ms Fisher emailed the claimant to ask for an email address so that the letter could be resent and stating that she understood that it had been agreed that the claimant would attend for work during his notice period. The claimant replied later that afternoon "*you sacked me. No need to turn up*". Mr Seddon then emailed the claimant saying "*I refer to our conversation of yesterday and my letter dated 14th May 2019. During that conversation I informed you that you would not be paid for any days absent from the office and that you would be required to attend the office to work your notice. You even went so far as to confirming that you would be here for 7.30 am. You again, failed to work today and again will not be paid for your absenteeism. Should you not attend the office for the remainder of your notice period you will only be entitled to be paid for*

your first day which you did attend.” The claimant replied later that day “I have been told that I do not need to work the week’s severance as you sacked me which is instant”. Mr Seddon replied by email that same day “for the record, you were not sacked, you were given notice to terminate your contract which we discussed and you agree the job was not for you. This is not instant dismissal and to reiterate yet again we require you to work your notice of one week, days absent will not be paid.”

- 10.7.** I have concluded that the claimant did attend briefly for work on 14 May but that, for whatever reason, the door was not answered and that the claimant left. He did not call anyone to explain that he had been unable to get in. He made no effort to return later in the day and performed no work.
- 10.8.** I consider it unlikely, given the exchanges of email that occurred subsequently, that Ms Fisher informed the claimant during her call with him that his employment was being terminated. I find that, during the afternoon of 14 May 2019, the claimant had Mr Seddon had a discussion. By the time this discussion took place, Mr Seddon had formed the view that, given the claimant’s behaviour, the claimant’s employment was not going to work out and that it would be best to terminate his employment with notice. I find that Mr Seddon told the claimant that his employment would be terminated with notice and that he would be expected to work during his notice period. I find that the claimant did not object to this because he too was having second thoughts about the job with the respondent.
- 10.9.** The emails and letters that were sent immediately after this meeting are consistent with the respondent’s having terminated the claimant’s employment on notice and having informed him that he was expected to work the notice period. Even if the claimant was unable to open the attachment to the email sent to him immediately after the meeting on 14 May 2019, by the morning of 15 May 2019, the claimant had clear, written confirmation that his employment was being terminated on notice and that he was expected by the respondent to work his notice period.
- 10.10.** The claimant then decided that he objected to being required to work his notice period. It was apparent, from his oral evidence, that the claimant felt that the respondent ought to have given him his notice pay without requiring him to work so as to compensate him for the expense and inconvenience to which he had been put by travelling such a long way for a job that had been withdrawn.
- 10.11.** On 12 May 2020 the respondent drew up a cheque for the pay which it considered was owing to the claimant for the work that he had carried out on 13 May 2019. The claimant was sent a cheque for £86 which the respondent had calculated to be the net daily rate of pay after deduction of tax and national insurance. The accompanying letter explained that this was an estimate because the respondent did not have the claimant’s tax details. The claimant confirmed in cross examination that he had received the cheque but had chosen to throw it away because he disputed the amount. He considered that the deductions made by the respondent for tax and national insurance were excessive. However, he put forward no evidence as to the correct net daily rate.

Law

11. The relevant parts of section 13,14 and 27 of the Employment Rights Act 1996, which define the prohibition on unauthorised deductions from wages are set out below.

13.— 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 the 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 this Part as a deduction made by the employer from the worker’s wages on that occasion.

14.— 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 on the employer by a statutory provision to deduct and pay over to a public authority amounts determined by that authority as being due to it from the worker if the deduction is made in accordance with the relevant determination of that authority.

27.— 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, including—

- (a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise,

.....

but excluding any payments within subsection (2).

- (2) Those payments are—

.....

- (b) any payment in respect of expenses incurred by the worker in carrying out his employment,

.....

- (3) Where any payment in the nature of a non-contractual bonus is (for any reason) made to a worker by his employer, the amount of the payment shall for the purposes of this Part—

- (a) be treated as wages of the worker, and

- (b) be treated as payable to him as such on the day on which the payment is made.

12. Regulation 15A of the Working time Regulations deals with the accrual of annual leave during the first year of employment

15A.— Leave during the first year of employment

(1) During the first year of his employment, the amount of leave a worker may take at any time in exercise of his entitlement under regulation 13[or regulation 13A]² is limited to the amount which is deemed to have accrued in his case at that time under paragraph (2) [or (2A)]³, as modified under paragraph (3) in a case where that paragraph applies, less the amount of leave (if any) that he has already taken during that year.

(2) For the purposes of paragraph (1), [in the case of workers to whom the Agricultural Wages (Scotland) Act 1949 applies,]⁴ leave is deemed to accrue over the course of the worker's first year of employment, at the rate of one-twelfth of the amount specified in regulation 13(1) on the first day of each month of that year.

[(2A) Except where paragraph (2) applies, for the purposes of paragraph (1), leave is deemed to accrue over the course of the worker's first year of employment, at the rate of one-twelfth of the amount specified in regulation 13(1) and regulation 13A(2), subject to the limit contained in regulation 13A(3), on the first day of each month of that year.

Conclusions

13. The claimant was entitled to receive a day's pay for his work on 13 May 2019. The gross sum payable was £115.40. However, the respondent was obliged to deduct tax and national insurance when making payment of the claimant's wages for that day and such deduction fell within section 14(3) Employment Rights Act 1996. Although at the time the claim was filed the respondent had not paid the claimant for this day's work, payment occurred, very belatedly indeed, when the respondent provided a cheque to the claimant dated 12 May 2020. The claimant has admitted receiving the cheque but chose to destroy it because he believed the amount to be incorrect. The respondent made clear that, not being in possession of the claimant's tax details, it had to estimate the appropriate amount of tax and national insurance. I consider that the sum advanced in that cheque (£86) was broadly correct as a net daily rate and the claimant has, of course, not put forward any contrary evidence as to the correct net amount. It is unfortunate that the claimant chose not to cash the cheque. However, the respondent had discharged its obligation to pay him for the work conducted on 13 May 2019 by sending the cheque to him.
14. As to 14 May 2019, the claimant did no work for the respondent on that date. Nor do I consider that the claimant was ready and available for work but prevented from working by the respondent. I consider that the claimant was frustrated at not getting admittance to the building when he first arrived and that he left without making any real efforts to get in, nor did he attempt to return a little later, nor did he attempt to contact anyone to explain that he was having difficulties. That is not consistent with the claimant making a genuine effort to be available for work on 14 May 2019.
15. I have found that the claimant's employment was terminated by Mr Seddon on a weeks' notice and that he made clear that the claimant would be expected to work his notice. The claimant took the view that he was not

prepared to do so because he did not believe that this could be required of him in circumstances where the respondent had terminated the contract. However, the respondent was contractually entitled to terminate the contract by giving a week's notice and to require the claimant to work his notice period if it wished him to do so. It was not legally obliged to pay wages during the notice period to an individual who was refusing to attend for work.

16. The claimant's contract was silent regarding the manner in which entitlement to annual leave accrued. Accordingly, it is necessary to consider the provisions of regulation 15A Working Time Regulations 1998 which provide, in summary, that entitlement to annual leave accrues at the rate of 1/12th on the first day of each month. The claimant, having worked only a single day in the middle of May, accrued no annual leave.

Employment Judge Milner-Moore
Dated 14 December 2020

Date:

Sent to the parties on: ..30/12/2020...
T Henry-Yeo

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For the Tribunals Office

Public access to employment tribunal decisions:

All judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Note:

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.