



EMPLOYMENT TRIBUNALS

Claimant: Mr S Tempesta

Respondent: Jobsworth Recruitment Solutions Limited

Heard at: Birmingham

On: 11 January 2022

Before: Employment Judge Flood (sitting alone)

Representation

Claimant: In person

Respondent: Mr Hayes (Operations Director)

RESERVED JUDGMENT

The claimant's complaints for unlawful deduction of wages and for unpaid holiday pay do not succeed and are dismissed.

REASONS

The Complaints and preliminary matters

1. By a claim form presented on 8 August 2021, the claimant brought a complaint of unlawful deduction of wages under **section 23 of the Employment Rights Act 1996 ("ERA")**. He claimed for the difference in wages between a pay rate of £13 per hour he was paid (for the 57 hours he worked between 1 and 6 May 2021) and £14 per hour which he says should have been paid (£57). He also claims the sum of £25 in respect of a night worked for the respondent (the difference between the £20 he was paid and the £45 he says he should have been paid). Lastly the claimant contends that he was not paid for holiday accrued but untaken during his employment.
2. The respondent contends that the rate of pay of £13 per hour was agreed by the claimant before he started to work for it. It says that it paid the claimant its

standard rate of £20 for the night worked and did not agree a different sum with the claimant. It also says that the claimant is not due to be paid any accrued but untaken holiday pay as the holiday pay to which he was entitled was included within the hourly rate of pay for hours worked.

3. The hearing was unable to be completed in the time allocated (although evidence and submissions took place), so I adjourned the hearing for a reserved decision.

The Issues

4. Unpaid Wages claim

- 4.1. What were the terms and conditions of the claimant with respect to hours and pay?
- 4.2. What work was performed by the claimant for the respondent and when was this performed?
- 4.3. What pay, if any, did the respondent pay to the claimant for any such work performed?
- 4.4. How much pay (if any) is outstanding to be paid to the claimant?

5. Holiday pay claim

- 5.1. Did the respondent fail to pay the claimant for annual leave the claimant had accrued but not taken when their employment ended?

Findings of Fact

6. The claimant attended to give evidence and Mr Hayes gave evidence on behalf of the respondent. I have considered the ET1 and the ET3 together with the two bundles of documents produced by the claimant ("C Bundle") and the respondent ("R Bundle"). I make the following findings of fact:

- 6.1. The respondent is in business as an employment agency supplying its workers to clients within the transport industry. The claimant worked for the respondent from 1 to 6 May 2021. The respondent initially contended that it did not employ the claimant as it "only acted as an intermediary" for its clients. However by the time of the hearing the respondent conceded that the claimant was a "worker" for the purposes of section 230 (3) (b) ERA and so the Tribunal has jurisdiction to consider his complaint.

- 6.2. The claimant says he saw an advertisement for a position in the respondent via the recruitment website Indeed. At page 20 and 21 of C Bundle I was shown copies of three advertisements for HGV Class 2 Drivers. At page 20, two position advertised as "*HGV Class 2 Driver – 1400-1600 starts*" is shown. Both had the location as Willenhall and advertised a rate of "*£14-17 an hour – Full time, Permanent*". The first such position also indicated payment of a £52 weekly bonus. It appeared to be for afternoon shifts of between 8 and 10 hours. The rates of pay shown were described as:

*“£14 p/h Monday to Friday – including holiday pay
£17 p/h on a Sunday – including holiday pay.”*

The second position was described in similar terms albeit did not reference a weekly bonus and described pay as being *“Salary: £14.00-£17.00 per hour.”*

The third position advertised appeared to be for a position in Bedford so was not of direct relevance to this claim.

6.3. The claimant says that having seen these advertisements he telephoned the number shown on the advertisement on 26 April 2021. The claimant did not apply via the link shown on the Indeed advertisement (and so the respondent did not have a record of any written application) and the claimant admits he did not apply in writing. I accept that the claimant saw these advertisements and as a result of this telephoned the respondent to apply for a position.

6.4. The claimant says he spoke to someone called James at the respondent about a position and says that he was asked whether he could work early shifts and said that he could *“but at the same terms and conditions of the job I applied for, that one of which I have sent a copy to the Tribunal, 14.00-16.00 start, £52 weekly bonus in Willenhall”*. The claimant said he also expressed doubts about holidays not being paid. I did not hear any direct evidence from the person the claimant spoke to so accept that there was a discussion at this time about the roles available and rates of pay although do not accept that there was any firm agreement in place on any particular role as a result of this telephone conversation.

6.5. Following discussions the claimant was sent the standard terms and conditions of engagement issued by the respondent via its payroll company Paylinks. This required the claimant to provide certain information in order to be registered on to its payroll and to gain access to its employment portal required that the claimant accepted the terms and conditions of this service in order to access it. The claimant was concerned about this process and did not in fact accept any terms and conditions at this time. Although I did not see a copy of this contract of employment the parties agreed that it contained a provision which stated that employees would only be guaranteed to be paid the minimum wage for the hours that they worked. Mr Hayes explained that this was a standard form contract and also explained that individual rates of pay would be as agreed before the start of any particular assignment. Mr Hayes explained that this was often done at short notice and so particular terms for particular jobs were communicated by text and Whatsapp message. He said that the drivers then attended for work and submitted timesheets for the hours completed on a particular job and were then paid the hourly rate agreed in advance for the particular job for the hours worked. I accepted his evidence in this regard.

6.6. There was some communication by text on 27 April 2021 between the claimant and James from the respondent about his attendance at induction

training and commencement of work. James sent the claimant a message which appears to be a reply to the claimant referring to the telephone conversation the previous day as follows:

"I can't remember how we spoke yesterday.

When are you looking to do an assessment and commence work"

The claimant replied:

"Ah, ok, as I working night shifts until Thursday night, we said if I could go on Saturday for the assessment, job is 4 on 4 off in Birmingham...starting at 16.00 if I don't mistake"

James replied that he remembered and then said

"Sorry , I've been speaking with about 30 drivers so gets a little messy. OK I will organise Saturday for you". To which the claimant replied that he understood.

6.7. There were further messages on 28 April 2021 where the claimant queried what he needed to do to and whether he should attend his assessment on the following Saturday (which was 1 May 2021). James replied yes and that full details would be provided later that day. The claimant sent a further message at 20.33 that evening saying that he had not been sent anything and did he *"need to carry on looking for somewhere else"*.

6.8. I then saw copies of further messages between the claimant and James which were exchanged the following morning, 29 April 2021. Although such messages were incomplete, I could see a message sent by James to the claimant at 8.22 where details were provided about equipment. The claimant replied to this message at 08.56 as follows:

"Thanks

Excuse me James, is it induction or assessment? And, I was reading once again your advert, how much ph is it paid please as it's written holidays are included, so I guess, the hourly rate is less than £13.00, do I mistake??"

James replied at 10.53 as follows:

"It's induction, part of that is a driving assessment to make sure your OK.

They show you the tail lift & the site & the operation & how it all works.

Then it's £13p/h including the holiday pay."

6.9. The respondent suggests that this exchange of messages shows that the rate of £13 per hour was communicated to the claimant and it was made clear to him that this included holiday pay. The claimant suggests that this was not clear to him at the time and he referred back to earlier messages

where he mentioned the advertisement he had seen so it must have been clear to the respondent that he was talking about the job advertised with a rate of pay of between £14 and £17 per hour. I find as a fact that the claimant did agree to the rate of pay of £13 per hour for this particular assignment (which was an assignment in any event working in the morning, rather than afternoons as was the case in the job advertised) and that he also agreed that this rate of pay included holiday pay. I make this finding primarily because his own message sent at 08:56 on 29 April 2021 expressly refers to this rate of pay and indeed also makes reference to holiday pay being included and queries this. I fully accept that the claimant was unhappy with this rate and that is why he sent his message but upon querying this, he was informed of the rate and was told that holiday pay was included. Therefore I find that he was aware of the rate being £13 per hour and that this included payment for holiday pay. There was no discussion about the payment of a weekly bonus.

- 6.10. The claimant attended his assessment on 1 May 2021 and then worked on an assignment at Blakemore (a client of the respondent) between 1 and 6 May 2021 (as per messages sent at page 4A R Bundle). I find that by attending for work and carrying out duties during this period the claimant accepted the rate of pay communicated to him by message on 29 April 2021 and accepted that this rate of pay included holiday pay. I find that the rate of pay agreed between the parties for the time worked by the claimant on this assignment was £13 per hour including holiday pay. There was no agreement that any further sums would be paid by way of weekly bonus or otherwise.
- 6.11. I heard evidence about events that took place during this assignment (relating to performance) which were not relevant to the determination of the claim so I have not considered these further. However it is clear that on 3 May 2021 the claimant worked during the day and had not finished the deliveries allocated by 9pm in the evening. The tacograph in his vehicle required the claimant to stop driving so he then pulled over to a service station and slept in the vehicle overnight (see page 4A R Bundle). This is not an uncommon occurrence in the industry and is known as a "Night Out". In such a situation, drivers are paid an overnight payment for the time spent sleeping in the vehicle. Mr Hayes stated that the rate for an Night Out at the respondent was £20 per night (pointing out that it had been set at that rate as anything paid over £23.55 was subject to tax). I accepted the evidence of Mr Hayes that this was the standard amount paid by the respondent for a Night Out worked by its workers. It is agreed that there was no discussion in advance about this overnight stay (and it was unplanned) nor had the parties agreed in advance what the rate of pay was to be for any Night Out worked.
- 6.12. The claimant worked one further shift with the respondent after he had worked the shifts on the Blakemore account, working a day shift on 6 May 2021 for Linkline (see page 4B R Bundle). The rate of pay for this client was £12 per hour including holiday.
- 6.13. The claimant submitted his timesheets for the work he had completed and he was paid the sum of £13 per hour for all the hours he had worked.

He was not paid for the Night Out. The claimant's payslips were shown at pages 26-28 of C Bundle. At pages 26 and 27 the payslips for the hours worked by the claimant on the Blakedown account were shown and on page 28 the payslip for the hours worked on the Linkline account were shown. Each payslip breaks the rate of pay down into two elements Hours paid at £11.60 per hour and Holiday paid at £1.40 per hour adding up to a total of £13.00 per hour. The payslips I have seen show that the claimant was paid (gross) the sums of £107.30 for hours worked and £12.95 for holiday pay, amounting to £120.25 (page 26 C Bundle); £414.70 for hours worked and £50.05 for holiday pay, amounting to £464.75 (page 27 C Bundle) and £95.70 for hours worked and £11.55 for holiday pay, amounting to £107.25 (page 28 C Bundle). The claimant was not sent the payslips upon payment as he had not signed up to the respondent's online portal. The payslips were sent to the claimant during the discussions around his pay that followed after his employment ended.

6.14. The claimant queried the sums he had been paid on a number of occasions alleging that he should be paid at a higher rate for all hours worked and that he should be paid a sum for the night out worked. I saw a copy of the respondent's response written by Mr Hayes at page 32 C Bundle. It first clarified that the claimant had not been paid for his Night Out in the vehicle and informed him that he would be paid the sum of £20 for that night out. It then said that his query that the "*hourly rate for Blakemores should be £13.50*" had been checked but that sms communication was clear that the claimant had been informed the rate is £13 so nothing further was owed. It then said that a query about the hourly rate for the Linkline work being £12.50 had also been checked and the respondent had paid the claimant £13 per hour in error for this work but that no correction would be made to recover the sums overpaid. It then went on to deal with the claimant's complaint that he should be paid holiday pay, stating:

"Conclusion. It is clear in all written confirmation I have seen to you via sms that it clearly states your rate includes your holiday pay. During the sms conversation you actually confirmed that back to us in a summary. In addition, the advert you responded to was clear that the holiday pay was included in the rate. On your payslip it has clearly been broken down what is holiday pay. We do not uphold this query."

The Law

7. **Section 13 ERA** provides that a worker has the right not to suffer unauthorised deductions from their wages. The relevant sections are set out in full 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.

- (2) *In this section “relevant provision”, in relation to a worker’s contract, means a provision of the contract comprised—*
- (a) *in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or*
 - (b) *in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.*
8. **Section 23 ERA** provides a right for a worker to present a complaint to Employment Tribunal that their employer has made an unlawful deduction from their wages, contrary to **section 13**.
9. Regulations 14 and 16 (1) and (5) of the Working Time Regulations provides as follows:

14 Compensation related to entitlement to leave

(1) This regulation applies where –

(a) a worker’s employment is terminated during the course of his leave year, and

(b) on the date on which the termination takes effect (“the termination date”) the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13 and regulation 13A differs from the proportion of the leave year which has expired.

(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).

16 Payment in respect of periods of leave

(1) A worker is entitled to be paid in respect of any period of annual leave to which he is entitled under regulation 13[and regulation 13A]1, at the rate of a week's pay in respect of each week of leave.

.....

(5) Any contractual remuneration paid to a worker in respect of a period of leave goes towards discharging any liability of the employer to make payments under this regulation in respect of that period; and, conversely, any payment of remuneration under this regulation in respect of a period goes towards discharging any liability of the employer to pay contractual remuneration in respect of that period.

10. The following authorities were relevant to determining the claim for holiday

pay:

Robinson-Steele v RD Retail Services Ltd and two other cases 2006 ICR 932, ECJ 'Article 7 of the Directive precludes the payment for minimum annual leave... from being made in the form of part payments staggered over the corresponding annual period of work and paid together with the remuneration for work done, rather than in the form of a payment in respect of a specific period during which the worker actually takes leave'. Article 7 did not preclude employers setting off genuine holiday payments paid under the rolled-up method against a worker's entitlement to payment when he or she actually takes leave. However, such sums had to have been paid 'transparently and comprehensibly, as holiday pay'. The burden is on the employer to prove such transparency and comprehensibility.

Lyddon v Englefield Brickwork Ltd 2008 IRLR 198, EAT there could be a contractual agreement to include a sum referable to holiday pay but the the critical question was whether there was a contractual agreement as to the amount of salary that was so allocated. There could be such an agreement even if there were no written contractual terms, and no discussion prior to employment concerning this, if the claimant knew that there would be a sum allocated to holiday pay and that this was calculated according to an established system.

Conclusion

11. I identified at the outset the questions that needed to be answered, and I will deal with each in turn below:

Unpaid wages claim

12. What were the terms and conditions of the claimant with respect to hours and pay?

12.1. As per my findings of fact above (paragraph 6.9) the claimant was engaged to work for the respondent on morning/day shifts at a rate of £13 per hour (including holiday pay). I do not find that the claimant's arguments as to a greater sum being payable to be persuasive. I accept that the claimant was responding to adverts which made reference to rates of pay being between £14 and £17 per hour. However such rates of pay were never communicated directly to the claimant by the respondent and the exchange messages referred to above shows that the claimant was informed that the rate of pay for work carried out was £13 (including holiday pay) and that by subsequently attending for work he accepted by his conduct the rate of pay that had been communicated to him. As to Night Outs, then there was no agreement in advance of the claimant carrying out the night out work as to what the rate of pay was. The claimant suggests that he should be paid a sum of £25 or even a higher sum of approximately £40. However there is no basis upon which it can be implied that this was the appropriate rate for such work. I accepted the respondent's evidence that the rate it paid for nights out was £20. I therefore conclude that this was the appropriate and correct rate of pay for the night out carried out by the claimant.

13. What work was performed by the claimant for the respondent and when was this performed?

13.1. It is agreed between the parties that the claimant worked a total of 57 hours for the respondent between 1 and 6 May 2021.

13.2. The claimant also worked one Night Out for the respondent on 3 May 2021.

14. What pay, if any, did the respondent pay to the claimant for any such work performed?

14.1. The claimant was paid the sum of £13 per hour (gross) for the 57 hours worked, amounting to £741 (gross).

14.2. The claimant was paid the sum of £20 for the Night Out worked which was paid to him when he queried this sum with the respondent.

15. How much pay (if any) is outstanding to be paid to the claimant?

15.1. The sums due to be paid to the claimant were paid to him by the respondent and no sums are outstanding.

Holiday pay claim

16. Did the respondent fail to pay the claimant for annual leave the claimant had accrued but not taken when their employment ended?

16.1. It is not in dispute that the claimant worked for between 1 and 6 May 2021 and did not take any annual leave during that period. The claimant accrued 0.1 weeks of holiday during that period which (given the claimant worked just one week and was paid £741 (gross) for that week), would amount to approximately £74.10 (gross).

16.2. No separate payment of holiday accrued but untaken was paid to the claimant but the respondent contends that the claimant is not entitled to be paid any additional amounts as the amounts paid to him by way of wages already included an allocated amount for holiday pay. Accordingly it submits that the claimant had already received holiday pay for the days he had accrued but untaken as at the date his employment terminated. The claimant contends that the additional sums paid by way of holiday pay cannot count towards satisfying the respondent's liability to pay him accrued but untaken holiday upon termination of employment. He contends that a separate sum must be paid to him in this regard.

16.3. It is correct that the claimant was in the three payslips I have seen paid the sums of £12.95, £50.05 and £11.55 in respect of holiday pay which amounts to £74.55 in total. This indicates a basis for calculation which accurately reflects the statutory holiday entitlement of the claimant (and other employees paid on this basis). The sums in question were clearly indicated and separated from the amounts paid by way of wages. The

claimant was informed in advance and accepted that his rate of pay including an element of holiday pay before he started work. On this basis on based on the findings of fact above I am satisfied that these amounts were paid by the respondent to the claimant 'transparently and comprehensibly, as holiday pay within the meaning of the guidance in the **Robinson Steele** case above. This is the case even though the claimant had not signed a written contract of employment which sets out (although it appears terms and conditions of employment were issued to him when he was given access to the respondent's online employment portal). The circumstances of this claim are on all fours with the factual scenario in the **Lyddon** case set out above and so the respondent could set off the sums already allocated and paid to the claimant by way of holiday pay during his employment against the accrued but untaken entitlement he was entitled to upon termination of employment. These sums entirely satisfied the claimant's holiday entitlement for the period he worked and so no further sums are due.

16.4. The claimant's complaints for unlawful deduction of wages and unpaid holiday pay are accordingly dismissed.

Employment Judge Flood

Date: 2 February 2022