



EMPLOYMENT TRIBUNALS

Claimant: James Price

Respondent: Kidsafe Limited

HELD AT: Manchester **ON:** 18 April 2018

BEFORE: Employment Judge Humble

REPRESENTATION:

Claimant: Self-represented

Respondent: Ms K Hudson, consultant

JUDGMENT

The Judgment of the Employment Tribunal is that:

1. The respondent made unauthorised deductions from the claimant's wages. The respondent is ordered to pay the claimant the sum of £326.76.
2. The respondent did not issue the claimant with a statement of employment particulars and is ordered to pay the claimant the sum of £816.90 pursuant to section 38 Employment Act 2002.
3. The respondent did not breach the claimant's contract of employment in respect of non-payment of notice pay. That claim is dismissed.
4. The claim for holiday pay is dismissed on withdrawal by the claimant.
5. The respondent is ordered to pay the claimant the total sum of £1143.66.

REASONS

The Hearing

1. The hearing took place at Manchester Employment Tribunal. The claimant represented himself at the hearing and gave evidence on his own behalf. The respondent was represented by Katie Hudson, a consultant; Phil Mears the managing director of the respondent gave evidence. The parties had prepared written witness statements which were taken as evidence in chief and there was an agreed bundle of documents which extended to 47 pages.
2. There were two documents whose admissibility was disputed by the claimant. These comprised a letter of resignation from the claimant to the respondent in respect

of a previous period of employment, and a document containing sales figures for the period May 2017 to August 2017. The claimant's case was that these documents were not relevant to the proceedings. The tribunal took the view that the documents were capable of having a bearing upon the issues, and they were brief documents which the claimant had a full opportunity to read and to deal with in evidence, and therefore the documents were admitted.

3. The evidence and submissions were concluded by lunch on the day of the hearing but another case was listed for the afternoon. The tribunal was therefore required to reserve judgment.

The Issues

4. The claims were for unauthorised deduction from wages and for breach of contract in respect of an alleged failure to pay notice pay. There was a claim for holiday pay but this had been paid by the respondent prior to the hearing and, with the claimant's agreement, that claim was dismissed upon withdrawal.

5. In respect of the unauthorised deduction from wages, the claimant's case was that he worked on 1 September and 4, 5 and 6 of September 2017 and was owed wages for those dates. The respondent's case was that the claimant failed to attend work on 4, 5, 6 September, and in respect of 1 September 2017 he was paid for that day on 8 September when he received his pay for the preceding month.

6. In respect of the breach of contract claim, the claimant said that he gave notice of his resignation in writing on 6 September 2017 and that the respondent's managing director Mr Mears told him, in terms, to leave with immediate effect. The claimant's case therefore was that the respondent failed to pay his notice pay during the period from 6 to 13 September 2017. The respondent's case was that the claimant failed to attend work at all after 1 September 2017 and it therefore treated him as having resigned with effect from that date. Accordingly, it was said that he was not entitled to any notice pay. It was noted that it was not in dispute that the claimant's employment had terminated, it was the manner of that termination that was in issue.

7. There was an additional claim under Section 38 Employment Act 2002 in respect of the respondent's alleged failure to comply with the requirement under section 1 Employment Rights Act 1996 to issue the claimant with a statement of employment particulars. During a discussion of the issues, the respondent's representative conceded that the claimant was not issued with particulars of employment. There was an offer letter issued to him (page 22 of the bundle) but this was a very brief letter which did not fully comply with section 1 Employment Rights Act 1996. It therefore followed that, if the claimant was successful with all or part of his other claims, the tribunal would award an additional two to four weeks gross pay pursuant to section 38(4) EA 2002.

8. The tribunal had regard to Part II of the Employment Rights Act 1996, and reminded itself that the onus was on the claimant to prove his claim on the balance of probabilities. The onus was also on the claimant to show, on the balance of probabilities, that there was a breach of contract on the part of the respondent.

Findings of Fact

The Employment Tribunal made the following findings on the balance of probabilities (the tribunal did not make findings upon all the evidence presented but made material findings of fact only upon those matters relevant to the issues to be determined):

9. This case turned upon the two very different versions of events, presented by the claimant on the one hand and by Mr Mears on the other. Mr Mear's case was that the claimant did not attend work at all after Friday 1 September 2017 and, having not attended work between Monday 4 September and Wednesday 6 September, he instructed payroll to process the claimant's P45 for 1 September 2017. Mr Mears said that he treated the claimant's failure to attend work as a resignation hence the decision to issue the P45 for 1 September.

10. The claimant's evidence was very different. He said that he attended work on Monday 4 September, worked a full shift and secured a sale on that date, and attended work on Tuesday 5 September when he did not make a sale. He said he also attended work on Wednesday 6 September 2017 when, at about 11:10am, Mr Mears came out of his office and approached the claimant's desk while the claimant was reading some notes. He said that Mr Mears called him into his office whereupon he became very abusive, was highly critical of the claimant and said words to the effect that the claimant should be making more calls.

11. The claimant said that he believed that Mr Mears was unreasonable and he "*lost a lot of respect*" for him and so after lunch that day, at about 2:00pm, he hand wrote a letter of resignation which outlined his reasons for leaving, including that he did not agree with the verbal abuse which he received from Mr Mears. The claimant said that he gave one weeks notice of resignation in his letter such that his final day of work would be Wednesday 13 September 2017. The claimant handed this letter to Mr Mears, he said, in front of five witnesses and Mr Mears looked incandescent and "stormed off" into his office. The claimant said that he then packed his belongings in to his bag, including some of his sales chits for "*his records*", and followed Mr Mears to his office. The claimant's said that he asked Mr Mears whether he wanted to discuss the letter to which Mr Mears said, "*Jim. Card!*" loudly and stared at the claimant. The claimant said he understood that to mean that he was to return his security card, which were issued to employees to enable them to access the building, and he placed the card on Mr Mears desk who picked it up and put it in his shirt pocket. The claimant said, in essence, that he understood from this that he was to leave the business with immediate effect and so he did not work the remainder of this shift and left the building.

12. It was not in dispute that the claimant did not receive any contact from the respondent after that date, save that on Thursday 7 September 2018 he received his wages for August and later, on about 11 September, he received his P45. The claimant did not receive any further payment and when he received his P45 he drafted a grievance which was sent to Mr Mears by email (page 40-41). In that email the claimant set out (among other things) that he had resigned giving one weeks notice on 6 September, the P45 which was issued had an incorrect leaving date of 1 September and he was owed outstanding pay for 1, 4, 5 and 6 September 2017 together with accrued holiday pay. The tribunal accepted the claimant's evidence that he contacted the respondent's office by telephone on 4 October 2017 and spoke with Jo Stafford (an employee of the respondent who dealt with administrative matters) and asked whether he was to be paid the amounts which he was claiming to which Ms Stafford said that he was not. The claimant asked why and the response was words to the effect of, "*Mr Mears said not to pay you.*" This was consistent with an email which he sent to the respondent on that date, making reference to that conversation and again requesting outstanding wages, notice pay and accrued holiday (page 42). The respondent did not reply to that email.

13. The task of determining which of the two different versions of events of 1-6 September to accept was made more difficult since the tribunal were faced with two

apparently credible witnesses who both appeared to be genuine when giving two very different accounts. In order to assist in determining the matter the tribunal was therefore required to closely examine the surrounding documents.

14. The most crucial document in this case was produced at page 34 of the bundle. This is a copy of a booking form, or “sales chit”, which related to a sale made by the claimant. It is dated 4 September and signed by both the claimant and Jo Stafford, a member of the respondent’s staff who approved sales. The respondent accepted that this was a valid sale chit relating to a sale made by the claimant and that it was signed by Jo Stafford at 12:09pm on 4 September 2017. An explanation was therefore required from the respondent as to why the sales chit was dated 4 September 2017 which appeared to put the claimant at his place of work on that day, a day when respondent said that the claimant failed to attend work. Mr Mears explanation was that this sale was made on 1 September 2017 but was not approved by administration until 4 September hence that date on the form. This was a plausible explanation on the face of it but it transpired in evidence that it was the claimant who had disclosed the document, including the copy signed by Jo Stafford, within these proceedings. This meant that the document had come in to the claimant’s possession on or after 4 September 2018. The claimant’s explanation was straightforward: he was at work on 4, 5 and 6 September and when he left work on 6 September he picked up took his sales chits with him, including the one of 4 September 2017.

15. Mr Mears on the other hand had some difficulty in explaining how the claimant came to have the sales chit of 4 September 2017. His only explanation was that the claimant must have accessed the building after 4 September and taken the sales chit; he said that the claimant was still in possession of his security card at that point which would have allowed him to access the building. However, in cross examination Mr Mears accepted that the building was occupied until about 7:00pm each evening and was then locked, after which time no one could access the building even with a security card. Mr Mears evidence was that he cancelled the claimant’s security card some time on the afternoon of 6 September, at about the same time he made the decision to issue the claimant with his P45. This meant, if Mr Mears evidence was accepted, that the claimant must have entered the work place at some point between 12.09pm on 4 September and the afternoon of 6 September, surreptitiously obtained the sales chit from administration and then left the building without been spotted by any other member of staff. This explanation seemed much improbable than the claimant’s version of events.

16. The other documents which assisted the claimant were his email of 12 September in which he wrote to the respondent objecting to receipt of the P45 which he said had “*an incorrect leaving date of 1 September 2017*” and raising a formal grievance. This email was the nearest document to a contemporary account of events and it was consistent with the claimant’s version of what happened between 1 and 6 September. The claimant wrote to the respondent again on 4 October 2017 and complained again that he had not been paid his wages or his notice pay. It was significant that the respondent did not reply to either of those emails. Mr Mears conceded that he had received them. His explanation for not responding was that these types of letters were frequently received from aggrieved sales staff and he expected it to “*fizzle out*”. However, he later admitted that he employed only six sales staff, which included the claimant, and that the other five sales staff had all been employed for at least a year. This suggested that these types of letter were much rarer than Mr Mears sought to suggest.

17. The absence of any documentation, or any apparent action, from the respondent after 1 September was of significance. If the claimant had failed to attend work on Monday 4 September the tribunal would have expected the respondent to have written to him, or attempted to contact him in some other way, to seek an explanation for his absence. Alternatively, when the P45 was issued on 6 September, it might well have sent it with a covering letter to the effect that the claimant's absence from work was being treated as a resignation. At the very least, even if those earlier steps were not taken, the tribunal would have expected an employer faced with an employee sending emails claiming wages for three days when he had failed to attend work to at least respond by pointing out that he had no such entitlement since he was not at work on those dates.

18. The tribunal, having considered all the documents and surrounding circumstances, concluded on the balance of probabilities that the claimant did attend work between 4 and 6 September 2018. It follows that the respondent's failure to pay him for those days amounted to an unauthorised deduction from his wages.

19. The tribunal were not satisfied by Mr Mears explanation about the payment of wages for the 1 September. He said that the month end shifted from month to month, sometimes going in to the next month and that in this particular month employees were paid up to 1 September. That may have had some bearing upon the calculation of commission in respect of assigning sales to a 'month end' but it did not make any sense in respect of the payment of employees' basic pay. The pay slips of the claimant showed a basic pay of £1666.66 for each of the months from June to August, which showed that the claimant's basic salary was simply divided in twelve equal parts and paid on a monthly basis. The tribunal held that no payment was made for 1 September.

20. Accordingly, the tribunal found that the respondent had made unauthorised deductions from the claimant's wages by failing to pay him on 1, 4, 5 and 6 September 2018. The claimant's daily rate of pay was, on his own calculation, £75.19. However, based upon his last three pay slips (pages 43, 45-46) his gross daily pay was in fact £81.69. The respondent is therefore ordered to pay the claimant four days pay at £81.69, a total of £326.76.

21. In respect of the breach of contract claim, the tribunal were not satisfied that even on the claimant's own evidence there had been a breach of contract. The claimant's case was that he had packed his belongings, including sale chits, in his bag before the confrontation with Mr Mears. This suggested that he intended to leave before the final discussion took place in Mr Mears office. Further, the claimant's case was not that Mr Mears told him unequivocally to leave with immediate effect, but only that he demanded the return of the claimant's security card. One for that was that the claimant should leave with immediate effect; another equally good explanation might be that Mr Mears did not want an aggrieved employee working his notice in possession of a security card (the claimant accepted that other employees would be able to let him in the office via an intercom system during a notice period). The tribunal were not satisfied, on the balance of probabilities, that the claimant was dismissed with immediate effect. Taking the claimant's case at its highest no such words of termination were used; the claimant was perhaps quick to jump to a conclusion that he was being dismissed having already packed his belongings with the intention of leaving. Accordingly, the breach of contract claim is dismissed.

22. In respect of the failure to issue a statement of particulars, the tribunal took account of the fact that this was a relatively small employer and that some of the key requirements of section 1 ERA 1996 were contained in a brief offer letter. Accordingly,

the tribunal ordered that the respondent should pay the claimant an additional two weeks pay at £408.45; a total of £816.90.

23. The claimant made an application for a preparation time order which focussed firstly upon the merits of the defence and secondly upon various complaints about the respondent's conduct of the proceedings. In particular, it was said that the respondent has disclosed witness statements and documents later than the tribunal orders directed. It transpired however that both sides had failed to comply with the tribunal directions in respect of dates for exchange of statements. The bundle and statements were prepared for hearing in a competent manner and both sides had adequate time in which to address the evidence contained within those documents. Ms Hudson, who was much criticised by the claimant, conducted herself with professionalism. Further, it does not follow from the fact that the tribunal found (at least partly) in the claimant's favour that there should be an order for costs against the respondent because it had allegedly misled the tribunal in the manner suggested by the claimant. Tribunals are rarely able to determine with certainty who is telling the truth, they are required to assess the evidence and make findings upon which party's evidence is preferred on the balance of probabilities. This not a case in which it could be said that the respondent's defence had no reasonable prospect of success. The application for a preparation time order did not therefore have merit.

Employment Judge Humble

12th May 2018

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON

23 May 2018

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FOR THE TRIBUNAL OFFICE

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NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number(s): 2424593/2017

Name of case(s): Mr J Price v Kidsafe Limited

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: 23 May 2018

"the calculation day" is: **24 May 2018**

"the stipulated rate of interest" is: 8%

MISS L HUNTER
For the Employment Tribunal Office