



EMPLOYMENT TRIBUNALS

Claimant: Mr M Hodgson

Respondent: Lyndon-Dykes Limited

Heard at: Manchester

On: 14 October 2020

Before: Employment Judge Leach

REPRESENTATION:

Claimant: In person

Respondent: Ms Anaïs Asch-D'Souza, Paralegal

JUDGMENT

1. The claimant is entitled to payment of 7.3 accrued untaken holidays and the respondent is ordered to pay to the claimant the sum of £701.89 gross
2. The respondent has made unauthorised deductions from the claimant's wages amounting to £2950.67 gross and is ordered to pay this amount to the claimant.
3. The respondent failed to provide pay statements to the claimant and is ordered to pay the claimant £212 (net) pursuant to section 12(4) Employment Rights Act 1996.
4. The respondent is therefore ordered to pay to the claimant the sum of **£3652.56** gross and **£212** net.

REASONS

A. Introduction

1. This claim was issued by the claimant because he claims that he did not receive payments due to him on the termination of his employment. He also claims that he did not receive his final payslips either. Whilst Tribunals generally endeavour to

bring such claims to a final hearing quickly, this claim has taken some 18 months for various reasons including of course the COVID-19 pandemic but also late filing of a response form by the respondent and the respondent's applications for previous hearings to be postponed.

2. As far as this hearing was concerned, both parties attended by CVP. The claimant represented himself. The respondent was represented by Ms Anaïs Asch-D'Souza, a paralegal with a business called Avensure. The issues involved were capable of being dealt with by CVP and neither party objected. The technology worked well throughout the hearing.

3. The parties had prepared a bundle of documents with 303 numbered pages. Reference to page numbers are references to this bundle.

4. The claimant provided evidence and Ms D'Souza cross examined the claimant. A witness statement had been provided by Mr Fenwick who was also in attendance. As it was neither Ms D'Souza nor I had any questions for him and his evidence was accepted, unchallenged.

5. There were no other witnesses. The respondent did not call any witnesses. One of the respondent's directors and its CEO, Michelle Lyndon-Dykes ("MLD"), provided a written statement and also provide written responses to questions sent by the claimant. MLD claimed that she was too ill to attend the hearing, even by CVP. The other director, Andrew Lyndon-Dykes ("ALD") did not attend. I understand he was also unable to attend for ill health reasons (either in person or by CVP).

6. The respondent made serious allegations against the claimant in these proceedings including that he had been stealing from the respondent. In relation to this MLD had set out in her response to one of the questions that there were a number of employees who would be prepared to testify against the claimant in any future criminal or civil proceedings. No such employees attended this hearing to provide evidence.

7. There is no indication either of any separate civil or any criminal proceedings that have been ongoing.

B. Unlawful deductions from Wages

8. The claimant's case is that he is due his pay up to and including the termination date of his employment, being 28 April 2019. He explained his claim was for the whole of the salary payment due to him in April 2019, which covered the period 22 March to 21 April 2019, as well as payment for seven days that would have been made in May 2019, for the period 22 to 28 April 2019 inclusive.

9. The respondent accepts that those payments were not made but says that the non-payments were due to a number of lawful reasons, having regard to the relevant provisions in the Employment Rights Act 1996.

10. The claimant provided a calculation of the amounts that he said were due, and this was based on him being paid a salary of £25,000. The respondent disputed that he was entitled to a salary of £25,000

11. Having considered the claimant's calculations, Ms Asch-D'Souza, on behalf of the respondent, agreed that if I found that the claimant was entitled to that salary amount that the claimant's calculations appeared to be correct. An important issue therefore was how much the claimant was paid under the terms of his employment contract and I considered and made a finding of fact on this matter first.

12. I find that at all relevant times, the claimant was entitled to a salary of £25,000 per annum. I base that finding on a number of matters, including the contractual document particularly at page 37 which I find to be genuine. The respondent has argued it is not genuine but I note that this document was referred to in the related contractual documents starting at page 38 where clause 3 starts, "*Your rate of pay will be based on agreement of employment terms*". Page 37 is that document. It is headed "*Agreement of Employment Terms*". The respondent has not provided an alternative version of that document,

13. I also note that the document at page 37, on its face, was signed at the same time as the statement of terms and conditions of employment starting at page 38. I find the signature and date to be genuine.

14. I also heard the claimant's own evidence on the documents, and I accept his evidence.

15. I have also seen payslips showing an increase from August 2018, many months before the claimant's employment ended, which is consistent with the amount that the claimant says his salary was. I find that the salary payment was £25,000.

16. The next finding I made was in relation to holiday pay. Clause 5 of the statement of terms and conditions of employment effectively mirrors the statutory holiday entitlement of 28 days including Bank Holidays. I find that the claimant had an entitlement up to the end of April (being the termination date of 28 April 2019), of 9.3 days. I find that the claimant took two days' paid holiday which means that he had a net outstanding holiday entitlement of 7.3 days rather than the eight days that the claimant has claimed. Payment for 7.3 accrued untaken holidays amounts to **£701.89** (gross)

17. Having decided on these amounts I then went on to make findings in relation to the deductions and the reasons for deductions that the respondent says it made, The respondent's reasons for making deductions from the claimant's final salary payment are set out in the witness statement of MLD at paragraphs 15(a)-(h). I deal with each in turn.

- (1) Paragraph 15(a) – Unauthorised pay rise with overpayment of £2,793.48: That has been dealt with in my first finding of fact – the claimant's salary was £25,000 per year.
- (2) HIT training costs of £212 – the claimant attended some but not all of a hospitality related training course. Clause 3.C of the statement of employment states, "*In the event of termination of your employment for any reason, if you have incurred education/training costs and have not remained in our employment for a minimum of three years after*

completion of your course, the company reserves the right to deduct an amount proportionate to the unexpired proportion of the contracted minimum period of service". Some discussion took place in the hearing as to precisely what that meant, including the term "*the contracted minimum period of service*". However, cutting through this the claimant was prepared to concede on this point and accept the deduction of £212 as a lawful deduction, which neatly deals with that issue.

- (3) Item C – items not returned to the company worth £191. These are listed at page 139. The claimant gave evidence supported by a handwritten confirmation or receipt that some items were in fact returned. The main additional item, particularly in terms of cost, was a suit. That was something that the respondent bought for the claimant. It was a uniform, but a uniform on a trial basis. The claimant provided an exchange of text correspondence between himself and MLD to confirm this. It was clear that the claimant was going to pay for this suit himself but the respondent (MLD) stepped in and said that was something the business would pay for. Although those emails have been in the bundle of documents for some time, I note that there is no comment by MLD in her statement in relation to those, and I find that that was in fact an item that the respondent bought for the claimant. In the alternative, as for the cost of the company not having returned to it a potentially well-worn second-hand suit then that cost would be minimal. There is no indication from either party of what the value would be, but as I say it certainly would not be anything like the amount that the respondent is claiming.
- (4) Moving to item 15(d), which is described as "*item stolen from Durham Tees Hotel and the Chapters Hotel worth around £3,000*". The respondent's evidence in support of the allegation of theft is in the form of the witness statement from MLD, and an email from one of the respondent's employees called Callum McCartan (CM) dated 17 October 2019 (page 243). Neither of those individuals attended this hearing so that the evidence could be tested, unlike the claimant who was subjected to cross examination, and also Mr Fenwick (who made himself available for cross examination) whose statement had relevant evidence in relation to this allegation. The email from CM notes that various items were removed. The claimant's evidence is clear. Nothing has been unlawfully removed by him and he has previously requested evidence in support of this serious allegation. On the basis of the information that was before me at the hearing, I do not find that the claimant has unlawfully removed any items from any of the respondent's premises.
- (5) The terms of clause 3 of the statement of terms of employment permit the deduction from wages for property not returned. I find that there is no property that has not been returned by the claimant. The respondent cannot rely on this provision.
- (6) Item (e) – unauthorised payments of £550 made to the claimant's brother, Matthew Hodgson, for what the respondent alleges was

agreed to be free photography services. There is no dispute that Matthew Hodgson provided a photography service for the respondent. There is no evidence that the work was not carried out. There is no evidence that the work was carried out badly. There is no evidence that the amounts claimed by Matthew Hodgson, a professional photographer, were extortionate or extraordinary. There is no evidence that the service would be provided for free. The invoice clearly states that it is from Matthew Hodgson, and from the evidence that I have it appears that the company paid those invoices. Ms Asch-D'Souza, on behalf of the respondent did refer to a payment that appears to have been made by the claimant's brother to the claimant at some time around the termination of employment, indicating that that might suggest that the services that had been paid for by the company to Matthew Hodgson was then transferred over to the claimant, but there was simply no evidence for that. It was no more than guess work on the respondent's part having been provided with a copy for the claimant's bank account details. I do not accept it on the basis of the evidence that I have. In so far as there is a dispute about the lawfulness of the invoices then that is a dispute between the respondent and Matthew Hodgson, but it is not a matter that is relevant to any of the terms of employment in relation to deductions from pay.

- (7) Item (f) – unauthorised invoice payments made to Laura Wheatley of £980. Laura Wheatley was an employee of the respondent. It is unclear from the evidence that I have been provided with whether there is a dispute that additional work was carried out by LW or whether it is accepted that the additional work was carried out but the dispute is about the amount and/or method of payment that was arranged from the respondent to LW.
- (8) My findings of fact in relation to payments to LW are as follows. The claimant has given evidence about the role that he had. I accept that evidence. The claimant had huge areas of responsibility on a range of operational issues. The claimant's title was Operations Director and it appears that the respondent had very significant expectations of him. The claimant has had no previous experience as an Operations Director. He has described some but very limited experience in the hospitality sector. For all of these responsibilities he received a salary of between £18,000 and £25,000 a year. The respondent had HR executives and accountants internally and externally and payroll providers. The issue of the payments to Laura Wheatley was not challenged by any of those internal or external experts until well after the termination of the claimant's employment, when at that stage all blame was attempted to be placed on the claimant. The claimant has given evidence that he did not know what he did was incorrect and potentially in breach of tax legislation. I accept that the claimant has not got significant experience and that insofar as these payments were being incorrectly made, that really was a matter for the respondent and their advisers that must have had the detail about payments being made. In any event, whilst the payment and the method of payment to Laura Wheatley might have formed a relevant topic for a disciplinary or

performance concern, it is not a valid reason to make deductions from the claimant's pay (having regard to the provisions in Part II of the Employment Rights Act 1996)

For the avoidance of doubt, I have no evidence that the payments to LW were somehow a fraudulent method of making payments to somebody when those payments were not due as may have been alleged by the respondent.

- (9) Item (g) – Till shortages worth around £2,350. Although this appears as one of the reasons why the claimant was not paid his wages, there is no evidence to support the allegation. In her witness statement MLD lists the till shortage as a reason for deduction of pay (at paragraph 15.g) but does not explain it at any part of the statement except if it is included within the allegation of theft. MLD is specifically asked about the allegation by the claimant and she provides a written response. In essence the written response is that they have plenty of evidence about till shortages but that investigations are ongoing and have been advised to let police investigations complete before bringing cases themselves. On the basis of the evidence provided to me, there is no basis to the allegation that the claimant has caused till shortages.
- (10) Unauthorised expenses of around £2,100 paid for with company bank cards – In relation to this matter, both Ms D'Souza and I tested the claimant's evidence in relation to the bank statements that had been produced in the bundle of documents. The claimant was able to deal with all questions by providing credible responses. A very significant issue that was included in the claimant's evidence was that the bank statement details in the bundle were for an account that was not just used by the claimant: it was used by others, particularly ALD, and a number of the items of expenditure listed there made by the respondent will have been authorised by ALD. As for matters that both Ms D'Souza and I tested the claimant on, the claimant had credible explanations for all of them and I accept the claimant's evidence.

18. The following unauthorised deductions were made from the claimant's pay:-

a. Salary – April 2019	£2083
b. Salary -May 2019 (for 21-28 April inc)	£673.05
c. Car allowance payment	£184.62
Total	<u>£2940.67</u>

19. The claimant also claimed for non payment of expenses. I noted the terms of section 27(2)(b) Employment Rights Act 1996 excluded expenses from the meaning of wages and therefore I declined to make an order for this element of the payment claimed.

C. Payslips

20. Payslips were not provided to the claimant. The claimant has a statutory entitlement to an itemised pay statement in accordance with section 8 of the Employment Rights Act 1996.

21. Where there has been a failure to provide an itemised pay statement then a reference can be made to the Employment Tribunal, and where I find that there has been a failure to provide a pay statement then section 12(4) of the Employment Rights Act 1996 applies, which says this:

“Where on a reference in the case of which subsection (3), the failure to provide a pay statement applies, the Tribunal also finds that any unnotified deductions have been made from the pay of the worker during the period of 13 weeks immediately preceding the date of the application for the reference, then the Tribunal may order the employer to pay the worker a sum not exceeding the aggregate of the unnotified deductions so made.”

22. I offered both parties the opportunity to make submissions to me before deciding whether to make an order for the respondent to make a payment to the claimant under section 12(4) and, of so, for how much. Whilst both parties did address me on the point, neither party made reference to the limiting impact of s26 Employment Rights Act 1996. I did not direct myself to section 26 either. Following the hearing I wrote to the parties on the following terms:-

On writing judgment for promulgation, I have recognised a potential error in that part of the judgment delivered orally, relating to sections 8 and 12(4) of the Employment Rights Act 1996 (“ERA”) (right to an itemised pay statement).

I note that section 26 ERA impacts on the amount that an Employment Tribunal can order to be paid under s12(4) as it contains the following provision:-

“ the aggregate of any amounts ordered by an employment tribunal to be paid under section 12(4) and under section 24 (whether on the same or different occasions) in respect of a particular deduction shall not exceed the amount of the deduction.”

The effect of this is that, as an award for unauthorised deductions is already being made (that award is being made under section 24) an additional payment under s12(4) can only be made where the total of the 2 awards does not exceed the overall deductions.

*The only deduction which does not form part of the award for unlawful deductions under section 24, is the deduction for training costs of £212. It is apparent that the legislation does not permit a higher award in this case and on that basis it appears that the maximum award that I am able to make under rule 12(4) is **£212**.*

In the hearing, I provided both parties with an opportunity of addressing me specifically on the issue of whether an order for payment should be made under section 12(4). The impact of 26 was not raised by either party or by me. It is fair and just to now provide both parties with an opportunity to make submissions (in writing) on this issue and this issue alone. Should either party wish to make submissions on this issue they must do so, in writing, within 14 days of the date that this letter is sent to the parties.

For the avoidance of any doubt, this does not impact on my judgment in relation to unauthorised deductions from wages or payment in lieu of holiday payment.

23. I have decided that the claimant should be awarded the sum of £212. I have taken in to account the provisions of section 8,12 and 26 of the Employment Rights Act 1996. I have also taken into account the correspondence in the bundle, particularly the text correspondence at pages 283-292, before and following the termination of employment when the claimant chased payslips from the respondent and did not receive a satisfactory response. I have also taken into account that the first time the claimant received the payslip in relation to April 2019 was on the preparation of the bundle of documents for use at this hearing. I have also taken into account the fact that the claimant has still not received a payslip in relation to May 2019.

24. Initially, at the hearing (and without directing myself to the terms of section 26 as noted above) I decided an appropriate award was £1500. The terms of section 26 do not permit me to make an award for this amount. I have decided therefore that the appropriate award, having regard to the issues that I have set out above, is **£212** and that is the amount that I order the respondent to pay to the claimant.

Employment Judge Leach
Date: 30 November 2020

REASONS SENT TO THE PARTIES ON
1 December 2020

FOR THE TRIBUNAL OFFICE

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NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: 2406503/2019
Mr M Hodgson v Lyndon-Dykes 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: 1 December 2020

"the calculation day" is: 2 December 2020

"the stipulated rate of interest" is: **8%**

MR S ARTINGSTALL
For the Employment Tribunal Office

INTEREST ON TRIBUNAL AWARDS

GUIDANCE NOTE

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at www.gov.uk/government/collections/employment-tribunal-forms

If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

2. The Employment Tribunals (Interest) Order 1990 provides for interest to be paid on employment tribunal awards (excluding sums representing costs or expenses) if they remain wholly or partly unpaid more than 14 days after the date on which the Tribunal's judgment is recorded as having been sent to the parties, which is known as "the relevant decision day".

3. The date from which interest starts to accrue is the day immediately following the relevant decision day and is called "the calculation day". The dates of both the relevant decision day and the calculation day that apply in your case are recorded on the Notice attached to the judgment. If you have received a judgment and subsequently request reasons (see 'The Judgment' booklet) the date of the relevant judgment day will remain unchanged.

4. "Interest" means simple interest accruing from day to day on such part of the sum of money awarded by the tribunal for the time being remaining unpaid. Interest does not accrue on deductions such as Tax and/or National Insurance Contributions that are to be paid to the appropriate authorities. Neither does interest accrue on any sums which the Secretary of State has claimed in a recoupment notice (see 'The Judgment' booklet).

5. Where the sum awarded is varied upon a review of the judgment by the Employment Tribunal or upon appeal to the Employment Appeal Tribunal or a higher appellate court, then interest will accrue in the same way (from "the calculation day"), but on the award as varied by the higher court and not on the sum originally awarded by the Tribunal.

6. 'The Judgment' booklet explains how employment tribunal awards are enforced. The interest element of an award is enforced in the same way.