



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: S/4100277/2018

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Heard on 4 July 2018 at Edinburgh

Employment Judge: J D Young (Sitting Alone)

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Grzegorz Ocytko

Claimant
In Person

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Zulfiquar Murtaza trading as Capital Wholesalers

Respondent
Represented by:-
Mr B Campbell, Solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Judgment of the Employment Tribunal is that the respondent shall pay to the claimant the sum of **One thousand one hundred and eighty pounds and seventy nine pence (£1180.79)** being the net sum due to the claimant after deduction of Income Tax and National Insurance in respect of arrears of wages.

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REASONS

1. In this case the claimant presented a claim to the Employment Tribunal complaining that he was due "arrears of pay" and "other payments" arising out of

his employment with the respondent. In the ET1 he stated he would wish to be paid the sum of £1355.20 “with interest for late payment and get compensation in the amount of £500”.

- 5 2. The response from the respondent advised that the wages due to the claimant net of Income Tax and National insurance amounted to £1180.79 but that the respondent had a contract claim against the claimant amounting to £192.59. Thus it was stated that the net amount due to the claimant was £988.20. It was also stated that the respondent had sought to make payment of that amount to
10 the claimant but that had not produced an agreed response.

Documentation

3. There was produced at the hearing:-
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- (1) an Inventory of Documents for the respondent paginated 1-31 (R1-31)
 - (2) an Inventory of Documents which had been submitted by the
20 claimant at an earlier Preliminary Hearing paginated 3-44 (C1-44).
 - (3) the original “Time Sheet” recording working hours of employees of the respondent in the period 1-31 October 2017 and then 1-5 November 2017 marked R32.
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4. It should be noted that the claimant also sought to produce what I was advised was a copy of communications between claimant and respondent through ACAS at a time when the conciliation process was in place. I advised that I could not allow those documents to be received or considered as they related to
30 communications which required to be kept confidential to the parties as they sought to resolve matters. Parties required to be free to negotiate without the fear that any statements made or communication would be used in subsequent

Tribunal Hearing. The claimant accepted that position and no reference was made to those documents.

The Hearing

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5. At the hearing I was advised that the claimant's "Table of Earnings" which he had prepared and which was produced at R31 was accepted subject to a dispute over the claimant's "finish time" on 21 October 2017. The respondent indicated that he finished that day at "12.30 hours rather than 14.15 hours". That made a difference of £14 in the wages claimed. Therefore it was agreed by the respondent that the gross amount due by way of wages to the claimant was £1341.20 against the gross sum claimed of £1355.20.

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6. It was also advised that the respondent was no longer insisting on the contract claim for £192.59. I was further advised that there was no agreement as to the compensation amount sought by the claimant of £500. It was also the case that the claimant disputed the deduction for tax and National Insurance. The claimant's position was that after enquiry he did not believe tax and National Insurance had been accounted for by the respondent.

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7. At the hearing I heard evidence from the claimant, who had the assistance of an interpreter familiar with the Polish language, and the respondent.

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8. From the relevant evidence led and documentary productions produced I was able to make findings in fact on the issues.

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Findings in Fact

9. The claimant was employed by the respondent as a driver delivering fruit and vegetables in Edinburgh and its environs. The respondent operates a fruit and vegetable wholesale business.
- 5 10. The claimant was employed in the period between 2-31 October 2017. The normal procedure for the respondent is to operate a 3 month probationary period. The claimant was not issued with terms and conditions of employment as the respondent would only do so after the initial training period had elapsed.
- 10 11. The claimant left the employment by not turning up for his shift on 2nd November 2017. It would appear he was concerned about lack of pay being received. The respondent's position was that payment was to be every 2 weeks with the first payment being treated as "lying time" meaning that the first wage payment would be at the end of the fourth week of service.
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12. In any event it was clear that the claimant and respondent did not part on good terms. The respondent advised that he had sought to get in touch with the claimant as to why he had not arrived for work and to advise in relation to payment which was due. The claimant denied that the respondent had been in touch with him except on one occasion when the respondent had answered a phone call the claimant had made to Peter Savage, one of the respondent's employees and in that discussion he became aware that his "pay was in the safe".
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- 25 13. So far as the hours of work on 21 October 2017 were concerned the claimant's position was that he had finished work at 14.15 hours that day. He advised that one of the respondent's employees (Louise) would mark up the timesheets with the hours of work and he would "check the next day". He produced (C7) a copy of a photograph taken on his phone of the timesheet showing that on 21 October there was a "start time" of 9am but no finish time entered. He was not able to say when it was that this picture was taken. He thought it might have been taken on 30 23 October 2017 but was not sure. He had made up his hours of work table (R7)

from his own recollection of hours that day but his memory was vague on the finish time.

14. The position of the respondent was that there had been a timesheet kept. The original (R32) showed an entry for 21 October 2017 as "9-00am-12.30". It was not clear when that entry had been made. The respondent questioned why the claimant would not have raised the issue of his finish time on 21 October 2017 after he had taken a picture of the timesheet when it was clear that time was not entered. He later indicated that the timesheet may have been completed when information was sent to his Accountants for a payslip to be created. He indicated that the 12.30 finish time would be apparent from the CCTV cameras showing drivers clocking out. He indicated that on previous Saturdays (7 October and 14 October 2017) the finish time was 1.15 and 12 noon respectively which would support the view that the finish time was 12.30 on 21 October 2017. The respondent also advised that the finish time on a Saturday would normally be between 12.30/1pm.
15. The claimant advised that he had made enquiries with HMRC and they were unable to confirm that tax and National Insurance had been paid over by the respondent in respect of any pay due to him. The respondent advised that matters regarding payroll were left with his Accountants and tax and National Insurance was paid every month and he found it "hard to believe" that HMRC would say that no tax or National Insurance had been paid.
16. The claimant wrote to the respondent on 2nd November 2017 seeking payment for the work done between 2nd and 31st October 2017. He sought the full payment of £1355.20 indicating in the letter that he did not believe the business had been making payment of National Insurance. He stated that he did not expect any other amount to be transferred. No reply was made to that letter.
17. The claimant advised that the claim for £500 related to "preparation of letters; attendance at the Preliminary Hearing when he required to take a day off his

work” as he “lost a day’s pay for that” as well as “interest for money not being paid to him” and “hurt feelings”.

Submissions

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18. The claimant advised that this was a “simple case” and was content to leave matters on the basis of the evidence heard. He did not believe that the respondent had acted in a professional way.

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19. For the respondent it was submitted that the evidence to show the finish time on 21 October 2017 was more reliable. Reference had been made to CCTV being checked. It was not clear when the information had been entered on the timesheet but it was likely to have been by the time the final payslips had been calculated for the claimant. The final payslip (excluding the holiday pay amount) had been calculated on 17 November 2017. The claimant had nothing other than a vague recollection of the finish time. The respondent’s position was that 12.30 finish on a Saturday was typical.

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20. So far as tax and National Insurance was concerned that was a matter for the respondent’s Accountant to calculate and for them to pay over. There was no reason to dispute that was the correct deduction.

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21. In relation to the compensation amount for £500 there was no proper statutory basis for that claim and no detail was given.

22. Accordingly the amount which should be awarded was the net amount of £1180.79.

Conclusions

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23. Given that the contract claim for the employer was not being pursued then so far as pay was concerned the calculation of the gross amount due related to whether or not the claimant had finished at 14.15 hours on 21 October 2017 or 12.30

hours. The evidence was not satisfactory on this. It was not clear when it was that the finish time of 12.30 had been entered onto the timesheet which was produced.

5 24. The picture taken by the claimant of his time record (C7) showed time being entered up to 29 October 2017. The figures and markings on that timesheet matched the original version (bar the entry for 21 October 2017) which was produced at the Hearing (R32). He could not have taken the picture of the timesheet then before 29 October 2017. It may have been taken 30/31 October
10 2017 because he did not return to work thereafter.

25. Accordingly the finish time was not entered on 21 October 2017 and must have been put in at a later date than 29 October 2017. The claimant indicated that he did not have a clear recollection of what happened that day and how it was he
15 thought that he had finished at 14.15 hours. The respondent indicated that there may have been a check taken of the CCTV camera. I did not regard that evidence as very reliable as his position was that he "would have done that" in this instance but made no claim he could recall checking. It was more reliable to think that the typical finish time for a Saturday was 12.30/1pm. The onus of
20 demonstrating the finish time would be with the claimant and given his frank admission that he had no clear recollection of events on that day I could only conclude that the finish time was more likely to be 12.30 hours rather than 14.15 hours on 21 October 2017.

25 26. So far as tax and National Insurance was concerned these are normal deductions. Normally the tax and National Insurance would be paid over when the payslips are made up. I was advised that the payments of those deductions were left in the hands of the Accountants. If the relevant amounts have not been accounted for to HMRC then it is essentially a matter between HMRC and the
30 respondent who would be liable for the amounts due. The award that I make for pay must be the net pay due after deduction of tax and National Insurance and so the amount of pay awarded is the net amount of £1180.79.

27. That would leave to be decided the issue of any compensation amount which the claimant put at £500. In relation to this claim no award can be made. In relation to the provisions which relate to deduction of wages under section 23 of the Employment Rights Act 1996 there is a provision (section 24 of the 1996 Act) which would enable the claimant to recover financial loss attributable to the non-payment. However that would not include compensation for “hurt feelings” or any anger suffered by him or his family. Neither would it relate to “preparation of letters”. There was no evidence of direct financial loss suffered as a consequence of the non-payment.
28. The claimant advised that he had required to take a day off to attend the Preliminary Hearing. However any claims for costs or expenses in relation to the Tribunal procedure would require to be dealt with as part of the regime regarding recovery of costs and expenses within the Tribunal Rules. Given that the claimant was the one who sought that the employer contract claim be “struck out” and given that he was unsuccessful at that Preliminary Hearing I do not consider there is any basis for the claimant to recover any loss of pay in attending that Hearing.
29. It is possible to make provision for interest to be paid on the amount awarded in the event of non-payment by the respondent and provision is made in that respect in terms of Article 2 of the Employment Tribunals (Interest) Order (Amendment) Order 2013 (the 2013 Amendment Order) which came into force on 29 July 2013. That Order amended the Employment Tribunals (Interest) Order 1990. In terms of that order interest cannot be ordered from the date that payment became due (which is what the claimant sought) but only when the Tribunal decide on the claim. In this case the rate of interest that should apply is 8% per annum ; the “decision day” is the date recorded as the date this document was promulgated to parties ie the date shown as “copied to parties”; and the “calculation day” is the date immediately following. This means that interest at 8% per annum starts to accrue on the sum awarded from the day after the date specified as the date the decision was promulgated (copied) to parties.

30. However while interest accrues from that date Article 3(4) of the 1990 Order
(which was inserted by the 2013 Amendment Order) provides that the interest
accrued is not payable if payment of the full amount of the award is made within
14 days after the relevant decision day i.e. within the time period set out in Rule
5 66 of the Employment Tribunals (Constitution and Rules of Procedure)
Regulations 2013. So if payment of the amount awarded is paid by the
respondent to the claimant within that time period no interest amount is payable.
Interest would only become payable if the sum due is not paid within 14 days.

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Employment Judge: Young
Judgment Date: 17 July 2018
15 Entered into the Register: 24 July 2018
And Copied to Parties