



EMPLOYMENT TRIBUNALS

Claimant: Mr Barnaby Galiffe

Respondent: Urban Sports Fitness Limited

Heard at: Birmingham Employment Tribunal (remote) On: 20.12.2022

Before: Judge L Mensah remotely

Representation

Claimants: In attendance

Respondent: Ms R Hodgkin (Counsel) and Mr Noel Smith (Owner)

FINAL JUDGMENT

1. The Tribunal orders;
 - (i) The Claims for Unlawful deduction of wages are well founded, I order the Respondent to pay the Claimants £1621.30.
 - (ii) The claims for holiday pay for 2021 on termination are made out. I order the Respondent to pay £1396.15
 - (iii) The Respondent did not provide the Claimant with a Statement of Particulars. I order the Respondent to pay 4 weeks wages. £1318.68
 - (iv) The claims for holiday pay for 2020 and unpaid holiday taken are out of time.

Total £4336.13

Declaration

- (v) The Respondent failed to provide the Claimant with payslips from the start of his employment. I have already addressed the unlawful deductions above and no evidence is filed, and no claim is made out for any further deductions having been made.

Background

2. The Claimant brought claims against his former employer for unauthorised deductions from his wages, failure to pay holiday pay, failure to provide him with a contract of employment and a failure to provide pay slips which would have enabled the Claimant to identify the unauthorised deductions and missing holiday pay. The claim was presented to the Tribunal on the 10 April 2022.
3. The Claimant appeared in person and the Respondent was represented by Counsel at the hearing. I had a bundle before me but the Respondent claims they had not been able to access the electronic version and so it was not agreed. However, The Claimant pointed out the bundle was identical to that before the previous Judge when the matter was case managed but with the addition on the case management order. Counsel did not suggest otherwise.
4. The Claimant had prepared a first supplemental witness statement and been given permission to rely upon it. In a second supplemental statement he sought to address further issues. As a litigant in person, he explained he wanted to have the full details of his evidence in writing after hearing what the Respondent had to say in the case management discussion. He confirmed he had served it on the respondent on the 02.10.2022. I note Counsel did not suggest this was not accurate and I had no explanation for the lack of anything further from the Respondent at the time it had been served.
5. I agreed to allow some flexibility in the proceedings and allowed Counsel for the Respondent the opportunity to ask her client supplemental questions if she felt anything material arose from the supplemental statement and reserved my position regarding the parties' respective positions in conduct of these proceedings. Nothing significant was brought to my attention and neither party suggest any prejudice nor raised any objections to this approach.
6. As we ran out of time for submission and judgment at the hearing, I gave each of the parties time to file written submissions and then prepared this judgment.

The Law

Unauthorised deductions

7. The Claimant bring claims under Section 23 of the ERA for Unauthorised deduction from wages. The starting point is Section 13 of the Employment Rights Act 1996 (ERA) which states,
 1. The right not to suffer an unauthorised deduction is contained in section 13(1) of the Employment Rights Act:

“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.”
8. The time limit is 3 months beginning with the date of payment of the wages from which the deduction was made (S.23(2)(a) ERA) with an extension for early conciliation unless it was not reasonably practicable to present the claim in time and it was presented within such further period as the Tribunal considers reasonable. In the alternative, was there a series of deductions and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one? The same test also applies to extend time in this alternative basis.
9. Section 230(3) ERA gives the definition of “worker”:

“In this Act “worker” (except in the phrases “shop worker” and “betting worker”) means an individual who has entered into or works under (or, where the employment has ceased, worked under)—

 - (a) a contract of employment, or
 - (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual; and any reference to a worker’s contract shall be construed accordingly.”
10. In most cases where a claimant has done work personally under a contract there will be no issue about his or her standing to make a claim. “Wages” are defined in section 27 ERA. Section 27(1) provides that “wages” means “any sums payable to the worker in connection with his employment” and then sets out a non-exhaustive list of what is included. Section 27(2) sets out what is excluded.

Holiday pay

11. Did the respondent fail to pay the claimant for annual leave the claimant had accrued but not taken when their employment ended? In the alternative,
- 1.1 What was the claimant's leave year?
 - 1.2 How much of the leave year had passed when the claimant's employment ended?
 - 1.3 How much leave had accrued for the year by that date?
 - 1.4 How much paid leave had the claimant taken in the year?
 - 1.5 Were any days carried over from previous holiday years?
 - 1.6 How many days remain unpaid?
 - 1.7 What is the relevant daily rate of pay?

Failure to provide Contract of Employment

12. When these proceedings were begun, was the respondent in breach of its duty to give the claimant a written statement of employment particulars or of a change to those particulars?
13. If the claim succeeds, are there exceptional circumstances that would make it unjust or inequitable to make the minimum award of two weeks' pay under section 38 of the Employment Act 2002? If not, the Tribunal must award two weeks' pay and may award four weeks' pay.
14. Would it be just and equitable to award four weeks' pay?

Failure to provide pay slips.

15. From 6 April 2019, the Employment Rights Act 1996 (Itemised Pay statement) (Amendment) Order 2018, requires employers to provide itemised payslips to all workers on their payroll, not just employees. Where pay varies depending on the hours worked, it is also necessary for the payslips to detail the hours and rates of pay. If the Employer fails to provide payslips the Tribunal can make a declaration detailing the failure, which is then published and has a discretion to award to the repayment of any deductions (whether authorised or not) up to 13 weeks prior to the claim.

Findings of fact

16. I find the Claimant commenced employment on the 30 September 2018 and his employment ended on the 23 December 2021. Mr Noel Smith appears to have had very poor record keeping and could not tell me when the Claimant started. The Claimant could not give an accurate date but told me it was in September 2018. Absent documentary evidence and given I find the fault lay with the Respondent who should have clear records of the start date for their staff. This is the most basic of record keeping, I have taken the last day in September as the best start date from the evidence. In terms of the last working day, I prefer the evidence of the Claimant throughout my findings and

for the reasons I set out below and so I accept his last shift was on the 23 December 2021 and he was paid at the end of that month.

17. The Claimant commenced employed with the Respondent at Mr Smith's gym after he had completed his university degree, Both the Claimant and Mr Smith described their relationship as not only employer and employee but as friends. This was the Claimant's first employment and I accept he did some casual work during the summer vacation before commencing a full-time role. The Claimant told me that as they were also friends, he did not question the lack of any documentation regarding his employment. He says he was naïve and did not realise he should have been given a written contract and monthly pay slips. He says he trusted Mr Smith to have paid him the correct wages after tax and national insurance. It is fair to say Mr Smith accepts he did not provide a statement of particulars and he accepts the friendship, but he argues he did provide pay slips to the Claimant and all other staff. The Claimant says he received pay each month into his account and assumed it was correct. The lack of a contract of employment is only the start of the poor record keeping in this case.
18. The Claimant says he worked Tuesdays to Saturdays and had every other Saturday off. He started his hours as 10am to 6pm but had some shifts of 9.30am to 5.30am or an odd day worked later, a shift from 2.00pm to 10pm. He explained he worked 12pm to 8pm every other Saturday. His average hours worked were 39.4 hours. As the relationship broke down the Claimant said he started to question the pay he was receiving. However, he didn't realise the difference because they had gone through lockdown, the gym was just reopened and shut in November, so he didn't know how to calculate his pay. Had the Claimant had some previous employment experience I would have found this evidence difficult to follow in a normal working year, but I accept that given 2020 was such an extraordinary time for employers and staff alike it is credible he wasn't able to appreciate the difference in pay between the hours he had worked and the pay he had received. In terms of Mr Smith's evidence, I found it highly unlikely and damaging to his overall credibility that when he was asked to explain the Claimant's hours, he was evasive and suggested they changed with no clear account of when or why. He suggested the staff would swop hours but has not adduced any financial evidence to show his overall staff payments demonstrated the overall hours were met by other staff.
19. It appears the parties had no apparent problems and in 2019 it was agreed between them that they would take a snowboarding holiday together in early 2020. I have seen the email and messages about this at B28-29 of the bundle. The Claimant told me that Mr Smith told him he would use his holiday entitlement to pay for the Claimant's part of the trip and so the Claimant accepted he had no holidays as they he would use his holiday pay for his part of the trip and would use his holidays for the trip. However, the trip had to be postponed due to Covid. The Claimant says he accepted this meant the whole

thing was going to be delayed but he says the trip did not take place and he was not paid his holiday pay. I get the impression he now doubts a holiday was ever booked. No evidence has been filed showing a holiday was in fact booked and delayed through Covid. Mr Smith seems to agree they were going to go on holiday but in his evidence to me he says the Claimant was paid his holiday.

20. In cross-examination, it was put to the Claimant that if he had realised, he wasn't getting paid for holidays and not taking holidays he did not raise this with Mr Smith, and this was effectively not credible. The Claimant told me he did have some concerns, but he had trusted Mr Smith. He told me the relationship with Mr Smith broke down in the December of 2020. At this stage he had suspected he had not been paid for his holidays and he had not taken his full holidays. He told me he had taken a few days only in the year 2020 and of course he had not taken any holidays in 2019 because that was supposed to be for the snowboarding holiday. He says he then asked Mr Smith for his pay slips as he wanted to check what had been paid and recorded.
21. The Claimant says he realised he had not been paid for all the hours he was contracted to work. He has gone back through the documents and his records of the hours he worked and calculated the pay he should have received. He now says he realises the friendship was not genuine and he was being taken advantage of by Mr Smith. Mr Smith argues the Claimant's records are not accurate and the Claimant was paid for the hours he worked for the Respondent throughout and adduces some records to support this. I will return to those records below.
22. Mr Smith seeks to argue the relationship with the Claimant was so casual that he did not work fixed contracted hours and not the hours he claims but was able to use the gym for his work as a personal trainer and to train his own clients and this shows the Claimant's time in the gym was not always when he was working for the Respondent. He also has suggested he may have swapped hours with other staff as addressed above and other reason I have addressed below. Effectively he has come up with multiple reasons he says why the pay difference exist between the Claimant's rotas and his rota and the payments made. All his evidence in couched in general terms with no clear paper trail.
23. Mr Smith says the Claimant was allowed to use the gym as a personal trainer for a fee of £100 for each month this occurred. The Claimant agrees but points out this did not start until February 2022 and has filed a screenshot of a conversation with Mr Smith about this payment. No evidence was filed by Mr Smith showing any payments had been made before that date. I prefer the evidence of the Claimant which is at least supported by some documentary evidence.

24. Mr Smith says the Claimant was also allowed to use the gym to train his own clients on an ad hoc basis at £5.00 per client. The Claimant agreed but told me this was only outside his contracted hours with the Respondent. The Claimant gave evidence explaining that he wouldn't have been available to undertake work for the gym if he was undertaking his own work and the fact his documentary evidence shows him discussing work for the Respondent is evidence which support his case as to the hours he worked. The Claimant also told me the ability to train clients at the premises on an ad hoc basis for £5.00 per client was not a special deal with the Claimant because of their friendship but was available to all staff in the gym. The lack of any records from the Respondent regarding these payments, which I assume would be subject to tax, is concerning and the prejudice lies with the employer who should be keeping proper records of income.
25. Mr Smith also tried to suggest the Claimant, the other staff, alongside Mr Smith's family worked a total of 100 hours a week as volunteers during 2020. This was another explanation for the differences. The Claimant says he did do some voluntary work such as painting and decorating during the lockdown periods not none outside when the gym was a open. It makes absolutely no sense that the whole team would agree and be able to work full time at a gym that was open as usual, as volunteers claiming furlough. If the staff were furloughed, I find it highly damaging to Mr Smith that he had the gym open and the staff effectively working their shifts! I find this damages Mr Smith's evidence yet again. When the clear inconsistency of this approach was put to Mr Smith, he changed his account and suggested the staff an Claimant were working "flexi-furlough" but again couldn't explain this and nothing in the pay slips he has filed reflect any such position.
26. Mr Smith also suggested the Claimant would purchase items from the gym and this would also account for differences in pay as these purchases were deducted from wages. The Claimant denied this and explained all staff would sometimes make purchases, but the Claimant would simply put money in the till for such purchases. The Claimant asked Counsel if it was being suggested the reason for the difference between the parties where the Claimant says he worked 160 hours and the Respondent say he worked 100 hours I because he purchased supplements. Counsel said he would have to check that and did not return to that issue or suggest this was being pursued. It is clearly incredible 60 hours of work is explained by supplement purchases. Not a shred of documentary evidence has been filed to show such purchases, no written agreement exists to allow the Respondent to make deductions and I agree with the Claimant, this does not explain the huge differences between the parties on the hours and it undermines the Respondent's position to make such a suggestion.
27. Mr Smith gave evidence that pay slips were prepared every month based upon the rota he finalised. When Counsel cross-examined the Claimant, it was put to him that the pay slips were generally handed out at the beginning

of the next month. The Claimant denied this and said he did not receive any pay slips during his employment. I have taken into account the lack of any proper documentary evidence in this case including the accepted fact no contract of employment was provided to the Claimant. Mr Smith told me he would personally hand out pay slips each month or put them in an envelope behind the reception. I do not believe Mr Smith. He has not called anyone to support his account of providing staff with pay slips during this time. If he had been putting the pay slips in an envelope and the Claimant was not collecting them that would have been apparent pretty quickly and yet he does not say he brought the mounting pay slips to the Claimant's attention. If the Claimant had collected his pay slips, I am satisfied he would have raised the issue of holiday pay earlier. I am further supported in this view when Mr Smith was unable to explain how his business dealt with furloughing of staff and in the April 2020, he claimed £2000 for the Claimant through furlough but paid him £1150 as 80%. He told me he effectively didn't have any explanation as dealt with my accountants. I see I have no evidence whatsoever from the accountants regarding pay roll.

28. There is a dispute between the Claimant and Mr Smith regarding rotas. Mr Smith says he would go through the "post work rota" and prepare pay based upon this document. He explained the rota that would have been prepared might have changed during the month and this is why the post work rota was the accurate rota. He has filed documents he says are post work rotas and relied upon those documents as the reliable account of the work done by staff. The Claimant argues there was no such thing as a post work rota, and this is a belated invention by Mr Smith to try and justify the payments he made. The Claimant told me one of his responsibilities in the gym was to prepare the staff work rotas/ They were prepared the month before. It was put to the Claimant that Mr Smith had a procedure whereby he signed off the rotas, but the Claimant told me he had never heard of this before it was suggested in the witness statement for the hearing. Mr Smith suggests the rota were pinned up on the reception and subject to change. However, the Claimant says the main rota was on the computer at the reception and if there had been any amendment, they were put into the computer rota and that is why that rota is the accurate rota. I had noted there were some discrepancies in the rota Mr Smith had filed. I asked him how it was there is a message in the bundle showing he was on holiday when his rota has him working. He told me this might be a mistake. I asked him who would have worked this shift then because he had already given evidence pay roll was solely based upon these rotas. Mr Smith told me he did not know but if there was a mistake, he would have raise it with staff and reconciled it. There wasn't a shred of evidence he did this. The Claimant asked him why on his rota some of the shifts were not manned when he had told me through his Barrister that all shifts were manned. He told me it could have been a family member. I asked him if he was saying he sorted out discrepancies in the rota at the time but failed to alter his rotas. He evaded the question and told me he paid everyone.

29. The Claimant took Mr Smith through multiple discrepancies in the rotas he had filed. Overall, I found the Claimant's explanation truthful and found Mr Smith a completely unreliable witness. I found his rotas unreliable evidence and I am further supported in this by the fact Mr Smith could not adequately explain why his rotas did not show a single member of staff taking any holiday. When I sought to clarify how holiday would be allocated if it is not shown on the rota he once again fell back on his accountant. In the end Mr Smith told me the staff didn't take any holidays in 2020 and were put on furlough in 2020 and concentrated on making money! His response of a family friendly business in my overall assessment of all the evidence was not the truth.
30. Some evidence was given regarding a discussion about the Claimant becoming a manager and there being a potential pay rise. I felt there wasn't enough evidence regarding this to reflect it in any award. I accept the Claimant took on additional duties as "assistant manager" as shown in the post he provided at B61, but he did not pay enough attention to agreeing new pay terms with Mr Smith, and so I find this was not sufficiently evidence to prove what his new pay would be.
31. I accept the Claimant did not take any holiday for 2020 and agree to use the payment in lieu, as a snowboarding holiday with Mr Smith. The fact the holiday did not take place is not a matter I can address in this jurisdiction. It was an agreed way of using the untaken holiday and so the loss no longer represents untaken leave but a dispute over the payment of a holiday. I do not have jurisdiction to deal with this and so I make no award. Further, it is out of time in any event and the Claimant knew about it throughout 2020! He has not shown it was not reasonably practicable for him to make a claim within three months of the end of 2019. Mr Smith admitted none of his staff took holidays in 2020. If the Claimant had filed his claim within three months of the end of 2020, I would have considered an award for this period. However, again his claim was not lodged until the 10.04.2022 and is significantly out of time as he is fir the claimed taken but unpaid days leave. He didn't need to see his pay slips to know if he had taken holidays or not. It has not shown it was not reasonably practicable for him to make such claims in time.
32. Further details of the figures are in the previous case management order and the Claimant's schedules. I do not repeat them here as they are before the parties. I accept on termination of his employment he had accrued 22 days and been paid for 6.3 days on termination. I find he is entitled to 15.7 days untaken and accrued holiday at £8.91. The Claimant was entitled to £1846.15 and was paid £450.

Total: £1396.15

33. Turning to the unlawful deduction of wages claims these go back to July 2020. Effectively the Claimant says he has now seen the pay slips and been able to

work out the underpayments and discovered they go back to this time. I accept he would not have been able to reasonably calculate his pay based on the lack of documentary evidence given to him by the Respondent. He had no contract of employment and was not given any pay slips. This was his first job and he relied upon his employer to make the correct payments and they failed. I found Mr Smith shifty and evasive and accept he would have been the same with the staff making it impossible for the staff to discover what he had been doing. I therefore accept it was not reasonably practicable for the Claimant to have made a claim for unlawful deduction of wages before the 10.04.2022. However, in any event I find the Respondent undertook a course of conduct sufficiently consistently throughout the Claimant's employment where underpayments were being made in a secretive way until termination of his employment on the 23.12.2021. I therefore award the entire claim for unlawful deduction of wages as follows:

- July 2020 £26.08
- August 2020 £181.56
- September 2020 £255.88
- April 2021 £173.21
- May 2021 £133.65
- June 2021 £271.76
- July 2021 £213.84
- August 2021 £31.19
- September 2021 £53.46
- December 2021 £280.67
- Total £1621.30

34. I find the Respondent's behaviour in failing to provide a contract of employment formed part of his attempt to keep staff in the dark about their rights and so award the full four weeks' pay at same minimum wage,

Total £1318.68

35. I find no payslips were provided but no further unlawful deductions have been shown so it attracts no further award.

Employment Judge **Mensah**

Date 20.04.2023

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