Case No: 2406787/2022

EMPLOYMENT TRIBUNALS

Claimant: Mr J Mundy

Respondent: A2B Financial Limited

Heard at: Manchester ET (by CVP) **On:** 29th June 2023

Before: Employment Judge Rhodes

Representation

Claimant: Ms D Geoghegan (claimant's mother)

Respondent: Mr A Bhatti (director)

JUDGMENT

1. The late payment of the claimant's wages for the period 1st to 14th June 2022 amounted to an unauthorised deduction from wages contrary to section 13 Employment Rights Act 1996. No compensation is awarded given that those wages were paid in full, albeit late.

2. The claimant's claim for payment in lieu of holiday pay is well founded and succeeds. The respondent must pay the claimant £88.62 (gross).

3. The claimant's complaint of wrongful dismissal is well founded and succeeds.

4. The respondent failed to provide the claimant with a written statement of employment particulars on or before the first day of his employment contrary to sections (1)(1) and 1(2) Employment Rights Act 1996 but no compensation is awarded under s38 Employment Act 2002 because the respondent was not in breach of s(1) Employment Rights Act 1996 when these proceedings began.

5. The claimant's complaint of unfair dismissal is dismissed upon withdrawal.

6. The respondent's counter-claim is dismissed upon withdrawal.

REASONS

Introduction and issues

1. At the outset of the hearing it was clarified that the claimant was not pursuing an unfair dismissal complaint because of his lack of two years' service and that complaint was withdrawn.

2. Although the respondent had ticked the box on the ET3 to indicate that it was pursuing a counter-claim, the complaint did not appear to satisfy the criteria set out in Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 in that it related exclusively to matters which had arisen since the end of the claimant's employment. The counter-claim was therefore also withdrawn.

3. I heard evidence from the claimant, his mother (Ms Geoghegan) and Mr Bhatti, on behalf of the respondent.

4. The start of the hearing was delayed because the parties had not prepared an agreed bundle so I sent them away to prepare and submit one. References to pay numbers below are references to pages in the bundle.

The law

5. Section 1(1) Employment Rights Act 1996 ("ERA") requires an employer to provide each of its workers with a written statement of employment particulars containing certain information which is detailed at sections 1(3) and 1(4) ERA. The statement must be provided no later than the start of the employment (section 1(2)(b) ERA).

6. Section 13 ERA makes it unlawful for an employer to make a deduction from a worker's wages unless:

    a. The deduction is required or authorised by statute or a provision in the worker's contract; or

    b. The worker has given their prior written consent to the deduction.

7. A failure to pay all or any part of the wages on time amounts to an unlawful deduction (see, for example, ***Elizabeth Claire Care Management Ltd v Francis [2005] IRLR 858 (EAT)***).

8. Section 25(3) ERA provides that a tribunal shall not make an order for payment "*in so far as it appears to the tribunal that [the employer] has already paid or repaid any such amount to the worker*." However, the tribunal may order the employer to pay the worker "*such amount as the tribunal considers appropriate in the circumstances to compensate the worker for any financial loss*" which is attributable to the deduction (section 24(2) ERA).

9. Holiday pay is included within the definition of 'wages' (section 27(1)(a)) ERA).

10. Where a tribunal finds in favour of a worker in a claim to which Schedule 5 Employment Act 2002 ("EA") applies, it must make an additional award to the claimant of two weeks' pay (and may increase that to four weeks' pay) if, when the proceedings began, the employer was in breach of s1(1) ERA. Schedule 5 EA applies to a complaint of unauthorised deductions from wages.

11. Article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 ("the Order") permits an employee to pursue a breach of contract claim against his employer in an employment tribunal in certain circumstances. One of those circumstances is that the claim must arise or be outstanding on the termination of the claimant's employment (Article 3(c)).

12. A complaint of wrongful dismissal is a breach of contract claim which arises on the termination of employment and is therefore within the scope of the Order. A wrongful dismissal arises where an employee is dismissed without their full entitlement to notice. An employer is entitled to dismiss without notice where an employee commits a repudiatory breach of contract.

13. In the context of an employment relationship, an employee commits a repudiatory breach of contract where he behaves in a way which amounts to "*a deliberate flouting of the essential contractual conditions*" (***Laws v London Chronicle (Indicator Newspapers Ltd) [1959] 2 All ER 285***).

14. In determining whether there has been a repudiatory breach, a tribunal must consider whether the employee's conduct "*so undermine[s] the trust and confidence which is inherent in the particular contract of employment that the [employer] should no longer be required to retain the [employee] in his employment*" (***Neary v Dean of Westminster [1999] IRLR 288***).

15. Further, "*dishonesty and other deliberate actions which poison the relationship will obviously fall into the gross misconduct category*" (***Adesokan v Sainsbury's Supermarkets Ltd [2017] EWCA Civ 22***).

16. In ***Sandwell & West Birmingham Hospitals NHS Trust v Westwood UKEAT 0032/09***, the EAT summarised the case law on what amounts to gross misconduct and found that it involves either deliberate wrongdoing or gross negligence. Minor or inadvertent breaches of disciplinary rules will not generally amount to gross misconduct: there must be deliberate and serious wrongdoing (***Robert Bates Wrekin Landscapes Ltd v Knight UKEAT/0164/13***).

17. A wrongful dismissal complaint is very different from an unfair dismissal complaint. The reasonableness, or otherwise, of the employer's actions is irrelevant. Further, it is not enough for the employer to prove that it had a reasonable belief that the employee had committed gross misconduct: the tribunal must be satisfied, on the balance of probabilities, there was an act of gross misconduct.

18. An employer cannot bring a free-standing contract claim against an employee but it can make a counter-claim in response to an employee's contract claim (Article 4(d) of the Order). As with an employee's contract claim, a counter-claim must arise or be outstanding on termination of employment.

Findings

19. The respondent provides mortgage and other financial advice. The respondent employed the claimant from 28th February 2022 until he was summarily dismissed on 14th June 2022. The claimant's job titled was Sales Executive and the purpose of his role was to generate leads, working in the respondent's call centre.
20. The claimant was initially taken on as an apprentice. For reasons which were not entirely clear from the evidence – and are in any event not relevant to the issues to be determined – the claimant withdrew (or was removed) from the apprenticeship programme at some point before the end of his employment.

21. Mr Bhatti accepted that the respondent did not provide the claimant with a written statement of employment particulars before his employment began. Mr Bhatti said

that he was under the impression that that was something for which the apprenticeship training provider would be responsible. The respondent did, however, provide the claimant with a written contract of employment on 28th March 2022 (page 2).

22. There was a dispute about whether the respondent had provided the claimant with itemised payslips during his employment. These were emailed to him by the respondent's accountant which administered the respondent's payroll (pages 7 to 17). The claimant's evidence was that the email address was incorrect in that it included an additional character. However, the email address used was exactly the same as that provided by the claimant in his new starter form (page 18). The claimant accepted that he had completed that form and that it was in his handwriting but asserted that someone else must have had added the additional character to the email address in the form. There was no plausible explanation as to who might have done that or why and I find that the claimant had put that email address in the form and that, if it was wrong, it was his error.

23. The claimant's holiday entitlement was provided for at clause 3 of his contract (pages 4 and 5). He was entitled to 28 days' holiday per year, inclusive of bank holidays and other business closure days. In the first year of his employment, he accrued holidays at a rate of 1/12th of his yearly entitlement. He was employed for 3.5 months. As a result, he accrued (28/12 x 3.5) = 8.5 days' holiday (rounded up) during his employment.

24. He took and was paid for five days' (35 hours') holiday in April 2022 (page 8) and two days' (14 hours') holiday in May (page 9), a total of seven days (49 hours). His holiday pay was calculated on the basis of his usual hourly rate of £8.44. Upon termination of his employment, therefore, he had 1.5 days (10.5 hours) of accrued but untaken holiday for which he is entitled to receive payment in lieu. **The respondent must therefore pay him (10.5 x £8.44) = £88.62 (gross).**

25. On Monday 13th June 2022, the claimant did not attend work. Mr Bhatti's case is that the claimant was absent without leave ('AWOL'). The claimant's evidence about the reason for his absence was vague and kept changing. He variously said that he was unhappy that the respondent had changed his hours (something which Mr Bhatti contested), that he was "busy", and that he could not recall but may have been sick. He did, however, say that he had informed the respondent (but not Bhatti). Mr Bhatti's evidence was that the claimant had notified the wrong person and that, in his view, the claimant was AWOL.

26. Whatever the reason for the claimant's absence, Mr Bhatti had not authorised it and did not know why he was not at work. At 2.48pm, Mr Bhatti texted the claimant to say "are you not in today, bud?" (page 23). The claimant did not reply.

27. The claimant returned to work the following day. At around 2pm, Mr Bhatti saw the claimant in the car park when he ought to have been working. I am prepared to accept the claimant's evidence that he was on a break, given that he returned to the office shortly afterwards. However, the claimant left work around 4pm (two hours before the end of his shift) and did not return.

28. In evidence, the claimant's explanation for leaving early was that he felt that his current working conditions were intolerable: he was under the impression (rightly or wrongly) that the respondent had changed or was about to change his hours. He also thought that the behaviour of some of his colleagues, including his direct line manager, was unacceptable. There was a drinking culture in the office, in working hours, and his manager was drunk that day. Mr Bhatti accepted that drunkenness was a problem in the office and that lent weight to the claimant's evidence.

29. At 5.17pm the same day (Tuesday 14th June 2022), Mr Bhatti texted the claimant to ask him "where did you go?" (age 23). Again, the claimant did not reply.

30. Later that evening (7.37pm), Mr Bhatti texted the claimant again:

    "*Brother I've texted you twice in 2 days & not had a reply. You didn't come in yesterday & didn't ring me or text me, & you walked out today a few hours into your shift. I don't know what else I can do. Let's just call it a day & tank [sic] you for your time. I'll send you your wage for the days you've done. All the best*."

31. Mr Bhatti accepted that that amounted to a dismissal without notice. The claimant's notice entitlement under his contract was two weeks (clause 1.5b at page 3). Mr Bhatti's case is that the respondent was entitled to summarily dismiss the claimant because of gross misconduct, namely a combination of his absence on 13th June and walking off shift on 14th June.

32. The respondent ought to have paid the claimant's wages for June 2022 before the end of that month but failed to do so until the following month. The payment was therefore late. There was also no payment in lieu of accrued but untaken holidays.

33. From here on, relations between the parties soured. A number of the claimant's grievances with the respondent arose in this period, for example the terms of reference which the respondent provided to a prospective employer and with which the claimant was unhappy. However, with one exception which is dealt with below, these matters were not within the tribunal's jurisdiction and not relevant to the issues to be determined.

34. The late payment of the claimant's June 2022 wages appears to have caused (or at least contributed to) a miscalculation and underpayment of the claimant's universal credit. Following reconsideration after the claimant had received his June 2022 wages, the Department for Work and Pensions ("DWP") recalculated the claimant's universal credit entitlement and paid him arrears of £10.07 on 11th October 2022 (page 69).

Conclusions

35. The respondent admitted to late payment of the claimant's wages for June 2022. The failure to pay those wages on time was an unauthorised deduction. However, when they were belatedly paid, they were paid in full and the tribunal cannot therefore make any order for payment in respect of the claimant's June 2022 wages, because of section 23(5) ERA.

36. I have already found that the respondent must pay £88.62 (gross) in lieu of accrued but untaken holidays.

37. The claimant invited me to order compensation in relation to his dealings with DWP in respect of his universal credit. The only basis on which such a claim could be pursued, in the circumstances of this case, is under section 24(2) ERA, namely an award of "*such amount as the tribunal considers appropriate in the circumstances to compensate the worker for any financial loss*" which is attributable to the deduction.

38. Whilst it is difficult to follow precisely how the underpayment came about, it appears from the DWP correspondence at page 52 that pay information received from the respondent led to the initial miscalculation. I am therefore prepared to accept that late payment was at least a major contributory factor to that miscalculation.

39. However, the language of section 23(5) is clear in that compensation can allowed

be awarded in respect of financial loss attributable to an unauthorised deduction. No award can be made to compensate the claimant for the stress and anxiety associated with having to deal with this issue. Ultimately, the DWP rectified the underpayment and paid the arrears of £10.07 to him. As a result, the claimant has not suffered any financial loss and I therefore make no award under section 23(5).

40. Having found that the respondent (1) failed to provide the claimant with a section statement of particulars before the start of his employment and (2) made unauthorised deductions from wages (which is a claim to which Schedule 5 EA applies), I need to consider whether I must make an additional award pursuant to section 38 EA. An additional award must be made if, when the proceedings began, the employer was in breach of section 1(1) ERA. That section deals only with the provision of a statement of particulars. It is section 1(2) ERA that provides that the statement must be made before the employment starts. When the proceedings began, the respondent was no longer in breach of section 1(1) because of the provision of the written contract of employment on 28th March 2022. It was only in breach of section 1(2) which is not referred to in section 38 EA.

41. I take the view that the inclusion of the words "when the proceedings were begun" and the exclusion of reference to section 1(2) ERA in section 38 EA must be deliberate. An employer at any time can rectify the absence of a written statement by providing one. It cannot however go back in time and remedy a breach of section 1(2). I conclude from this that a section 38 award can only be made in cases where the employer has not provided a statement and that it is not intended to punish employers who provide one late. I therefore make no additional award under section 38 EA.

42. Turning to the wrongful dismissal complaint, I do not accept that the claimant's conduct on 13th and 14th June 2022 was so serious as to constitute gross misconduct. Although Mr Bhatti's genuine belief was that the claimant was AWOL on 13th June 2022, a finding of wrongful dismissal requires more than a genuine belief on the employer's part. I do not find that the claimant was AWOL. He may not have had a good reason for his absence but notified the respondent of his absence on the day. Whilst he may have notified the wrong member of the respondent's staff, this would amount to failure to comply with the respondent's policies and procedures rather than the more serious offence of AWOL.

43. Further, the respondent appears to have acquiesced in, or overlooked, his absence on 13th June 2022. Mr Bhatti did not say that he intended to take any action against the claimant for that absence. Had the claimant not walked off shift the following day, it seems that Mr Bhatti would not have been prompted to take any action at all.

44. The claimant's conduct on 14th June 2022, when he left shift early, was an act of misconduct but I do not consider it to have been so serious as to destroy trust and confidence in him that summary dismissal was justified.

45. The wrongful dismissal complaint therefore succeeds. There will need to be a remedies hearing to determine the amount of damages to which the claimant is entitled, unless the parties can agree the amount between themselves. The parties must write to the Tribunal within 28 days to notify the Tribunal:

    a. If a remedy hearing is required; and
    b. If so, any dates to avoid.

46. It will then be listed for a ½ day hearing by video.

Employment Judge Rhodes

Date 28th July 2023

JUDGMENT & REASONS SENT TO THE PARTIES ON

4 August 2023

FOR THE TRIBUNAL OFFICE

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990 ARTICLE 12

Case number: **2406787/2022**

Name of case: **Mr J Mundy** v **A2B Financial Ltd**

Interest is payable when an Employment Tribunal makes an award or determination requiring one party to proceedings to pay a sum of money to another party, apart from sums representing costs or expenses.

No interest is payable if the sum is paid in full within 14 days after the date the Tribunal sent the written record of the decision to the parties. The date the Tribunal sent the written record of the decision to the parties is called **the relevant decision day**.

Interest starts to accrue from the day immediately after the relevant decision day. That is called **the calculation day**.

The rate of interest payable is the rate specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as **the stipulated rate of interest**.

The Secretary of the Tribunal is required to give you notice of **the relevant decision day**, **the calculation day**, and **the stipulated rate of interest** in your case. They are as follows:

the relevant decision day in this case is: 4 August 2023

the calculation day in this case is: 5 August 2023

the stipulated rate of interest is: **8% per annum**.

For the Employment Tribunal Office