



EMPLOYMENT TRIBUNALS

Claimant: Mr J Nicholls

Respondent: Veltopia Ltd

Heard at: Bristol (remotely by CVP) **On:** 9 September 2022

Before: Employment Judge Leverton (sitting alone)

Representation

Claimant: Mrs T Farthing, friend

Respondent: Mr B Bland, Director

RESERVED JUDGMENT

1. The claim for notice pay is not well-founded and is dismissed.
2. The Tribunal grants a declaration that the Respondent has made unauthorised deductions from wages under Part II of the Employment Rights Act 1996 in respect of statutory holiday pay and wages.
3. The Tribunal grants a declaration that the Respondent has failed to provide written itemised pay statements contrary to section 8 of the Employment Rights Act 1996.
4. The Tribunal awards the Claimant £815 under section 38 of the Employment Act 2002 for the Respondent's failure to provide a written statement of employment particulars.

REASONS

Claims and background

1. By a claim form presented on 21 March 2022, the Claimant brought the following claims:

- a. damages for failure to pay notice under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 (SI 1994/1623) (the 'Extension of Jurisdiction Order')
 - b. holiday pay for statutory annual leave accrued but not taken on termination of employment under regulation 14 of the Working Time Regulations 1998 (SI 1998/1833) ('WTR')
 - c. unpaid wages under Part II of the Employment Rights Act 1996 ('ERA') (unauthorised deductions from wages)
 - d. failure to provide written itemised pay statements contrary to section 8(1) ERA
 - e. compensation for breach of the duty under section 1(1) ERA to provide a written statement of particulars of employment.
2. Mr Bland paid the Claimant £588 on the day before the hearing in satisfaction of the claims for wages and holiday pay. The Claimant confirmed at the hearing that he had received the payment and did not claim any further sums under those headings.

Evidence and procedure

3. The Claimant attended the hearing and was assisted by a friend, Mrs Tina Farthing. The Respondent was represented by its Director, Mr Ben Bland. Both the Claimant and Mr Bland gave oral evidence.
4. On 8 September 2022 Mr Bland had applied for a postponement of the hearing on the basis that he had been off sick all week with Covid. The postponement was refused by the Regional Employment Judge on the ground that the Claimant had not stated that he was unfit to attend a remote hearing and had not provided medical evidence. At the start of the hearing on 9 September, Mr Bland confirmed that he was feeling well enough to proceed.
5. In advance of the hearing, the Claimant had provided a witness statement and a 47-page bundle of documents, including a schedule of loss. I am grateful to him for his assistance. Mr Bland failed to comply with the case management order attached to the notice of hearing. He did not provide a witness statement but he sent various documents to the Tribunal by email on the day before the hearing, namely: five payslips, a P45, a print-out from his bank evidencing a payment of £588 made to the Claimant, and an unsigned copy of a contract of employment. He emailed a sixth payslip to the Tribunal during the hearing.
6. The Claimant raised the matter of Mr Bland's non-compliance with the case management order. Mr Bland apologised for this oversight. Given that he had provided some information by email on the day before the hearing and was available to give oral evidence, I decided not to strike out his response on the ground of his failure to comply.

Findings of fact

7. I find the following facts on the balance of probabilities, based on the evidence I heard and the documents before me.
8. The Claimant was employed from July or August 2020 as a manager in the Respondent's vape shop. He worked 45 hours per week for the national minimum wage (NMW). There was a dispute between the parties as to whether he had in fact been paid the NMW but that was not one of the issues I had to decide.
9. When the Claimant started work for the Respondent, he provided his personal details. He gave his mother's address as his correspondence address but he subsequently moved into a flat above the vape shop. The flat was owned by Mr Bland. Mr Bland says that the Claimant's contract and monthly payslips were posted to the Claimant's mother's address, but the Claimant says that neither he nor his mother ever received them.
10. The Claimant asked for his payslips shortly after he started working for the Respondent. He was sent one via WhatsApp but no further payslips were provided. In early 2022 the Claimant made further requests for his payslips, both verbally and by text or WhatsApp. Written requests from the Claimant dated 12, 18 and 19 January 2022 were included in the bundle of documents. The Claimant needed the payslips in connection with a dispute that arose at around that time concerning the rent payments for his flat. The Respondent told the Tribunal that the company's accountant posted payslips to the Claimant at his mother's address every month but there was no evidence from the accountant to support that. I am satisfied that no payslips were provided to the Claimant during his employment, except on one occasion following a request in 2020.
11. I am also satisfied that the Claimant was not sent a copy of his contract. Having regard to the Respondent's failure to provide payslips, I consider it more likely than not that a similarly relaxed attitude was taken to the requirement under section 1 ERA to provide a written statement of terms and conditions no later than the beginning of the Claimant's employment.
12. On 3 January 2022, Mr Bland told the Claimant that the vape shop was going to close and he would be made redundant. There was a dispute as to whether Mr Bland had first mentioned redundancy to the Claimant in December 2021 but it was not necessary for me to resolve that. Mr Bland mentioned to the Claimant the possibility of some cash in hand work and a position starting in a few months' time in another shop he owned. He told the Tribunal that this was an offer of suitable alternative work, and that the Claimant accepted the offer but then changed his mind and resigned. On the evidence before me, I am satisfied that there was a discussion about the possibility of alternative work and that the Claimant at one point expressed an interest in continuing to work for the Respondent at a different location. However, the discussion was too vague to amount to an agreement or a variation of the Claimant's contract. I find that the Claimant was dismissed for redundancy and did not resign.

13. The Claimant's last day at work was 15 January 2022. His tribunal claim included claims for £400 wages for his work in January and £188 in lieu of 2.8 days' outstanding holiday entitlement for his final leave year, which started on 1 April 2021. Mr Bland said that the Claimant had taken and been paid for his full leave entitlement, but he produced no holiday records or other documentary evidence to support that. I am satisfied that, at the time when he presented his tribunal claim, the Claimant was owed a payment in lieu of unused statutory leave under regulation 14 WTR.
14. Mr Bland said that he had sent a cheque for the outstanding wages to the Claimant's mother's home address with the Claimant's final payslip and P45. I accept the Claimant's evidence that he did not receive the cheque, payslip or P45. This is supported by messages he sent to Mr Bland in February and March 2022 asking when he was going to be paid his January wages, and by a WhatsApp message to the Claimant from his sister dated 13 July 2022 confirming that their mother had not received a cheque. It was not clear to me why Mr Bland would have sent a cheque when the Claimant's wages were usually paid by bank transfer, nor why the cheque should have been sent to the Claimant's mother's address when Mr Bland was aware that the Claimant was living above the shop. On the balance of probabilities, I am satisfied that no cheque was ever sent and that, at the date when he presented his tribunal claim, the Claimant was still owed his wages for January 2022.

Legal framework

Notice pay

15. Section 86 ERA provides: '*(1) The notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more (a) is not less than one week's notice if his period of continuous employment is less than two years.*'
16. The Extension of Jurisdiction Order allows employment tribunals to hear some contractual claims brought by employees, including claims for damages in respect of unpaid notice pay, provided '*the claim arises or is outstanding on the termination of the employee's employment*' – Article 3.

Unpaid wages

17. Section 13 ERA provides, in so far as material: '*(1) 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.*'

Itemised payslips

18. Section 8(1) ERA provides: '*A worker has the right to be given by his employer, at or before the time at which any payment of wages or salary is made to him, a written itemised pay statement.*' The statement must contain details of gross and net wages and any deductions – section 8(2).

19. Where a statement is not provided, the worker may make a reference to an employment tribunal under section 11 ERA. Section 12(3) ERA provides, in so far as material: *'Where on a reference under section 11 an employment tribunal finds (a) that an employer has failed to give a worker any pay statement in accordance with section 8... the tribunal shall make a declaration to that effect.'*
20. Section 12(4) provides: *'Where... the tribunal further finds that any unnotified deductions have been made from the pay of the worker during the period of thirteen weeks immediately preceding the date of the application for the reference (whether or not the deductions were made in breach of the contract of employment), the tribunal may order the employer to pay the worker a sum not exceeding the aggregate of the unnotified deductions so made.'*

Written statement of employment particulars

21. Section 38 of the Employment Act 2002 provides:

'(2) If in the case of proceedings to which this section applies (a) the employment tribunal finds in favour of the worker, but makes no award to him in respect of the claim to which the proceedings relate, and (b) when the proceedings were begun the employer was in breach of his duty to the worker under section 1(1)... of the Employment Rights Act 1996 [duty to provide written particulars]..., the tribunal must... make an award of the minimum amount to be paid by the employer to the worker and may, if it considers it just and equitable in all the circumstances, award the higher amount instead.'

(4) In subsections (2) and (3) (a) references to the minimum amount are to an amount equal to two weeks' pay, and (b) references to the higher amount are to an amount equal to four weeks' pay.'

Discussion and conclusions

Notice pay

22. The Claimant had been employed for less than two years. It follows that his statutory entitlement under section 86 ERA was one week's notice. He was not contractually entitled to a longer notice period (see clause 4.2 of the contract provided by Mr Bland). He was told by Mr Bland on 3 January 2022 that he was going to be made redundant, and his last day at work was 15 January. He was therefore given more than a week's notice of the termination of his employment. Mr Bland was entitled to require the Claimant to work out his notice; the Claimant had no entitlement to leave immediately and receive a payment in lieu. The Claimant accepts that he has now been paid his outstanding wages for January 2022, which include payment for work done during his notice period. He is not entitled to any additional notice payment and his claim for damages in respect of his notice period is therefore dismissed.

Holiday pay and wages

23. The Claimant claimed £188 for 2.8 days' annual leave outstanding at the termination of his employment, and £400 for unpaid wages. I am satisfied that these payments were outstanding at the time when the Claimant issued his tribunal claim and I grant a declaration under section 24(1) ERA that the Respondent made unauthorised deductions from the Claimant's wages. The Claimant confirms that the outstanding sums have now been paid and that he does not seek to recover any further payments for holidays or wages. I therefore make a nil award of compensation.

Payslips

24. With the exception of one payslip provided in 2020, the Respondent failed to send the Claimant any payslips. The Claimant's last six payslips were emailed to the Tribunal by Mr Bland, but they were not provided '*at or before the time at which any payment of wages or salary is made*' as required by section 8(1) ERA. I therefore make a declaration that the Respondent has failed to provide written itemised pay statements to the Claimant.

25. I am permitted to award the Claimant a sum not exceeding the amount of any unnotified deductions made during the 13 weeks before the tribunal application (i.e. during the period 20 December 2021 – 21 March 2022), whether or not the deductions were made in breach of contract. The Claimant's payslips for December 2021 and January 2022, which Mr Bland sent to the Tribunal on the day before the hearing, do not show any deductions (such as tax and National Insurance contributions) that were not notified at the time. The tax records provided by the Claimant also show that no deductions for tax and National Insurance were made from his December wage payment of £550. The Claimant has now been paid his outstanding wages and holiday pay. I therefore make no award of compensation for the Respondent's failure to provide itemised pay statements.

Written statement of terms and conditions

26. I am satisfied that, at the time when the Claimant issued these proceedings, the Respondent had failed to provide a written statement of employment particulars. I explained to the parties that section 38 of the Employment Act 2002 is parasitic on the success of another claim under one of the jurisdictions listed in Schedule 5 to the 2002 Act. Because I have granted the Claimant a declaration in relation to his claims for unauthorised deductions in respect of wages and holiday pay, section 38 applies and I must therefore make an award for the Respondent's failure to provide a written statement of terms and conditions. I award the minimum amount of two weeks' pay at the weekly rate of £407.50 set out in the Claimant's schedule of loss, giving a total award of £815.

27. Because the Respondent is a small employer and a written contract has now been provided, I do not consider it just and equitable to award the higher amount of four weeks' pay.

Employment Judge Leverton

Date: 20 September 2022

Judgment & Reasons sent to the parties: 23 September 2022

FOR THE TRIBUNAL OFFICE