



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Mr S Martinhull

Respondent

AND
Stephen and Leslie Kirk
Trading as MH Activity and Development Centre

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bodmin

ON

21 December 2020

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: In person

For the Respondent: Mrs L Kirk in person

JUDGMENT

The judgment of the tribunal is that:

1. The claimant's claims for breach of contract and/or unlawful deduction from wages are dismissed; and
2. The respondent's employer's contract claim would have succeeded but is dismissed on withdrawal by the respondent.

RESERVED REASONS

1. In this case the claimant Mr Samuel Martinhull brings a monetary claim for breach of contract and/or unlawful deduction from wages against his ex-employer Mr Stephen and Mrs Leslie Kirk who were in partnership together trading as MH Activity & Development Centre. The respondent denies the claims, and has raised an employer's contract claim for repayment of the sum which it says it has overpaid the claimant.
2. I have heard from the claimant. I have heard from Mrs Kirk of the respondent.
3. There was a degree of conflict on the evidence. I have heard the various witnesses give their evidence and observed their demeanour in the witness box. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

4. The respondents owned and operated an activity and development centre known as Manor House near Wadebridge in Cornwall ("The Centre"). The Centre provided residential and activity facilities including Outward Bound activities. They have since had to close the business and sell the assets as result of difficulties arising from the Covid-19 pandemic.
5. The claimant Mr Samuel Martinhull was employed by the respondent as an Activity Instructor from 5 November 2018 until his resignation which took effect on 10 January 2020. Although he was described as a full-time employee, the claimant was allowed to work other shifts as an activity instructor for other businesses. The respondent was aware of this arrangement and did not object.
6. The claimant was issued with a written statement of the terms and conditions of his employment, which he signed to accept. Clause 5 dealt with Pay, and the level of pay depended upon qualifications. This clause provided: "You are contracted for 40 hours per week; equivalent to between £15,350 and £19,188 gross per annum depending on where you are on the scale at any point in time. Notes on your pay and benefits: (i) you are required to complete daily timesheets of hours worked; (ii) salary will be paid monthly in arrears by direct bank transfer; (iii) please see additional attached information (Appendix 2) monitoring your hours of work and completion of the daily timesheet."
7. Clause 6 dealt with Hours of Work. This clause provided: "you are required to work Full Time. Your normal working hours will be approximately 30 to 45 hours per week, although this will vary according to time of year, workload and staffing levels. Flexibility is very important."
8. Appendix 2 provided further information by way of "notes re salary and timesheet completion" for full-time monthly paid staff which was based on a 40 hour week with each day of eight hours, and annual leave entitlement of 28 days. This document provided: "Your salary is based on a 40 hour week; you may work significantly more or less than this each month ... You will be paid 1/12 of your annual salary each month in arrears irrespective of hours worked from month 2 onward; the first month will be paid on number of hours worked up until the cut-off date if it is not a full month ... You will need to accurately complete a monthly timesheet daily throughout each month to monitor your hours ... At the end of each month the Partners will provide a statement of your current hours worked against the contracted hours ... Any additional hours worked will be accrued and taken back at a quiet time in the business ... Any hours owed to the company will be held against future additional hours worked ..."
9. This document also attached an example of a Monthly Hours Statement which was a form issued to each employee and which accompanied each monthly itemised payslip. This Monthly Hours Statement gave the date of the month in question; whether any hours were brought forward; what hours had been worked that month as per the timesheet; what hours were contracted to have been worked; the extra hours worked which amounted to time owing; or alternatively extra time off to claim back as time owed; and the figure for hours carried forward. The statement also noted whether any holiday entitlement had been taken, and how much remained in the holiday year. A negative figure meant that hours were owed by the employee to the respondent; a positive figure meant that the employee had overworked the contractual hours and that payment for these was due at some stage to the employee.
10. This was the system that was adopted between the respondent and the claimant, and the claimant was aware of and accepted these terms.
11. Towards the end of June 2019 Mrs Kirk sent an email to the claimant and two of his colleagues in connection with the proposed rota to cover their self-catering activities for the forthcoming weeks. The claimant responded by email dated 30 June 2019 to this effect: "I have sorted out work for myself through July and August, as I didn't think I was needed. I have spoken to Tom and Debbie who have said they are happy to cover my week between them and Henry said he would be happy to do the Saturdays if that's all right with you."
12. Mrs Kirk was prepared in principle to agree to this, but was concerned about the arrangements, and later that day responded by email to this effect: "I have always said that you were needed for the self-catering cover; you, Tom and Debbie as the permanent members of the team. The only concern about you not covering one of these weeks is that

- you will run out of holiday and use up all your hours owing, and by the end of the financial year your hours may be below the total you would have been paid for; this means that you could end up having a reduction in the amount you are paid in Feb and/or March to balance this out. So you need to be aware of this and if you are still wishing to do this then I will discuss it ... Can you confirm that you understand the risk of this with regards to your pay and whether you wish to hand over this cover to them?"
13. The claimant responded by return email to the effect: "I can confirm that I am happy to take the risk of owing you hours/money at the end of the financial year ..." The claimant was able to work elsewhere at a different business in July and August 2019 and he was paid for these alternative shifts by that third party, at the same time as he was receiving his monthly salary from the respondent.
 14. As Mrs Kirk had predicted, this is what then transpired. As confirmed in the Monthly Hours Statement which accompanied his itemised payslip to the end of November 2019, the claimant was notified that he had already taken 25 of his 28 days annual holiday, and that 123.91 hours had been carried forward as being hours for which he had been paid but had not worked, and which were therefore owed to the respondent. The claimant did not raise any complaint at that time. Similarly, the Monthly Hours Statement which accompanied the claimant's itemised payslip to the end of December 2019 showed that 113.80 hours were now being carried forward as hours which had been paid but not worked, and which were therefore owed to the respondent. This reflected the timesheet up to and including 26 December 2019.
 15. The claimant then continued to work, and did shifts on 27, 30 and 31 December 2018, and 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 January 2020, for which he was credited 90 hours.
 16. The claimant also decided at that stage to resign his employment. By email dated 2 January 2020 he notified the respondent that he was resigning on one month's notice with his last day planned for 31 January 2020. He also indicated that he would still be available for freelance work if given the appropriate notice.
 17. Mrs Kirk then accepted his resignation by email dated 5 January 2020, and agreed to the proposed arrangements. She pointed out that the respondent would need to calculate the outstanding hours which were owed and agreed that the respondent would be interested in engaging the claimant as a freelance instructor.
 18. On 12 January 2020 the claimant then emailed Mrs Kirk to request confirmation of how many hours he would be paid for in his final month's salary. He suggested that the respondent had underpaid him by £200 on the last payday and complained that he had been unable to discuss his hours with her. Mrs Kirk responded saying that she had a degree of sympathy with the claimant, but also set out in detail the respondent's position. She stated: "We had numerous discussions during July that if you didn't work the hours we were asking you to work during the summer period, you could end up in a situation where you will have been paid for hours that have not actually been worked. I repeatedly discussed this with you to ensure that you understood the potential implications and that if the situation occurred you would have to repay those hours at the end of the financial year. You accepted that situation could be the case and it is also clearly stated in your contract of employment. You made a decision on 2 January 2020 that you wished to resign from the company, which we respected, however that inevitably was going to leave you in a situation where you would in fact be owing us hours. You were clearly aware of this as the running total is stated on the attachment to each monthly payslip you receive ... You seem to be getting frustrated with us for trying to accommodate your request for time off during the summer to pursue another commercial venture and one would assume, perhaps wrongly, that you were paid for that venture, which means not only did you take the salary from us, you were also earning money from that separate venture ... You make reference in your email to the fact that the accountant had started to make an adjustment on your pay to recover those hours paid but not worked; she clearly looked to the outstanding and decided to recover the amount due in smaller amounts rather than taking it in one big hit. I accept your criticism that this should have been discussed with you prior and there appears to have been some disconnect between the accountants and myself. However, you do accept that money had to be repaid at some point ..."

19. The claimant then responded by email on 12 January 2020, agreeing to meet with the respondent, and confirming: "I would just like to clarify that I understand that you offered me a week of work over the summer and a few additional days during changeovers and I have no dispute that I owe you for those hours. Which assuming you would have paid me for an eight-hour day on the changeover days would mean you would offer me 72 hours between mid-July and mid-September that I was unavailable for. However, my concern is that you have not always been offering me my contracted hours since then, even though I have been available, making the hours that you say I owe you rise significantly and I was not given enough notice to find work elsewhere unlike the two months over the summer."
20. Mrs Kirk and the claimant then met on 13 January 2020, and reached agreement as to how to proceed. Mrs Kirk put down the agreed terms in a form of letter which she sent undercover of an email dated 13 January 2020 which stated: "please find attached a letter confirming the agreement we discussed at the meeting concerning ending of your contract with immediate effect and confirms how the overpaid hours will be repaid to the Manor House. I have also attached the final hours calculation we discussed." That final hours calculation gave credit for the 90 hours worked between 27 December 2019 and 10 January 2020, and made it clear that the total hours owed by the claimant to the respondent as of 12 January 2020 was 48 hours, which at an hourly rate of £8.49 came to £407.52.
21. The proposed agreement was a letter signed by Mrs Kirk, and inviting the claimant to sign, on the following terms under the heading "End of Employment Contract". The letter read: "Following our meeting at the Manor House earlier, we write to confirm the mutual verbal agreement made regarding the immediate termination of your contract of employment. The final number of hours owed to the business as of today is 48, which equates to £407.52 at your current hourly rate. See attached sheet. We have agreed that this amount can be repaid by you working four (4) freelance days at no charge to the Manor House; those dates to be agreed and confirmed by both parties in advance. The freelance instructor day rate is £100 per day. Please sign in the space below to confirm your acceptance and agreement of this offer." Mrs Kirk had also given details of approximately 30 dates from 27 April 2020 on which she offered the claimant availability to work freelance shifts.
22. The claimant then agreed these terms by email to Mrs Kirk dated 23 January 2020 and stated: "Sorry I haven't got back to you yet I have been very busy and I've been working away this week. I will print off and sign the agreement and get it to you over the weekend. I'm available for all the other shifts as well, however I will be charging £110 per day instead of £100 to do them, are you happy to continue at this rate after I have worked for four days from our agreement? Hope you are well."
23. Mrs Kirk responded on 24 January 2020 to this effect: "Thank you for your reply. Yes I am happy with £110 per day so I will book you in for all those days. Good to hear you have been working, thank you for getting back to me. See you soon. Best wishes."
24. However, by March 2020 the claimant decided that he no longer wished to continue with relationship, and he says this was because he had heard from other sources that the respondent made negative comments about the way he claimed his hourly pay. He sent an email to Mrs Kirk on 7 March 2020 to this effect: "I am writing to inform you that I will no longer be available for any of the freelance work that you have offered me. I was very disappointed to hear some of the lies and negative comments about me coming from the Manor house, I was under the impression that by the time I left my contract with you that we had finished on reasonably good terms. Considering one of the things discussed at our last meeting was that you had heard about me allegedly making negative comments about the Manor House and its management I find this all the more insulting. As a result of this I no longer feel comfortable coming to work for you."
25. Mrs Kirk responded by email on 9 March 2020 to this effect: "it is a shame that you feel this way without even speaking with us first, but if you have decided on this course of action, I must point out you that there is still a matter of the final number of hours owed to the business, which equates to £407.52 as you are well aware through our meeting and previous emails. I attach your invoice for the outstanding amount ..."
26. Bearing in mind all of the above facts, I find that (i) there was an agreed contractual relationship between the parties; (ii) that agreed contractual relationship was one in which

- the respondent paid an average monthly salary and gave credit for hours worked in excess of that amount, but also recorded hours owed to the respondent on a rolling basis if the pay exceeded the hours worked; (ii) the claimant specifically understood and agreed to that arrangement; and (iv) as at 12 January 2020 the claimant expressly agreed with the respondent's calculation that the respondent was owed £407.52 because this sum had been overpaid to the claimant as against the hours which he had actually worked.
27. Having established the above facts, I now apply the law.
 28. The claimant's claim is for hours worked during December 2019 and January 2020 for which he says he has not been paid. He has presented his claim as being one for unlawful deduction from wages and/or for breach of contract.
 29. The claimant claims in respect of deductions from wages which he alleges were not authorised and were therefore unlawful deductions from his wages contrary to section 13 of the Employment Rights Act 1996.
 30. The claimant's claim for breach of contract is permitted by article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 ("the Order") and the claim was outstanding on the termination of employment.
 31. The respondent has also entered an employer's contract claim in response, claiming repayment of the sum of £407.52 which it says it has overpaid the claimant. That employer's contract claim is permitted by article 4 of the Order.
 32. For the reasons set out in my findings of fact above, I find that the claimant was overpaid by the respondent the sum of £407.52 and that the claimant has been fully paid for all of the hours which he worked. I therefore dismiss his claim for unlawful deduction from wages and/or for breach of contract.
 33. It also follows from the findings of fact that the respondent succeeds in its employer's contract claim against the claimant in the sum of £407.52. However, at the end of this hearing the claimant apologised to the respondent for having brought the claim which he now accepts was not accurate, and on that basis the respondent agreed not to pursue its claim, which is now dismissed on withdrawal by the respondent.

Employment Judge N J Roper

Dated: 21 December 2020

Judgment sent to Parties: 18 January 2021

For the Tribunal Office