



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH
BEFORE: EMPLOYMENT JUDGE ELLIOTT (sitting alone)
BETWEEN:

Ms H S Chan Chi
Claimant

AND

W. Wing Yip (London) Ltd
Respondent

ON: 8 February 2017

Appearances:

For the Claimant: In person
For the Respondent: Mr J Crozier, counsel
Interpreter in the Spanish language: Ms J Eldon

JUDGMENT

The Judgment of the Tribunal is that the claim fails and is dismissed.

REASONS

1. This judgment was given orally on 8 February 2017.
2. By a claim form presented on 1 December 2016 the claimant Ms Hoi Shan Chan Chi claims unlawful deductions from wages.
3. The claimant works for the respondent as a cashier / shop assistant in Croydon. The respondent is the UK's leading Oriental grocer, owning and operating four sites in the UK.
4. The claimant's language is Spanish.

The issues

5. The issue for the tribunal is whether the respondent made unlawful deductions from wages by paying the claimant at £6.47 per hour and whether there was a binding agreement to pay her at £7 per hour.

Witnesses and documents

6. The tribunal heard from the claimant. For the respondent the tribunal heard from Mr Michael Wong, a director. There was a written witness statement from Mr Wong. There was no statement from the claimant who said that she relied upon the content of her claim form.
7. The claimant presented a witness statement which she subsequently wished to withdraw. The witness did not attend. I have therefore not attached any weight to this witness statement.
8. There was a bundle of documents from the respondent of 60 pages. The claimant had not received it. It had been sent but she had not had time to go to the post office to pick it up. The claimant produced a bundle of documents which she had not copied for the tribunal or the respondent. The claimant confirmed that she had received the Tribunal's letter of 19 January 2017 which said that both parties should send to each other in advance copies of the documents that were relevant to the issues.
9. Both parties indicated that the documents they had were likely to be common documents. I therefore took a break of 30 minutes to allow the parties to have a look at each other's documents and then to inform me as to whether they considered they were ready to proceed or whether they needed more time with the documents. If more time was needed I would have to consider postponing the hearing. The parties confirmed that the documents were common to one another save for four additional documents from the claimant to which the respondent did not object. After the break the parties said they were therefore content to proceed.
10. I explained the process for the benefit of the claimant.

Findings of fact

11. The claimant speaks Chinese and Spanish. She has limited English. She is also known by the first name of Sandra, a name which appeared in the documents. We had the benefit of a Spanish interpreter, Ms Eldon. The claimant understood some of the questions I put to her in English.
12. Mr Wong, the respondent's witness speaks fluent English and Chinese.
13. On 5 June 2014 the claimant attended an interview with the respondent's Director Mr Michael Wong. The interview was conducted partly in English and partly in Chinese. The claimant had good retail experience so she was successful at interview and Mr Wong offered her an initial wage of £280 per week. The claimant's evidence was that Mr Wong told the claimant that this was equivalent to £7 per hour which she thought was fine because it was more than the national minimum wage and more than she got in her previous job. Mr Wong denies offering the claimant an hourly rate. A start date was agreed of 9 July 2014.

14. Mr Wong said that the respondent's practice is to pay employees a fixed weekly rate of pay rather than an hourly rate. Mr Wong could not remember with precision the exact words he said at the claimant's interview which was 2.5 years ago. He is an experienced interviewer for the respondent, having interviewed staff since 2005 and he conducts approximately 2 interviews per month, so about 24 per annum. His standard practice is always to express a weekly rate of pay and not an hourly rate of pay.
15. I saw the claimant's application form for employment at page 26C which was annotated by Mr Wong in the box marked "for office use only" in which he has written Pay £280/week 5 days 09/07/14. It states the claimant's days off as Wednesdays and Fridays. The claimant filled this application form out prior to the interview notwithstanding that the form is in English and she said she understood it at the time.
16. The claimant received her contract on 14 August 2014 and signed it immediately (bundle page 27-32). Her evidence was "*Really I didn't look at the contract before signing it*". The contract at clause 8 under the heading "Remuneration" stated "*Your salary/wage is made up of a basic rate of £280.00 per week and is payable weekly in arrears.....*".
17. The provisions as to hours of work are at clause 9 which states "*Your normal hours of work are 9.15am to 7.00pm Monday, Tuesday, Thursday, Saturday and from 10.15am to 6.00pm on Sunday. These hours include an unpaid lunch break 1 hour each day (or ½ hour if you avail yourself of the free Chinese meal). The hours of work will be dictated by the specific needs of the business. You will, therefore, be required to suit your hours and days of work to the needs of the business. There is an unpaid ½ hour tea break each day.*"
18. Clause 10 deals with overtime. It says "*you are not entitled to overtime payments, although from time to time additional hours of work may/will be required, to perform your duties satisfactorily*".
19. The claimant confirmed that the contract showed her signature at page 32 and that she signed the declaration stating that she agreed that it accurately represented her terms and conditions of employment. It also states that any queries should be raised with management within one month. No such queries were raised by the claimant within that period.
20. The claimant said she signed the contract immediately because she trusted the respondent. Her first weekly pay slip stated £7.08 per hour. This was because of a payroll error basing it on 39.5 hours per week.
21. The claimant had a pay review in November 2014 at which her pay was increased to £300 per week. Her second pay review was on 10 October 2015 when her pay was increased to £316 per week. Her payslips from October 2015 showed her hourly rate as £8.

22. On 5 February 2016 the Finance Director Mr M J Newport wrote to the claimant (page 37) stating that a recent review of employment contracts and the Sage payroll system showed that some employees had inadvertently been paid less than the minimum wage and that the claimant was one such employee. The letter said she had been underpaid by £5.62 and enclosed a calculation (page 38). The claimant was told that she would be paid this amount with her next monthly salary and it would be shown in her payslip. .
23. The claimant the position in March 2016 with Mr Albert Yip. Mr Yip did not get back to the claimant so she followed this up on Thursday 28 April 2016. He told her he could not do anything about it because she had signed a contract and it did not matter how many hours she worked.
24. On 1 August 2016 the claimant sent a grievance letter to the respondent (bundle page 39) which was addressed to Mr Henry Yap, the respondent's managing director. In that letter she states in the second paragraph "*Mr Wong offered me an initial salary of £280 per week*". She went on in that letter to say that she thought £280 was low "*but at the time Michael said that the hourly rate was around £7 (I was not sure how many hours I would work per week because I could not calculate it quickly).*" (Judge's underlining).
25. The claimant said that she would not have joined the respondent's employment if she had understood that she would be earning less than she was earning at her last job, which was £6.95 per hour.
26. The claimant set out in the second paragraph of her grievance letter the information she was given as to hours of work. This said that she was told that the shop opens at 09.30am and she had to be there at 9.15, to prepare. She said she thought the first 15 minutes was unpaid. She was told there was a half hour lunch break with a Chinese meal included and a half hour tea break. She was told that the shop closed at 7pm. She said she always left at 7.15pm, sometimes later.
27. A grievance hearing took place on 18 August 2016 conducted by Junny Shek, a Director. The claimant was accompanied by Ms Connie Chueng and there was also a note taker present. The notes were at pages 44-46.
28. Mr Shek wrote to the claimant on 23 August 2016 stating that the grievance was not upheld substantively but the claimant was awarded back pay of £16.76 based on a recalculation of pay for April, May and June 2016. The claimant was given a right of appeal which she exercised.
29. The appeal hearing took place on 14 September 2016. The claimant was represented by a union representative Mr Matt Smith from Unite, a Regional Officer. Mr Henry Yap the managing director heard the appeal. The notes were at page 55-58.

30. Mr Yap wrote to the claimant on 19 September 2016 dismissing her appeal (page 59).
31. The claimant said she knew of others who had been told by Mr Wong that they had an hourly rate. She named two such individuals, Mr Zheng Zhao. Mr Wong did not recall Mr Zhao's interview and a Thai national named Narumon. Mr Wong recalled interviewing Narumon and said he told her what the weekly rate would be, the start and finish times, the breaks and the days per week in accordance with his normal practice.
32. The claimant seeks not less than £7 per hour from 10 October 2015. The claimant calculates this at £3,100 in a Schedule of Loss sent to the tribunal on 19 December 2016. In 2014 when the claimant started work for the respondent the national minimum wage was £6.50 rising to £6.70 in 2015. The rate in 2016 when these proceedings were issued was £7.20.
33. I find that on the claimant's own case, Mr Wong did not give her a specified hourly rate. The claimant's own case is that it was "around £7 per hour". Even if there was a discussion about the hourly rate, which I find there was not, the claimant went on to sign a binding contract of employment. It is not the fault of the respondent if she chose not to read it before she signed it. It is a legally binding contract. It specifies a weekly rate of £280 per hour and not an hourly rate of £7 or any other hourly rate. During cross examination the claimant said "*He didn't say that he would pay me an hourly rate but he said you have £7 per hour*". I find that Mr Wong did not specify an hourly rate.
34. The application form at page 26C with Mr Wong's handwriting in the top right hand corner is a contemporaneous document showing £280 per week. This supports my finding that Mr Wong gave the claimant a weekly and not an hourly rate.

The law

35. Section 13(1) of the Employment Rights Act 1996 provides an employer shall not make a deduction from wages of a worker employed by him unless 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 the worker has previously signified in writing his agreement or consent to the making of the deduction. Where the total amount of wages paid to a worker is less than the amount properly paid, the deficiency is treated as a deduction.
36. Section 27 defines wages as including:

- (1) In this Part "wages", in relation to a worker, means any sums payable to the worker in connection with his employment, including—*
(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise,

37. The right to bring a claim for unlawful deductions from wages is set out in section 23 ERA.

Conclusions

38. The claimant's paid hours of work on Monday, Tuesday, Wednesday and Saturday were 8.75 hours per day, being 9.15am to 7pm and deducting a half hour lunch break and a half hour tea break – making a total of 35 hours for those days. On Sundays her hours of work were from 10.15am to 6pm, with the same breaks, being 7.75 hours. This makes a total of 42.75 hours per week. Taking the weekly wage of £280 and dividing this by 42.75 hours means that the claimant's hourly rate of pay was £6.55 – and therefore just over, by 0.5p, the national minimum wage.

39. The claimant submitted that in signing her contract of employment she was not signing away her right to the minimum wage. I agree with this but find that she has been paid the national minimum wage.

40. It was always open to the claimant to do her own calculations. She was aware of the hours she was working and the amount she was getting paid. It was a simple question of mathematics yet it took the claimant two years to raise any issue concerning her rate of pay.

41. I find that there was no binding agreement to pay the claimant at £7 per hour and the claim for unlawful deductions fails and is dismissed.

Employment Judge Elliott
Date: 8 February 2017