EMPLOYMENT TRIBUNALS

Claimant: **Mr A Gboe**

Respondent: **Poundland Limited**

Heard at: **Birmingham** **On: 9 December 2016**

Before: **Employment Judge Britton**

Representation

Claimant: **Mr E Komeng**, Lay Representative

Respondent: Miss E Williamson, Counsel

REASONS

1. The claimant commenced proceedings by submitting an ET1 Form to the Tribunal on 30th August 2016. In that pleading he alleged that he had suffered unlawful deductions from wages and an underpayment of holiday pay. The respondent entered a Response in form ET3 and indicated an intention to resist the claims.

2. It was agreed with the parties that the Tribunal had to determine the Claimant's complaint under Section 23 of the Employment Rights Act 1996, namely, that his employer had made a deduction from his wages in contravention of Section 13 of that Act.

Insofar as it is relevant Section 13 provides that:-

(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.

(2) -

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

3. The claimant's representative explained that the holiday pay claim was limited to the extent to which the claimant may have been underpaid holiday pay as a result of any finding that there have been unlawful deductions from his wages on the basis that the holiday pay previously paid by the respondent in those circumstances would not have been calculated on normal remuneration.

4. The claimant gave evidence in support of his own case and for the respondent evidence was given by Leanne Slater, Employment Relations Adviser. I was also referred to an agreed paginated bundle of documents.

Findings of Fact

5. The claimant was employed by the respondent from 12 December 2015 to 21 September 2016. As an employee the claimant at all material times had the protection afforded by the relevant provisions of the Employment Rights Act 1996 with regards to unlawful deductions from wages.

6. By virtue of the above it will be apparent that I have determined that the claimant's start date was 12 December 2015. This has been an issue in this case. I have taken into account the claimant's evidence on the point but I have also had to take careful regard of the documentation within the agreed bundle. That documentation consists of the pre-employment documentation that one would normally expect to see such as recruitment form, a P46 and proof of right to work. Whilst it is correct that this documentation all predates 12 December 2015 it is not unusual for a prospective employee to sign documentation of this type in advance of actually starting employment.

7. I have had regard to the fact that both the recruitment form and the contract of employment, both of which being documents that were signed by the claimant, clearly state that his start date was 12 December 2015.

8. There is no documentary evidence that the claimant ever complained to anyone in writing specifically about not being paid for a period of one week prior to 12 December 2015. The claimant has given evidence that he complained to his line manager but this evidence is not corroborated by any documents. It is also surprising that the claimant did not take up this issue more strongly during the six months period of his employment if he indeed had worked for one whole week without pay and he does not refer to this complaint within his letter of complaint to the respondent dated 31 May 2016.

9. Although the respondent did indicate within the ET3 that the claimant's start date was 5 December 2015, I accept that this was simply an error. I have therefore found that the claimant did not complain to his line manager about not being paid for one week prior to 12 December 2015.

10. When giving evidence on this point the claimant appears to have been making an honest mistake; his assertion that he started on 5 December 2015 seemingly based steadfastly on the fact that that date was a Saturday, albeit that he may have overlooked the fact that 12 December 2015 was also a Saturday.

11. The effective date of termination of the claimant's employment was 21 September 2016. I have not found that the claimant resigned at any point. There was no evidence that the claimant expressly communicated his resignation and it

is not necessary to imply that the claimant had resigned by his conduct due to not attending work in the absence of any other indication of an intention to no longer be treated as bound by his terms and conditions of employment. In my judgment the respondent properly treated the claimant's absence from work beyond May 2015 as unauthorised absence.

12. The letter terminating the claimant's employment was sent by recorded delivery on 19 September 2016. I have heard no evidence as to whether that letter was actually received. although I note that it was sent by recorded delivery apparently to an incorrect address. As indicated, however, neither party has given any evidence to say that the letter was either not received or returned to the sender. I am therefore treating the letter as being received two days after posting. For the purposes of this case the precise termination date is not material to an issue.

13. It is agreed between the parties that the claimant worked at the Shirley store as a Sales Assistant. His hours of work were a minimum of 8 hours per week as per his contract and those hours were to be worked 5 days out of 7. The claimant's hourly rate when he commenced his employment was £6.77 which increased to £7.20 with effect from 1 April 2016. The claimant's contract of employment made it clear that his basic 8 hour's per week were a minimum and that he was required to be flexible as per clauses 7.1 and 7.2. This means that when correctly interpreted the claimant's obligation was to work whatever basic hours were rota'd to him by the respondent from time-to-time on the basis that he was still at that point working normal basic hours and would be entitled only to his basic rate of pay.

14. At the Shirley store the respondent does not operate a night shift. However there is a twilight shift which operates from 6.00pm until 11.00pm. The claimant's hourly rate was increased by 1.5 for any hours worked during the twilight shift period. Although the twilight shift is referred to as "Night Shift" on his payslips, it was not strictly speaking a night shift when worked at the Shirley store. I have heard evidence and accept that at some of the respondent's stores there is a full night shift which works through the night but not at the Shirley store.

15. The claimant recorded his start and finish times on a manual handwritten timesheet along with his colleagues. This information was then uploaded to the respondent's computer system, usually by the Store Manager, as part of standard procedure both at the Shirley store and the respondent's other stores. Again, as part of standard procedure, once uploaded an electronic record of hours worked was generated for each employee and this "electronic timesheet" then used by the respondent's payroll in turn to generate payslips and the payments made to employees.

16. Once the electronic timesheets have been submitted to payroll the paper time records and rotas are disposed of both at the Shirley store and as a general norm throughout most of the respondent's stores.

17. It follows that any alleged discrepancies with regard to hours worked are impossible to resolve unless the issue is brought to the attention of the respondent reasonably promptly. If brought to the attention of the respondent promptly they can verify the start and finish times on any given day by reference to CCTV. However, the CCTV is only available for 48 days.

18. In this case the claimant first complained formally about alleged underpayments in writing by letter dated 31 May 2016. This complaint was investigated jointly by Ms Slater from HR and Jonathon Shepherd, the Store Manager at the Corporation Street store. At that time, the position of Store Manager at the Shirley store was vacant. Ms Slater checked the electronic timesheets against the payslips and Mr Shepherd looked for any documents at the Shirley store and his own store to see whether documentation might exist to corroborate or otherwise shed light upon the claimant's complaint.

19. I should say that the claimant did work for part of the time at the Corporation Street store as a 'loanee' to help them out. The hours he worked there were input at the Corporation Street store but assimilated automatically to the overall electronic time records for the claimant as an employee of the Shirley store. In other words, the hours worked by the claimant at a different store were not shown separately according to the matrix within the bundle at pages 81-82. All hours worked by the claimant were given the Shirley store code and it is not possible to identify whether any of those hours were in fact worked at other stores.

20. I assume that documents must have been created to determine the hours worked at different stores by the respondent's employees to enable there to have been a cross charge between the stores as explained by Ms Slater when giving evidence, but the respondent's evidence, which is I accept, is that such documents no longer exist. The CCTV could not be checked by Ms Slater as part of her investigation into the complaint dated 31 May 2016 because for some reason it was missing. Ms Slater was unable to explain why in this instance the CCTV apparently could not be located.

21. The claimant's letter of complaint read as far as is relevant, as follows:

> "I wish to raise a formal complaint regarding unlawful deductions of hours I have worked since the beginning of my employment leading to unpaid wages at the end of every month.
> I worked a 6 day shift per week averaging a minimum of 8 hours per shift. At least twice a month, I work from 6.00pm until 6.00am the following morning which works out at 12 hours per that shift. On the basis of those hours, I should be remunerated at a minimum of 48 hours per week. Thus on the average, I should be paid for a minimum of 192 hours per month."

22. The above extract from the claimant's letter of complaint illustrates the vague unspecific nature of the claimant's complaint. He did not provide the respondent with exact dates or any clear details of the additional hours that he allegedly worked. This can be seen starkly by the claimant's reference to "averaging a minimum of" and "at least twice a month". The claimant's letter demonstrates the claimant's own inability to provide clear evidence of the hours he allegedly worked.

23. As part of her investigation the respondent could not ask the claimant's line manager whether complaints were raised with him on a monthly basis or on several occasions as alleged by the claimant, as the claimant's line manager, known as "Jay" (whose real name was Javid Siyad), had been dismissed for falsifying his own timesheets by this stage.

24. In the absence of documentary evidence or even clear oral evidence from the claimant, the only information held by the respondent was their electronic timesheets and it is not surprising that the respondent felt unable to uphold the claimant's complaint.

25. I am however satisfied having heard evidence from the claimant that he did raise issues with his line manager about his payslips on more than one occasion because he genuinely did not believe that he had been paid the correct amounts. The claimant's concerns were not addressed to his satisfaction by his line manager at the time and he did not appreciate that it would have been in his own interests to escalate them above his line manager or to actually retain his own written record to support a formal internal complaint or these proceedings.

26. At the time that the claimant raised his complaint about underpayments with the respondent's HR it was too late for them to establish whether the hours that the respondent had recorded for the claimant on their electronic timesheets were reliable and the claimant had no evidence to substantiate hours allegedly worked above those within the respondent's records. The respondent only had their own internal electronic timesheets and payroll information generated from those timesheets with which they could investigate the claimant's complaint. The claimant was not able to provide any records that would give the respondent any reason to doubt that their own records were not accurate.

27. The claimant does not have any record of the hours that he allegedly worked over and above the hours for which he has been paid. The claimant has been inconsistent with his own recollection of the hours he allegedly worked and the inconsistencies are illustrated by the two schedules of loss that he has produced, his witness statement and his oral evidence at the tribunal that all differ. The claimant's evidence is not reliable and is not sufficiently cogent to establish on the balance of probability, being the standard of proof in cases of this type, that there have been underpayments of wages.

28. I have heard evidence about a text message which is at page 80 in the bundle. It is not clear by whom that text was sent and although it sets out a rota, on the face of it, it does not of itself prove that the claimant actually worked the hours referred to in the rota and the claimant did not persuade me that he could recall working those hours.

Conclusions

29. I have my own concerns about the respondent's processes and have doubts that their system of recording hours is robust enough to identify errors or fraud. However, the claimant has the burden of proof to show on the balance of probabilities that he has suffered unlawful deductions from his wages. It is obviously embarrassing to the respondent that the claimant's line manager was dismissed for falsifying his own timesheets in May 2016, but it would be wrong for me to speculate that he had also falsified the claimant's time records without evidence. It is not clear to me either that the claimant's line manager would have had any obvious motive to do this because he would not necessarily have personally gained by this conduct.

30. As indicated above the claimant has to prove that he has suffered unlawful deductions from wages and underpayments of holiday pay on the balance probability. I have indicated that I have a small doubt that the respondent's electronic records may not be entirely accurate in all respects all of the time, but this is not the same thing as the claimant being able to prove on the balance of probabilities that he has worked additional hours over and above those recorded on the electronic timesheets held by the respondent and that the claimant has therefore been underpaid. The claimant's representative in his submissions candidly acknowledged that there was "no smoking gun". Although I am not entirely sure what he meant by this it seems to me that there is insufficient evidence in this case to support a judgment in the claimant's favour.

31. In my judgment the claimant has not proven to the standard of proof required that he has suffered unlawful deductions from wages or, as a consequence, an underpayment of holiday pay. Accordingly, the claims are dismissed.

I confirm that this is my judgment or order in the case of Mr A Gboe v Poundland Limited and that I have signed the judgment by electronic signature.

Employment Judge Britton

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Date 20 February 2017

JUDGMENT SENT TO THE PARTIES ON
20 February 2017

FOR EMPLOYMENT TRIBUNALS