



THE EMPLOYMENT TRIBUNALS

Between

Claimant: Mrs B Rogalska

Respondent: Care Homes of Distinction Limited

Hearing at London South on 9 August 2017 before Employment Judge Baron

Appearances

For Claimant: Agata Rogalska – Daughter of the Claimant

For Respondent: Luke Hutchings - Solicitor

JUDGMENT

The Tribunal **declares** in accordance with section 24 of the Employment Rights Act 1996 that the complaint by the Claimant under section 23 of such Act that there has been an unlawful deduction from the wages properly payable is well founded and the Tribunal **orders** the Respondent to pay to the Claimant the sum of £1,111.11.¹

REASONS

- 1 Although there are arithmetical complexities with which I deal below, the essential facts in this case are very simple. The Claimant was employed by the Respondent as a Care Assistant from October 2016. The written terms of her employment required her to give one month's notice of termination. It also contained provisions purporting to authorise deductions from the final payment if the Claimant terminated the employment without giving such notice. Those deductions were 'the costs involved in recruiting, training and arranging cover' subject to a maximum of the amount which the Claimant would have been paid during the balance of the notice period. On 3 March 2017 the Claimant wrote a letter to Mr Coomb, director of the Respondent, giving notice to expire on 10 March 2017. That was the last day that she worked for the Respondent. Although not material to the issues, the reason for the Claimant leaving was that she did not like working the number of night shifts required of her because of the effect it had on her family life.

¹ Note: Such amount is not liable to have statutory deductions made from it.

- 2 According to a payslip dated 31 March 2017 the last payment to be made to the Claimant would have been £1,565.69. However that amount was shown as an additional deduction so as to create a zero balance. It is accepted by the Respondent that other figures shown in the payslip were wrong, and further payments were later made.
- 3 It is the principal case for the Claimant that she agreed with Mr Coomb that the Respondent would accept one week's notice period rather than the contractual period of one month. In the alternative, the Claimant contends that the calculation of the deduction was incorrect. It is the case for the Respondent that Mr Coomb did not agree to any reduction of the notice period.
- 4 The Claimant is Polish, and she is not fluent in English. She gave evidence with the assistance of her daughter who acted as interpreter. Normally any interpreter is appointed by HM Courts & Tribunals Service, but no request had been made for an interpreter. On this occasion Mr Hutchings helpfully agreed that Miss Rogalska could interpret. I explained to her that she must simply translate what was said and in particular not seek to embellish the evidence of her mother. I am entirely satisfied that Miss Rogalska properly fulfilled her function as an interpreter.
- 5 The Claimant's evidence was that a week or so before 3 March 2017 she had spoken to Mr Coomb in an office at the care home where she worked and he had agreed to a reduction to one week's notice. Mr Coomb gave evidence to the contrary, saying in his witness statement that any suggestion that he encouraged the Claimant to resign or give seven days' notice was entirely false, and that he did not have such discussions with staff. He referred to the disruption caused by staff leaving at short notice.
- 6 I have mentioned the letter of 3 March 2017. Mr Coomb did not reply to that letter until 13 March 2017. He said as follows:

We refer to your notice letter which was given to us after your Holiday request dated 3 March 2017.

We note, regrettably you have not reported to work as under your terms of your notice period you are required to work the notice period.
- 7 Mr Coomb then said that the Claimant was not allowed to take leave during her notice period, and referred to the contractual provision relating to deductions from wages mentioned above. It is not clear to what holiday request Mr Coomb was referring. The document included in the bundle was dated 27 February 2017, and shows that a request by the Claimant for leave from 18 to 31 March 2017 had been approved.
- 8 The Claimant sought advice from the Citizens Advice Bureau. A letter was sent to Mr Coomb by the Claimant on 6 April 2017, apparently written with the assistance of the CAB. As Mr Hutchings pointed out the letter did not seek to challenge the right of the Respondent to make deductions, but only the basis of calculation.
- 9 Also produced to the Tribunal were two copy documents purporting to be invoices from Premier HR Services Limited ('the agency'). Both were dated 13 March 2017 and had a stamp 'Received 13 Mar 2017' on them.

There was a signature over such stamps and it is not clear whether the stamp and signature were intended to indicate date of receipt of the invoice or payment of it. The point was not explored at the hearing. One invoice was for 'Agency Healthcare Assistants (3 weeks cover from 11 March 2017)' totalling £1,462.50 being 112.5 hours at £13 per hour. Included on the document was the following note:

PS: Other invoices to follow for ongoing provision of Care assistants

- 10 The other document was for 'Recruitment and Commission cost Healthcare assistant)' in the sum of £2,246.40. There was no breakdown of that amount.
- 11 I am faced with a material conflict in the evidence as between the Claimant and Mr Coomb on the point as to whether one week's notice was agreed in place of the original period of one month. I had the benefit of seeing and hearing each of them give evidence. I have concluded that I prefer the evidence of the Claimant, and I find that there was an agreement to vary the contractual notice period from one month to one week.
- 12 The Claimant was absolutely confident and resolute in her evidence on the point. When asked why there was no reference to the agreement in her letter giving notice dated 3 March 2017 she immediately replied saying that there was no need for her to do so as the reduction had already been agreed. When I asked the Claimant for more details of the conversation she convincingly set out her position that when she received a rota allocating more night shifts to her she decided that she had to leave, and then spoke to Mr Coomb about her notice period.
- 13 I found Mr Coomb to be less convincing as a witness. When asked why there was no immediate reply to the letter of 3 March 2017 he said that it took some time to reply, although he had spoken to the Claimant's husband about the matter. I fail to understand why he did not immediately contact the Claimant and tell her that the required notice period was one month. Mr Coomb was asked questions about the two invoices and his contacts with the agency. He said that the Respondent dealt constantly with the agency, and that he saw its director regularly. However he was not able to supply the family name of the director.
- 14 On looking at the copy invoices I have concluded that they have been prepared for the purposes of these proceedings. I am not suggesting that the Respondent may not have incurred costs as a result of the Claimant leaving but I am not satisfied that these invoices accurately represent the position. One invoice is for an assistant for three weeks from 11 March 2017. The invoice is dated 13 March 2017. On the basis that the agency was also instructed to obtain a permanent member of staff I fail to understand how it was known at 13 March 2017 that cover would be needed for three weeks. Further, my experience is that invoices are delivered by employment agencies in arrears based upon the hours actually worked in the preceding relevant period, whether it be a week, a multiple number of weeks, or a month. Further, the Respondent had

granted leave to the Claimant from 18 to 31 March 2017. Her absence would have had to be covered either by other staff or by agency staff in any event. It is therefore wrong to seek to rely on this invoice for the purpose of justifying a deduction.

- 15 The other invoice is also dated 13 March 2017 and is for commission for recruiting a permanent member of staff. Again it is dated 13 March 2017. There was no evidence that at that date any permanent member of staff had been engaged. If an employee had been engaged and had started working for the Respondent then the cover staff referred to in the other invoice would not have been needed. There is no name on the invoice of the new member of staff, the date of commencement, nor the basis of the calculation of the commission. If no new member of staff had been engaged then the invoice should not have been issued. I was told by Mr Coomb that the normal rate charged was 10% of annual salary. Allowing for VAT the commission equates with a salary of £18,720. That contrasts with the Claimant's pay of about £15,600. Mr Coomb told me that £1,872 was simply a figure agreed with the director of the agency. That is not appear to be credible. Why such an unusual figure?
- 16 Finally Mr Coomb said that if the Claimant had given one month's notice then he would have advertised for a replacement in the press rather than through an agency. If that were the case, then I fail to see how the Respondent can maintain that the Claimant is effectively liable to pay for the cost of cover for three weeks, and also for the cost of obtaining a replacement. A replacement would have had to be obtained anyway. Mr Coomb is seeking to have it both ways.
- 17 I therefore have to turn to the arithmetic which is not entirely straightforward. The final payslip showed payment in effect for 185 hours at £8 per hour. It was later agreed that the Claimant was owed payment for a further 21 hours. There was a further error in respect of accrued holiday pay, and the Respondent accepts that payment for a further 17.4 hours was due. The total was therefore 38.4 hours amounting to £307.20 gross. That amount would be taxable.
- 18 From the Claimant's final net pay there was deducted the sum of £1,565.69 resulting in a zero balance. After taking advice the Respondent decided that the amount which it was entitled to deduct was the lower amount of £1,113.24, a difference of £452.45. That was also a net amount.
- 19 Further payments were then made to the Claimant intended to cover both the hours worked and holiday pay shortfall, and the reduction in the amount to be deducted from the net pay. Those payments amount to £920.05 gross and £682.56 net. There has therefore been an excess payment of £612.85 gross over the amount due in respect of hours worked and holiday pay.²

² £920.05 minus £307.20

- 20 The amount deducted from the Claimant's final payment was £1,565.69 net. The question is how to make an allowance of the gross figure of £612.85 against the net figure of £1,565.69. Tax and NICs have been deducted from the gross amount of £612.85 before the payments were received by the Claimant, and of course such deductions were also made before arriving at the net figure of £1,565.69.
- 21 I do not see how realistically it is possible accurately to calculate the matter, because of the incidence principally of PAYE tax liability and the overall tax position of the Claimant for 2016/17. It may be that excess tax and NICs have been deducted above the amount actually due. It seems to me that the equitable way to deal with this problem is to ascertain the proportion of the further gross payments received by the Claimant in excess of those attributable to hours worked and holiday pay, and then set off the relevant amount on a net basis against the deduction of £1,565.69. That proportion is 66.6%.³ The net further payments received by the Claimant totalled £682.56, and 66.6% of that amount is £454.58. I therefore find that the balance due to the Claimant is £1,111.11.

Employment Judge Baron

Dated 10 August 2017

³ £612.85 divided by £920.05