Case Number: 1401640/2016 &
1401695/2016

EMPLOYMENT TRIBUNALS

Claimants		Respondents
Miss K Price (1)	**v**	**Nacrogate Limited (1)**
Mr P Reynolds (2)		**Fosfelle Country House Limited (2)**

Heard at: **Exeter**

On 6 April 2017

Before: **Employment Judge Pirani**

Appearances
For the Claimants: both in person
For the Respondents: Mr S Jagpal, consultant

JUDGMENT

1. The first respondent unlawfully deducted £1,852.78 from the first claimant.
2. It is agreed that the first respondent owes the first claimant 7.5 days holiday in the sum of £450.
3. In accordance with section 38 Employment Act 2002, because the first respondent failed to provide the first claimant with a written contract of employment, I award the first claimant two weeks' pay in the sum of £600.
4. The second claimant's claims against the second respondent do not succeed and are dismissed.

REASONS

Although reasons were provided. Written reasons were subsequently requested by the respondents.

Background and Issues

1. By a claim form received at the Employment Tribunal on 20 October 2016, Miss K Price, the first claimant, brought a claim against both respondents for breach of contract, outstanding holiday pay, unlawful deduction of wages, and payment below minimum wage.

2. The second claimant, Mr P Reynolds, issued a claim on 20 October 2016 also for arrears of pay and what he says is pay below national minimum wage.

3. The dates on both ACAS certificates are 26 August 2016 until 26 September 2016.

4. The first claimant says she was employed as a manager from 11 April 2016 until 4 September 2016. The second claimant says he was employed by the second respondent as a chef from 11 April 2016 until 11 August 2016.

5. The cases came before Employment Judge Bridges at a telephone case management hearing on 23 January 2017. He noted that the respondents' case is Miss Price was employed as an employee by Nacrogate Ltd ("Nacrogate"). However, the respondents denied that Mr Reynolds was employed either as an employee or a worker either by Nacrogate Ltd or by Fosfelle Country House Ltd ("Fosfelle"). Miss Price agrees that she was employed by Nacrogate and was paid by them. Mr Reynolds contends that he was an employee of Fosfelle.

6. Miss Price's complaints are as follows:

i. Breach of contract/unlawful deduction of wages: 60.50 hours (£453.75) were deducted from her final month's salary without explanation together with rent and electricity payments of £309.30. From 11 April 2016 until 1 June 2016, £70 per week was deducted from wages for rent. She also says she is owed £2620.63 for an additional 259 hours worked.
ii. Holiday pay: she says she was not paid her statutory holiday entitlement: £506.25.
iii. No written statement of terms and conditions of employment.

7. In her claim form she says she undertook additional work (the 259 hours) which was mutually agreed with the respondent on the understanding that she would be recompensed for this work in the future.

8. Mr Reynolds's complaints are:

i. Breach of contract
ii. Unlawful deduction from wages

9. Mr Reynolds says it was understood and was agreed at interview that monies would be paid to him as business revenue increased. He says it was also agreed that he would be officially employed in "due course". Mr Reynolds says he worked for 155 hours between 11 April 2016 and 11 August 2016 for which he received no payment. He says he undertook this work on the mutual understanding that he would be paid in the future.

10. For this he is claiming £3,276, which is calculated using the national minimum wage as an hourly rate. He says he has already received £435.75 from the respondents leaving an outstanding total of £2,940.25.

11. It was established at the case management hearing that although both claimants referred to payments being made to them as being below the national minimum wage level they agreed they were not putting forward a case based on the agreement between the parties in relation to the remuneration being less than the national minimum wage. Rather, they say because of the alleged breach of contract and unlawful deductions the amounts they received were below the national minimum wage.

12. In relation to Miss Price the respondents say in a response received at the Employment Tribunal on 27 November 2016:

i. The claimant was employed by the first respondent from 11 April 2016 as an administrator/bar person until she left on 25 August 2016
ii. At interview it was confirmed that the claimant would work 30 hours per week at £7.50 per hour
iii. The job was only for one person and included cooking small numbers of simple meals in the bar
iv. After 6 weeks Miss Price was given an additional 10 hours per week from 1 June 2016
v. She was paid cash bonuses totalling £585.75 in addition to her hourly pay
vi. The claim that she worked a further 259 hours is rejected
vii. She was issued with a contract of employment on 28 April 2016
viii. Deductions were made from her wages for 60.5 hours for matters set out in the ET3, including failing to show up for work on dates from 12 August 2016 onwards
ix. She failed to work contracted hours between 12 and 24 August.

13. In relation to Mr Reynolds the respondents say in a response received at the Employment Tribunal on 27 November 2016 that he was never an employee or worker.

The Issues

14. The issues to be determined were agreed at the commencement of the hearing as follows:

i. Was the second claimant employed by Fosfelle, and if so, during what period?

ii. If so, did the second claimant do work in accordance with his contract of employment for which he received no remuneration?

iii. Did the first claimant do work in accordance with her contract of employment for which she received no remuneration?

iv. It is agreed that Nacrogate made deductions from the first claimant's wages. Were they authorised and, if so, were the deductions made in accordance with the contract/other written agreement?

v. When did the first claimant's employment end?

vi. Is the first claimant owed any outstanding holiday entitlement?

vii. Did the claimants receive written contracts of employment?

viii. Did the parties comply with the relevant Acas codes and, if not, was the failure unreasonable?

Documents and Evidence

15. I had an agreed bundle which ended at page 184.

16. For the claimants, I heard from the two claimants themselves. For both respondents I heard from Peter McArdle who is a director of both respondent companies.

17. I ignored references to evidence covered by without prejudice privilege.

18. Neither party made reference to any case law.

Facts

19. After reading the documents I was taken to and hearing the evidence and submissions, I made the following relevant findings of fact. Some of my findings on disputed facts are dealt with in the conclusions section.

20. Network Drycleaners is the trading name of Nacrogate Ltd which is a company operated by Peter McArdle and his wife. It is a laundry and dry cleaning business employing about 11 staff.

21. Fosfelle Country House is a business comprising three holiday cottages accommodating a maximum of 13 people, a caravan club camping site for a maximum of 5 caravans and a small bar/restaurant. Again, this is a business operated by Mr and Mrs Peter McArdle.

22. On 23 March 2016 the respondents placed an advert in the North Devon Gazette for "person or persons required" to run a small holiday cottage business and restaurant. It was indicated that approximately 30 hours per week would be available. Previously this work was done by Mr and Mrs McArdle.

23. The first claimant was interviewed for a job at Fosfelle 27 March 2016. Her partner, the second claimant, was in also attendance.

24. The respondents say only one job was on offer for the first claimant, being paid at a fixed 30 hours at the rate of £7.50 per hour. Because Miss Price's partner was much better at cooking than her it was agreed that he would assist voluntarily in the kitchen without additional payment. In other words, he would do this work instead of Miss Price but she would be paid for it.

25. On 27 March 2016 the claimants emailed Mr McArdle saying, "We would be very interested in taking on the management of the restaurant, cottages and campsite and feel that we have the necessary experience and drive to help it reach its potential". They went on to say that the job would only work with them living on site (63).

26. The email ended thus, "We know, having done this kind of thing before it is likely that the hours are going to be more than those offered but we are happy to do what it takes. We understand that you have a limited budget so the wage of £7.50 per hour for 30 hours is fine but we would like to negotiate on the £80 per week rent for the caravan. Having said that, if you feel that we are the right people for you then we would love to take on the challenge. Let me know what you think."

27. After the first interview Miss Price made notes in preparation for a further meeting to discuss the job (64). Within the notes she indicated that both claimants would need a guarantee of increased income based on an improved revenue.

28. The claimants say that although it was agreed at a further meeting on 31 March 2016 that Miss Price would be the one officially employed, the agreement was that this would be regularly reviewed and as they built the business the pay would increase and at that point Mr Reynolds would then also become officially employed.

29. The respondents' version of events is that initially there was never an agreement to pay any more than 30 hours per week and that only Miss Price would be employed.

30. In the event, both claimants took up residence on the respondent site at an agreed rent of £70 per week, which was negotiated down from £80. The first claimant says, and I accept, that she never requested that rent be deducted from her salary. She gave clear and cogent evidence about this issue.

31. The first claimant started work on 11 April 2016. She was initially paid for 30 hours per week at £7.50 per hour and £70 rent was deducted from her salary by the respondents. She was paid by Nacrogate and it is agreed that this was her employer at all material times. There was no set pattern to the hours she worked. The hours were on an as required basis.

32. Mr McArdle says that on 28 April 2016 the first claimant was handed a copy of a written contract of employment and asked to sign and return it (49). The claimant says

she was never given any such written contract and the first time she saw the document was when it was given to her in the course of these proceedings.

33. All parties agree that the claimant never signed or returned any such contract. It also does not appear that the respondents chased the signed version from the claimant. Although later on there was some dispute about the terms on which the claimant was employed and how much money she was owed Mr McArdle made no reference to the written contract in the many text messages he sent to the claimant. On the balance of probabilities, I accept the claimant's account that she received no written contract of employment.

34. The first claimant complained about additional hours she was working so the respondents say they agreed to pay an additional 10 hours per week backdated to 1 June 2016. Additionally, the first claimant took on a part-time helper in early June to assist her with cottage cleaning, washing up and serving in the bar. However, in the event no additional hours were paid to the claimant although it appears that they stopped charging rent from 1 June 2016.

35. The claimant did a number of tasks including promoting the activities of the company, administrating the site bookings, cleaning cottages at the end of each let and working in the bar and restaurant.

36. Mr Reynolds, the second claimant, also helped out in the bar and restaurant. As both claimants had indicated in their email sent on 27 March 2016, Mr Reynolds's skills were in the kitchen and Miss Price's were front of house (63).

37. During the busy holiday season the respondents agreed to pay the first claimant a bonus which was the equivalent of 10% of the bar takings from the beginning of July to cover what they regarded as "possible extra work".

38. In addition, sums of money were given to the first claimant after a wedding event in May 2016. The first claimant passed on the sums to the second claimant.

39. On 4 August 2016 the first claimant issued what was in effect a grievance (67). She wrote: "At the interview, prior to starting work on 11 April 2016, it was agreed that I would be paid the 30 hours as this was what you could afford to pay at the time. It was made clear that the hours required to turn the business around would be in excess of the hours to be paid but that as the business grew we would receive a share of the profits". The claimant then went on to set out what she regarded as income generated by her. She asserted that they had both jointly worked an average of 75 hours per week.

40. The letter ended saying Mr Reynolds was no longer willing to work in the restaurant and she was only willing to work the 30 hours she was being paid for.

41. At a meeting on 10 August 2016, which was arranged to discuss the complaint and attended by both claimants, the first claimant was dismissed. Four weeks' notice was provided together with two months' notice to quit the accommodation.

42. During the meeting, the claimants requested outstanding monies for work done including that done by Mr Reynolds.

43. The day after, on 11 August 2016, Mr McArdle texted Miss Price asking for a breakdown of Mr Reynolds's hours, dates and times (102). Miss Price replied saying that he had worked for 382 hours and that her additional hours in the same period were 242.

44. On 17 August 2016 Mr McArdle wrote to Miss Price confirming that she would be dismissed and that her last working day would be Sunday, 4 September 2016 (71). Miss Price wrote the next day disputing the notice period. In the same letter she said she was still awaiting a response in respect of unpaid hours worked by both her and Mr Reynolds.

45. On 25 August 2016 Mr McArdle texted the claimant indicating he had a cheque for her awaiting collection. He subsequently texted saying that he was deducting 60.5 hours as she had failed to turn up for work. Subsequently the claimant queried the deduction and indicated that she had worked during August. Mr McArdle replied saying speak to Acas.

46. On 15 September 2016 Mr McArdle indicated via text that a further deduction of £309.03 would be made for rent and electricity due from 25 August 2016 (109).

47. The claimant says she worked in August and evidences this by hours detailed at page 116 of the bundle. She says that although this was not a contemporaneous record it was done in conjunction with her diary and other documents. It was put to her in cross examination that Mr McArdle would not necessarily know that she was working at this time. The claimant accepted this because she may have been cleaning or doing admin work. Even on the first respondent's case, the first claimant was not required to work a particular number of hours per day. I accept that the first claimant did work her required hours in August 2016 as she says. She was able to answer questions about the work she says she did in a clear and cogent manner.

48. The last day the claimant worked was 25 August 2016.

49. During her employment with the first respondent the first claimant took 3 days holiday. It is agreed that on termination she was owed 7.5 days outstanding holiday.

Conclusions

50. The first issue for me to determine is whether or not the second claimant, Mr Reynolds, was employed by the second respondent. It is admitted by the second respondent that he did some work at its premises but it is said this was on a voluntary basis and under the direction of the first claimant, his partner. Further, they say although money was passed on to him for some events this was done via the first claimant. In other words, they say Mr Reynolds had no obligation to work for them and they had no obligation to pay him.

51. In contrast, both claimants say that there was an agreement that Mr Reynolds would be employed by the second respondent.

52. A contract is a promise, or set of promises, that the law will enforce. In the context of an employment contract, for example, the employee usually promises to perform certain tasks for the employer, who in turn promises to pay the employee wages or a salary.

53. In order for a contract to exist, several conditions must be satisfied. There must be an agreement (usually consisting of an offer which is then accepted) made between two or more people; the agreement must be made with the intention of creating legal relations; and it must be supported by consideration - *i.e.* something of benefit must pass from each of the parties to the other.

54. Individual terms of a contract must be also sufficiently certain for the courts to be able to give them meaning. However, just because a term does not lend itself to precise figures does not mean it cannot be binding.

55. The Court of Appeal in *Stack v Ajar-Tec Ltd 2015 IRLR 474, CA*, held that the absence of express agreement as to the amount of remuneration due to a company director did not preclude the existence of a contract.

56. In *Judge v Crown Leisure Ltd 2005 IRLR 823, CA*, the Court of Appeal held that a 'promise' made by a director at a Christmas party that he would eventually ensure that an employee was placed on roughly the same level of remuneration as other managers was not legally enforceable. The director had said that pay parity was likely to be achieved 'eventually' or 'in due course', which was too vague and uncertain to amount to a contractual promise and was simply a reiteration of his intention of bringing existing managers' salaries into line with that of a new manager.

57. It is accepted by the claimants that there was never any specific agreement over hours and rate of pay in relation to Mr Reynolds. Even if what the claimants say is correct, namely the original agreement was to be regularly reviewed as the claimants built up the business such that the pay would increase and Mr Reynolds would be officially employed, that is a promise of a review and of future employment rather than of employment itself.

58. In any event, I am not satisfied that this was the agreement. In the grievance letter sent on 4 August 2016 Miss Price said it was agreed that the claimants would receive a share of the profits.

59. Although, I accept that Mr Reynolds did do work for which the respondents were the beneficiaries this was not pursuant to any contractual agreement or contract of employment with them. He was not obliged to do any such work and the respondents were not obliged to pay him. In effect, he worked to help out Miss Price.

60. Turning then to Miss Price. The first issue for me to determine is whether or not she should be paid for any hours above the original 30 hours, which later increased from 1 June 2016 to 40 hours per week. I am satisfied that Miss Price did work in excess of those hours.

61. However, the issue is whether or not this work was done in accordance with any contract of employment. Again, the agreement which Miss Price relies on in her witness statement is not a further contract of employment beyond the original 30 or 40 hours, but rather a review of that contract. In fact, the contract was reviewed such that the hours went up from 30 to 40 hours. Further, as I have pointed out in her grievance letter of 4 August 2016 she makes reference to a share of the profits rather than being paid for additional hours.

62. Overall, I am not satisfied that there was any agreement to pay the claimant in excess of the 30 or 40 hours per week.

63. However, even on the respondents' case, as set out in their response at page 33, as of 1 June 2016 her hours were increased to 40 per week. I am satisfied, having made reference to the first claimant's evidence of the hours she worked set out in the bundle, that she did work at least 40 hours per week. It is agreed that the first claimant was only paid for 30 hours per week from 1 June 2016 contrary to what the respondent says was agreed with her.

64. Section 13(1) Employment Rights Act 1996 ("ERA") states that: 'An employer shall not make a deduction from wages of a worker employed by him.' However, it goes on to make it clear that this prohibition does not include deductions authorised by statute or contract, or where the worker has previously agreed in writing to the making of the deduction - S.13(1)(a) and (b).

65. A deduction is defined in the following terms: '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… as a deduction made by the employer from the worker's wages on that occasion' - S.13(3).

66. Section 23(1) of the ERA gives workers the right to complain to an employment tribunal about deductions from wages or payments received by employers that are not permitted under the Act and to seek reimbursement of the sums involved.

67. There was never any agreement, written or otherwise, to deduct £70 rent from the first claimant's salary from 11 April to 1 June 2016. Accordingly, the respondent unlawfully deducted seven weeks rent totalling £490.

68. Further, although it is the respondents' case that she be paid for 40 hours per week from 1 June onwards the first claimant was only paid for 30 hours. Accordingly, I award and additional 80 hours for 8 weeks from 1 June to 31 July which amounts to £600. Neither party took issue with this calculation.

69. At the end of her employment 60.5 hours was unlawfully deducted for work which the claimant did. This amounts to a further £453 .75.

70. In addition, rent and electricity was unlawfully deducted from her final pay packet in the sum of £309.03.

71. It is agreed that the claimant is owed 7.5 days holiday outstanding on termination of her employment. At £60 per day this equates to an agreed amount of £450.

72. Section 207A(2) TULRCA provides that: "If, in any proceedings to which this section applies, it appears to the employment tribunal that – (a) the claim to which the proceedings relate concerns a matter to which a relevant code of practice applies, (b) the employer has failed to comply with that code in relation to that matter, and (c) the failure was unreasonable, the employment tribunal may, if it considers just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25% . An identical provision in respect of any failure to comply by an employee is set out in 207A(3).

73. The ACAS code on grievances provides, among other things, that grievances must be raised in writing, employers should arrange for a formal meeting to be held and allow the employee to be accompanied at the meeting and the employee should be informed that they can appeal if they are not content with the action taken.

74. The claimant outlined some but not all of her concerns in a letter dated 4 August 2016. Subsequently, the respondents had a meeting with the claimant. They replied in writing although did not offer the claimant and appeal. To some extent, therefore it could be said that neither fully complied with the ACAS code on grievances. However in the circumstances I do not regard their failures as being unreasonable. This was a small employer with no written procedure. Accordingly I make no uplift or deduction in this regard.

75. Finally, in accordance with section 38 Employment Act 2002 I award an additional two weeks' pay for failure to provide a written contract of employment. This amounts to a further £600. It was important for the claimant to be provided with a written contract of employment. Had she been provided with one some of the disputes which arose in this case might not have arisen. Balanced against that, the claimant had not been employed by the respondent for long. Accordingly, I regard two weeks as the appropriate level of award.

Employment Judge Pirani
20 April 2017
Sent to the parties on:

24 April 2017