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EMPLOYMENT TRIBUNALS

Claimant ***Respondent***

Miss G Pavan **AND** Ms Nicola Greer

FINAL HEARING

HELD AT: London Central Employment Tribunal **ON:** 11 January 2019

BEFORE: Employment Judge Brown (Sitting alone)

Representation:

For Claimant: In person
For Respondent: In person

JUDGMENT

T**he Judgment of the Tribunal is that:**

1. The Respondent made the following unlawful deductions from the Claimant's wages; £145 in relation to taxi journey hours in September 2017, £121.25 in relation to taxi journey hours in October 2017 and £137.50 in relation to 11 lunch breaks hours taken when the Claimant was an independent contractor between April 2017 and July 2017.

2. The Respondent did not make any other unlawful deductions from the Claimant's wages.

3. The Respondent shall pay the Claimant £403.75 on account of unlawful deductions from wages.

REASONS

1. The Claimant brought a complaint of unlawful deductions from wages against the Respondent, who is the proprietor of a nursery school.

2. The Claimant presented her ET1 claim form to the Employment Tribunal on 22 December 2017. Judgment in Default was entered in the claim, but it was later reconsidered and set aside, because the Respondent had not

received the relevant documents and had not had the opportunity to defend the claim.

3. The claim therefore came before me for a fresh Hearing, today, 11 January 2019.

4. At the start of the Hearing, I identified the issues between the parties. The parties agreed that the Claimant had been a worker for the Respondent in September and October 2017, within the meaning of *s230(3)Employment Rights Act 1996.* Previously, the Claimant had been engaged by the Respondent as an independent contractor between April and July 2017. The parties agreed therefore that it was for me to decide whether or not the Claimant had been paid less, in September and October 2017, than she should have been paid at the contractual rate of pay agreed between the parties at the beginning of her employment as a worker in September 2017.

5. I heard evidence from the Claimant and I heard evidence from Nicola Greer.

6. I found as follows. The Claimant was engaged by the Respondent as an independent contractor between April and July 2017. During that period, the Claimant was paid at an agreed rate of £12.50 per hour gross. The Claimant paid her own tax and national insurance.

7. In July 2017, the Claimant enquired whether she could be "put on to a contract"; in other words, whether she could start being paid a salary and effectively become an employee. The Respondent sent the Claimant an email in July 2017, agreeing to do this, but saying that the Claimant would be paid a lower rate of pay because, for example, she would become entitled to holiday pay. The Claimant told me that she understood that, when she became an employee, she would be paid less because she would become entitled to holiday pay, but also that tax and national insurance would be deducted from her pay before it was paid to her.

8. The Respondent told me that Teaching Assistants are paid on a "term time basis" and that they are paid so that they accrue one day's holiday for each of five days worked. The Respondent told me, and I accepted, that Teaching Assistants' pay is then averaged over the term time plus holiday time, so that employees receive less per week than they would do if they were simply paid in term time only. The Respondent explained her calculations of pay to me and I accepted that she paid the Claimant the equivalent of £12.50 gross per hour when the Claimant became a worker, but that pay was averaged over term time plus the holiday period, so that the Claimant was in fact paid £8.46 per hour, over the whole of the period over which the pay was averaged. I accepted that this calculation by the Respondent, of the Claimant's basic wage during her employment as a worker, was correct.

9. There was a disagreement between the parties, however, about the correct rate of pay for the Claimant's work when she was accompanying taxi journeys during her employment as a worker. The Claimant told me that she

had agreed with the Headteacher of the school, her Line Manager, that the Claimant would be paid at £12.50 per hour for those taxi journeys. The Claimant told me that the taxi journeys took one hour each, at the beginning and end of the relevant days.

10. Miss Greer told me that she had discussed the matter with the Headteacher at the time and had advised the Headteacher that the taxi journeys would only be paid at £7.50 per hour. She told me that the Headteacher had confirmed to her, afterwards, that the Claimant had agreed to undertake the journeys on that basis.

11. As stated, the Claimant told me that the Headteacher agreed with her that the taxi journeys would be paid at £12.50 per hour. The Claimant was the person who had the relevant conversation with the Headteacher; Miss Greer was not. While the Headteacher may have assured Miss Greer that she understood that the Claimant would be paid £7.50 an hour, given that the Claimant was present during her own conversation with the Headteacher, I found that the Claimant was a more credible witness as to the conversation and I accepted her evidence, rather than Miss Greer's, who was not there at the relevant time. I therefore found that the Headteacher, on behalf of the Respondent, agreed to pay the Claimant at the rate of £12.50 an hour for the taxi journeys.

12. Miss Greer told me that she made deductions of £145 for September 2017 taxi journeys, representing what she considered to be an overpayment of £5 per hour for each of the hours during which the Claimant undertook taxi journeys in September. She told me that she deducted £121.25 for the taxi journeys in October 2017, again representing the £5 per taxi journey hour that she considered the Claimant had been overpaid. I have found that the Claimant was entitled to £12.50 per hour and, therefore, that the Respondent should not have made the deductions from the Claimant's wages.

13. Furthermore, the Respondent told me that she made deductions from the Claimant's wages for 11 lunch hours for which the Claimant had been paid in the period April to July 2017, when the Claimant was employed as an independent contractor. The rate of pay was £12.50 per hour. 11 x £12.50 = £137.50. The Respondent deducted £137.50 in respect of lunch hours for which the Claimant had claimed pay, but for which the Respondent said that she was not entitled to be paid.

14. By *s.13 Employment Rights Act 1996,* 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 a statutory provision or 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.

15. By *s.14 Employment Rights Act 1996, s.13* does not apply to a deduction from a worker's wages, "made by his employer where the purpose of the deduction is the reimbursement of an employer in respect of –

(a) an overpayment of wages or
(b) an overpayment in respect of expenses incurred by the worker in carrying out his employment made for any reason by the employer to the worker."

16. Accordingly, *s.14 Employment Rights Act 1996* allows employers to make deductions from workers' wages in respect of overpayment of wages. By *s27 ERA 1997,* "(1) In this Part "wages" in relation to a worker, means any sums payable to the worker in connection with his employment." I consider that the reference to "wages" in *s14 ERA* must be to wages paid in the worker's employment; it does not apply to payments made, to the person when engaged as an independent contractor in a different employment relationship. I therefore find that the Respondent was not entitled to make deductions from the Claimant's wages in respect of payments made in a different employment relationship, when the Claimant was an independent contractor and not a worker receiving wages from the Respondent.

17. The Respondent said that, with regard to the taxi journeys, the Claimant had been told that the rate was £7.50 on or about 19 October 2017, but had continued to undertake the taxi journeys thereafter. It appeared to me, however, that the Claimant resigned her employment very quickly thereafter and that the parties were, at that point, in dispute about the correct rate of pay. I did not consider that, when the Claimant continued to undertake taxi journeys for a short time, she indicated any consensual variation of the agreement between the parties regarding day for taxi journeys. I therefore considered that unlawful deductions were also made for the period after 19 October 2017.

18. Accordingly, I found that the Respondent made the following unlawful deductions from the Claimant's wages, £145 in relation to taxi journey hours in September 2017, £121.25 in relation to taxi journey hours in October 2017 and £137.50 in relation to 11 lunch break hours taken when the Claimant was employed as an independent contractor between April 2017 and July 2017.

19. The Respondent did not make any other unlawful deductions from the Claimant's wages.

20. I order the Respondent to pay to the Claimant £403.75 on account of unlawful deductions from wages, which is the amount of the deductions that she made in respect the taxi journeys and in respect of the lunch hours in the independent contractor period.

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Employment Judge Brown

Dated:. 30 January 2019

Judgment and Reasons sent to the parties on:
1 February 2019
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For the Tribunal Office