



EMPLOYMENT TRIBUNALS

Claimant
Miss J. Horan

Respondent
Sisters Stationery Limited

v

Heard at: Watford
Before: Employment Judge Heal

On: 23 January 2019

Appearances

For the Claimant: in person.

For the Respondent: Mr. F. Kocan, director.

RESERVED JUDGMENT

1. The name of the respondent is amended, by consent, as above.
2. The complaints of unauthorised deductions from wages (failure to pay national minimum wage and holiday pay) are dismissed.

REASONS

1. By a claim form presented on 24 July 2018 claimant made complaints underpayment of wages and unpaid holiday pay.
2. This matter was listed before me today at 2pm as a one hour full hearing. In fact the hearing lasted from 2:30 pm until 5:56 pm.
3. There were original documents on the tribunal file which had been sent to the tribunal by one party but not sent out to the other. The delayed start until 2:30 pm arose while the tribunal clerk was copying and collating documents to remedy this problem. Thereafter I gave the parties the time to look at the new documents which each had not seen. I was able to start hearing evidence at 2:55 pm.
4. There was on the tribunal file an 'unless order' dated 6 November 2018 ordering the claimant to disclose a schedule of loss, payslips, relevant bank statements, evidence of any attachment of earnings and evidence of working hours and to inform the tribunal whether she accepted that there were attachment of earnings orders in respect of her pay. However, although that order was headed 'Unless Order' it did not specify that if it was not complied with by the date specified, the claim would be dismissed without further order. I decided therefore that the order was not an unless

order in substance. Although it appeared that the claimant had not complied with it in full the claim could not be treated as dismissed on the basis permitted by rule 38.

5. The respondent had produced a bundle running to 37 pages and had also prepared a typed witness statement for Mr Kocan.

6. I was also given copies of the claimant's P45 dated 25 May 2018, copies of the claimant's bank statements from 31 July 2015 to 31 May 2018, historic payslips produced by the respondent for the claimant from 30 November 2015 to 31 March 2017 and 31 March 2016 to 31 March 2017, payroll summaries for the claimant for April and May 2017. There was a certain amount of duplication in the documents with which I was provided.

7. The respondent having produced a bundle and witness statement, I decided with the claimant's consent to hear Mr Kocan's evidence first so that I could gather a clear understanding of at least one party's position at the outset.

8. Mr Kocan gave evidence in chief therefore by means of his prepared witness statement and he was then cross-examined by the claimant and re-examined in the usual way.

9. The claimant did not have a witness statement. I asked her questions to enable her to give her evidence in chief and I then permitted the respondent to cross-examine her. I then gave her an opportunity to give further evidence, effectively in re-examination, arising out of cross-examination.

10. I also heard evidence on the claimant's behalf from:

Mr Paul Wilkins, her partner and
Ms Kim Brooks, retail assistant.

11. Those witnesses gave evidence in chief means of a short witness statement and then they were cross-examined and re-examined in the usual way.

12. The claimant also submitted a written witness statement from Mrs Sarah Lansley who she did not call to give evidence in person. The claimant told me that Mrs Lansley is working today. I have admitted that witness statement in evidence subject to the weight that is appropriate to give it, given that I have not heard Mrs Lansley speak to it and questions about it.

13. The issues I have to decide are these:

13.1 As a question of fact, did the respondent pay the claimant the national minimum wage for the duration of her employment, as the wage slips appear to show, or did the respondent only pay the claimant £50 per day in cash?

13.2 If so, what is the shortfall which the respondent owes to the claimant?

13.3 The claimant says that she took one week off work in 2017 and one week off work in 2018 but was not paid any holiday pay for those weeks. The respondent says

that she was paid each week as the wage slips show, so that she was paid for any holiday taken.

Facts

14. I have made findings of fact on the balance of probability. As I explained to the parties at the hearing I do not possess a fool-proof method of discovering absolute truth. What I have to do is to read and listen to the evidence placed before me by the parties and on that evidence and only that evidence I decide what is more likely to have happened than not. That is what the balance of probability means.

15. The respondent is a limited company which runs a shop selling stationary at the Quadrant in St Albans. The shop is open from Monday to Saturday from 9 am to 5:30 pm.

16. Mrs Brooks was employed as a sales assistant by Mr Kocan's predecessor. Overall, she worked in the respondent business for 22 years. During the final period of her employment she was paid £7.89 per hour which was what she had been paid by the previous owner. She received wage slips. Her wages were paid into her bank account.

17. Mrs Brooks' colleague Ms Johnson was also paid by bank transfer. Both worked for 28 hours per week.

18. In about October 2014 Mr Kocan took over the business. Mrs Brooks did not like Mr Kocan's management style (she found him rude) and she left the respondent in October 2015.

19. Meanwhile, the claimant saw an advert for the vacancy of retail assistant in the window of the respondent's shop at the beginning of May 2015. She went into the shop and spoke to Mr Kocan's wife who described the job to her. After a trial day, the claimant formally began her employment for the respondent on 15 May 2015.

20. Initially, the claimant worked 16 hours per week. The hours varied depending on holidays taken by other members of staff. In general, however the claimant worked two days per week of eight hours per day from 9 am to 5:30 pm with half an hour off for lunch.

21. Mr Kocan paid the claimant in cash weekly, taking the money from the till. He did not ask for and the claimant did not give him a receipt. There was no book or other method of recording the sums paid. The claimant has a bank account but she did not pay these cash sums into it. She told me that she used to go directly to the post office which stays open until 10 pm and there she would pay her rent and pay £10 each on a gas and electricity card. She had no document at the tribunal to record these transactions. The remainder of the cash each week, she says she would spend on shopping, putting petrol in her car or providing school dinner money for her children. She did not put the money in her bank account because this would have involved a trip into the middle of St Albans and parking in the middle of town is expensive. She did not ask Mr Kocan to pay the money directly into her bank account.

22. The respondent has no time sheets and no rotas which record the hours worked by staff. There is a year planner on the wall, but that has not been kept.

23. There is therefore no record or paper trail whatsoever to provide evidence of the hours worked or the cash sums that were paid from the respondent to the claimant each week.

24. From May to September 2015 the claimant worked part-time two days per week and sometimes three days per week.

25. Two members of staff, Mrs Brooks and Ms Johnson left in the same week. The claimant asked Mr Kocan if she could work full-time and he agreed.

26. The claimant says she began to work 40 hours per week with one day off from the week on the first week in October 2015. Mr Kocan says that she worked 30 hours per week over 3.5 days per week.

27. The claimant says that she was paid £50 per day. Mr Kocan says that he paid her the national minimum wage as it changed from year to year.

28. The claimant accepts that she was given the wage slips which show her being paid the national minimum wage as appropriate from time to time. She knew, she said, that the sums shown on the wage slips were not correct. She says that she did nothing about the inaccuracy because she was suffering from depression and was grateful to get out of the house and start a new job.

29. On the balance of probability (and only on the balance of probability) I consider it more likely than not that the respondent did pay the claimant the sums shown on the wage slips and therefore did pay her the national minimum wage and pay her during her holidays as shown. I accept that the claimant worked 30 hours per week. Almost the only area in which the two sides agree is that wage slips were given to the claimant monthly and that they showed these figures. This therefore is the only contemporaneous record available of the payments made.

30. The wage slips do not separately identify holiday payments, but they show weekly payments, so if the wage slips record accurately the payments made, it follows that the claimant was paid for any holidays taken.

31. It seems to me highly unlikely that the claimant would accept cash payments which were so very different from the sums being shown on the wage slips from May 2015 to 18 May 2018 when she left, without ever questioning the discrepancy or trying to correct it.

32. I do find therefore that the respondent paid claimant the sums shown on wage slips. This involves the unpalatable result that I have to reject the evidence of Mr Wilkins and Mrs Brooks, pleasant and apparently straightforward though those witnesses were. It is possible that Mr Wilkins gave evidence in the claimant's favour because he is her partner and it is possible that Mrs Brooks gave evidence for the

claimant because she disliked Mr Kocan. Whether or not that is the case, I take the difficult step of rejecting their evidence on balance for the reasons I have set out above.
33. There has been some evidence about an attachment of earnings order, but nothing has turned on that, so I make no findings about it.

34. For the reasons set out above, I find that the respondent did pay the claimant the national minimum wage and pay her for her time on holiday. Accordingly I dismiss the complaint of unauthorised deductions from wages and unpaid holiday pay.

Employment Judge Heal

Date: 31.1.2019

Sent to the parties on: 5.2.2019

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For the Tribunal Office