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# EMPLOYMENT TRIBUNALS

**Claimant:** Miss L Patten  
**Respondent:** A Stars Nursery Limited  
**Heard at:** East London Hearing Centre  
**On:** 25<sup>th</sup> February 2019  
**Before:** Employment Judge Reid

## Representation

**Claimant:** Did not attend  
**Respondent:** Mrs F Ojuade (former administration manager of the Respondent)

# JUDGMENT

The judgment of the Tribunal is that:-

1. The Respondent made an unauthorised deduction from the Claimant's wages contrary to s13 Employment Rights Act 1996 by not paying her wages on 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> June 2018. The Claimant is therefore entitled to three days' pay for these dates, being £120 (5 hours a day x £8 per hour x 3 days).

Oral judgment was given at the end of the hearing but written reasons are also now given because the Claimant did not attend the hearing.

# REASONS

## Background and claim

1 The Claimant brought a claim for unpaid wages for 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> June 2018 on a claim form presented on 5<sup>th</sup> August 2018. The reference to holiday pay in the Tribunal letter dated 9<sup>th</sup> January 2018 is an error because the claim form did not contain a

claim for holiday pay but did refer to the Claimant's complaint that her rest breaks had been unpaid.

2 The Claimant did not attend the hearing having notified the Tribunal by email dated 13<sup>th</sup> February 2018 that she would not be attending for two reasons, firstly because of childcare issues and secondly because she did not want to see Mrs Ojuade. I considered whether to explore with the Claimant whether another date might resolve the childcare issues but concluded that another date would not resolve the second problem of having to see Mrs Ojuade. The hearing therefore proceeded in the absence of the Claimant pursuant to Rule 47 of the Tribunal Rules 2013.

3 Mrs Ojuade attended the hearing on behalf of the Respondent. The nursery operated by the Respondent at which the Claimant worked has closed and Mrs Ojuade is no longer employed by the Respondent. However, the owner of the Respondent Ms Mariam Ikaan had asked Mrs Ojuade to attend on behalf of the Respondent.

4 While the nursery has closed there was no evidence that the Respondent has yet been wound up, Mrs Ojuade saying that the accountant was finalising the final accounts. The fact that the Respondent wanted to pursue the Claimant for unpaid nursery fees for her own child was consistent with outstanding liabilities and claims still being dealt with and not consistent with the Respondent having been wound up and no longer existing as a legal entity.

5 In addition to the oral evidence of Mrs Ojuade, the Claimant had provided the following evidence: emails dated 17<sup>th</sup> and 19<sup>th</sup> November 2018 setting out her statement and attaching two relevant documents (May 2018 payslip and P46) and an email dated 19<sup>th</sup> November 2018 from Ms Jenny Bond of Thurrock Council saying she had seen the Claimant at work on 6<sup>th</sup> June 2018. It emerged that Mrs Ojuade had not seen any of these documents (despite the Claimant saying she had delivered copies of the payslip and P45 to the Respondent) and I therefore provided copies to her and gave her time to read them.

6 I identified with Mrs Ojuade that the Respondent accepted that the Claimant had worked on 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> June 2018 and should be paid for those days. The Respondent did not however accept that the Claimant should be paid for 2<sup>nd</sup> June 2018 which was a Saturday, a day the Respondent said she was not obliged to work because the nursery was closed.

7 I also clarified with Mrs Ojuade that it was not the Respondent's case that the Claimant had agreed to deductions from her wages to account for the reduced childcare costs she paid in order to take her child to work with her. The Respondent's case was that this was a separate arrangement and that the Claimant had failed to pay the agreed contribution (though the Claimant said it was agreed to be totally free). This therefore had no bearing on her wages claim because the Claimant was in a situation akin to any other parent from whom fees may be due.

### **Findings of fact**

8 The Claimant was not paid for working on 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> June 2018, her last three days at work before she resigned. These three days were the first three days of a week in

which the Claimant had been asked to do a trial of the manager's role, following an Ofsted report which required a more experienced employee as manager. Her P45 was therefore wrongly dated 31<sup>st</sup> May 2018 because her employment did not terminate until she resigned late on 6<sup>th</sup> June 2018.

9 Taking into account Mrs Ojuade's oral evidence I find that the Claimant's rate of pay for those three days was still £8 per hour because the Respondent had not agreed that the new salary of £17,000 pa for the manager's role, which role the Claimant was on a trial for that week, would apply during the trial period; it was only if she passed the trial period that her salary would go up. I find that they discussed increasing her salary but that this was subject to successful completion of the trial week in the manager's role.

10 As regards Saturday 2<sup>nd</sup> June 2018 I find based on the evidence before me that there was no contractual obligation on the Claimant to go into work on a Saturday when the nursery was closed and there were no terms regarding payment of overtime. I find based on Mrs Ojuade's oral evidence that the Claimant was issued with an employment contract when she started which contained no such obligations. Unfortunately, Mrs Ojuade did not bring and could not access electronically the Claimant's contract and she did not know where the signed contract now was, given the closure of the nursery. However, the Claimant in her claim form did not say that the Respondent had agreed to pay her if she went into work at a weekend or claim any contractual entitlement to overtime; instead her claim was couched in terms of the unfairness of not being paid when she went in on a weekend or stayed late/went in early. I find that if the Claimant did go into work on Saturday 2<sup>nd</sup> June 2018 it was not because the Respondent required her to do so and if she did go in it was voluntarily and unpaid.

11 The Claimant also complained that her rest breaks had been unpaid. I find based on Mrs Ojuade's oral evidence that she was entitled to two 30 minute breaks during the day and that this was provided for in the contract of employment, stating they were unpaid. Rest breaks under the Working Time Regulations 1998 do not have to be paid, although they often are.

### **Relevant law**

12 Under s13 Employment Rights Act 1996 an employer cannot make an unauthorised deduction from wages which includes not paying the employee at all.

13 Under Regulation 12 of the Working Time Regulations 1998 a worker is entitled to a rest break of at least 20 minutes but it does not have to be paid unless the employer agrees that it will be paid.

### **Reasons**

14 Taking into account the above findings of fact the Claimant is entitled to be paid for 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> June 2018. She is not entitled to be paid for Saturday 2<sup>nd</sup> June 2018.

15 Taking into account the above findings of fact the Claimant is not entitled to be paid for the rest breaks she took during her employment.

Employment Judge Reid

4 March 2019