



EMPLOYMENT TRIBUNALS

Claimant: Ms S Clarke
Respondent: KLOO Ltd trading as Bargain Booze
Heard at: Leeds **On:** 10 May 2019
Before: Employment Judge Davies
Representation
Claimant: In person
Respondent: Mr B Singh (director)

RESERVED JUDGMENT

1. The Tribunal does not have jurisdiction to deal with a claim about entitlement to statutory sick pay and the Claimant's claim of unauthorised deduction from wages relating to non-payment of statutory sick pay is dismissed for that reason.
2. The Claimant's claim for notice pay is dismissed on withdrawal by her.
3. The Claimant's claim for 12 hours' holiday pay is well-founded and succeeds. The Respondent shall pay the Claimant **£93.96**.
4. The Respondent's claims for breach of contract in respect of uniform that was not returned, overpaid wages and holiday and losses associated with thefts from the premises are not well-founded and are dismissed.

REASONS

Introduction

- 1.1 The Claimant brought claims of breach of contract and unauthorised deductions from pay. Her pregnancy discrimination claim had previously been dismissed on withdrawal. The Respondent also brought an employer's contract claim. I discussed the claims with the parties at the start of the hearing. The position was as follows:
 - 1.1.1 The Claimant wanted to claim unpaid statutory sick pay from 17 September 2018 onwards. The Respondent said that she was not entitled to statutory sick pay because her earnings in the preceding 8 weeks did not meet the required threshold. I explained to the parties that the Tribunal cannot deal with this type of complaint about entitlement to statutory sick pay. The Claimant needs to raise that with HMRC. That is the effect of the *Statutory Sick Pay and Maternity Pay (Decisions) Regulations 1999* SI 1999/776: see e.g. *Taylor Gordon & Co Ltd v Timmons* [2004] IRLR 180, EAT. That claim is dismissed because the Tribunal cannot deal with it.

- 1.1.2 The Claimant confirmed that she gave two weeks' notice and is not claiming notice pay. That claim is dismissed because the Claimant is not pursuing it.
 - 1.1.3 The Claimant was claiming for 12 hours' holiday pay for holiday she took starting on 4 August 2018. She was paid some holiday pay but she says she was underpaid by 12 hours. The Respondent says that the Claimant had already taken more leave than she had accrued, so she was not entitled to be paid.
 - 1.1.4 The Respondent was claiming for the cost of a cardigan (£26) it says it gave to the Claimant at the start of her employment, which she has not returned to it. The Claimant says that she was never given a cardigan.
 - 1.1.5 The Respondent was seeking to recover an overpayment of wages for the week ending 29 July 2018. It said that the Claimant worked 13 hours 15 minutes but was paid for 25 hours 15 minutes because of a payroll error. The Claimant said that she worked the 25 hours 15 minutes.
 - 1.1.6 The Respondent was seeking to recover holiday pay on the basis that the Claimant had taken and been paid for more holiday than she had accrued when her employment ended. It said that she had taken 71 hours' holiday and had only accrued 53 hours, so she had been overpaid by 18 hours (£140.94). It said that it was entitled to recover that sum from her under clause 5 of the Claimant's employment contract.
 - 1.1.7 The Respondent was seeking to recover £330.92 from the Claimant, which was the cost of 8 bottles of gin stolen from the shop when she was on duty. The Respondent said that she neglected her duties, which allowed the thief to steal the gin. It said that it was entitled to recover that sum from her under clause 5 of her employment contract.
- 1.2 At the hearing, the Claimant represented herself. The Respondent was represented by Mr B Singh, one of the directors, with help from his wife Mrs N Saini, the other director.
 - 1.3 At a preliminary hearing EJ Keevash had ordered the Respondent to produce a joint file of both parties' documents. The Respondent had produced a file containing only its own documents. The Claimant had brought her own documents with her. Although I explained that it was not satisfactory that EJ Keevash's clear order had been disregarded, I made arrangements for all the necessary documents to be copied so that we could proceed with the hearing. Likewise, the parties had not produced witness statements. However, I agreed that they could give oral evidence and be questioned about it.
 - 1.4 I heard evidence from the Claimant on her own behalf. For the Respondent I heard evidence from Mr Singh and Mrs Saini.

The issues

- 2.1 The issues to be decided at the hearing were as follows:
 - 2.1.1 When the Claimant took annual leave starting on 4 August 2018, should she have been paid at the rate of 12 hours' pay per week or 24 hours' pay per week?
 - 2.1.2 Did the Respondent give the Claimant a cardigan at the start of her employment and, if so, is it entitled to £26 damages for breach of contract for her failure to return it?

- 2.1.3 How many hours did the Claimant work in the week ending 29 July 2018?
- 2.1.4 Is the Respondent entitled under clause 5 of the contract to recover damages for breach of contract from the Claimant for excess holiday pay paid to her if she had taken more holiday than she had accrued when her employment ended?
- 2.1.5 If so, had the Claimant taken more holiday than she had accrued? By how much was she overpaid?
- 2.1.6 Is the Respondent entitled under clause 5 of the contract to recover damages for breach of contract for losses caused by theft of gin when she was on duty?
- 2.1.7 If so, did the Claimant breach the contract and what losses did the Respondent suffer as a result?

The Facts

- 3.1 The Respondent is a small business operating as a post office and off-licence. The directors are Mr Singh and Mrs Saini. The Claimant worked for them as a shop assistant. She was paid £7.83 per hour. She signed a contract of employment in September 2017.
- 3.2 Clause 5 of the contract said the following:

Deductions

The employer reserves the right to deduct any outstanding monies you owe to the employer from your pay or on termination, from your final pay. This includes any previous error or overpayment, loan, holiday or time off in lieu taken but not yet accrued, the cost of damages or losses attributable to your negligence or dishonesty.

For the purpose of Part II of the Employment Rights Act 1996 and otherwise, you consent to the deduction of any sums owing by you to the employer at any time from your salary to compensate for cash shortages and stock deficiencies during the hours/days worked by you. The employer may only deduct up to 10% of the gross amount payable to you on the pay day upon which any deduction is made. The employer can make a series of similar deductions on each subsequent payday until the value of the cash shortage or stock deficiency is repaid.

Should your employment terminate while a part of any cash or stock deficiency remains outstanding, the employer reserves the right to recover the balance in full from your final pay.

- 3.3 Holiday was dealt with in clause 8 of the contract. The holiday year started on 5 April and ended on 4 April. The contract said that the Claimant's annual holiday entitlement was 5.6 weeks, or pro rata to the proportion of the year completed. She would be paid at her normal rate of pay for annual holiday. Clause 8 said that employees would not be able to take more than 10 working days' holiday at a time save in exceptional circumstances and that holiday requests would be dealt with on a first-come first-served basis. Clause 8f said that employees were encouraged to take their full holiday entitlement within the year and that payments in lieu and carrying holidays over would not be permitted. The contract did not say that employees had to accrue their holiday before they were allowed to take it.
- 3.4 Clause 12 of the contract said that the Claimant would be provided with an official uniform when she joined which would be signed for by both parties. At termination of her employment she was required to hand over the uniform in a good state and failure to do so would result in deductions from her final salary.

- 3.5 The Claimant was given some uniform when she started work. She signed to say that she had received a long-sleeved shirt and a short-sleeved shirt, a polo shirt, a scarf, a cardigan and a jacket. The Claimant's evidence was that Mrs Saini gave her her uniform in a bag, which she took home. She did not check what was in the bag until she got home. When she checked, she realised that she did not have a cardigan. She said that she rang the shop and spoke to someone called Jo to let her know. She was told that was fine and nothing else was said. She did not check the bag before she went home because she trusted everything would be there.
- 3.6 Mrs Saini gave evidence that she remembered giving the Claimant her uniform. All the uniform was kept in a case and when a new staff member started she would delve around in it for the items and put them in a carrier bag. She fairly accepted that she could not say one hundred percent that she put a cardigan in the bag for the Claimant. She did not remember any conversation with Jo. She accepted that she had never seen the Claimant in a cardigan at work. She was mainly in her fleece jacket.
- 3.7 I accept the Claimant's evidence that she was not given a cardigan. She had a clear recollection. I accept that she signed the document without checking and that she telephoned as soon as she realised something was missing. Mrs Saini could not actually remember putting a cardigan in the bag so it is possible she had overlooked it. The Claimant had never worn a cardigan to work. In all the circumstances, I am satisfied that this is because she had not been given one.
- 3.8 In about April 2018 a thief stole gin from the Respondent's premises on three separate occasions. I saw CCTV footage of two occasions. On those occasions the Claimant was serving customers. To her side and slightly behind her were the shelves of gin. The thief concealed two or three bottles in his jacket and walked out. Mrs Saini said that on the third occasion the Claimant was looking at the newspaper book and there was nobody else in the shop. The Claimant accepted that she had seen CCTV footage along those lines at the time.
- 3.9 In fact, when the thefts were discovered Mrs Saini called the Claimant into the back room and gave her a letter terminating her contract. The Claimant took a day off and then attended the premises to say that she was unhappy about being dismissed. The letter of dismissal was ripped up and she was told to be extra vigilant in future. She was given a final written warning. There was no suggestion that the Respondent would or could pursue her for the losses.
- 3.10 Mrs Saini explained to me how the payments and invoice system operates. I accept that the thefts led to actual losses of £330.92 suffered by the Respondent. However, there was no suggestion at the time that the Respondent would make deductions from the Claimant's wages to recover those losses. Mr Singh said in his evidence that this was because the Claimant was already paying him back some money she had borrowed. However, he accepted that she had repaid that loan in full by the end of June. Still no suggestion was made that deductions would be made from the Claimant's wages. It was not until September when the Claimant was off sick that a letter was written to her saying that she was liable for the loss of £330.92 and asking her to confirm how she wished to settle the loss.

- 3.11 Returning to the chronology, there was a dispute about the number of hours the Claimant worked in the week ending 29 July 2018. The Claimant said that she worked 25 hours. She had a copy of her diary for that week. She always wrote the hours she was due to work from the rota into her diary. She used her diary to help her fill in her timesheets. If there was any change from the rota she would change it in her diary. The Claimant's diary entries indicated that she had worked on 23, 24, 25, 26 and 27 July 2018 and had worked a total of 26.15 hours. There was reference to a medical appointment for her son on 23 July 2018.
- 3.12 The Respondent produced a copy of the Claimant's timesheet for that week, which had been signed by her. That suggested she had only worked on 26 and 28 July 2018, for a total of 13 hours 15 minutes. The Claimant had signed the timesheet. She was asked about this in her evidence. The Claimant said that the timesheet was wrong. She had no idea why. She said, for example, that she remembered taking her child to the medical appointment recorded in her diary and dropping him with his grandparents afterwards so she could go to work. She was sure she had worked the hours written in her diary. That was reflected in the amount she was paid.
- 3.13 Mr Singh had produced a copy of his diary. It had different names written in for different days and he explained that he would write down any day on which a member of staff was unavailable to work. The Claimant's name was written for 23, 24 and 25 July 2018. He said that he had discovered when preparing for these proceedings that payroll had mistakenly paid the Claimant for more hours than they should have done. He produced a copy of a report he said was sent to payroll. It said that the Claimant worked 13.15 hours that week.
- 3.14 The burden of proof is on the Respondent to show on a balance of probabilities that the Claimant was overpaid. I am not satisfied on that basis that she was. It is clear that some of the documents must be incorrect, and that one or other party's evidence is mistaken or inaccurate. The Respondent has not shown on a balance of probabilities that its version of events is correct. I preferred the Claimant's oral evidence. She produced her diary and had a clear recollection of particular details, such as her son's appointment. In addition, the amount she was paid in fact reflected the entries in her diary (less 1 hour). Mr Singh's evidence generally was not convincing. He gave inconsistent answers and was unable to explain certain things, for example why he told HMRC that he had paid the Claimant statutory sick pay when he had not. His evidence about the hours the Claimant worked was based on the documents, not on any recollection of the hours she worked. I do not know why the copy of the Claimant's timesheet appears to show that she signed to say she had worked only 13.15 hours. That could have been mistake, oversight or some other reason. However, on the basis of the evidence before me I find that the Claimant worked the 25 hours for which she was paid in that week.
- 3.15 I have mentioned that the Claimant was off sick in September. I do not need to go into the detail. She went off sick on 16 September 2018. She did not in fact return to work after that date. She gave notice eventually and her employment ended on 26 November 2018.
- 3.16 I turn lastly to the question of annual leave. The Claimant accepted that she took annual leave on 5, 6, 9, 10, 11 and 12 April 2018 amounting to 30 hours. She took

a further day's leave (5 hours) on 7 May 2018. She also took holiday (for which she was paid) on 6, 7, 13, 14, 15 and 16 August 2018 amounting to 36 hours in total (6×6). There was no dispute, therefore, that she was paid for 71 hours' holiday.

- 3.17 Dealing specifically with the Claimant's annual leave in August 2018, she took 2 weeks (10 days) off work. She had carefully calculated her average hours worked over the preceding 12 weeks. She regularly did overtime and this was reflected in her pay. The calculation showed that the Claimant had worked and been paid for an average of 24.27 hours per week in the 12 weeks prior to this period of annual leave. I accept that as accurate. She said that she was paid for only 12 hours in respect of the first week's leave. She raised it with Mr Singh and he paid her 24 hours for the following week. However, he did not correct the payment for the first week.
- 3.18 Mr Singh gave evidence that the Claimant was not paid for those 12 hours because she had already taken more holiday than she had accrued. He was asked whether the Claimant's contract said that she had to accrue her holiday before she could take it. He said that it did not. When Mr Singh was asked why he had paid the Claimant for 24 hours in the second week he said that he wanted to look after his staff. The Claimant said that she was never told she had taken too much holiday and that she was given the year to take her holidays. She was never told that if she took more than she had accrued she would have to pay it back.

Legal Principles

- 4.1 Claims for unlawful deduction from wages are dealt with by sections 13-27 Employment Rights Act 1996. Under s 13(1), an employer shall not make a deduction from a worker's wages unless authorised to do so by statute, the contract or a prior written agreement with the worker. Under s 13(3), where the total wages paid on any occasion is less than the total amount of wages properly payable to the worker on that occasion, the amount of the deficiency is treated as a deduction made by the employer from the worker's wages. Section 23 gives the worker the right to complain to an employment tribunal about a deduction from wages. That includes underpaid holiday. Sections 17 to 22 deal with circumstances in which deductions can be made from the wages of retail workers to recover cash shortages or stock deficiencies.
- 4.2 An individual's entitlement to paid annual leave derives from the Working Time Regulations 1998 and/or from the contract of employment. The Working Time Regulations say that leave to which a worker is entitled under those Regulations may be taken in instalments but may only be taken in the leave year in which it is due. Under Regulation 15 a worker may take leave on such days as she may elect by giving notice to her employer and an employer may give notice requiring a worker to take leave or not to take leave on particular days. The Regulations do not say that leave must be accrued before it can be taken.
- 4.3 Payment for annual leave is governed by Regulation 16. A worker is entitled to be paid at the rate of a week's pay for each week's leave. A week's pay is determined in accordance with the Employment Rights Act 1996 and case law. It is now well-established that for leave under Regulation 13, that is based on an average of the worker's normal weekly remuneration over the preceding 12 weeks.

- 4.4 Article 4 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 enables employers to claim damages for breach of contract that arise or are outstanding on termination of an employee's employment. Applying ordinary contractual principles, they must show that a term of the contract has been breached and that they have suffered recoverable losses as a result.

Application of the law to the facts

- 5.1 Applying those principles to the findings of fact above, I deal with the issues in turn.
- 5.2 As set out in the findings of fact above, when the Claimant took annual leave starting on 4 August 2018, her average hours over the preceding 12 weeks were 24.27. Nothing in her contract or in the Working Time Regulations said that she could not take the leave unless she had already accrued it. She was taking part of her annual leave entitlement at a time agreed with her employer. She should therefore have been paid in accordance with the Working Time Regulations, i.e. at the rate of 24.27 hours' pay per week. She was only paid on the basis of 12 hours' per week. She calculated the shortfall as £93.96. The Respondent therefore made an unauthorised deduction from her wages of that amount.
- 5.3 For the reasons set out above, I found that the Claimant was not given a cardigan at the start of her employment. The Respondent is not therefore entitled to damages for her failure to return it.
- 5.4 For the reasons set out above, I find that the Claimant worked the 25 hours for which she was paid in the week ending 29 July 2018. The Respondent did not overpay her and it cannot recover damages for breach of contract in respect of any overpayment.
- 5.5 I find that the Respondent is not entitled under clause 5 of the contract to recover damages for breach of contract from the Claimant for excess holiday pay paid to her if she had taken more holiday than she had accrued when her employment ended. Clause 5 is concerned with sums that can be deducted from a final instalment of wages. If the Respondent had paid the Claimant sick pay, it would have been able to make a deduction if she had taken more holiday than she had accrued. But it did not pay her sick pay, so there was no final instalment of wages.
- 5.6 The Respondent is trying to go further and say that clause 5 entitles it to sue the Claimant for damages if she had taken more holiday than she had accrued when she ended her employment. That is not about deducting money from her wages, it is about requiring her to pay money to the Respondent by way of damages. Applying normal contractual principles, I do not find that clause 5 has that effect. The parties could have reached a clear agreement that the Claimant would pay back any sums that had been overpaid, but the contract does not contain any such agreement. Clause 5 cannot be stretched to cover the situation. The Respondent does not say that any other term of the contract entitled it to recover damages in this situation. Therefore, I do not need to decide whether the Claimant had taken more holiday than she had accrued when her employment ended. If I had done so, it is important to note that the Claimant would have continued to accrue holiday during her sick leave until the date her employment terminated.
- 5.7 Applying similar reasoning, I find that the Respondent was not entitled under clause 5 of the contract to recover damages for breach of contract for losses caused by theft of gin. Again, clause 5 is concerned with sums that can be deducted from a final instalment of wages. It reflects the relevant provisions of the

Employment Rights Act. If the Respondent had paid the Claimant sick pay, it would in principle have been able to make an appropriate deduction for stock deficiencies (or losses caused by the Claimant's negligence).

- 5.8 However, the Respondent is again trying to go further and say that clause 5 entitles it to sue the Claimant for damages if there were outstanding stock deficiencies or losses. That is not about deducting money from her wages, it is about requiring her to pay money to the Respondent by way of damages. Applying normal contractual principles, I do not find that clause 5 has that effect. The parties could have reached a clear agreement that the Claimant would pay the Respondent for any outstanding sock deficiencies or losses caused by negligence, but the contract does not contain any such agreement. Clause 5 cannot be stretched to cover the situation. The Respondent does not say that any other term of the contract entitled it to recover damages in this situation. Therefore, the claim for losses associated with the theft of gin cannot succeed.

**Employment Judge Davies
7 June 2019**

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