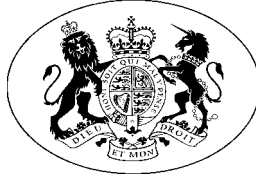


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EMPLOYMENT TRIBUNALS

Claimant: Miss K Bibi
Respondent: Indigo Trading Limited
Heard at: East London Hearing Centre
On: 8 July 2019
Before: Employment Judge Goodrich

Representation

Claimant: In person
Respondent: Mr Joshi (Solicitor)

JUDGMENT

The judgment of the Employment Tribunal is that the Claimant's unlawful deduction of wages complaint succeeds. The Respondent is ordered to pay the Claimant £1,365.30.

REASONS

Background and the Issues

- 1 The background to this hearing is as follows.
- 2 The Claimant presented her Employment Tribunal claim on 12 March 2019.
- 3 Before starting the proceedings, the Claimant had obtained an early conciliation certificate from ACAS covering the period between 11 February 2019 and 11 March 2019.
- 4 The Claimant's claim is for unpaid wages.
- 5 In box 8.2 of her ET1 claim form the Claimant stated that she had been working

with Indigo Trading from 14 August as an apprentice but that the owner had refused to pay her for August and September. She said that the reason he gave her was "I didn't had my insurance number." She went onto state "I applied for my insurance number and I had to wait for few weeks as they ask you for work related questions to fill the application". The Claimant complained that she still had to be paid for 364 hours.

6 The Respondent completed an ET3 response form denying the Claimant's claims.

7 In Box 3.1 of the Response the Respondent stated that "The employee was told when she arrived at interview that she would need to obtain NI number before starting work, also will not pay any money until obtaining NI number. Whether she wishes to come in to factory or not. She gave her NI number in October 2019".

8 The case was set down for this hearing before me.

9 At the outset of the hearing I discussed with the parties what were the issues I was required to decide.

10 The Claimant was acting in person. Shortly before the hearing, Peninsula Group Limited were instructed to represent the Respondent. Mr Joshi, solicitor, represented them at this hearing.

11 After discussion of the issues with the Claimant and the Respondent's representative and Respondent the issues were clarified as follows.

12 The Respondent accepted that the Claimant had worked the hours that she stated had worked. If, therefore, she was entitled to be paid prior to obtaining a National Insurance number they accepted that she was owed the sum of £1,365.30.

13 The Respondents, in paragraphs 5 and 6 of the witness statement of the Managing Director (Mr Miah) contended that the Claimant had been told that she could not start as an apprentice until she received her National Insurance number and until then she could work voluntarily for work experience.

14 The Respondent accepted, however, that the Claimant was entitled to be paid for hours that she had worked but not being paid between 4 October 2018 and the end of her employment.

15 The parties agreed that the Respondent had paid her £451.40.

16 Mr Miah accepted in his witness statement that the Respondent owed her £532.80 for hours worked between 4 October 2018 and the end of her employment.

17 The Respondent's representative, shortly before evidence was heard, refined this amending the amount slightly to the amount of £425.50.

18 In his closing submissions (to which I will refer later) Mr Joshi accepted that there was an initial agreement between the Claimant and Respondent that her apprenticeship

should start on 14 August 2018 and that she should be paid from that time. What they say, and the Claimant denies, was that this agreement was changed about two weeks later, when Mr Miah found out that the Claimant did not have a National Insurance number, so that the period up to obtaining a National Insurance number should be unpaid.

19 The issue for me to determine was, therefore whether the Claimant was entitled to be paid for the hours she worked for the Respondent during August, September and the start of October before she obtained her National Insurance number, as she contends and as the Respondent disputes.

The Relevant Law

20 This dispute is in part a factual issue, rather than an issue of law, as to when Mr Miah told the Claimant that he would not pay her until she obtained a national insurance number.

21 In his closing submissions Mr Joshi contended that the agreement initially made by the parties was either varied shortly afterwards when Mr Miah told the Claimant that he would not pay her until she got a National Insurance number; or that, even if she did not agree to this at the time, by continuing to work with the Respondent she affirmed the change in the contractual agreement.

22 An apprentice is entitled under the national minimum wage legislation to be paid at least the minimum rates of pay set out in that legislation. During the Claimant's employment the rate was £3.70 per hour.

23 The issue is, therefore, whether the actions of the Claimant and the Respondent were such as to amount to a variation of contract, or affirmation of contract.

The Evidence

24 On behalf of the Claimant I heard evidence from the Claimant herself.

25 On behalf of the Respondent I heard evidence from Mr Miah, Managing Director of the Respondent.

26 In addition, I considered the documents to which I was referred in an agreed bundle of documents.

Findings of Fact

27 To a large extent there is agreement as to the relevant facts.

28 On or around 27 July 2018 the Claimant, accompanied by her sister, attended an interview with Mr Miah.

29 The Claimant wanted to start an apprenticeship with the Respondent.

30 About two days later the Claimant and Mr Miah had another discussion at the Respondent's premises at which they agreed that the Claimant's apprenticeship would start on 14 August 2018.

31 The reason the Claimant chose 14 August 2018 as her start date was that this was the start date provided for on the government website on apprenticeship.

32 On or around 30 July 2018 she saw Mr Miah at the Respondent's premises and agreed with him that she would start on 14 August 2018. She also told her teacher that she would do so.

33 Mr Miah assumed that the Claimant already had a National Insurance certificate, although he did not ask the Claimant this at either of his meetings with her on or around 27 July or on or around 30 July 2018.

34 In fact, the Claimant did not have on 14 August 2018 a National Insurance number. She had to apply to obtain her number.

35 There was a delay in the insurance number coming through to her.

36 The person from the Claimant's College dealing with the Claimant's apprenticeship was Ms Parsonage. On 4 October 2018 the Claimant wrote to Ms Parsonage notifying her that she had got her insurance number today and wanted to know what she had to do next.

37 By email on 9 October 2018 Ms Parsonage wrote to the Claimant, copied to Mr Miah, thanking her for the information and sending her a pack for enrolment.

38 Later that day Mr Miah sent an email to Ms Parsonage stating "let me know when I should pay her".

39 In response, Ms Parsonage sent Mr Miah an email stating "I will let you know which date we will use you should be paying her though if she is working for you."

40 The Claimant did not get paid for work done before 4 October.

41 On 29 November 2018 she sent an email to Ms Parsonage. Included in that email were the following contents:

"...it's been 3 months and 2 weeks working with Indigo trading. Sid only paid me for 2 weeks and when I asked him for the rest of payments he said he's not paying me for last 3 months because government is not paying him and he said he's not sure if he's gonna get the money back which he paid me. So can you please sort this matter out with him please let me know if I'm gonna get paid from the day I start working or not?"

42 The minimum rate of pay for an apprentice at that time was £3.70 per hour. Mr Miah has not suggested that he was unaware of the requirement to pay the Claimant at the rate for an apprentice during the Claimant's apprenticeship with the Respondent.

43 The dispute between the parties is when they had the conversation at which Mr Miah notified the Claimant that he would not pay her for the time she worked before getting a National Insurance number.

44 Neither the Claimant nor Mr Miah were entirely sure about when that conversation was.

45 Initially the Claimant stated that the conversation was not until December. Later, after hearing Mr Miah's evidence, she thought that it might be nearer the time stated by Mr Miah. Later, when giving her closing submissions, she reiterated that it was later than was stated by Mr Miah.

46 Mr Miah, for his part, initially said that the conversation was a few days after the first meeting on 27 July. Later, he stated that it might not have been until early September.

47 On the balance of probabilities, therefore, when was the occasion when Mr Miah told the Claimant that he would not be paying her until she had obtained her National Insurance number? I find that this was not until shortly before 29 November 2018, when the Claimant send the email to which I have referred above to Ms Parsonage. I so find because:

- 47.1 Although neither party's recollections were entirely clear, the Claimant seem more likely, and more consistent with the chain of emails than the evidence of Mr Miah. Mr Miah's recollections appeared to be particularly vague. In Mr Miah's ET3 Response he claimed that the conversation was at his first meeting with the Claimant. This would have been the meeting on 27 July. During his evidence he shifted this to being a day or two later then possibly not until September. The Claimant, although not entirely clear herself, did suggest that it was considerably later on.
- 47.2 The Claimant's account appears to me to be more consistent also with the emails.
- 47.3 On 9 October 2018 Mr Miah stated to Ms Parsonage "let me know when I should start pay her." It appears unlikely, therefore, that by then he had told Ms Parsonage and the Claimant, as he says, that he would not pay the Claimant until he got her National Insurance number. If he had told Ms Parsonage that he would not pay the Claimant until she was issued with her national insurance number, it seems likely that he would have referred to this in his email, rather than asking her from when he should pay her. It also appears likely that the Claimant would have written sooner to Ms Parsonage to ask her to "sort the matter out."
- 47.4 It also appears unlikely that the Claimant would have carried on working without complaint until 29 October 2018 if she had been told that she was not going to be paid before 4 October. The tone and contents of her email on 29 November 2018 suggests that it was a recent conversation that he had had with Mr Miah. She referred in the email to her employer stating

that he would not pay her for the last 3 months. This suggests that the conversation was a recent one, as by 29 November the Claimant has been working for the Respondent for slightly over three months. The most likely course of events is that the Claimant first found out that Mr Miah would not pay her until she had got her national insurance number shortly before her email to Ms Parsonage and wrote to her because she did not agree to this, to ask her to sort out getting her paid from when she first started working for the Respondent.

Closing Submissions

48 Both parties gave short oral closing submissions.

49 On behalf of the Respondent, initially I explored with Mr Joshi whether he was stating that there was an illegal contract (which would have needed an amendment to the response) in view of Mr Miah's evidence when he had stated that he thought it was illegal to pay the Claimant before she got a National Insurance number. After taking instructions, Mr Joshi notified me that that was not a part of the Respondent's case and that his case was solely that, about two weeks after the start of the Claimant's employment their contractual agreement was varied by Mr Joshi telling the Claimant that she would not be paid before she obtained a National Insurance number; or that alternatively, if there was on such variation of contract, she affirm the contract by continuing to work there. He accepted that the Respondent owed the Claimant the money he initially stated plus about two weeks additional pay until the variation of contract.

50 The Claimant maintained that she was owed the sum initially stated of £1,365.30, that there was no such variation of contract and she did not agree to any change.

Conclusions

51 For the reasons given in my findings of fact I find that the conversation when Mr Miah told the Claimant that he would not pay her until she had obtained her national insurance number shortly before the Claimant's email to Ms Parsonage on 29 November 2018.

52 Firstly, did the conversation amount to a variation of contract, as submitted by Ms Joshi on behalf of the Respondent? I find and conclude that it did not- telling the Claimant that he would not pay her for the period of time in question was a breach of contract, not a variation of contract. The Claimant did not agree to it, which was why she wrote to Ms Parsonage.

53 Secondly, did the Claimant affirm her contract, as was the alternative submission of Mr Joshi? I find and conclude that she did not. Her email to Ms Parsonage was to try to find a resolution to a dispute between her and Mr Miah and does not suggest that she agreed to the change. I am not clear whether Ms Parsonage replied to the Claimant's email or, if she did, when she did; or, if she did respond, what she stated. The Claimant left the Respondent's employment soon after her email and, I find, not so long after so as to amount to an affirmation of contract.

54 The Claimant is entitled, therefore, to the sum of £1,365.30. I order the Respondent to pay her this sum.

Employment Judge Goodrich

Date: 31 July 2019