EMPLOYMENT TRIBUNALS

Claimant: **Miss C Cummings**

Respondent: **Seren Unisex Hair Studio**

Heard at: **Cardiff** **On: 29 July 2019**

Before: **Employment Judge W Beard**

Representation:
Claimant: Mr Cummings (the Claimant's father)
Respondent: Ms Clarke (owner of the Respondent business)

JUDGMENT

1. The claimant's claim of unlawful deduction of wages is well founded and the respondent is ordered to pay to the claimant the sum of £111.00 calculated as set out below.

2. The claimant's claim of breach of contract (notice pay) is well founded and the respondent is ordered to pay to the claimant the sum of £70.30 calculated as set out below.

Unlawful Deduction		
38 hours at £3.70 p.h.	£140.60	
Less 8 hours overpaid	(£ 29.60)	
Sub total		*£111.00*
Notice Pay		
19 hours at £3.70 p.h.	£ 70.30	
Total Award		**£181.30**

REASONS

PRELIMINARIES

1. The claimant was represented by the father the respondent was represented by Miss Clarke its owner. I heard oral evidence from the claimant. Miss Clarke and Miss Jeremiah gave oral evidence for the respondent. There was written evidence from other witnesses, they were not present to be cross examined, I gave the evidence such weight as was appropriate. I was also provided with a bundle of documents running to 76 pages which I also considered in drawing my conclusions.

2. The claimant is dyslexic, in order that she could give evidence effectively I permitted her father to guide her through the document bundle and for extracts to be read out when necessary, I was not asked to make any other specific adjustments.

3. The following issues were identified for resolution in the order of Judge Harfield 9 July 2019 as:

Arrears of Pay

14 December 2017 to 17 January 2018

4. What hourly rate of pay was the Claimant entitled to during this period? The claimant asserts that she was entitled to £7.05 an hour that a hand amendment to £3.50 an hour was made without her knowledge or consent. She asserts that on 17 January 2018 a further Agreement was signed between the parties reducing her hourly rate by agreement to £3.50 an hour (the minimum wage for an apprentice @ £3.70 from 5 April 2018 onwards). The respondent contends that the claimant agreed to £3.50 an hour. Was the claimant throughout this period therefore paid less wages than were due to her, because she was paid at an hourly rate lower than the rate she was entitled to be paid and, if so, how much less? Was this element of the claimant's claim presented within time? If not, would it be reasonably practicable to extend time?

25 May 2018 to 9 June 2018

5. What date did the claimant's employment terminate? The respondent asserts it was the 2nd June 2018. The claimant claims it was the 9 June 2018 when she received the letter informing her that her employment had been terminated with immediate effect. Is the claimant owed wages for the period 25 May 2018 to 9 June 2018? The claimant states that she was fit and well and able to resume her duties and told the respondent so. The respondent states that the claimant told her to the contrary that she was not fit for work and therefore no wages are due. If so, what sum is the claimant owed?

Holiday Pay

6. The respondent accepts that the claimant was not paid in respect of accrued and untaken annual leave on the termination of her employment. It was also agreed that the claimant had taken paid annual leave on the 28 and 29 December 2017 but no other paid holiday. How many days of accrued holiday pay entitlement remain unpaid to the claimant, what is the net daily rate of pay, and what sum is therefore outstanding to be paid to the claimant for holiday pay?

Notice Pay

7. The parties are agreed that the claimant was entitled to 1 week's notice. What sum is the claimant therefore entitled to for that failure to provide notice of the termination of her employment?

Offsetting

8. The statement of terms and conditions of employment dated 14 December states:

> *"The Company reserves the right to require you to repay to the company by deduction from your pay… any other sums owed to the company by you, including, but not limited to,*

> *any overpayment of wages, outstanding loans or advances, or relocation expenses…. You authorise the company to make any such deductions from any and all monies owing to you by the company."*

Was this contract/clause valid and binding? Does this clause permit the respondent to offset any sums proved to be owed by the claimant to the respondent from (a) any arrears of pay, and/or (b) holiday pay due and/or (c) notice pay found to be payable by the respondent to the claimant above? Does this clause constitute advance and valid agreement/consent in writing by the claimant to a deduction from the claimant's wages within the meaning of section 13(1)(b) of the Employment Rights Act 1996? Alternatively, does this clause constitute a written term of the claimant's contract which the respondent has given the claimant a copy of before making the deduction in question within the meaning of section 13(1)(a) and 13(2)(a) of the Employment Rights Act 1996?

Unpaid Breaks

9. If the respondent is entitled to offset, has there been an overpayment of wages to the claimant in respect of unpaid breaks? The respondent asserts that the claimant, under the statement of terms and conditions of employment dated 14 December 2017, was entitled to a 20 minute unpaid break where she worked 6 consecutive hours or more. The respondent asserts that the claimant has been overpaid by 20 minutes each day throughout her employment. The claimant asserts that those terms and conditions are not valid and binding and that the true agreement reached was that the claimant was entitled to paid breaks. The claimant also asserts that there were occasions on which she did not take a break and therefore, in any event, no overpayment will have occurred. If there has been an overpayment of wages in respect of unpaid breaks what is the amount?

Snow Days

10. If the respondent is entitled to offset, was there an overpayment of wages for any days when the claimant was paid but did not attend work due to snow? The respondent states that this occurred on 1, 2 and 3 March 2018 and that agreement was reached that the claimant would still be paid on condition she would work the time back, and this was not all worked back before the termination of the claimant's employment.

11. The claimant denies there was such an agreement and states, in any event, that she worked the time back. The parties agree that the claimant worked back 6 hours on the 13 March 2018. The claimant claims that she worked additional hours back in a training day on a bank holiday Monday. The respondent states that this was voluntary unpaid training. If there has been an overpayment of wages in respect of days the claimant was unable to attend work due to snow what is the amount?

Late arrivals

12. If the respondent is entitled to offset, was there an overpayment of wages for any days when the claimant was late for work? The respondent states this happened on 25 January 2018, 24 January 2018, 12 February 2018 and 13 February 2018 and that agreement was reached with the claimant that she would be paid on condition she would work the time back, and this was not all worked back before the termination of the claimant's employment. The claimant denies there was

such an agreement and, in any event, states that the additional time was worked back. If there has been an overpayment of wages in respect of days the claimant was late for work what is the amount?

Offsetting overall

13. If the respondent is entitled to offset any overpayments from any sums due to the claimant then what is the sum that is due to the claimant from the respondent?

THE FACTS

14. The claimant met with Miss Clarke on 7 December 2017 discussions about the claimant being employed by the respondent resulted in her being offered employment. No letter of offer was sent to the claimant but a Facebook message was. This was sent at 1:33 pm (p14) it offered the claimant three days of work on Thursday to Saturday at the rate of £266 on a four-weekly cycle; the hours offered amounting to 19 hours. The claimant denied receiving this message I reject that evidence as the claimant responded to the message at 2:39 pm on 7 December 2017 accepting the appointment.

15. The claimant signed a contract which is dated 14 December 2017. There is a dispute as to whether that was signed on that date, however I do not need to resolve that as the claimant accepted that she signed this before receiving her first wages. The contract has three clauses which are of relevance to these proceedings: the first is a clause indicating that a person would have unpaid breaks of 20 minutes if working 6 hours or above; the second that the respondent is entitled to recover overpaid sums from the claimant, the last is that the claimant was to be paid at a rate of £3.50 hour. This latter clause is shown as a manuscript addition to a typewritten document, there are no initials shown at the alteration. However, the deleted hourly figure is £5.30 pence. I accept Miss Clarke's evidence that this was a change made prior to the claimant signing as it was a copy of an earlier document. The claimant's payslips show that the claimant, when working was paid for each period of four weeks on the basis of 78 hours i.e. 19 hours a week and that for this she received £273, the payslips show an hourly rate of £3.50. The claimant told me that she had researched the higher hourly rate she claims, that she had not read the contract and that she was not told of her wage. Therefore, on the claimant's evidence no figure was discussed, I cannot accept that anyone would accept a job without an idea of the wage. I reject her evidence on that basis. The claimant's contractual rate was £3.50 per hour until the statutory change to apprentice minimum rates on 1 April 2018.

16. Miss Jeremiah explained in evidence that there was a general approach where someone was late the time would not be clawed back. There was no expectation of working back that time. Ms Clarke said that the claimant had agreed to work back hours, the claimant agreed this was the case in respect of snow days but said that she had worked back those hours. Both parties agreed that the claimant had attended a training event, the respondent said this was voluntary. None of the documentation inviting the claimant to the event demonstrated that the expectation was that the claimant would not be paid. I did not accept the claimant's evidence that this lasted for a whole day and accepted the respondent's evidence that it was for 5 hours. The claimant was absent on the 1, 2 and 3 March 2018, Thursday to Saturday Inclusive. The claimant was expected to work 19 hours in this period. It was common ground that the claimant had

worked back 13 March 6 hours. That leaves outstanding 8 hours which the claimant did not work back.

17. The respondent has a clause within the contract of employment permitting the respondent to recover overpayments. The claimant signed this contract. The claimant contends that she was not given a copy of this contract. I do not accept that evidence. The claimant was engaged in a tripartite relationship because of the apprenticeship scheme. The contract was signed when the apprenticeship organisation representative was present. There is nothing in the evidence which has led me to conclude that the claimant was not able to take a copy of the contract with her. There is nothing to indicate that there was any discussion of any changes to this term of the contract.

18. In respect of breaks the claimant had always been paid for 19 hours from the start of her employment. The respondent had never sought to reduce the claimant's time by the breaks she took. This was in effect an afterthought when this tribunal claim was brought, the claimant told me that Ms Clarke had told the claimant at the outset that she would not be deducting for breaks. I accepted this evidence as it fitted the factual circumstances.

19. The claimant had returned to work after an absence in April 2017 on the basis of restricted duties. The claimant was taken ill at work again on 25 May 2018. She fainted and went to hospital. The messaging trail between the claimant and Miss Clarke demonstrate this: the claimant was communicating with the respondent up to 30 May clearly implying that she was unable to work because of illness. On the 30 the claimant indicated that she was able to come back to work. On 31 May 2018 the claimant met with the respondent. There is a significant dispute about what was said at the meeting. The respondent contends that the claimant said that she wouldn't improve in terms of carrying out her duties and the respondent informed her that her employment would be terminated and a letter would confirm this. The claimant denies that she said her condition would not improve and she denies being told her contract would be terminated. I am unable to choose between the accounts, none of the witnesses gave me a credible account of that meeting. I reject both accounts and therefore draw my conclusions from the documents which are as follows: the claimant was informing the respondent she was unfit for work during the period 26 May to 30 May 2018, the claimant was ready willing and able to work from 31 May 2018, the respondent sent a letter dismissing the claimant which although dated 2 June 2018 was posted on 6 June 2018, the P45 shows the termination of the claimant on 10 June 2018.

The Law

20. Section 13 of the Employment Rights Act 1996 applies to this case and which, so far as is relevant, provides:

> *(1) An employer shall not make a deduction from wages of a worker employed by him unless—*
> *(a) the deduction is ---- authorised to be made by virtue of ------ a relevant provision of the worker's contract, or*
> *----------*

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—
(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or
(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.
(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

21. Section 23 of the Employment Rights Act 1996 provides a means to claim unpaid wages and holiday pay, under the working time regulations. The Working Time Regulations 1998 deal with entitlement to annual leave and, so far as relevant, provide:

Regulation 13: Entitlement to annual leave:

(1) ---------- a worker is entitled to four weeks' annual leave in each leave year.

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(3) A worker's leave year, for the purposes of this regulation, begins—

(b) where there are no provisions of a relevant agreement which apply—

(ii) if the worker's employment begins after 1st October 1998, on the date on which that employment begins and each subsequent anniversary of that date.

And

Regulation 13A: Entitlement to additional annual leave

(1) Subject to ----- paragraphs (3) and (5), a worker is entitled in each leave year to a period of additional leave determined in accordance with paragraph (2).

(2) The period of additional leave to which a worker is entitled under paragraph (1) is—

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>
> *(e) in any leave year beginning on or after 1st April 2009, 1.6 weeks.*
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> *(4) A worker's leave year begins for the purposes of this regulation on the same date as the worker's leave year begins for the purposes of regulation 13.*

22. I take account of the decision in **Mrs Lyndsey Beveridge –v- KLM Limited UKEAT 1044_99_1602** Where Lord Johnson expressing the judgment of the EAT said:

> *All contracts of employment are governed, obviously, essentially by their expressed terms, but we are satisfied that at common law an employee who is offering his or her services to his or her employer is entitled to be paid in that situation and in those circumstances unless a specific condition of the contract regulates otherwise. In the present case we consider that the employee could do no more, in respect of her side of the mutual contract, than proffering her services against a background of a certificate of good health. It was thus for the employer to show that in this context the contract expressly entitled the employer to withhold payment.*

23. Part of what I have to consider it whether the agreed time off was to be made up on a different occasion, or was it simply a concession by the respondent that has become a contractual term. I have to consider what was the employer's agreement with the employees (as a group)? Is that agreement an express term or implied into the contract and is it suitable for incorporation as a term of an individual contract? If it is to be implied is it reasonable, certain and notorious? If it is to be implied by custom and practice is the evidence such that it can be inferred that the respondent intended to be bound by the term and an inference that had achieved the quality of the term.

ANALYSIS

24. The first question I am required to resolve is what hourly rate of pay the Claimant was entitled to? The claimant's assertion that she was entitled to £7.05 an hour is based on an internet search of average wages. She has accepted her wages as correct and not raised an issue about them and the level at which she was paid reflected that sum as did the social media message she responded to. The hand-written amendment to £3.50 an hour was as I have found an alteration to a sum of £5.30 per hour, which did not apply on any party's argument. It was however a sum that represented the minimum wage for an apprentice, which was a role which the claimant accepts that she took up (albeit she argues later). In my judgment this was an alteration made before the claimant signed the contract and there was no agreement for a different sum. The claimant's hourly rate was originally £3.50 but would have risen to £3.70 on 5 April 2018.

25. The claimant's employment terminated on 9 June 2019 when she received the communication from the respondent. The claimant is owed wages for the period 31 May 2018 to 9 June 2018 because she was indicating that she was ready, willing and able to return, on the reasoning in **Beveridge**, there was nothing in the contract of employment which permitted the respondent to prevent the claimant returning to work. The claimant is therefore entitled to be paid from 31 May to 9 June 2018 for the Thursdays, Fridays and Saturdays which fall within that period. This amounts to 38 hours.

26. The parties are agreed that the claimant was entitled to 1 week's notice. The claimant is entitled to be paid at £3.70 an hour for 19 hours?

27. The statement of terms and conditions of employment permits the respondent to make appropriate deductions from the claimant's pay. It is advance agreement in writing by the claimant to a deduction from the claimant's wages within the meaning of section 13(1)(b) of the Employment Rights Act 1996. The respondent has identified unpaid breaks. In my judgment there was an express variation of the term by the respondent telling the claimant she would not make those deductions. Even if I were wrong about that it had clearly become a custom and practice implied term in the claimant's case, as it was reasonable certain and notorious (i.e. well known). With regard to snow days, the claimant agreed to work those hours back. On my calculation the claimant had worked back 11 hours, the one 6 hour day agreed by the parties and the 5 hours for the training day that I have found to be payable. These latter hours are payable because the respondent did not inform the claimant that this training was voluntary, and when requested to attend training by an employer it would be clear that payment would be made unless the contrary was spelled out. In respect of late arrivals at work it was clear to me that again it was reasonable, certain and notorious that leeway was given for occasional minutes late. On this basis I conclude that the respondent is entitled to set off only the snow days hours.

28. Taking account of all of the above I conclude the following that the respondent has failed to pay to the claimant wages for the six working days between the 31 May and 9 June 2018. That is a period of 38 hours for which the rate, at that time, was £3.70 per hour a total of £140.60. From this must be deducted the 8 hours which the respondent is entitled to offset a sum of 29.60. The total the respondent must pay to the claimant for unlawful deduction of wages is therefore £111.00. The respondent was required to give the claimant notice of dismissal of one week. This was not done, on that basis the claimant is entitled to notice pay of 19 hours (a week's wage) at £3.70 per hour a sum of £70.30 for breach of contract. The total sum which I order the respondent to pay to the claimant in compensation is £181.30.

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Employment Judge Beard
Dated: 16 August 2019

ORDER SENT TO THE PARTIES ON

……17 August 2019……

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FOR THE SECRETARY TO EMPLOYMENT TRIBUNALS