Case Number: 1600349/2018

EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT		**RESPONDENT**
YVONNE WINTLE	**V**	**BREAKSEA RESIDENTIAL HOMES LIMITED**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: CARDIFF ON: 3RD AUGUST 2018

BEFORE: EMPLOYMENT JUDGE HOWDEN-EVANS

REPRESENTATION:
FOR THE CLAIMANT: IN PERSON

FOR THE RESPONDENT: IN PERSON, BY MARCUS ROSSINI

JUDGMENT having been sent to the parties on 16th August 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The Claimant was employed as a care assistant at the Respondent's residential home from 29th March 2017 to 18th January 2018. On 4th January 2018 she resigned from this position giving the Respondent two weeks' notice.

2. This claim relates to deductions that were made to the Claimant's final pay and to holiday pay that the Claimant alleges has not been paid at an appropriate rate.

3. On 10th February 2018, the Claimant contacted ACAS and early conciliation commenced. Early conciliation ended on 27th February 2018. On 2nd March 2018, the Claimant presented a claim for unlawful deductions from wages and for outstanding holiday pay.

The Hearing

4. Throughout these proceedings, both parties have represented themselves.

5. The final hearing took place on 3rd August 2018 at Cardiff Employment Tribunal. It was conducted by an employment judge sitting alone. The employment judge had the benefit of an agreed bundle which was approximately 31 pages. Oral evidence on oath was given by Ms Wintle and by Mr Rossini and each party was freely able to ask questions of each witness. The employment judge also asked questions of witnesses.

6. Mr Rossini, on behalf the Respondent, also sought to rely upon written witness statements from Melanie Corry (Home Manager) and Donna James (Administrator). There was no attendance by either witness. As their evidence was not tested on oath and we were not able to ask questions of these witnesses, their evidence carried little weight. The employment judge explained this to Mr Rossini, who confirmed he did wish to proceed with the hearing in the absence of these witnesses.

7. Having heard oral evidence and having read all the documents, the employment judge heard oral closing submissions from both Ms Wintle and Mr Rossini. The employment judge considered her decision and gave an oral judgment and reasons. Subsequently, Mr Rossini requested written reasons. Due to an administrative error there was a delay in passing this request on to the employment judge. The employment judge apologises for any inconvenience this delay has caused.

Findings of Fact

8. Prior to the Claimant starting work with the Respondent, she attended a meeting with Melanie Corry, the Respondent's Home Manager, on 28th March 2017. The Claimant's evidence is that at this meeting she gave Ms Corry copies of her documents and certificates and Ms Corry gave her an application form. She is adamant she was not given an employment contract. She was equally adamant there was no mention of training costs being deducted from her pay if she was to resign within 12 months of starting employment.

9. Ms Corry's written statement asserts that during this meeting, the claimant was given a copy of an employment contract and was told training costs would be

deducted from her pay if she was to leave the company within 12 months. This is a dispute the employment judge will return to later in this judgment.

10. The employment judge considered the documents that exist. There were two versions of an employment contract with the Claimant's name on it in the bundle (pages 7-9 and pages 29-31). Neither contract has been signed by the Claimant. The first pages of both documents (p7 & p29) appears to be identical. The second pages (p8 & p30) appear to have identical typed paragraphs, but the hourly rate is handwritten onto both pages and appears as *"£7.50p"* on p 8 and as *"£7.50"* on p30, indicating these are not copies of the same document. On the final pages of these documents are the most differences:

    10.1. On p9 paragraph 21 reads

    > *"Your employment with the company may be dependent upon the possession of particular qualifications or registration with a statutory body or other authority; evidence of this must be produced on request, including a current DBS check. The cost of the DBS check will be requested from you prior to the commencement of your employment and is non-refundable. Failure to produce such evidence may lead to the termination of your employment."*

    10.2. On p31, paragraph 21 reads

    > *"Your employment with the company may be dependent upon the possession of particular qualifications or registration with a statutory body or other authority; evidence of this must be produced on request, including a current DBS check. The cost of the DBS check will be requested from you prior to the commencement of your employment and is non-refundable. Failure to produce such evidence may lead to the termination of your employment. Training will be provided. If you leave the company within 12 months of training course being completed, a deduction may be made to your final pay equivalent to the cost of any training that the company has provided." [employment judge's emphasis]*

    10.3. On p9 the signature table at the foot of the page is empty. On p31, the same table has been completed with the words *"Donna James, Administrator, 29/03/17",* purportedly being Donna James signing the agreement on behalf of the Respondent on 29th March 2017. This is at odds with the first page of the contract, which states the commencement date of the contract as being 6th April 2017.

11. The Claimant's evidence was the first time she had seen any contract of employment with the Respondent was on 5th February 2018 when the document at pages 9 to 11 was posted to her. Mr Rossini's evidence was that

the contract at pages 29 to 31 was the Claimant's contract of employment. This is a dispute I will return to later in the judgment.

12. The Claimant's evidence was that when she handed in her notice on 4th January 2018 she was told by Donna, the wages clerk, that there might be deductions from her pay for the courses that she had attended during her employment, as Mr Rossini sometimes made these deductions. The claimant's evidence was that this was the first time anyone had ever suggested there might be deductions from her wages.

13. There was a conversation between Mr Rossini and the Claimant, during which he tried to persuade the Claimant to withdraw her notice. During this conversation Mr Rossini complained that he had put the Claimant through a lot of training, to which the Claimant responded she had undertaken most of it before she had joined the company.

14. Mr Rossini (& Ms Corry & Ms James's written statements) allege that during this conversation and other conversations, Mr Rossini and Ms Corry reminded the Claimant that money would be deducted from her final pay for courses she had attended. The Claimant denies that she was ever told by Mr Rossini or Ms Corry that money would be deducted. This is another dispute I will return to later in the judgment.

15. On a compliment slip (dated 1st February 2018) enclosing the Claimant's final payslip, Fran, on behalf of the Respondent wrote

    "…Deductions have been made for training courses attended…"

16. On 1st February 2018, the Claimant received her payslip which showed that £150 had been deducted for courses she had attended and a further £165 had been deducted for wages that had previously been paid to her to attend these courses.

17. On 2nd February 2018 she phoned her former employer and spoke to Fran Rossini. She asked for an explanation for the deductions. She was told by Fran, that Marcus (Rossini) had instructed her to make the deductions.

18. On 5th February 2018, the Claimant received in the post a copy of her employment contract (pages 7-9).

19. On 5th February 2018 the Claimant wrote a grievance letter to Melanie Corry. In this grievance letter she states

    I write to you regarding a grievance I have about the money that has been deducted from my final wages… I would like to bring to your attention that the deduction of money for courses attended will be reclaimed should I

resign from the company was never explained to me by anyone at the company during my interview or time whilst employed at Breaksea care home"

20. Having considered the evidence, the employment judge accepts the Claimant's evidence that the first time she received any written contract from the Respondent was on 5th February 2018 and the first time she saw the extended paragraph 21 (as appears on page 31 of the bundle) was during these proceedings. The contract she received on 5th February 2018 was that at pages 7 to 9, which makes no reference to training costs being deducted.

21. The employment judge finds that the Respondent's employment contracts were amended after the deduction had been made to Ms Wintle's final pay. Someone has deliberately amended paragraph 21 to add sentences that purport to give the Respondent the right to claim training costs. It is highly suspicious that two versions of Ms Wintle's employment contract would exist and that this is the only amendment to the contract. When you consider the document as a whole, paragraph 21 is not a natural place for the training costs deduction to appear. Further when examining the documents, the employment judge noted that p31 does not have the fold marks or hole punch marks that p29 (and pages 7-9) have, suggesting that p31 has been created at a later date, after the event. It is more likely than not that this was amended sometime after 5th February 2018, as the contract the Claimant received on this date did not have the extended paragraph 21.

22. The employment judge also finds that the Claimant was not told of the deduction by Mr Rossini or Ms Corey prior to the deduction actually happening. The employment judge does not accept that Ms Corey told the Claimant about the deduction during the meeting on 28th March 2017. The employment judge does not accept that the Claimant was told deductions would be made during any conversation in January 2018, for the following reasons:

    22.1. If the Claimant had previously been told about the deduction, there would be no need for Fran to explain the deduction on the compliment slip; and
    22.2. If the Claimant had previously been told about the deduction, she would not have written the paragraph she did in her grievance letter (see paragraph 19 above).

23. Crucially, there was no written document or letter sent to the claimant explaining a deduction would be made, before the deduction was actually made.

24. Turning to consider the Claimant's claim for unpaid holiday pay, paragraph 6 of the contract (on both pages 8 and 30) provides:

"The hourly pay amount for this post is £7.50. This will be reviewed periodically. Hours worked on Christmas Day will be paid at double plain time rate and other bank holiday days worked will be paid at time and a half plain time rate. The company reserves the right to amend."

25. The Claimant alleges she worked 7 hours on each of the following Bank Holidays: 14th April 2017, 17th April 2017, 1st May 2017, 29th May 2017 and 28th August 2017. She alleges she was paid £7.50 per hour for this work when the written employment contract states she should have been paid £11.25 per hour (time and a half). She did not question this at the time, as she was not aware of the terms of her contract until she received it on 5th February 2018.

26. Mr Rossini does not dispute the Claimant worked these dates or the hours she worked on these days – instead the Respondent alleges the policy on Bank Holiday pay changed in April 2017 and was communicated to the Claimant and others verbally by Alison Brown and Ms Corry. The Claimant denies ever being told the Bank Holiday policy had changed.

27. The contract sent to the Claimant on 5th February 2018 clearly states the Claimant was entitled to receive £11.25 per hour on Bank Holidays. I accept this is the best evidence available to me as to the terms of the Claimant's contract.

The Law

28. Section 23 Employment Rights Act 1996 provides:

(1) A worker may present a complaint to an employment tribunal

(a) that his employer has made a deduction from his wages in contravention of section 13

29. Section 13 Employment Rights Act 1996 provides:

Right not to suffer unauthorised deductions

(1) An employer shall not make a deduction from wages of a worker employed by him unless

a. the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
b. the worker has previously signified in writing his agreement or consent to the making of the deduction.

(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.

Conclusions

30. The effect of Section 13 Employment Rights Act 1996, is that an employer can only make a deduction from the wages of an employee (or worker) if:

a. It is a deduction authorised by statue (eg PAYE tax and NI deductions); or
b. There is a written term in the employment contract that allows the employer to make this deduction and the employer has given the contract to the employee prior to making the deduction; or
c. There is an oral term or agreement for there to be a deduction and the employer has notified the worker of this in writing prior to the deduction; or
d. The employee has given written consent prior to the deduction.

31. Crucially, in this case, the Respondent had not provided the Claimant with a written contract (containing the right to deduct training costs) prior to making the deduction. Nor had the Respondent written to the Claimant prior to making the deduction, explaining the deduction that would be made and referring to any oral agreement or oral term of the contract. Nor was this a deduction authorised by statue or by prior written consent from the Claimant.

32. As such, the deductions in relation to training costs were unauthorised deductions and the Claimant succeeds with her claim under s23 Employment Rights Act 1996.

33. Turning to consider the Bank Holiday pay, I find that the amounts paid to the claimant in respect of the Bank Holidays she worked was less than the "*wages properly payable"* to her (see S13(3) Employment Rights Act 1996. She was paid £52.50 gross for each of these days (7 hours x £7.50 per hour). The wages that were properly payable to her was £78.75 for each of these days (7 hours x £11.25). She has been underpaid by £26.25 for each of these days. As she has been underpaid on 5 Bank Holidays, she is owed £131.25 in total for Bank Holiday work (£26.25 x 5).

34. The total amount owed to Ms Wintle is £446.25. This is £131.25 for Bank Holiday work, £150 unlawfully deducted for course fees and £165 unlawfully deducted for hours worked attending courses.

35. In the event of this debt not being paid by 30th August 2018 (ie within 14 days of 16th August 2018), interest will accrue on this debt at a rate of 8% per annum on any amount that remains unpaid, from the 30th August 2018 until full settlement. (See Article 3(1) Employment Tribunals (Interest) Order 1990).

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Employment Judge Howden-Evans
Dated: 11th November 2018

REASONS SENT TO THE PARTIES ON

……..……12 November 2018……...

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS