EMPLOYMENT TRIBUNALS

Claimant: Miss P Melia

Respondent: Liverpool Six Community Association

HELD AT: Liverpool **ON:** 5 June 2019

BEFORE: Employment Judge Horne

REPRESENTATION:

Claimant: In person
Respondent: Mrs M McGiveron, Trustee, and Mrs S Marshall, Head of Operations

JUDGMENT having been sent to the parties on 22 June 2019 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

Issues for determination

1. The claimant is a former employee of the respondent. She worked in the respondent's café. By a claim form, treated as having been presented on 29 March 2019, the claimant raised a single complaint of unlawful deduction from wages. It was her case that she had not been paid for the correct number of hours that she had worked. According to her claim form, she was still owed £3,519.56.
2. The respondent presented a response, accepting that the claimant had been underpaid, but contending that the amount of the shortfall was only £200.86. The response set out the method by which that figure had been calculated. In broad outline, the respondent set out how many hours it believed that the claimant had worked, multiplied those hours by the claimant's hourly rate of pay, and then added her holiday pay and her pay in lieu of notice. The respondent did not try to argue that it had been authorised to make deductions from wages.

3. It was undisputed that the claimant had come to an agreement with the respondent that she would not be paid in full for all the hours she worked at the time she worked them. Rather, she would "bank" 8 hours per week so that she could have additional paid leave on top of her statutory annual leave. This arrangement effectively enabled the claimant to stay away from work for the whole of the school holidays.

4. The claimant relied on her own handwritten week-by-week breakdown of hours worked. In response, the responded prepared a spreadsheet based on the claimant's signing-in sheets. From these two documents it was possible to see what the parties' respective contentions were in respect of each week of work. It was still unclear, however, what the areas of disagreement were over holiday pay and pay in lieu of notice, and how much money the claimant was entitled to be paid for each week.

5. At the start of the hearing, we discussed how I should try to resolve the dispute. It was agreed that, because of the "banked hours" agreement, and the lack of records of payment each week, it would be very difficult to establish whether or not a deduction had been made in any particular week. Instead, the parties agreed that I should start from scratch. I should determine the claimant's overall entitlement to wages, including holiday pay and pay in lieu of notice, and compare that figure with what the claimant was actually paid. That calculation would enable me to know whether the claimant's wages were up to date by the time of the termination of her employment. If they were not, I would treat the respondent as having made a deduction from the claimant's wages on the occasion of the termination of her employment, with the amount of the deduction being the overall amount of the shortfall.

6. The parties also agreed that, in undertaking this exercise, I should unravel the "banked hours" agreement, and proceed on the following footing:

   6.1. The claimant was entitled to be paid only for the weeks in which she had actually worked.

   6.2. The claimant would be treated as entitled to the full wages for all the hours' work that she did in any week.

   6.3. When determining entitlement to holiday pay, the parties agreed that I should treat the claimant as not having taken any paid leave. I should calculate the claimant's accrued annual leave on termination, leaving out of account any days on which the claimant had not worked.

   6.4. The calculation of a week's pay, for the purposes of compensating for accrued annual leave, should be at the rate of pay prevailing at the time of the claimant's time off work, multiplied by 16 hours' work per week.

7. By the time I came to do the final calculation, the common ground had become more precisely defined:

   7.1. The claimant was employed from 9 April 2018 to 7 December 2018.

   7.2. The claimant's hourly rate was £7.83 up to 2 September 2018 and £8.00 from 3 September 2018.

   7.3. In the absence of any records to the contrary, the respondent was prepared to accept that the claimant had worked 32.5 hours per week from 9 April 2018 to 16 July 2018. For her part, the claimant accepted that there were

two weeks in May 2018 in which she did not work. The result of these concessions was that the claimant was entitled to wages of £3,308.18 for her 13 weeks' work during that period.

7.4. The claimant did not work from 23 July 2018 to 31 August 2018 inclusive.

7.5. The claimant was owed £128.00 for her pay in lieu of notice.

7.6. The claimant's accrued statutory holiday pay was £463.54 (3.7 weeks' accrued leave x 16 hours x £7.83 per hour.)

7.7. The respondent had paid the claimant a total of £5,524.92 for the entirety of her employment, including holiday pay and pay in lieu of notice.

8. Ultimately, the points of dispute I had to resolve related to how many hours the claimant had to work during the months of September to December 2018. The following table sets out the parties' rival contentions. Where there were particular factual disputes that would explain the difference in hours, these disputes are set out in the right hand column.

Week commencing	**Hours worked alleged by claimant**	**Hours worked alleged by respondent**	**Factual dispute**
3 September 2018	39.5	28	Greggs (2 hours) Did the claimant work on Tuesday 4 September? If so, for how long?
10 September 2018	32.5	21	Greggs (2 hours)
17 September 2018	30	27.5	Did the claimant leave at 2pm or 4.30pm on 21 September 2018?
24 September 2018	28.5	26.5	Greggs
1 October 2018	29.5	27.5	Greggs
8 October 2018	29	27	Greggs
15 October 2018	26.5	23.5	Greggs (2 hours) Did the claimant work through her lunch break on 15 October 2018? (I hour)
22 October 2018	0	0	
29 October 2018	30	25.5	Did the claimant finish work at 2pm or 2.30pm on 31 October 2018?

			(0.5 hours) Did the claimant take a break between 2pm and 6pm on 2 November 2018? (4 hours)
5 November 2018	29.5	27.5	Greggs
12 November 2018	29	27	Greggs
19 November 2018	25	23	Greggs
25 November 2018	38	38	
3 December 18	11.5	11.5	

9. References to "Greggs" in the right-hand column are a short-hand for a single dispute which ran as a thread through most of the autumn of 2018. Everyone agreed that the claimant used to drive to a Greggs bakery to collect leftover food for use in the café. The "Greggs run" took about an hour. The claimant started doing the Greggs run once per week and, by the time the claimant's employment ended, she had increased the frequency to twice per week. Where the parties disagreed was about whether or not the claimant volunteered to do the Greggs run in her own time or whether she was entitled to be paid for this work.

Evidence

10. I heard oral evidence from the claimant on her own behalf. The respondent called Mrs McGiveron as a witness. As well as noting their answers to questions, I took into account a sample of handwritten timesheets that Mrs McGiveron handed to me.

Facts

11. The respondent is a local charity operating a community centre in North Liverpool. Its Chief Executive is Mr Woodhouse. The community centre includes a small café where the claimant worked.

12. The claimant has a young son of school age. By arrangement with the respondent, did not work during the school holidays so that she could be with him. As most parents know, the school holidays last for about 13 weeks, but statutory annual leave is only 5.6 weeks. To cover the shortfall, the claimant and respondent agreed that the claimant would make up the time during term times. So, for every week's work that she did, 8 hours would be unpaid and "banked" to replace the 7 or so additional weeks that the claimant would need to cover the school holidays.

13. The claimant was given regular wage slips. They routinely showed payment for less work than the claimant was actually doing. The claimant did not query them. Nor did she complain about not being credited with sufficient hours. This does not surprise me: she knew that some of her hours were being banked.

14. Every week, the respondent would prepare a template sheet for staff to sign in and sign out. The purpose of the sheet was twofold.

    14.1. The first was for health and safety. The sheet was meant to be a record of which employees were in the building at a given time, so that they could be traced, for example, in the event of a fire. The reliability of this document as a real-time record was substantially undermined by a widespread practice of backfilling entries or failing to sign out. For example, one member of staff might sign in at 10.55am, and the next member of staff to sign in would state that they had arrived at 9.30am.

    14.2. The second purpose of the document was so that the respondent could keep a record of the hours that each member of staff had worked for pay purposes.

15. There is a dispute about where the sheet was routinely kept, but I did not need to resolve that dispute. I accept the claimant's evidence that she could not always find the sign-in sheet and, on those occasions, did not sign in or out.

16. One of the ways in which the respondent kept its food costs down was by collecting leftovers from a Greggs bakery and selling them on. The task of collecting the food was known as the "Greggs run". A member of staff would drive their own car to Greggs, often through rush-hour traffic, and return to the community centre with the food. The return journey took about an hour.

17. The claimant did the Greggs run at the end of her working day in the café. She did not record the time spent on the Greggs run on the sign-in sheets.

18. Before the claimant took on the Greggs run, it was done by a number of different individuals. At some point it was done by Mrs Marshall, Head of Operations, on a voluntary basis. It was also done by two colleagues known to the claimant as Danielle and Ellis. These two women were paid for their time.

19. Prior to September 2018 the claimant did the Greggs run once per week, but increased the frequency to twice a week from September 2018. Again, I do not have any evidence about when in September the frequency of Greggs runs increased. As part of my oral reasons I informed the parties that the frequency increased in mid-October. This finding was not supported by the evidence. It affects the total number of hours that the claimant worked in the weeks commencing 1 October and 8 October 2018. Had I taken into account that the frequency of Greggs runs increased in September 2018 (and not mid-October), I would have found that the claimant had worked one more hour during those weeks than I actually found. The claimant has therefore effectively been denied credit for two additional hours' work, for which I apologise. I have not, however, altered my findings of fact about how many hours the claimant worked. That would require reconsideration of the judgment, which is beyond the scope of these written reasons.

20. The claimant started doing the Greggs run following a conversation between her and Mr Woodhouse. It is unclear when this conversation took place. I am, however, satisfied that, during the course of this conversation, Mr Woodhouse told the claimant that she would be paid for doing the Greggs run. The essence of their agreement was that the claimant would be paid for her time on the Greggs run at her usual hourly rate. This is a controversial finding, so I set out my reasons briefly here:

20.1. There was no direct evidence to contradict the claimant's account. The respondent did not, for example, call Mr Woodhouse. If the claimant's evidence was capable of belief, it was likely to be persuasive on the balance of probabilities.

20.2. I decided that the claimant's evidence was capable of belief. It was not fatally undermined by the absence of subsequent complaints from the claimant. As I have explained, I do not think it is surprising that the claimant did not complain or query her pay slips.

20.3. I also think that it is unremarkable that the Greggs run did not appear on the sign-in sheets. Part of the purpose of the sign-in sheets was to act as a record – albeit not a very good one – of who was in the building at a particular time. Moreover, the claimant and the respondent would not necessarily have been considered it important to keep a record of precisely when the claimant had done the Greggs run. The hours were the same, week in, week out. The only exception is when the regular hours changed from once to twice per week in September 2018. I do not know when in September 2018 this happened.

20.4. It seems to me relatively unlikely that a low-paid employee would give up their time, and the running costs of their car, to do voluntary work for their employer with no expectation of anything in return. Here, on the respondent's version, there was not even an agreement to pay the claimant's petrol money.

21. It is common ground that, during the week commencing 3 September 2018, the claimant worked on at least the Monday, Wednesday, Thursday and Friday of that week. No sign-in sheet exists for the Monday or Tuesday, but something led the respondent to credit the claimant with 7.5 hours' work on the Monday. She was also recorded as having started work at 8.00am on the Tuesday. In passing, it surprises me that the claimant worked on the Monday at all, because her son would not have returned to school on the first Monday in September. That said, the only dispute is about whether the claimant worked on the Tuesday and, if so, for how long. Doing the best I can, I find that the claimant is most likely to have worked the same number of hours on the Tuesday as she did the day before. Accordingly, my finding is that on Tuesday 4 September 2018 the claimant worked 7.5 hours.

22. During the weeks commencing 10 September and 17 September 2018, the claimant did two Greggs runs: one each week.

23. On 21 September 2018, the claimant was unable to sign out as she left work. This was because, for whatever reason, the claimant and her colleagues could not get access to the sign-in sheet. This explains why colleagues did not sign out either. I have to decide what time the claimant finished work that day. Doing my best, looking at the other days that week, I find that the claimant is most likely to have worked until 3.00pm.

24. The claimant worked through her lunch break on Monday 15 October 2018. The claimant's oral evidence in this regard is consistent with her sign-in sheet. Her total working hours for that day were therefore 8.5 and not 7.5 as alleged by the respondent.

25. On Wednesday 31 October 2018, the claimant worked until 2.30pm. She did not sign out. The finish time of 2.30pm is the most likely on the balance of probabilities, because it accords with previous Wednesdays and also the Monday and Tuesday of that week.

26. The community centre hosted a special function in the evening of 2 November 2018. The claimant worked in the café during the day until about 2.00pm, and also worked at the evening function from about 6.00pm. The claimant tells me, and I accept, that, between 2.00pm and 6.00pm, she remained at the community centre, doing work such as preparing linen. The timesheets for that day did not show any break.

27. Adding the time spent on the Greggs runs, and the 4 additional hours' work on 2 November 2018, to the time already conceded by the respondent, the claimant's total working hours during week commencing 29 October 2018 actually exceeded the 30 hours that the claimant alleges she worked. The claimant agreed that she would not claim the excess.

Relevant law

28. In view of the parties' agreement as to my method of approach, there were few if any relevant legal principles that I needed to apply in order to resolve the dispute, which turned squarely on the facts. I kept the following legal framework in mind.

29. Section 13 of the Employment Rights Act 1996 provides, so far as is relevant:

> "(1) An employer shall not make a deduction from wages of a worker employed by him...
>
> …
>
> (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, 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 wage on that occasion.
>
> …

30. Wages for a task can become properly payable if the worker and the employer vary the contract of employment so as to include a term that the employer will pay the worker for that task. Such a variation may be reached by oral agreement.

Conclusions

31. The claimant worked the following hours from 2 September 2018 until the termination of her employment. Asterisks in the table denote the two weeks in early October where I should have found that the claimant did one more hour than I actually found (see paragraph 19).

Week commencing	**Hours worked**
3 September 2018	31.5
10 September 2018	22

17 September 2018	29.5
24 September 2018	27.5
1 October 2018 *	28.5
8 October 2018 *	28
15 October 2018	26.5
22 October 2018	0
29 October 2018	30
5 November 2018	29.5
12 November 2018	29
19 November 2018	25
25 November 2018	38
3 December 2018	11.5
Total hours worked	**356.5**

32. For those hours, the claimant was entitled to be paid as follows:

    356.5 x £8.00 per hour = £2,852.00.

33. Adding in the agreed figures relating to the other elements of the claimant's pay, the total amount of wages properly payable to the claimant for the whole of her employment was:

	£
Wages for hours worked from start of employment to 16 July 2018	3,308.18
Wages for non-working days between 16 July 2018 and 2 September 2018	0
Wages for hours worked from 2 September 2018 to end of employment	2,852.00
Accrued holiday pay	463.54

Pay in lieu of notice	128.00
Total wages payable	6,751.72

34. The claimant was only paid £5,524.92 in total.

35. By paying her only £5,524.92, and not the properly payable wages of £6,751.72 as at the termination of her employment, the respondent made a deduction from the claimant's wages of £1,226.80.

36. Since the respondent did not contend that the deduction was authorised, it contravened section 13 of the Employment Rights Act 1996.

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Employment Judge Horne

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Date: 18 September 2019

REASONS SENT TO THE PARTIES ON
3 October 2019

FOR THE TRIBUNAL OFFICE