



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4123557/2018

Held in Edinburgh on 2, 3 and 4 July 2019

Employment Judge: M Sutherland

Nina Wilczek

**Claimant
In Person**

Cyan Beauty Studios Limited

**Respondent
Represented by:
Mr R Morton -
Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the complaint of unauthorised deduction from wages is well founded and the Respondent is ordered to pay the Claimant wages in sum of £976.92 (gross).

REASONS

Introduction

1. The Claimant made a complaint of unlawful deduction from wages in respect of failures to pay national minimum wage and holiday pay.
2. The Claimant was unrepresented and appeared in person. The Respondent was represented by Mr Morton, Solicitor.
3. The Claimant gave evidence on her own behalf and led evidence from Billy McPhillips, Beauty Therapist. The Respondent led evidence from Nadia Ashley, Director.
4. The parties each lodged a set of documents.

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5. Neither party made closing submissions.
6. The following initials are used by way of abbreviation in the findings in fact:

Initials	Name	Title
RS, Director	Rachel Sylvester	Director
NA, Director	Nadia Ashley	Director
BM, Therapist	Billie McPhillips	Beauty Therapist

Findings in fact

7. The Tribunal makes the following findings in fact:
8. The Claimant worked as a beauty therapist in the Respondent’s salon from 17 February 2018 until 7 September 2018.
9. The Respondent’s salon was established by RS, Director and NA, Director. The business was owned equally between them until December 2018 when their investment was diluted to 10% each following a share purchase. RS, Director and NA, Director were the salon managers. RS, Director was responsible for marketing and administration.

The Contract

10. The Respondent had a standard contract which it provided to its beauty therapists (‘the contract’). The document was headed “Employment Contract”. The contract stated that the claimant was “self-employed”. The contract was to subsist until terminated and was to be re-negotiated every January. At a meeting with Respondent management in February 2018 the contract was read out to the Claimant (she was not provided with a copy). In September 2018 the Claimant was provided with a revised contract which was in identical terms to the February contract other than changes which pertained to her new working hours; VAT on commission; further details on cleaning requirements; and social media requirements (‘the revised contract’).

Type of work

11. The Claimant worked as a beauty therapist. The Respondent regarded her as a very competent beauty therapist. The Claimant performed manicures, pedicures, waxing and facial treatments. The Respondent did not supervise how the Claimant undertook those beauty treatments.
12. The treatments performed by the Claimant took on average 1 hour including tidying-up the treatment room (a facial would take about 60 mins; a waxing 45 minutes; a manicure 45 minutes). The Claimant specialised in and regularly performed facials.

Other workers

13. About 7 people worked in the beauty salon. The Respondent held “staff meetings” on a Saturday after the last client.

Working days

14. The contract stated that the position was “full time” and that her working days were the salon opening days of Tuesday to Saturday. In March 2018 the Respondent agreed that the Claimant could work part time hours so that she could work part time in a care home (i.e. not in competition with the Respondent). The Claimant recruited another part time therapist, BM who started in June 2018. From early March 2018 until termination, the Claimant’s working pattern was Thursday, Friday and Saturday and this pattern was reflected in the revised contract. Exceptions to that working pattern arose on Wednesday 7 and Tuesday 13 both March 2018; and Tuesday 26 June 2018.

Working hours

15. The contract stated that her working hours were the salon opening hours of 11am to 6pm (with late night opening until 8 pm on Thursday and 7pm on Saturday). Under the contract the Claimant was to arrive 30 minutes before the start of every shift.
16. The Claimant did not work the salon opening hours. The Claimant generally arrived 30 minutes before her first client and left after her last client. On a scheduled working day, if Claimant had hours where no client appointments had been booked, the Claimant would sometimes block off those hours in the booking diary.

17. The Claimant was reprimanded by the Respondent management when she was late into work (i.e. less than 30 minutes before her first client).

Substitute

18. The contract did not provide a right to send a substitute. The expectation was that the work would be undertaken by the Claimant personally. The Claimant undertook the work personally and did not seek to send a substitute.

Salon

19. The salon opening hours were Tuesday to Saturday 11am to 6pm (with late night opening until 8 pm on Thursday and 7pm on Saturday). Occasionally clients were seen outside of opening hours.
20. The salon was opened by Respondent management. The Claimant did not have a key.
21. The salon premises were branded as Cyan Beauty and used the Cyan logo and Cyan colour scheme. There was no notice advising customers that the therapists were self-employed.
22. After BM, Therapist started the Claimant did not always have sole access to a treatment room and she had to wait until BM, Therapist was finished (this arose at least a couple of times a day). The Respondent tried to share clients fairly between the Claimant and BM, Therapist.
23. There was a cleaning rota with about 7 names on it including the Claimant's. It specified what areas had to be cleaned by which person. It took about 15 minutes a day to undertake the cleaning duties.

Equipment and products

24. Beauty equipment and products were provided by the Respondent.

Website

25. The salon had its own website which was branded as Cyan Beauty and used the Cyan logo and colour scheme.
26. The Respondent business was promoted by NA, Director. NA, Director arranged deals through discount websites to attract customers.
27. The Claimant was asked by management to promote on social media using the Cyan logo and provide links to the salon website. The Claimant did not promote on social media.

Clients

28. Clients made appointments online, by telephone and in person. These appointments were made with the Respondent business. Management took the client bookings and put them in the online bookings' diary. The Claimant had access to the bookings diary.
29. Clients were regarded as clients of the Respondent unless the therapist had a prior relationship. The Claimant had 5 such clients.

Payment

30. The contract stated that the Claimant was to be paid a "wage" weekly in arrears. She was paid commission of 50% of the 'retail cost' of the treatment, except for facials which were 40%. Income tax and national insurance was not deducted from the payments made to the Claimant. The Claimant was not paid if she did not work.
31. The treatment prices were set by the Respondent. Payment for treatments was made to the Respondent and paid into their business bank account.

Uniform

32. The contract stated that "salon dress and behaviour must comply to Cyan Policy". The contract detailed the uniform to be worn. The contract referred to black or grey soft indoor shoes. The Claimant wore trainers.
33. The contract stated: "Salon will provide uniform, and this will be recharged to Nina". The salon provided the Claimant with a tunic top which she paid for and which she wore.

34. The contract stated: "black trousers only". The Claimant wore dark trousers.

Substitution

35. The contract did not provide with Claimant with a right to send a substitute worker and the Claimant did not send or seek to send a substitute worker.

Time off

36. Under the contract time off required prior approval by "a manager" (either RS, Director or NA, Director). Under the contract the Claimant was not permitted to block time off in the bookings diary without management prior approval and "No holidays will be approved [if] any other member of staff is already on holiday at this time".

37. The Claimant sought approval for time off for holidays and approval was granted. The Claimant was on unpaid leave on 24 March, 14 and 21 April, 4 and 5 June and 3 August all 2018.

Training and insurance

38. Under the contract the Claimant was required to provide proof of Training Certificates and of Public Liability Insurance. The Claimant provided this to the Respondent.

39. In March 2018 the Claimant was asked to undertake a beauty treatment called dermaplaning which she was not qualified or insured to perform.

Termination

40. Under the contract both parties were required to give 1 month's notice to terminate the contract. Following termination the Claimant was not permitted to have contact with the Respondent's clients. The Claimant has not undertaken work for the Respondent's clients.

Payments received and treatments undertaken

41. The following table sets out the payments made by the Respondent to the Claimant; the number of treatments undertaken by the Claimant that week;

and the number of days worked that week. No written records were kept of the hours that the Claimant worked.

Date of payment (week in arrears)	No of Treatments	No of days Worked	Pay
27 February 2018	7	1	£75.00
6 March 2018	8	4	£26.51
13 March 2018	5	2	£76.00
20 March 2018	11	4	£169.95
27 March 2018	5	3	£78.00
3 April 2018	8	2	£78.70
10 April 2018	18	3	£151.70
17 April 2018	20	3	£187.60
24 April 2018	9	2	£97.00
1 May 2018	15	2	£130.50
8 May 2018	18	3	£151.74
15 May 2018	5	1	£64.00
22 May 2018	20	3	£234.00
29 May 2018	23	3	£227.50
5 June 2018	20	3	£189.25
12 June 2018	14	3	£189.00
19 June 2018	15	3	£150.50
26 June 2018	9	3	£80.50
3 July 2018	16	3	£189.50
10 July 2018	20	3	£284.44
17 July 2018	19	3	£185.37
24 July 2018	14	3	£103.00
31 July 2018	19	3	£166.00
7 August 2018	13	3	£76.32
14 August 2018	10	2	£38.00
21 August 2018	20	3	£93.00
28 August 2018	9	3	£98.20

4 Sept. 2018	12	3	£86.60
11 Sept. 2018	12	3	£158.71
18 Sept. 2018	8	2	£5.94

Observations on the evidence

42. BM, Therapist gave her evidence in a credible and reliable manner. There was no hesitation or attempts to answer in a self-serving manner.
43. The Claimant's evidence in relation to her hours of work was self-serving and was not an accurate reflection of the hours she actually worked. The Claimant stated that she worked the salon hours. However both BM, Therapist and NA, Director stated in evidence that the Claimant started work 30 minutes before her first client and finished work after her last client.
44. NA, Director's evidence in relation to the contract was self-serving and having been on employment law training she sought to distance the Respondent from the contract despite the fact that the contract was reflective of salon practice and was re-issued in similar terms in early September 2018.

Relevant Law

National Minimum Wage

45. Under Section 1 of the National Minimum Wage ('NMW') Act 1998 a worker qualifies for the NMW. References to a numbered Section are to the NMW Act.
46. Under Section 54 a worker is an individual who works under a contract of employment or any other contract whether express or implied, oral or in writing, whereby the individual undertakes to do or perform personally any work or services for the other party whose status is not that of a client or customer of any profession or business undertaking carried on by the individual.
47. Under Section 28 where any question arises as to whether an individual qualifies for the NMW it shall be presumed that the individual qualified for the NMW unless the contrary is established.

48. Under Regulation 4 of the NMW Regulations 2015 the hourly rate for a worker who is aged 25 years and not an apprentice is the national living wage. References to a numbered Regulation are to the NMW Regulations 2015.
49. Under Section 17 where an employer has failed to pay the applicable rate a worker has an implied contractual entitlement to the higher of the applicable or current rate. The applicable rate from April 2017 to March 2018 is £7.50; from April 2018 until March 2019 is £7.83; and current rate of the national living wage is £8.21.
50. Under Regulation 7 the worker's remuneration is determined by dividing the remuneration in the pay reference period with the hours of work in the pay reference period.
51. Under Reg 6 the pay reference period is a month or the period of payment if shorter.
52. Determining the hours of work depends upon whether the work is salaried work, time work, output work or unmeasured work. Under Reg 21 salaried work arises where the worker is entitled to be paid regardless of the number of hours actually worked. Under Reg 30 time work arises where the work is not salaried work, and where pay is calculated by reference to the time worked. Under Reg 36 output work arises where the work is not time work, and where pay is calculated by reference to the measure of output by the worker, including the number of tasks performed. Under Reg 44 unmeasured work arises where the work is not salaried, time or output work.
53. For time work the hours worked in a pay reference period is the total number of hours of time worked. Under Reg 37, for output work, where there is no rated out put work, the hours worked are the total number of hours of output work. Under Reg 45, for unmeasured work, where there is no daily average agreement, the hours worked are the total number of hours worked.

Holiday Pay

54. Under Regulations 13 and 13A of the Working Time Regulations 1998 a worker is entitled to 5.6 weeks annual leave in each leave year. Where a worker's employment is terminated during a leave year the worker is entitled to a proportion of that leave and a payment in lieu in respect of any leave not taken. (Less than half a day's leave is rounded up to half day's leave and if more is rounded up to a whole day.) The definition of worker in Regulation 2 of the Working Time Regulations 1998 is the same as Section 54 of the NMW Act. The holiday year begins on the date when employment begins unless a relevant agreement provides otherwise. A worker is entitled to leave paid at the rate of a week's pay calculated under the Employment Rights Act 1996. Under Section 224 where there are no normal working hours the amount of a week's pay is the amount of the worker's average weekly remuneration in the period of 12 weeks ending with the calculation date.

Unlawful deduction from wages

55. Under Section 13 of the Employment Rights Act 1996 an employer shall not make an unauthorised deduction from wages. A deduction arises where the total amount payable on any occasion is less than the amount properly payable.
56. Under Section 23 a claim must be made within 3 months or such further reasonable period if it is not reasonably practicable. Where there is a series of deductions the time limit runs from the last date.

Discussion and decision

Status

57. The following criteria are necessary for an individual to fall within the definition of a 'worker': first, there must be a contract (comprising an obligation to offer and accept some work); second, that contract must provide for the individual to carry out personal services; and third, those services must be for the benefit of another party to the contract who must not be a client or customer of the individual's profession or business undertaking.

58. Factors relevant to the third criteria (determining whether the Claimant is running a business and whether the Respondent is a customer of that business) include: the degree of control and subordination exercised by the Respondent; the degree of integration into the Respondent business; the exclusivity of the engagement and its duration; the method of payment of the Claimant; the degree of investment by the Claimant in terms of capital, provision of equipment and products, hire of support staff; the degree of risk borne by the Claimant; whether the claimant was free to provide the same services to others; and how the relationship was categorised by the parties.
59. There was a contract between the parties and the parties largely performed their obligations according to that contract from 17 February 2018 until 7 September 2018. The contract was to subsist until terminated with notice and was to be re-negotiated every January.
60. The categorisation of the relationship by the parties was inconsistent – the contract referred both to the Claimant being in an employment relationship and also to a self-employed relationship.
61. Under the contract the Claimant's days of work were initially Tuesday to Saturday and from March 2018 Thursday to Saturday. With only minor exceptions, the Respondent provided work on the agreed days which the Claimant undertook. The contract did not provide a right to send a substitute. The contractual expectation was that the work would be undertaken by the Claimant personally. The Claimant undertook that work personally and did not seek to send a substitute.
62. Under the contract the Claimant's hours of work on her working days were the salon opening hours but the Claimant did not work those hours. The Claimant generally arrived 30 minutes before her first client and left after her last client. The Claimant was reprimanded if she did not do so. The Claimant performed an average of about 5 treatments each working day.

63. The Claimant was expected to and wore the salon uniform. The salon was branded by the Respondent. Clients made appointments with the Respondent and the Respondent determined which therapist would see which clients. Equipment and products were provided by the Respondent. The salon prices were determined by the Respondent and the clients paid the Respondent. The Claimant was paid commission weekly in arrears based upon the type of work undertaken. The Claimant's earnings fluctuated with the number and type of clients booked by the Respondent. The Claimant did not work in competition with the Respondent. The salon clients were regarded as belonging to the Respondent.
64. In all the circumstances, and having regard to the relevant factors, the Tribunal has no hesitation in determining that the Claimant was a worker rather than self-employed. There was a contract (comprising an obligation to offer and accept some work) between the Respondent and the Claimant. That contract provided for the Claimant to carry out personal services. Although there was some risk to the Claimant regarding the level of her earnings, the degree of control, subordination, integration, exclusivity, investment and duration was such that the Claimant could not be said to be running a profession or business undertaking and the Respondent was not a client or customer thereof.

National Minimum Wage

65. The period of payment of the Claimant was weekly and accordingly that is the pay reference period.
66. The Claimant was not undertaking salaried work. Where there is no rated output work and no daily average agreement, the hours worked fall to be calculated in the same manner whether the work is time work, output work or unmeasured work.
67. The beauty treatments performed by the Claimant took on average 1 hour. In addition the Claimant required to attend 30 minutes before her first client and undertake 15 minutes general cleaning duties each day. Accordingly 45 minutes of 'additional hours' have been added if 1 day was worked per week;

1 hour 30 minutes if 2 days were worked per week; 2 hours 15 minutes if 3 days were worked per week, etc.

68. The following table sets out:

- a. the date of payment (week in arrears);
- b. the number of treatments performed that week;
- c. the number of additional hours worked that week;
- d. the total weekly hours (number of treatments x 1 hour + number of additional hours);
- e. the total pay paid in respect of that week;
- f. the hourly rate paid that week (total weekly pay / total weekly hours);
- g. the NMW rate applicable that week;
- h. the sum due (if the hourly rate paid is less than the applicable NMW rate, then: the total weekly hours x the current NMW rate);
- i. the difference between the sum due applying the current NMW rate and the total weekly sum paid.

Date of payment (week in arrears)	No of Treatments	Addition- al hours (Hrs: Mins)	Total Weekly Hours (Hrs: Mins)	Total Weekly Pay	Hourly Rate	Applic- able NMW Rate	Sum due applying current rate	Differ- ence
27-Feb-18	7	00:45	07:45	£75.00	£9.68	£7.50	£0.00	£0.00
06-Mar-18	8	03:00	11:00	£26.51	£2.41	£7.50	£90.31	£63.80
13-Mar-18	5	01:30	06:30	£76.00	£11.69	£7.50	£0.00	£0.00
20-Mar-18	11	03:00	14:00	£169.95	£12.14	£7.50	£0.00	£0.00
27-Mar-18	5	02:15	07:15	£78.00	£10.76	£7.50	£0.00	£0.00

03-Apr-18	8	01:30	09:30	£78.70	£8.28	£7.83	£0.00	£0.00
10-Apr-18	18	02:15	20:15	£151.70	£7.49	£7.83	£166.25	£14.55
17-Apr-18	20	02:15	22:15	£187.60	£8.43	£7.83	£0.00	£0.00
24-Apr-18	9	01:30	10:30	£97.00	£9.24	£7.83	£0.00	£0.00
01-May-18	15	01:30	16:30	£130.50	£7.91	£7.83	£0.00	£0.00
08-May-18	18	02:15	20:15	£151.74	£7.49	£7.83	£166.25	£14.51
15-May-18	5	00:45	05:45	£64.00	£11.13	£7.83	£0.00	£0.00
22-May-18	20	02:15	22:15	£234.00	£10.52	£7.83	£0.00	£0.00
29-May-18	23	02:15	01:15	£227.50	£9.01	£7.83	£0.00	£0.00
05-Jun-18	20	02:15	22:15	£189.25	£8.51	£7.83	£0.00	£0.00
12-Jun-18	14	02:15	16:15	£189.00	£11.63	£7.83	£0.00	£0.00
19-Jun-18	15	02:15	17:15	£150.50	£8.72	£7.83	£0.00	£0.00
26-Jun-18	9	02:15	11:15	£80.50	£7.16	£7.83	£92.36	£11.86
03-Jul-18	16	02:15	18:15	£189.50	£10.38	£7.83	£0.00	£0.00
10-Jul-18	20	02:15	22:15	£284.44	£12.78	£7.83	£0.00	£0.00
17-Jul-18	19	02:15	21:15	£185.37	£8.72	£7.83	£0.00	£0.00
24-Jul-18	14	02:15	16:15	£103.00	£6.34	£7.83	£133.41	£30.41
31-Jul-18	19	02:15	21:15	£166.00	£7.81	£7.83	£174.46	£8.46
07-Aug-18	13	02:15	15:15	£76.32	£5.00	£7.83	£125.20	£48.88
14-Aug-18	10	01:30	11:30	£38.00	£3.30	£7.83	£94.42	£56.42
21-Aug-18	20	02:15	22:15	£93.00	£4.18	£7.83	£182.67	£89.67
28-Aug-18	9	02:15	11:25	£98.20	£8.60	£7.83	£0.00	£0.00
4 Sept. 2018	12	02:15	14:15	£86.60	£6.08	£7.83	£116.99	£30.39
11 Sept. 2018	12	02:15	14:15	£158.71	£11.14	£7.83	£0.00	£0.00

18 Sept. 2018	8	01:30	09:30	£5.94	£0.63	£7.83	£78.00	£72.06
TOTAL								£441.02

69. The Claimant is therefore due arrears of pay in sum of £441.02.

Holiday Pay

70. The Claimant's holiday year began on 17 February 2018, the start of her employment. The Claimant's contract ended on 7 September 2018. Accordingly the Claimant had accrued 10 days holiday under the WTR 1998 (30 weeks worked/ 52 weeks a year x 5.6 weeks annual holiday entitlement x 3 working days a week).

71. The Claimant was on unpaid leave on 24 March, 14 and 21 April, 4 and 5 June and 3 August all 2018. The Claimant was not paid for leave accrued but unused as at the termination date. These failures to pay were factually linked all being failures to pay holiday pay. These failures to pay were not interrupted by a temporal gap of 3 months or otherwise. These failures accordingly amounted to a series of deductions.

72. The Claimant was owed 10 days of holiday pay as at the termination date.

73. The following table sets out the total pay received plus the NMW pay due in respect of the last 12 weeks of work.

Date of payment (week arrears)	of in	Total Weekly Pay	NMW difference
03-Jul-18		£189.50	£0.00
10-Jul-18		£284.44	£0.00
17-Jul-18		£185.37	£0.00
24-Jul-18		£103.00	£30.41
31-Jul-18		£166.00	£8.46
07-Aug-18		£76.32	£48.88
14-Aug-18		£38.00	£56.42

21-Aug-18	£93.00	£89.67
28-Aug-18	£98.20	£0.00
4 Sept. 2018	£86.60	£30.39
11 Sept. 2018	£158.71	£0.00
18 Sept. 2018	£5.94	£72.06
TOTAL	£1,485.08	£336.29

74. The Claimant's average weekly pay is £151.83 ($\text{£1,485.08} + \text{£336.29} / 12$ weeks). The Claimant's average daily pay is £53.59 ($(12 \text{ weeks} \times \text{£151.83}) / (3 \text{ days} \times 12 \text{ weeks} - 2 \text{ days re unpaid leave } 14 \text{ August and } 18 \text{ September})$).
75. Accordingly the Claimant is entitled to arrears of holiday pay in sum of £535.90 ($10 \text{ days} \times \text{£53.59}$).

Date of Judgement: 18th September 2019

Employment Judge: M Sutherland

Date Entered in Register: 28th September 2019

And Copied to Parties