EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss C Lawrie	**v**	BCIE

Heard at: Norwich **On:** 17 October 2019

Before: Employment Judge S Moore

Appearances
For the Claimant: In person.
For the Respondent: Did not attend and was not represented.

JUDGMENT

The claim for unauthorised deduction of wages succeeds and the Respondent must pay the Claimant the sum of £1,100.

REASONS

Introduction

1. This is a claim for unauthorised deduction of wages pursuant to sections 13 and 23 of the Employment Rights Act 1996 ("ERA").

2. The Respondent did not attend and was not represented. It had recently sent a letter to the Tribunal stating that it was willing to pay the Claimant's claim in full, however at the outset of the hearing the Claimant stated that since the Respondent refused to accept liability she wished the case to proceed and to obtain a judgment on the matter, even if her claim was ultimately unsuccessful.

3. The Claimant provided a witness statement and a bundle of documents and gave evidence. The Respondent provided a witness statement from a director, Dr Cliff Dedynski. On the basis of that evidence I make the following findings of facts.

Facts

4. The Claimant began to work for the Respondent, an international student recruitment agency, in July 2008. She was not given a written contract of employment. The verbal agreement was that she would work as an administrator Monday to Friday 10am-2pm for £7.00/hr. She was based in Bedford, which is the only UK office of the Respondent. Subsequently her hours increased from 9am-3pm, but she was still paid by the hour. At that stage her duties were filing, chasing up offers for and recruiting students from overseas. At the end of 2010 she became the officer manager. Her hours stayed the same but she was paid an annual salary. She was still not given a written contract of employment. Three other members of staff worked with her in the Bedford office. None of them were ever given a written contract either and, apart from the Claimant, the turnover amongst the staff was very high.

5. Part of the Claimant's job was to check and file the contracts of the staff employed overseas. The Claimant was given a template contract against which to check them, although certain matters, such as annual leave varied from contract to contract. The Claimant was also aware that the contracts were not consistent with the requirements of UK employment law as regards matters such as annual leave and maternity pay (although since they had been issued to staff working overseas this did not matter). The template contract and the contracts for the staff employed overseas contained a provision headed "Termination of Employment/Resignation Procedures". It provides:

> "1 You will be required to give an 8 week notice period before you leave BCIC. This must include a 4 working week training period with a new member of staff. Failure to comply with this may result in loss of bonuses.
>
> 2 Both parties to the contract are henceforth required to give one month's notice should they decided to terminate the contract of employment. The period of notice clause takes immediate effect and supersedes any other 'leave of Notice' stipulated above. If a member of staff terminates the contract without the one month notice period they will not be entitled to their pay for the last working month with BCIE"

("The Termination Clause")

6. The Claimant stated that she did not consider that this contractual provision applied to her or the other office staff in the UK. She did not consider that the provisions in the contracts issued to staff employed overseas were applicable to staff in the UK because those contracts were not compatible with UK employment law and because, in any event, there were variations amongst them which meant that there was no one set of potentially applicable contractual terms.

7. On Sunday 8 July 2018 the Claimant sent a WhatsApp message to a director of the Respondent, Mrs Nazmina Dedynski asking to speak to her.

She subsequently had a telephone conversation with her in which she gave two weeks' notice of the termination of her employment and said her last working day would be 20 July 2018. She followed this up with an email the next day, again confirming her last day of work would be 20 July 2018. During the next two weeks there were a number of WhatsApp messages and emails between the Claimant and Mrs Dedynski concerning the Claimant's departure, including the tasks that the Claimant needed to complete before she left and the practicalities of hiring replacement staff.

8. On the Claimant's last day of work she sent an email to her colleagues saying goodbye and thanking Mr and Mrs Dedynski for their support and guidance during the last 10 years. Mrs Dedynski sent the Claimant a WhatsApp message confirming she had changed the passwords for the UK office so that the Claimant no longer had access to them and asking the Claimant to send her an update of her contact details from her personal email.

9. On Monday 23 July 2018 the Claimant started work at a new job. That morning she received an email from Mrs Dedynski stating that "she was amazed that [you] have decided to set your own end date of last Friday at BCIE Ltd … it was clear there was an implied contract between BCIE and yourself. You were in charge of contracts and you were well aware of the terms and conditions of all office managers' contracts. As such you are contractually obliged to comply with the standard period of notice… "Your will be required to give an 8 week notice period before you leave BCIE. This must include a 4 working week training period with a new member of staff… As such we cannot accept your resignation and notice period associated with it and you are expected to be at work today."

10. This email came as a shock to the Claimant who understood the Respondent to have accepted her resignation and, although the Respondent had asked if she could postpone the start date of her new job, it had never been said to the Claimant that she was contractually obliged to give the Respondent a longer period of notice.

11. On 5 August 2018, the date that the Claimant should have been paid, she found that she had not been paid for the period between 6-20 July 2018. The Respondent maintained that it was entitled not to pay her by reason of the Termination Clause.

Conclusions

12. Section 13 of the ERA provides:

> "(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 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."

13. The Respondent relies on the Termination Clause on the basis that it is a relevant provision of the Claimant's contract that authorised the deduction made.

14. Whether or not the Termination Clause is, in principle, enforceable or constitutes an unenforceable penalty clause has not been raised as an issue before me and, in any event, is not necessary to decide in order to determine the outcome of this case because it is clear that the deduction made by the Respondent does not satisfy the requirements of section 13(1).

15. It is clear that the Claimant never signified her consent to the making of the deduction in writing for the purposes of section 13(1)(b). As regards section 13(1)(a) the Termination Clause was never a relevant provision of the Claimant's contract. The Claimant never had a written contract, still less one that included the Termination Clause. Further, there is no basis for implying such a term into the Claimant's oral contract: it is not necessary to give the contract business efficacy, an intention to include the term has not been demonstrated by the way in which the Claimant's contract has been performed, the term is not so obvious that the parties intended it, and there is no evidence that it is normal custom and practice to include such a term in contracts of that particular kind. The fact that the contracts of the staff employed overseas contained the Termination Clause is not a basis for implying that provision into the Claimant's contract since it is clear that the contracts of those staff differed from the Claimant's contract by reason of the fact that they had written contracts, whereas she did not, and their contracts were not required to, and did not, comply with UK employment law. The Claimant did not expect or believe that the Termination Clause applied to her and there is no evidence that the Respondent ever sought to apply the term to any of the staff employed in the UK office.

16. Further and in any event, even if it could be argued that the Termination Clause was an implied term of the Claimant's contract, the Respondent waived the term by accepting the Claimant's notice period of two weeks and not seeking to invoke the Termination Clause at any time during her notice period. The first point at which the Respondent sought to invoke the Termination Clause was by email on 23 July 2018, after the Claimant's employment had terminated.

17. It follows that the Claimant's claim of unlawful deduction of wages succeeds and the Respondent must pay her the sum of £1,100, which are her gross wages for the period 6-20 July 2018.

_____
Employment Judge S Moore

Date: 22 October 2019

Sent to the parties on: .8/11/19.....

.....
For the Tribunal Office