

EMPLOYMENT TRIBUNALS



Claimant

Miss A Odonnell

v

Respondent

Mrs J Middleton

Heard at: **Leeds**

On: **18 November 2019**

Before:

Employment Judge Knowles

Appearances:

For the Claimant: In person

For the Respondent: In person

RESERVED JUDGMENT

1. The Claimant's claim for unlawful deduction from wages (pay below the National Living Wage) is well founded. The Respondent is ordered to pay to the Claimant the sum of £339.84 which was unlawfully deducted from her wages.
2. The Claimant's claim for holiday pay in 2017 and 2018 was brought outside of the time limit for bringing that complaint of unlawful deduction from wages. It was reasonably practicable for that complaint to have been brought within the prescribed time limit. The Claimant's claim relating to holiday pay is dismissed.

RESERVED REASONS

Issues

1. This matter was listed for a one hour hearing to determine the Claimant's claims for holiday pay and unpaid wages.
2. Since instituting these proceedings the Claimant's employment was terminated on 27 September 2019 and on 11 November 2019 the Claimant's contacted the tribunal to add a complaint of unfair dismissal. I made a separate case management order granting leave to amend the complaint to include a complaint of ordinary unfair dismissal and made other orders concerning that claim and the steps that need to be taken in order that that complaint can be

dealt with in future. However, the Claimant has since the hearing date and prior to this judgment being promulgated made a separate claim of unfair dismissal which has been issued and has a hearing date 27 March 2020 under case number 1807168/2019.

5. I set aside the orders made on 18 November 2019 and instruct the parties to follow the directions which have been issued with the new claim of unfair dismissal under case number 1807168/2019.
4. This reserved judgment and reserved reasons deals solely with the complaints concerning holiday pay and unpaid wages.

Evidence

5. I heard evidence from the Claimant and from the Respondent. The Claimant produced a letter written by the Respondent in 2017 (C1). The Claimant had no other papers relevant to the issues. The Respondent produced a series of documents (R1-R11) together with a print out from an on-line SSP calculator (R12-R15).

Findings of fact

6. I made the following findings of fact on the balance of probabilities.
7. The Respondent owns and operates a sandwich shop which retails from the premises and delivers to customers. The Claimant has worked over time both in the shop and as a delivery driver.
8. The Claimant has claimed that she began employment on 25 November 2016 in her claim form. The Respondent in its response form stated that the Claimant began employment 12 September 2016. There is a dispute over the dates and the Claimant and Respondent presented themselves mostly interested in whether or not the Claimant worked for another employer and claimed sick pay from them between 12 September 2016 and 25 November 2016, an issue which does not assist me in determining when the employment with the Respondent began.
9. I was presented by the Claimant with a letter written by the Respondent early in 2017 which recorded her start date, working hours and pay as at that time. This states that her employment began 28 November 2016. On the balance of probabilities, given the proximity of that document to the matter in question, I conclude that the Claimant's employment with the Respondent began 28 November 2016.
10. Neither party has any pay records. The Claimant was paid cash in hand. The Respondent did not issue pay slips. There is no written contract of employment. I asked the Claimant what she had agreed with the Respondent in terms of pay on commencement of employment and she told me that nothing was agreed. She stated that they only agreed hours of work, which were 16 hours per week over 4 days.

11. The Claimant has claimed that she was paid less than the National Living Wage because she was paid £7 an hour from her date of commencement then from April 2019 was paid £7.25 per hour. The Claimant has put in her claim form that her loss in wages is £1,257.76 between her date of commencement of employment and date of termination. However, someone else calculated this for her and she does not know how it was calculated.
12. The Claimant stated that she has always worked 16 hours per week.
13. The Respondent has stated that from the date of commencement of employment until the end of March 2017 the Claimant was paid £115.20 per week and from April 2017 to the date of termination the Claimant was paid £139.60 per week.
14. The Respondent has stated that the Claimant began working 16 hours a week in the shop but after Christmas 2016 began working as a delivery driver working 9.00am to 1.30pm 4 days a week, 18 hours per week.
15. This means, according to the Respondent, that the respective hourly amounts are £6.42 (to March 2017) and £7.75 (from April 2017). The Respondent concedes that the Claimant was paid an hourly rate less than the National Living Wage.
16. I have seen evidence from the Respondent in the form of Messenger App messages where the Claimant can be seen on 1 May 2019 to be asking the Respondent to write a letter for her. The messages are incomplete. I doubt these amount to full and frank disclosure. The Claimant appears to be fearful about disclosing the true amount of hours she actually worked to someone. The Respondent receives a reply and from the reply it seems that the Respondent probably told her to tell the third party involved that she was paid the National Living Wage. The Claimant replies that "if I tell them I get minimum wage I'm in s**t as I will owe over £1500 and get done for fraud". The exchange of messages appears to have the purpose of the Claimant seeking to reduce her exposure to a reclaim of an overpayment of benefits. The Respondent refused to write the letter.
17. The Claimant went on sick leave the following day 2 May 2019 and never returned to work. Both parties appear to agree that when the Claimant went on leave due to sickness there was a dispute about whether or not SSP was payable, the Respondent initially suggesting that the Claimant did not earn above the threshold (which was then £118 per week) but the following week conceding that SSP was payable and thereafter making appropriate payments.
18. The Claimant states that she is not owed any SSP. The Respondent has produced an on-line SSP calculator which sets out SSP due based on the Claimant's earnings of £139.60 per week over the 8 weeks to 26 April 2019.

19. The Respondent's correspondence contained in their documents refers to £139.60 per week being average pay and referring to the Claimant regularly working more than 16 hours per week.
20. On the balance of probabilities I found that the Claimant is unable to state her working hours or pay because she has previously told others that she worked less and was paid less than she really was.
21. In my conclusion on the balance of probabilities the Claimant was paid at the rates and for the hours suggested by the Respondent, which were below the National Living Wage. The Claimant was paid £6.42 per hour for 16 hours per week between 28 November 2016 and 31 March 2017, then £7.75 per hour from 1 April 2017 to 27 September 2019 and worked 18 hours per week.
22. The Claimant has stated in her claim form that she has received no holiday pay from the Respondent. She expressly refers to 2 week closures over Christmas and having not been paid.
23. In evidence she has stated that she did take holiday leave during her employment with the Respondent but had to put money to one side to cover for the fact that she would not receive any pay whilst on holiday leave.
24. The Respondent states that the Claimant has always received holiday pay. There are no records of leave or pay to assist in determining this.
25. The messenger messages refer to the Claimant asserting an entitlement to holiday pay and in her response the Respondent does not refute that suggestion. The Respondent refutes only the Claimant incorrectly stating her pay level. I find it unlikely that the Respondent would not have refuted also the holiday pay claim in the message if it were, as she now suggests, untrue.
26. For that reason, on the limited information provided by the parties, I find that the Respondent has not paid to the Claimant holiday pay between November 2016 and December 2018.
27. I would observe also, although it was never apparent from the claim form, that the impact of the Claimant's evidence today that she has been paid for holiday pay for 2019 is that her claim for the time she took off previously, in 2018 and beforehand, has not been brought within the required three month time limit for bringing such a claim. The Claimant notified ACAS of her claim on 4 June 2019, which was already outside of the 3 month time limit for bringing a claim of unlawful deduction from wages. No evidence has been presented by the Claimant as to whether or not it was reasonably practicable to bring her holiday pay complaint earlier.
28. An early conciliation certificate was issued 4 July 2019.

29. The Claimant issued her claim in the Employment Tribunal on 18 September 2019.
30. On 27 September 2019 the Respondent terminated the Claimant's employment purportedly for capability reasons, i.e. her absence from work.
31. The Claimant has not suggested that any deduction of holiday pay occurred in 2019 or that the failure to pay her for holiday leave in 2018 and beforehand continued into 2019.
32. The Claimant has not provided any evidence which would suggest that it was not reasonably practicable for her to present a claims of unlawful deduction from wages (whether they relate to holiday pay or wages) earlier than she did.

Submissions

33. The Respondent submitted that she was here in tribunal because she refused to write a fraudulent letter for the Claimant. She stated that the Claimant had clearly been shown to be a liar, because if her wages were £112 then no SSP would have been payable to her.
34. The Claimant submitted that she just wants what she is entitled to. She stated that she asked the Respondent to say what she actually got, which was £7 per hour and no holiday pay.

The Law

35. Part II of the Employment Rights Act 1996 sets out the protection of wages.
36. The National Minimum Wage Act 1998 provides for the Secretary of State to prescribe minimum levels of pay for workers in the UK.
37. The Working Time Regulations 1998 provide for minimum periods of paid annual leave.
38. The Working Time Regulations 1998 provide for paid leave but if an employee is given leave which is not paid then the non-payment is to be considered as a deduction from wages for the purposes of Part II of the Employment Rights Act 1996. For that reason, Section 27(1) states that 'wages' includes holiday pay.
39. Section 23 of the Employment Rights Act 1996 provides as follows:

23 Complaints to employment tribunals.

- (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 (including a deduction made in*

contravention of that section as it applies by virtue of section 18(2))....

- (2) *Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—*
 - (a) *in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made....*

- (3) *Where a complaint is brought under this section in respect of—*
 - (a) *a series of deductions or payments, or*
 - (b) *a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates, the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.*

- ...

- (4) *Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.*

- (4A) *An employment tribunal is not (despite subsections (3) and (4)) to consider so much of a complaint brought under this section as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint.*

Conclusions

- 40. I am satisfied that on the balance of probabilities the Claimant has not been paid the National Living Wage for hours worked between 28 November 2016 and 2 May 2019.
- 41. Between those dates the adult national living wage was payable.
- 42. I made a finding earlier that the Claimant was paid £7.75 from April 2017. The Respondent has stated that the Claimant's working hours went from 16 to 18 hours per week from January 2017.
- 43. The Respondent concedes that the Claimant was paid an hourly rate less than the National Living Wage.

44. The Respondent has conceded that the national living wage was payable and was not paid.
45. The Claimant, in bringing an unlawful deduction from wages claim, is limited to 2 years arrears by virtue of Section 23(4A) of the 1996 Act. This means that her claim is limited to the consideration of the pay from 18 September 2017, given that the claim was raised 18 September 2019.
46. During the period April 2017 to March 2018 the Claimant was paid £7.75 per hour which was above the prevailing rate of the National Living Wage which then applied, £7.50 per hour. The Claimant began to receive pay at less than the rate of the adult national living wage from April 2018 when the rate became £7.83 per hour but she was paid £7.75, then from April 2019 when the national living wage became £8.21 per hour but she continued to receive £7.75 per hour.
47. I calculated the underpayment of wages as follows:

Period	Paid	Due	Balance
1 April 2018 to 31 March 2019	52 weeks X 18 hours X £7.75 = £7,254.00	52 weeks X 18 hours X £7.83 = £7,328.88	£74.88
1 April 2019 to 11 November 2019	32 weeks X 18 hours X £7.75 = £4,464	32 weeks X 18 hours X £8.21 = £4,728.96	£264.96
TOTAL UNDERPAYMENT			£339.84

48. The Claimant's claim for holiday pay was brought outside of the time limit for bringing such a claim and it was reasonably practicable for it to have been brought in time. The Claimant's claim for holiday pay is dismissed.

Employment Judge Knowles

Date: 20 December 2019