



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs M Paraia  
**Respondent:** Eden Brook Home Care Limited  
**Heard at:** East London Hearing Centre  
**On:** Monday 11<sup>th</sup> May 2020  
**Before:** Employment Judge McLaren

## Representation

**Claimant:** In person  
**Respondent:** Mrs. V Worcester, Managing Director

## JUDGMENT

1. The complaint to the Employment Tribunal that the employer has made a deduction from wages in contravention of section 13 is well founded to the extent set out below and I make a declaration to that effect that the Claimant is entitled to repayment of a personal loan but all other sums about which the complaint was made were properly deducted.
2. The Claimant was not paid for accrued but untaken holiday in the amount of 5 days and her claim for this succeeds.
3. The claim for breach of contract for unpaid overtime does not succeed.
4. The claim of wrongful dismissal succeeds. The Claimant is entitled to be paid in lieu of notice.
5. I order the Respondent to pay the Claimant the following net sums:
  - (i) £500 deducted as repayment of a personal loan
  - (ii) holiday pay of £525
  - (iii) £2265 as payment in lieu of notice.

6. **The Claimant's request for costs against the respondent arising from a postponed hearing is rejected.**

## **REASONS**

### Remote hearing

1. This has been a remote hearing on the papers which was not objected to by the parties. The form of remote hearing was by telephone via BT Meet Me. A face to face hearing was not held because it was not practicable. The parties referred to their witness statements and paginated bundles of documents. The Claimant's witness statement/bundle consisted of 85 pages. The Respondent's contained a six-page witness statement, screenshots A to E and pages numbered 2 to 14. Both confirmed they wished these to stand as their evidence today.

2. At the outset of the telephone hearing I confirmed that both parties had received the other's documents and witness statements and had an appropriate time to consider them. At the conclusion of the hearing I asked both parties if they had been given the opportunity to say all they wanted, in particular if the claimant had a full opportunity to ask all her questions. I offered to relist for another day if they considered the time we had spent was insufficient. Both declined and confirmed they had been able to give all the evidence they wanted and to question the other in full. I did not ask the parties for submissions as we did not finish the evidence until 11.55. Instead, I summarised each parties evidence for them and both confirmed my summaries were accurate and covered the points they wished to make.

### Background

3. The Claimant was employed from 11 March 2019 until her dismissal on 23 August of that year. By a claim form dated 13 October 2019, she brought claims of unpaid wages, failure to pay holiday pay, wrongful dismissal and breach of contract.

4. I heard evidence from the Claimant and from Mrs Worcester on behalf of the Respondent. In reaching my decision I considered all the evidence I heard and those parts of the documents in the bundle to which I was directed.

### The issues

- (i) The claim is for unlawful deduction of wages pursuant Section 13 of the Employment Rights Act 1996 (ERA). The Claimant asserts that the Respondent made unlawful deductions from her final wages in the total of £1407 (this is made up of £102 for using a credit card, £500 cash advance, hundred pounds balance of initial £600 advance and training not being provided at £474.10)

- (ii) The Tribunal is to determine whether the Claimant suffered such unlawful deduction of wages in breach of contract and to determine the amount.
- (iii) The Claimant also complains that she has not been paid all outstanding holiday pay. She considers she is entitled to 9 days holiday pay. The Respondent disputes this.
- (iv) wrongful dismissal – the Claimant considers she was entitled to one months pay in lieu of notice. The Respondent asserts that the Claimant was dismissed for gross misconduct, so no monies are due
- (v) Breach of contract. The Claimant says that she worked a number of shifts which she was not paid, and she is owed £205. The Respondent disputes this. It asserts that some of the hours worked fell within normal working hours and the Claimant received time off in lieu for any other time with her agreement.

5. The Claimant clarified that she was not claiming for unpaid on call time, she accepted that this was paid initially and then included in her increased salary, so nothing was owed. This had been included for background.

6. The claim for unfair dismissal had previously been dismissed as the Claimant does not have sufficient qualifying service.

### Findings of Fact

#### Contractual Position

7. The Claimant began work for the Respondent as a care manager. The role would work 9-to-5 Monday to Friday with some availability at weekends. It was accepted by both parties that the Claimant was provided with a written contract of employment which contained a three-month probationary period. It was also agreed that this contract contained examples of what might amount to gross misconduct and provided that summary termination could be the outcome in the event of any kind of gross misconduct

8. The parties agree that the Claimant passed the probation period and that there was then a discussion about changing the nature of the role. Page 14 of the Claimant's bundle was correspondence which confirmed that on 11 June the Claimant became a permanent member of staff. There was discussion about her being granted shares and becoming a partner in the business. Both parties agreed that no new contract was ever issued.

9. Mrs Worcester in her evidence said the contracts were issued by her office manager and not by her. She understood, however, that a new employment contract should be issued once the probation period was passed and this would have a further probationary period in it. There was no evidence that this had ever occurred, and it was not the Claimant's understanding. It is certainly not referred to in the correspondence in

the Claimant's bundle which talks about effective partnership. I find that no second contract was issued and that the terms of the Claimant's employment remained as set out in the first signed contract. She was not therefore required to work a further probationary period and the period notice required to terminate the contract would be one month.

#### The deductions claim

10. Mrs Worcester explained that the £1407 deducted from the final payment was made up of four elements. The sum of £100 was outstanding from an initial advance of £600. £500 related to a personal loan she had made the Claimant, a further £474.10 was deducted for training that had not been provided but had been paid for in advance and the deduction of £102 was for the Claimant using the company credit card without authorisation.

#### £600 loan

11. It was common ground between both parties that the Claimant was loaned £600 by the Respondent in order to fix her car (as at page 4 the Respondent's bundle). It was accepted that this will be deducted into rounds over the next two salaries. The Claimant accepted she repaid only £500 and therefore £100 was outstanding on termination of her employment. (Page 31).

#### Use of the company credit card

12. Page 10 of the Respondent's bundle is an email in which the Claimant thanks the Respondent for providing her with a card. This suggests that it would be used for office supplies. It was the Claimant's evidence that she was also permitted to use this to pay for fuel for carers when they were unable to get to clients' addresses because they did not have enough petrol.

13. Details of the credit card payments were provided at page 5a and this showed that five such payments were made; one was at a garage in Chelmsford, all the others were at garages in Basildon which is near the Claimant's home. Mrs Worcester told me that all her carers were based in Chelmsford and only the Claimant lived in Basildon. Mrs Worcester believed the Claimant was using the card for her personal fuel expenses. She did not provide any evidence in support of her allegation of dishonesty

14. The Claimant's evidence was that one of these was for herself as she had run out of cash to pay for fuel and was needed to make a work trip, one was for a carer in Chelmsford and the others were heard filling her large petrol can that she could drive that to carers who ran out of fuel. She explained that these entries were the £20 fuel purchases. The document at page 5a shows these occurring on 15<sup>th</sup>, 17<sup>th</sup>, 19<sup>th</sup> and 23<sup>rd</sup> August.

15. Mrs Worcester suggested that it was illegal to transport more than £6 worth of fuel which is all that fills a petrol can and that the Claimant's evidence was not therefore credible. The Claimant replied that she had a 4x4 with a large petrol can for

spare fuel.

16. On balance I find it unlikely that carers would run out of petrol on so many occasions in such a short space of time so that the Claimant had to refill her spare fuel can and drive to them as she suggested. I also note that one entry is on the day she was dismissed. I prefer Mrs Worcester's account and accept that the Claimant was using the card for personal use.

#### The £500 personal loan

17. It was common ground that the Claimant had originally been given a salary of £31,000. In June the Claimant said that she needed a pay rise for various reasons and Mrs Worcester said that she agreed to pay a £35,000 per annum and to give her a £500 loan from her personal money. Page 8 was an email exchange between the Claimant and Mrs Worcester in which the Claimant states "we can have 32k on paper and the rest as ...bonus or whatever as discussed face to face".

18. Mrs Worcester said that it was in reaction to this discussion that on 3 July she took £500 from a personal bank account and left that in the Claimant's handbag in the office. Mrs Worcester referred to page 8C of the Respondent's bundle which he said was an exchange of texts referring to the fact that she had not yet brought in the money that she was going to loan to the Claimant but was going to do so. She also produced a bank statement showing £500 being taken out.

19. The Claimant denied that any such loan had been made. She said that she had never received this money, let alone had it left in her handbag. Mrs Worcester was clear that the money was a personal sum loaned by her to the Claimant and was not monies paid on behalf the Respondent to the Claimant.

#### Training payment

20. Mrs Worcester's evidence again was that, in order to help the Claimant out and to get the money that she said she needed to pay for her grandmother's care home fees in Romania, she would think of what she could do. One solution was to pay her for training.

21. The Claimant agreed that she did carry out training and that she had done some days of this, but it was within her salary and there was no agreement for extra pay for this. The deduction if this sum was therefore for some other reason and should not have happened.

22. Mrs Worcester said that she had asked the Claimant to deliver training in July, but this was not carried out and had not been delivered at the time of the Claimant's departure. Her evidence was that £474.10 was an advance payment and therefore she is entitled to deduct this. Page 6 of the Respondent's bundle showed that this amount has been paid and the reference is "July training".

23. The Claimant said that this reference did not appear on her payslip. The Claimant did not give any explanation as to why she thought she would receive an extra £474.10 in pay and on balance I accept that this was therefore a payment for a future service and was in effect an advance on wages.

#### Holiday Pay

24. There was no dispute as to the holiday year or the total number of days entitlement. The dispute is the number of days outstanding at the termination the Claimant's employment. The Claimant says she had 13 days holiday accumulated from 11<sup>th</sup> of March 2019 until the termination of employment and had taken only 4 days. There was therefore a balance of 9 days holiday at a rate £105 net per day.

25. The Respondent did not produce any holiday records. The Respondent's bundle contained an email in which the Claimant said that she would be on annual leave on the 2<sup>nd</sup>, 5<sup>th</sup>, 6<sup>th</sup>, and 7<sup>th</sup> of August. The Respondent also said that the Claimant took the usual bank holidays and therefore had taken leave on 6 May, 27<sup>th</sup> of May, 19 April and 22 April. This would leave only a day unpaid.

26. The Claimant accepted that she had originally intended to take leave in early August but said that she had not been done so and had cancelled this leave. She had instead arranged to take leave on what turned out to be the day of her dismissal in order to move home.

27. I would expect that even a small employer would have holiday records that it could provide. Mrs Worcester made clear in correspondence in the bundle that she did not have hands-on approach to the business. On balance I think it more likely that the Claimant would be aware of the dates on which she took holiday and it would have been open to the Respondent to produce official holiday records which it must have in some form. On that basis on the question of holiday pay I therefore prefer the Claimant's account that she had did not take the leave in August to move to a new house but postponed this until later in the month. Indeed, Mrs Worcester in part dismissed the Claimant for taking leave on 23 August to move home. I find it more likely than not, however, that she did take the bank holidays off as Respondent says they do not operate on those days. This would mean on her calculation there would be 5 days due.

#### Unpaid Shifts

28. The Claimant considers that she is owed £205 for 20 ½ hours care she delivered at a rate of £10 per hour. This was effectively unpaid overtime. She produced screenshots from the people planner which she says shows her working outside her working hours as follows. On 13 July between 7 PM to 9 PM, 20 July between 5 PM and 7 PM, the 17<sup>th</sup> of August (a Saturday) between 6:30 PM and 9 PM and the 20<sup>th</sup> of August starting at 7 AM and working until 11 AM, 22 August 7 AM to 9 AM and 27<sup>th</sup> of August, half an hour at 7 AM.

29. Mrs Worcester disputed there was any monies outstanding. The Respondent had also submitted extracts from the people planner in the bundle at screenshots A onwards. Mrs Worcester's evidence was that screenshots C and D did not show the Claimant working at all and screenshot E showed her doing four 30 minute calls. The Respondent's main contention is that the Claimant was not entitled to pay for extra hours worked, the arrangement was that she took time off in lieu when she had to work outside the 9-to-5 pattern. Mrs Worcester said the Claimant regularly did not coming to work until 10 in the morning claiming this was to make up for over time.

30. Both parties relied on evidence from the access people planner in support of their case. The copies were very poor quality but to the extent they could be compared screenshot A, which seems to be for 23 August, does correspond with the screenshot the same date the Claimant produced at page 19. I accept the Claimant's evidence that the documents at pages 19 to 22 are screenshots taken from the Respondent system and show her undertaking client visits at the times and the dates recorded.

31. The Claimant was equally adamant that she did not take time off to make up for these calls and was therefore entitled to the money. I conclude that the Claimant did work the hours she said she did and there are no records that either side can show as to how this was logged and how any time off in lieu was monitored. This would be important, not least from working time perspective if not a financial one. However, I conclude that there was no entitlement to additional monies for this. On 25 June the Claimant responded to Mrs Worcester as part of the negotiations for her increased role and pay review, that being on call was part of her salary anyway. This was a change from the original position when the Claimant was paid some on call monies but was agreed as part of the pay rise. I conclude that she was not therefore entitled to an additional financial compensation for these hours worked.

#### Other issues

32. In her witness statement the Claimant suggested that the £500 that had been deducted from the final salary was recoupment of £500 bonus. Mrs Worcester stated that it was not, and it was a personal loan that she made the Claimant. I accept that the Respondent did not attempt to reclaim the bonus.

33. The Claimant made reference to her being given money to purchase a laptop but the Respondent confirmed this was not an issue between the parties did not have to make any finding in relation to this.

34. The Claimant's witness statement also contained an application for costs from the Respondent for 2 days in a hotel which was unable to use because the face to face hearing was cancelled. While this will usually be determined at the end of a hearing I deal with it now as it formed part of the witness statement. The reason for changing from a face to face hearing was related to the current pandemic. In those circumstances it is not appropriate to award costs

Wrongful Dismissal

35. Both parties agreed that the Claimant's employment was ended at around lunchtime on 23 August. The Claimant's account is that she received a telephone call from Mrs Worcester's husband and after that she left the office and went home. Her account was that she had booked leave from the evening of the 23rd and the bank holiday Monday because she was moving that weekend. As far as she was aware, she was dismissed for booking that leave.

36. Mrs Worcester's account was that the dismissal was for gross misconduct. She explained that in August she was told by a family member of a Client that there had been some missed calls. As referred to page 11 of the Respondent's bundle. That shows an email dated 21 August from Mrs Worcester, copied to the Claimant but addressed to Nadia who scheduled carers and clients. It notes that Mrs Worcester has been told that there are 4 cancelled calls. The documents show that the Claimant was responded to Nadia telling her how to respond to Mrs Worcester. She explained that 2 of the calls were cancelled by agreement and that she did not have an explanation for the other calls but that she had already explained this to Mrs Worcester. Mrs Worcester did not think that the Claimant advising Nadia what to say to her was appropriate. I do not find that the email 22 August sent to Nadia is sufficient to amount to any form of misconduct let alone gross misconduct.

37. Mrs Worcester was also concerned because she became aware that Nadia was on holiday on 23 August and that the Claimant was also proposing to take time off. She became aware that morning that 82 calls were outstanding for that weekend. The Claimant, as care manager was, in Mrs Worcester's view, responsible for ensuring that client care calls were rostered properly. Missing appointments is a safeguarding issue. It is also very detrimental to the business. The Claimant's failure to have put carers in place to deal with this volume of clients' need was in Mrs Worcester's view gross misconduct entitling her to terminate the contract immediately.

38. The Claimant said that it was not her responsibility but, in any event, she had intended to address the issue on the afternoon of the 23rd before she went on leave that evening. However, she was sacked at lunchtime and did not have the chance to do this. It was true that the scheduler was going to be away for 2 weeks but that when this lady was hired this was pre-existing holiday that the company therefore had to honour. The Claimant said that she had also told Mrs Worcester's husband, Jason, on the Tuesday of that week that there were staff issues. They were therefore aware.

39. There is no written job description to identify what was and was not part of the Claimant's obligations. The Claimant was, however, hired as care manager and it is reasonable to find that she had some responsibility for making sure that client care was in place. Her evidence that she would have put some cover in place had she not been dismissed confirms that she considered this was within her role. I find therefore that having cover in place was the Claimant's responsibility.

40. I am not satisfied on these facts that any act had actually occurred. It seems to be agreed that by lunchtime care was not in place the weekend, but there is nothing to suggest that the Claimant would not have gone on to address that and put



arrangements in place for the weekend. After the Claimant was fired Mrs Worcester and others did put those arrangements in place so it was possible to achieve that in the space of half a day and I have no reason to suppose the Claimant would not have done that before she went on leave.

Relevant law

Deductions from wages

41. The statutory prohibitions on deductions from wages are contained in Part II of the Employment Rights Act 1996 (ERA). The general prohibition on deductions is set out in s.13

*13.— 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.*

*(4) (Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the*

*computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.*

*(5) For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.*

*(6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.*

#### *14 Excepted deductions.*

*(1) Section 13 does not apply to a deduction from a worker's wages made by his employer where the purpose of the deduction is the reimbursement of the employer in respect of—*

*(a) an overpayment of wages, or*

*(b) an overpayment in respect of expenses incurred by the worker in carrying out his employment,*

*made (for any reason) by the employer to the worker.*

*(2) Section 13 does not apply to a deduction from a worker's wages made by his employer in consequence of any disciplinary proceedings if those proceedings were held by virtue of a statutory provision.*

*(3) Section 13 does not apply to a deduction from a worker's wages made by his employer in pursuance of a requirement imposed on the employer by a statutory provision to deduct and pay over to a public authority amounts determined by that authority as being due to it from the worker if the deduction is made in accordance with the relevant determination of that authority.*

*(4) Section 13 does not apply to a deduction from a worker's wages made by his employer in pursuance of any arrangements which have been established—*

*(a) in accordance with a relevant provision of his contract to the inclusion of which in the contract the worker has signified his agreement or consent in writing, or*

*(b) otherwise with the prior agreement or consent of the worker signified in writing,*

*and under which the employer is to deduct and pay over to a third person amounts notified to the employer by that person as being due to him from the worker, if the deduction is made in accordance with the relevant notification by that person.*

*(5) Section 13 does not apply to a deduction from a worker's wages made by his employer where the worker has taken part in a strike or other industrial action and the deduction is made by the employer on account of the worker's having taken part in that strike or other action.*

*(6) Section 13 does not apply to a deduction from a worker's wages made by his employer with his prior agreement or consent signified in writing where the purpose of the deduction is the satisfaction (whether wholly or in part) of an order of a court or tribunal requiring the payment of an amount by the worker to the employer.*

#### The Working Time Regulations

42. These provide that a worker has the right to:
- a. be paid during the minimum holiday entitlement conferred by Regs 13 and 13A — Reg 16, and
  - b. receive a payment in lieu of unused annual leave on the termination of his or her employment — Reg 14.
43. Regulation 14(3)(b) provides that, where no provisions of a relevant agreement apply, the sum payable to a worker in lieu of his or her unused holiday according to the formula  $(A \times B) - C$  where:
- A is the minimum period of leave to which the worker is entitled under Regs 13 and 13A
  - B is the proportion of the worker's leave year which expired before the termination date
  - C is the period of leave taken by the worker between the start of the leave year and the termination date.

#### Constructive dismissal/breach of contract

44. Any dismissal by the employer in breach of contract will give rise to an action for wrongful dismissal at common law. The most common types of wrongful dismissal

is dismissal with no notice or inadequate notice where summary dismissal is not justifiable.

45. Only repudiatory breaches by employees will justify summary dismissal. The conduct must so undermine the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in his employment.

46. The underlying legal test to be applied by courts and tribunals is whether it amounts to repudiation of the whole contract. This is a question of fact, and the tribunal must be satisfied, on the balance of probabilities, that there was an *actual* repudiation of the contract by the employee. It is not enough for an employer to prove that it had a reasonable belief that the employee was guilty of gross misconduct.

### Conclusion

47. In applying the relevant law to my findings of fact I find as follows. The Claimant complains of various deductions. Section 14 of the Employment Rights Act creates a number of exceptions to the provision under section 13 the right not to suffer unauthorised deductions. The Respondent is therefore entitled to deduct overpaid wages or overpaid expenses.

48. I have found that of the original £600 advanced to the Claimant to repair her car, £100 remained due and this amounts to overpaid wages and can be deducted. I have also found that the Claimant had been overpaid expenses because she had been reimbursed monies spent on the company credit card which were in fact for her personal use. The Respondent was therefore entitled to deduct £102 for these.

49. I have also made a finding of fact that the Claimant was paid in advance in respect of training which was not provided and therefore £474.10 could also be deducted as an overpayment of wages.

50. The £500 with Mrs Worcester said was a repayment of a personal loan to her cannot be deducted from the Claimant's wages. Mrs Worcester and the Respondent have separate legal identities. It is not open to Mrs Worcester to claw back monies she says are owed of her personal capacity from monies owed to the Claimant from her employer. Accordingly, I have not made a finding of fact as to whether these monies were or were not owed as I do not need to. They cannot be deducted. Accordingly, the Respondent is to pay the Claimant £500.

51. I have concluded that the Claimant had not taken all of her pro rata holiday entitlement and is entitled to 5 days untaken holiday at a daily rate of £105, being £525 in total. This money is due to the Claimant.

52. I have concluded that the Claimant was not entitled to be paid for worked overtime as this was included in her salary. Her claim for £205 therefore fails.

53. I have made a finding of fact that the Claimant did not commit an act repudiatory breach. She was dismissed on the prospect of such an event occurring rather than it having done so. The dismissal was therefore in breach of contract and she is entitled to one month's pay in lieu of notice. This is calculated as £2265.

**Employment Judge McLaren**  
**Date: 13 May 2020**