



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4113105/2018**

**Held in Glasgow on 9 July 2019**

**Employment Judge: Rory McPherson**

**Miss Olivia Nowicki**

**Claimant  
In Person**

**Ms Samina Mohammed**

**Respondent  
Represented by:  
R Ali -  
Agent**

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The judgment of the Employment Tribunal is that

- (1) The respondent shall pay to the claimant the sum of **One Thousand One Hundred and Thirty Seven Pounds and Forty One Pence (£1,137.41)** being the net sum in respect of unauthorised deductions of wages; and
- (2) The respondent shall pay to the claimant the sum of **Four Hundred and Forty Seven Pounds and Twenty Three Pence (£447.23)** being the net sum due to the claimant in respect of pay for holidays accrued but untaken at date of termination of her employment with the respondent; and
- (3) The respondent shall pay to the claimant the sum of **Fife Hundred and Eight Pounds and Eighty Two Pence One (£580.82)** as an increase in the award under s38 of the Employment Act 2002 for failure to provide a statement of employment particulars; and
- (4) The respondent shall pay to the claimant the sum of **Forty Four pounds and thirty six pence (£44.36)** being the sum due to the claimant in respect of employment pension contribution and uniform charge; and
- (5) each sum is payable immediately to the claimant.

## REASONS

### Introduction

### Preliminary Procedure

1. This claimant brought complaints the respondent had failed to pay outstanding wages, not made employer pension contributions and further had failed to pay outstanding holiday entitlement. By Judgment of the Tribunal 21 March 2018 it was determined that the respondent was Ms. Nowicki's employer at the date Ms. Nowicki's employment ended and was liable for any sums found due to Ms. Nowicki. The Tribunal Judgment of 21 March 2018 made Findings in Fact which are referred to here where relevant to do so.
2. At this hearing the claimant who was accompanied by her father represented herself. The respondent was represented by Mr Ali, Solicitor, who had an involvement in the business in which Ms. Mohammed employed Ms. Nowicki.

### Evidence

3. The Tribunal heard evidence from the claimant. Ms Nowicki, Ms Mohammed and Mr Ali. The Tribunal was referred to a number of documents throughout the hearing and where relevant I identify the document below. In the claimants ET1 the claimant had set out calculations of sums due reflecting 2 weeks 7 March to 23 March at an average of 90 working hours and 2 June to 14 June at an average of 90 hours, and 3.5 hours in respect of a days training. No alternate written calculation was provided on behalf of the respondent.
4. In the Judgment of 21 March 2019, the Tribunal had set out Findings of Fact which are relevant to this judgment in paragraphs 9 to 15 as to the circumstances of engagement. The following Findings in Fact set out further relevant detail supplemental to the existing Findings in Fact.

### Findings in fact

5. The claimant, Ms Nowicki was employed by the respondent from 7 March 2018 to 14 June 2018 as a Beauty Therapist at premises which were operated under

the trading name Medica Skin Clinic at 84 Renfield Street, Glasgow G2 1NQ (the "clinic").

6. Ms Nowicki started work with respondent the on Wednesday 7 March 2018 with start time of 9 am and end time of 6pm, although that working day was described as a "trial shift" and she was shadowed that day, Ms Nowicki was working through that day as an employed Beauty Therapist and carried out the full range of duties including therapeutic massages.
7. Ms Nowicki who was 25 years of age at the start of her employment was advised she would receive hourly pay at the rate set by the National Living Wage which at start of her employment was £7.50 per hour and which increased to £7.83 per hour from April 2018. She was advised that her working week was 5 days being Tuesday to Saturday with the hours being the same 9 am to 6pm. She was advised that her income would be supplemented by a percentage commission on sales she achieved. There was no precise advice of the level of commission notified during her interview. The claimant understood from subsequent discussions with colleagues including her manager that commission would be paid at the rate of 7% on all sales achieved. No written guidance was issued to Ms Nowicki identifying any alternate model of commission structure. Ms Nowicki operated at all times on the basis that it was agreed that she would receive 7% of sales.
8. Ms Nowicki started employment with the respondent on Wednesday 7 March 2018 working the full work shift of 9 am to 6pm with a 30 minute break, Ms Nowicki carried out the full range of duties of a beauty therapist that date including operating the reception for taking calls and therapeutic client massages. She worked 8.5 hours with a 30 Minute lunchbreak. On that initial date the claimant was expected by her manager to wear black colour uniform. She paid the respondent's manager direct the sum of £24.50 on Monday 12 March 2018 to purchase the standard staff tunic, it was understood that the claimant would be reimbursed for same.
9. Ms Nowicki also worked the following Thursday 8 to Saturday 10 March and thereafter subsequently each Tuesday to Saturday always following the same pattern of hours until her last day on Wednesday 14 June 2019.

10. Ms Nowicki was not provided with written terms and conditions in relation to her employment. There was no written information of what her hourly pay would be nor what level of commission was paid on sales to clients.
11. In discussions with her colleagues, Ms Nowicki understood that she would receive the same level of commission her colleagues received which equated to 8% on sales per week. In order to ensure that Ms Nowicki keep herself informed on sales and therefore commission she earned she put a note on her mobile phone of each sale as it was achieved. Sales were also recorded by her employer in a "Purple book" from which her employer ensured that its' employees were paid their commission.
12. Ms Nowicki's employment terminated at 3pm on Wednesday 14 June 2014.
13. Ms Nowicki was been paid for the hours she worked in the period from Friday 23 March to Friday 1 June 2018 inclusive (the paid period). The respondent made the required pension contributions during the paid period. In the two week period up to 18 May 2018 the claimant was paid net pay after deduction of 12.73% of her gross pay in respect of Income Tax and National Insurance.
14. Ms Nowicki did not receive any pay, for the hours worked or in relation to commission earned for the period Wednesday 7 March to Thursday 22 March inclusive, a period of 12 full working days (the first unpaid period). Ms Nowicki worked 102 hours in the first unpaid period. Ms Nowicki had been advised that she would receive payment for this first two week period when she left employment. She was at all times however an employee throughout this period and was entitled to paid.
15. Ms Nowicki did not receive any pay for attending a 3.5 hour staff training event on Sunday 10 June 2018 at the clinic at which she received tuition on the operation hair removal beauty devices used at the clinic and aspects of customer engagement with such treatments (the June Training Event).
16. Ms Nowicki did not receive any pay, for the hours worked or in relation to commission earned for the period from Saturday 2 June 2108 to Thursday 14 June 2019 inclusive (the second unpaid period), a period of 8 full working days and one part day, in respect her final day when she worked to 3pm. In addition,

the respondent did not make employer pension contributions for either the first of the second unpaid period. Ms Nowicki worked 73.5 hours in the second unpaid period.

17. Ms Nowicki did not receive her commission on sales for either the first of the second unpaid period.
18. In respect of the first unpaid period Ms Nowicki earned commission at 7% of sales on 7 March 2018 of sales of £99 and £99, on Thursday 8 March of sales of £528 and £99 and £99, on Tuesday 12 March of sales of £99 (being one half of £198 split with a colleague), on Tuesday 13 March of sales of £125; on Wednesday 20 March of sales of £125 (being one half of £250 split with a colleague); and on Thursday 21 March of sales of £100 being cumulative commission of £89.11.
19. For the second unpaid period, Ms Nowicki is entitled to commission at 7% of sales on Saturday 2 June of sales of £125; Friday 8 June of sales of £99, Tuesday 12 June of £40; Wednesday 13 June of sales of £120 and Thursday 14 June of sales of £99 being cumulative commission of £33.81.
20. As at the date of termination Ms Nowicki had accrued 7.7 days holiday, for which she has not been paid.
21. The respondent failed to make employer pension contributions for first and second unpaid period and in respect of the June Training Event.
22. Ms Nowicki was not issued with wage slips for first and second unpaid period or otherwise covering the June Training Event.

### **Submissions**

23. The claimant and respondent confirmed their positions in informal submissions. provided oral submissions, for the claimant she had not been paid for hours she had worked, she had not been paid commission she was due and no terms and conditions had been provided. For the respondent it was argued that the claimant was not due the sums as set out in the claimant's ET1 in particular the claimant had not worked full days in the respect of the first two weeks; she had been paid for the full day worked on 23 March; the training event should not be

treated as paid employment; her employment had ended on the last day approximately 1 hour before the time intimated by the claimant; and the commission sought was excessive, the respondent suggesting that a staggered system of commission had been intimated her.

### **Provision of Terms and Conditions and Provision of Itemised Pay Statement.**

#### **Relevant Law**

24. In terms of s1 of ERA 1996 each employee is entitled to receive from his employer not later than two months after the beginning of the employee's employment, a written statement of the major terms upon which he is employed. The Employment Act 2002 (EA 2002) provides at s38 that where the matter is before the Tribunal, it is required to increase an award by at least 2 weeks' pay and the Tribunal may if it is just and equitable increase that award to 4 weeks' pay.
25. Section 8(1) of ERA 1996 provides that:  
  
*(1) [A worker] has the right to be given by his employer, at or before the time at which any payment of wages or salary is made to him, a written itemised pay statement.*
26. There is however no provision for any award or uplift in respect of a failure to provide the required itemised pay statements at or before the time at which any payment of wages or salary is made. The role of the Tribunal would have been restricted, in terms of s11 of ERA 1996 to ascertaining what information ought to have been included.

### **Provision of Terms and Conditions and Provision of Itemised Pay Statement**

#### **Discussion and Decision**

27. The respondents had not complied with their obligations to provide written terms and condition under s11 of ERA 1996 to provide itemised pay statements at least through 2018. There is, however, no provision for any compensation payment for such failure.

### **Provision of Terms and Conditions**

### **Discussion and Decision**

28. The claimant was not provided with written statement of the terms of her employment. The present statutory basis for such written terms is provided in the ERA 1996. The claimant would be entitled to 2 weeks' pay, having regard to the claimant's limited period of employment I do not consider that it would be just and equitable to apply increase this to four weeks. As such the claimant is entitled to payment reflecting gross pay **£665.55**.

### **Unlawful deduction of wages contributions.**

### **Relevant Law & Discussion and Decision**

29. In terms of s23 of the Employment Rights Act 1996 an employee may bring a claim that an employer has made unlawful deductions of wages.
30. The claimant is entitled to payment reflecting outstanding gross pay which amounts to (102 hours x £7.50 + 77 hours x £7.83) **£1,180.41**.
31. While the respondent sought to argue that the claimant had not worked as many hours a week in the first two weeks, she was engaged this did not accord with the claimant's evidence on the constant profile of her working day. Further, and while a specific lower total number of hours worked was proposed to the claimant, by the respondent, for the first unpaid period, this invitation was made on an inadvertent miscalculation by the respondent of the number of days and hours worked in that first unpaid period. In those circumstances I have discounted the claimant's response invitation as it did not accord with her otherwise clear evidence of days worked and the start and end time of her shifts. The respondent did not provide any documentary evidence as they would be required to keep in terms Reg 38(1) of the National Minimum Wages

Regulations 1999 (NMWR 1999) and section 31 of the National Minimum Wages Act 1998 (NMWA 1998).

32. The claimant had set out her position that she was entitled to unpaid commission of 7% on sales over the 4 week period when she was not paid in her ET1 presented on 3 August 2018. While an ET3 was presented it did not offer any explanation of any alternate calculation method.
33. In the course of this one day hearing and after a mid day break photocopy extracts of what were said to be the relevant respondent's sales was provided. There had been no prior intimation of any such documentation. Those photocopies were admitted into evidence. I have throughout this hearing reminded myself of the terms of Rule 41 of the Schedule 1 to Employment Tribunals (Constitution & Rules and Procedures) Regulations 2013 which provides that "*The Tribunal may regulate its own procedure and shall conduct the hearing in the manner it considers fair, having regard to the principles contained in the overriding objective. The Tribunal shall seek to avoid undue formality and may question the parties or witness so far as appropriate in order to clarify the issues or elicit the evidence. The Tribunal is not bound by any rule of law regarding the admissibility of evidence in proceedings before the court*" and to Scott v IRC 2004 IRLR 713 identifying the continuing duty to disclose relevant documentary evidence, while in some instances the letters T, W, T, F which appear to accord to working days do not accord with the date at the top of the page I am satisfied that that the extracts do correctly identify sales for employees. There was no alternate documentation available.
34. In two instances the sale had the claimant names alongside another named employee, I am satisfied on the available evidence that where indicated above certain sales should be split 50% thus reducing the commission due. While the respondent argued that there was a staggered system of commission with lower than 7% commission being paid up to a specific figure of sales there was no documented evidence of this system being operated.
35. The respondent provided extracts of what were described as the Purple Book in which recorded sales and a date. While some of the dates were inconsistent with the day of the week to which they referred it provided contemporaneous



evidence of the recorded sales which ought to have been credited to the claimant in the first and second unpaid period.

36. The claimant is entitled to payment reflecting gross commission in the sum **£122.92.**

### **National Living Wage**

#### **Relevant Law & Discussion and Decision**

37. Reg 4 of the National Minimum Wages Regs 2015, as amended by the Amendment Regulations of 2017/465 and 2018/455 provide for the National Living Wage of employees who are aged 25. Reg 38(1) of NMWR 1999 and section 31 of NMWA 1998 provide that an employer must keep sufficient records to show that workers who qualify have been paid the National Living Wages and a worker is entitled to inspect those records in terms of s10 of NMWA 1988. The respondent did not produce to the Tribunal records they are required to keep for the purpose of the NMWA 1988. No relevant records were provided by the respondent for this hearing. In all the circumstances the claimant's evidence on the days and hours worked is preferred.

### **Failure to make employer required contributions -a pension scheme**

#### **Relevant Law & Discussion and Decision**

38. In terms of section 3 of the Pensions Act 2008, since April 2017 the respondent was required, unless an employee elected to opt out, to make minimum statutory contribution by the employer equivalent to 1% of the claimants earning until 6 April 2018 and thereafter 2% of the claimant's earnings. The employer made those contributions in the period but did not do so in relation to either the first unpaid period or the second unpaid period. The failure to make those payments amounted to a breach of contract which was continuing as at the date of termination of employment and falls within the meaning of Reg 3 and 4 of the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 SI 1994/1624.
39. The claimant is entitled to payment for breach of contract reflecting the respondent's failure to make the required pension contributions and is

calculated reference to the 4<sup>th</sup> edition (August 2017) of the Principles for Compensating Pension Loss is calculated at (£318.75 x 0.02 x 1.9 weeks) and (£332.77 x 0.02 x 1.2 weeks) **£19.86**.

### **Holiday Pay**

#### **Relevant Law, Discussion and Decision**

40. The claimant is entitled to holiday pay accrued in terms of the reg 30 of the Working Time Regulations 1998. The claimant is entitled payment reflecting accrued gross holiday pay equating to 7.7 days untaken accrued holidays of **£512.47**.

### **Rest Breaks**

#### **Relevant Law, Discussion and Decision**

41. In terms of Reg 12 (1) the Working Time Regulations 1988, in the absence of a workforce agreement after a working period of 6 hours, an adult worker is entitled to a 20 minute uninterrupted rest break. The claimant was provided with the required rest breaks.

### **Conclusion in respect of Breaches of Contract**

42. The claimant is entitled to be paid the cumulative sums in relation to the elements of breach of contract, it is the employers responsibility to deduct National insurance Contributions and pay them with its own contribution to HMRC in terms of Sch 1 Para 3 Social Security Contributions and Benefits Act 1992 (SSCBA 1992) and similarly to make deduction in respect of Income Tax and pay to HMRC. The claimant's deductions from her pay in the week of 18 May 2018 in respect of Income tax and National Insurance Deductions amount to 12.73% of her gross pay. The claimant is entitled to be paid by the respondent net pay reflecting the gross sums of £665.55 (net £580.82) + £1,180.41 (net £1,030.14) + £122.92 (net £107.27) + £512.47 (net £447.23). It is the respondent's responsibility to account to HMRC in respect of the National Insurance and Income Tax due. In addition, the claimant is entitled to paid the sum of **£44.36** reflecting the unpaid employer pension contribution for first and second unpaid period and cost of staff uniform.

**Conclusion**

43. The claimant is awarded the sums set out above.

Employment Judge:

Rory McPherson

Date of Judgement:

17 July 2019

Entered in Register,

Copied to Parties:

18 July 2019