EMPLOYMENT TRIBUNALS

Claimant: Mrs L Hewitt

Respondent: The Potting Shed Spa Limited (in liquidation)

HELD AT: Leeds **ON:** 10 July 2020

BEFORE: Employment Judge T R Smith

REPRESENTATION:

Claimant: Mr Bronze (of Counsel)
Respondent: Mrs Pearce (Director)

JUDGMENT AT A TELEPHONE HEARING

It is declared the Respondent made an unlawful deduction from wages from the Claimant and the Respondent is ordered to pay the Claimant £539.80.

REASONS

Documentation

1. The Tribunal had before it a statement from the Claimant Mrs Hewitt dated 19 July 2020.
2. The Tribunal also had before it a bundle which contained documents from the Claimant and some documents provided by the Respondent. The bundle totalled 105 pages.

3. There was no statement from the Respondent or any of its employees. It may be, and the Tribunal says no more than this, that there is some dispute between the Respondent and its former advisors.

Introduction

4. The Respondent is a company in a creditor's voluntary liquidation. Liquidators have been appointed. The liquidators, by an email dated 3 July 2020, indicated to the Tribunal that it was content that Mrs Pearce, a director of the Respondent was authorised to represent the company at the hearing today.

Issues

5. In essence the Tribunal had to determine how many hours the Claimant has actually worked for the Respondent and secondly, were the admitted deductions that were made by the Respondent, authorised deductions within the meaning of section 13 of the Employment Rights Act 1996.

Background

6. The Respondent was a well-established beauty and spa business.

7. Mrs Pearce was a director of the company and had secured a number of awards both nationally and internationally.

8. The Respondent sought and obtained employment with the Respondent as a reception manager.

9. She reported to Ms Emma Coomber. Mrs Pearce, whilst a director of the company was not on site from approximately 12 or 13 October 2019. The Claimant started work, two hours training on the 05 October.

10. The first necessary finding of fact the Tribunal had to make, was whether the Claimant worked 86 or 88 hours for the Respondent. The Claimant said 88 and the Respondent 86.

11. The Tribunal is satisfied that the Claimant visited the Respondent's premises on 5 October 2019 for a period of two hours. This was prior to the formal commencement of her employment on 10 October 2019.

12. The email from the Respondent to the Claimant of 4 October 2019 is instructive. It invited the Claimant to visit the Respondent's premises from 10am to 12pm. The email contained the following sentence "*I will arrange our salon software training for you so you have as much information as possible, this training can be a bit overwhelming if it isn't something you have done before, but I am here to guide and support you as much as I can".* That email was written by Mrs Pearce on behalf of the Respondent.

13. The Tribunal is satisfied that the Claimant attended to undertake work. She was under the control and management of the Respondent for those two hours. She was required to attend work to understand how to use the computer system to better perform her duties. There is no suggestion whatsoever that the Claimant would not be paid for attending that training and the training was a necessary requirement of her role. The Claimant's case was that she believed she would be paid and there was no compelling evidence to the contrary.

14. The Tribunal therefore concluded that the Claimant worked a total of 88 hours for the Respondent during the course of her employment which ended on 31 October 2019.

15. At this juncture it is important the Tribunal makes reference to section 13 of the Employment Rights Act 1996. Paragraph 13 sub paragraph 1 provides:

    "*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."

    There is no issue before the Tribunal that the Claimant did sign a document entitled "*deduction from pay agreement"* which can be found at pages 99 to 101 in the bundle. It is important to make reference to two particular provisions of that agreement which read as follows:

    "Any damage to stock or property (including non-statutory safety equipment) that is the result of your carelessness, negligence or deliberate vandalism will render you liable to pay the full or part of the cost of repair or replacement".

    The second relevant provision states:

    "Any loss to us that is the result of your failure to observe rules, procedures or instruction, or is as a result of your negligent behaviour or your unsatisfactory standards of work will render you liable to reimburse to us the full or part of the cost of the loss".

    The agreement makes reference to the fact that a failure to pay could result in such costs being deducted from pay.

16. The Tribunal is satisfied having heard the evidence that there is now no dispute that the Claimant had signed that agreement, probably on 10 or 11 October and well prior to any deductions being made by the Respondent. Having found that the deduction from pay agreement existed the Tribunal then had to determine whether it fell within section 13(1). The Tribunal was so satisfied that at the very least this was an agreement in writing and, arguably, a relevant provision of the employee's contract of employment.

17. It is not, however, sufficient simply for a Respondent to have such an agreement. It has to be shown that when a deduction is made it falls within the scope of the agreement and the burden of proof is upon the Respondent to establish that. Given the rather draconian nature of such clauses the Tribunal is entitled, if there is ambiguity, to construe any ambiguity in favour of the Claimant.

18. Deductions, or perhaps more properly one deduction but sub divided into six categories was made from the Claimant's pay.

19. The Tribunal intends to deal with each matter in turn.

    (1) <u>First deduction – the cost of fixing the lock on the filing cabinet - £82.80</u>

    It is common ground the sum deducted was £82.80. There is no evidence before this Tribunal that that sum has actually been expended by the Respondent although the Tribunal has little reason to doubt Mrs Pearce's submission that that sum was paid. She did not, however, give evidence and no voucher was produced. It is common ground the lock was broken. What there is not clear evidence about is how the lock came to be broken. The

Respondent's case was the Claimant admitted that she had broken the lock to Mrs Coomber. However, Mrs Coomber was not called to give any form of evidence. There was no statement from Mrs Coomber before the Tribunal. In any event even if the Claimant had said she had broken the lock, that does not automatically fall within the ambit of the deduction agreement.

The Claimant worked from Thursday until Saturday. The Respondent's premises were open from Tuesday till Saturday. The Tribunal is not satisfied that it has been demonstrated on the balance of probabilities that the damage to the lock was the result of the Claimant's carelessness, negligence or deliberate vandalism. It follows therefore that this sum is an unlawful deduction.

(2) Not following correct protocol for dealing with last minute cancellation amounting to £100

The Tribunal was told there was a cancellation protocol. That document was never produced before the Tribunal. However, it does appear there is a measure of agreement as to what that document did say. The Claimant herself accepted she was aware of the protocol. She appeared to accept that she understood that if someone cancelled then they should still pay for their appointment but it was simply rearranged. It was common ground that two clients did cancel, and did not pay. There is no evidence one way or the other whether they did or did not rearrange. The Claimant's evidence was the first client cancelled because her daughter had gone into labour that day and she was the birthing partner and the second client cancelled because her mother had just been hospitalised. The Claimant believed that she was entitled to accept the cancellation without seeking payment because it was "exceptional circumstances" within the meaning of the protocol. If there were "exceptional circumstances" the normal requirement for payment to be made was waived.. Her evidence was that she spoke to Mrs Coomber, her manager who, putting the Respondent's case at its highest did not disagree. To fall within the deduction policy it must be established that the Claimant has failed to observe the rules, procedures or instruction or there has been a loss as a result of her negligent behaviour. The Tribunal is not satisfied the Respondent has discharged the burden of proof. Whether or not these cases fell within the parameter of "exceptional circumstances" was a judgment call. On the evidence before the Tribunal it was not solely the call of the Claimant. The manager approved of that judgment call. It cannot be said that what the Claimant did did not fall within the Respondent's procedures. The whole purpose of having an exceptional circumstances clause is to allow departure. In the circumstances therefore the Respondent has not justified the deduction.

(3) Providing a client with an unauthorised free gift voucher for £60

The Tribunal finds that the Claimant had a unique PIN number. With that PIN number she could issue a gift voucher. A gift voucher would not normally be issued until payment had been made. The normal procedure was that Mrs Coomber would cash up. It would follow therefore that if a voucher had been issued and payment not been made there would be a discrepancy in cashing up. The Tribunal accepts that Mrs Coomber may not always have been the last person at the Respondent's premises. The fact remains there was no evidence from Mrs Coomber that at any stage that there was a discrepancy prior to the Claimant's termination of employment. It may well be that the Respondent has further, perhaps strong evidence in respect of this matter. The difficulty however for the Tribunal is that it can only make a judgment on the

base of the evidence that is actually placed before it. It doesn't have the evidence from Mrs Coomber for example as to a discrepancy. It doesn't have documentation, for example the daily cashing up records to show there was a discrepancy. If such documentation had been before the Tribunal it may well have been the Tribunal would have favoured the Respondent on this particular matter. However, in the absence of that evidence the Respondent has not established that the deduction policy was applicable to this particular case and thus it is an unlawful deduction.

(4) Undercharging gift vouchers totalling £20

It appears that if a customer spent over £50 they got an extra £10 free. The Claimant sold two vouchers each worth £57.50 but only charged £47.40. In other words, they got £10 free. That is the same effect as selling a £50 gift voucher to the value of £60. The Claimant's evidence on this was that she thought she was following procedure but was very confused about gift vouchers. No evidence was placed before the Tribunal as to what the procedure was. There was no indication, for example, why there could not be a deduction for the £57.50 vouchers although they totalled over £50.Whilst Mrs Pearce represented that these were already heavily discounted there was no evidence as they were over £50 they could not be discounted. She did not however give formal evidence on this matter, no doubt because she didn't know from her former representatives that it would be helpful to do so. Again, therefore the Tribunal is left in the position that having regard to the deduction agreement it has not been established that the Respondent was entitled to make the deduction and the deduction is therefore unlawful.

(5) Cancelling an entire morning of clients without authority

The evidence before the Tribunal is that a beauty therapist employed by the Respondent had some form of doctor's appointment. She wanted time off work. The Tribunal can see considerable merit in the suggestion that that was not a decision that the Claimant could make. Indeed, that ties in with the fact that the Claimant's own holidays had to be approved by Mrs Pearce. The Claimant's evidence was that Mrs Coomber authorised the beauty therapist to take time off although she accepted that she entered that information into the computerised system. If the Claimant is right that she was authorised by the manager then it is difficult, particularly given the fact the Claimant had only recently started employment, for her not to follow the guidance given to her by the manager. It may well be that Mrs Coomber was wrong. It may well be that Mrs Pearce wanted to be consulted about such matters. The fact was, she wasn't, but that would be a matter between Mrs Pearce and Mrs Coomber. No evidence was called from Mrs Coomber to dispute the Claimant's account. It follows therefore that the provisions of the deduction agreement are not satisfied and the deduction is unlawful.

(6) Using the cash value of a voucher to tip staff without authority amounting to £20

On the evidence the Tribunal finds that a £120 voucher had been issued. Only £100 of treatment had been utilised. The recipient of the voucher, it appears to have been a relative of the Claimant, said the residue, £20 was to be divided amongst the two beauty therapists who had treated her. The Claimant contends that she wrote this on the voucher although, mysteriously, the voucher has disappeared. She contended she told the two beauty therapists that her relative had wanted to tip them £10 each but denied making any payment to

them. There is no evidence from the Respondent that the beauty therapists received £10 each be it, for example from the beauty therapists or from anybody else. Nothing was produced to the Tribunal to suggest that tips were prohibited. In the circumstances, once again, looking at the deduction agreement and bearing in mind that it is for the respondent to satisfy strictly that the agreement has been breached the Respondent failed to do so and thus the deduction is unlawful.

20. It therefore follows the Tribunal determined and declared there had been an unlawful deduction of £539.80. This is comprised of 88 hours at £10 per hour less the agreed sum of £340.20 which was paid by the Respondent. It follows therefore that the Claimant is entitled to judgment in the sum of £539.80.

Employment Judge T R Smith

Date16 July 2020