



EMPLOYMENT TRIBUNALS

Claimant: Ms Gemma Mortland

Respondent: Islanders Vets

Heard at: London South Employment Tribunal (by CVP)

On: 3 December 2020

Before: Employment Judge Rahman sitting alone

Representation

Claimant: In person

Respondent: In person

JUDGMENT

Introduction

1. The Claimant's complaint that there was an unauthorised deduction from her wages is well founded. The Respondent unlawfully deducted the sum of £441.25 for the month of October 2019 (which amounts to a gross sum of £573).
2. The Claimant's claim for notice pay is successful. She would have been entitled to £2,276.91 for 2 months, but she mitigated her loss and obtained alternative employment from 28 October 2019. The Tribunal therefore considers she is entitled to notice pay for 1 month namely £1,138.46. This is calculated net of tax.
3. The Claimant's claim for holiday pay is well-founded. This is for 3.5 days for £229.88. This is calculated net of tax.
4. There is no order as to costs.

Claims and Issues

5. The Claimant has brought claims for notice pay, holiday pay and also claimed unauthorised deductions from wages.
6. The issues were agreed at the outset of the hearing and confirmed as follows:
 - a. Was the Claimant entitled to notice pay. This includes consideration of whether the Claimant was wrongly dismissed and entitled to notice pay or did both parties agree the Claimant could be released from her contractual obligations sooner without notice pay.
 - b. Were the deductions from the Claimant's wages in October 2019 authorised.

- c. The Respondent's counterclaim – whether that entitled the Respondent to offset the amounts that were said to be owing to the Respondent
- d. Was the Claimant entitled to holiday pay; if so how much.

Procedure

7. The Tribunal heard evidence from the Claimant and Ms Quernell on behalf of the Respondent.
8. There was a Tribunal bundle that was prepared by the Claimant. The Tribunal also had the benefit of the Tribunal file that contained the Claim Form, the Response and the Respondent's Grounds of Resistance. The Respondent also provided a witness statement and enclosures in advance of the hearing.
9. The hearing was conducted by CVP. Breaks were offered throughout the hearing. In particular there was a significant break at the outset to consider updating papers. This was after each party confirmed what documents were missing and arrangements were made for any outstanding documents to be provided to each party. There was also a further significant break after the evidence and submissions.

Fact-Finding

10. The Claimant is an apprentice veterinary nurse. The Respondent is a vet surgery. Ms Quernell is a Director of the Respondent.
11. The Claimant and Ms Quernell met before October 2017 and the Claimant was offered a position at the Respondent practice in October 2017.
12. It was not disputed that there were two employment contracts between the parties namely one that commenced in September 2017 and one that commenced in October 2018.
13. Neither party was able to provide these contracts to the Tribunal. The Claimant confirmed she did not seek to rely on either previous contract. It was however not disputed that both previous contracts were between the Respondent as Employer and the Claimant as Employee but for different rates of pay.
14. On 1 October 2019 the parties signed an employment contract. The Tribunal has seen the terms. The agreement was in force from 1 September 2019 and it is common ground that this is the start date of the Claimant's employment with the Respondent. This October 2019 contract is the contract each party seeks to rely on in respect of this claim
15. There was also an Apprenticeship Training Service Agreement dated 29 August 2018 to which the Tribunal was referred to in terms of the background to this case.
16. On 7 October 2019 the Claimant wrote to the Respondent with notice of her resignation. She indicated she would work for the next two months but she also stated that if the Respondent could release her sooner she would appreciate it.
17. There were then two communications from Ms Quernell on behalf of the Respondent to the Claimant. On 7 October 2019 Ms Quernell wrote to the Claimant and indicated that she would 'release' the Claimant sooner and that the end date of her employment was 11 October 2019. In a second communication by email sent at 10.10am on 9 October 2019 Ms Quernell said "I have decided that your last day at my practice is today."
18. The Claimant did not work at the Respondent's practice after 9 October 2019.
19. She did not respond however to any of the Respondent's communications of 7 or 9 October 2019.
20. The Claimant obtained new employment from 28 October 2019.
21. This claim was issued on 21 November 2019.

Law

22. A claim for wrongful dismissal / notice pay is a common law action based on breach of contract. In other words the termination of a contract without due notice is a wrongful dismissal.
23. This Tribunal has to consider whether the employment contract has been breached. If it has and dismissal is the result, then it is wrongful. The burden of proof falls on the employee to show a dismissal. The standard of proof is the 'balance of probabilities' as normally applied in civil courts: the Tribunal has to consider whether it was more likely than not that the contract was terminated by dismissal rather than, for example, resignation or by mutual agreement between employer and employee.
24. Section 13(1) of the Employment Rights Act 1996 enshrines the right not to suffer an unauthorised deduction from wages; section 23 gives a worker a right of complaint to the Employment Tribunal. Section 230(3) sets out the definition of a 'worker' which includes a person who works under an employment contract.
25. A claim for holiday pay can be brought as a breach of contract claim, a complaint of unauthorised deduction of wages under the ERA (WA) or a complaint under the Working Time Regulations 1998 (WTR). Under the Regulations workers are entitled to 5.6 weeks' paid leave per year (pro rata for part-time employees). In this case this appears not to be disputed: the issue is a factual issue in that the Claimant states she worked full time, including her over-time and therefore claims 3.5 days' holiday pay for the relevant period (this was amended at the hearing from the initial holiday pay claim); the Respondent disputes this and states that her entitlement is only 2 days for the relevant period as she states she worked part-time. The relevant period is 1 September 2019 to 9 October 2019.

Conclusions

26. The Tribunal has considered all the material provided for the hearing and listened carefully to the evidence of the Claimant and Ms Quernell.
27. The Tribunal makes the following findings of fact:
 - a. There was an unauthorised deduction of wages for the period of 1 – 9 October 2019.
 - i. The starting point is that both parties agree that the Claimant worked her contracted hours in October 2019, namely 1- 9 October 2019 but the Respondent seeks to offset amounts that are said to be owing to the Respondent as a result of the additional payments set out in the schedule in the Counterclaim at paragraph 9.
 - ii. Both parties agree the extra amounts were paid as set out in the schedule. These were paid as part of the wages and the Tribunal has seen an email where Ms Quernell refers to them as bonuses to the Claimant.
 - iii. Significantly these extra sums pre-date the October 2019 contract that both parties rely on.
 - iv. Moreover the Tribunal heard evidence from each party about whether there was an agreement for the extra monies to be reimbursed.
 - v. Ms Quernell gave evidence about a significant discussion in August 2018 and a verbal agreement between the Claimant and the Respondent that the Claimant would remain with the Respondent for the period of her apprenticeship or reimburse extra monies. The Claimant disputes this. On balance the Tribunal prefers the Claimant's account as (a) the agreement described by Ms Quernell is a significant issue that the Tribunal would have expected to have been evidenced in writing if it was agreed verbally and (b) the Tribunal was referred to paragraph 6.4 in the Apprentice Agreement where it states that the Employer (the Respondent) cannot ask the Apprentice (namely the Claimant) to contribute financially to the direct costs of the learning or assessment at any time. This is inconsistent with the contention that the parties agreed that the Claimant would reimburse monies to the Respondent.

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- vi. To the extent the Tribunal is required to deal with this, it finds that the Respondent has not established that she is entitled to offset the additional sums in the schedule of the Counterclaim and therefore the deductions of wages for October 2019 are unauthorised.

- b. The Tribunal considers that the Claimant provided notice to terminate the employment contract on 7 October 2019 and was entitled to notice pay. The Tribunal accepts her evidence, notwithstanding the suggestion she wanted to be released sooner, that she was willing to work the two months and had told her new employer this. She told the Tribunal that she expected to work until December 2019 and the Tribunal accepts this evidence.

- c. The Tribunal finds that the communications of both the 7 and 9 October 2019 from the Respondent amounted to a wrongful dismissal. There is no evidence that this was accepted by the Claimant who did not respond to the terms dictated to her. The Tribunal finds she is entitled to notice pay. She mitigated her loss and obtained new employment in October 2019 – therefore her entitlement should be adjusted to reflect this.

- d. The Tribunal finds the Claimant accumulated holiday pay in the time she worked between 1 September – 9 October 2019 and that this entitlement was for 3.5 days. She calculated this on the basis of an annual 28 days holiday. The Tribunal accepts her evidence that she worked overtime – indeed the emails provided in the bundle demonstrate how in the past she had worked extra time. The overtime was not challenged by the Respondent, but Ms Quernel’s evidence was that the Claimant worked part-time and her entitlement was 2 days accrued over the relevant period. The Respondent said some of the hours included time when the Claimant was a student – however this was known to the Respondent and was part of her contractual hours. The Tribunal is satisfied that the Claimant worked sufficient hours such as to justify an entitlement of 3.5 days holiday pay; this amounts to £229.88 on the basis of an hourly rate of £8.21 and an 8 hour day.

Order

28. The Tribunal therefore orders as follows.

- (1) The Respondent is ordered to pay the Claimant
 - (i) £573 for unauthorised deductions under section 13 of the Employment Rights Act 1996. The Claimant is to account for any deductions for tax or national insurance.
 - (ii) £1,138.46 for notice pay. This is net of tax.
 - (iii) £229.88 for holiday pay. This is net of tax.

- (2) No order as to costs. The starting point is each party bears their own costs. Each party is in person and the Tribunal is satisfied there is no reason for departing from general rule.

**EMPLOYMENT JUDGE RAHMAN
3 December 2020**