



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4114130/2019 (V)

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Held via videoconference on 3 August 2020

Employment Judge A Kemp

10 **Ms E Anfuso**

**Claimant
In Person**

15 **Ms Valentina Capizzi trading as Hollywood**

**Respondent
No appearance**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The claimant had unlawful deductions made by the respondent from her wages for (i) pay for annual leave taken by the claimant in the period 7 – 17 August 2019 under Regulation 16 of the Working Time Regulations 1998 in the sum of £255.00 and (ii) work carried out on 9 and 11 October 2019 in the sum of £170.00
2. The respondent is in breach of contract in terminating the contract of employment on 11 October 2019 and not permitting the claimant to work the balance of her notice to 20 October 2019, such that the claimant did not work on 16 and 18 October 2019 and lost £170.00 in pay.
3. The total of the sums due is £595.00, less the sum of £100.00 paid to the claimant to account by the respondent on 4 November 2019, and the balance due is £495.00.
- 35 4. The claimant is awarded the sum of **FOUR HUNDRED AND NINETY FIVE POUNDS (£495.00)** payable to her by the respondent.

REASONS

Introduction

1. This Final Hearing took place remotely by Cloud Video Platform in accordance with the arrangements made at the last Preliminary Hearing.
5 The respondent had not attended the two earlier Preliminary Hearings on 25 March 2020 and 27 May 2020. Notice of the Final Hearing had been sent to the respondent, and the clerk attempted to contact her by email and telephone in advance of the Final Hearing, on 31 July 2020, but without reply. The hearing then proceeded in the absence of the
10 respondent. It was conducted successfully, and in accordance with the Practice Direction dated 11 June 2020.

Evidence

2. The claimant had sent various documents, which were before me. Evidence was given by the claimant herself.

15 Facts

3. I made the following findings in fact.
4. The claimant is Ms Eliza Anfuso.
5. The respondent is Ms Valentina Capizzi.
6. The claimant was employed by the respondent from 1 July 2019.
- 20 7. The respondent is a sole trader operating a nails and hair extension business.
8. The claimant worked two days per week, ten hours each day. She normally worked on Wednesdays and Fridays. She was paid £8.50 per hour. Pay was without statutory deductions in light of the level of it.
25 Payment was made into her bank account on a monthly basis.
9. On 7 August 2019 the respondent took a holiday and the business was closed. The claimant had a holiday herself, for the period 7 – 17 August 2019.
10. The claimant was not paid for taking that holiday.

11. The claimant was paid in September 2019 for the hours she worked in August 2019, being a total of six days work at ten hours per day.
12. On 9 October 2019 the claimant gave the respondent three weeks' notice in writing of her resignation. Notice of three weeks was required under the contract of employment (which was not before the Tribunal).
13. The claimant worked a normal shift of 10 hours on 9 October 2019. She has not been paid for doing so.
14. The claimant worked another normal shift of 10 hours on 11 October 2019. She has not been paid for doing so.
15. Towards the end of the shift on 11 October 2019 the respondent came into the work premises and told the claimant that she did not have to work the remainder of her notice as the respondent was closing the business down.
16. That was confirmed in an email sent to the claimant by the respondent on 12 October 2019.
17. The respondent did not close the business, which is still trading.
18. On 23 October 2019 the claimant initiated a grievance with the respondent, with a letter written for her by the Citizens Advice Bureau. There was no reply to that letter but the respondent did text the claimant and sought to persuade her to seek only pay for the two days worked on 9 and 11 October 2019.
19. The claimant received the following payments from the respondent during her employment, recorded in her bank statements:

	Date	Amount (£)
25	6 August	480.00
	4 September	510.00
	7 October	548.26
	4 November	100.00

The law

20. The entitlement to holidays is regulated by the Working Time Regulations 1998 (“the Regulations”). They are made to give effect to the Working Time Directive 93/104/EC and require to be construed purposively in light of that.

21. The Regulations provide for an entitlement to annual leave under Regulations 13 and 13A, which amount to a total of 5.6 weeks per annum, capped at 28 days. For someone who works 2 days per week, the entitlement is to 11.2 days’ leave per annum. Entitlement accrues according to the work being performed at the time.

22. The entitlement to pay for leave taken is provided for in Regulation 16, which states as follows:

“16 Payment in respect of periods of leave

(1) *A worker is entitled to be paid in respect of any period of annual leave to which he is entitled under regulation 13 and regulation 13A, at the rate of a week's pay in respect of each week of leave.*

(2) *Sections 221 to 224 of the 1996 Act shall apply for the purpose of determining the amount of a week's pay for the purposes of this regulation, subject to the modifications set out in paragraph (3) [and the exception in paragraph (3A)].*

(3) *The provisions referred to in paragraph (2) shall apply—*
(a) as if references to the employee were references to the worker;

(b) as if references to the employee's contract of employment were references to the worker's contract;

(c) as if the calculation date were the first day of the period of leave in question;

(d) *as if the references to sections 227 and 228 did not apply;*

5 [(e) *subject to the exception in sub-paragraph (f)(ii), as if in sections 221(3), 222(3) and (4), 223(2) and 224(2) and (3) references to twelve were references to—*

10 (i) *in the case of a worker who on the calculation date has been employed by their employer for less than 52 complete weeks, the number of complete weeks for which the worker has been employed, or*

(ii) *in any other case, 52; and*

(f) *in any case where section 223(2) or 224(3) applies as if—*

15 (i) *account were not to be taken of remuneration in weeks preceding the period of 104 weeks ending—*

(aa) *where the calculation date is the last day of a week, with that week, and*

20 (bb) *otherwise, with the last complete week before the calculation date; and*

(ii) *the period of weeks required for the purposes of sections 221(3), 222(3) and (4) and 224(2) was the number of weeks of which account is taken.*

25 (3A) *In any case where applying sections 221 to 224 of the 1996 Act subject to the modifications set out in paragraph (3) gives no weeks of which account is taken, the amount of a week's pay is not to be determined by applying those sections, but is the amount which fairly represents a week's pay having regard to the considerations specified in section*
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228(3) as if references in that section to the employee were references to the worker.

5 (3B) *For the purposes of paragraphs (3) and (3A) “week” means, in relation to a worker whose remuneration is calculated weekly by a week ending with a day other than Saturday, a week ending with that other day and, in relation to any other worker, a week ending with Saturday.*

10 (4) *A right to payment under paragraph (1) does not affect any right of a worker to remuneration under his contract ('contractual remuneration') and paragraph (1) does not confer a right under that contract*

15 (5) *Any contractual remuneration paid to a worker in respect of a period of leave goes towards discharging any liability of the employer to make payments under this regulation in respect of that period; and, conversely, any payment of remuneration under this regulation in respect of a period goes towards discharging any liability of the employer to pay contractual remuneration in respect of that period.”*

20 23. The reference to sections 212 – 214 is to the Employment Rights Act 1996.

25 24. The provisions for an unlawful deduction from wages are found in Part II of the Employment Rights Act 1996. The right not to suffer unlawful deduction from wages is provided for in section 13. There are exceptions provided for in section 14, which include “overpayment of wages”, and where the worker signifies consent in writing.

25 25. The definition of wages is provided for in section 27 and includes “any sums payable to the worker in connection with his employment including (i) holiday pay.....”

30 26. A claim in respect of breach of contract may be pursued in the Employment Tribunal under the Employment Tribunals (Extension of Jurisdiction) (Scotland) Order 1994, provided that it is outstanding on termination of employment.

27. Claims for unlawful deductions from wages or for breach of contract must be pursued within three months of when the amount was due and payable. That starts by commencement of early conciliation and then presentation of a Claim Form.

5 **Discussion**

28. I accepted that the claimant was seeking to give honest evidence, and she volunteered that a payment to account of £100.00 had been made by the respondent for example. She gave evidence in a straightforward and candid manner. I accepted her evidence as being credible and reliable.

10 *Holiday pay*

29. I address the issue of holiday pay for the holiday taken in August 2019 first of all. The holidays that accrued during the period of employment were a little over 3 days. The claimant was entitled to be paid for the holidays taken. She worked two days per week, for 10 hours each day, and was paid at the rate of £8.50 per hour. There were no statutory deductions.

30. The bank statements the claimant produced showed that she had not been paid for taking those holidays, despite the claim in the Response Form, and of course the respondent did not give evidence. The claimant was paid in September for the days she worked in August outwith the holiday period referred to. I was satisfied that the claimant was entitled to holiday pay, and that it had not been paid such that there had been an unlawful deduction from wages.

Deductions in October 2019

31. I turn to the failure to pay for two days worked in October 2019, being 9 and 11. I was satisfied from the evidence that the claimant had not been paid for those days, a total of 20 hours, which ought to have been paid at £8.50 per hour. That was an unlawful deduction from wages.

Breach of contract

32. I finally turn to the failure to pay for the two days after 11 October 2019. The claimant had properly given 3 weeks' notice, which would have expired on 20 October 2019. That was set out in writing. On 11 October

2019 the respondent told her not to work beyond that date, and whilst there was nothing inherently wrong in so doing the claimant was entitled to be paid for the two days she would have worked during the balance of the notice period, on 16 and 18 October 2019. The respondent did not do so, save for a payment to account of £100.00 on 4 November 2019. A further 20 hours of pay ought to have been paid, at £8.50 per hour, and the failure to do so is a breach of contract.

33. Early Conciliation was commenced within three months of the date on which holiday pay would have fallen as due, and all claims were timeously raised by the claimant, such that they are within the jurisdiction of the Tribunal.

Conclusion

34. I award the claimant the sums set out above.

Consideration of penalty

35. The respondent has not attended the Tribunal, and has failed to pay sums when due. I consider that there is an issue of whether to impose a penalty under section 12A of the Employment Tribunals Act 1996, for what on the face of it is a flagrant breach of the terms of the Working Time Regulations 1998 and the Employment Rights Act 1996, with the failure to address the grievance, or to make payment when Tribunal proceedings started, potentially being sufficient to constitute aggravating features under that section.

36. I shall defer considering that matter further to allow the respondent to make written representations to the Tribunal within 14 days of the date of this Judgment, setting out any argument she wishes to make as to why such a penalty ought not to be imposed, and secondly if one is to be imposed what her financial circumstances are, which the Tribunal will take into account.

Employment Judge: A Kemp
Date of Judgment: 3 August 2020
10 Entered in register: 4 August 2020
and copied to parties