EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Ms P Ross	**v**	**1. Mr O Opiah** **2. London Recruitment Ltd (T/A LDN Recruitment)**

Heard at: Watford (by CVP) **On**: 9 February 2021

Before: Employment Judge Alliott (sitting alone)

Appearances

For the Claimant: In person
For the 1st & 2nd Respondents: Mr O Opiah

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals

This has been a remote hearing on the papers which has not been objected to by the parties. The form of remote hearing was by Cloud Video Platform (V). A face to face hearing was not held because it was not practicable during the current pandemic and all issues could be determined in a remote hearing on the papers.

JUDGMENT

The judgment of the tribunal is that:

1. The second respondent has made unauthorised deductions from the claimant's pay and is ordered to pay her the gross sum of £2,625.

2. The claimant's claim for notice pay is upheld and the second respondent is ordered to pay her the gross sum of £600.

3. The claimant's claim that she was automatically unfairly dismissed is well founded. (For the avoidance of doubt, no award or a basic award or a compensation award is made).

REASONS

1. The claimant was employed on 14 November 2016 as a recruitment consultant. Her employment ceased on 26 July 2017. Although she has referred to being "fired" in her claim form, it is clear from her witness statement and her evidence before me today that she resigned. As such her unfair dismissal claim has to be characterised as constructive unfair dismissal.

The issues

2. The issues are as set out in paragraph 5.1 of the record of a preliminary hearing heard by Employment Judge Andrew Clarke QC on 13 November 2019. I do not repeat them here.

The history of this matter

3. This case has a chequered history. Employment Judge Andrew Clarke QC has reviewed much of the history in the record of the open preliminary hearing heard on 13 November 2019.

4. On 25 June 2018 Employment Judge Palmer QC gave judgment against the first respondent in the claimant's favour and in the absence of the first respondent. At that stage, based presumably upon what the claimant had told her, she calculated the unauthorised deduction of wages in the sum of £2,349.60 and two weeks' notice pay in the sum of £692.00. No reasons have been given or requested as to how those amounts were calculated. I have Employment Judge Palmer QC's handwritten notes of the hearing which give a monthly breakdown of the wages due that she awarded but I have been unable to ascertain the basis from which she came to those conclusions.

5. Today the claimant has placed before me some documents that indicate that the claimant took County Court proceedings against Mr Opiah in January 2019 based on Employment Judge Palmer's judgment. She obtained judgment in the County Court and instructed bailiffs to enforce it. It would appear that those proceedings came to a halt when Mr Opiah was able to show the bailiffs that an application for reconsideration of Employment Judge Palmer's judgment was proceeding in this jurisdiction.

6. The unfair dismissal claim had been struck out by Employment Judge Heal on the basis that the claimant did not have two years' qualifying service. However, Employment Judge Palmer QC left open the prospect of her continuing her claim in relation to an automatically unfair dismissal. As Employment Judge Andrew Clarke QC observed, she implicitly set aside the strike out which had followed from the order of Employment Judge Heal.

7. On 13 November 2019 Employment Judge Andrew Clarke QC directed that the judgment of Employment Judge Palmer QC of 25 June 2018 will be reconsidered (together with the issue of the claimant's alleged unfair

dismissal) on a later date. Employment Judge Andrew Clarke QC set out the issues and made case management orders. These included joining the second respondent to the case. Orders were made for the respondents to disclose company documents and information relating to the directors of the second respondent. It does not appear that the second respondent has complied. A schedule of loss was ordered by 20 January 2020, requiring the claimant's claim to be set out and, in particular, setting out the claimant's claim for compensation in respect of unfair dismissal. A counter-schedule was ordered for 23 March 2020 and witness statements were to be exchanged on 11 May 2020. None of these appear to have been complied with.

8. On 29 May 2020 Employment Judge Heal listed this hearing. She made further orders for disclosure of a schedule and counter-schedule of loss, documents for the hearing and witness statements.

9. The first respondent did not comply with the order for his witness statement by 26 June 2020 and, in the face of complaints from the claimant, Employment Judge Heal made a further order on 6 August 2020 requiring the respondent to send to the claimant his witness statement by 28 August 2020 along with a written explanation as to why he had not done what he had been ordered to do and giving an explanation as to why his response should not be struck out. It would appear that the respondent did send a form of witness statement on 28 August 2020 but does not appear to have complied with paragraphs 2 and 3. On 31 December 2020 the first respondent was written to indicating that Employment Judge Heal directed that the claimant must comply with orders 2 and 3 of the order sent on 6 August 2020. On 8 January 2021 Employment Judge Vowles directed that any outstanding default in complying with the tribunal's orders can be considered at the start of the hearing.

10. Mr Opiah sought to explain any defaults on the basis that he had sent emails with attachments to the tribunal but there may have been a fault somewhere that meant they did not get through. Be that as it may, I decided to proceed with this hearing and hear from both parties rather than striking out the respondent's response.

11. The first issue I need to consider is who was the claimant's employer. Although the claim was originally brought against Mr Opiah, it was based on an early conciliation certificate that named London Recruiting Ltd as the prospective respondent. The claimant's witness statement says that when she went for an interview she told the receptionist that she had an interview with LDN Recruitment. In June and July 2017 the claimant's employer produced two forms of contract of employment, both of which recited that her employer was London Recruitment Ltd. The respondent has disclosed payslips for the claimant in the name of London Recruiting. I find that the claimant's employer was London Recruiting Ltd t/a LDN Recruitment, the second respondent.

12. When she began her employment the claimant was not issued with a contract of employment. The claimant states that Mr Opiah told her on recruitment that she would be earning £18,000 plus commission. The advert that the claimant has shown me does state "salary: £18,000 to £25,000 per year". Mr Opiah told me that this was intended to include commission payments and was the total package potentially available. On this issue I accept the evidence of Mr Opiah that the claimant was not offered the job at £18,000 with commission in addition. A salary of £18,000 translates into £1,500 gross per month. The payslip for December 2016 sets out a salary of £1,000. I find that if the claimant had been expecting a salary of £1,500 per month I would have expected to see contemporaneous complaints from her.

13. The information provided to me by both parties was confusing as to precisely what the claimant's entitlement to pay was. However, Mr Opiah told me that the claimant was entitled to be paid at a rate of £7.50 per hour as long as she hit her sales targets. It was agreed between the parties that in order to hit her monthly sales target the claimant would have to make 15 sales. It was further agreed between the parties that having reached the sales target, the claimant would be entitled to commission of £30 per sale. In addition, the claimant would be entitled to a £25 bonus if she was the top sales person for that month.

14. With the exception of November, between December 2016 and June 2017the respondent has asserted that the claimant worked 130 hours per month (excluding April for which 89 hours is recorded). The claimant has contended that she was entitled to be paid for 160 hours per month. Both parties have worked on a four week month and although that may not reflect the actual number of weeks, both indicated they were prepared for me to adopt their reasoning and work on a four week calendar month. Mr Opiah suggested that his monthly hours were based on observations and records, none of which have been placed before me. I reject his evidence as inherently unlikely seeing as he has repeatedly asserted 130 hours per month. The form of contract that has been shown to me indicates that the claimant's hours of work were 10-6pm. There is no reference in the contract to not being paid for a lunch hour. Accordingly I find that the claimant's contract of employment entitled her to be paid eight hours per day at an hourly rate of £7.50. The claimant's contract of employment was for five days a week, and consequently I find that she was entitled to be paid 40 hours per week at £7.50. There is nothing in the contract of employment that entitled the respondent to reduce the hourly rate from £7.50 in the event that the claimant did not reach her target. I find that the claimant was not entitled to be paid a bonus if she failed to reach her monthly target of 15 sales. The claimant told me that he reduced the amount of hours paid to the claimant for April 2017 due to the fact that she missed her sales target and to take account of the bank holidays over Easter. I find that the respondent was entitled to not pay because the claimant did miss her sales target in April 2016. However, I find that the claimant was entitled to be paid for four weeks at 40 hours per week in April.

15. It is common ground that the claimant began work on 14 November 2016. There was a dispute between the parties as to whether she ceased work on 19 or 26 July 2017. Neither party could put a dated text message before me and I have taken it that the claimant was employed for eight months between 14 November 2016 and mid-July 2017. Working on a four week calendar month and taking eight months in all probability benefits the respondents. However, the claimant has been content that I work with these figures.

16. It is common ground that the claimant made 101.5 sales during her employment. Each of those would have earned her commission of £30. Further the respondent told me that the claimant was top sales person approximately six times.

17. Accordingly I find that the claimant was entitled to be paid the following amounts during her employment:-

    (1) 8 months @ 160 hours per month = 1,280 hours @ £7.50 = £9,600
    (2) 101.5 sales @ £30 per sale = £3,045
    (3) Sales bonus: 6 x 25 = £150

    Total gross pay: £12,795

18. The wage slips indicate that the claimant was paid a total of £10,170 during her employment.

19. £12,795 - £10,170 = £2,615.

20. Accordingly, I find that the claimant has been subjected to unauthorised deduction of wages in the gross sum of £2,615 and judgment will be entered for that sum against the second respondent.

21. Although the basis upon which Employment Judge Palmer QC found unauthorised deduction of wages in the sum of £2,349.60 is unclear to me, I note that the figure I have arrived at is not that dissimilar. I record that the claimant was unable to explain to me how Employment Judge Palmer QC's figure had been arrived at although, from the note on file, the claimant said it was correct.

22. I find that the claimant's dismissal was wrongful and that she was entitled to two weeks' notice. Two weeks' notice is £600 and accordingly there will be judgment for this sum.

23. I now turn to consider the claimant's termination of employment. It is common ground that the claimant was requesting written terms and conditions of employment and that forms of contract were provided in June and July 2017. Further I find that the claimant was questioning the basis of her pay and how it was calculated. I find that this was against the background where she was alleging that the pay was below the National Minimum Wage. In due course the claimant went to ACAS and the date of

notification is 19 July 2017. The respondent states that he received a call from ACAS about not paying Priscilla the minimum wage. The respondent tells me that he was very angry at the whole situation. It was Mr Opiah's case that he had paid the claimant the National Minimum Wage and that, if anything, she had been overpaid. In any event it is clear that there were text messages between the two about the issue. Mr Opiah told me that his attitude was that if the claimant was unhappy then she could leave. He denied having terminated her contract of employment and suggested that she had resigned.

24. Nevertheless, the background to the exchanges between the claimant and Mr Opiah was that she was asserting that she had not received the National Minimum Wage. Mr Opiah has acknowledged that he was angry about this. I have seen a text message from him stating: "This month is your last month". In addition I have seen the following exchange:-

> "Mr Opiah: Are you leaving from today or end of the month
> Claimant: You said I'm not getting paid this month so today."

25. On this issue I prefer the evidence of the claimant and find that Mr Opiah, angry at the intervention of ACAS and questions concerning payment of the National Minimum Wage, told the claimant that he would not be paying her for July. I find that to be a fundamental breach of the claimant's contract of employment and that in response to that threat the claimant resigned. As such I find that the claimant was constructively dismissed.

26. I have gone on to consider what the reason for the dismissal and/or the principal reason if more than one was. I find that the reason was that the claimant had taken action with a view to enforcing or securing the benefit of the National Minimum Wage by contacting ACAS and getting them involved. Consequently, I find that the dismissal was automatically unfair.

27. Despite numerous directions that the claimant should set out in a schedule of loss and in a witness statement any compensation that she was claiming as a result of the unfair dismissal, she has not done so. Indeed the claimant told me that her principal claim in this matter was the unauthorised deduction of wages. No evidence has been placed before me upon which I could make a finding in respect of a compensation award. The claimant did not have one full year's employment and consequently was not entitled to a basic award. As such the claimant's remedy is limited to the declaration that she was automatically unfairly dismissed.

28. It follows that I have decided the judgment of Employment Judge Palmer QC dated 25 June 2018 should be varied.

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Employment Judge Alliott

1 April 2021
Date: …………………………………..
20 April 2021
Sent to the parties on: ....

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For the Tribunal Office