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## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4104087/2020**

**Full Hearing by Cloud Video Platform (CVP) on 4 March 2021**

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**Employment Judge B Campbell**

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**N McCulloch**

**Claimant  
In Person**

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**Orems Care Services Asonta Hailstones**

**Respondent  
In Person**

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### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

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1. The Respondent made an unlawful deduction from the claimant's wages contrary to section 13 of the Employment Rights Act 1996 and is ordered to pay the claimant the sum of £211.98.

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#### **Introduction**

2. This claim arises out of the claimant's employment with the respondent which ended on 27 April 2020. The claim is for unlawful deduction from her wages, on the basis that she was not paid for the period from 20 April 2020 until her termination date.

3. The hearing of this claim was slightly delayed owing to the respondent requiring to deal with an unexpected staffing matter which meant she could not join at the scheduled starting time. Initially she sought a postponement of the hearing, to which the claimant objected. The commencement of the hearing was delayed until later in  
5 the day with the claimant's agreement and by that time parties confirmed they were both in a position to proceed.
4. Evidence was heard from the claimant and the respondent. The respondent had initially intended to call a witness, a Mr Morrison who is an employee of hers. Having given her evidence and having heard the claimant's evidence, she elected not to call  
10 him when it became clear that his evidence would have no obvious bearing on the remaining issues in the claim. Both parties were credible and helpful in giving their evidence, particularly given the upset each had felt at the events surrounding the claimant's resignation.
5. The claimant provided a written statement summarising her position and also a  
15 bundle which contained extracts of emails and other documents. These were helpful in piecing together the timeline of relevant events.

## **ISSUES**

6. A number of allegations of failure to make different types of payment had initially been made by the claimant against the respondent, including in relation to wages,  
20 holidays and sick pay. By the time of the hearing the issues had been narrowed down owing principally to the respondent paying certain sums to the claimant, and with the parties' assistance the outstanding matters were confirmed to be:
  - 6.1. Did the respondent make an unlawful deduction from the claimant's wages contrary to section 13 of the Employment Rights Act 1996 by not paying her in respect of the  
25 dates 20 to 27 April 2020 inclusive;
  - 6.2. If so, what is the amount of the deduction made?

## **FINDINGS IN FACT**

7. The following findings were made as relevant to the above issues.

8. The claimant was an employee of the respondent between 16 April 2018 and 27 April 2020. The respondent operates a care service (the 'Service') which supports members of the community with an emphasis on those with autism. The Service operates from its main premises at Torrance and there is a second property at  
5 Milngavie called 'Craigdhu' where the claimant usually worked. She was a Support Worker.
9. The Service operates on a 24/7 basis as that is the level of care required to be provided. Staff would generally tend to work shifts and a rota would be prepared to match their working hours and times to the needs of the Service.
10. The claimant settled into a working pattern shortly after commencing her service which involved her working 12-hour shifts from 8am to 8pm on Monday and Thursday of each week, thus 24 hours per week. Her rate of pay latterly was £9 per hour.
11. The claimant has a young child who attends nursery. She arranged the child's  
15 nursery attendance to fit with her working hours and the arrangement was generally satisfactory. Occasionally when she needed to work different hours from those allocated to her on the rota she would arrange to swap shifts with a colleague and the respondent had no apparent issue with this.
12. The claimant took ill on or around 11 March 2020 and undertook a period of absence  
20 from work on grounds of ill health. She was admitted to hospital on 6 April 2020 and was discharged on 9 April 2020. She notified the respondent the following day that she was fit to return to work as of Monday 13 April 2020. She sent a copy of the discharge certificate. She was not ill after that date.
13. The claimant had already arranged some annual leave for the week beginning  
25 Monday 13 April 2020 and so sought to return to work on Monday 20 April 2020. Some time in that intervening week she and the respondent were in touch about her return. On 14 April 2020 the respondent arranged a return to work meeting for 11am on Monday 20 April 2020, which the claimant confirmed she was happy to attend.
14. The claimant considered herself fit to work as normal on Monday 20 April 2020 but  
30 agreed to attend the return to work meeting which would begin after her normal shift

start time. She was prepared, and expected, to return to her work as soon as the meeting had finished.

15. The claimant had been considering other roles outside of the respondent's service and submitted an application to another employer, referred to in the documents as  
5 'East Park'. Through a misunderstanding the owners of East Park tried to contact the claimant using her work email address and so the respondent found out about the application. This led the respondent to believe, understandably but mistakenly, that the claimant was not going to return to work with her. The claimant confirmed that she had applied for the role, but in the meantime was available to work on 20  
10 April 2020.

16. By 16 April 2020 the respondent had been made aware of concerns raised about the claimant by some managers and intended to cover those, as well as the claimant's manner on a telephone call between the two earlier in the week, as part of the return to work meeting. The venue was changed to the main Torrance  
15 premises.

17. Towards the end of that week, around Friday 17 April 2020, the claimant found out from a colleague that she was not scheduled to work on the following Monday according to the rota. She wanted to verify therefore what her working hours would be, since they appeared to be different from usual.

2018. The claimant called the respondent's office on the morning of 17 April 2020 and had a conversation about the rota with the respondent. She asked when the respondent could fit her in. She said that if it was to be a variation of her normal working pattern she would need to make arrangements for the care of her child, but would do so.

19. The conversation descended into something closer to an argument as it went on,  
25 with the result that nothing was agreed as regards the claimant's shifts for the following week. The issues included that the respondent wished to know who had told the claimant about the rota, and the fact that the claimant had applied for a role elsewhere, and the prospective employer had contacted her using her work email address, disclosing to the respondent in the process that the claimant was looking  
30 at alternative jobs. The respondent had a concern that the claimant was showing

signs of stress and may be unwell. She suggested out of a sense of care for the claimant's wellbeing that the claimant contact her doctor. The claimant saw no need to do so. The conversation ended abruptly.

20. The respondent followed the conversation with an email to the claimant that stated  
5 the return to work meeting on 20 April 2020 was no longer going to take place. There was also a disagreement over whether the respondent had wrongly withheld sick pay from the claimant, with the respondent saying that the claimant's lack of contact and late submission of fit notes was the reason why sick pay had not been paid when the claimant expected.

1021. The parties did not resume the discussion about what shifts in that week the claimant would work. The return to work meeting was not rescheduled to another time and she was not asked to work any further hours.

22. The claimant confirmed by email to the respondent on 20 April 2020 that she was resigning, giving one week's notice to end on 27 April 2020. In the email she  
15 confirmed having taken advice from ACAS and said:

*"I have stated previously I am fit for work and you have refused to put me on the rota. I am lawfully due 24 hours pay for this week as noted in my contract which amounts to £216 before deductions. Not paying this amount constitutes unlawful deduction of wages but I assume that you will already know this."*

20 The respondent received her resignation email.

23. The claimant had been willing and able to work on Monday 20 and Thursday 23 April 2020, and on the other days that week had it been necessary by rearranging her childcare pattern. She was also willing and able to work at the weekend, 25-26 April and on her last day of service, Monday 27 April 2020. She had not at any time been  
25 offered work on any of those dates and did not refuse to work on any of them.

24. The claimant's employment with the respondent ended on 27 April 2020 with the expiry of her notice. She was not paid any wages in respect of the period 20 to 27 April 2020.

## APPLICABLE LAW

25. By virtue of section 13 of the Employment Rights Act 1996 (the 'Act') a worker is entitled not to have unauthorised deductions made from their wages. Therefore, subject to specific exceptions provided for in that part of the Act, there will have been
- 5 an unauthorised deduction if the worker is paid less than they have earned, depending on how their earnings are calculated, or not paid at all for their work. The date of the deduction is deemed to be either the day when less is paid to them than they have earned, or when they would normally have been paid but were not.
26. Examples of lawful deductions would include PAYE income tax properly deducted
- 10 or a sum which the worker had explicitly consented to having deducted in advance by writing.
27. A worker who has suffered one or more unlawful deductions from their wages may submit a claim to the employment tribunal under section 23 of the Act. There are detailed requirements as to the timing of complaints to ensure that a tribunal can
- 15 determine them. In short, if a claim is about a series of deductions, the claim process (initiated by way of commencement of Early Conciliation through ACAS) must begin within 3 months of the last alleged deduction.
28. There are different ways of calculating an employee's pay, reflecting the different arrangements which may exist for individuals to earn payment under their contract.
- 20 They may be entitled to a fixed wage or salary, or their pay may depend on how much time they work in a given period, or be based on output or results. They may work fixed or variable hours. Chapter II of the Act contains the provisions for calculating a week's pay for any given employee.
29. There are additional and specific rules which apply to an employee who has
- 25 given or received notice of termination of their employment.
30. Section 88(1) of the Act states as follows:

**88 Employments with normal working hours.**

(1) If an employee has normal working hours under the contract of employment in force during the period of notice and during any part of those normal working hours—

- 5 (a) the employee is ready and willing to work but no work is provided for him by his employer,
- (b) the employee is incapable of work because of sickness or injury,
- (c) the employee is absent from work wholly or partly because of pregnancy or childbirth or on adoption leave, shared parental  
10 leave, parental bereavement leave, parental leave or paternity leave, or
- (d) the employee is absent from work in accordance with the terms of his employment relating to holidays,

15 the employer is liable to pay the employee for the part of normal working hours covered by any of paragraphs (a), (b), (c) and (d) a sum not less than the amount of remuneration for that part of normal working hours calculated at the average hourly rate of remuneration produced by dividing a week's pay by the number of normal working hours.

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**CONCLUSIONS**

31. It was not completely clear on the evidence available whether the claimant had a right to payment for any given week irrespective of whether she worked in that week. A copy of her contract of employment or other similar statement of  
25 key terms and conditions was not available, which may have provided clarification.

32. On the balance of probability given the evidence available, the claimant's contract of employment required her to work in order to be paid. Despite the stability of her pattern of weekly working hours and days which had been

established, she was subject to a degree of change to that within her contract and she did have to attend and complete a given shift in order to earn pay for it. Therefore, under normal circumstances, the respondent would not have been obliged to pay the claimant anything in a given week if she did not work any shifts (assuming she was not ill and entitled to sick pay, or on holiday and entitled to holiday pay). This would have been the case even if the reason for the claimant not working in a given week was that the respondent did not schedule her to work, and even if she was willing and able to work.

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33. However, and in any event, the claimant gave a week's notice of her resignation on Monday 20 April 2020. Therefore, section 88(1) of the Act applied to the claimant in respect of that week, as she had 'normal working hours', namely 24 hours per week.

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34. On the evidence, the claimant was 'ready and willing to work' throughout the week commencing Monday 20 April 2020 (and also between Saturday 25 and Monday 27 April 2020) and therefore should have been paid for her normal working hours in respect of that time period.

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35. It follows that the respondent was obliged to pay the claimant a week's pay to cover her notice period. That figure was agreed between the parties to be £216 gross. A copy of the claimant's payslip covering a week of holidays paid to her (item 25 in her bundle) showed that she paid £4.02 of employee National Insurance contributions on that figure. A tribunal, when upholding a claim of unauthorised deduction from wages, is required to put a claimant in the position they would have been in had they been paid the correct amount, and therefore an award of £211.98 is ordered to be paid to her by the respondent.

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Employment Judge: B Campbell

15 Date of Judgement: 12 March 2021

Entered in register: 16 April 2021

and copied to parties