



EMPLOYMENT TRIBUNALS

Claimant: Ms H Ghafoor

Respondent: K2 Prestige Ltd

Heard at: London Central (remotely, by video) **On:** 18 February 2021

Before: Employment Judge Smailes (sitting alone)

Appearances

For the claimant: In person

For the respondent: No attendance

Note: This has been a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video, conducted using Cloud Video Platform (CVP). It was not practicable to hold a face to face hearing because of the COVID-19 pandemic.

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The claimant was an employee of the respondent at all material times.
2. The respondent made unauthorised deductions from wages by failing to pay the claimant the full amount of wages due from 15 April 2019 to 04 April 2020 and is ordered to pay the claimant the sum of £9,586.79, being the total gross sum deducted.
3. The respondent is ordered to pay the claimant the sum of £393.06 in respect of financial loss attributable to the unlawful deduction from wages, pursuant to s24(2) Employment Rights Act 1996.
4. The respondent is ordered to pay to the claimant additional compensation of £800.00 pursuant to section 38 Employment Act 2002 for failure to provide the claimant with a written statement of employment particulars.

REASONS

Introduction

1. The claimant submitted a claim form on 21 August 2020, claiming arrears of pay and consequential financial loss.

2. The respondent did not reply to the claim or attend the hearing.
3. I heard evidence on oath from the claimant, who adopted her document entitled 'Tribunals Documents' as her witness statement (witness statement), and considered the following documents: the ET1, the witness statement, a payslip dated 29 February 2020, and bank statements in rich text format. During the course of the hearing the claimant showed me the records of hours worked that she had recorded on her phone and sent to the respondent and other messages stored on the phone.
4. The witness statement was sent to the Tribunal on 17 February 2021, the day before the hearing. At page 13 there is a reference to unfair dismissal. The claimant did not include this claim in her ET1. The claimant confirmed that she wanted to pursue the arrears of pay and the additional cost of having an overdraft at the bank only and she did not wish to apply to amend her claim to pursue a claim for unfair dismissal.

Issues for the Tribunal to decide

5. The claimant claims for unauthorised deductions from wages in that she did not receive her wages regularly or in full throughout the time that she worked for the respondent: 15 April 2019 to 04 April 2020. The claimant also claimed that she had suffered financial loss in the form of bank charges of £393.06 because of the unlawful deductions from wages. The claimant did not receive a written statement of employment particulars.
6. The issues for me to determine are:
 - a. Was the claim presented in time?
 - b. Was the claimant an employee (for a complaint about the failure to provide a written statement of employment particulars) or a worker (for a complaint about unlawful deduction from wages)?
 - c. Did the respondent make unauthorised deductions from the claimant's wages in accordance with s13 Employment Rights Act 1996 (ERA) by not paying her wages in full for the period 15 April 2019 to 04 April 2020 and if so how much was deducted?
 - d. As the claim relates to a number of deductions, are the deductions sufficiently linked to form a series and, if yes, are there any gaps that break the series?
 - e. Did the claimant suffer any financial loss by not being paid wages on time and, if so, how much?
 - f. If the claimant succeeds in this claim and I find that she had not been provided with a written statement of employment particulars, should I award additional compensation of 2 or 4 weeks' pay under section 38 Employment Act 2002?

Findings of fact

7. The relevant facts are as follows.

Employment

8. The claimant was employed by the respondent from 15 April 2019 to 04 April 2020. The claimant heard through her brother, who knew Marcus Walker, the director, that the respondent was looking for staff. She was interviewed on 12 April 2019. The agreed terms were that the claimant would start work as an office administrator on 15 April 2019 and be paid £10.00 per hour. For the first two weeks she would work from 11 a.m. to 6 p.m. and thereafter from 10 a.m. to 6 p.m. on 5 or 6 days per week. The working week was normally 40 hours per week but with overtime worked as required.
9. The claimant was shown what work she would be carrying out. The respondent operates a car rental service. The claimant's main task was to deal with parking tickets incurred by customers but issued to the company as the registered owner of the vehicles. The claimant's task was to transfer liability for such tickets to the customer who had hired the car at the time. This had to be done within 28 days or the local authority would not accept a transfer of liability and the respondent would remain liable to pay the charge. There was a backlog of this work when the claimant started and this remained so throughout her employment.
10. The claimant was not given a written contract or written statement of employment particulars when she started. She did not think anything about this at the time and expected to receive it later but she never received a written contract or a written statement of the particulars of her employment.

Pay

11. The claimant took unpaid leave for 3 weeks in May 2019 following a family bereavement. She had not yet been paid for work carried out in April 2019.
12. From April 2019 to October 2019 the claimant kept a record of hours worked and submitted this to the respondent each month. The claimant did not provide hard copies of this record. She showed me the record of the hours on her phone during the hearing.
13. There was a change in November 2019. The respondent wanted to change the terms of employment so that instead of being paid £10 per hour, the claimant would be paid £400.00 per week and would be required to work a 40-hour week over 5 days and in addition work 8 hours on one Saturday per month. By this time the claimant was already concerned about the problem with her pay and the lack of payslips. The claimant was reluctant to agree to this change but did so as she felt she had no choice. The change was implemented at the beginning of November 2019. The claimant was not given written confirmation of the change to the terms of her employment.
14. The claimant asked the respondent several times for payslips as she was concerned that she should pay and have a record of paying Income Tax and National Insurance. The claimant first asked for pay and a payslip on her return from unpaid leave in May 2019. The respondent said that it would provide these, but did not.
15. The claimant continued to ask for payslips, for example in 'whatsapp' messages to Andrea, the claimant's line manager, on 02, 28 and 30 December 2019 and 06 and 08 January 2020 (p12, 13 witness statement). On 09 January 2020

Andrea replied that 'payslips will be sent by Monday and tax information', but this did not happen.

16. The claimant received one payslip only, dated 29 February 2020, relating to a payment made on 12 March 2020. Tax and National Insurance were shown on this payslip. The cumulative tax and National Insurance payments from April 2019 are not shown on this payslip, which is set out as a first month's payslip for February 2020.
17. The respondent did not pay the claimant regularly. The respondent did not pay the claimant at all in April or May 2019. In June 2019 the claimant's brother gave her £750 to pass on to the respondent as he owed the respondent money. The respondent said the claimant should keep this as the respondent owed her wages. The claimant continued to be told that the respondent would sort out wages and payslips. She did not receive any further payment until September 2019, when she received two payments via bank transfer on 03 September 2019. The claimant had waited for payment for so long that she agreed to accept the payments and wait for the payslips to be prepared. The claimant had provided her National Insurance details and continued to think that the respondent would eventually provide payslips and deal with any outstanding payments of Income Tax and National Insurance.
18. In October 2019 the claimant received a payment of £1,200.00 on 31 October 2019 but no payslip. As had happened in September, the claimant thought that the respondent would eventually provide payslips and deal with tax and National Insurance.
19. Although the claimant had agreed to the change in terms described above, she did not receive regular payments from November 2019. She received two payments in December (£500 on 19 December and £2,000 on 21 December) and one payment of £1,654.48 (net) in March 2020. To ensure that there was a record of the payment the claimant sent text messages to Andrea and to Marcus Walker on 21 December 2019 saying 'You paid me £2,00.00 cash on 21st December for wages' (p9, 10 witness statement)
20. As there are no other payslips, the only payment expressed to be net of Income Tax and National Insurance is the payment in March 2020.
21. The payments received by the claimant are summarised in this table:

Month and payment method	Amount (£)
April 2019	0.00
May	0.00
12 June (cash, respondent told claimant to keep the payment from her brother, which was money owed by her brother to the respondent)	750.00
July	0.00
August	0.00
03 September (bank transfer 'APED GROUP')	1034.00
03 September (bank transfer 'APED GROUP')	1342.00
31 October (bank transfer 'APED GROUP')	1200.00

November	0.00
19 December (bank transfer 'D Savva')	500.00
21 December (cash)	2000.00
January 2021	0.00
February	0.00
12 March (bank transfer, net figure, gross £2000.00, payslip is dated 29 February 2020 for month 11)	1654.48
Total	8480.48 (8826.00, using the gross March figure and taking all other figures as gross)

22. The claimant's evidence is that her gross wages should have been as set out in this table:

Month	Amount (£)
April 2019 (based on record of hours submitted)	894.99
May (based on record of hours submitted)	725.00
June (based on record of hours submitted)	1407.90
July (based on record of hours submitted)	1913.33
August (based on record of hours submitted)	1822.50
September (based on record of hours submitted)	1486.67
October (based on record of hours submitted)	1250.00
November (based on £400 p.w)	1600.00
December (based on £400 p.w)	1600.00
January 2020 (based on £400 p.w)	1600.00
February (based on £400 p.w)	1600.00
March (based on £400 p.w)	1600.00
April	Not claimed
Total	17,495.00

23. The claimant claims for the shortfall of £8,869.00. She has calculated this by using the gross figure for March 2020 and calculating the agreed rate of £400 per week from 01 November 2019 as equating to £1,600 per calendar month. I find that the rate of pay from 01 November 2019 is £400.00 per week, not £1,600 per calendar month. I will deal with the calculation in my conclusions.

Termination of employment

24. As to how the claimant's employment ended, the claimant did not receive a reply to her message to Mr Walker asking if she needed to come to work on 24 March 2020, the day after the first lockdown was announced. She arranged for a colleague, Chris, to bring some work to her at home

25. Mr Walker did not reply to the claimant's message of 01 April 2020 asking to be paid for March 2020 or to the claimant's message of 02 April 2020 asking for an update.

26. On 04 April 2020 the claimant sent Mr Walker a message: 'Hi Marcus, please can I get this payment, I can't mess up my mortgage and I've got to show them my next payslip and wages'. Mr Walker replied: 'You seen the tickets in the office at the minute it dint look like you will be working with us Again an im gonna haft to deal with over a 100k of tickets you created' (spelling as in message). The tickets are the parking tickets incurred by users of the hired vehicles as described above.

27. The claimant understood this to mean she was dismissed as she was familiar with how Mr Walker he behaved and knew that was what he meant. This was confirmed when she sent a message to Chris, who confirmed that he knew she would not be working for the respondent again.
28. On 07 April 2020 the claimant sent a message to Mr Walker to say she had asked Chris to collect the files and office keys from her and take them back to the office. She also asked for the outstanding wages. The claimant sent a further message on 11 April 2020. Mr Walker replied on 11 April 2020 saying: 'Tell you bro come see me'.
29. The claimant replied that she did not think it was anything to do with her brother. Mr Walker then said she should deal with Chris instead. Chris collected the files and keys on 04 May 2020. The claimant gave Chris details of the outstanding payments and thought he would deal with her wages but he did not.
30. On 16 May 2020 the claimant asked Mr Walker for an update and sent the details of the outstanding wages. The claimant showed me the reply on her phone as it was not included in the screenshots in her witness statement. The reply was: 'You lost me a lot of money. I treated you like a sister. When back on my feet, if you can help Chris, finish tickets if you want your money.'
31. The claimant asked for another update on 31 May 2020 to which Mr Walker replied that he didn't owe the claimant anything and she hadn't done her work properly. The claimant sent one further message to Mr Walker on 05 June 2020 saying she was owed wages and that she intended to make a claim to the Employment Tribunal.
32. I find that the claimant was dismissed on 04 April 2020.

Financial loss

33. As a result of not being paid regularly the claimant had to rely on an overdraft facility with her bank and help from family. She was overdrawn throughout except for a few weeks after being paid in December 2019. She incurred overdraft charges of £393.06 for the period 15 April 2019 to 04 April 2020.

Written statement of employment particulars

34. The claimant was not given a written statement of employment particulars.

ACAS

35. The claimant notified ACAS under the early conciliation process of a potential claim on 22 June 2020 and the ACAS Early Conciliation Certificate was issued on 22 July 2020. The claim was presented on 21 August 2020.

The law

Employment and Worker status

36. An employee is defined by section 230(1) Employment Rights Act 1996 (ERA) as being 'an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment'. 'Contract of employment' is defined as meaning a contract of service or apprenticeship. Whether an individual works under a contract of service is determined according to various tests

established by case law. A tribunal must consider relevant factors in considering whether someone is an employee. An irreducible minimum to be an employee will involve control, mutuality of obligation and personal performance, but other relevant factors will also need to be considered.

37. A 'worker' is defined by section 230(3) ERA as being: 'an individual who has entered into or works under (or, where the employment has ceased, worked under) – (a) a contract of employment...'

Unauthorised deduction from wages

38. Section 13(1) ERA provides that an employer shall not make a deduction from wages of a worker employed by him unless 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 the worker has previously signified in writing his agreement or consent to the making of the deduction. An employee has a right to complain to an Employment Tribunal of an unauthorised deduction from wages pursuant to Section 23 ERA.

39. A claim about an unauthorised deduction from wages must be presented to an employment tribunal within 3 months beginning with the date of payment of the wages from which the deduction was made, with an extension for early conciliation if notification was made to ACAS within the primary time limit, unless it was not reasonably practicable to present it within that period and the Tribunal considers it was presented within a reasonable period after that.

40. Where the claim is about a series of deductions, the three-month time limit starts to run from the date of the last deduction or payment in the series, section 23(3) ERA. For a number of deductions to be a series there has to be 'sufficient frequency of repetition', **Bear Scotland v Fulton** [2015] IRLR 15.

Financial loss

41. Where a Tribunal makes a declaration that there has been an unauthorised deduction from wages, it may order the employer to pay to the worker, in addition to the amount deducted, such amount as the Tribunal considers appropriate in all the circumstances to compensate the worker for any financial loss sustained by him which is attributable to the unlawful deduction: section 24(2) ERA

Section 38 Employment Act 2002

42. Where a tribunal finds in favour of an employee in a complaint of unlawful deductions from wages, and the tribunal finds that the employer has failed to provide the employee with a written statement of employment particulars, the tribunal must award the employee an additional two weeks' pay, unless there are exceptional circumstances which would make that unjust or inequitable, and may, if it considers it just and equitable in all the circumstances, order the employer to pay an additional four weeks' pay.

Conclusions

Employment or worker status

43. The claimant was interviewed for a vacancy by the respondent and was offered employment at a rate of £10.00 per hour. She had to work specified basic hours at

the respondent's premises and be prepared to work overtime. She was given a specific task to deal with parking tickets. She had to do this work herself.

44. The claimant was not given payslips and it appears that, save for the payment made in March 2020, no deductions for tax and National Insurance were made under the PAYE system. However, the claimant expected such deductions to be made and asked when this would happen on several occasions. It is not enough to outweigh the factors which point to her being an employee.

45. I conclude that the claimant was an employee, and so also a worker, and is entitled to pursue her complaints.

46. Time Limits

47. I found that the claimant's employment was terminated on 04 April 2020 when she received the message from the respondent. The last payment was due on termination of her employment.

48. I found that the claimant was not paid regularly. She did not receive her first payment until June 2019. The claimant was paid more than the wages due for the month in September and December 2019 but these payments were not enough to cover the arrears of pay. They are not enough to break the link in the series of deductions.

49. In **Bear Scotland** the Employment Appeal Tribunal held that a gap of more than 3 months between any two deductions would break the link in the series of deductions. There was a gap in the series of deductions as the claimant was paid in September and October 2019. This gap is not long enough to break the link in the series of deductions.

50. The claim was presented in time and as there is no break in the series of deductions, the claimant can claim for deductions from 15 April 2019 to 04 May 2020.

Unauthorised deductions

51. I conclude that the claimant was entitled to be paid wages from 15 April 2019 to 04 April 2020 and that the respondent made unauthorised deductions from wages by failing to pay regularly and failing to pay the correct amount.

52. The wages due from 15 April 2020 to 31 October 2020 are as set out in the uncontested evidence above and amount to £9,498.50 gross. The claimant is entitled to a payment of £400.00 per week from 01 November 2019 to 04 April 2020, a period of 22 weeks and 2 days. This amounts to £8,914.29 gross. For the period 15 April 2019 to 04 April 2020 the claimant is entitled to £18,412.79 gross. The claimant was paid £8,826.00 gross. The amount due is £18,412.79 - £8,826.00 = £9,586.79 gross.

53. I have calculated the amount on a gross basis, but the respondent is to make any deductions which are due for tax and national insurance contributions before payment is made to the claimant.

Financial Loss

54. I have found that the claimant was overdrawn and incurred bank charges of £393.06. The claimant was overdrawn and incurred the bank charges because she was not paid the full amount of wages. In accordance with section 24(2) ERA, I order the

respondent to pay additional compensation of £393.06 to compensate the claimant for this financial loss.

Written statement of employment particulars

55. The claimant was not given a written statement of employment particulars. In the circumstances, I must order the respondent to pay an amount equivalent to 2 weeks' wages in additional compensation pursuant to section 38 Employment Act 2002 for the failure to provide a written statement of employment particulars. I award £800.00.

Employment Judge Smailes

____11 May 2021_____
Date

JUDGMENT SENT TO THE PARTIES ON

14th May 2021

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