



# EMPLOYMENT TRIBUNALS

**Claimant**

Ms Mathy Jorine Matondo

v

**Respondent**

Kingsland Nursery Limited

**Heard at:** Bury St Edmunds

**On:** 18 November 2020

**Before:** Employment Judge K J Palmer

**Appearances:**

**For the Claimant:** Ms U Delpino-Mark, Volunteer with FRU

**For the Respondent:** Mr K Ubah, Officer of the Respondent

**JUDGMENT** having been sent to the parties on 8 December 2020 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunal Rules of Procedure 2013, on 20 December 2020 and that request having been passed to Employment Judge KJ Palmer on 23 April 2021, the following reasons are provided:

## REASONS

1. This matter came before me today and is brought by the Claimant who worked at the Respondent's between 2 July 2018 and 31 July 2019. She resigned and brings claims based upon an unlawful deduction of wages under s.13 and s.23 of the Employment Rights 1996 and she also pursues claims for unpaid holiday, that is essentially accrued holiday pay in lieu under the Working Time Regulations 13 – 16 1998, accruing on termination of her employment.
2. I have before me a comprehensive Bundle running to some 180 pages. I also have various other documentation that had been submitted to the Tribunal this morning which came in dribs and drabs and which was emailed to me during the course of the Hearing. I had before me the Claimant and her representative Ms Delpino-Mark and also had a representative from the Respondent, Mr Keith Ubah.
3. I heard from them both and I also had before me a witness statement produced by the Claimant which I only saw for the first time this morning. I put some questions to the Claimant myself during the course of the Hearing.

4. Essentially, the claim is a straight forward one in law, but as is often the case with these types of claims it is very complicated in terms of the facts. The claim that is pursued by the Claimant is a claim for unlawful deduction of wages and then secondly a claim for unpaid holiday pay.
5. Dealing with the unlawful deduction claim first of all, I was greatly assisted by a very helpful schedule of loss that I had before me which was in the Bundle and that was produced by Ms Delpino-Mark who was acting for the Claimant. It was an up to date schedule of loss as at 18 November 2020. In that schedule of loss was set out what the Claimant says are the payments owing to her. In fact, she has been through each and every month from July 2018 through to July 2019 setting out the hours that she says she worked, the amount that she said she was owed as a result, the amount that she was paid and therefore the shortfall that she says are owing to her.
6. In total the Claimant calculates a gross figure of £880.48 which she says she was underpaid.
7. I must point out that in a case such as this it is for the Claimant to prove her case. Therefore, I have to be satisfied that on the balance of probabilities the Claimant has done that. I therefore have to look at the evidence that is in front of me to enable me to determine whether she has discharged that burden of proof. I asked and was given and directed towards documents in the Bundle by Ms Delpino-Mark which set out the calculations which sat behind the Claimant's claims and these were essentially calculations which the Claimant had done herself, but which are on everyone's admission were not contemporaneous. I questioned the Claimant myself on this and she said that she produced the calculations based upon the hours that she was working at that time and that is what led to the schedule which is in front of me.
8. Essentially, she says that it is the overtime pay that she was not paid during the course of her employment that has amounted to the £880.48.
9. The Respondents on the other hand, in the shape of Mr Ubah who is a Director of the Respondent, have said that the schedule produced by the Claimant is essentially a schedule based upon a predictive amount of hours and in fact, he also produced a spreadsheet which was in front of me in the Bundle, setting out timesheets running from July 2018 to July 2019.
10. He says that the whole calculation of the Claimant's pay was rather skewed by the fact that at the commencement of her employment the Claimant failed to appreciate that she was going to have to work a month in arrears. A very common thing when employees commence their employment, that they have to work a month in arrears before they are paid. In fact, in the Contract of Employment that I had in front of me in the Bundle, paragraph 5, it is clearly stated that the rate of pay would be £21,500 per annum and that she would be paid 4 weeks in arrears. However, it is Mr Ubah's evidence that that did not happen and that in fact, when the Claimant asked for a payment at the end of July, a payment was made to her. This means that thereafter every months' payment was

somewhat skewed because it was based on the hours that she was expected to work rather than the hours that she did work.

11. Mr Ubah then explained today in his evidence that he went through the time sheets which sit behind the Claimant's payments. Those timesheets actually show the hours that the Claimant did work.
12. The difficulty with that was that he did not produce those and we only saw one of them that was sent through during the course of these proceedings. For him to rely upon those, it is unacceptable for those to be produced at the eleventh hour and in fact during the course of this process. I do accept however, that he went through an exercise where he compared the predicted payments and hours worked based on his spreadsheet, against the actual hours worked. The actual hours worked is recorded in hand written timesheets for each employee working at the Respondents and that is recorded by the Manager and Deputy Manager.
13. I accept that he went through that process but I cannot accept him producing evidence during the course of the Hearing, nor indeed at the eleventh hour as he did this morning. That is unfair to the Claimant and Ms Delpino-Mark did not have the opportunity of seeing that documentation and therefore being prepared to respond to that part of the Respondent's case.
14. Having said that, the failure of the Respondents to produce that documentation does not, in my Judgment, make any difference to the outcome of this unlawful deductions claim.
15. In light of the evidence that I have before me, I am simply not convinced that the Claimant has produced sufficient evidence to show that she actually did work the hours which she is claiming. The schedule which has been produced in the schedule of loss, is very closely aligned to the predicted timesheet spreadsheet that the Respondents have produced and as the burden of proof is on the Claimant to show that she did actually work the hours which she said she worked, I am not convinced that she has been able to do that. The figures which she has given to her very well prepared advocate, Ms Delpino-Mark, to produce the well put together schedule of loss are based on her memory and her supposition. She does not have any definitive evidence that supports her claim and therefore I am bound to come to the conclusion that she has not succeeded in convincing me on the balance of probabilities that she was underpaid the sum of £880.48.
16. Therefore, her claim for unlawful deduction of wages fails.
17. In respect of her holiday pay claim, she claims that she had asked to take four days holiday in July 2018. It is worth mentioning that the Respondent's holiday year runs from 1 September every year to 31 August the following year. Therefore, the holiday that she asked to take in July 2018 was in the holiday year which ended in August 2018. She says that she was refused that holiday and that she was not allowed to take holiday because she was told that she could not take holiday in a probation period.

18. Mr Ubah refutes that and says there is no evidence that she requested that holiday. It is also the Claimant's case that there was then an agreement that she would be allowed to carry over those four days that she was not allowed to take in July. Mr Ubah referred me to the Contract of Employment which quite clearly states that holiday that is not used is lost, from one holiday year to the next, unless there is written evidence that the Respondent's consent in writing to that holiday being carried over, paragraph 9 of the Contract of Employment.
19. I was referred by Ms Delpino-Mark to some telephone texts, in fact the Claimant herself referred me to an exchange of texts between herself and Verity Sharp, one of the employees of the Respondent (a Manager). At page 125 of the Bundle was a text which clearly suggests that there was an agreement that those four days could be carried over in to the holiday year commencing on 1 September 2018 and I therefore am convinced that that was agreed and that those four days could be carried over.
20. The Respondent makes the point that the text is some time after the event, dated 25 March 2019, well after the beginning of the holiday year which relates to the carry over of those four days. That, in my Judgment, does not make any difference, the agreement was clearly made and it is evidenced in writing as per the text of 25 March 2019.
21. I therefore make a finding that the Respondents did agree that those four days be carried over.
22. The rest of the holiday pay claim relates to a calculation of holidays untaken at the date of termination which was 19 July 2019 and I will not repeat the detail of those calculations but they are well set out in the schedule of loss.
23. Essentially, they calculate that at the date of termination, the Claimant was entitled to pay in lieu of untaken holiday of 13.71 days; that becomes 14 days as we round up holidays in such calculations.
24. Interestingly, in August 2019, the Respondents actually made a payment to the Claimant and the Claimant and her representative have before this Tribunal, accepted that the Claimant received such a payment, but did not understand how that payment was calculated.
25. Mr Ubah, amongst the documents that he produced at the eleventh hour this morning, there is a document that I have now looked at which sets out not entirely how that payment was calculated, but at least sets out that the payment that was made in August included a sum relating to wages which he says was unpaid at that time. That was £494.06. And also, a sum relating to 13 days holiday. It is clear to me that a payment was made for accrued and untaken holiday of 13 days.
26. On the evidence before me, I am happy to accept that the Claimant was in fact owed 14 days and that therefore that payment is one day short.

- 27. Equally, there are the 4 days that were carried over which should also have been paid, which were not. On that basis, I make a finding that the Claimant is entitled to be paid for 5 days accrued untaken holiday up to the date of termination. That is a payment that I am going to Order to be paid gross, it is then for the Claimant to account for her own tax.
  
- 28. I therefore make an award in the holiday pay claim in the sum of £435.80 to be paid by the Respondent to the Claimant as soon as possible and I reiterate that the unlawful deductions claim fails.

4 May 2021

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Employment Judge K J Palmer

Judgment sent to the parties on

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For the Tribunal office