



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4107785/2020 (V)

Final Hearing held remotely on 30 April 2021

Employment Judge J Shepherd

Ms Elizabeth Fleming

Claimant
Represented by:
Ms Rita Kocher
Solicitor

Cardowan Limited

Respondent
Represented by:
Mr Matthew Boyle
Director

JUDGMENT

The judgment of the Tribunal is:

1. The claim for a statutory redundancy payment is well founded and the Respondent is ordered to pay to the Claimant a redundancy payment in the sum of £1,810.26.
2. The complaints of unlawful deductions from wages are well founded and the Respondent is ordered to pay the Claimant the sum of £1804.20 net. It is the responsibility of the Respondent to account to HMRC for any income tax and national insurance that may be owing in respect of that net payment.

3. The claim for unpaid holiday pay is dismissed upon withdrawal by the Claimant.
4. The claim for notice pay is dismissed upon withdrawal by the Claimant.

REASONS

Introduction

1. By a claim form dated 9 December 2020 the Claimant presented a number of claims, including claims for unfair dismissal, redundancy payment, notice pay and unlawful deductions from wages in respect of arrears of pay and outstanding holiday. The Claimant withdrew her unfair dismissal and other related claims and those claims were dismissed upon withdrawal on 27 April 2021. The holiday pay and notice pay claims were withdrawn at the outset of the hearing on 30 April 2021.
2. The Claimant was represented by Ms Kocher, Solicitor. The Respondent was represented by Mr Matthew Boyle, Director of the company.
3. The Claimant lodged a set of productions and gave evidence on her own behalf.
4. The Respondent did not lodge any documents. Mr Boyle gave evidence on their behalf.
5. In discussion with the parties at the outset of the hearing, Ms Kocher confirmed that the only claims that the Claimant wished to proceed with were the claims for a statutory redundancy payment and the claim for unlawful deductions from wages. Ms Kocher confirmed that all other claims had been, or were to be, withdrawn.

6. Ms Kocher wished to make some minor amendments to the ET1. At paragraph 3 of the Paper Apart to the Originating Application, 23 July 2020 should be amended to 3 July 2020. At paragraph 1, March 2017 should be amended to April 2017. Mr Boyle had no observations to make in respect of these amendments and I therefore allowed them.

Findings of Fact

7. The Tribunal makes the following findings of fact –
8. The Claimant commenced employment in April 2017 with the Bathgate Pub Company, working as kitchen manager and chef of the Foundry pub and restaurant, overseeing the day to day running of the kitchen. The Claimant worked a minimum of 5 days a week.
9. The Claimant was not provided with a contract of employment, nor was she told the gross salary she would be paid. At the commencement of her employment Mr Frank Hogan and Mr Martin McKay, who ran the Bathgate Pub Company and leased the pub, asked the Claimant how much she was earning in her previous employment and stated that they would try and match what she earned.
10. Throughout the Claimant's employment, until March 2020, she received the same net monthly salary of £1490.46. Her salary was paid a month in arrears, so that payments made on or around 25th of each month related to the pay for the previous month (eg a payment on 25 October 2019 related to the Claimant's wages for September 2019).
11. In or around July 2019 the Claimant overheard a conversation amongst other employees stating that her employer was changing from the Bathgate Pub Company to Cardowan Ltd. The Claimant queried this with the pub manager, Clare Smith, who confirmed that the business was changing to Cardowan Ltd, but that everything would remain as business

as usual and the only thing that would change was the name of the employer.

12. As at July 2019 the Bathgate Pub Company was insolvent and could no longer pay the rent on the building. Cardowan Ltd was started in July 2019 to take over the running of the pub so that it could continue to trade. Mr Boyle was an owner of the pub building and became a Director of Cardowan Ltd. Mr Boyle was not familiar with the day to day running of the pub, nor did he have any first hand knowledge of the terms and conditions of employment of the staff, including the Claimant, as this had all been dealt with by the outgoing Directors of the Bathgate Pub Company, Mr McKay and Mr Hogan.

13. On 17 March 2020 the Government made an announcement calling upon people to avoid visiting pubs due to the coronavirus pandemic. This was followed by the announcement on 20 March 2020 that pubs and restaurants must close.

14. As a consequence, the Foundry Bar was closed as of 20 March 2020. The Claimant received a letter from Mr Matthew Boyle and Mr Martin Brown dated 2 April 2020 stating “I regret to inform you that due to the current business decline with the ongoing Covid-19 crisis, we have had to close business so therefore we are having to place your employment on Furlough (temporary layoff) from 26/03/2020 for at least 3 months (as per Government Guidelines). During this period, you will receive up to 80% of your wages as agreed with Government. We are still uncertain when this will take place but we will keep you informed...”

15. On 30 March 2020 the Claimant received a payment in respect of her wages for February 2020, but this was in the sum of £1117.50 rather than £1490.46. When the Claimant queried this underpayment she was

informed that the Respondent did not have enough money to pay the full wage bill.

16. The Claimant did not receive any payments in April 2020 in respect of salary for March 2020.
17. On 11 May 2020 the Claimant received a payment in respect of her salary for April 2020 in the sum of £1466.66. The Claimant had been expecting to receive 80% of her usual salary so this appeared to her to be an overpayment.
18. On 1 June 2020 the Claimant received a payment in respect of her salary for May 2020 in the sum of £1466.66.
19. On 1 July 2020 the Claimant received a payment in respect of her salary for June 2020 in the sum of £1466.66.
20. The Claimant received a message from the pub manager on 3 July 2020 informing her that furlough payments had been made to staff without any tax deductions for the last 3 months and that those who normally pay tax would see those tax payments for April, May and June come off in July. The message also informed the Claimant that Cardowan Ltd were trying to give staff a couple of months to look for another job as it was unlikely that they would be able to continue after the August payment. The Claimant took this to be notice of the termination of her employment, with 2 month's notice, as of 3 July 2020 by reason of redundancy.
21. On 4 August 2020 the Claimant received a payment in respect of her salary for June 2020 in the sum of £662.81.
22. On 8 August 2020 the Claimant received an email from Mr Boyle and Mr Brown, said to be a follow up to the email from the pub manager giving 2

months' notice, explaining that Cardowan Ltd would be able to continue to pay staff until the end of August 2020 but they were not in a position to continue to pay staff in September. This was consistent with the 2 months' notice that had been given to the Claimant at the beginning of July 2020. The email also explained that staff should use any accrued holiday in August 2020 and that Cardowan Ltd would pay the additional 20% of salary so that staff should receive 100% of pay, and not just the 80% government payment, in August.

23. On 7 September 2020 the Claimant received the final salary payment from the Respondent in the sum of £1500.37.

24. On 21 October 2020 the Claimant commenced the ACAS early conciliation process, the certificate was issued on 10 November 2020, and the Claimant issued her claim on 9 December 2020.

25. The Claimant did not receive any redundancy payment from the Respondent upon termination of her employment.

26. As at the date of the termination of the Claimant's employment she had 3 years of continuous service and was 53 years old.

27. The Claimant's net monthly salary was £1490.46. Grossed up, this equated to an annual gross salary of £20,918.40, a gross monthly salary of £1743.20, and her gross weekly pay was £402.28.

Discussion and decision

The relevant law

28. Section 13 of the Employment Rights Act ('ERA 1996') provides that an employer shall not make a deduction from wages of a worker employed

by him unless the deduction is required or authorised by statute, or by a provision in the worker's contract advised in writing, or by the worker's prior written consent. Certain deductions are excluded from protection by virtue of s.14 or s.23(5) of the ERA.

29. Under s.13(3) ERA there is a deduction from wages where the total amount of any wages paid on any occasion by an employer is less than the total amount of the wages properly payable by him to the worker on that occasion.

30. Section 14 ERA provides that s.13 does not apply to a deduction from a worker's wages made by his employer where the purpose of the deduction is the reimbursement of the employer in respect of an overpayment of wages.

31. Under s.27(1) of the ERA 'wages' means any sums payable to the worker in connection with their employment.

32. S.23(2) of the ERA provides that an employment tribunal shall not consider a complaint of an unlawful deduction from wages unless it is presented before the end of the period of three months beginning with, in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made. Where a complaint is brought in respect of a series of deductions or payments the reference to deduction is to the last deduction in the series. In **Bear Scotland Ltd v Fulton and another [2015] ICR 221**, the EAT held that, whether underpayments constituted a series of deductions was a question of fact; that "a series" required sufficient similarity of subject matter to link each event factually with the next and a sufficient frequency of repetition.

33. Section 135 ERA provides that an employer shall pay a redundancy payment to any employee of his if the employee is dismissed by reason

of redundancy. Section 139 ERA provides that an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to the fact that his employer has ceased or intends to cease to carry on business for the purposes of which the employee was employed by him, or to carry on that business in the place where the employee was so employed.

34. Section 162 ERA provides that the amount of a redundancy payment shall be calculated by determining the period, ending with the relevant date, during which the employee has been continuously employed, reckoning backwards from the end of that period the number of years of employment falling within that period, and allowing the appropriate amount for each of those years of employment. The “appropriate amount” means one and half weeks’ pay for a year of employment in which the employee was not below the age of 41, one weeks’ pay for a year of employment in which he was below 41 but not below the age of 22, and half a weeks’ pay for each year of employment below the age of 22. Section 227 provides that for the purpose of calculating a statutory redundancy payment, the amount of a week’s pay as at July 2020 shall not exceed £538.

Claim for redundancy payment

35. The Claimant was dismissed by reason of redundancy. The Claimant was informed that she was to be made redundant on 3 July 2020 and that she would continue to be paid for 2 months. Cardowan Ltd ceased to carry on the business for the purposes of which the Claimant was employed as a result of the coronavirus pandemic. The Claimant was therefore entitled to be paid a redundancy payment.

36. The Claimant had never received any payslips from the Respondent during her employment and was therefore unaware of what her gross annual, monthly or weekly salary should be. Mr Boyle was also unable to

assist me with the Claimant's normal gross salary figures. There was no dispute between the parties that, prior to March 2020, the Claimant had always received a net monthly salary of £1490.46. I have therefore taken the Claimant's net monthly salary of £1490.46 (£17,885.52 per annum) and have grossed it up, giving a gross annual salary figure of £20,918.40 per annum, a gross monthly salary of £1743.20 and a gross weekly salary of £402.28.

37. The amount of the redundancy payment is therefore calculated as $3 \times 1.5 \times £402.28 = \mathbf{£1810.26}$

Claim for unlawful deductions from wages during the period March 2020 to 7 September 2020

38. During the period 30 March 2020 to 7 September 2020 there were both underpayments and overpayments of the Claimant's salary. These arose for a number of reasons, either because the Respondent was unable to pay the amount properly payable to the Claimant due to financial difficulties, or because payments were mistakenly paid without any deductions as to tax and national insurance, which were recouped in later salary payments. I have taken account of all underpayments and overpayments in the relevant period in reaching my judgment as to the sums owing to the Claimant in respect of unlawful deductions from her wages.

39. I am satisfied that the Claimant's claim relates to a series of deductions in the period between 30 March and 7 September 2020 and that, taking account of adjustments for the ACAS conciliation process, the Claimant's claim was brought within the relevant time limits.

40. Whilst furloughed, from the beginning of April 2020, the Claimant was entitled to be paid at 80% of her salary (£16,734.72 gross per annum,

£1394.56 monthly gross) equating to a net annual salary of £15,040.46 and a monthly furlough salary payment that should have been paid to the Claimant of £1253.37.

41. The total amount of wages paid was less than the total amount of the wages properly payable by the Respondent to the Claimant over the period claimed. The total underpayments and overpayments are set out below. All figures are expressed as net figures as the gross figures could not be provided by either the Claimant or the Respondent. It is therefore my judgment that the total amount payable to the Claimant in respect of her unlawful deductions claim is **£1804.20 net**. It is the responsibility of the Respondent to account to HMRC in respect of any tax or national insurance that may be payable in respect of that net sum.

DATE	NET AMOUNT PAYABLE	NET AMOUNT PAID	NET DEDUCTION
30 March 2020 (salary for February 2020)	£1490.46	£1117.50	£372.96
30 April 2020 (salary for March 2020)	£1490.46	£0	£1490.46
11 May 2020 (salary for April 2020)	£1253.37 (net furlough rate of 80%)	£1466.66	-£213.29
1 June 2020 (salary for May 2020)	£1253.37	£1466.66	-£213.29
1 July 2020 (salary for June 2020)	£1253.37	£1466.66	-£213.29

4 August 2020 (salary for July 2020)	£1253.37	£662.81	£590.56
7 September 2020 (salary for August 2020)	£1490.46 (R had agreed to pay at 100% to account for holiday pay)	£1500.37	£-9.91
TOTALS	£9484.86	£7680.66	£1804.20

Employment Judge: Jude Shepherd
Date of Judgment: 13 May 2021
Entered in register: 14 May 2021
and copied to parties