



EMPLOYMENT TRIBUNALS

Claimant: Mrs A Livesley

Respondent: Mrs C Pratt t/a Pitstop Deli

HELD AT: Liverpool (by CVP)

ON: 28 June 2021

BEFORE: Employment Judge Buzzard

REPRESENTATION:

Claimant: In person

Respondent: Miss S J Wood, Litigation Consultant

JUDGMENT having been sent to the parties on 2 July 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

The Claims

1. The claimant in this claim made three claims:
 - 1.1. A claim that she had not been provided with payslips;
 - 1.2. A claim that she had suffered an unlawful deduction from her wages; and
 - 1.3. A claim that she was owed holiday pay.

Evidence

2. The Tribunal heard evidence from the claimant and from the Respondent. In addition the Tribunal was presented with a bundle of relevant documents.

3. There was very little, if any, dispute regarding a relevant factual matter. The dispute between the parties related to the correct application of the law to the facts.

The Issues & Law Relevant to the Claims

4. Failure to provide Payslips

4.1. All employees have a right to be given written payslips, which comes from section 8 of the Employment Rights Act 1996 (“ERA”). This states:

“8 Itemised pay statement.

(1) A worker has the right to be given by his employer, at or before the time at which any payment of wages or salary is made to him, a written itemised pay statement.”

4.2. An employee can make a complaint to an employment Tribunal if they believe that their right to receive a payslip under this section has been breached. A right to make a reference to the Tribunal comes from s11 ERA, and the determination of any reference to the Tribunal is governed by s12 ERA which states:

“12 Determination of references.

(3) Where on a reference under section 11 an employment tribunal finds—

(a) that an employer has failed to give a worker any pay statement in accordance with section 8, or...

(4) Where on a reference in the case of which subsection (3) applies the tribunal further finds that any unnotified deductions have been made from the pay of the worker during the period of thirteen weeks immediately preceding the date of the application for the reference (whether or not the deductions were made in breach of the contract of employment), the tribunal may order the employer to pay the worker a sum not exceeding the aggregate of the unnotified deductions so made.”

4.3. Accordingly, if no pay statements were given to the claimant, the claimant is entitled to a declaration to that effect. Further, if there were then unnotified deductions from that pay, the claimant may be entitled to an award not exceeding the total amount of the unnotified deductions.

5. Unauthorised Deduction from Wages

5.1. The claimant complains in relation to a deduction made from her wages to recover a number of days’ pay that she had received during a period of self-isolation. There is no dispute that the deduction was made. The claimant claims it was unauthorised.

5.2. All employees are protected against deductions being made from their pay by s13 ERA, the relevant parts of which state:

“13 Right not to suffer unauthorised deductions.

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) 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

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.”

5.3. The respondent seeks to rely on the provisions of s14 ERA, the relevant parts of which state:

“14 Excepted deductions.

(1) Section 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—

(a) an overpayment of wages,

(3) Section 13 does not apply to a deduction from a worker’s wages made by his employer in pursuance of a requirement imposed on the employer by a statutory provision to deduct and pay over to a public authority amounts determined by that authority as being due to it from the worker if the deduction is made in accordance with the relevant determination of that authority”

5.4. The respondent argues that the only deductions made were:

5.4.1. To recover an overpayment of wages paid to the claimant in error whilst self-isolating; and

5.4.2. For tax and national insurance as required by PAYE rules.

5.5. The respondent argued that the overpayment of wages was an error that arose due to genuine misunderstanding regarding the claimant’s rights. The claimant had initially been paid her salary because it was, in error, believed she was entitled to full pay when self-isolating. When the respondent formed the view that the claimant did not have that entitlement the respondent sought to recover the wages paid to the claimant relating to her self-isolation. There was no dispute that recovery was for that specific amount;

6. *Holiday Pay Claim*

6.1. The claimant made a claim that she was owed five hours’ holiday pay. This was agreed to be the shortfall in holiday pay given to the claimant for the relevant leave year.

6.2. The claimant’s claim was argued on two alternate bases:

- 6.2.1. that she had taken the holiday and then not then been paid; or
- 6.2.2. the respondent had refused to allow her to take paid leave.
- 6.3. The parties were agreed that the claimant had been absent from the workplace for the disputed 5 hours during the leave year. The respondent's position is that the claimant's absence was unauthorised, and thus not leave that she was entitled to be paid for.
- 6.4. The claimant claims that when she was told this she sought to take the leave in December, but this was refused. The respondent's position is that the leave was refused as leave is not permitted in December, which is a very busy time for the business.
- 6.5. There is no dispute that the claimant was entitled to a further 5 hours leave in the relevant year.

Conclusions

7. *Payslips*

- 7.1. There is no dispute that the claimant did not get, on a regular basis, payslips as required by s8 ERA during the COVID-19 pandemic. There are potentially extenuating circumstances that explain this lack of payslips. Those are not of significance when it comes to whether a declaration should or should not be made. The payslips were not provided as required, and a declaration is, accordingly, made to that effect.
- 7.2. The claimant sought compensation for the failure to provide payslips. Any such compensation is *limited* to the amount of any unnotified deductions. There is discretion as to whether any compensation should be awarded.
- 7.3. At the time of this hearing the claimant continues to be an employee of the respondent. This is relevant to the exercise of that discretion. Dealing with the deductions in turn:
 - 7.3.1. *Tax & National Insurance:*
 - 7.3.1.1. There was no suggestion that the deductions for tax and/or national insurance were unexpected or improper.
 - 7.3.1.2. On the facts they were minimal, around £2 per week in total.
 - 7.3.1.3. They are deductions required by HMRC when employees are paid via PAYE. There is no suggestion that the amounts deducted were not properly then paid by the respondent to HMRC.
 - 7.3.1.4. If the deductions had not been made the claimant would now owe these sums to HMRC. If the respondent was liable for any unpaid tax, they would be entitled to deduct the sums owed from the claimant via PAYE going forward. If the deductions have resulted in an overpayment of Tax of National Insurance, the claimant is entitled to seek a refund from HMRC.

7.3.1.5. Accordingly, it not award in relation to the deductions made for Tax and National Insurance is made.

7.3.2. *Overpayment of Wages:*

7.3.2.1. The claimant accepted that she had been notified of these deductions by the respondent. There were emails in the evidence before the Tribunal that made this clear. Those emails also make clear that the claimant objected to the deductions to recover the wages paid to the claimant whilst self-isolating.

7.3.2.2. The respondent's evidence that the payment of wages during self-isolation was in error is accepted. The claimant suggests that the respondent decided to exercise a discretion to pay her during that period. It is not accepted that a party can be found to have exercised a discretion when they are operating under a misunderstanding of the law such that they believe they have no choice. The respondent's evidence, which is supported by emails sent at the time, that they had when the payment was made thought they had no choice is persuasive is credible and persuasive. The claimant has no evidence to contradict this, other than her opinion.

7.3.2.3. There is no dispute that the respondent recovered the over-payment in a number of small deductions over six weeks. This scheme of recovery was notified to the claimant via email, albeit the claimant sought to object.

7.3.2.4. Given the overpayment was made in error, the respondent was entitled to recover the overpayment. Had the overpayment not yet been recovered, the respondent would still be entitled to recover it.

7.3.2.5. Noting the above factors, no award of compensation in relation to a failure to provide payslips is made.

8. *Unauthorised Deductions*

8.1. The deductions the claimant complains about in this claim are for tax & national insurance, and to recover the overpayment of wages.

8.2. The deductions for tax and national insurance fall within the scope of s14(3) ERA. Accordingly, the respondent was entitled to make those deductions.

8.3. The deductions to recover the overpayment of wages fall within the scope of s14(1). Accordingly, the respondent was entitled to make those deductions.

8.4. For the above reasons, the claimant's claim that there were unlawful deduction from her wages is dismissed.

9. *Holiday Pay Claim*

9.1. It was agreed that the claimant's leave year was the calendar year, and that in 2020, the relevant year to this claim, the claimant took and was paid for all

but 5 hours of her annual leave entitlement. (It is noted that the actual period of leave was 4.6 hours, but the parties have agreed it should be rounded to 5 hours).

9.2. This claim is argued on two alternative basis.

9.2.1. *The claimant took leave which was not paid:* If the claimant's absence in October was not unauthorised, but was annual leave, she was entitled to be paid for it.

9.2.2. *The claimant had 5 hours outstanding leave which the respondent refused to let her take in December 2020:*

9.2.2.1. If the respondent is correct that the leave in October was unauthorised, the claimant had 5 hours untaken leave as at December 2020.

9.2.2.2. It was not in dispute that the claimant had asked to take leave in December 2020. It was further not disputed that when the claimant initially broached the subject of leave, and before any specific dates were discussed, she was told by the respondent that leave was not permitted during December. The respondent's evidence was that this was because December was a busy period for the respondent where they do not allow annual leave to be taken.

9.2.2.3. This stance appears to have entirely disregard two further facts not in dispute:

- the respondent's business was closed because of the COVID pandemic meaning that the claimant was not working in any event; and
- Regardless of the COVID pandemic, the respondent had suffered an unfortunate flooding incident that meant that remedial building works were needed to the premises before the business could reopen.

9.2.2.4. No credible explanation was provided as to why, during the period the business was closed for both the pandemic and flood remedial works, when there could have been no work the claimant could possibly have done, the claimant was refused permission to take 5 hours' annual leave.

9.3. *Holiday Pay Summary:*

9.3.1. On either basis that this claim was argued, the claimant's claim succeeds. If the absence in October was not unauthorised but was leave, the claimant is entitled to be paid for that absence. If the absence was unauthorised, the claimant had untaken leave that the respondent has, without good cause, prevented the claimant from taking.

- 9.3.2. Accordingly, the claimant is awarded compensation of five hours' pay. The parties agreed that for the claimant five hours' pay amounts to £46.30.

Employment Judge Buzzard

27 August 2021

REASONS SENT TO THE PARTIES ON

1 September 2021

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