



EMPLOYMENT TRIBUNALS

Claimant
Ms K Felstead

Respondent
Chapel House Ltd

Heard at: By CVP
Before: Employment Judge Davies

On: 13 August 2021

Appearances
For the Claimant: In person
For the Respondent: Mr Hoyle (legal consultant)

RESERVED JUDGMENT

1. The complaint of unauthorised deduction from wages is well-founded and succeeds. The Respondent shall pay the Claimant **£4058.16**.
2. When the proceedings were begun the Respondent was in breach of its duty to give the Claimant a written statement of employment particulars. There are no exceptional circumstances that make it unjust or inequitable to award two weeks' pay. It is just and equitable to award four weeks' pay. The Respondent shall pay the Claimant **£877.44**.

REASONS

Technology

1. This hearing was conducted by CVP (V - video). The parties did not object. A face to face hearing was not held because it was not practicable and all the issues could be dealt with by CVP.

Introduction

2. This was a complaint of unauthorised deduction from wages brought by the Claimant, Ms Felstead, against her former employer, Chapel House Ltd. The Claimant represented herself and the Respondent was represented by Mr Hoyle, counsel.
3. Mr Hoyle was instructed by the Respondent's legal advisors very late in the day. He had produced a file of documents on the morning of the hearing and everybody had a copy of it. The Claimant had already disclosed a number of documents, but it became clear that she also had other relevant emails, and she read out relevant

parts during the course of the hearing. I heard evidence from the Claimant and from Ms O'Toole for the Respondent.

The Claims and Issues

4. The Claimant says that she was an employee of the Respondent, employed to work 24 hours per week. She was suspended on full pay and then subjected to a disciplinary process. She has not been notified of the outcome of that process and has not been dismissed. She has not been paid since 14 March 2021 and this amounts to an unauthorised deduction from wages. The Respondent says that the Claimant was not an employee but a worker on a zero hours contract. She was paid for all the hours she worked and she was told in an email in the first week of April that she would not be offered any more shifts. The following issues therefore arise:
 - 4.1 Was the Claimant an employee of the Respondent employed to work 24 hours per week?
 - 4.2 If so, has the Respondent on any occasion paid her less than the wages properly payable?
 - 4.3 How much is she owed?
 - 4.4 When these proceedings were begun, was the Respondent in breach of its duty to give the Claimant a written statement of employment particulars?
 - 4.5 If the claim succeeds, are there exceptional circumstances that would make it unjust or inequitable to make the minimum award of two weeks' pay under section 38 of the Employment Act 2002? If not, the Tribunal must award two weeks' pay and may award four weeks' pay.
 - 4.6 Would it be just and equitable to award four weeks' pay?

The Facts

5. I start with some observations about the evidence. In general, I preferred the Claimant's evidence. It was clear and consistent. It was supported by the documentary evidence, and when cross-examined the Claimant was able to identify and refer to the relevant documents. As regards the agreement made between the Claimant and the Respondent, the Respondent did not call as a witness the person who interviewed and appointed the Claimant, Ms Greenall. Ms O'Toole frankly accepted that she had no involvement in the Claimant's recruitment or appointment. She was not even in the country. She was not in a position to give evidence about what was agreed between the Claimant and Ms Greenall. On the matters about which she could give evidence, I found Ms O'Toole's evidence lacking in credibility. Her answers were vague, inconsistent and contradictory. By way of example, the Respondent's ET3 response said that the Claimant had been told in an email in the first week of April that she would not be offered any more shifts. That email was not included in the file of documents. It was plainly a relevant and significant document. Ms O'Toole could not explain why it had not been produced. When asked about it she said that: she had sent it; it should be in the file; she had had a lot of trouble finding documents; she did not know where it was; she did not have a record of it; it was in the file; she had an email where the Claimant disputed that she was bank staff and was told she was; she would have to see if she could find the email; and, finally, she did not have it. The Claimant said that she had not received any such email and I had no

hesitation in finding that it was not sent. This is one example of why I found Ms O'Toole's evidence lacking in credibility.

6. Against that background, I make the following findings of fact. The Claimant started working for the Respondent as a Support Worker on 28 January 2021. She found out about the role through a friend who was already working there. The friend gave her number to Ms Greenall, the manager, who contacted her. They had an informal discussion. Ms Greenall asked if the Claimant wanted part-time or full-time work and the Claimant said that it would have to be part-time because she went to college two days per week. Ms Greenall agreed that was fine and told her that for part-time work it would be a contract for 24 hours per week. The Claimant said that was fine. She told Ms Greenall that she went to college on Mondays and Fridays, but any other day would be fine to work. They agreed verbally that the Claimant would start work and come to see around the house. She would be paid £9.15 per hour.
7. Ms Greenall emailed her a form to fill in. It was headed Form AP1 Application for Employment. The Claimant could not print it out, so she contacted Ms Greenall who told her not to worry and they would talk about it when she came into the house.
8. The Claimant started work on 28 January 2021. She was not given any written contract or confirmation of her terms and conditions. She asked for one when she started and was told by Ms Greenall that it would be sorted out in time. It never was.
9. Nothing was said to the Claimant about being a bank worker or a zero hours worker. She just understood that she would work her 24 hours and be paid for them. She did indeed work 24 hours every week. Initially while she was learning the role she did three 8-hour shifts. Everybody else on a part-time contract did two 12-hour shifts. Not long after starting, the Claimant agreed with Ms Greenall that she would go onto two 12-hour shifts and she did so. Soon afterwards she discovered that she was pregnant. She asked to go back onto shorter shifts. Ms Greenall told her that would be quite difficult and they continued with the Claimant doing two 12-hour shifts. The rota was written in a workbook by Ms Greenall. The Claimant would check in advance what shifts she was required to do. The Claimant had told Ms Greenall at the outset the two days she could not work because of college. In fact, Ms Greenall started putting the Claimant down to work on Mondays. If she could do it, the Claimant worked the shift anyway. Because of COVID restrictions, she was often not going to college on a Monday. However, if she did have to go to college she would tell Ms Greenall and she did not have to work on the Monday. Apart from that she could not pick and choose her shifts. That was Ms Greenall's decision. It was only because she had told her at the outset that she could not work Mondays and Fridays because of college that she could refuse to do a shift on one of those days.
10. The Claimant was paid weekly.
11. There was an incident at work on 13 March 2021, which involved something of an altercation between the Claimant and another member of staff. I do not need to go into what happened. The Claimant left work an hour early because of it. She

was due to work the next day, with the same colleague. She did not feel safe to do so because of her pregnancy. She sent a text to Ms Greenall saying that she would not work with the staff member. Ms Greenall did not reply.

12. On 15 March 2021 the Claimant emailed a grievance to Ms Greenall. She made clear that she had received no reply to her messages from Ms Greenall. She said that she had made clear she was willing to work, but not with that staff member, and she complained that Ms Greenall had removed her from the work group chat. Ms Greenall replied to say that the Claimant's grievance would be looked at in accordance with company policy. The Claimant sent two further emails that evening. She asked where she stood with her employment and said that she was meant to be picking up a colleague the next morning. Ms Greenall rang her and told her she had covered her shifts for the rest of the week. The Claimant sent a further email asking whether that meant she was suspended with pay. If not, she asked to be put on the rota for her contracted hours.
13. On 16 March 2021 the Respondent wrote what was clearly a standard template letter suspending the Claimant pending an investigation into her conduct. It said that the Claimant would remain on full pay while suspended. The letter was emailed to the Claimant by Ms Greenall, along with an invitation to attend an investigatory meeting.
14. The investigatory meeting took place by Teams on 18 March 2021. After the investigatory meeting, the Claimant was required to attend a disciplinary hearing. That took place on 10 April 2021, and was conducted by an external HR consultant by Zoom.
15. As noted above, Ms O'Toole's evidence was that she had emailed the Claimant in the first week of April telling her she was a bank worker and that she would not be given any more shifts. Ms O'Toole was unable to explain why, if that was right, the Claimant had been asked to attend a disciplinary hearing on 10 April 2021, and the Respondent had gone to the expense of instructing an external consultant. This too indicates that the only plausible explanation is that no such email was sent.
16. There was email correspondence between the Claimant and Ms O'Toole in the week before the disciplinary hearing. In one email Ms O'Toole said that there was a misunderstanding about the Claimant's status and that Ms O'Toole was seeking legal advice. She asserted that the Claimant had no written contract and that as such she was not able to pay the Claimant as an employee as it was her understanding that the Claimant had done some shifts for the Respondent as a bank worker. The Claimant responded stating that she was not bank staff but was contracted to work 24 hours per week, and reminded Ms O'Toole that she had been told in writing that she was suspended with full pay. Ms O'Toole said that there had been "communication issues" and that she was awaiting legal advice. It seemed to me that Ms O'Toole was not concerned with what the Claimant's actual position was. She was trying to take advantage of the fact that the Claimant did not have a written contract to say that she was a bank worker, regardless of whether that was correct.

17. The Claimant did not hear back from Ms O'Toole and the disciplinary hearing went ahead. The consultant who carried out the disciplinary hearing told the Claimant that she would be in touch. The Claimant never received an outcome to the disciplinary process. She called and emailed the consultant, Ms Greenall and Ms O'Toole to try to find out what was happening. In one email Ms O'Toole said that she was confused about why the Claimant was repeatedly asking the same questions. She stated that the Claimant was aware that she had no contract with the Respondent and was bank staff. The Claimant again replied expressing her disagreement. She said that she was not hired as bank staff, she was hired on a 24 hour per week part-time contract. She added that bank staff was her choosing her shifts, whereas she was told when she was working. She agreed that she did choose the days she had off due to college but said that Ms Greenall chose the days she worked in between.
18. The Claimant was never sent an outcome to the disciplinary process. She was never told that her suspension had come to an end. She was not given any further shifts. She was never told that her employment had been terminated. In the end, she gave up chasing. The Respondent produced a P45 for the Claimant. It was dated 15 July 2021. The Claimant received it from the Respondent's legal advisors in the course of these proceedings on 15 July 2021. Ms O'Toole accepted in cross-examination that she had no basis for disputing the Claimant's evidence that this was when she received the P45.
19. The Claimant was paid for 9 hours of work on 13 March 2021. She was not paid for any further hours.

Legal principles

20. The right not to suffer unauthorised deductions from wages is contained in s 13 Employment Rights Act 1996. Both workers and employees have the right. However, a zero hours worker does not have the right to be paid for any hours other than the hours they have worked. An employee with a contract to work a fixed number of hours and to be paid a fixed rate for them has the right to be paid their agreed weekly salary.
21. What is meant by an employee is defined in section 230 of the Employment Rights Act 1996. There is no single test for determining whether an individual is an employee within the meaning of s 230(1). Each case depends on its own facts. There is, however, said to be an "irreducible minimum", without which there can be no contract of employment. That minimum comprises:
 - 21.1 *Mutuality of obligation* - an obligation on the employer to provide work and on the employee to accept and perform the work offered;
 - 21.2 *Control* – put simply, that ultimate authority over the person in the performance of their work must rest with the employer; and
 - 21.3 *Personal service* - the employee must be obliged to perform the work personally, subject to a limited power of delegation.

See: *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 1 All ER 433 QBD; *Nethermere (St Neots) Ltd v Gardiner* [1984] ICR 612 CA; *Carmichael v National Power plc* [2000] IRLR 43.

22. The Tribunal must find as a matter of fact whether there was a contract between the parties and, if so, what its terms were.
23. Section 38 of the Employment Act 2002 applies if the employer was in breach of its duty to give a written statement of employment particulars to the employee under s 1 of the Employment Rights Act 1996 when relevant proceedings were begun. In such cases, the Tribunal must make an award of two weeks' pay to the employee unless there are exceptional circumstances that would make it unjust or inequitable to do so. The Tribunal may make an award of four weeks' pay if it considers it just and equitable to do so. Relevant proceedings include a claim of unauthorised deduction from wages.

Application of the Law to the Facts

24. Applying those principles to the findings of fact above, my conclusions on the issues were as follows.
25. I have no hesitation whatsoever in finding that the Claimant was an employee of the Respondent. That turns on what terms were agreed between the Claimant and the Respondent at the outset. I have accepted her evidence about the agreement between her and Ms Greenall. It was an agreement that she would work 24 hours per week for an agreed rate of pay. She told Ms Greenall her two college days, and Ms Greenall agreed that she would not need to work on those days. What happened in practice reflected that agreement. The Claimant was required to and did work 24 hours per week and was paid weekly at the agreed rate. Ms Greenall knew that she needed to fix the rota around the Claimant's college days. If Ms Greenall asked her to work on a college day, the Claimant could refuse to do so, otherwise she had to work when she was told to work. That was plainly not the Claimant choosing when to work, or what shifts to accept. The suggestion that because the Claimant said in her email on 19 April 2021 that bank staff was "me choosing my shifts" and because she accepted that she had chosen which days she had off due to college, she was admitting that she was a bank worker was nonsense. It was clear throughout her correspondence that she did not agree she was a bank worker and it was equally clear that she was not one. She was required to work 24 hours per week, working the shifts allocated to her by Ms Greenall on any of her five available working days. She could not refuse any of those shifts. She might be asked to work on one of her two unavailable (college) days, and if so she could refuse to do so. The Respondent was obliged to offer the Claimant 24 hours' work per week and she was obliged to accept and perform it.
26. The Claimant attended for work and was subject to the direction and control of her managers. They told her what to do and how to do it. Other elements pointed to the Claimant being an employee too: in particular, the initial application form emailed to her was for employment; and she was later suspended on full pay and subjected to a disciplinary process. The Claimant was clearly subject to the direction and control of the Respondent, and there was no suggestion that she could send someone else to do her work. The irreducible minimum for a contract of employment was present, and all of the evidence pointed to this being a contract of employment. Indeed, none of the evidence was consistent with the suggestion that the Claimant was a bank worker on a zero hours contract. The suggestion

that she was appeared to me to be little more than wishful thinking on Ms O'Toole's part, despite the fact that she knew nothing about what had actually been agreed between the Claimant and Ms Greenall. Ms O'Toole's correspondence repeatedly asserting that the Claimant was a bank member of staff could not make that the case.

27. The Claimant was suspended on full pay from 14 March 2021. It follows that unless and until that suspension was brought to an end, by termination of her employment or otherwise, the Claimant was entitled to be paid.
28. As explained in the findings of fact above, the Claimant was never notified of the outcome of the disciplinary process and was never told that she was dismissed. She did not receive a P45 until 15 July 2021, during the course of these proceedings. I find that she was not dismissed prior to that date and her suspension on full pay was never lifted prior to that date. However, being provided with a P45 by the Respondent's solicitor did amount to termination of her contract. She knew at that stage that the Respondent regarded her employment as being at an end. She was entitled to one week's notice, so I find that the effective date of termination of her employment was 22 July 2021.
29. The Respondent therefore failed to pay the Claimant from 14 March 2021 to 22 July 2021, a period of 18.5 weeks. The amount owed to her is $18.5 \text{ weeks} \times \text{£}9.14 \times 24 = \text{£}4058.16$.
30. Further, when these proceedings were begun, the Respondent was in breach of its obligation to provide the Claimant with a written statement of employment particulars. No satisfactory explanation for that failure has been provided and no exceptional circumstances have been identified that would mean two weeks' pay should not be awarded. Further, it seems to me that Ms O'Toole was attempting to take advantage opportunistically of the fact that the Claimant had not been provided with a written contract of employment, in her repeated baseless assertions that the Claimant was a bank worker. Her email on 6 April 2021 expressly (and incorrectly) asserts that because the Claimant did not have a written contract she could not be paid as an employee. Ms O'Toole evidently made no attempt actually to find out what terms had been agreed with the Claimant. The lack of a written contract was the cause of serious disadvantage to the Claimant. In those circumstances, I find that it is just and equitable to make the higher award of four weeks' pay.

**Employment Judge Davies
9 September 2021**