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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4110056/2021

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Final Hearing held remotely on 31 August 2021

Employment Judge: R Sorrell

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Mrs G McGregor

**Claimant
In Person**

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TRJ Contract Builder Ltd

**Respondent
Mr T Roy
Managing Director**

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FINAL HEARING

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Judgment of the Tribunal is that:-

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- (i) The claim for holiday pay is well founded and upheld and the respondent is ordered to pay to the claimant the sum of £323.24 (Three Hundred and Twenty Three Pounds and Twenty Four Pence).
- (ii) The claim for unauthorised deductions from wages is well founded and upheld and the respondent is ordered to pay to the claimant the sum of £397.00 (Three Hundred and Ninety Seven Pounds).

E.T. Z4 (WR)

(iii) The claim for notice pay is not well founded and is dismissed.

REASONS

Introduction

- 1 The claimant lodged a claim for holiday pay, notice pay and arrears of pay.
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- 2 The burden of proof is on the claimant and the standard of proof is on the balance of probabilities.
- 3 This hearing was scheduled to determine the claim. It took place remotely given the implications of the COVID-19 pandemic. It was a virtual hearing held
10 by way of the Cloud Video Platform.
- 4 As both parties were party litigants, I explained the purpose and procedure for the hearing and that I was required to adhere to the Overriding Objective of dealing with cases justly and fairly and to ensure that parties were on an equal footing.
- 15 5 Prior to the hearing, the claimant had lodged documents that she intended to rely on which she had provided to the respondent. During the course of the hearing, Mr Roy, for the respondent lodged a further document. The importance of referring to the relevant documents when giving their evidence was explained to parties.
- 20 6 The claimant gave evidence. The respondent called one witness, Mrs Carol Ann Roy, who is the manager of the respondent business.

Findings in Fact

The following facts are found to be proven or admitted;

- 7 The claimant's date of birth is 22 February 1976.
- 25 8 The respondent is the parent company of the café, "Rolls at Roys" which commenced trading on 17 March 2021.

9 On 12 February 2021, Mr Roy emailed the claimant as follows:-

“Good afternoon Geri.

Thanks for coming over this morning to meet Teresa and myself.

5 *Going forward and on the hope of having the place open for the end of the month we would be looking for you to come on board as from Monday the 15th February.*

Our anticipated trading hours would be from 7.30-2.30 over the 7 days.

Staff tba on how many and what days required, I would emphasis that the 7 days needs to be met.

10 *Our package for this position is a salary of £25,000 with a 30-day holiday package.*

We can pay you weekly as we have a payment run every Friday. A week lie time is what we work on so your first pay date would be the 26.02.21.

15 *If all this is to your requirements if you can reply to this email we will print and save to file.*

Also, if you have any questions add them to this email.

Regards,

Tom Roy.” (C1)

10 The claimant commenced employment with the respondent as the Chef
20 Manager for “Rolls at Roys” on 15 February 2021.

11 The claimant’s hours of employment were 40 hours per week. Her hours were worked over a 7 day week.

12 The claimant was paid a gross salary of £25,000 per annum. Her net pay was £397 per week. She was not entitled to overtime.

13 Prior to the café opening, the claimant worked at home. Her role included organising catering equipment, recruiting staff, costing and dealing with suppliers and health and safety matters.

14 On 26 April 2021 the claimant tendered her resignation by email to the
5 respondent as follows:

“Hi,

Due to unforeseen circumstances, events over the weekend and the past couple of weeks, I have taken the decision not to return to the café.

*The working relationship has broken down and I feel that there is
10 irreconcilable differences.*

I have left the laptop, café keys, Anna card and office fob in the laptop bag in the staff cupboard in the café.

All supplier info is in the café also.

Gerii” (R1)

15 15 The claimant did not work any notice period.

16 Following her resignation, the claimant did not receive payment from the respondent for the one week’s lie in time she worked at the commencement of her employment.

17 The claimant did not take any annual leave during her employment with the
20 respondent. Upon termination of her employment, she did not receive payment from the respondent for the annual leave she had accrued.

Respondent’s Submissions

18 The respondent submitted that there were many issues after the claimant left. It is a new business venture and they have never been in catering before. The claimant left them in the lurch and they incurred additional expenses as a result. When the claimant walked out on them, they didn't deserve any of this.

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Claimant's Submissions

19 The claimant submitted that she took this job and worked very hard for 3 months. She was not told she had been employed on a trial basis. She deserves her holiday pay and lie in time. She worked hard when she was
10 there, but had no option to leave due to the toxic environment created.

Relevant Law

Breach of Contract

20 If an employee is dismissed with no notice or inadequate notice in
15 circumstances which do not entitle the employer to dismiss summarily or it is determined that an employee is constructively dismissed with no notice, this will amount to a wrongful dismissal and the employee is able to bring a breach of contract claim to recover damages in respect of the contractual notice period. Damages in a wrongful dismissal claim will be limited to the
20 employee's losses occurring during the period between the date of dismissal and the date at which the contract could lawfully have been brought to an end by the employer in accordance with the contractual notice period or an implied reasonable notice period.

Holiday Pay

25 21 Section 27(1) of the **Employment Rights Act 1996** defines "wages" as "*any sums payable to the worker in connection with his employment.*" Under this section, holiday pay is listed as a specific payment that is to be counted as wages.

22 **The Working Time Regulations 1998 SI 1998/1833** provide workers with a
guaranteed statutory right to paid holiday. Under Regulations 13 and 13A,
workers are entitled to a minimum of 5.6 weeks paid holiday in each leave
year beginning on or after 1 April 2009. Regulation 16(1) provides that a
5 worker is entitled to be paid at the rate of a week's pay in respect of each
week of annual leave to which a worker is entitled.

23 Regulation 14 provides that where a worker's employment is terminated
during the course of their leave year and at the date of termination, the
proportion of leave the worker has taken to which the worker is entitled under
10 Regulation 13(1) is less than the proportion of the leave year which has
expired, the employer shall make a payment in lieu of leave for a sum equal
to the amount that would be due to the worker under Regulation 16.

24 The House of Lords decision in **Revenue and Customs Commissioners v
Stringer 2009 ICR 985, HL** establishes that unpaid holiday pay due under
15 Regulations 16 (1) or 14 (2) of the Working Time Regulations can be
recovered by means of a claim for unlawful deductions from wages under
section 23 of the **Employment Rights Act 1996** in accordance with its time
limit provisions.

Unauthorised Deductions from Wages

20 25 The law relating to unauthorised deductions from wages is contained in section
13 of the **Employment Rights Act 1996**.

26 This provides that: *"An employer shall not make a deduction from wages of a
worker employed by him unless:-*

(i) *The deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker’s contract [Section 13(1)(a)]; or*

(ii) *The worker has previously signified in writing his agreement or consent to the making of the deduction [Section 13(1)(b)].”*

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27 Section 13 (2) states: *“In this section “relevant provision,” in relation to a worker’s contract, means a provision of the contract comprised –*

(i) *In one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question or, [Section 13(2)(a)]*

(ii) *In one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion [Section 13(2)(b)].”*

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28 Section 13 (3) provides that: *“Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker’s wages on that occasion.”*

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29 In accordance with the **Employment Rights Regulations 2018 SI 2018/1378**, holiday pay is calculated by reference to the 52 weeks of pay prior to the calculation date (the first date of leave taken). Where there are no such weeks to take into account, it is the amount that fairly represents a week’s pay having

regard to the factors specified in section 228 (3) of the **Employment Rights Act 1996** which include any remuneration received by the worker in respect of the employment.

5 **Issues to be Determined by the Tribunal**

30 The Tribunal identified the following issues required to be determined:-

- (i) Is the claimant entitled to any holiday pay?
- (ii) If so, has the respondent made unauthorised deductions from the claimant's wages?
- 10 (iii) If so, how much is the claimant to be awarded?
- (iv) Is the claimant entitled to a week's lie in pay?
- (v) If so, has the respondent made unauthorised deductions from the claimant's wages?
- (vi) If so, how much is the claimant to be awarded?
- 15 (vii) Has there been a breach of contract in that the respondent has not paid the claimant notice pay to which she is entitled?
- (viii) If so, how much is the claimant to be awarded in damages?

20 **Conclusions**

Holiday Pay

31 I found that the claimant is entitled to holiday pay she accrued during her employment with the respondent. This is because it was not in dispute that
25 she did not receive any holiday pay and in accordance with **The Working Time Regulations 1998 SI 1998/1833**, workers are provided with a guaranteed statutory right to paid holiday. I am further satisfied that in terms

of the respondent's email to the claimant dated 12 February 2021, which outlined details of her employment, it was clear the claimant would receive 30 days holiday per year. (C1)

5 32 In reaching this view, I considered the leave year began from the date the claimant's employment commenced and not after the expiry of a 3 month trial period, as asserted in evidence by Mrs Roy. This is because I was not persuaded this had been discussed with the claimant as it was not indicated in the respondent's email to the claimant of 12 February 2021. In any event, **The Working Time Regulations 1998 SI 1998/1833** provide that a worker is
10 entitled to holiday pay according to the duration of their employment. I therefore did also not attach any weight to Mrs Roy's evidence that the claimant was not entitled to holiday pay anyway due to the volume of work that had to be put in after she resigned on 26 April 2021.

Compensation

15 33 The Claimant's holiday pay entitlement has been calculated at the rate of a week's net pay of £397.00 in respect of each week of annual leave she is entitled to.

20 34 The claimant worked for the respondent from 15 February 2021 until 26 April 2021 which is 10 weeks. As the claimant was entitled to 30 days holiday per annum, this equates to 0.57 holiday entitlement per week (30 days divided by 52 weeks). The claimant is therefore due 5.7 days of holiday entitlement. (0.57 x 10 weeks)

25 35 The claimant's weekly hours were worked over a 7 day week. The claimant's net pay per day was £56.71. (£397 divided by 7) On the basis that the claimant is due 5.7 days holiday, she is accordingly entitled to a net total of £323.24 holiday pay. (56.71 x 5.7)

Unauthorised Deductions from Wages

36 It was equally not in dispute that the claimant had not been paid the one
week's lie in pay which she worked at the commencement of her employment.
5 In view of Mrs Roy's evidence that this was for much the same reason the
respondent considered she was not entitled to any holiday pay and that I am
satisfied this deduction was not authorised by statute, contract or the
claimant's consent, I found that the respondent has made an unlawful
deduction of one week's wages from the claimant's salary.

10 37 I did not find that the claimant was entitled to overtime pay. This is because
there was no evidence to indicate this had been previously agreed and in fact
it was the claimant's own evidence that this was not discussed with Mr Roy
until after the second weekend in March when she had worked in excess of
her 40 hour week and he advised she would not receive it.

15 Compensation

38 In respect of the one week's lie in pay, the claimant is accordingly due one
week's net pay of £397.00.

Breach of Contract

39 I found there was no breach of contract by the respondent in that the claimant
had not been paid any notice pay. This is because I did not accept the
20 claimant was entitled to notice pay on these facts. Although the claimant gave
evidence that she resigned from her employment without notice because the
working relationship had broken down due to irreconcilable differences, I did
not have the jurisdiction to consider what amounts to a constructive dismissal
25 claim as this is not a claim that has been made and the claimant did not have
the two year statutory qualifying service with the respondent to raise such a
claim.

40 For these reasons the claims for holiday pay and unauthorised deduction from wages are well founded and upheld and the claim for breach of contract is not well founded and dismissed.

5 Employment Judge: Rosie Sorrell
Date of Judgment: 04 October 2021
Entered in register: 08 October 2021
and copied to parties

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