EMPLOYMENT TRIBUNALS

Claimant: Miss C McGuinness

Respondent: Roman Caring Services Limited

Heard at: Manchester **On:** 12 May 2021
2 June 2021
(in Chambers)

Before: Employment Judge Rice-Birchall

REPRESENTATION:

Claimant: In person
Respondent: Ms Asch-D'Souza, Paralegal

JUDGMENT

The judgment of the Tribunal is that the respondent has made an unlawful deduction from the claimant's wages in the sum of £529.38 (gross). The claimant's claim that the respondent has made an unlawful deduction from wages succeeds. The respondent failed to provide the claimant with a payslip but no award is made in this regard.

The respondent must pay the claimant the sum of £529.38 (gross) subject to deductions.

REASONS

Background

1. By a claim form dated 20 January 2021, the claimant complained of an unlawful deduction from her wages which arose from the termination of her employment on 27 December 2020. Early conciliation took place between 18 and 19 January 2021. The claimant also states in her claim form that the respondent refused to give her payslips.

2. The Tribunal heard from the claimant and from Ms Percival, Director for the respondent.

Issues

Unauthorised deductions

a. Were the wages paid to the claimant on termination of employment less than the wages s/he should have been paid? The parties agreed that the sum in question was £529.38 (gross) which related to the shifts the claimant had worked in December 2020.

b. Was any deduction required or authorised by a written term of the contract?

c. Did the claimant have a copy of the contract or written notice of the contract term before the deduction was made?

d. How much is the claimant owed?

Payslips

e. Was the claimant given a written itemised pay statement at or before the time at which payment was made?

f. Did that pay statement include the particulars set out in section 8(2) of the Employment Rights Act 1996?

g. Has any unnotified deduction been made?

h. Should the Tribunal the respondent to pay the claimant any sum up to the amount of the unnotified deduction?

Facts

3. The claimant commenced employment on 1 September 2020.

4. The claimant signed a statement of particulars on 5 August 2020 and returned it to the respondent on 8 August 2020. She was not given a copy of that statement, nor did she see a copy of the handbook which was referred to in the contract as set out below.

5. The contract stated: “You have no set hours per week, start/finish times and days of work are variable…as advised by your Manager between Monday to Sunday.” However, the claimant’s usual shifts were Friday and Sunday one week and then Tuesday and Thursday the following week.

6. The contract provided that any additional hours worked would be paid at the normal hourly rate. There was no reference in the contract to any emergency rates or mileage being paid, or indeed, any overtime rates.

7. The contract required the claimant to provide one month's notice of termination of employment.

8. The contract also included the following paragraph: "I confirm that I have read and understand the final section of the Employee handbook entitled "Summary of our right to deduct" and agree that this section, along with all other sections of the Employee Handbook (except where expressly stated) form part of my contract of employment."

9. The handbook contains a page entitled "Summary of our rights to deduct". Beneath the heading there is a paragraph which states: "We reserve the right to recoup any losses the company incurs in the circumstances listed below from your wages or any other monies owing to you (eg commission, bonuses, accrued holiday pay at termination of employment).

10. One of the circumstances listed is "Your required notice period will be detailed in your individual Statement of particulars. If you fail to work your notice and we incur a cost in covering your duties, we reserve the right to recover this cost from any monies owing to you."

11. Finally, the handbook states: "The above clauses are express terms of your contract of employment."

12. The claimant had not seen the handbook, but had signed the contract with the above clauses contained in it. She was aware of its existence and had been told that she could make an appointment to see it in the office, but as the claimant did not drive, she did not do so and could not do so without inconvenience.

13. Payslips, which set out the claimant's pay, and in the case of the final payslip, any deductions, were included in the Bundle and were, according to the respondent, available in the office. However, the claimant rarely, if ever, went to the office as she was a non-driver. The payslips could also be requested from team leaders who would provide a screenshot.

14. The claimant handed in her notice on 16 December 2020.

15. It was agreed that her employment would terminate on 7 January 2021.

16. However, the claimant's last day of work was 27 December 2020. On 28 December 2020, the claimant informed the respondent, by email, that she would not complete her notice period. She had been assigned shifts on 2, 3, 5 and 7 January 2021, with rotas being prepared two weeks in advance.

17. The claimant said she was leaving early: "due to being told my personal circumstances were being discussed and you were trying to find legal loop holes to make me leave without been paid with immediate effect. I do not feel comfortable working for your company any longer. I expect to be paid for what I've worked and will take this further if I don't get paid the wages I've worked for."

18. On 29 December 2020, the respondent wrote to the claimant to remind her of the terms of her contract and to state: "As for your comment regarding gossip

and trouble making is not justifiable reason for not working notice as is hearsay."

19. The respondent uses existing staff where possible for additional hours that become available. Ms Percival explained that the respondent prefers to use existing staff, rather than agency staff because they know the service users.

20. Generally speaking, the respondent requests staff to work additional hours, for example, by text. There is no additional pay as per the contract. The claimant provided some examples of such requests for additional hours to be worked. There was no evidence, despite these being short notice requests, of emergency cover rates being available in those examples. The claimant was never paid an emergency cover rate, or any additional pay, to cover an additional shift. If she covered a shift it would just be paid at the ordinary rate even if it was at short notice. If the claimant didn't work her shift ordinarily it would just be covered by someone else at standard rates.

21. There was also no evidence of staff being requested to work additional hours in respect of the claimant's unworked shifts at a normal rate, or indeed any evidence of the arrangement made for those staff to cover the claimant's shifts.

22. The respondent's evidence was that it does occasionally request emergency cover for which the respondent pays staff an additional £11 per hour for emergency cover above the rate of basic pay. There was no evidence of that other than the respondent's oral evidence and the payslips referred to below.

23. Although there was no evidence that staff had been asked to cover the claimant's shifts at the normal rate of pay, the two staff members who covered the claimant's shifts were paid mileage and the emergency rate. The two staff covered two shifts each and were paid £219.21 and £329.45 respectively. The payslips were in the Bundle.

24. During December the claimant worked fifty eight hours. Her wage was £8.75 per hour. For December she was due £529.38 (gross). This sum was agreed between the parties at the outset of the hearing.

25. The respondent did not pay the claimant her wages for the hours worked in December. The respondent says that that money was, in accordance with her contract, paid out to the employees who covered her shifts which amounted to more than the wages she was due.

26. The claimant's payslips were not sent to her or provided to her. The respondent says they were available in the office or upon request from her team leader.

The Law

27. Section 13 of the Employment Rights Act 1996 (the1996 Act) reads as follows:

    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 workers contract, or

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

2. In this section relevant provision, in relation to a worker's contract, means the provision of the contract comprised:

(a) 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

(b) 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;

3. 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 the 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".

28. **Kerr v The Sweater Shop (Scotland) Ltd** [1996] IRLR 424 confirmed that a lawful deduction could be achieved by means of a relevant provision in a worker's contract. It is not necessary for a worker to acknowledge in writing that a relevant term has been incorporated but its existence and effect must have been notified in writing by the employer. References to other documents for terms and conditions must be references in writing so the worker knows where to look.

29. Section 13(2)(a) applies to written terms authorising deductions which have been entered into before the deduction has been made. The provision is satisfied if the employer gives a copy of the contract containing the relevant term to the worker. There would, however, appear to be no requirement under S.13(2)(a) that the worker's attention is drawn to the specific contractual provision(s) authorising the deduction.

30. This can be contrasted with S.13(2)(b), which provides that the employer must notify the worker about the existence and effect of the specific term(s). So, for example, where there is a written term authorising a deduction contained in a staff handbook, the employer must ensure that, prior to the deduction, the worker has either received a copy of the handbook (S.13(2)(a)) or been notified in writing about the existence and effect of the term (S.13(2)(b)).

31. As S.13(2)(a) makes clear, the worker must have been given a copy of the written contractual term prior to the deduction being made (or a copy of the contract containing the relevant term). If the employer fails to do this, the deduction will be

unlawful. In **Bird t/a Mayfair Nursing Home v Honey** EAT 14/93, for example, H was employed as a nurse. She left after just two days and the employer refused to pay her any wages, relying on a term in the contract of employment providing for forfeiture of pay in the event of an employee leaving without notice. The EAT held that, although H had been informed at the commencement of her employment of the terms and conditions of her employment, she had never been given a written copy of the contract or of the relevant term. Accordingly, H was entitled to be paid in full for her two days' work.

32. When analysing repayment clauses, employment tribunals should bear in mind the works of His Honour Judge Pugsley in **Yorkshire Maintenance Company Ltd v Farr** EAT 0084/09, who cautioned employers against acting as 'judge and jury' when requiring an employee to repay certain costs and expenses and considered that such terms should be 'subject to a considerable degree of scrutiny' because of the vast disparity in economic power between employer and employee. Any ambiguity should be construed according to the contra preferentum rule (ambiguity will be resolved against the party who seeks to rely on it in order to avoid obligations under the contract.

Compensation and Remedies

33. When the Tribunal finds the complaint to be well founded it must make a declaration to that effect. It must also order the employer to reimburse the worker for the amount of any unauthorised deduction made or payment received (Section 24 ERA) (save that account must be taken of any payments made to rectify the unlawful deduction).

34. Section 24(2) provides that a Tribunal may order the employer to compensate the worker for any financial loss sustained by her as a result of the unlawful deduction or payment. This includes bank charges or interest incurred, it does not however include non-financial loss such as injury to feelings and upset.

Payslips and unlawful deductions from wages

35. If any unrecorded deductions have been made during the thirteen weeks immediately before the employee's application to the Tribunal for a reference, it may order the employer to pay compensation of up to the aggregate amount of those unrecorded deductions. However, if the breach is a technical breach and there has been no real loss suffered, a Tribunal may made no award or only a token award.

Conclusions

36. The claimant had worked fifty eight hours in December and was due to be paid £529.38 in respect of that period. Accordingly, the wages paid to the claimant on termination of employment were less than the wages she should have been paid in respect of that period.

37. The claimant's contract of employment included, by reference to the handbook, a contractual right for the respondent to recover cost incurred as a result of the claimant failing to work her notice from any monies owing to her.

38. As stated above, section 13(2)(a) applies to written terms authorising deductions which have been entered into before the deduction has been made.

39. As S.13(2)(a) makes clear, the worker must have been given a copy of the written contractual term prior to the deduction being made (or a copy of the contract containing the relevant term). If the employer fails to do this, the deduction will be unlawful.

40. In this case, the written term authorising the deduction was contained in the contract and in the staff handbook. In such a case, the employer must ensure that, prior to the deduction, the worker has received a copy of the handbook and the contract.

41. As in **Bird**, although the claimant was informed at the commencement of her employment of the terms and conditions of her employment, which she signed, she had never been given a written copy of the contract or of the relevant term in the handbook, as copies were kept in the office.

42. In particular, the claimant had never seen the handbook, a copy of which was kept at the respondent's office. The claimant was told she would need to make an appointment to see the handbook. The claimant had never, therefore, seen the handbook.

43. Although the claimant signed the contract to state that she had read the contract, the respondent knew that she had not read it or been given a copy.

44. Bearing in mind the guidance given in **Farr** about the disparity in economic power, the Tribunal concludes that, despite the clause stating the claimant had read the handbook, she in fact hadn't.

45. Accordingly, the deduction is not made lawful by section 13(2)(a).

46. Section13(2)(b) does not apply, and is not relied upon by the respondent as it provides that the employer must notify the worker about the existence and effect of the specific term(s).

47. The deduction was therefore not required or authorised by a written term of the contract.

48. In any event, even if the Tribunal is wrong on that, the wording of the clause does not allow the deduction made. The wording of the clause must give the employer the right to make the particular deduction.

49. The wording relied upon is: "If you fail to work your notice and we incur a cost in covering your duties, we reserve the right to recover this cost from any monies owing to you."

50. In order to rely on this clause, the respondent must show that the cost of the emergency cover was a cost incurred as a result of the claimant failing to work the remainder of her notice period. They were not able to do so. Although we had oral evidence from the respondent, and a written statement, there was no evidence that

the respondent had tried to cover those shifts at a "normal" rate of pay before offering emergency cover rates. There was not even evidence of an emergency rate being used more widely and on other occasions.

51. Accordingly, the Tribunal concludes that the deduction made was not a lawful deduction.

Remedy

52. As there is no evidence that the cost of covering the claimant's duties was any more than the claimant's own rate of pay, no part of the deduction was a lawful deduction.

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Employment Judge Rice-Birchall

Date: 16 October 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON

27 October 2021

FOR THE TRIBUNAL OFFICE

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: **2401223/2021**

Name of case: **Miss C McGuinness** v **Roman Caring Services Limited**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant judgment day" is: 27 October 2021

"the calculation day" is: 28 October 2021

"the stipulated rate of interest" is: **8%**

For the Employment Tribunal Office