



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Ms E Hicks

v

South Northants Home Care Ltd

Heard at: Watford (by CVP)

On: 22 October 2021

Before: Employment Judge R Lewis (sitting alone)

Appearances

For the Claimant: In person

For the Respondent: Did not attend or participate

RESERVED JUDGMENT

1. The claim for unlawful deductions succeeds in part and the respondent is ordered to pay to the claimant the sum of £1,522.56 net.
2. The claim for holiday pay succeeds and the respondent is further ordered to pay to the claimant the sum of £594.00. This is a gross sum, which the respondent may discharge in part by paying tax and National Insurance to the appropriate authority and providing to the claimant proof of having done so; but in the absence of the respondent providing such proof, the sum is payable to the claimant in full.

REASONS

1. This was the hearing of a claim presented on 18 February 2021.
2. At the time of this hearing, the Tribunal file was not available to me. I was not aware of any case management direction which was given. (I now see that directions were sent by letter of 13 July). The only documents which I had were the ET1 and ET3. I asked the claimant during the hearing to email the Tribunal copies of her payslips. She sent payslips for the months September to November 2020; and two different payslips for December. December 2020. I asked for email correspondence, and the claimant sent eight emails to the Tribunal which had passed between her and the respondent in December 2020. I asked for the claimant's contract of employment, but she said that she did not have that. In answer to my question, she mentioned her bank statement, but a copy was not available.

3. The respondent did not join the hearing. At my request, a member of Tribunal staff telephoned the respondent at 10.15am. The staff member reported that Ms Williams of the respondent had stated that the respondent was short staffed, and she would not attend the hearing.
4. It quite often happens that a last minute emergency prevents a party from taking part in a hearing. When that happens, the party often emails the tribunal politely to explain their absence and apologise. Sometimes the absent party asks for a postponement. Sometimes it sends the tribunal copies of the papers which it had prepared for the hearing. The respondent did none of those. I therefore proceeded in the absence of the respondent, taking account of what it had written in the ET3.
5. I proceeded informally, on the basis of the documents and the claimant's oral account. I found the following facts.
 - 5.1 The claimant was born in 2002 and was 18 years old at the time of her employment.
 - 5.2 She joined the respondent in August 2020. The exact date is unclear.
 - 5.3 The claimant was unclear as to whether she had a written contract of employment. The respondent had written that one was on her personnel file. The two sides agreed that it provided for the claimant to give four weeks' notice. The respondent described the claimant's job as Community Carer.
 - 5.4 The claimant was a mobile carer, driving to clients' homes, and providing care to them there. She said that much of her work was distant from her home. The driving element of her job therefore was driving from her own home to the first client of her shift, and then from each client's home to the next client's home, until she drove home after the final call.
 - 5.5 Her first three payslips show monthly figures for travelling time (rounded up) of 30 hours, 42 and 49, and mileage payments in those three months totalling around £600.00. I infer that driving at work (ie from client to client) was an essential and integral part of the claimant's employment.
 - 5.6 The claimant explained that there were two other types of carer: carers who did not drive, and were dependent on being driven by a carer who did drive; and "walking" carers who only covered a small geographical area and could walk from location to location.
 - 5.7 On 14 December 2020 the claimant's driving licence was revoked. The claimant said that this was the result of a speeding infringement, and not her fault. Revocation took immediate effect (and remained

in effect on the day of this hearing). The claimant could not lawfully drive.

- 5.8 As the claimant agreed, the respondent had by that date set the rota for the period up to 3 January 2021. I count the period 14 December to 3 January as 20 days.
 - 5.9 That day (14 December) the claimant telephoned Ms Williams. The claimant told the tribunal that she said that she was not immediately available for driving based work but could do other work. Ms Williams has written that the claimant said that she would not be returning to work at any stage. There may have been a genuine misunderstanding.
 - 5.10 In my judgment the information which the claimant conveyed was that with immediate effect she was no longer able to carry out the duties of carer on a mobile basis. I accept that she may have said that she wished to work on a non-driving basis. I was shown an email which she sent to Ms Williams on 18 December in which she wrote about walking duties.
 - 5.11 At this hearing the claimant said that she offered the services of her mother as a driver for every shift throughout her notice period, ie from that day to 11 January. There was no mention of that in the emails at the time. While I can accept that the claimant's mother might have driven the claimant to work, I do not accept that her mother was available for the entire period of the notice period to drive the claimant from home to the first client of each shift, then from client to client, and then home at the end of the day.
 - 5.12 The respondent did not re arrange the shifts booked up to 3 January, and did not offer the claimant any work for the remaining days of her notice period.
 - 5.13 The claimant told the tribunal that she accepted the accuracy of her payslips for September to November, and that she had been paid the sums written there. She said that she had not been paid after that.
6. The questions for the tribunal were therefore:
 - 6.1 Had the claimant been paid for the days which she worked in December up to giving notice on 14 December 2020?
 - 6.2 Had the claimant been paid holiday pay earned up to 14 December?
 - 6.3 Was the claimant entitled to be paid for the notice period of 28 days from 14 December?
 7. For the reasons which now follow, I answer 'No' to all three questions.

8. The claimant said that she did not know why she had had two December payslips; she could not explain the discrepancy between them; and that her bank statements showed that she had not been paid in accordance with either payslip. She said that she had been paid nothing in December, and therefore not paid for shifts worked up to 14 December, or for the accrued holiday pay.
9. In correspondence on 24 December and to the Tribunal, the respondent wrote that with the benefit of legal advice, it understood that the claimant had forfeited her accrued holiday pay but that it would pay it anyway. The first half of that assertion was wrong: any right of an employer to forfeit untaken holiday was abolished when the Working Time Regulations 1998 came into force, over 20 years before these events.
10. The respondent wrote that the claimant's unexpected absence on and after 14 December had been covered by members of its management team. It wrote secondly that it was entitled to charge the claimant, and deduct from her pay, sums which represented an hourly charge of those salaried managers, already in the respondent's service, who were required to cover for her absence during her notice period. I do not agree. I do not accept that a notional paper charge of an existing fixed overhead counts as damages which the respondent could claim against the claimant.
11. The respondent did not suggest that the claimant's contract of employment authorised deduction of any notice pay, and I did not have the contract available to me.
12. One of the December payslips was for the net sum of £1256.05 and included £594.00 for 66 hours holiday pay. However, it clearly was not a complete payslip, because it referred to tax of £1.60. It included a stated deduction of "recovered costs" of £1404.67. The second was a payslip for a net sum of £1522.56 which did not include holiday pay. The absence of the respondent left this discrepancy unexplained.
13. In my judgment the claimant was entitled to be paid by the respondent for work done up to 14 December 2020. I accept the claimant's evidence that that pay is set out in the payslip for £1522.56 net. I accept the claimant's evidence that that sum is not shown in her bank statement. I find that it has not been paid and accordingly it is payable.
14. As to pay after 14 December 2020, I find that this is not payable for two reasons. I find that the claimant's employment included a contractual obligation to be available to drive to work. Loss of that facility ended the contract on 14 December 2020. The claimant was in breach of the implied (or possibly express) term that she was available to drive to work.
15. I find in the alternative that the claimant was only entitled to her notice pay if she were available and willing to work throughout the notice period in her contractual capacity. In the absence of her driving licence, she was not available for work.

16. If I am asked to decide whether the respondent was under an obligation to reorganise shifts so that the claimant could be found walking work, my judgment is that the respondent was under no such obligation, either at all, or that might arise in the context of the present claim. The claimant agreed in discussion that that was the case for the shifts which had already been set by 14 December, which ran to 3 January.
17. The claimant agreed the respondent's calculation of holiday pay at £594.00. I accept her evidence that that payment does not appear in her bank statement, and was not received. It is not included on the same payslip as the item of £1522.56. It is therefore payable to the claimant.
18. I have of my own initiative considered whether I must also make an award under s.38 Employment Act 2002. I am not convinced that the claimant did not have particulars of employment, as she must have known of her notice period (unusually long in her circumstances) at the time of termination of her employment. I therefore make no award.
19. I heard and decided this case on the basis of incomplete evidence from the claimant and no evidence from the respondent. I am well aware that either side's bank statements for December 2020 might contradict my findings. If that is the case, it is open to either side to ask the tribunal, under rule 70, to reconsider any part of this Judgment. If it does, it should do so within the time limit set by the rule, and by at the same time sending any new evidence to the tribunal which was not produced at this hearing. It should also explain why any new evidence was not available at the hearing. As the interests of justice include finality in litigation, the respondent might well, if applying, explain its failure to attend this hearing, or to contact the tribunal on the morning of the hearing.

Employment Judge R Lewis

Date: 3 November 2021

Sent to the parties on:

10 November 2021

For the Tribunal Office