



THE EMPLOYMENT TRIBUNALS

Claimant: Miss E Yousif

Respondent: BSH LTD

Heard at: Newcastle upon Tyne Hearing Centre

By Cloud Video Platform (CVP) **On:** Monday 11th October 2021

Before: Employment Judge Martin

Representation:

Claimant: In Person

Respondent: Mr R Malhotra (husband of owner of respondent)

This case was heard by Cloud Video Platform (CVP), due to the ongoing Coronavirus pandemic. The parties agreed to the case being heard by way of CVP.

RESERVED JUDGMENT

1. The claimant's complaint of unlawful deduction from wages is well-founded. The respondent is ordered to pay the claimant the sum of £900.00 (gross).
2. The claimant's complaint of breach of the working time regulations is also well-founded. The claimant is awarded the sum of £2,403.00

REASONS

1. The claimant gave evidence on her own behalf. Mr R Malhotra, the husband of the owner of the respondent business, gave evidence on behalf of the respondent. He largely appears to have managed the business on behalf of the respondent. The tribunal were provided with a bundle of documents from the claimant who then produced a further bundle of documents which is marked C1 and C2; as well as a bundle of documents from the respondent marked R1.
2. The law which the tribunal considered was as follows:

Section 13 (3) of the Employment Rights Act 1996 (ERA 1996) “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.”

Section 23 (2) ERA 1996 “an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with:-

- (a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made”

Section 23 (3) (a) ERA 1996 “Where a complaint is brought under this section in respect of:-

- (a) a series of deductions or payments

the reference to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.”

Section 23 (4) ERA 1996 “Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.”

Regulation 13 (1) of the Working Time Regulations 1998 (WTR 1998) “a worker is entitled to four weeks annual leave in each leave year.”

Regulation 13 (3) WTR 1998 “a worker’s leave year for the purposes of this regulation begins:-

- (a) on such date during the calendar year as may be provided for in a relevant agreement or
- (b) where there are no provisions....
- (ii) if the worker’s employment begins after 1st October 1998 on the date on which that employment begins and each subsequent anniversary of that date”

Regulation 13 A (1) WTR 1998 “a worker is entitled in each leave year to a period of additional leave as referred to below.”

Regulation 13 A (2) (e) “in any leave year beginning on or after 1st April 2009, 1.6 weeks.”

Regulation 13 A (3) WTR 1998 “the aggregate entitlement provided is subject to a maximum of 28 days.”

Regulation 14 (1) WTR 1998 “where a worker’s employment is terminated during the course of his leave year and on the date on which the termination takes effect (“the termination date”) the proportion he has taken of the leave to which he is entitled in the leave year under Regulation 13 and Regulation 13A differs from the proportion of the leave year which has expired.”

Regulation 14 (2) WTR 1998 provides “where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave.”

3. In the case of *Bear Scotland v Fulton Ltd* [2015] IRLR 40 the EAT sought to limit how far back a claim could be pursued for back dated holiday pay which was limited to two years as subsequently enshrined in Regulations in 2014.
4. Section 23 (4A) “An employment tribunal is not to consider so much of a complaint brought under this section as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint.”

Findings of fact

5. The respondent is a small beautician company owned by Mrs Uma Malhotra. The respondent suggested that the claimant had been employed by a different company owned by the respondent, but did not dispute that her employment transferred to that company. The claimant was employed by the respondent as a beauty therapist from August 2018. The respondent suggested that all employees were issued with a contract of employment. The document produced by them is a generic document without any details being provided other than the tribunal note employees were to be given 5.6 weeks holiday. The tribunal accepts the claimant’s evidence that she was not issued with or signed such a document. No specific contract of employment for the claimant was produced.
6. The claimant says that she was employed to work 40 hours a week at £9.00 an hour. In their evidence, the respondent suggested that the claimant was on a zero-hours contract and would sometimes not be available for work which was why she was not always offered work of 40 hours towards the end of her employment. The claimant says that she was always available to work the 40 hours. She relied on her pay slips in the bundle C1, which show she was working for the period of her employment for 40 hours excluding the period of the Coronavirus Pandemic. Accordingly the tribunal accepts the claimant’s evidence that she was employed to work a 40 hour week. Her oral evidence is supported by her pay slips.
7. The claimant said in evidence that she was given and took four weeks holiday each year until the last period of her employment. She said that she was not however paid for bank holidays. The respondent did not dispute that the claimant was not paid her bank holidays.

8. The claimant was put on furlough in April 2020, when the Coronavirus pandemic occurred. She had not taken all of her holidays and asked to carry forward those outstanding holidays. The respondent, Mrs Malhotra, agreed that the claimant could carry her holidays forward, as is confirmed in a text message at page 21 of bundle C1. The respondent concedes that the claimant is entitled to that week's holiday pay.
9. In her evidence, the claimant said that the respondent had not provided her with pay slips. However upon cross examination, it appears that the claimant was, as she acknowledged, provided with payslips by the respondent when she requested them. There are various text messages in both bundles C1 and R1 showing requesting for payslips by the claimant and no suggestion by her that they were not provided. It does not appear to be in dispute that she was largely provided with pay slips up to the time when the respondent moved on to the Sage account. At that point she was given a passcode to obtain her pay slips, but did not use that in time and then had difficulty obtaining her pay slips. The respondent says that, whenever the claimant requested pay slips, she was always provided with them and that they were always available to the claimant until they moved onto the Sage computer system. At that stage, they sent her a passcode to access those payslips, which the claimant did not access in time.
10. The claimant was effectively put on furlough from April 2020 through to April 2021, albeit that towards the end of her period of furlough, she started to work some hours for the respondent company.
11. The claimant claimed in her evidence that she was not paid some wages for October 2018, November 2018 and November 2019.
12. The claimant also said that she was not paid her correct wages whilst she was on furlough. This was from April 2020 she said through to April 2021. The respondent said all the furlough payments were calculated on the basis of their Sage system and that they did so in accordance with the government instructions under the furlough scheme. The respondent said it paid the claimant all the sums which it claimed in furlough and which were paid directly to her under that scheme.
13. The claimant came off furlough on 12th April 2021.
14. The claimant said that in May 2021 she was only given 30 hours rather than her usual 40 hours after she returned from furlough. The respondent seemed to suggest that the claimant was not available during that time period, but she indicated that, although she was doing a college course, she was available and had made herself available to work her 40 hours.
15. The claimant left the respondent in June 2021. She said that she took June off effectively as holiday being the approximately outstanding holiday which she was due. However, the claimant said that she was only paid 20 hours of holiday pay (page 26 of bundle C1).

16. Her final pay slip prior to holiday was 31st May 2021 (page 25 of bundle C1).
17. The claimant said that she undertook a calculation of what she believed she should have been paid for holiday pay from the government website. She calculated that she was due 205 hours, which would have included all the holidays which she was due for that year, including any bank holidays. That calculation is at page 4 – 5 of bundle C1.
18. The claimant raised a grievance with the respondent on 13th July regarding issues about her pay slips and the amount of holiday pay paid to her. She also referred to the decrease in her hours and raised some concerns about her wages albeit that she provided no details. The respondent responded to that grievance.
19. The claimant then contacted ACAS about these proceedings on 28th July and issued proceedings in this tribunal on 29th July 2021. In her ET1, she raised an issue about not receiving pay slips and referred to holiday pay, notice pay and other payments. She referred to the grievance letter which had been sent and the claims relating to furlough payments, wages and holiday pay, but no details were provided in the claim form about what exactly she was claiming or how she calculated any such claims.
19. In her evidence to the tribunal, the claimant said that she had not issued proceedings to the tribunal until she had received the pay slips from ACAS. However, the tribunal notes that, when she did issue these proceedings, she still did not provide details of what exactly she was claiming or how she calculated any claims, even following her contact with ACAS.

Conclusions

20. This tribunal considers that the claimant's claims for wages in October 2018, November 2018 and November 2019 are substantially outside the time three-month limit for bringing such complaints. The tribunal considers that it was reasonably practicable for the claimant to have brought her complaints in time. In that regard, the tribunal finds that the claimant was being issued with pay slips. On her own evidence, she accepts that when she asked for a pay slip, it was provided, as is noted in the various text messages. The tribunal does not accept her evidence that she did not have most of her payslips over the period of her employment, but in any event it is quite clear from her evidence and the documentary evidence that she could have asked for her payslips at the time and would have been provided with them. Accordingly the tribunal does not consider that the tribunal has jurisdiction to consider that element of her claim.
21. The tribunal finds that the claimant's claim for unlawful deduction from wages relating to her furlough payments is also not upheld. The tribunal prefers the respondent's evidence in that regard, namely that they claimed the monies through the government scheme under the Sage computing system and paid the claimant what they were paid by way of furlough payments to her. Furthermore, this tribunal notes that, although the claimant was receiving furlough payments for over a year April 2020 through to April 2021, she did not raise any complaints about those payments until July 2021. This tribunal does not accept that the

claimant did not receive any pay slips for the reasons set out above. Further, as indicated above, it is clear payslips were given to her when requested and she could have requested those payslips at a much earlier stage if she considered that she was not being paid the correct amount on furlough. The tribunal has reminded itself that the burden of proof is on the claimant and the tribunal does not consider that the claimant has met that burden of proof.

22. However the tribunal does consider that the claimant is entitled to some sums for unlawful deduction from wages. The tribunal accepts the claimant's evidence, which is supported by the pay slips, that she was engaged to work 40 hours a week up to the time of Coronavirus Pandemic. After she returned from furlough she was only offered and paid for 30 hours in May. On that basis, the tribunal consider that she is entitled to an additional 10 hours for that month at £9.00 per hour.
23. The tribunal accept that the claimant took all of her holiday due for 2020 to 2021 after her employment terminated. She would have been due, in accordance with the government website, 205 hours which would include any bank holidays. However the tribunal notes that she was only paid 90 hours as noted on her last payslip page 26 bundle C1. Therefore, she is due an additional 115 hours on termination of her employment. The tribunal also accepts the claimant's evidence that she was not paid for the additional one week which she was allowed to carry over from the previous holiday year, which was not contested by the respondent. Accordingly, she is entitled to a further 40 hours which would make a total of 155 hours in total at an hourly rate of £9.00. Therefore, she is due accrued outstanding accrued holiday up to the date of termination in June 2021 in the sum of £1395.
24. Finally the tribunal considers that the respondent is in breach of the working time regulations with regard to the payment of holiday pay over the proceeding two years. The claimant accepted that she was paid her holidays over that period. However, she said in evidence that she was not paid her bank holidays, which is not disputed by the respondent. Therefore, she is entitled to the additional 1.6 weeks or, as calculated by the claimant 56 hours, relating to bank holidays for the proceeding two years. The tribunal has taken note of the case of Bear Scotland and Section 23(4A) of the Employment Rights Act 1996 and concluded that the claimant is entitled to claim 56 hours for the proceeding two years which amounts to 112 hours at the hourly rate £9.00 an hour, making the total sum of £1,008. That sum should be added to the sum for accrued holiday pay due for the last year of the claimant's employment which amounted to £1395, making a total sum due to the claimant for holiday pay in the sum of £2,403.

EMPLOYMENT JUDGE MARTIN

**JUDGMENT SIGNED BY EMPLOYMENT
JUDGE ON
3 November 2021**

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