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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4113747/2019

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Final Hearing Held on Monday and Tuesday 15th and 16th November 2021

Employment Judge Russell Bradley

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Andrew Udy

**Claimant
In person**

Opulent Catering Limited

**Respondent
Not present or represented**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is: -

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1. To declare that the claimant's claim that the respondent has made a deduction from his wages in contravention of section 13 of the Employment Rights Act 1996 is well founded;

2. To order the respondent to pay to the claimant the sum of ONE HUNDRED AND NINETY POUNDS AND TWELVE PENCE (£190.12) being the amount of the deduction; and
3. To find that the claim for damages for breach of contract succeeds; the respondent is ordered to pay to the claimant the sum of THREE HUNDRED AND TWO POUNDS AND SIXTEEN PENCE (£302.16).

REASONS

Introduction

1. On 29 November 2019 the claimant presented an ET1 in which he made various claims. They were resisted. At a preliminary hearing on 20 July 2020 the claimant explained that he maintained claims that (i) he had been underpaid in his last month's pay and (ii) he was entitled to a week's pay in respect of notice following his summary termination on 30 September 2019.
2. In response to an order made at that hearing and on 30 July 2020 the claimant specified his claim as being for £785.75 made up of £442.00 allegedly unpaid from his salary and £375.00 for a week's notice.
3. After an earlier postponement, a notice of hearing was issued fixing 15 and 16 November 2021 as dates for this hearing. No hearing bundle was prepared. At 10.00am on 15 November neither party had appeared. The clerk attempted to contact both by telephone to ascertain their reasons. The respondent's telephone numbers proved to be unobtainable. Emails with the claimant disclosed that he had understood that the hearing was due to start on 16. In the circumstances, I adjourned the start of the hearing until 10.00am on Tuesday 16 November. The claimant was present and represented himself. The clerk again attempted to contact the respondent by telephone, without success. The numbers were again unobtainable. In taking account of Rule 47, I considered that online enquiries about the respondent at Companies House were practicable, which the clerk undertook. From them it appeared that on 27 July 2021 the Registrar of Companies gave notice that,

unless cause was shown to the contrary, the respondent would be struck off the register and dissolved not less than 2 months from that date. Upon the respondent's dissolution, all property and rights vested in, or held in trust for it would be deemed to be *bona vacantia* and would belong to the Crown. It also appeared that on or about 24 July an objection to the striking off had been received. Accordingly after the attempts to contact the respondent by telephone on both days, the information at Companies House and the fact that recent emails from the tribunal to the respondent had "*bounced*", I took the view that, in terms of Rule 47, the hearing should proceed in the absence of the respondent.

4. After the preliminary hearing the respondent had sent to the tribunal copies of various documents including an unsigned contract of employment and various pieces of correspondence between the parties in the period 8 August to 30 September 2019. In a short adjournment, I arranged for copies to be provided to the claimant. He gave evidence about some of them.

5. The issues for determination were:-

- a. what sum was properly payable by the respondent to the claimant as pay due to him for September 2019?
- b. were any deductions made by the respondent from that payment either authorised to be made by virtue of a relevant provision of the contract, or ones to which the claimant had previously signified in writing his agreement or consent?
- c. In summarily dismissing the claimant on 30 September 2019 was the respondent in material breach of contract? If so to what damages is he entitled?

Evidence

6. I heard evidence from the claimant. He explained the background to his work for the respondent in the short period of his employment and the manner and reason for his summary dismissal. He spoke to documents as necessary.

Findings in Fact

- 5 7. I found the following facts admitted or proved.
8. The claimant is Andrew Udy.
9. The respondent is Opulent Catering Limited. One of its owners (directors) is (or at least was at the time) Alan Valante. Another was his wife, Pauline Valante. At the relevant time it provided catering and delivery services. It also
10 offered wedding planner services.
10. The claimant's employment began on or about 7 August 2019. He was employed as office administrator. At or about that time he was issued with and signed a written contract of employment. He did not retain a copy. His annual salary was agreed as £16,500 per annum. He was contracted to work
15 37.5 hours per week. He was not entitled to any contractual sick pay.
11. In the first month of his work, the claimant attended to a number of duties including completion of expenses, filing orders and dealing with correspondence for the respondent's kitchen.
12. In the first or second week of September, Mr and Mrs Valente took about two
20 and half weeks holiday. They were abroad. In that time the claimant was expected to and did attend to a number of issues as they arose within the respondent's business.
13. The claimant was absent from work by reason of illness for two days in September 2019.
- 25 14. Mr and Mrs Valente returned towards the end of September 2019. Mr Valente suggested a team meeting immediately on his return. He then put the meeting off several times. On or about 30 September He invited the claimant into a

meeting alone with him. In the meeting the claimant was dismissed with immediate effect. The reason provided at the time related to allegations that he had been a few minutes late. No other reason was relied on at the time.

5 15. The claimant was issued with a payslip dated 30 September 2019. It recorded gross pay for the month of £1084.88 representing 131.5 hours allegedly worked. Net pay after listed deductions was £933.00.

10 16. By email on 30 September the claimant complained about the calculation of his gross pay. Mr Valente replied that day. He sought to justify the amount by reference to his calculations of actual hours worked (131.5). The claimant replied that day. Mr Valente in turn set out (also on 30 September) the detail of his calculation of those hours (shown for each of the four weeks in the month). He also reminded the claimant that the respondent did not pay sick pay. In the course of that exchange the claimant sought a copy of the contract which he had signed. The respondent provided an unsigned copy. The
15 claimant believes that it (which was the copy before the tribunal) is not an accurate version of the one which he signed.

20 17. Related to the preliminary hearing on 20 July, the respondent produced to the tribunal an amount of correspondence spanning the period 8 August to 30 September. Some of it bears to show the claimant's signature. The claimant denies that it is his signature. Some of the correspondence relates to informal and formal disciplinary action taken in the period 14 August to 30 September. The claimant had not seen any of it until it was produced within the tribunal process. He believes that it was created after the event. He denies that he was disciplined in any of the ways or for any of the reasons contained in that
25 correspondence. He denies that he was in material breach of contract in the way suggested by the respondent.

Comment on the evidence

18. The claimant gave evidence in a structured and chronological order. While some of his evidence about his work was not strictly relevant to the issues it provided useful background to the respondent's business. He answered questions from me in a clear and direct way. He was measured, articulate and credible.

Submissions

19. The claimant did not make a submission as such. He was content that I decide the issues based on the evidence that he gave, the material that had been referred to, and the discussion that we had.

The Law

20. Section 13 (1) and (2) of the Employment Rights 1996 provide that: *“(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 worker's 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 a 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.”*

21. Section 13 (5) to (7) of the 1996 Act provide that: *“(5) For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect. (6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise*

the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified. (7) This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting “wages” within the meaning of this Part is not to be subject to a deduction at the instance of the employer.”

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22. Section 23(1) (a) of the 1996 Act provides that:- “(1) A worker may present a complaint to an employment tribunal —(a) that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2))”.

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23. Section 24(1)(a) of the Act provides that “(1) Where a tribunal finds a complaint under section 23 well-founded, it shall make a declaration to that effect and shall order the employer—(a) in the case of a complaint under section 23(1)(a), to pay to the worker the amount of any deduction made in contravention of section 13”.

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24. Article 3 of the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 provides that “Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if—(a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in Scotland would under the law for the time being in force have jurisdiction to hear and determine;(b) the claim is not one to which article 5 applies; and(c) the claim arises or is outstanding on the termination of the employee's employment.”

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25 Discussion and decision

25. The total claim is in two parts. It is convenient to deal with them in turn.

26. On the issue of pay for September 2019, the claimant accepted two points. First, from the gross amount claimed of £1375.00 there required to be deducted two days' pay in respect of his two days of illness absence. The

claimant agreed that a day's pay should be calculated on the proportion of 1/365 of his annual salary. Two days' pay is therefore £90.41. Second, he accepted that his entitlement is to net pay, not gross. In that regard, he accepted the respondent's entitlement to deduct £100 from his salary which was done in September 2019. The unsigned contract does not authorise the respondent to apportion monthly pay in accordance with its determination as to the number of hours worked in the month. In any event, the respondent has not offered to prove that its calculation as to hours worked in September is accurate. The claimant did not give his written consent to permit the respondent to calculate his pay in the manner relied on by the respondent, or for it to deduct from his pay amounts to reflect those adjustments.

27. On my analysis, the gross amount of pay properly due by the respondent to the claimant was £1284.59. From it there falls to be deducted income tax and national insurance contributions (NIC). Applying the percentage used by the respondent in its deduction on the September 2019 wage slip for income tax (0.736%) results in a deduction for income tax of £9.45. Applying the percentage used by the respondent in its deduction on the wage slip for NIC (4.05%) results in a deduction of £52.02. The amount due net of tax and NIC is £1223.12. The claimant accepted that from that amount a cash advance of £100.00 should be deducted. This results in the sum due to him reducing to £1123.12. The respondent paid him £933.00. The balance of £190.12 is due by the respondent to the claimant. The judgment reflects an order that the respondent pay this sum to the claimant.

28. The second part of the claim is for a week's pay. He accepted that his gross pay per week was £317.31 (£16,500/52 weeks) and not £343.75 as he had calculated. Applying the same rates of tax and NI to £317.31 (£2.33 and £12.82) results in a net sum due as damages for the respondent's failure to pay a week's notice pay of £302.16. This sum is also reflected in the judgment.

29. In the circumstances, both parts of the claim succeed albeit in amounts less than were sought by the claimant. I have made orders accordingly.

5 Employment Judge: Russell Bradley
Date of Judgment: 17 November 2021
Entered in register: 19 November 2021
and copied to parties