



EMPLOYMENT TRIBUNALS

Claimant: Miss M Radwanska

Respondent: Ryan Food Plus Ltd

Heard at: Leeds **On:** 6 January 2022

Before: Employment Judge Parkin

Representation

Claimant: Mr G Surma, lay representative

Respondent: Mr J Cordingley, Consultant

RESERVED JUDGMENT

The Judgment of the Tribunal is that:

- 1) The claimant's claim of unlawful deductions from her wages is well-founded; the respondent made unlawful deductions from her wages for days worked in December 2020 in the sum of £540.64 gross and for the balance of her notice period up to 11 January 2021 in the further sum of £889.44 gross and is ordered to pay her the total sum of £1430.08 gross;
- 2) Pursuant to regulation 14 of the Working Time Regulations 1998, the respondent is ordered to pay the claimant compensation for accrued paid annual leave in the sum of £732.48 gross;
- 3) The claimant's claim of unlawful deductions from her wages in respect of pension contributions is adjourned to a date to be fixed; and
- 4) The respondent has conducted the proceedings unreasonably and is ordered to pay the claimant the sum of £410 in respect of preparation time spent on her behalf before the final hearing.

REASONS

The Claim and Response

1. By her claim form presented on 27th February 2021, the claimant presented money claims primarily of unlawful deduction from her wages arising on the termination of her employment on 11 January 2021. In its response presented on 2 April 2021 the claimant resisted her claims, contending she had worked only two days (8 and 9 December 2020) in December before leaving of her own accord. At a case management hearing on 16 June 2021, Employment Judge Wade made a Consent Judgment in favour of the claimant for the net sum of £261.24 in respect of the December 2020

payment set out on the payslip for that month. Employment Judge Wade also ordered the respondent to pay a deposit of £500 as a condition of pursuing its defence that the claimant was making false and even fraudulent claims for payment.

The Issues and Factual Disputes

2. As identified by Employment Judge Wade, the issues and disputes were as follows.
 - 2.1. Non-payment for days actually worked in December 2020 (other than 8 and 9 December). The factual dispute is how many days did she work? The claimant says 11 days and the respondent says just 2 days, 8 and 9 December. Having now been paid for 12 hours on those two days, her claim is for 62 hours at the hourly rate of £8.72 for the days up to 17 December, if she proves she worked them.
 - 2.2. Holidays: how many days paid holiday did the claimant take in the relevant holiday year from 6 April 2020? The claimant says she took 7 days and is owed a further 14 days; the respondent says she is only owed a further 3.1 days, having taken 18 days already in the holiday year prior to leaving. The parties therefore broadly agree that the full pro rata entitlement in the holiday year up to termination of the claimant's employment was 21 days.
 - 2.3. Sick pay during notice: the respondent says it did not receive the claimant's resignation, that her fit note is fraudulent and that she simply left her employment by not attending after 9 December. This raises the issue when did the claimant's employment terminate and how did it terminate? Was it a resignation with immediate effect on 9 December or was it termination on 11 January 2021, after notice given on 15 December 2021.
 - 2.4. Pension deductions: the claimant believes there has been no contribution into a pension scheme during her employment, despite employee contributions deducted from her gross pay for several months, and so claims further unlawful deductions on that basis.

The Hearing and the Evidence

3. The Tribunal had great assistance from 2 interpreters: Ms I Sikorska, a Polish interpreter who interpreted for both the claimant and Mrs Stobinska throughout and Mrs S B McGee, a Farsi interpreter, who interpreted for Mr Zaraie when he gave evidence. The claimant had prepared a bundle of documents (1-127). Regrettably, despite Judge Wade's Order this was not ultimately an agreed bundle and the respondent provided its own brief bundle (R1) with additional documents disclosed during the hearing about pension enrolment (R2), pension report results and September 2020 payslip (R3) and handwritten notes concerning the claimant's holidays (R4).
4. The claimant gave evidence on her own behalf based on her witness statement. The respondent's director/proprietor Mr Ahmadreza Zaraie and his wife Mrs Marika Stobinska gave evidence on behalf of the respondent, again based upon their various witness statements. The respondent relied

upon a statement dated 28 April 2021 from the claimant's supervisor at a former employer, Monika Dabrowny; the Tribunal was unable to attach any significant weight to this in circumstances where this witness was not in attendance to give oral evidence (with no explanation whether she had been asked to attend) and where the typed statement lacked a statement of truth or even a signature. In any event, the content of the witness statement was solely to attack the character and credibility of the claimant especially in respect of the allegation that the claimant had fabricated an accident and made a fraudulent personal injury claim in connection with the former employer; this aspect is dealt with below. In her written statement, Mrs Stobinska gave no direct evidence of substance on the matters in issue and was not convincing in oral evidence about recollecting working in the shop on 13 and 15 December 2020. This meant that on most matters there was a straightforward conflict of versions between that of the claimant and that of Mr Zaraie.

5. The claimant was a generally accurate and reliable witness, although she was unable to remember individual days she worked in December 2020 without reference to contemporaneous documents; she vigorously resisted the respondent's full-frontal attack upon her credibility that she was making wholly fraudulent claims against it and indeed had made a fraudulent personal injury claim against a previous employer. Whilst Mr Zaraie, at paragraphs 20 to 23 in his first statement, included extensive hearsay evidence about this alleged fraudulent personal injury claim concerning the former employer, the respondent's case was nullified by the fact that the claimant had not only made a personal injury claim but had then successfully achieved monetary settlement of the litigation without further consequence thereafter. Mr Zaraie was a witness very prepared to embellish or overstate his evidence, such as when at paragraph 18 of his first statement he set out: "The Claimant has cleverly presented in her index bundle screen shots... of WhatsApp messages which are either invented or prepared and dispatched to support her fraudulent claims". However, in evidence, he admitted that the WhatsApp message dated 16 December 2020: "Hi Tomorrow 2-8" was indeed sent by him in connection with work hours the following day, 17 December; that message was unprompted by anything from the claimant. The Tribunal did not accept that he failed to receive three recorded delivery letters to the shop address in one month. On the balance of probabilities, the Tribunal had no hesitation in preferring the claimant's version to that of Mr Zaraie on each of the significant disputes of fact. Her version was fully consistent with the contemporaneous documents, in particular those WhatsApp messages which revealed Mr Zaraie was still looking to the claimant to continue working at the shop after 9 December 2021 (the date he said she had left unilaterally), the provision of her sick/fit note to her employer, the records of transactions at the shop by the claimant after that date (which supported her case that she worked on the days she made shopping transactions after 9 December, 10, 11 and 12 December 2020) and the recorded delivery details at the bottom of the claimant's 3 letters dated 15 December 2020, 5 January 2021 and 15 January 2021. Even the Google location documents supported her version of having worked up to 17 December 2020.

The Facts

6. Accordingly, from the oral and documentary evidence, that Tribunal made the following key findings of fact.
 - 6.1. The claimant was employed as an assistant by the respondent at its shop in Doncaster Road, Wakefield from October 2019. This was a small newly established shop run by Mr Zaraie, with his brother, his wife Mrs Stobinska and 2 or 3 other employees including the claimant. The shop was very close to the claimant's home.
 - 6.2. There was a formal written contract of employment (65-69) which did not identify a job title, but the claimant's role was much more than just as a shelf stacker. She was a general shop assistant carrying out unloading and moving goods after deliveries as well as shelf stacking and cleaning and working on the till.
 - 6.3. The leave year ran from 6 April each year. The claimant's entitlement was 28 days of paid holiday per full working year, in addition to statutory/bank holidays, with payment to be made for all unused paid holiday entitlement calculated on a pro rata basis upon termination of employment.
 - 6.4. The notice provision was that the claimant needed to give four weeks' notice of termination of employment whereas the respondent was required to give statutory minimum notice.
 - 6.5. The sickness provisions required the employee to report any sickness absence as soon as practicably possible to the respondent, with entitlement to sick pay at the rate of full pay for 30 continuous sick leave days before Statutory Sick Pay was payable.
 - 6.6. When she started employment, the claimant told the respondent about her lower back condition, resulting from an industrial injury at a previous employer as a result of which she had made a successful personal injury claim. Although she was assured, she would not be given heavy lifting duties, over the months and as the shop became busier, she was expected to do more unloading and carrying and found the work much less congenial.
 - 6.7. She was originally contracted to work 35 hours each week across five days, often including weekends, at times the respondent needed her in the shop. However, from about July 2020 her hours reduced and often totalled about 30 hours a week from then on (with September, October and November payslips recording 116.67 hours each month). By the end of her employment, her hourly rate of pay was £8.72 per hour and the length of her shifts on the days she worked was normally 6 hours.
 - 6.8. In July 2020 she had 4 working days paid leave, reflected in her payslip that month. Whilst no other paid leave days were accounted for in her pay slips, she acknowledged another 3 working days' paid leave in late September 2020 when she visited Poland because her grandmother was very ill. She worked on bank holidays and so did not receive pay for any bank holidays not worked. She was paid for

7 days leave in the holiday year from 6 April 2020. Despite a contractual term that the claimant be paid monthly in arrears by BACS, this never happened, and she was paid in cash weekly at the shop.

- 6.9. By early December 2020, the claimant was not very happy in her employment. When she indicated to Mr Zaraie or Mrs Stobinska that month that she was considering leaving her job, she was told she must give four weeks' notice before doing so.
- 6.10. The run-up to Christmas was obviously a busy time in the shop. The claimant therefore continued to work as normal that month and not only on 8 and 9 December. She had also worked on 1, 2, 3 and 5 December. She did not state on 9 December that she no longer wanted to work for the respondent anymore and she did not fail to return to work thereafter. After 9 December, the claimant worked on 10, 13, 14, 15 and 17 December. Her total days worked in December, before going off sick, were 11 days, amounting to 74 hours worked.
- 6.11. On 15 December 2020, after working and completing her shift, the claimant handed her letter of resignation to Mr Zaraie (106), asking him to sign a copy to confirm he had received it. He declined to do so, saying he did not know what it was, and that the accountant dealt with all documents. The letter expressly set out that the claimant was giving four weeks' notice with her last working day to be 11 January 2021. The next day, the claimant sent a copy of it by recorded delivery to the Warrington Road address.
- 6.12. Although she did not work on 16 December 2020, the WhatsApp record shows that the respondent contacted the claimant on 16 December 2020 saying: "Hi Tomorrow 2-8" (84), indicating those were the hours the respondent expected her to work that day.
- 6.13. The claimant then worked on 17 December 2020 when she was required to unload and move a large delivery single-handedly, resulting in aggravation of her back condition.
- 6.14. She went to hospital that night and then attended her Doctor's surgery on 18 December 2020. She was given a statement to fitness for work (sick note, 107) certifying that she was unfit for work until 11 January 2021 because of acute or chronic back pain. She promptly provided a copy of this sick note to Mr Zaraie via WhatsApp (85). She did not return to work after 17 December during the rest of the notice period.
- 6.15. After receiving no pay at the end of December, the claimant wrote again to the respondent on 5 January 2020 (109-110), by recorded delivery. There was no response from the respondent and no payments made for December wages or final payments of holiday payment.
- 6.16. On 15th January 2020 she sent a formal letter before action to the respondent (111) by recorded delivery. Again, there was no

response from the respondent nor any payment of wages for December or final payment of holiday payment.

- 6.17. The payment of £261.24 net made to the claimant under the Consent Judgment represented pay for 12 hours on two days, 8 and 9 December 2020, in the gross sum of £104.64 together with an income tax refund of £156.60 but no holiday pay or compensation for accrued paid annual leave. The 12 hours represented a small shortfall since the claimant had worked 14 hours on those days: 8 on 8 December and 6 on 9 December 2020.

7. The Parties' Submissions

- 7.1. The claimant provided written submissions in the bundle (114-118). She applied for a preparation time order urging that she had proved her own case following extensive preparation by her representative, to the extent of 23.5 hours.
- 7.2. The respondent contended that the claimant's previous history of claiming compensation after an alleged accident and extended period of claiming sickness benefit undermined her credibility. Documentation relating to Google reports meant nothing at all when she lived so close to the respondent's shop. There was no question of her being at work on 15 December 2020, the date of her purported resignation and no letter of resignation was received. Her account of working on 17 December was untrue and the product of her vivid imagination. She had been paid for 12 hours work on the two days actually worked in December. The explanation for the WhatsApp messages after 9 December was that the respondent had not wanted her to leave, although she had chosen to leave; this was a busy time in the shop. She had wanted time off in December and was intending to leave the respondent in any event; she therefore planned and implemented this sophisticated scheme including providing a Doctor's sick note to cover her actions. The respondent opposed the making of a preparation time order; putting together documents and preparing its case had been difficult because of Covid, the sickness of its accountant and the representative which had all delayed the very small newly established business dealing with matters.

The Law

8. The Tribunal applied part II of the Employment Rights Act 1996, particularly sections 13 and 23-24. Deductions from wages which are unlawful include non-payment as well as actual deductions. Entitlement to paid annual leave, often called holiday pay, is provided for in the Working Time Regulations 1998, particularly at regulations 13, 13A, 14 and 30. The Tribunal needed to consider the terms of the claimant's contract of employment and determine her effective date of termination. In respect of the claimant's application for a preparation time order, the Tribunal applied Rules 39(5) and 74-84 of the Employment Tribunals Rules of Procedure 2013.

Conclusions

9. The Tribunal accepted the claimant's case that she worked 11 days in December 2020 before going off sick but found that she was ultimately paid only for 8 and 9 December, pursuant to the Consent Judgment, albeit with 2 hours pay missing. On 15 December 2020, she gave notice to terminate her employment 4 weeks later on 11 January 2021 in keeping with her contractual notice provision, handing Mr Zaraie her letter of resignation at the end of work that day. For December 2020, she was entitled to payment for 74 hours work less credit for the 12 hours paid by the respondent, a total of 62 hours at £8.72 per hour. The respondent therefore made unlawful deductions from her wages to the extent of £540.64 gross and is ordered to pay her that sum.
10. However, having worked on 17 December 2020, she never physically returned to work at the shop after that because she was certified unfit for work through her back condition by her Doctor. Again, in keeping with the contractual provisions, she provided a copy of her fit/sick note to the respondent. Her contract provided for 30 days continuous sickness to be paid at the full rate of pay and she was therefore entitled to be paid in full up to 11 January 2021. She would have worked some 17 further days if fit to do so and therefore lost sick pay for 6 hours each day in the total amount of $17 \times 6 \times £8.72 = £889.44$. The respondent therefore made unlawful deductions from her wages in the further sum of £889.44 gross and is ordered to pay her this further sum, making a total sum of £1430.08 gross to be paid in respect of unlawful deduction from wages.
11. The claimant was paid for 7 days' holiday in the holiday year from 6 April 2020 and gives credit for those. By 11 January 2021, she was entitled to take or have taken 21 days paid holiday. Thus, applying Regulation 14 of the 1998 Regulations, she was entitled to compensation representing the accrued paid annual leave of 14 days at her daily rate of £52.32 (6 hours x £8.72 = £52.32), a total of £732.48 gross.
12. Between March 2020 and November 2020, the claimant's payslips record that there were deductions from her gross pay for employee pension contributions. Whilst deductions totalling £198.56 were undoubtedly made, the documentation disclosed by the respondent thus far does not demonstrate conclusively that those contributions (alongside employer contributions) were made into a pension account for the claimant's benefit and certainly does not suggest such contributions were made soon after the deductions were taken from the claimant's pay. However, it should be no great effort on the part of the respondent to provide unequivocal documentation showing this. Accordingly, determination of the claimant's claim relating to pension deductions is adjourned, at this stage to a date to be fixed, in order that the respondent can produce documentation to satisfy the Tribunal that a modest pension entitlement is in place for her.

Preparation Time

13. The Tribunal had no hesitation in concluding that the respondent had conducted the proceedings unreasonably. Its fact-finding and conclusions are ultimately consistent with Judge Wade's reasons for making the deposit order, set out at paragraph 5 of her Order. Under Rule 39 (5) of the 2013

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Rules, this itself establishes unreasonable conduct since the contrary was not shown. Moreover, even by the date of final hearing, it was necessary for the respondent to continue disclosing documents in order to seek to comply with Judge Wade's case management order made over six months previously, which further establishes unreasonable conduct of these proceedings. The Tribunal noted that the application in the claimant's written submissions was only for 10 hours (not the hours eventually claimed at the hearing). Time spent at the hearing is not itself preparation time and taking all matters into account, the Tribunal assesses that the time it was reasonable for the claimant's adviser to spend in preparation and which it is appropriate to order the respondent to pay is 10 hours' preparation time at the current hourly rate of £41. The respondent is therefore ordered to pay the sum of £410.00 to the claimant for preparation time, pursuant to Rules 39, 75, 76, 77 and 79 of the 2013 Rules.

Employment Judge Parkin
Date: 17 January 2022

RESERVED JUDGMENT & REASONS

SENT TO THE PARTIES ON
18 January 2022

Olivia Vaughan
FOR THE TRIBUNAL OFFICE

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