EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111295/2019
Held at Glasgow on 11 December 2019
Employment Judge M Robison

Ms A Clark	**Claimant in person**
Abby Cleaning Scotland Ltd	**Respondent Represented by Mr T Muirhead Consultant**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claimant's claims for unpaid wages and outstanding holiday pay succeed, and the respondent shall pay to the claimant the total sum of NINE HUNDRED AND FORTY SEVEN POUNDS AND EIGHTY TWO PENCE (£947.82) (gross).

REASONS

1. The claimant lodged a claim in the Employment Tribunal on 28 September 2019 claiming arrears of pay. The respondent entered a response resisting the claim.

2. At the hearing I heard evidence from the claimant, and from Mr R May, operations director for the respondent. I was referred to productions which had been lodged by the respondent.

3. The claimant had brought documents but she had not brought copies, although she was advised to do so in the letter advising her of the date of the hearing. As it transpired, only one of the documents which she had brought was lodged, numbered 76. The respondent lodged a further document numbered 77.

Findings in fact

4. On the basis of the evidence heard and the documents lodged, the Tribunal finds the following facts admitted or proved:
5. The claimant commenced employment on 17 September 2018. She stated that she was engaged as a contracts manager, which is what was stated on her business card. This was a full-time position, which included working evenings and week-ends on occasion.

6. The claimant was issued with terms and conditions of her employment (pages 25 to 36). This is not signed. However by e-mail dated 3 December 2018, she confirmed that she had read and understood the terms and conditions of the business.

7. The claimant had however indicated to Ms Chloe McGoldrick that there were errors in her contract. Specifically the contract stated that she was area manager when she understood that she was contracts manager. Further it stated that her annual salary was £20,000 (page 26). In fact her annual salary was £22,000. This is represented by a daily rate of £83.33 (page 76).

8. She was reassured that the contract was to be reissued in the near future.

9. She did accept the other terms of her contract, which in particular includes the following.

10. Under “sick pay”, it is stated: “If you are absent from work because of sickness or injury you will be entitled to statutory sick pay, provided you meet the qualifying conditions”.

1 1 . Under notice, it is stated that an employee who has been employed following completion of a probationary period should give one month’s notice. It continues, that “If you terminate your employment without giving the required notice you will be in breach of contract. If the company incurs any losses or additional costs as a consequence of your breach of contract, it reserves the right to deduct these losses/costs directly from any outstanding wages, holiday pay or other monies due to you as liquidated damages to compensate the company for the financial loss it has suffered. The above clause will be enforced by the company only in order to compensate it for any loss it has suffered. It is not intended to be used to impose a penalty on an employee who has not given the required notice. The method used to quantify the amount of any deduction made will be confirmed to you in writing at the time”.

12. On 29 April, a Helen Bryson commenced employment with the respondent.

13. On 30 April 201 9 at 1 3.04, the claimant intimated her intention to resign by email marked for the attention of Robert May (operations director) and Lindsay Lundy (operations manager, and her line manager), which stated “I would like to hand in my resignation from today’s date, Tuesday 30 April 2019. I understand it is one month’s notice and would be obliged if you would confirm my last working day, which I believe would be Thursday 30 May 2019. My reasons for wishing to leave are simply personal” (page 45). The claimant had decided to resign because of commitments to her son who has severe mental health issues. The claimant’s personal circumstances were known to Mr May.

14. On the evening of 30 April 2019, Ms Bryson emailed the claimant, who had

not been aware that she was due to start, to advise her that she was expected to shadow her, and asked to accompany her the next day.
15. On 1 May 2019, the claimant met with Helen Bryson, and she accompanied her on a job (which they attended, but there was no-one present to open the premises).

16. On 3 May 2019, Mr May e-mailed in response to the resignation, as follows "Thanks for the email and apologies for the delay in replying. I'm sure Lynsay will catch up with you nearly (sic) next week to discuss your reasons for leaving and manage your exit in a structured manner to limit the potential issues within the business. Good luck going forward".

17. The claimant started to work her notice and worked until the morning of 8 May. At 2 pm on 8 May she attended a doctor's appointment. The doctor certified that she was not fit for work for 28 days "because of the following conditions: stress" (page 46). The claimant copied the fitness for work note and sent it to the respondent that same day.

18. As the summer is a busy time of year for the respondent, not least because of student accommodation contracts, they required to arrange cover for the claimant's absence. A T.Jeffries was supplied to them by M8 Staffing, at a cost of £136.77 for 16 days during the month of May, totaling £2,625.98 (page 75).

19. On 16 May 2019, the claimant signed a contract to commence employment with Cleaning Scotland Ltd, whom she had worked for previously. This was a part-time role of between 20-25 hours per week, primarily office based and closer to home.

20. On 24 May 2019, Mr May wrote to the claimant, headed "Notice period" in the following terms: "It has been brought to my attention that you have started new employment while on your notice from Abby Cleaning. I find it strange that you are fit for work while on such a long period of sick leave signed by your general practitioner. I am unsure why you would have started new employment without consulting with us, your current employer before doing so. As such it is with regret to inform you that you have left us with no option but to seek compensation for your failing to work your agreed notice period of 4 weeks. This compensation will cover any expense the business has incurred in covering hours you were scheduled to work. Failure to work the required notice agreed in the contract of employment means that you are breaching the contract the company has in place. The expense the company has incurred covering the hours you were scheduled to work is over and above the salary that you would have been paid. I would appreciate you getting in touch to arrange an informal meeting to discuss your reason for leaving and in such haste" (page 47). This letter was sent recorded delivery.

21. The claimant commenced work with Cleaning Scotland Ltd on Monday 10 June 2019.

22. On 13 June 2019, the claimant came upon the letter dated 24 May 2019 while cleaning her son's bedroom. Due to his condition, he had a habit of signing for and hiding the mail. On reading it, the claimant e-mailed Mr May, as follows: "Apologies for the delay in replying to your letter. Steven signed for it and he never gave it to me until today when we were tidying his room, typical boy!! I am unsure where you received your information that I had

started with a new employer during my notice period. You knew that Steven had attempted to end his life and I felt I had to be at home more with him. I am also unsure as to why you feel the need to withhold any outstanding monies owed to me since you already had a new contract manager, Helen Bryson, in place before I handed in my sick line from my GP. I gave my all to Abby Cleaning as you well know and would have done anything I could for the business" (page 49).

23. By e-mail dated 14 June 2019, Mr May responded in the following terms: “The information that I have received has come from four separate people at different times. These people vary from colleagues who you are currently working with. Current Abby employees who you communicate with and ex employees of your new company. If you are disagreeing with these people then please send a letter of grievance to our office and it will be investigated through the proper processes. Helen was not brought in to replace you. She was brought in to work alongside you as a replacement for Stuart” (page 48).

24. The claimant received her pay for the month of May on 15 June 2019, with the details set out in the pay slip (page 52). This was stated to be paid at a daily rate of £79.71. The claimant was paid for five days work at that rate, totalling £398.55. The claimant also received holiday pay, again at a daily rate of £79.71, representing 4.65 days, and totaling £370.65. She also received sick pay of £282.75. The respondent also deducted tax, national insurance, pension, a parking ticket as well as “costs to cover notice” stated to be £912.89, with no further explanation about how that was calculated.

25. The respondent calculated the sum to be deducted from the claimant for "costs to cover notice” by subtracting the daily rate calculated for her last pay slip from the rate paid to the agency worker manager, that is £136.77 minus £79.71 , which is £57.06 times 16, which would total of £912.96 (page 52).

26. Following receipt of the claimant’s final pay slip, the claimant contacted ACAS by telephone during this first week in August, while her son was in respite care. In or around 12 September 2019, the claimant gave early conciliation notice and an EC certificate was issued that day. No mention was made to the claimant regarding time limits by ACAS advisers.

27. On or around 28 September 2019, when the claimant’s son was taken for a day out with his Aunt who was over from the US, the claimant completed and lodged the ET1 form.

Submissions

28. Ms Clark confirmed that she was seeking recovery of the £912.89 that had been deducted from her last pay slip. She said that she had commenced her new employment on the second Monday in June. She did not accept that the individuals who had advised Mr May were correct to say that that she had started work before that.

29. Further, the respondent states that they found out that she was working for someone else on 24 May, but the invoice for cover relates to the period before, and she questions why he could claim for management cover before that date. Her enquiries have not revealed that a T Jeffries worked for the respondent, and she believes her role was covered by Mr May and Ms Lundy. She pointed out that Ms Bryson had left within a few weeks, and that

she had never been replaced in her role, specifically that no manager is covering the geographical area which she covered.
30. She relies on her first wage slip to prove that her daily rate was £83.33 and pointed out that the respondent had used the wrong daily rate to calculate the outstanding wages due to her for her work during May, which she accepted was 5 days, and also to calculate her holiday pay, which she accepted was for 4.65 days. She pointed out that even if she was due money in regard to any failure to work her notice, again they had used the wrong daily rate to calculate what she owed to them, so she is due some payment for that, if not for it all.

31 . With regard to the time limit argument, she was sure that she had not lodged her claim out of time and no-one had mentioned this at ACAS, although they did when she contacted them again regarding being made redundant from her subsequent job.

32. Mr Muirhead dealt first with the time limit point. He accepted that it depends on the date from which time runs. He argued, in the first instance that time ran from the date of the letter to the claimant when she was advised of the deductions, that is 24 May, which means that the claim is lodged out of time. He accepted on the other hand that if it ran from 15 June, then the claimant's claim was lodged in time.

33. On the question whether it was reasonably practicable to have lodged the claim in time, he argued that the claimant gave the impression of knowing about her rights, had taken advice from ACAS, who in his experience will give advice about time limits.

34. He argued that sick pay was not properly payable.

35. The claimant stated in the ET1 that she had started work with her new employer on 16 May 2019. The claimant's claim for the first time today that she had not in fact started until later should be treated with a high degree of scepticism. Mr Muirhead said that he was in touch with the claimant recently and that she had made no mention of any error in the start date.

36. With regard to the respondent's contractual right to make the deduction, he relied on the notice clause in the contract of employment. Although there is a reference there to "giving notice", the reference to "giving" implies that it will be worked. He argued that if it is accepted that she started her new job on 16 May then she did not give the required notice, which was a period of one month. In such circumstances the respondent was entitled to make the deductions which they did.

37. Indeed, the respondent could argue that her employment ended on 1 6 May. The fact that Mr May found out on 24 May is not relevant to the question whether the deduction is lawfully made, because although he would have incurred the cost anyway, if the absence is not genuine, it is not right that the respondent should suffer losses flowing from the claimant's actions, and therefore he was entitled to make the deductions. Even if the respondent would otherwise have required to cover the claimant's sick leave, if it is found that she was not genuinely on sick leave, then the respondent has incurred the costs because of the breach of contract of the employee and is entitled to damages.

38. He pointed out that until today the respondent was not aware that the claimant had not started on 16 May because that is what she put in her ET1 form. Had they known they could have brought witnesses to refute

Relevant law

39. Section 13 of the Employment Rights Act 1996 states that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is authorised by a statutory provision or a relevant provision of the worker's contract or he has the worker's consent.

40. Section 23(1) states that a worker may present a complaint to an employment tribunal that his employer has made a deduction from his wages in contravention of Section 13.

41. Section 23(2) states that an employment tribunal shall not consider a complaint unless it is presented before the end of the period of three months beginning with the day of payment of the wages from which the deduction was made.

42. Section 23(4) states that where the employment tribunal is satisfied that it was not reasonably practicable for a complaint to be presented before the appropriate date, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.

Tribunal deliberations

Observations on the evidence and the witnesses

43. In this case there was apparently a crucial question of fact in dispute regarding when the claimant commenced work with her new employer.

44. Having considered the evidence carefully, I accept the claimant's claim that she was just being "honest" in putting down the date of 16 May as the start date of her employment, having signed the contract that day. If she was seeking to be dishonest then I would have expected her to have put down a date after the end of her notice with the first respondent. I accepted her evidence that she had signed the contract on that date, but that her employment did not commence until the second Monday in June, which she believed to be 10 June. She was very clear about that, and did not waiver when Mr Muirhead wrongly but inadvertently suggested to her that in fact 1 0 June was a Wednesday. She explained that she would not have started work on a Wednesday by reference to the fact that her son has his appointments on Wednesday, which I thought was a credible reference point. I accepted that it was an honest mistake to have put down that she commenced employment on 1 6 May.

45. I accept that Mr May may have been led to believe that she had "started" work in the second or third week of May, but I also take the view that "starting" work might be used to refer to an individual who agreed to join, even someone who has signed a contract but not yet commenced employment

46. I accepted her evidence that it was only while she was giving evidence that she realised that to have put 16 May on the claim form was an error. She did

however respond to the letter of 24 May on 13 June questioning where he had got the information that she had started during her notice period.
47. This was in the context of evidence which I thought was otherwise credible - the claimant would concede points quickly when she thought she was wrong, and otherwise made no attempt to embellish her evidence. She recalled when things happened by reference to other significant events in her life, for example when her son went for respite and when his aunt came over from the US and took him out for the day.

48. For these reasons, I accept the evidence of the claimant regarding the start date of her employment. I was aware of, and took into account, the fact that the respondent (or their representatives) had relied on the fact that the claimant had stated in the claim form that she had started on 16 May, which I deal with later.

Time limits

49. Having accepted the claimant's evidence on the point regarding the date of the commencement of her new employment for the reasons stated above, I accepted the claimant's evidence with regard to time limits, that is that the adviser at ACAS made no mention of time limits, and that she was entirely unaware that there was any possibility that her claim was "out of date".

50. I am of the clear view that time starts to run from the date upon which the deduction was made, that is 15 June. This is because the provisions of section 23(2) of the ERA refer to time running from "the day of payment of the wages from which the deduction was made".

51. I did not accept Mr Muirhead's submission that time would start to run from the date on which the claimant was notified of any intention to make a deduction from the claimant's wages, that is in the letter of 24 May. There is a reference is to "seeking compensation" to cover "any expense the business has incurred in covering the hours you were scheduled to work", without making any reference to a specific sum, and indeed "any" might mean none.

52. Since I find that time starts to run from 15 June, and the claimant intimated the claim to ACAS on 12 September, the claimant therefore had a further month within which to lodge her claim, in light of the time limit provisions in the early conciliation rules of procedure. Consequently, a claim lodged on 28 September 2019 in the context of this case is a claim lodged in time.

Calculation of daily rate

53. As I understood it, the respondent conceded that the claimant's daily rate had been calculated wrongly for the final pay slip, Mr May putting this down to his administrative staff using two different methods to calculate the daily rate.

54. In such circumstances, the claimant is clearly due to receive the difference in the two rates for the five days which it was accepted that she did work in May. The claimant was paid for 5 days at £79.71 (a total of £398.55) whereas she should have been paid at a daily rate of £83.33, which makes a total of £41 6.65, meaning that the claimant is due the difference which is £18.10.

55. Further, the holiday pay due was also calculated using the wrong daily rate, and so that the parties having accepted that she had 4.65 days of holiday

outstanding, the claimant is due to receive the difference between £387.48 and the £370.65 paid, which is £16.83.

Deduction in respect of notice period

56. Having accepted the claimant's evidence regarding her start date with her new employer, there was no basis upon which the respondent could rely on the notice clause to justify any deduction. The claimant had lodged a legitimate fitness for work certificate. She had subsequently informed the respondent that she had not commenced new employment during the notice period in the e-mail of 13 June. This was prior the issue of the wage slip on 1 5 June. Although she was asked to lodge a grievance, I did not consider that the onus was on her to do so since she had left the claimant's employment.

57. I did however apply my mind to the legal position had I not believed her. I did this not least because I was conscious that the claimant had stated in her ET1 form that she had started her new job on 16 May 2019. I came to the view in any event that the contract of employment did not give the respondent the right to deduct the sums due in the circumstances of this case. Only deductions warranted by a relevant clause of an employee's contract are valid.

58. I noted that the relevant clause stated that an employee would be in breach if they did not give the required notice. Here the claimant did give notice of the termination of her employment. She had a sick line which Mr May said that he had accepted as genuine, not least because he knew of the claimant's personal circumstances, but in any event he had no basis on which to gainsay the word of the claimant's GP.

59. Mr Muirhead argued however that if she started on 16 May, he would be entitled to treat the contract as ended at that time so that she did not give the requisite notice, so was in breach. However, the clause states that "if the company incurs any losses or additional costs as a consequence of the breach of contract, it reserves the right to deduct these losses/costs directly from any outstanding wages"

60. I do not accept that the respondent had incurred any losses as a consequence any breach (even if there had been one). Although the claimant questioned the existence of a T Jeffries, for the same reason that I did not accept that reliance should have been placed on the comments of others in regard to the date of commencement with the new employer, I did not accept that the claimant could be sure that those she spoke could be confident in their knowledge. Although the respondent had taken on Ms Bryson and the claimant understood that she could cover her job, I was prepared to accept that Ms Bryson may not have sufficient experience to take over immediately from the claimant since it was suggested that she was shadowing her. I did note that Mr May had also said in the letter that Helen was a replacement for Stuart although that was not what he said in evidence. I did note too that Mr May said on the one hand in evidence that it was a busy time of the year but on the other hand that they did not have work for Ms Bryson to do at that time. In any event, I accepted that the respondent had brought in another member of management staff to assist with the duties which the claimant would otherwise have covered.

61 . In any event, and crucially, as the claimant pointed out, Mr May had however

brought that person in even before he had come to the view that the claimant had breached contract. He explained that it was a busy time of the year when another manager was necessary. That manager worked for 16 days during the month of May, presumably from after 9 May.

62. The point is that the respondent had taken on extra staff from M8 because this was deemed necessary to cover the sick leave absence of the claimant. Mr May was quite clear that there would be no question of deducting the sums had the claimant been on sick leave. He decided that her absence on sick leave was not genuine, and he took the view that he could therefore deduct the sums which he had incurred. But he had already incurred the costs and would have incurred them anyway, because the claimant was absent on sick leave, and he needed to cover her role.

63. I could not see then that these costs could be categorised as “losses” or “additional costs” as a consequence of any breach of contract. The contract stresses that such deductions will only be made “in order to compensate it for any loss it has suffered” and continues “it is not intended to be used to impose a penalty on an employee who has not given the required notice”.

64. Even if I had accepted Mr Muirhead’s submission that the claimant had not give the required notice, it seemed to me then that this could only be categorised as a penalty for, as they saw it, not in fact giving the required notice and not being truthful about the start date of her new employment, since the costs which they incurred, and claim to be “losses” would have been incurred anyway.

65. Regarding the claim by Mr Muirhead that if the situation had been other than that stated in the ET1 he would have brought along other witnesses, I noted however the respondent would only have known this after September 28 in any event, and did not raise the matter with the claimant. Further I noted that despite what is stated in the notice clause, the claimant was not advised how the deduction had been calculated.

66. I therefore conclude that the deduction of £912.89 was an unlawful deduction which was not permitted in terms of the contract and therefore should be repaid by the respondent.

Sick pay

67. Some reference was made by both parties to sick pay, but I note that in the pay slip of 15 June, the claimant was paid sick pay, which I take to be in line with the requirements of her contact, and in light of the fit note which she lodged. Therefore there could be no question of the claimant being required to repay that, if that is what Mr Muirhead was arguing, and in any event no counterclaim was lodged by the respondent.

Conclusion

68. I conclude therefore that the respondent has made unlawful deductions of £18.10, £16.83 and £912.80, making a total of £947.82, which the respondent is required to pay to the claimant. It should be noted that sum is gross, so that appropriate tax and national insurance will require to be deducted.

69. The respondent lodged the P45 and although I was not referred to it, it seems to me that it may require to be re-issued to account for the tax and national insurance due on these payments and to correct the date of the claimant's final employment.

Employment Judge: Muriel Robison
Date of Judgment: 23 December 2019
Entered in register: 09 January 2020
and copied to parties