



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case Number: 4105490/2020

Hearing held by video on 14 July 2021

Employment Judge M Whit com be

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Miss M Arbuckle

Claimant

Represented by:

Mr G Booth

(ET Representative)

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VG Homes 2019 Limited

Respondent

Represented by:

Ms C Carr

(Solicitor)

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JUDGMENT

The respondent unlawfully deducted the sum of £591.12 from the claimant's wages. The claimant is entitled to be paid that sum by the respondent

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REASONS

Introduction

1. Full oral reasons for this judgment were given at the end of the hearing. These written reasons are provided at the respondent's request.

35 2. The claimant was formerly employed by the respondent as its office manager from 7 October 2019 until 5 July 2020. The respondent is an estate agency

and property development company. Although the claims were originally rather more complex, the sole remaining claim is for unlawful deductions from wages. The alleged deduction was the failure to pay wages due in respect of the final month of the claimant's employment. The value of the claim is agreed at £591.12.

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Legal principles

3. Neither side made any submissions on the law. The legal issue is very simple and derives from section 13(3) of the Employment Rights Act 1996. Was the total amount of wages paid to the claimant less than the total amount of wages *properly payable* to her on the relevant occasion?

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The parties' positions

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4. It is agreed that, when read together, the statements of the claimant's two bank accounts show 8 correct payments of wages in respect of 9 months' employment. This case is about the other month.

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Claimant's case

5. The claimant's case is that she was paid monthly in arrears and that she only received the 8 payments shown in her bank statements in respect of 9 months of employment. The final payment in relation to the month ending on 5 July 2020 was never made and she claims that as an unlawful deduction from wages. She denies receiving any cash payments of wages in addition to those shown on her bank statements or that it was ever agreed that she would be paid in advance.

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Respondent's case

6. The respondent's case is that it made 9 monthly payments of wages. The first payment was made in advance rather than in arrears and it was made in cash. All subsequent transfers of funds to the claimant's bank account were also therefore made in advance rather than in arrears. On that basis the

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respondent contends that the claimant has been paid in advance in respect of every month of her employment and that no sums were due on or after the effective date of termination.

- 5 7. In more detail, the respondent contends that on 10 October 2019 (just after the commencement of the claimant's employment) Georgi Georgiev paid the claimant £1,400 in cash with the full knowledge of Velina Georgieva (the Respondent's director and the daughter of Georgi Georgiev) and that the payment was also witnessed by Silvia Savova (the partner of Georgi
10 Georgiev). That payment was allegedly referable to an advance payment of the claimant's first month's salary (rounded up to £600), a joining bonus of £400 and a further £400 for the claimant to purchase office attire.
8. The respondent says that there were two main reasons for making the first
15 payment in cash. First, the respondent did not at that time have a business bank account or payroll services set up. Second, the claimant wanted a cash payment so as to avoid any adverse effect on the receipt by her of state benefits. Essentially, the respondent claims to have paid in cash in order to assist the claimant in a potential benefit fraud.
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Key issues

9. The case therefore turns on the following key issues:
- 25 a. whether the claimant was paid in advance rather than in arrears;
b. whether the respondent made an initial cash payment to the claimant, including (but not limited to) her first month's pay in advance.

Evidence

- 30 10. I was provided with a joint file of documents running to 186 pages. At my request, the respondent also obtained the claimant's P60 for 2019-2020 during the hearing, for which I am grateful.
11. The claimant gave evidence and did not call any other witnesses.
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12. The witnesses for the respondent were:

- a. Velina Georgieva (Director);
- b. Georgi Georgiev (a businessman and the father of Velina Georgieva);
- c. Silvia Savova (the partner of Georgi Georgiev).

5 13. All of the witnesses gave evidence on oath or affirmation and were cross-examined. Witness statements were not used and evidence in chief was oral. I intervened to limit evidence in chief where it strayed onto matters which were undisputed or irrelevant. As a matter of impression, all four witnesses appeared credible and cogent. Cross-examination did not reveal any exaggerated, contradictory or evasive answers.

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Findings of fact

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Burden and standard of proof

14. Overall, it is for the claimant to prove that an unlawful deduction was made from her wages. The "evidential burden" of proving the particular facts asserted by a party rests with that party.

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corroborative evidence. I am also entitled to take into account the inherent probabilities of a situation. All of that is relevant to the overall question who, on the balance of probabilities, is more likely to be correct.

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Facts found

16. I have seen a total of 9 wage slips beginning with one dated 5 November 2019 and then the 5th day of each month up to and including 5 July 2020. The claimant accepts that she received some but not all of them. The wage slips were prepared by a third party from whom the respondent obtains payroll services. The respondent informed them of the payments made to the claimant. Each wage slip indicates a gross payment of £591.12 and that no tax was deducted. The payment dates on the payslips suggest payments in arrears rather than in advance.

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17. The claimant's bank statements indicate payments by the respondent on the following dates:

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- a. 6/11/19 £591.12 (the claimant says that this was the first payment of any sort made to her)
 - b. 6/12/19 £600.00
 - c. 6/1/20 £591.12
 - d. 7/2/20 £738.90
 - e. 23/3/20 £591.12

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 - f. 14/4/20 £591.12
 - g. 18/5/20 £591.12
 - h. 17/6/20 £591.12.

18. The P60 for the tax year 2019-2020 does not cover the whole of the period of the claimant's employment. It indicates payments totalling £3,546.72 (which would be consistent with 6 payments of £591.12) without deduction of any tax. Both sides agree that the P60 does not reflect the cash payment of £1,400 allegedly made in October 2019, nor does it reflect an "ex-gratia" Christmas bonus of £1,000 which the respondent claims to have made but

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which the claimant disputes receiving. It is worth noting the declaration at the bottom right of the P60. The employer declares that it shows total pay for Income Tax purposes, including bonuses. The respondent's case before the Tribunal is therefore inconsistent with its declaration on the P60.

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19. It was accepted on behalf of the respondent that it has not declared all of the taxable payments made to the claimant and that both the P60 and the P45 under-report the claimant's true taxable earnings. The respondent says that was a mistake.

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20. The P45 for the year in which the claimant's employment ended does not shed any further light on the position because it has not been completed correctly. It does not show any earnings information at all for the 2020-2021 tax year, even though both sides agree that payments were made in that tax year.

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21. The respondent recorded cash payments in a handwritten cash book. One entry dated "10/10" says "Melissa wages & clothes £1400". No other aspects of the arrangements for managing cash were explained and there does not appear to have been any requirement for receipts or a system for storing them. I did not hear any evidence to indicate that the cash payments were subject to any form of audit or checking.

22. The written contract of employment is silent as to whether monthly payments of salary are made in advance or in arrears.

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Conclusions on key issues

23. On balance, I prefer the claimant's evidence that there was no initial payment of salary in October 2019, and that the first payment made to her was by bank transfer on 6 November 2019. I also prefer the claimant's evidence that payments were made in arrears rather than in advance. My reasons are as follows.

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24. Corroboration is a point in the respondent's favour. Three different and apparently credible witnesses corroborated its case on payment in advance and two of them corroborated the evidence of the initial cash payment of £1,400 (Velina Georgieva was aware of it but not present). Georgi Georgiev
5 and Silvia Savova both say that they were present when the payment was made and that they counted it together. However, it is important to acknowledge the close family ties between the three individuals concerned as well as their business relationships. The effect of the corroboration is not as powerful as might be the case if any of those witnesses was truly independent of the respondent. On behalf of the claimant Mr Booth suggested collusion. There is no direct evidence of that, but I am open-minded about the possibility.
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25. The respondent also submits that the claimant has changed her case several times, not only by abandoning discrimination claims but also by changing her case and making concessions in relation to the payments of wages made to her. That is true, but it does not cause me to doubt the claimant's general credibility on the facts of this case. The memories of honest people can and do fade and honest people make mistakes. The objective paper trail is something of a mess in this case, with the respondent arguing that its own payslips, P60 and P45 do not reflect the reality of the payments made.
15 Payments of salary were made to two different bank accounts as well as (allegedly) in cash. In those circumstances it is easy to understand why a claimant might be confused and why their case might be adjusted as more evidence emerged. I draw no adverse inferences.
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26. I find it unlikely that the respondent would not have obtained proof of payment when making a very significant cash payment of £1,400 to the claimant. That is a very significant sum amounting to significantly more than 2 months' gross wages and it is inherently improbable that the respondent would pay it without some acknowledgement of receipt by the claimant. The fact that the claimant was a trusted individual who had previously acted as a babysitter for the family does not alter my view. While this factor is by no means determinative, it undermines the respondent's case.
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27. The respondent's case is also undermined by the payslips prepared by payroll professionals on its own instructions. It is likely that they would accurately reflect the respondent's instructions, including as to payment dates and periods. The respondent did not act to correct what it now portrays as systematic errors in the payslips. The payslips are consistent with payment in arrears. While the payslips fail to recognise that wages ever exceeded £591.12 in any particular month, and it is agreed between the parties that sometimes that was the case, the payment dates are inconsistent with payment in advance and inconsistent the alleged initial payment on 10 October 2021. Overall, the payslips assist the claimant and harm the respondent's case.
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28. The P60 also undermines the respondent's case. However the total is made up, it is common ground that it cannot include all of the cash payments which the respondent claims to have made, including the important and disputed initial payment of £1,400. The P60 was prepared on the respondent's instructions by a third party with tax and accounting expertise. The respondent confirmed that the third party was aware of the cash payments.
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- 20 In those circumstances I find that the best explanation for the fact that the P60 omits the significant initial cash payment is that it was never made.
29. I do not find the respondent's rationale for making a cash payment convincing. First, I do not see why the lack of a business bank account or payroll services should necessitate a cash payment. It could equally be by cheque or BACS transfer from an alternative account. Second, I accept the claimant's evidence that she was not in financial difficulties, that she continued to receive some payments from another employer, that she received a significant payment from a third party's inheritance and that she did not at any time seek to involve
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- 30 the respondent in a scheme to mislead the DWP.
30. Finally, it was submitted on behalf of the respondent that the respondent's preparedness to incur legal costs defending a claim for £591.12 somehow enhanced the credibility of its evidence. I reject that argument. The strength

or weakness of a party's case is assessed on the evidence before the Tribunal and a willingness to incur legal costs is just as irrelevant to the merits of a claim or a defence as an inability or an unwillingness to do so.

- 5 31. In my judgment, the points made above in relation to documentary evidence have tipped the scales in the claimant's favour and I think she is the more likely to be giving accurate evidence. If the respondent were correct then I would expect the P60 and the payslips prepared on the respondent's instructions to be correct, but they are not.

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Conclusion

32. For the reasons I set out above, I find that the claimant was paid in arrears rather than in advance, and that no payment in respect of salary was made in cash in October 2019. It follows that the claimant was not paid her final month's salary, and that the respondent has made an unlawful deduction from wages of £591.12.

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Employment Judge: M Whitcombe
Date of Judgment: 14 July 2021
Entered in register: 19 July 2021
and copied to parties

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