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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102291/2020 (V)

Held via Cloud Video Platform (CVP) on 27 January 2022

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Employment Judge Murphy (sitting alone)

15 **Ms C Barr**

**Claimant
In Person**

20 **KMS (Scotland) Ltd**

**Respondent
Represented by
Mr K Murray,
Director of the
Respondent**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The respondent has made an unauthorised deduction from wages
30 contrary to section 13 of the Employment Rights Act 1996 and is ordered
to pay to the claimant the sum of SEVEN HUNDRED AND NINETEEN
POUNDS STERLING AND FIFTY SIX PENCE (**£719.56**) in respect of
unpaid wages in the period from 19 December 2019 to 25 January 2020.
2. The sum awarded in item 1 is expressed gross of tax and national
35 insurance. It is for the respondent to make any deductions lawfully
required to account to HMRC for any tax and national insurance due on
the sums, if applicable.

REASONS

Preliminary Issues

1. The claimant brought a claim for unauthorised deductions from wages in connection with her employment from 19 December 2019 to 25 February 2020 with the respondent, a company which traded as a restaurant in Falkirk called 'Taste' at the material time. Two days before the final hearing was due to take place, on 25 January 2022, the claimant sent to the Tribunal an email attaching several items, indicating that she wished to submit these as evidence for the forthcoming hearing. She copied in the respondent. On 26 January 2022, the claimant sent further attachments which she said she wished to refer to at the hearing.
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2. In the morning of the 27 January 2022, an hour or so before the hearing was due to start, the respondent's Mr Murray wrote to the Tribunal. He advised that, having seen the evidence submitted by the claimant, he would like to propose having the hearing thrown out or cancelled. He said he did not wish to participate further. He alleged, without providing many details, that some of the documents submitted by Ms Barr were "currently under separate criminal investigation" relating to a male member of staff who, he said, was under investigation. The correspondence was referred to me and the Tribunal issued a direction that any case management application the respondent wished to make would be considered at the preliminary stages of the hearing.
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3. Mr Murray attended the CVP hearing on behalf of the respondent and the claimant attended in-person. During the preliminaries I advised I would hear Mr Murray's application but before doing so I sought clarification of the issues in the case and the relevance of the evidence the claimant had sent in. I explained I had not opened or reviewed the multiple attachments to the claimant's emails of 25 and 26 January 2022.
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4. It was clarified by the parties that it was not disputed that the claimant was employed by the respondent between 19 December 2019 and 25 February 2020. Though there was no agreement on the claimant's precise job title, it was not disputed that her rate of pay was £8.21 per hour (the
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national minimum wage rate at the relevant time). It was not disputed that the respondent had paid the claimant a total of £2,000 by way of wages in relation to her period of employment. The claimant maintained that she had worked 395.75 hours across the period of her employment while it was the respondent's position that she had worked only 231 hours across the agreed period of her employment.

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5. Having clarified the factual issue in dispute, I asked the claimant which of the attachments she had sent with her emails of 25 and 26 January 2022 she wished to refer to during the hearing and how she believed they would be relevant to the disputed question of how many hours she worked. The claimant confirmed that, the issue for determination having been focused, she did not wish to rely upon the attachments to her emails of 25 and 26 January 2022. She wished to refer to a spreadsheet she had prepared which she claimed showed her working hours which she had previously sent to the Tribunal and respondent in August 2020. A brief adjournment was provided to allow the document to be re-sent to the Tribunal and Mr Murray.

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6. Given the claimant's confirmation that she did not wish to rely upon the items attached to her emails of 25 and 26 January 2022 to which Mr Murray had taken exception in his correspondence, I asked him if he intended to participate in the hearing and whether he wished to pursue an application. Mr Murray asked for a postponement of the hearing to enable him to take legal advice on some of the items which the claimant had attached to her emails of 25 and 26 January 2022. Any such legal advice he perceived necessary related not to the present wages claim but to other matters. He alleged that there was an ongoing police investigation (in relation, I understood, to a third party) but advised he had no police investigation number. The claimant advised that she had received no contact from the police but would be happy to cooperate with any inquiries.

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7. I was not satisfied based on the information provided by Mr Murray that any active criminal investigation concerning the claimant, or any other

individual was ongoing or that any criminal proceedings concerning any individual would be prejudiced by proceeding to determine the claimant's claim for unauthorized deductions from wages. This claim hinged on the disputed number of hours worked. The items attached to the claimant's emails of 25 and 25 January 2022 from which the respondent's concern arose were not to be admitted into evidence at the hearing. This wages claim has an unfortunate procedural history and has been outstanding for some considerable time. I did not consider that the application was necessitated by the claimant's acts for the purposes of Rule 30A of the Employment Tribunal Rules 2013 or that there were exceptional circumstances warranting a postponement. I did not consider further delay would serve the overriding objective in the Tribunal Rules. The respondent's application was refused.

Findings in Fact

8. Having considered the evidence, I have made the following findings in fact on the balance of probabilities.
9. The claimant was employed by the respondent from 19 December 2019 to 25 February 2020 in the Respondent's restaurant 'Taste' from the date it opened until she resigned. Prior to that, she attended at the venue from time to time to assist Mr Murray, the respondent's director, to prepare for the restaurant opening. The claimant previously worked for the pharmacist next door to the respondent on a full-time basis. She gave up this role at the end of November 2019. She believed, based on conversations with Mr Murray in November, that she had a future involved in the management of the restaurant when it became established. Before beginning her employment with the respondent on 19 December 2019, the claimant also had a job in a local pub. The claimant continued to work some hours for the pub after beginning her employment with the respondent.
10. The claimant and Mr Murray were in a relationship during some part of the period of her employment by the respondent. As well as working at the restaurant, she used to attend socially from time to time.

11. From 19 December 2019, the respondent employed the claimant to undertake waitressing and other duties including opening up and locking up the restaurant, making up rotas and menus and cleaning. The claimant and Mr Murray's understanding was that the claimant would be paid at the national minimum wage rate. At the material time that was £8.21 per hour.
12. The claimant maintained a record of the hours she worked in a diary. The claimant also recorded the hours she worked in the other pub in same diary.
13. In December 2019, the claimant worked 12 shifts on 19, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30 and 31 December 2019. The total number of hours covered by her shifts in December 2019 was 123.75 hours. However, on shifts which lasted 6 hours or longer, the claimant took a break of approximately thirty minutes. There was no agreement between the claimant and the respondent that the claimant would be paid during her breaks. In December 2019, she worked 11 shifts which lasted 6 hours or more so took a total of 5.5 hours in breaks. The total number of working hours (with breaks excluded) for December 2019 was, therefore, 118.25 hours.
14. The claimant received no pay throughout December 2019. The claimant and other staff had agreed with the respondent's Mr Murray that their first pay would be delayed into January as the respondent was a new business with early cash flow challenges.
15. During January 2020, the claimant worked shifts for the respondent on 2, 3, 4, 6, 7, 8, 9 and 10 January. On 10 January she worked a double shift. She also worked shifts on 11, 12, 17, 18, 22 and 25 January 2020. She did not work a shift on 16 January 2020 (as indicated on the Excel spreadsheet produced). The total number of hours covered by her shifts in January 2020 was 120. As in December, on shifts when she worked 6 hours or more, she took a 30-minute break. In January 2020 she worked 10 shifts which lasted 6 hours or more so took a total of 5 hours in breaks.

The total number of working hours (with breaks excluded) for January 2020 was, therefore, 115 hours.

16. During February 2020, the claimant worked shifts for the respondent on 1, 9, 12, 13, 14, 15, 18, 19, 20, 21, 22 and 24. She did not work shifts on 3, 4, 6 or 8 February 2020 (as indicated on the Excel spreadsheet she produced). The total number of hours covered by her shifts in February 2020 was 103.5 hours. As in previous months, on shifts when she worked 6 hours or more, she took a 30-minute break. In February 2020 she worked 11 shifts which lasted 6 hours or more so took a total of 5.5 hours in breaks. The total number of working hours (with breaks excluded) for February 2020 was, therefore, 98 hours.

17. Throughout the period of her employment, the claimant only received one payment from the respondent around 4 February 2020. This payment was in the sum of £1,000. The claimant received no pay slip from the respondent. She is unaware whether any deductions were made in respect of income tax or national insurance contributions.

18. The total number of hours worked by the claimant during her employment with the respondent (excluding breaks) was 331.25 hours (that is 118.25 in December, 115 in January and 98 in February). In addition to the payment of £1,000 made by the respondent on or about 4 February 2020, the respondent made a further payment of £1,000 after the claimant's employment had ended in or about April 2020. Again, the claimant received no pay slip in relation to this payment.

Relevant Law

19. Under the section 13 of the Employment Rights Act 1996 ("ERA"), a worker has the right not to suffer unauthorised deductions from her wages. Under section 23 of ERA, a worker may complain to an employment tribunal that an employer has made a deduction from her wages in contravention of section 13. Where a Tribunal finds such a complaint well founded, it shall make a declaration to that effect and order the employer to pay the amount of the deduction (section 24 ERA).

Observations on the evidence

20. The Claimant gave evidence in her own right. Mr Kyle Murray gave evidence on behalf of the respondent and also led evidence from Stephen Johnston who formerly worked for the respondent as an assistant chef at Taste restaurant.

21. The key dispute related to the hours she worked. Mr Murray's evidence was that she worked for 7 weeks at an average of 33 hours per week across the period of her employment, taking 3 weeks' unpaid leave. The claimant disputed that she took as much as 3 weeks' unpaid leave but accepted that between 18 January and 1 February 2020, she worked far fewer hours because of a requirement to care for an injured pet.

22. Mr Johnson's evidence shed very little light on the disputed factual issue. His recollection of the whole period of his involvement with the restaurant was poor. It had been a difficult time for reasons unrelated to his work. He couldn't recall his own hours or dates of his employment. When asked what he recalled about the claimant's hours, he said that everyone's hours varied and that the claimant's hours were not relevant to him.

23. I found the claimant to be a credible and reliable witness. She gave her evidence in a straightforward and cogent way. She did not give evidence in a self-serving manner. She was forthcoming when asked about breaks she took on longer shifts and was quick to agree that her claim should be adjusted to reflect the time spent on unpaid breaks.

24. She spoke to the spreadsheet which she had prepared in or about July 2020, setting out the dates and hours she had worked. She explained this spreadsheet had been based on entries in diaries she kept at the time where she wrote down the shifts worked for the respondent and for her other employer. I granted an adjournment for the claimant to produce photographs of entries on a sample of dates which I specified. The claimant produced photographs of the requested diary entries in January and February 2020. She explained that she had been unable to locate her 2019 diary. The entries in the spreadsheet generally matched the

produced diary entries with the exception of 5 shifts when there was no corresponding diary entry to the spreadsheet entry. These were on 16 January and 3, 4, 6, and 8 February 2020. The claimant believed she had inferred she worked these shifts not from her contemporaneous diary entries but from a retrospective review of her Google Maps history, carried out at the time she compiled the spreadsheet.

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25. Mr Murray produced no timesheets, payroll records or rotas. He gave evidence that some time sheets had been made but that he did not have access to the premises in which these were stored. His evidence regarding the claimant's working pattern lacked detail. He maintained the claimant had continued working for the pharmacy next door full time between 19th December 2019 and Christmas and could not, therefore, have worked the hours claimed in that period. He gave evidence that he did not have the budget to offer the extensive hours the claimant alleged she worked, particularly since the restaurant was not licensed to sell alcohol until February 2020. Mr Murray also gave evidence that the claimant sometimes visited the restaurant with her mother, her sister, or alone for social rather than work purposes.

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26. I preferred the claimant's evidence which was more specific and was supported by the photographs produced of her diary. The impression was that Mr Murray did not, at the time, keep detailed records of the hours worked by the claimant or others at the restaurant. He was busy with the opening of a new venture. I accepted that, as it was a matter of personal importance for the claimant, she, in contrast, maintained a careful record of her shifts at the time. I have resolved all areas of factual conflict in favour of the claimant's account except as set out in the following paragraph.

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27. With respect to the shifts on the spreadsheet which were missing from those weeks of the claimant's diaries which she produced, I don't find that the claimant has discharged the onus upon her to prove those hours were worked but not paid. I accept that the claimant inferred her attendance at

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the restaurant from her Google history. Nevertheless, the alleged shifts were omitted from the diary which the claimant kept for the very purpose of keeping track of her working hours with her two respective employers, an omission she could not account for. She did not dispute that she visited the restaurant socially from time to time. These social visits may explain the discrepancy. For the avoidance of doubt, there is no finding of dishonesty by the claimant in relation to the shifts claimed on 16 January and 3, 4, 6, and 8 February 2020; I merely find that she has not discharged the onus upon her in relation to this aspect of the claim.

10 **Discussion and Decision**

28. I have found as a matter of fact that the claimant worked a total of 331.25 hours between 19 December 2019 and 25 February 2020. The rate of pay to which she was entitled was the National Minimum Wage which, at the material time, was £8.21 per hour. The total amount of gross pay earned during her employment was, therefore, £2,719.56. It was undisputed that the claimant received £2,000 from the respondent by way of wages across two payments made in February and April 2020. The claimant has, therefore, suffered a deduction from her wages in the gross sum of **£719.56** (i.e. 331.25 hours @ £8.21 per hour LESS £2,000 received) and the respondent is ordered to pay the claimant this sum, making any deductions lawfully required for income tax and Employees' National Insurance contributions.

25 Employment Judge: Lesley Murphy
Date of Judgment: 05 February 2022
Entered in register: 08 February 2022
and copied to parties