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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4112412/2021 (V)

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Held on 25 January 2022 by Cloud Based Video Platform

Employment Judge Neilson

Ms Fenwick

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**Claimant
Represented by
Mr R Fenwick**

Sintilli Studios Limited

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**Respondent
Represented by
Ms C Campbell**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Tribunal declares that the claimant's complaint under Section 23 of the Employment Rights Act 1996 is well-founded and orders the respondent to pay to the claimant the sum of £521.96 less any appropriate tax and national insurance.

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REASONS

1. This was a claim for unlawful deductions from pay brought by the claimant against the respondent. The claim was for a total of £521.96
2. The claimant had been engaged by the respondent as a shop assistant at the respondent's premises in Girvan from April through to May 2021.

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3. The case called or a two hour CVP final hearing on 25 January 2022. The claimant was represented by her father, Mr R Fenwick. The respondent was represented by their director and shareholder, Ms Caroline Campbell.

5 4. Ms Campbell confirmed at the outset that the correct identity of the respondent was Sintilli Studios Limited. This was accepted by the claimant. The Tribunal allowed the amendment of the identity of the respondent to Sintilli Studios Limited.

5. Evidence was taken from both the claimant and Ms Campbell. A number of documents had been lodged with the Tribunal by both parties.

10 **Findings in Fact**

6. The respondent operates a dance studio and shop at premises in Girvan (“the Premises”).

7. Ms Campbell is a director of the respondent and the main shareholder.

15 8. In or about December 2020 Ms Campbell of the respondent contacted the claimant to enquire if she might be interested in working for her at the Premises. Ms Campbell and the Claimant had known each of other for a number of years. Ms Campbell had previously taught the claimant to dance.

20 9. The opening of the Premises were delayed by the covid pandemic. The respondent hoped to open for business on 26 April 2021 (although this was subsequently delayed into the start of May 2021).

25 10. The claimant agreed to come to the premises on 23 April 2021 to assist with painting the Premises. On 23 April 2021 the claimant drove to Ayr to obtain materials for painting and brought them back to the Premises. The claimant assisted with the painting of the Premises.

11. Whilst at the premises on 23 April 2021 the claimant and Ms Campbell discussed a position for the claimant to assist the respondent in working in

the shop at the Premises. Ms Campbell notified the claimant that she would be paid the appropriate national minimum wage rate, £6.56 per hour, and that she would be paid on a monthly basis. Ms Campbell explained that she could not guarantee any set number of hours given the start up nature of the business following the pandemic.

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12. The claimants engagement by the respondent commenced on 23 April 2021.

13. The respondent paid the claimant for hours worked by way of bank transfer to the claimant's bank account with the TSB. The payments were not put through PAYE. All payments for hours worked were put through as bank transfers.

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14. The respondent did not provide the claimant with a written contract or any pay slips.

15. The claimant had no set working hours. She worked as and when agreed with the respondent.

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16. The claimant was told in advance when she was required to attend on any particular day and would be specifically told when she could leave.

17. In June 2021 the claimant worked a total of 71 hours for the respondent.

18. In August 2021 the claimant was instructed by the respondent to work 4 hours a day from 12 noon to 4 p.m.

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19. The claimant ceased working for the respondent on 13 August 2021.

20. The respondent acknowledges that it is due to pay to the claimant £54 in respect of print work carried out to 27 T shirts.

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Submissions

21. The claimant provided a written note setting out the sums claimed. She alleges she is due unpaid wages for the period 23 April to 27 May 2021. The claim is for 6 hours of work on the 23 April 2021. The respondent maintains there is no right to payment as the claimant was not "working" on the 23 April 2021. Her engagement did not start until later. The sum claimed is £39.
22. In respect of the period 1 June to 30 June 2021 the claimant alleges she worked a total of 71 hours. The respondent disputes this and alleges it was 58 hours. The respondent accepts that in respect of these hours (58) it still owes £15.28 but did pay £70 in cash in addition to bank transfers. The difference in hours arises, according to the respondent, from the fact the claimant has charged for hours she stayed on the premises when she was not working. The claimant seeks £166.56.
23. In respect of the period 2 August to 13 August 2021 the Claimant seeks payment for 40 hours in respect of 10 days working 12 noon to 4 p.m.. The respondent alleges that the claimant was only asked to work from 12 noon to 3 p.m.. The claimant seeks £262.40. The respondent accepts it is due to pay £196.80.
24. It was agreed that there is a payment due from the respondent to the claimant of £54 in respect of design work carried out to 27 T shirts at a cost of £2 per T shirt.

The Law

25. Section 23(1)(a) of the Employment Rights Act 1996 ("ERA") provides a "worker" with the right to make a complaint to an Employment Tribunal that an employer "has made a deduction from his wages in contravention of section 13". Section 13 ERA provides a worker with a right not to suffer unauthorised deductions. Specifically, Section 13(3) states "Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency

shall be treated for the purposes of this Part as a deduction made by the employer from the workers' wages on that occasion."

26. Section 24(1)(a) ERA provides "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,.."

27. This remedy is available to an individual engaged as a "worker". It is not reliant upon the claimant being an "employee".

10 Discussion & Decision

28. The first issue is whether or not the claimant is entitled to payment in respect of the six hours that she worked on the 23 April 2021. There was no express agreement that the claimant would be paid for these hours. What was agreed was that the respondent would offer the claimant work as a shop assistant and would pay her at a national minimum wage rate of £6.56. However it is clear that on the day the claimant did undertake activities on behalf of the respondent that were clearly related to the respondents business. She assisted with the decorating of the premises. The claimant was only in attendance on 23 April 2021 as she and Ms Campbell were discussing her engagement to work for the respondent. In these circumstances the Tribunal is satisfied that in fact her engagement to work for the respondent commenced on 23 April 2021 and accordingly she is entitled to be paid for those hours. There was accordingly an unlawful deduction from pay in respect of those 6 hours. A total of £39.

29. In respect of pay for the period of 1 June to 30 June there is a dispute about the agreed hours of work. The claimant alleges that she worked a total of 71 hours. The respondent maintains that it should be 58 hours. A difference of 13 hours. The respondent alleges that the claimant stayed beyond her finishing time on a number of occasions, particularly on 1, 3, 8 and 9 June

2021. It is not disputed that the hours reflect the time the claimant was on the Premises. What is disputed is whether she needed to be there for work purposes and was still performing her duties or merely talking with others after the end of her “shift” (as alleged by the respondent). It is not disputed that there were no formally agreed hours of work. The claimant would be contacted and asked to come in and would then attend until told to leave. There does seem to have been a broad understanding that generally it would be 3 to 4 hours per day when the claimant was working. However there were occasions when it might be longer (as evidenced by the hours set out in the respondents letter to the claimant dated 12 September 2021 – which are not disputed). Ms Campbell very fairly put to the claimant in cross examination the respondent’s position that the hours claimed for each of 1, 3, 8, 9 and 11 June were excessive. In each instance the claimant explained why she attended for the hours that she did and that she only left when told that she could leave. In circumstances where the claimant is young and inexperienced in the world of work it does not seem unreasonable that she should wait to be specifically told when her shift was completed (in the absence of clearly agreed hours of work). It was for the respondent to be clearer about the working hours required. Indeed Ms Campbell admitted in giving her evidence that “I do think there was a lack of clarity about hours”. The Tribunal accordingly finds that as a matter of fact the claimant was “working” for the hours claimed for. The respondent did refer to a cash payment of £70 being paid on the 12 July 2021 to the claimant. However this was denied by the claimant. All other payments to the claimant were made by bank transfer – even for quite small sums of money. In the absence of any other evidence to corroborate the £70 cash payment the Tribunal cannot determine that it was paid. There has accordingly been an unlawful deduction in respect of £166.56.

30. In respect of the period from 2 to 8 August 2021 the claimant claims for 10 days at 4 hours a day. The respondent alleges the agreed hours were 3 hours a day. There was a text message sent by Ms Campbell to the claimant on 30 July 2021 telling the claimant it would be 12 noon to 3 p.m. every day in

August. However this was followed up by a further text message on 2 August 2021 stating that she meant 12 to 4 p.m. every day. Ms Campbell maintained that at a meeting on 3 August 2021 she notified the claimant it would be 12 to 3 p.m. every day. The claimant denied this was raised at the meeting. In the letter dated 12 September 2021 submitted by the respondent to the claimant there is a detailed reference to a meeting on 2 August (and both parties accepted this was an error – it should be 3 August). There were a number of issues discussed at the 3 August meeting – but there is no reference in the note to the 12 noon to 3 p.m. requirement for August. The Tribunal prefers the evidence of the claimant on this point and in light of the specific reference to 12 to 4 p.m. from Ms Campbell on 2 August 2021 accepts that the agreed hours were 40 hours. There has been no payment from the respondent for these hours and the unlawful deduction is accordingly £262.40.

31. Finally in relation to the T shirts. It was not disputed that the claimant had been asked to carry out some design work on the T shirts as part of her engagement with the respondent. A price of £2 a T shirt was agreed. The total due was agreed at £54. This is also an unlawful deduction from pay.

32. In conclusion the Tribunal acknowledges the difficulties that the respondent faced in opening and operating a business in the uncertain times caused by the pandemic. However the Tribunal does find that unlawful deductions from the claimant's pay were made and accordingly so declares and finds that the claimant is entitled to a total payment of £521.96.

33. It has not been necessary for the purposes of these proceedings to determine if the claimant was engaged as an "employee". The Tribunal notes that payments to date have not been put through PAYE. The respondent may

34. wish to consider with her accountant whether or not the payment of the £521.96 should be put through PAYE.

Employment Judge: Stuart Neilson

5 Date of Judgment: 13 February 2022

Entered in register: 15 February 2022

and copied to parties