Case Number: 1309126/2020, 1307573/2020 and 1307572/2020

EMPLOYMENT TRIBUNALS

Claimants: Ms Jusdeep Singh and Ms Sajinder Nagra

Respondent: Essence of Beauty

Heard at: Employment Tribunal **|** HMCTS **|** 13th Floor, Centre City Tower, 5-7 Hill Street, Birmingham, B5 4UU

On: 4 February 2022

Before: Employment Judge Hena (sitting alone)

Representation

Claimant 1: In person

Claimant 2: In person

Respondent: Mr P Maratos - Consultant

RESERVED JUDGMENT

The Tribunal makes the following findings in respect of Ms Singh, claim no 1309126/2020, known as the first claimant:

1. That the respondent did make an unlawful deduction of wages from the first claimant pursuant to s.23(1)(a) of the Employment Rights Act 1996.
2. The Tribunal shall not order the employer (respondent) under s.24 of the ERA 1996 to pay the worker (first claimant) any sum in respect of the deduction in so far as it appears they have already been paid or repaid to the worker (first claimant) pursuant to s.25(3) of the ERA 1996.
3. The respondent is ordered to pay the additional compensation of £680 based on the first claimant's ET1, 40 hours worked at £8.50 pursuant to section 38 of the Employment Act 2002, for failure to provide the claimant with a written statement of employment particulars.
4. That the Tribunal cannot order interest to be paid on wages owed from the date of this decision.

The Tribunal makes the following findings in respect of Ms Nagra, claim no 1307573/2020 (and 1307572/2020), known as the second claimant:

5. That the respondent did make an unlawful deduction of wages from the second claimant pursuant to s.23(1)(a) of the Employment Rights Act 1996.
6. The respondent is ordered to make payment of £2,306.75 gross, deducting the appropriate NI and tax, to the second claimant.
7. The claim for holiday pay succeeds and the respondent is ordered to pay a further £4,986.70 gross, deducting the appropriate NI and tax, to the second claimant.
8. The second claimant was a full-time employee of the respondent from at least March 2020 – 21 August 2020 when she resigned.
9. The respondent is ordered to pay the additional compensation of £680 based on the first claimant's ET1, 40 hours worked at £8.50 pursuant to section 38 of the Employment Act 2002, for failure to provide the claimant with a written statement of employment particulars.
10. The respondent's counterclaim against the second claimant fails because she did not make an application for breach of contract but unlawful deduction of wages.
11. The Respondent must pay the claimant £2,306.75 under section 12(4) Employment Rights Act 1996

REASONS

Preliminary Matters

Notice of Hearing

12. The second claimant confirmed that whilst she received from the Tribunal a link to the CVP proceedings she had not prior to this had notice of the proceedings and the papers for a year.

Second Claimant – 2 Claims

13. The second claimant issues 2 identical claims which she was notified of by the Tribunal. She confirmed in correspondence issues in both are the same and the Tribunal has been using claim reference number 1307573/2020 for her claim, but for the avoidance of doubt they're both identical and both claims have been dealt with.

Payment Made to the First Claimant

14. The first claimant expressed her dissatisfaction that evening before the hearing the respondent had appeared to pay her all the sums owed in relation to the unlawful deduction of wages.
15. The respondent confirmed this to be the case, that the representative came on board at a late stage and payments were made late evening the day before. That the bundle they had prepared was also sent after 16:00 to the Tribunal the day before the hearing.

Brief Adjournment

16. The Tribunal directed a brief adjournment for the following to be undertaken;

    (i) The respondent to send the bundle to all the parties.

    (ii) For the first claimant to consider the payment made to her by the respondent and what issues, if any, remain to be considered by the Tribunal.

Claims and Issues

17. The claims and issues agreed in respect of the first claimant were:

    13.1 Did the respondent unlawfully deduct wages from the first claimant?

13.2 Can a s.38 of the Employment Rights Act be made out when the respondent made payment to the first claimant the day before the hearing?

13.3 Can the first claimant claim interest on the wages owed and any damages?

18. The claims and issues agreed in respect of the second claimant were:

14.1 Was the second claimant a part time worker when she was being paid furlough on a full-time basis?

14.2 Did the respondent make unlawful deductions from the second claimant's wages?

14.3 Does the respondent owe the second claimant holiday pay and if so, how much is owed?

14.4 Can the respondent make a counterclaim against the second claimant for failing to work a notice period before leaving?

14.5 Did the respondent fail in his duty to provide the second claimant wage slips for the periods of March – August 2020?

19. It was agreed that the first claimant would go first with submissions made in relation to her case and then the second claimant would do the same, ending with submissions.

Evidence

20. The first claimant's matter was dealt with first with submissions from both sides at the end of both parties giving evidence. The evidence of the first claimant can be summarised as;
    - She has always been professional and consistent.
    - That she did respond to the Tribunal's request at page 46 of the bundle, and despite what the respondent states, she included him in all correspondence.
    - The respondent has not included her in correspondence with the Tribunal.
    - That she received no communication that the payment was going to be made to her the day before the hearing.
    - That the respondent contradicted himself so many times by saying that agreement had been reached between them and that they had never settled via ACAS. That she rejected settlement prior to the hearing as the respondent kept changing the sum, he was willing to offer her.
    - That it can be seen when she was cross examining the respondent that he is a bully and not letting her finish speaking.
    - That she would like an additional award as this claim goes back more than 2 years and impacts her mentally.

21. The respondent's evidence can be summerised as;
    - That the respondent's position in August was that he would not pay until the Tribunal hearing but that this was because he was not represented, but since has changed and the matter could have been settled.
    - That s.38 cannot stand alone and this is the only reason why this matter did not settle. But if the Tribunal does find can make a s.38 award it should be 2 weeks not 4.
    - That it's felt that the Tribunal, at page 46 of the bundle, may have directed more information as to what was disputed as it was seen that there were problems with the claim and as far as respondent is concerned the first claimant did not respond to the Tribunal.
    - The respondent believes he has given the first claimant an extra 48 hours wages than what she was owed – so he has now gone above and beyond.

22. The second claimant's evidence commenced after concluding the first claimant's matter. The second claimant's evidence can be summerised as follows:

- That she did make a request in 2020 to go part time orally which she then put in writing but she never received a response from the respondent so she carried on working full-time and then lockdown occurred end of March 2020.
- When lockdown restrictions eased in 2020 on average the second claimant worked 17 hours per week. This was because of the COVID pandemic and the respondent began to do weekly rota's and give the hours that he had – not her fault it was only 17 hours p/w, she was never told this was because she was considered part time.
- That, as there was no contract of employment, was never clear how much holiday entitlement that she had. She did not have a contract for the 3 years she worked there.
- She wanted to be clear that she had never received wages for hours she worked March, July and August 2020.
- She feels she did not ruin the respondent's business and never received formal notice of her contact whilst she worked for the respondent.
- That she agrees with the respondent that in March she worked 106.5 hours and in July 49 hours.
- That in addition to not replying to her part-time working request the respondent began to pay her full-time furlough which indicated he did not accept her request and she was still full time.
- That the respondent had enough time to respond in writing to confirm her part-time request was accepted before the lockdown restrictions commenced, he had from 7th - 21st March 2020.
- She was a full-time worker up until 21 August 2020.

23. The respondent's evidence in response to the claim can be summerised as follows;
    - That he, orally agreed the second claimant's request to go part-time and asked that she put it in writing for the record. He did not respond in writing because lockdown happened but also that he did not intend to reply in writing as he had already agreed.
    - That he had made an error with the furlough in failing to tell the accountant that the second claimant was in fact part-time but it was an overpayment that she must pay back.
    - He agreed that he never warned the second claimant as to her professionalism at work or conduct a formal disciplinary, but that she was abusive of the business as always on her phone.
    - The respondent was aware that she had 28 days' leave and in January 2020 asked the staff to sign a document to agree to take that leave which was set out.
    - That the expenses the second respondent claimed had been paid in July 2020 – which the second respondent does not dispute.
    - The second claimant failed to give proper notice putting the respondent at a loss and the only reason she left was that they discovered that they had overpaid her and asked for it back.

- That he ran a very small company built on trust and if a s.38 award is made it should not be 4 weeks but 2. That he has now stopped trading due to the pandemic.

Fact Findings First Claimant

24. The Tribunal found the following in relation to each issue relating to the first claimant;

(a) Did the respondent unlawfully deduct wages from the first claimant?

25. Despite the respondent making payment to the first claimant, without her knowledge, the evening before the hearing, the matter before the Tribunal for determination was a claim for unlawful wages. By the respondent's own admission, she was indeed owed the wages she had been seeking in relation to the hours worked and travel expenses in 2020.

26. The first claimant's claim for unlawful deduction of wages was made up of the following:
    - 112 Hours from 1/03 - 21/03/2020.
    - Furlough pay from 23/03 - 31/03/2020.
    - 48 hours from 15/07-31/07/2020.
    - Expenses in relation to petrol and rail tickets to the Rhyl branch throughout March 2020.

27. The Tribunal finds that the respondent made an unlawful deduction from the first claimant's wages pursuant to s.23 of the Employment Rights Act 1996 and further to this the same act allows the Tribunal to not order the respondent to make payment to the first claimant as a result of that unlawful deduction if it appears they have made payment.

28. The Tribunal does not accept the respondent's position that it cannot make a finding for unlawful deduction of wages if payment of the claimed funds has been paid. It is clear the 1996 Act allows a finding of unlawful deduction and order no payment, if that payment has been made.

(b) *Can a s.38 of the Employment Rights Act be made out when the respondent made payment to the first claimant the day before the hearing?*

29. Compensation under s.38 is available only where 'the employment tribunal finds in favour of the worker'. It will not be awarded where a claimant withdraws his or her claim, the withdrawal in these circumstances represents a favourable outcome for the claimant, but that is not to be equated to a finding in his or her favour. The policy underlying s.38 is unclear and it is therefore not open to an employment tribunal to take a purposive approach to the interpretation of the clear wording of the section.

30. With this in mind, the Tribunal can make an award under s.38 of the same Act as the first claimant did not withdraw her claim at the date of the final hearing. It has been accepted by the respondent that he provided no employment particulars to the first claimant. Where the tribunal finds that the employer breached its duty to provide full and accurate employment particulars, it:

- must award the 'minimum amount' of two weeks' pay (subject to exceptional circumstances which would make an award or increase unjust or inequitable), and
- may, if it considers it just and equitable in the circumstances, award the 'higher amount' of four weeks' pay — s.38(2)-(5).

31. The Tribunal finds that there are no exceptional circumstances to not award the minimum amount for the breach to the claimant. It does not consider it just and equitable that this award be a higher amount of 4 weeks' pay, given the size of the respondent's business.

(c)Can the first claimant claim interest on the wages owed and any damages?

32. The Tribunal cannot award interest on a claim for unlawful deduction for wages as defined by the Employment Tribunals (Interest) Order 1990.

Findings of Fact Second Claimant

(a) Was the second claimant a part time worker when she was being paid furlough on a full-time basis?

33. The Tribunal considered the evidence of the second claimant and respondent carefully and found that the second claimant provided consistent evidence on this point, that she was in fact a full-time worker until 21 August 2020. The Tribunal accepts that the respondent requested a written request for part-time working for him to consider after she spoke to him about her circumstances. But he failed to get back to her confirming this after the 7th March 2020 and the second claimant believed that her request was not successful.

34. The Tribunal finds that the second claimant did not renew her request for part-time working again, because quite simply, the landscape had changed with lockdown and she no longer had the issues she had had when she made the request. This is further evidenced by the fact that the respondent continued to inform his accountant that the second claimant worked full-time until August 2020.

35. Even the updated evidence submitted to the Tribunal as to the second claimant's holiday pay which the respondent assured was very accurate still maintained that the second claimant was a full-time worker. Her holiday entitlement was calculated and set out as a full-time employee of the respondent.

36. For the avoidance of doubt the Tribunal finds that the second claimant was a full-time worker and that there has been no overpayment made to her in respect of furlough that she owes the respondent.

(b) Did the respondent make unlawful deductions from the second claimant's wages?

37. The respondent admits that there were issues with the March 2020 payment to the second claimant due to the pandemic and it was never paid to her. It is also not disputed that until the 7th March 2020, the date the second respondent made a request to work part time, she was a full-time worker.

38. The respondent, however, does not accept an overpayment in respect of the months July and August 2020 as they believe they have in fact overpaid the second claimant in respect of furlough. The Tribunal has determined that this is not the case and the second claimant was a full-time worker

39. The Tribunal finds that the respondent did make unlawful deductions from the second claimant in respect of the hours she worked in July and August 2020. It is found that from 1st – 21st March 2020 the second claimant worked 162.50 hours this is based on the respondent's evidence submitted at page 75 of the bundle as it's shown that she worked 106.5 hours and had 7 days leave (7 x £8.50 = 56 hours). The second claimant calculated it as slightly less at 160 hours and the respondent failed to include the leave and had the figure at 106.5 hours.

40. Both parties agree that the hours worked in July 2020 were 49 hours (as shown on the time sheet at page 76), the respondent sets out that flexible furlough applied during that period. The government guidance on flexible furlough for July 2020 calculates it as follows:

Average working hours from March 2020 = 48 hrs p/w

Divide by days p/w 48/7 = 6.86

Multiply by calendar days in July 2020 6.86 x 31 = 212.57 (213 furlough hours)

Subtract hours worked in July 2020 213 – 49 hrs = 164 furlough hours

Average monthly earnings from February 2020 £1,606.50 (28-day month)

Deduct furlough pay at 80% £1,606.50 - 80% = £1,285.20

Minimum sum employer must pay employee = £1,285.20 x 164 (furlough hours) = 210,772/213 (usual hours worked by employee) = £989.54

July 2020 reduction £989.54/80 x 70 = £865.85 (the max the employer can claim from the government)

41. The guidance is clear that the hours worked must be calculated at the usual contractual rate. At page 84 of the bundle, it is agreed that the furlough sum of a minimum of £989.54 was paid to the second claimant but, the respondent was intended to pay the second claimant hours worked in July 2020 in September 2020 due to cash flow problems.

    Hours worked 49 hrs x £8.50 = £416.50.

42. There is a large disparity in the hours the second claimant said she worked in August 2020, which is 104 hours and the respondent's position is that it was 38.5 hours. Unlike the other months the respondent has failed to provide the second claimant's time sheet to show the hours that she worked. The respondent has included whatsapp messages he sent his employees at page 56 of the bundle which states he gave everyone extra hours as the first claimant was off sick. He did not ask but allocated them according to his business needs for the week of 16th August 2020. It is clear there are rota's the respondent could have included to evidence his claim she worked only 38.5 hours, but he did not. What the evidence does show is that extra hours were worked by all staff and the Tribunal therefore accepts that the second claimant did in fact work 104 hours over 13 days in August.

43. The calculations are as follows:

    1st – 21st March 2020 162.5 hours x £8.50 = £1,381.25

    16th – 31st July 2020 49 hours x £8.50 = £416.50

    1st – 19th August 2020 104 hours x £8.50 = £884

44. It is agreed that the respondent made a payment in respect of the second claimant's expenses for travel to the Wales branch of £82.

    (c) *Does the respondent owe the second claimant holiday pay and if so, how much is owed?*

45. The respondent's position is that as the second claimant did not use her holiday leave that she has now lost them and he does not owe her anything. Whilst it's accepted that in January 2020 the respondent became frustrated with his staff and set out how much leave they had and that it must be used in during that year at page 80 of the bundle. By the same logic the Tribunal finds that prior to this in absence of an employment contract there was no management of leave taken and how much was taken until 2020. But 2020 was disrupted by the pandemic so the leave could not be taken.

46. The Tribunal also relies on the respondent's evidence in relation to the second claimant who stated he issued the document at page 80 of the bundle when he became frustrated over the years that staff would not take leave and would swap days. It is clear that staff prior to January 2020 believed they could do this and carried leave over frequently.

47. Whilst the respondent's position is correct, the Working Time Directive does not entitle a worker to carry leave over, I have considered the CJEU case of *Max-Planck-Gesellschaft v Shimizu* and *Kreuziger v Land Berlin 2018* in which the decision means that, going forward, the prohibition in the Working Time Regulations 1998 on the carryover of the four weeks' EU statutory holiday will be subject to the condition that the employer has exercised all due diligence to ensure the worker could take their leave and knew the consequences of not doing so.

48. The Tribunal finds no evidence prior to the 7 January 2020 that the respondent encouraged the second claimant to take her leave, there was no contract informing her of her leave and when her leave year commenced and no details of the consequence of not taking that leave. The second claimant is, therefore, entitled to carry over her leave and claim for this.

49. The holiday leave calculated by the parties differs but when added up there is only 1 hour difference. I find the second claimant's calculations to be more reliable as the figures for 2020 align with the timesheet in March 2020 and the fact the second claimant was attempting to comply with the January 2020 agreement to use leave. The only exception being that in 2019 the figure of 29 days is reduced to the maximum annual leave for the year of 28 days;

2017 – 14 days x 8 x £7.50 = £840

2018 – 19.5 days x 8 x £7.85 = £1,208.70

2019 – 28 days x 8 x £8.50 = £1,904

2020 – 15.5 x 8x £8.50 = £1,037

(d) Can the respondent make a counterclaim against the second claimant for failing to work a notice period before leaving?

50. The respondent's ET3 response form and his representative expressed the wish to make a counterclaim against the second claimant as she failed to give statutory notice of 2 weeks.

51. The Tribunal finds that the counterclaim cannot be made as the second claimant did not make a breach of contract claim in the first instance. She made an application for unlawful deductions of wages which does not allow an employer to then make a counterclaim for breach of contract.

(e) Did the respondent fail in his duty to provide the second claimant wage slips for the periods of March – August 2020?

52. The tribunal found that the respondent failed to provide the second claimant with her payslips from March – August 2020. He states that he left them in the branch as he did not like posting them in case they got lost in the post. However, there was a lockdown and the second claimant would not have been attending her place of work until at least July 2020. At page 57 of the bundle the second claimant cites no payslips as one of the reasons she resigned from the job and makes a reasonable request for them to be sent to her in the post.

53. The Tribunal makes reference to s.8 of the Employments Rights Act 1996 which requires employers to provide employees with accessible itemised pay statements either before or on the day payment is made to an employee. These payslips need to be accessible, given the pandemic the respondent was obliged to post them to his employees to ensure they had payslips each month. Upon the second claimant giving her notice and making a written request for these payslips they should have certainly been posted to her in a bid to comply with s.8.

54. The Tribunal considers s.12(4) of the same Act which directs that where s.12(3) is satisfied the Tribunal may order an employer to pay a sum that does not exceed the aggregate unnotified deductions they made. The Tribunal considers that the sum should be limited to the unlawful deductions found to have been made in respect of hours worked.

Employment Judge Hena

Date: 8 March 2022