



EMPLOYMENT TRIBUNALS

Claimant: Mrs Bogumila Kowalewska
Respondent: First Recruitment Limited
Heard at: Via Cloud Video Platform (Midlands East Region)
On: 1 March 2022
Before: Employment Judge Sharkey

Representation

Claimant: In person
Respondent: Mr A Mohammed – Director

This has been a remote hearing. The form of remote hearing was V – fully remote via Cloud Video Platform (CVP).

RESERVED JUDGMENT

The judgment of the tribunal is that:

1. The respondent made an unauthorised deduction from wages by failing to pay the claimant all the wages due on 31 May 2021, although this amount due has subsequently been paid, and therefore the respondent is not Ordered to pay any further sum to the Claimant in respect of that part of the claim.
2. The respondent made an unauthorised deduction from wages by failing to pay the claimant all the wages due on 8 June 2021 and is Ordered to pay to the claimant the sum of **£440.00** being the gross sum unlawfully deducted subject to deductions for tax and national insurance.
3. The respondent made an unauthorised deduction from wages by failing to pay the claimant in lieu of accrued but untaken holiday and is Ordered to pay to the claimant the sum of **£484.00** being the gross sum unlawfully deducted subject to deductions for tax and national insurance.

REASONS

BACKGROUND & THE ISSUES

Claims and issues

1. The claimant claimed an unlawful deduction from wages for failure to pay her 150 hours wages due on 31 May 2021; 52 hours wages due on 8 June 2021; and 5.5 days (44 hours) in lieu of accrued but untaken holiday on 8 June 2021. She also claimed interest on the unpaid wages.
2. The respondent clarified that he had paid the claimant's net wages of £1195.26 on 14 September 2021 that were due on 31 May 2021. He provided a copy of the claimant's payslip to support this assertion. The claimant was given an opportunity to check that this sum had been paid and that the correct amount had been paid during an adjournment. She confirmed that she had been paid the correct amount of wages due on 31 May 2021. This therefore dealt with this part of her claim but a declaration is still appropriate and is made above on the basis that the claimant was not paid her wages in full and on time and therefore an unauthorised deduction was still made.
3. The respondent confirmed that the claimant was owed 5.5 days of holiday pay as per this part of her claim which amounted to 44 hours at £11.00 per hour and totalled a gross amount of £484.00. The respondent agreed to pay this amount and therefore this dealt with this part of her claim.
4. In relation to the wages claim for 1 June 2021 to 3 June 2021, the respondent confirmed that the claimant was owed wages for 2 June 2021 and 3 June 2021 which amounted to 16 hours at £11.00 per hour and totalled a gross amount of £176.00. The respondent did not agree that he owed wages for 1 June 2021 as he stated that this was a bank holiday and so this amount is included in her holiday pay. The claimant agreed that the gross amount of £176.00 dealt with her claim for wages from 1 June 2021 to 3 June 2021. The respondent agreed to pay this amount and therefore this dealt with this part of her claim.
5. The remaining area of dispute was 4 days unpaid wages during the claimant's suspension from work period. It was agreed between the parties that this amounted to 24 hours at £11.00 per hour and totalled a gross sum of £264.00.
6. The issues were agreed to be as follows:

Unpaid Wages

- a. Did the respondent make an unauthorised deduction from wages?
 - b. If so, how much was deducted?
7. There was a bundle of documents which included a written witness statement from the claimant. There was no contract of employment filed. The bundle did

not include the respondent's defence at section 6 of the ET3 form and there was no written statement from the respondent.

8. As it stood at the start of the hearing, the respondent was defending the claim but had not provided a defence. Mr Mohammed stated that they had served the defence at the same time as the ET3 on the claimant and the tribunal and thought that it had been received. Mr Mohammed provided an explanation for how the error may have occurred. As we had not received the defence, Mr Mohammed made an application for an extension of time for filing their defence. I adjourned for a short period of time for the respondent to file their defence on the claimant and the tribunal. When we recommenced, the claimant confirmed receipt of the short statement and she said that she did not object to its inclusion as it contained information that she already knew and that she had had sufficient time to consider it during the break. The respondent confirmed that this defence was also his witness statement.
9. A late response accompanied by an Application for an Extension of Time is provided for by Rule 20. The exercise of judicial discretion in consideration of the Application also entails applying the overriding objective and balancing the prejudice to the parties.
10. The purpose of the Default Judgment Provisions in Rule 21 is to provide justice where a respondent wilfully ignores a claim. It is not to punish inefficiency, error, or oversight. There would be significant prejudice to the respondent if the merits of the claim were not tested and she received the full amount of compensation for her claim. The only prejudice to the claimant is that she would not receive compensation without her claim being heard in a Full Tribunal. The balance of prejudice favoured granting the application. It is a proportionate decision and in accordance with the overriding objective.
11. The claimant had a witness present in the same room as her namely her partner. The claimant confirmed that she had not served a witness statement in accordance with the tribunal's Orders for this witness and the respondent had not been put on notice of the witness's attendance at the hearing. The claimant said that his evidence related to ACAS conciliation matters following her claim. She accepted that ACAS discussions were privileged and she concluded that his evidence was not relevant to the matters in issue and therefore she did not wish to make an application.
12. The claim was listed for two hours of hearing time. Due to the length of time taken to deal with the preliminary issues, after the conclusion of evidence and closing submissions, there was insufficient time for me to consider my decision and give an oral Judgment before the end of the day. I therefore notified the parties that I would reserve my decision.

FINDINGS OF FACT

13. I ask the parties to note that I have only made findings of fact where those are required for the proper determination of the issues in this claim. I have therefore not made findings on each and every area where the parties are in dispute with each other where that is not necessary for the proper determination of the complaint before me.

14. The claimant was employed by the respondent between 25 March 2019 and 8 June 2021 as a Team Leader for their client, Uni-electronics.
15. The claimant was paid £11 per hour and normally worked Monday to Saturday.
16. The claimant had a written statement of terms and conditions of employment.
17. The claimant was suspended from work on full pay on 28 May 2021 due to an allegation of gross misconduct.
18. The claimant attended a disciplinary hearing on 8 June 2021 and resigned from her employment and therefore her employment came to an end.
19. The claimant was not paid wages from 3 June 2021 to 8 June 2021 during her suspension period.
20. The claimant provided a witness statement which stated that on 31 August 2021, she was arrested by police on suspicion of theft and burglary. She stated that she was informed by the HR Manager that she was suspended from work and that the company would contact her soon. She stated that the police seized her phone and laptop on that date. She said that therefore she did not have access to her email as she did not remember her password. On 3 June 2021, she stated that she went to the workplace car park to collect her car which had been seized by the police. She said that she met Mr Mohammed there and he collected the company's phone from her. He raised that she had not turned up to her disciplinary hearing. She says that she explained to him that she had not been aware of the hearing and she agreed to attend the hearing next Monday. She states that she received a further date of 8 June 2021 by letter for a disciplinary hearing and therefore she attended this hearing.
21. The respondent in their defence stated that on 1 June 2021, the claimant was sent a suspension letter. They said that on 2 June 2021, she was invited to a disciplinary meeting. They stated that they were unsuccessful in contacting the claimant by phone. They said that they sent a letter to the claimant on 3 June 2021 for the disciplinary meeting on 8 June 2021 and the claimant attended. They stated that when they asked her why she did not turn up to the meeting, she said that she did not have access to her emails or mobile phone. They said however, that the claimant had access to her sim card.
22. The claimant gave evidence, she said that when she came to the workplace car park to collect her car, she did remove her sim card from the company phone before returning the phone to Mr Mohammed. She said that the respondent had not tried to contact her on her number and the sim card was not topped up for her to make contact. She also said that she had not tried to contact her employer as she had been told by the police not to contact them and on 28 May 2021, she was told by her employer's HR Manager not to attend work unless they contact her. She said that she did not remember the password to her email and so did not attend the first disciplinary meeting. She said that she first communicated again with the respondent on 3 June 2021 when she attended the car park to pick up her car and Mr Mohammed was present. She says that she later contacted the respondent by text message

and offered for the disciplinary hearing to be conducted at her home address. She then received a letter in the post for her to attend the disciplinary hearing on 8 June 2021 so she attended.

23. Mr Mohammed gave evidence for the respondent, he said that the claimant delayed her resignation until 8 June 2021 and that she could have made herself contactable.
24. I find that the claimant was suspended on full pay due to her arrest by police and was therefore entitled to be paid during her period of suspension. The respondent did not take me to any contractual or written provision which entitled the respondent to withhold wages in the circumstances described by the respondent.
25. The claimant was consistent when giving evidence and I do not find that she deliberately failed to attend the disciplinary meeting as her electronic devices had been seized from her home address and she had not been able to access her emails. The respondent had also emailed the claimant with the date of the disciplinary meeting with only a day's notice when the respondent knew that she was under police investigation and there was a possibility that she may not have her electronic devices. The respondent said that they had not been successful in contacting her by phone but the respondent did not say whether their call had fully connected with her phone or not and the respondent did not provide any evidence to show that this form of contact was made. The claimant explained that she did have a sim card but that it was not topped up to make contact and she had been informed by the police not to make contact with the respondent as she was under police investigation. When the claimant understood that she had missed the disciplinary meeting on 3 June 2021, she agreed to attend on a subsequent date. A new date of 8 June 2021 was sent to her in the post and she attended on this date. The respondent said that she was not contactable but the dispute is in relation to 3 June 2021 to 8 June 2021 and there is evidence to show that she was in contact with Mr Mohammed from that date and that she subsequently attended the disciplinary when a new date was arranged. In any case, even if she had deliberately failed to attend the disciplinary meeting on 3 June 2021, she was not absent without leave such that pay should be withheld.

LAW

26. Section 13(1) of the Employment Rights Act 1996 (ERA) provides that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract or the worker has previously signified in writing his agreement or consent to the making of the deduction. The definition of wages in section 27 ERA includes holiday pay.
27. Kent County Council v Knowles EAT 0547/11, which stated that the fact that a suspended employee has been arrested, and even charged, does not remove any right to be paid which the employee would otherwise have. In that case, K was arrested while at work but not remanded in custody. He faced serious allegations of fraud, which, if proven, would severely damage the Council's reputation and financial situation, and he was suspended from work as a

result. The EAT held that the Council was contractually liable to pay arrears of salary to K in respect of the suspension period. The EAT distinguished the case of *Burns v Santander UK plc* 2011 IRLR 639, EAT, in which the employee was suspended while remanded in custody pending trial. The EAT implied a contractual term to the effect that the employee was not entitled to his wages during that time because he had conducted himself in such a way that he was deprived of his freedom and therefore of his ability to attend work. K, by contrast, had not been remanded in custody, meaning that (unlike the claimant in *Burns*) he had not acted in such a way as to render it impossible for him to work.

28. *Abbiw v Vue Entertainment Ltd* ET Case No.2702189/11: the claimant, A, was a general manager at one of VE Ltd's cinemas. VE Ltd raised concerns about cleanliness, security and communication with him. He was subsequently given two warnings: first for leaving the cinema early at peak viewing time, and later for poor stock control. A resigned with notice. During his notice period, VE Ltd discovered that £4,000 was missing from the accounts of A's cinema and he was suspended from work on full pay and called to two investigatory meetings. When he attended neither of them, VE Ltd stopped paying him for the remainder of his notice period. The tribunal upheld A's claim for unlawful deduction from wages. While a person who is on suspension and fails to attend a disciplinary meeting is clearly not behaving wisely or appropriately, it was difficult to see that he or she is in some way absent without leave such that pay should be withheld.

CONCLUSIONS

29. Insofar as I have not already done so within my findings of fact above, I deal here with my conclusions in respect of the complaint made by the claimant.
30. In the absence of any contractual or written right to suspend without pay, a worker's wages are properly payable while she is suspended from work. The claimant is therefore entitled to her full pay from 3 June 2021 to 8 June 2021.
31. It was agreed that this amounted to £24 hours at £11.00 per hour which totals a gross sum of £264.00.
32. As above, there is further sum that the respondent must pay. The respondent confirmed that the claimant was owed wages for 2 June 2021 and 3 June 2021 which amounted to 16 hours at £11.00 per hour and totalled a gross amount of £176.00.
33. I therefore conclude that the respondent made an unauthorised deduction from wages by failing to pay the claimant all wages due on 8 June 2021 and is Ordered to pay to the claimant the sum of £440.00 being the gross sum unlawfully deducted. The respondent will be entitled to deduct any tax and national insurance contributions due on this amount before payment to the claimant.
34. The respondent confirmed that the claimant was owed 5.5 days of holiday pay as per this part of her claim which amounted to 44 hours at £11.00 per hour and totalled a gross sum of £484.00.

35. I therefore conclude that the respondent made an unauthorised deduction from wages by failing to pay the claimant in lieu of accrued but untaken holiday and is Ordered to pay to the claimant the sum of £484.00 being the gross sum unlawfully deducted. The respondent will be entitled to deduct any tax and national insurance contributions due on this amount before payment to the claimant.

36. The claimant referred to the respondent not following the ACAS Code of Practice on disciplinary and grievance procedures in her claim but she confirmed at the outset of the hearing that she had not made and is not making a claim for an ACAS uplift so I do not need to make a finding.

37. As the tribunal does not have jurisdiction to award interest on unpaid wages, I do not need to make a finding for this part of the claim.

Employment Judge Sharkey

Date: 22 March 2022

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

Note:

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.