EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss Jessica Engel	**v**	KC Bakery Limited

Heard at: Cambridge Employment Tribunal **On**: 24th February 2022

Before: Employment Judge Conley

Appearances
For the Claimant: Mr Karl Engel (Representative)
For the Respondent: No attendance

RESERVED JUDGMENT

1. The Claimant's claim of unauthorised deduction from wages is well founded. The Respondent made unauthorised deductions from wages by failing to pay the Claimant the full amount of wages due from 6th April 2020 to 28th October 2020; and is ordered to pay to the claimant the sum of £79.56, being the total gross sum deducted.

2. The Claimant's claim for unpaid holiday on termination of employment is well founded, and I order the Respondent to pay the Claimant £240 (Gross) for untaken accrued holiday pay for period 2020/2021.

3. The Respondent was in breach of its duty to the Claimant pursuant to section 1(1) and/or (4) of the Employment Rights Act 1996. The Claimant, having been successful in her claim of unlawful deduction of wages, is awarded compensation. The Respondent is therefore ordered to pay the Claimant an additional four week's pay which is £288, pursuant to section 38 of the Employment Act 2002 in respect of a failure to provide a statement of particulars of employment.

4. It is declared that the respondent has failed to provide the claimant with fully itemised pay statements for the months of May, June, July and August 2021. No financial award is made in respect of the failures.

5. The claimant's pay statements should have contained the following particulars:
a. Gross hourly rate
b. Hours per week
c. Gross weekly pay
d. Net weekly pay

e. A declaration that there were no deductions.

6. The Respondent is therefore ordered to pay compensation to the Claimant in the sum of £607.56 within 14 days of this Judgment.

REASONS

BACKGROUND

1. By a claim form presented to the Employment Tribunals on 9th April 2021, following a period of ACAS early conciliation between 29th January 2021 and 12th March 2021, the Claimant pursues a number of complaints against the Respondent, which can be summarised as follows:

   i) Unauthorised deductions from wages;
   ii) Failure to pay for accrued but untaken annual leave upon determination of employment;
   iii) Failure to provide a written statement of terms and conditions and any subsequent changes to those terms;
   iv) Failure to provide itemised pay statements.

2. The ET1 indicates additional complaints of Unfair Dismissal and Breach of Contract. The Unfair Dismissal claim is no longer the subject of this claim as the Claimant plainly had not worked for the Respondent for the necessary two year period required under the Employment Rights Act 1996, s108 and was dismissed earlier in the proceedings.

3. Upon closer consideration, it is apparent that the matters claimed under the heading of Breach of Contract are, in fact, claims for Unauthorised Deductions from Wages, Failure to Provide a Written Statement of Particulars of Employment and Failure to Provide Itemised Payslips.

4. A bundle provided by the Claimant at page CET03 also sets out various other complaints; however, none of those are matters which the Tribunal has jurisdiction to consider.

5. The Claim was resisted by the Respondent and they presented a Response on 28th May 2021 containing a statement setting out the matters in dispute.

6. However, since filing that Response, the Respondent has subsequently failed to comply with any of the Case Management Orders relating to the exchange of Witness Statements and service of evidence.

7. On the 10th December 2021, Employment Judge Tobin issued a Strike Out Warning under Rule 37 of the Employment Tribunals Rules of Procedure 2013 on the grounds that the Respondent had not complied with the Tribunal's Order dated 8th August 2021, and that the response was not being actively pursued.

8. The Respondent was given the opportunity to object to this proposal by making representations by 24th December 2021. The Respondent claimed that he had not received emails due to the incorrect email address being placed onto the Tribunal's computer system.

9. However I am not satisfied by this explanation as I seems clear to me that the Respondent would have been fully aware of the proceedings for a number of reasons. Firstly, the Claimant contacted the Respondent frequently by email and made repeated requests for compliance with the Case Management Orders, and, in particular, for disclosure of the Respondent's bundle and witness statements. Secondly, the Tribunal did not solely correspond with the Respondent by email. It appears to me from the file that correspondence was also sent to the Respondent by post to both the Respondent's business address and the home address of the Managing Director, Mr Tom Priestley.

10. Nobody from the Respondent attended the hearing, nor was it legally represented. I directed the Clerk to contact Mr Priestley and I was informed that his explanation was, in essence, the same as had been the case in relation to the CMO's - that he had not received the correspondence in a timely way due to the error in relation to the email address. However, he went on to indicate that he felt he had nothing to add to the rebuttal of the claims that he had already provided, and in due course he would consider any Judgment from the Tribunal and take such action as he considered appropriate.

11. However, it was not only the Respondent that failed to comply with the Case Management Orders. The Claimant herself failed to comply by not serving her own Witness Statement. This failure was then compounded by the Claimant's non-attendance at the hearing.

12. Mr Karl Engel, the Claimant's father, appeared as her Representative before me, but the Claimant herself did not appear. Mr Engel explained to me that the Claimant had been extremely anxious to the point of feeling physically unwell about the prospect of appearing before the Tribunal, and didn't feel able to do so. I sympathise with both the Claimant and her father Mr Engel if the proceedings have had this effect upon her and it seemed to me that Mr Engel, as a concerned parent, understandably wanted to spare his daughter unnecessary stress.

13. In accordance with the Overriding Objective, and reminding myself of Rule 47 of the Employment Tribunal Rules, I decided that it would not be appropriate to postpone the hearing. I considered that in light of Mr Engel's explanation as to the Claimant's non-attendance, it did not seem likely to me that she would attend any future hearing if I were to postpone. A postponement would have given her a further opportunity to provide a witness statement, but in my Judgment she had had ample opportunity to provide a witness statement by the date of the hearing.

14. As far as the Respondent was concerned, I formed the view from all of the available information that he had knowingly absented himself from the hearing and that he, too, had indicated to the Clerk that he did not wish to take any further part in the proceedings that day.

15. I considered that I had sufficient material before me, assisted by representations from Mr Engel, to be able to determine the claims in the absence of the parties.

THE EVIDENCE

16. As I have already indicated, unfortunately I was not assisted in the consideration of this matter by receiving the oral or written evidence from either of the parties. The only material that I have in order to consider these claims are the Claim and Response forms, and a bundle prepared by the Claimant, the content of which was not agreed by the Respondent. I have also received oral representations from Mr Engel on behalf of the Claimant, for which I am grateful, but I remind myself that his representations are not evidence.

17. The bundle prepared by the Claimant contains a number items of 'without prejudice' correspondence between the Claimant and ACAS, which ought not to have been included in the bundle as it is, by definition, without prejudice. In view of the fact that the Claimant and her representative are not legally qualified and I prepared to accept that this material was included in error. However, I should state that I have completely disregarded this material in considering my decision.

FINDINGS OF FACT

18. The Claimant commenced employment with the Respondent on the 28th September 2019.

19. The Claimant was not provided with a written Statement of Terms of Employment upon commencement of employment, and did not receive one until 26th November 2020, when the Respondent's Managing Director Tom Priestley sent her a letter with a number of enclosures, which included a copy of what was purported to be her Contract of Employment and a number of wage slips corresponding with the period during which she was furloughed by the Respondent.

20. I say 'purported', because the Contract of Employment that was provided on the 26th November 2020 is obviously a template that was printed out upon request. It contains some obvious errors; in particular, it is dated the 7th August 2020 - this being a date which, according to the Claimant, was 7 days after the Claimant was laid off. It could not have been a copy of a contract with which the Claimant could have been provided at the outset of her employment, as it appears to be a template produced on the 29th March 2020, some 6 months after the Claimant commenced her employment with the Respondent.

21. The Rate of Pay is indicated in the contract as provided on the 26th November 2020 as being £9 per hour. This is a matter that forms a significant part of the Claimant's claim.

22. From the outset of her employment with the Respondent, the Claimant was paid at the rate of £8 per hour. This was never the subject of any challenge or dispute prior to 26th November 2020 when the Claimant was sent her copy of the Contract.

23. I find that the written Contract was erroneous in this respect and that the agreed contracted rate of pay was indeed £8. I do not accept that the Claimant would have been oblivious to the fact that she was being underpaid in this way throughout the course of her employment, and I find that it was the understanding and intention of both parties that the rate of pay would be the lower of the two figures.

24. Although the Claimant's contract did not guarantee a specified number of hours of employment per week, in fact she worked 9 hours per week at weekends throughout the duration of her employment.

25. From April 2020 onward, until the point at which she was laid off, the Claimant was entitled to be paid 80% of her average weekly earnings under the Coronavirus Job Retention Scheme (the 'furlough' scheme).

26. The contract of employment states the following:

"The holiday year runs from first April to 31st March. Your annual holiday entitlement in any holiday year is 5.6 weeks subject to a maximum of 28 days which is inclusive of recognised public holidays . If you work part time your annual holiday entitlement will be calculated and applied on a pro rata basis."

27. On this basis, the Claimant's pro rata holiday entitlement was 50.4 hours per year, which is calculated as being the number of hours worked per week multiplied by 5.6.

28. The Claimant's accrued, but not taken, holiday entitlement for the period 1st April 2020 to 28th October 2020 (30 weeks) is calculated as (50.4/52) x 30 = 29.08 hours.

29. The Contract goes on:

"In the event of termination of your employment, you will be entitled to holiday pay calculated on a pro rata basis in respect of all Annual Holiday already accrued in the current holiday year, but not taken at the date of termination of your employment"

30. The document entitled KC Bakery Ltd Employee Handbook sets out the Respondent's company policy in relation to amongst other things annual holidays.

31. Under the heading 'Carrying over unused holidays' it says the following:

"You are not normally permitted to carry over accrued annual holiday from one holiday year to the next. Holidays not taken within the holiday year will be lost."

32. The Respondent's Holiday Year was from 1st April to 31st March.

33. There is no evidence of any contemporaneous agreement between the Claimant and Respondent to the effect that the Claimant had been given permission to carry forward unused holiday entitlement from year to year, nor is there any evidence that the Claimant had been prevented from taking any holiday during the holiday year 2019/2020.

34. In the tax year 2019/2020, the Claimant was paid £1900.00.

35. From the start of the tax year in 2020 (from 6th April 2020) until the termination of her employment, the Respondent was paid £1,590.84, including a total of £1,518.84 in 'Furlough' payments, as set out in payslips for the months of May to August. This calculates as being one week of 9 hours work at £8 per hour, followed by 4 equal furlough payments of £379.71.

36. The payslips with which the Claimant was provided during the 'furlough' period were not fully itemised in terms of identifying the number of hours of employment that the payments represented, or the hourly rate of pay. Instead, they were simply itemised as '1 furlough payment'.

37. No deductions for tax or National Insurance were made from the Claimant's wages during the 'furlough' period, as she was not earning enough to clear the threshold for income tax or NI contributions. Accordingly, the payslips did not indicate any deductions.

38. The date from which the Claimant was 'laid off' was in my Judgment the 28th October 2020, when she was first notified of this, and not 29th July 2020 as suggested by the Respondent. I find support for this in the fact that the Claimant continued to receive furlough payments after the 29th July 2020, and clearly had no knowledge of the 'lay off' until she sought information from Mr Priestley; and from the fact that, had the Claimant been laid off in July as suggested, she would have been very substantially overpaid by the Respondent - far more so than the overpayment that was already acknowledged and written off by the Respondent.

39. I am not satisfied that the letter from the Respondent to the Claimant dated 29th July 2021, a copy of which was forwarded to the Claimant upon her request on 28th October 2021, was in fact sent to her on 29th July 2021.

THE LAW AND CONCLUSIONS

Unlawful Deduction from Wages

40. The Protection of Wages provisions in Part II of the ERA 1996 apply to workers as defined at s.230(3) ERA 1996:

'In this Act "worker"…means an individual who has entered into or works under (or, where the employment has ceased, worked under) – (a) a contract of employment, or (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual…'

41. S13 ERA 1996 provides protection of wages for workers:

(1) An employer shall not make a deduction from wages of a worker employed by him unless –
(a) 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
(b) The worker has previously signified in writing his agreement or consent to the making of the deduction.

42. In essence, the Claimant's case is that simply that her salary should have been payable under the furlough scheme from 1st April 2020 to 31st October, and there has been a shortfall for which she should be compensated. However, in my judgment this period should have ended on 28th October 2021, the point at which the Claimant was properly notified of the lay-off. This is significant insofar as the 31st October was a Saturday and as such would have been an additional week's work.

43. As I have already identified from the Claimant's P45, she had been paid the total sum of £1,590.84 for the tax year 2020/21 - that is, from 6th April 2020. Had she been paid at her full contractual rate of pay during that period, she would have earned £2,088. However, under the terms of the furlough scheme, the details of which were set out in the bundle at page EV71, she was would receive 80% of her salary, which calculates as £1,670.40.

44. I therefore find that there was an unlawful deduction from wages in the sum of £79.56.

Holiday Pay

45. Section 13 as set out above also applies in respect of holiday pay, in accordance with section 27 of the ERA 1996.

46. As I have already identified in my Findings of Fact, by the 28th October 2020, the Claimant had accrued 29.08 hours of untaken annual leave.

47. The Claimant has sought to claim holiday pay for the entirety of her holiday entitlement since commencing employment on 28th November 2019 until the date on which she asserts (and I accept) that she was laid off on 28th October 2020. However, as the terms of her contract specify, reflecting the information contained in the Respondent's Employee Handbook, there is no contractual provision that would allow her to carry forward untaken leave from the previous year, nor is there any evidence of an agreement between the parties to allow this to happen.

48. Accordingly I calculate that the sum to be awarded to the Claimant under this head is £240 (gross) - rounding up to 30 hours at £8 per hour.

FAILURE TO PROVIDE A STATEMENT OF PARTICULARS OF EMPLOYMENT

49. Under Section 38 of the Employment Act 2002, the Employment Tribunal must award compensation to an employee where, in connection with proceedings in relation to certain specified matters (including, as in this case, proceedings for unauthorised deductions from wages), the Employment Tribunal finds in favour of the employee, and at the time the proceedings were begun, the employer was in breach of section 1(1) or 4(1) of the Employment Rights Act 1996 by failing to provide a statement of the particulars of employment.

50. In circumstances where, as here, the claim under one of the specified matters is successful and the Employment Tribunal makes an award, the tribunal must increase the award by the minimum amount of two weeks' pay and may increase the award up to the 'higher' amount of four weeks' pay (section 38(3), (4) and (6)).

51. I have already determined that the Claimant was not provided with a statement of particulars upon commencing her employment or at any stage prior to the correspondence that she received from the Respondent on 26th November 2020. Although the Respondent did, eventually, provide a statement of particulars, it is important in my judgment to note that the statement that was provided was defective in a very important aspect in that it misstated the Claimant's hourly rate of pay, and in the absence of evidence from the Respondent as to the accuracy and status of this document (given the issues that I have already identified as regards its authenticity) I cannot be satisfied that it contains other inaccuracies.

52. Accordingly in my Judgment the Respondent continues to be in breach of its duty under s1(1) and (4) of the ERA, and in light of my ruling in relation to the claim under s13, I am required to award the Claimant at least 2 weeks pay and up to 4 weeks pay.

53. I am required to consider the question of whether, in the circumstances of this case taken as a whole, it would be just and equitable to award the higher

amount. I have considered this question with care. I take into account the persistent failure by the Respondent to communicate with the Claimant in respect of numerous matters of importance to her in relation to her conditions of employment. These failures have continued over many months and indeed have continued during the currency of these proceedings.

54. The failure to correctly identify the Claimant's hourly rate of pay has had a particularly marked effect upon the Claimant, and indeed on these proceedings. It has led to a sense of grievance on the part of the Claimant which has in turn led to a number of claims before the Tribunal which could have been avoided entirely had the Respondent complied with its duty accurately and in a timely way. Accordingly I have decided to award the higher amount of 4 weeks pay.

FAILURE TO PROVIDE ITEMISED PAY STATEMENTS

55. Section 8(1) of the Employment Rights Act 1996 gives the right to an employee every time he is paid his wages or salary, to receive a written statement giving the breakdown of the amount paid to him.

56. The right to receive an itemised pay statement is an absolute one and is not conditional upon an employee requesting such a statement (*Coales v. John Wood & Co (Solicitors)* [1986] ICR 71, EAT). As HHJ David Richardson put it in *Ridge v. HM Land Registry* UKEAT/0098/10 (23 September 2014, unreported):

'The purpose of an itemised pay statement is, I think, clear enough. It is to enable an employee receiving a payment of wages or salary to see, at a glance and in broad outline, how that payment is made up. In order to do so, deductions must be identified and explained. Hidden and unexplained deductions are not permitted.'

57. Where the employer fails to give a pay statement or gives one that does not provide the required information, an aggrieved employee can refer the question to an employment tribunal to determine what the statement should have contained (ERA 1996 s 11(1)). However, it is important to note that the right to an itemised pay statement and whether any award of compensation is to be made under these provisions is concerned primarily with whether deductions have been properly notified.

58. In this case, there no deductions made at source for tax, National Insurance or any other purpose, and therefore I consider that this was a technical breach only and not one for which I am minded to make any award. I appreciate that the lack of certainty in relation to the hourly rate of pay, the duration of the furlough period and the date on which the Claimant was laid off could have been avoided had the pay statements set out these matters plainly and transparently. However, I have taken the view that the Claimant has suffered no actual detriment and in any event can and will be adequately compensated under other heads of claim. I also bear in mind the

unprecedented nature of the furlough scheme under which the Respondent was operating at the time.

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Employment Judge **Conley**

Date: 29/3/2022

Sent to the parties on: 8/4/2022

For the Tribunal Office