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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Numbers: 4111962/2021 and 4111963/2021

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Final Hearing held remotely on 20 January 2022 and 15 February 2022

Employment Judge: R Sorrell

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Mrs Irem Sunay

**First Claimant
In Person**

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Miss Ferggy Nathaly Salvador Cruz

**Second Claimant
No Appearance**

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Safran (Edinburgh) Ltd

**Respondent
Represented by:
Mr Levent Celik
**Respondent Owner
and Manager****

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FINAL HEARING

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that:-

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(i) The 2nd claimant's claim is dismissed under Rule 47 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

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(ii) The 1st claimant's claim for unauthorised deductions from wages is well founded and upheld and the respondent is ordered to pay to the 1st claimant the sum of £517.50 (Five Hundred and Seventeen Pounds and Fifty Pence)

E.T. Z4 (WR)

(iii) The 1st claimant's claim for holiday pay is well founded and upheld and the respondent is ordered to pay to the 1st claimant the sum of £208.48 (Two Hundred and Eight Pounds and Forty Eight Pence)

5 (iv) The 1st claimant's claim for notice pay is not well founded and is dismissed.

(v) A declaration is made to the effect that the claim for failure to provide written itemised pay slips is well founded and upheld.

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REASONS

Introduction

1 The 1st claimant lodged claims for unfair dismissal, notice pay, unauthorised deductions from wages (including tips), holiday pay and failure to provide her with itemised pay slips on 22 October 2021.

15 2 The second claimant was referred to in the 1st claimant's ET1 and her claim was conjoined with the 1st claimant's claim on 22 October 2021.

3 The burden of proof is on the claimants and the standard of proof is on the balance of probabilities.

4 This hearing was scheduled to determine the claim. It was a virtual hearing
20 held by way of the Cloud Video Platform.

5 As both parties were party litigants, I explained the purpose and procedure for the hearing and that I was required to adhere to the Overriding Objective under Rule 2 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 of dealing with cases justly and fairly and to
25 ensure that parties were on an equal footing.

6 Parties lodged separate productions in advance of the hearing and further documents were lodged during the course of the hearing. The importance of referring to the relevant documents when giving their evidence was explained to them.

7 The 1st claimant and Mr Celik for the respondent gave oral evidence. The 1st claimant was assisted by an independent Turkish interpreter.

8 At the conclusion of the evidence, the claimant and respondent made oral
submissions. Following the hearing, further written submissions were lodged
5 by both parties. I have read and digested both the oral and written
submissions and referred to them in my findings in fact where relevant.

Preliminary Issues

9 Prior to the hearing, the 1st claimant informed the Tribunal that the 2nd claimant
had advised she had received her payment due from the respondent through
10 ACAS and therefore no longer wished to pursue her claim. In support of that,
the 1st claimant provided an extract from a Whatsapp text message she
received from the 2nd claimant. However, the Tribunal had not received the
settlement agreement from ACAS, nor did it have any contact details on file
for the 2nd claimant to confirm that.

15 10 The 2nd claimant did not appear at the hearing and the clerk attempted to
contact her without success. Mr Celik confirmed that her claim had been
settled through ACAS and provided a scanned copy of the ACAS agreement
No. R180188/21 signed and dated by the 2nd claimant and the respondent on
23 November 2021 and 27 November 2021 respectively.

20 11 In view of the ACAS agreement and the information before me, I decided to
dismiss the 2nd claimant's claim under Rule 47 of the Employment Tribunals
(Constitution and Rules of Procedure) Regulations 2013.

12 At the hearing the 1st claimant withdrew her claim of unfair dismissal as she
did not meet the two year qualifying period of employment with the
25 respondent.

13 It was further explained to the 1st claimant that the Tribunal had no powers to
consider or award compensation for future financial loss and emotional
distress in respect of the claims she pursues.

Findings in Fact

The following facts are found to be proven or admitted;

- 14 The 1st claimant's date of birth is 26 July 1996.
- 15 The respondent business was established in 2018 and is a café bistro.
5 Mr Celik and his wife own and manage the respondent business.
- 16 The 1st claimant commenced employment with the respondent as a waitress on 15 July 2021. This involved waiting and serving on customers.
- 17 The 1st claimant was not provided with a contract or particulars of her employment.
- 10 18 The 1st claimant's hours of employment varied and her pay was irregular. She was paid £9.00 per hour. When she worked 8 hours or more in a day, she was not paid for her 1 hour lunch break. There were no tax or national insurance deductions made from her pay by the respondent.
- 15 19 The respondent kept a weekly time-sheet record of staff hours worked. The hours recorded in the time-sheets for the 1st claimant were also checked by the 1st claimant.
- 20 On or around 1 August 2021 the 1st claimant was paid £350.00 in cash by the respondent. On or around 6 August 2021 the 1st claimant was paid £540.00 in cash by the respondent. On 18 August 2021 the 1st claimant was paid
20 £540.00 via a bank transfer by the respondent. (D1 of the 1st claimant's bundle) The 1st claimant was therefore paid a total of £1430.00 by the respondent during her employment. This equates to 159 hours.
- 21 The 1st claimant worked a total of 216.5 hours during her employment with the respondent which is 57.5 hours more than she was paid for. This is broken
25 down as follows:-
- (i) 15 – 18 July 2021 = 23.25 hours
 - (ii) 19 – 25 July 2021 = 38.5 hours

- (iii) 26 July – 1 August 2021 = 40 hours
- (iv) 2 – 8 August 2021 = 50.5 hours
- (v) 9 – 15 August 2021 = 48 hours
- (vi) 16 – 22 August 2021 = 13.5 hours
- 5 (vii) 25 August 2021 = 2.75 hours

22 The respondent has a cash tip system in place for employees whereby the total amount of weekly tips is collected and divided by the total number of working hours, multiplied by the number of hours worked that week by each employee and then distributed accordingly.

10 23 Between 15-20 August 2021 the 1st claimant tendered her resignation. The 1st claimant's employment with the respondent terminated on 25 August 2021.

24 The 1st claimant did not receive any holiday pay during her employment with the respondent or upon termination of her employment.

15 25 During her employment with the respondent, the 1st claimant did not receive pay slips at or before the time at which payment of her wages was made to her.

Relevant Law

Unauthorised Deductions from Wages

20 26 The law relating to unauthorised deductions from wages is contained in Section 13 of the Employment Rights Act 1996 (the 'ERA').

27 This states: "An employer shall not make a deduction from wages of a worker employed by him unless:-

- 25 (i) The deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract [Section 13(1)(a)]; or
- (ii) The worker has previously signified in writing his agreement or consent to the making of the deduction [Section 13(1)(b)]."

28 Section 13 (2) states: “In this section “relevant provision,” in relation to a worker’s contract, means a provision of the contract comprised –

5 (i) In one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question or, [Section 13(2)(a)]

(ii) In one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion [Section 10 13(2)(b)].”

29 Section 13 (3) states that: “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 wages properly payable by him to the worker on that occasion (after 15 deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker’s wages on that occasion.”

30 Section 23 (1) (a) states that: “A worker may present a complaint that his 20 employer has made a deduction from his wages in contravention of Section 13.” Section 23 (3) states that: “Where such a complaint involves a series of deductions, the references in Section 23 (2) to the deduction or payment are to the last deduction in the series.”

Tips

25 31 Remuneration is contractual monetary payments made by the employer in return for work done. It was held in the case of **Wrottesley v Regent Street Florida Restaurant [1951] 2 K.B.** that the cash tips paid from the tronc to the waiters on a weekly basis did not become the property of the employer and therefore could not be treated as remuneration and taken into account in 30 computing the amounts which the employer paid to them.

32 Section 27(1) of the Employment Rights Act 1996 ('ERA' 1996) defines "wages" as "any sums payable to the worker in connection with his employment". Holiday pay is listed as a specific payment that is to be counted as wages under Section 27(1)(a) of the "ERA" 1996.

5

33 The Working Time Regulations 1998 SI 1998/1833 ('WTR') provide workers with a guaranteed statutory right to paid holiday. Under Regulations 13 and 13A, workers are entitled to 5.6 weeks paid holiday in each leave year beginning on or after 1 April 2009. Where there is no relevant agreement which applies between the worker and employer, the leave year begins on the date on which that employment begins and each subsequent anniversary of that date. Regulation 16(1) provides that a worker is entitled to be paid at the rate of a week's pay in respect of each week of annual leave to which he/she is entitled.

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34 The House of Lords decision in **Revenue and Customs Commissioners v Stringer 2009 ICR 985, HL** establishes that unpaid holiday pay due under Regulations 16 (1) or 14 (2) of the Working Time Regulations can be recovered by means of a claim for unlawful deductions from wages under Section 23 of the "ERA" 1996 in accordance with its time limit provisions.

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35 In accordance with the Employment Rights Regulations 2018 SI 2018/1378 (which amend Sections 221-224 of the 'ERA' 1996), holiday pay is calculated by reference to the 52 weeks of pay prior to the calculation date which is the first date of leave taken. Where there are no such weeks to take into account, it is the amount that fairly represents a week's pay having regard to the factors specified in Section 228 (3) of the 'ERA' 1996 which include any remuneration received by the worker in respect of the employment.

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30 Statutory Notice Periods

36 Section 86 of the Employment Rights Act 1996 sets out minimum periods of notice required to terminate a contract of employment. Where notice is given by an employee who has been continuously employed for one month or more,

the notice required is one week. Where notice is given by an employer, the notice required is one week for employees who have been continuously employed for at least a month, but less than two years and one week for each year of service for employees who have been continuously employed for two years or more up to a maximum of 12 weeks for continuous employment of 12 years or more. If the contract provides for more notice, it is the longer notice period which prevails.

Itemised Pay Slips

37 With effect from 6 April 2019 Sections 8,9,11 and 12 of the 'ERA' 1996 provide all workers with a right to be given a written itemised pay statement at or before the time at which any payment of wages or salary is made and a right to enforce that in the employment tribunal. From the same date employers are required to itemise pay slips to show the number of hours paid for where a worker is paid on the basis of an hourly rate. An itemised pay statement must also contain the gross amount of the wages or salary, the amounts of any variable or fixed deductions from that gross amount and the purposes for which they are made, the net amount of wages or salary payable and where different parts of the net amount are paid in different ways, the amount and method of each part-payment. There is no qualifying period for the right to an itemised pay statement.

38 Under Section 11 (1) of the 'ERA' 1996, a worker who has not been provided with an itemised pay statement has the right to refer the matter to an employment tribunal. A reference must be made within three months of the termination of the employment, or if not reasonably practicable to present the claim within that time, within such further time as the tribunal considers reasonable.

39 If the tribunal finds that a worker has not received a pay statement, or that it does not contain the particulars required, Section 12 (3) of the 'ERA' 1996 provides it must make a declaration to that effect. Section 12 (4) further

provides that where a tribunal finds that any unnotified deductions have been made during the 13 weeks immediately preceding the claim, it may also make a monetary award to the worker.

5 **Issues to be Determined by the Tribunal**

40 The Tribunal identified the following issues require to be determined:-

- (i) Has the respondent made unauthorised deductions from the 1st claimant's wages?
- (ii) If so, how much is the 1st claimant to be awarded?
- 10 (iii) Is the 1st claimant entitled to any holiday pay?
- (iv) If so, how much is the 1st claimant to be awarded?
- (v) Is the 1st claimant entitled to any notice pay?
- (vi) If so, how much is the 1st claimant to be awarded?
- 15 (vii) Did the 1st claimant receive pay slips at or before the time at which payment of her wages was made to her?

Conclusions

41 In reaching my findings in fact I carefully considered all the evidence in the round.

20 42 Overall, I found there were credibility issues in respect of elements of both the 1st claimant's and the respondent's evidence. I have considered these further below in terms of each head of claim.

43 It was also apparent that relations between the 1st claimant and the respondent were unfortunately acrimonious and throughout proceedings it was necessary to keep parties' minds focussed on the relevant issues the
25 Tribunal was tasked to determine.

Unauthorised Deductions from Wages

44 It was the 1st claimant's evidence that the three payments made to her by the respondent were for the hours she worked in July 2021 and her claim for

unpaid wages therefore only related to the hours she worked in August 2021. However, I did not find this was borne out by the evidence in the round.

45 In terms of the payments the 1st claimant received from the respondent, I
found that she was paid a total of £1430.00 in three payments (which equate
5 to 159 hours) during her period of employment with the respondent. In her
evidence the 1st claimant referred to a different total amount of £1,381.50
made in three payments of £603 in cash, £238.50 in cash and £540 by way
of bank transfer which she based upon the two pay envelopes she lodged.
However, I attached little weight to the reliability of these envelopes as
10 although the respondent had noted on the first envelope to the left hand side:
“60 @ bank” and further down “Irem,” “£603.00” and “67 @ £9,” the
respondent had noted on the second envelope: “Alex,” “30.Bank,” “26.5 @ 9,”
“238.50” and “26.5h” and there is no note of the 1st claimant’s name. There
was also no reference on either envelope as to the dates these payments
15 were made or the dates of work the payments related to.

46 Furthermore, the respondent’s evidence was that the three payments were
£350 in cash, £540 in cash and £540 by way of bank transfer which amounted
to £1,430.00 that the 1st claimant did not dispute and even though the 1st
claimant makes reference to the figure of £1381.50 in her written submissions,
20 she then breaks it down into the same three figures given by the respondent
which total £1,430.00.

47 I first considered the number of hours the 1st claimant worked in July 2021.
Whilst there were some issues regarding the reliability of the time-sheets
lodged by the respondent which I have discussed in more detail below, I
25 accepted that the time-sheets lodged for 19-25 July 2021 and 26 July-1
August 2021 were reasonably reliable evidence in support of the respondent’s
evidence that the 1st claimant worked 38.5 hours between 19-25 July 2021
and 40 hours between 26 July-1 August 2021. In doing so, I accepted the
respondent’s evidence that when the 1st claimant worked more than 8 hours
30 in a day, her 1 hour lunch break was unpaid which was then deducted as
indicated in the time-sheets from the total number of hours the 1st claimant

worked each week. I have also noted it was not in dispute that the 1st claimant was involved in checking her hours of work recorded in the time-sheets.

48 In reaching this view, I found there were inconsistencies in the 1st claimant's evidence regarding the accuracy of the time-sheets for this two week period.
5 In her evidence in chief, the 1st claimant said she had no issue with the 38.5 hours recorded in the time-sheet for 19-25 July 2021. However, in cross-examination she said she had worked more hours than that but hadn't calculated them as she was only claiming her wages for August. She then contradicted this by saying she agreed with the July time-sheets, but when I
10 sought further clarification she said she didn't accept the hours on the time-sheet for 19-25 July 2021 as the time-sheet had no date on it. In respect to the 40 hours recorded in the time-sheet for 26 July- 1 August 2021, she said that she had not been paid for the 10 hours she worked on 1 August 2021, but in her oral submissions accepted this had been paid to her.

15 49 I further found that the 1st claimant had commenced her employment on 15 July 2021 and not on 19 July 2021 as asserted by the respondent. This is because I accepted the 1st claimant's evidence as reliable that she undertook a paid trial and training period between 15-18 July 2021, which was confirmed by the respondent in his evidence in chief. I therefore attached little weight to
20 the document produced by the respondent which recorded the 1st claimant's start date as 19 July 2021.

50 However, there was no time-sheet produced for 15-18 July 2021 and the hours of work undertaken by the 1st claimant during this week were in dispute, in that the respondent said the 1st claimant undertook a two hour trial period
25 and 18 hours training, but the 1st claimant said she worked a total of 26.5 hours which was corroborated by the second pay envelope she produced.

51 For the reasons given above I did not find the second pay envelope produced by the 1st claimant to be reliable evidence in support of any payment to her for hours worked. In the absence of any supporting documentary evidence, I
30 concluded that the 1st claimant worked 23.25 hours during that week which is the mean figure between the two conflicting figures given.

52 In light of these findings, I found that the 1st claimant worked a total of 101.75
hours between 15 July 2021 and 1 August 2021 inclusive which was 57.25
hours less than the 159 hours she had been paid for by the respondent. In
making this finding, I accepted the respondent's evidence as plausible that
5 the reference in the documentary record lodged of the payment to the 1st
claimant via bank transfer on 18 August 2021: "Wages July" was a mistake
which should have been noted as wages for August.

53 I then considered the evidence regarding the hours worked by the 1st claimant
in August 2021. In doing so, I have lent little weight to the records lodged by
10 the 1st claimant of uber journeys she claims to have taken during August to
attend work as these do not state where the journey starts or the destination.

54 In respect to 2-8 August 2021, the 1st claimant's hours of work were in dispute
in that the 1st claimant said that she worked 56.5 hours and the respondent
said that she had worked 19.5 hours. This evidence was not assisted by the
15 time-sheet lodged for this week which had two separate entries for the hours
worked by the 1st claimant. Having examined both entries I did not find the
entry for a total of 19.5 hours to be reliable evidence in support of the
respondent's position as apart from the entry for 2 August 2021, there were
only start times recorded and no finishing times. I have therefore accepted the
20 second entry for the 1st claimant's hours as more reliable and that after
deducting the unpaid 1 hour lunch break for each of the 6 days the claimant
worked for more than 8 hours, I am satisfied that the 1st claimant worked 50.5
hours during that week.

55 In terms of the week 9-15 August 2021, the 1st claimant's evidence in chief
25 was that she worked 54 hours over a 7 day period, whereas the respondent's
evidence was that 7 of the 54 hours were for unpaid lunch breaks and
therefore she had worked 47 hours. Having examined the time-sheet for this
week, I found that taking account of the hours worked over the 7 days and the
unpaid 1 hour lunch breaks, the 1st claimant had worked a total of 48 hours
30 as on one of the 7 days she had only worked 2 hours and therefore did not
have a lunchbreak.

56 It was not in dispute that the 1st claimant worked 13.5 hours for the week 16-23 August 2021 which was also corroborated by the time-sheet. Although it was not recorded in the relevant time-sheet, it was accepted by the respondent that the 1st claimant had worked 2.75 hours on 25 August 2021.

5 57 Therefore, I found that during the period 2-25 August 2021, the 1st claimant worked a total of 114.75 hours.

58 Having calculated the total number of hours worked by the 1st claimant during her employment with the respondent to be 216.5 hours (101.75 + 114.75), together with my finding that she has only been paid for 159 hours, I am
10 satisfied that there has been an unauthorised deduction of the 1st claimant's wages of 57.5 hours.

Compensation

59 In deducting the 57.25 hours the 1st claimant was paid by the respondent from the 114.75 hours worked between 2-25 August 2021 that I found the 1st
15 claimant had not worked between 15 July – 1 August 2021, I am satisfied the 1st claimant is due a total of 57.5 hours pay by the respondent which amounts to £517.50. $(114.75 - 57.25 = 57.5 \times 9)$

Tips

60 I found that in view of the respondent tip system in place to distribute cash
20 tips to employees and applying the case of **Wrottesley** ("supra"), that the tips did not form part of the claimant's remuneration as contractual monetary payments made by the respondent in return for work done. I therefore did not consider the issue further of whether the claimant had been paid tips by the respondent during her employment or not.

25 Holiday Pay

61 In his evidence in chief, the respondent accepted he had not paid the claimant any holiday pay she was entitled to during the course of or upon the termination of her employment. Although the respondent produced a pay slip

for accrued net holiday pay of £139.41 between the first and second hearing date, which payment of had not yet been made, I did not find this evidence reliable as it did not reflect the total number of hours worked by the claimant.

Compensation

5 62 I have calculated the 1st claimant's holiday pay entitlement at the rate of a week's pay in respect of each week of annual leave she is entitled to on the basis of the evidence before me.

63 The 1st claimant worked a total of 216.5 hours (101.75 + 114.75) over a 7 week period between 15 July – 25 August 2021 at the rate of £9 per hour =
10 1,948.50 which divided by the 7 week period = £278.35 as her average weekly pay. Therefore, the total amount of holiday pay due to the 1st claimant for the period is 15 July – 25 August 2021 = £208.48 (5.6 weeks divided by 52 weeks = 0.107 x 7 weeks = 0.749 x 278.35)

Notice Pay

15 64 I found that the 1st claimant was not entitled to any notice pay. This is because it was not in dispute that the 1st claimant tendered her resignation between 15-20 August 2021 and that her employment terminated on 25 August 2021.

Failure to Provide Itemised Payslips

65 I found the 1st claimant's evidence credible that she had not received any pay
20 slips before, at the time of, or indeed subsequent to the payment of her wages. In reaching this view, I did not accept the two pay slips produced by the respondent dated 31 July and 31 August 2021 between the first and second hearing dates, for the net amounts of 625.50 and 800.52 respectively, to be reliable corroboration of his evidence that he had sent these by post to the 1st
25 claimant after her employment terminated. This is because the respondent has been on notice of this particular claim since the 1st claimant lodged her ET1 on 22 October 2021, yet he did not respond to it in his ET3 response or produce these pay slips before the first hearing date. Nor did he put it to the

1st claimant in cross examination at the first date of the hearing that she had been sent the pay slips by post after her employment terminated.

66 Furthermore, both pay slips recorded that the 1st claimant was paid these amounts through the 'BACS' payment method (i.e. via bank transfer) which I
5 accepted the 1st claimant had not received as parties had already accepted the respondent gave the 1st claimant three payments for entirely different amounts, two of which were in cash and the third via a bank transfer on 18 August 2021.

67 In view of this finding, I have issued a declaration to the effect that the claimant
10 was not provided with written itemised pay slips at or before the time she was paid as required. On the basis the claimant suffered no unnotified deductions during the 13 weeks immediately preceding her claim, other than her holiday pay entitlement and the unauthorised deductions from her wages, which the respondent is ordered to pay, no further monetary award is made.

15 68 For all these reasons the claims for unauthorised deductions from wages, holiday pay and failure to provide written itemised pay slips are well founded and upheld.

20 Employment Judge: Rosie Sorrell
Date of Judgment: 05 April 2022
Entered in register: 06 April 2022
and copied to parties