EMPLOYMENT TRIBUNALS

Claimant: Miss S Aston

Respondent: Dolce Ltd

Heard at: **Birmingham by CVP** **On:** **22 March 2022**

Before: **Employment Judge Routley**

Representation
Claimant: In person
Respondent: Miss B Breslin (Counsel)

RESERVED JUDGMENT

The judgment of the Tribunal is:

1. The name of the Respondent is changed to Dolce Ltd;

2. The Respondent paid the Claimant at the appropriate contractual rate, and did not make an unauthorised deduction from the Claimant's wages in this respect;

3. The Respondent did make unauthorised deductions from wages in that it failed to pay the Claimant for all overtime worked between 19 April and 31 August 2021; and

4. The Respondent is ordered to pay the Claimant the sum of £926.64, subject to appropriate deductions for tax and National Insurance.

5. The Claimant's claim for failure to pay Statutory Sick Pay is outside of the jurisdiction of the Tribunal and so is dismissed.

REASONS

Introduction

1. I spent some time at the start of the hearing clarifying the Claimant's claims. The Claimant confirmed that her claims were as follows:

a. That she was paid at an incorrect hourly rate from April 2018 until the end of her employment. It is the Claimant's case that her hourly rate should have increased proportionately to the National Minimum Wage;

b. That the Respondent failed to pay her for 8.5 hours overtime per week, from April 2021 until her resignation in August 2021. The Claimant later clarified that the precise start date was the start of the school term after the 2021 Easter holidays.

The hearing

1. The hearing took place by CVP. All parties attended, and there were no significant connection issues.

2. At the start of the hearing, Miss Breslin confirmed that the correct name for the Respondent was Dolce Limited rather than Dolce Catering. The Claimant did not object to the change of name. The Respondent's name is therefore changed to Dolce Limited.

3. I heard evidence from the Claimant on her own behalf. The Claimant also provided a witness statement from Mrs Lewis. Mrs Lewis did not attend to give evidence. I explained to the Claimant that Mrs Lewis's statement would be accepted, but that I could place limited weight on its contents.

4. I heard evidence from Ms Veronika Lorencova on behalf of the Respondent.

5. There was a Tribunal bundle of 131 pages. In addition, the Claimant provided a copy of a text message conversation between the Claimant and Lynn Masters.

Findings of fact

I make the following findings of fact:

1. The Claimant was employed by the Respondent from 5 June 2017 until 31 August 2021.

2. The Claimant alleges that she was engaged as a Lead Catering Assistant. The Respondent alleges that her job title was General Catering Assistant. The Claimant was not provided with a contract of employment which could have provided confirmation of the correct job title. However, it is not necessary for the Tribunal to reach a determination on this point in order to reach a judgment in respect of this issue.

3. When the Claimant's employment began, she was paid at a rate of £8.00 per hour, against a National Minimum Wage rate of £7.50 per hour. The Claimant's hourly rate remained higher than the National Minimum Wage until 1 April 2020, when she began to be paid at the rate of National Minimum Wage. By the time the Claimant's employment terminated, she was paid at £8.91 per hour, a rate equal to the National Minimum Wage.

4. The Claimant claims that her hourly rate should have been maintained at a level in excess of the National Minimum Wage. There was no express

contractual provision to this effect. The Claimant's view was due to an "assumption" that she should be paid more due to the seniority of her role.

5. The Claimant was placed on furlough from June-August 2020, as a result of the Covid-19 pandemic.

6. On 21 October 2020, the Claimant was provided with a letter setting out a proposal to reduce her contractual hours from 22.5 hours per week to 14 hours per week (page 48 of the Bundle).

7. On 29 October 2020, the Claimant confirmed her agreement to this proposal (page 49 of the Bundle).

8. Both the 21 October and 29 October letters stated that "if meal numbers deem it necessary, your core hours will be supplemented by variable hours".

9. The letters do not explain what level of meal numbers would deem it "necessary" for the Claimant to undertake variable hours. The letters do not state that further approval is required for these variable hours.

10. Following the school Easter holidays in 2021, the Claimant was required by Mrs Lewis, a more senior member of staff, to work overtime.

11. The Respondent does not dispute that the Claimant worked overtime during this period. Further, the Respondent does not dispute that Mrs Lewis required the Claimant to work these hours.

12. The Respondent maintains that the Claimant should have spoken to managers higher than Mrs Lewis in order to obtain authorisation for her overtime. The Tribunal has not been provided with any documents setting out the Respondent's authorisation process for overtime.

13. The Claimant stated in evidence that the meal numbers "were there". The Respondent did not provide direct evidence to refute this. The bundle contained an email stating that the meal numbers "remained low" but I was not provided with further detail.

14. The Claimant's line manager also believed that it was necessary for the Claimant to work these additional hours. I therefore find that the meal numbers were such that they made it "necessary" for the Claimant to work additional hours.

15. The hearing bundle contains the Claimant's pay slips for the period in question. However, I was not taken to these pay slips by either party, and have not been provided with any explanation in respect of them. They do not set out the number of hours for which the Claimant was paid. I have therefore proceeded on the basis of the evidence of the parties: that the Claimant was paid on the basis of her contractual hours of 14 per week.

16. The Claimant was offered an increase to her contractual hours to 16 hours per week on 24 May 2021. However, the Claimant did not agree to this increase.

17. The bundle contains signing in sheets for the weeks in question. The Claimant stated in evidence that these accurately reflected her hours. The Respondent did not challenge the accuracy of these signing in sheets. I therefore find that the Claimant worked the following hours during the period in question:

    a. **w/c 19 April: 13.5 hours**
    b. **w/c 26 April: 18 hours (4 hours overtime)**
    c. **w/c 4 May: 13.5 hours**
    d. **w/c 17 May: 22.5 hours (8.5 hours overtime)**
    e. **w/c 24 May: 20.5 hours (6.5 hours overtime)**
    f. **w/c 7 June: 22.5 hours (8.5 hours overtime)**
    g. **w/c 14 June: 22.5 hours (8.5 hours overtime**
    h. **w/c 21 June: 22.5 hours (8.5 hours overtime)**
    i. **w/c 28 June: 22.5 hours (8.5 hours overtime)**

    The Tribunal was not provided with signing in sheets for the weeks after this date. However, I find that the Claimant continued to work 22.5 hours from this date until the termination of her employment (with the exception of w/c 5 July and 12 July when the Claimant was on sick leave). The Claimant gave evidence to this effect which was not challenged by the Respondent. This therefore amounts to a further 6 weeks of 8.5 hours overtime.

18. The Claimant worked a partial week w/c 31 August. On the basis of an average of 8.5 hours overtime, we find that the Claimant will have worked 2.4 hours of overtime on these days.

19. This gives a total of 104 hours of overtime worked. The Claimant's hourly rate during this period was £8.91 per hour.

Judgment

1. Section 13 of the Employment Rights Act 1996 states that it is unlawful for an employer to make a deduction from a worker's wages unless either: a) the deduction is required or authorised by statute, or a provision in the worker's contract or b) the worker has given their prior written consent to the deduction.

2. There is no dispute that the payments made to the Claimant amounted to "wages" for the purposes of the Employment Rights Act 1996.

3. Section 13(3) states that a deduction from wages will have occurred where the total amount paid to the worker is less than the net amount of wages "properly payable" on that occasion.

4. In order to reach a determination of the Claimant's claims, the Tribunal is therefore required to determine what amounts were properly payable under the Claimant's contract of employment (section 13(3) Employment Rights Act 1996).

5. In respect of the Claimant's claim regarding her hourly rate, the Claimant was unable to point to any contractual obligation on the part of the Respondent to pay her at a rate higher than National Minimum Wage. The

Claimant herself stated that this was based on an "assumption". Even if the Claimant was in fact employed as a Lead Catering Assistant, this does not provide a contractual guarantee of a higher rate of pay.

6. The Claimant is understandably aggrieved by having to work at a higher level whilst being paid at the same rate as a more junior member of staff. However, the question of the fairness of the Claimant's pay is not one for the Tribunal to determine. As a matter of contract, there is no evidence that the Claimant was entitled to a higher level of pay.

7. I therefore find that the Claimant was paid at the correct hourly rate for the duration of her employment.

8. In respect of the Claimant's claim regarding her working hours from April to August 2021, I find that the Claimant was entitled to be paid at a rate of £8.91 per hour for all hours worked in excess of 14 hours per week.

9. The Claimant does not dispute that she agreed that her contractual hours would be reduced from 22.5 to 14 hours per week. However, these letters specifically stated that the Claimant could work overtime where "meal numbers deem it necessary".

10. The Respondent has stated that the Claimant's right to work overtime was conditional on meal numbers, and that meal numbers were not at a level to justify the Claimant's overtime.

11. However, the Respondent's letter does not state that the Claimant's right to work overtime was conditional upon her having received prior authorisation. It simply says that overtime may be worked where "meal numbers deem it necessary". I have made a finding of fact that the meal numbers deemed it necessary for the Claimant to work overtime. The Claimant therefore fulfilled the condition set out in the letters of 21 and 29 October 2020. The wages properly payable to the Claimant should therefore include all overtime worked.

12. The Claimant's line manager authorised her overtime. This indicates that the Claimant's manager believed that the meal numbers "deemed it necessary" for the Claimant to work additional hours. The Claimant stated in evidence that the meal numbers remained high. I find that the meal numbers were such that it was necessary for the Claimant to work additional hours. The condition set out in the letters of 21 and 29 October was therefore met and the Claimant was entitled to work variable hours. The Claimant is entitled to be paid for those hours.

Employment Judge Routley
Date 24 March 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR EMPLOYMENT TRIBUNALS