



EMPLOYMENT TRIBUNALS

Claimant: Miss C. Patterson

Respondent: Ms C. Goodburn Baker

Heard at: London South Employment Tribunal (by CVP) **On:** 9 June 2022

Before: Employment Judge T Perry

Representation

Claimant: in person

Respondent: in person

JUDGMENT

1. The Claimant's claim for unfair dismissal is dismissed due to insufficient length of service.
2. The Claimant's claims for holiday pay and notice pay are dismissed on withdrawal.
3. The Claimant's claim for unlawful deduction from wages succeeds and the Respondent is ordered to pay the Claimant the gross sum of £342.10 (being £265.60 in respect of underpaid furlough pay and £76.50 unlawfully deducted on 30 April 2021). The Claimant may be liable to tax on such sums.

REASONS

Claim and issues

1. The Claimant brings claims for unfair dismissal, for notice pay, for holiday pay and other payments.
2. At the start of the hearing, it was confirmed that, the Claimant not having sufficient length of service and this not being a case of automatically unfair dismissal, her claim for unfair dismissal was dismissed.

3. The Claimant also confirmed that her claims for notice pay and holiday pay were not being advanced and could be dismissed on withdrawal.
4. The Claimant's only remaining claim is therefore for unlawful deduction from wages in respect of underpayment of salary. I was referred to the Claimant's document dated 24 February 2022 which sets out the basis of this claim.
5. The Claimant claims an underpayment of furlough pay between 19 December 2020 and 12 April 2021, which she says should have been calculated based on 80% of contractual hours of 30 hours a week as opposed to 80% of an average of the Claimant's hours worked before commencement of furlough.
6. The Claimant also complains that she was simply not paid furlough pay at all for February 2021.
7. Finally, the Claimant claims for alleged deductions in relation to hours worked from 12 April 2021 to 4 June 2021, when she says she was underpaid.

Evidence

8. I had at my disposal a set of documents attached to the ET3 form by the Respondent including a letter of dismissal, a summary of payments made to the Claimant, payslips for payments to the Claimant and an explanation from the Respondent's accountant as to the basis of the calculation of the Claimant's furlough pay. The Respondent during the course of the hearing provided a full set of bank transactions with the Claimant.
9. From the Claimant I had the summary document dated 24 February 2022. I also had 31 screenshots of WhatsApp messages between the parties. This included screen shots of the Claimant's bank statements. The Claimant also provided during the course of the hearing evidence of her own records of hours worked.
10. The documents above were not in a single bundle but copies of the important documents were made available on the day to both parties.
11. Ms Patterson had, on the morning of 9 June 2022, made a late application to postpone the hearing as she had not seen some of the documents provided by the Respondent. Having made the relevant documents available, I was happy that a fair hearing was possible. Accordingly, with the agreement of the parties, the hearing went ahead.
12. The parties gave brief evidence under oath. There were no witness statements.

Findings of fact

13. The start date of the Claimant's employment was in dispute between the parties. There was a week's unpaid trial period before the Claimant started fully as an apprentice. The exact status of this week is not material to the outcome of the claim. Importantly it is agreed on both sides that by 30 October 2020 the Claimant was in paid employment with the Respondent as an apprentice. The Respondent believed the Claimant to be enrolled with The Hair Academy in relation to the college course part of her apprenticeship. I find that the Claimant's first week as a paid employee of the Respondent was the week commencing 12 October 2020. This corresponds with the first payment of salary at the end of the week after on 23 October 2020 (salary being paid one week in arrears).
14. There was no written contract of employment between the Claimant and the Respondent. I accept the Respondent's evidence that this resulted from a breakdown in communication between The Hair Academy, the Claimant and the Respondent regarding the commencement of the Claimant's employment with the Respondent. It is clear from messages I saw from the Respondent to the Claimant that the terms of the Claimant's employment were for 30 hours' work a week. However, it is also clear from the pattern of payslips that the Claimant was paid by the hour worked (initially at an apprenticeship rate of £4.15) rather than being paid a fixed monthly or annual salary.
15. During the Claimant's first week of work commencing 12 October 2020, she was paid £122.43 for 29.5 hours' work.
16. During the Claimant's second week of work starting 19 October 2020, she was paid £22.83 for 5.5 hours' work. The Claimant only worked one day that week before she had to self-isolate due to her partner getting Covid. She did not work the following week commencing 26 October 2020 for this same reason.
17. During the Claimant's fourth week of work starting 2 November 2020, she worked 24 hours and was paid £99.61.
18. The UK went into lockdown between 5 November 2020 and 2 December 2020. The Claimant does not bring a claim for deductions in respect of furlough pay during this period of lockdown.
19. The Claimant returned to work on 2 December 2020 and worked until 18 December 2020. The Claimant accepts that she was paid the correct amounts for hours worked during this period.

20. On 19 December 2020 the UK went back into lockdown. For hairdressers, this lockdown ended on 12 April 2021, when the Claimant returned to work. This was a period of 16 weeks. During this period, payslips shows the intention was for the Claimant to be paid furlough pay at a rate of £66.40 per week. Payments to the Claimant were not on the dates indicated by the payslips provided by the Respondent but rather were made once the government made payment to the Respondent. Payments were made on 3 February 2021, 1 March 2021, and 2 April 2021.
21. Thereafter the Claimant returned to work. The Claimant alleges to have been underpaid by £51.49 between 12 and 30 April 2021 and by £85.19 between 3 May 2021 and 4 June 2021. The Claimant recorded her time during this period both in a note function on her phone and on the Respondent's timesheets. I did not have the timesheets in front of me but it was agreed between the parties that the time entered on the Claimant's time entry was likely to correspond to the timesheets completed by the Claimant at the time but that these had been disputed by the Respondent at the time.
22. A deduction of £76.50 was made to the Claimant's pay on 30 April 2021. This was apparently in relation to a hair treatment the Claimant received at the Respondent's salon.
23. The evidence before me regarding the other alleged deductions during the period from 12 April to 4 June 2021 was unsatisfactory on both sides. The conclusions reached have been done so far as I am able based on the limited information before me.

The Law

24. Section 13(1) of the Employment Rights Act 1996 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. A worker has a right to complain to an Employment Tribunal of an unlawful deduction from wages pursuant to Section 23 of the Employment Rights Act 1996.
25. The UK government furlough scheme (or Coronavirus Job Retention Scheme) in effect after November 2020 was based on HMRC guidance issued on 12 November 2020. This guidance states that a person is a "fixed rate employee" if the person is entitled to be paid an annual salary and is entitled to be paid that salary in equal instalments regardless of the number of hours worked. If a person is not a fixed rate employee their reference salary is set as the average salary for the period from the

commencement of their employment through to the period immediately before a furlough claim was first made.

Conclusions

26. It is notable that the Claimant does not assert that the Respondent was making an unlawful deduction in reducing her salary down from normal levels to the 80% level subsidised by the furlough scheme. Nor does the Claimant suggest that she did not agree to such a reduction in writing even though no such written agreement was in front of me. The Claimant's claim during the December to April lockdown appears to relate solely as to the level of calculation of the furlough pay and whether this should have been calculated based on a 30 hour a week basis.

Rate of pay

27. In light of my finding of fact above that the Claimant was paid an hourly rate rather than being entitled to an annual salary payable in equal amounts regardless of hours worked, I conclude that the Respondent in calculating the amount payable to the Claimant under the furlough scheme based on the average number of hours worked before the Claimant was furloughed in November 2020 did so on the correct basis. The Claimant was not a "fixed rate employee" in the terms used in the guidance.

28. The hours worked by the Claimant during the relevant four weeks before going on to furlough were 29.5, 5.5, 0 and 24 hours. This produced an average of 14.75 hours, which should have been rounded up to 15 hours. At a rate of £4.15 per hour this equated to a total of £62.25 per week. In fact, the Claimant was paid at a rate of £64.40. Therefore, there was no deduction resulting from using this rate of pay.

February furlough pay

29. The period of furlough from 19 December to 12 April was 16 weeks. The payslips and payments from the Respondent for 3 February 2021, 1 March 2021, and 2 April 2021 cover in total 12 of those 16 weeks ($£265.60+£332+£199.20/£66.40=12$). I therefore find that the Respondent unlawfully deducted four weeks' furlough pay. It is not possible to ascertain exactly which weeks during the lockdown the deduction relates to. The Claimant alleges that it relates to February but I find that it could equally relate to the end of the lockdown period. Accordingly, I find that this deduction is in time for the purposes of section 23 Employment Rights Act 1996.

Subsequent deductions

30. A deduction of £76.50 was made to the Claimant's pay on 30 April 2021. This was apparently in relation to a hair treatment the Claimant received at the Respondent's salon. I have seen no evidence that the Claimant agreed to this deduction in writing in advance. I therefore find it unlawful.

31. I am not satisfied based on the extremely limited evidence before me that unlawful deductions were made in relation to the period from 3 May to 4 June 2021. The evidence before me was that the Respondent disputed the hours recorded by the Claimant on the timesheets at the time. In those circumstances, I do not uphold the Claimant's claim in respect of this period.

Employment Judge T Perry

Date 29 June 2022