



EMPLOYMENT TRIBUNALS

Claimant: Miss O'Dwyer

Respondent: The Halo Tech Group Limited

JUDGMENT having been sent to the parties on 12 July 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Background

1. By a claim form dated 4 April 2022 having achieved an ACAS early conciliation certificate number R139647/22/94 against the respondent, the claimant brought complaints of unauthorised deductions from pay Section 13 Employment Rights Act 1996 and failure to provide itemised pay statements under Section 8 Employment Rights Act 1996. She said she was short paid in January and February 2022 and not paid at all in March 2022. Her total claim was for £4986.82

2. The respondent defended the claim by its Response Form dated 1 June 2022 and accepted by the Tribunal on 13 June 2022. The respondent alleged a lawful right to withhold pay for March 2022, contained in its Employee Handbook, which it said was contractual in effect. It said it provided payslips via its software system called Xero which the claimant could have accessed.

3. The matter was listed for a final hearing to take place on 6 July 2022. The parties sent witness statements and bundle of exhibits to the Tribunal in readiness for that hearing. The matter came before me by CVP hearing at 10am on 6 July 2022.

The hearing

4. We agreed a short list of issues as follows:

1. Did the respondent have a contractual right to withhold pay in March 2022?

2. Did the respondent provide itemised pay statements to the claimant in January and February and March 2022 ?
5. It was important that we agreed the issues before hearing evidence because the respondent wanted to argue that there were competence and conduct issues that the Tribunal should take into account to explain the respondent's actions and the basis on which it had withheld pay in March 2022.
6. Following discussion of the list of issues and explanation of the law the respondent accepted that section 13 required an express, prior, written agreement to the making of deductions.
7. The claimant appeared in person and the respondent appeared by its Chief Financial Officer Garry Grant. The claimant gave her evidence in a helpful way. She remained calm and composed and was careful to check accurately the dates and amounts that she relied on. I found her to be a credible witness
8. There were witness statements from three employees, Jessica Bamping and Sarah Worthington and Zara included in the documents. Ms Bamping's statement appeared to be signed but the signature was not legible and Ms Worthington's and Zara's were not signed. The witnesses did not attend. Mr Grant was asked did he want them to attend and he explained that they worked from home and he did not want to call on them. I therefore disregarded the content of those statements.
9. Mr Grant was angry when giving evidence. When challenged in cross examination on key points about there being no signed contract and no payslips he said "If I lose this I will be appealing". Mr Grant made accusations about the claimant's performance and said in closing submission "we've been led a merry dance by this young lady". When the claimant remained composed at this remark he said "you can sit and smarm Emily but I notice you didn't ask for a reference mate". On this and other occasions I had to remind him to be courteous.
10. Guidance and support was provided to both litigants in person in accordance with the Equal Treatment Bench Book.

Facts

11. The claimant worked as in house legal counsel for the respondent from 13 September 2021 until 31 March 2022 on a gross monthly salary of £ 3750.00 being £ 2855 net of lawful deductions for tax, national insurance and NEST pension contributions.
12. The respondent used an accounts software package called Xero. It had functionality to send emails attaching payslips to employees. It required someone to input the email addresses for the employees. The claimant had never heard of this software, not accessed it nor received emails generated by it during her employment.
13. In January 2022 when the claimant received her net pay to her bank account she saw that it was £2777 not the £2855 she had been expecting. She raised this verbally with Mr Grant in a colleague JW's office. Mr Grant said that it was probably to do with tax. The claimant asked for a payslip and Mr Grant replied "I will ping

that over to you right away". The claimant did not receive an email attaching a payslip in January.

14. In February the claimant again received £2777 and no payslip. She again raised this verbally with Mr Grant and was told it would be emailed to her. It was not.

15. In March 2022 the claimant resigned giving notice that her last day of employment would be 31 March 2022. On that day her salary was not paid to her. During March 2022 the claimant had taken annual leave which had not yet accrued to her with a value of £ 707.70

16. Upon receipt of her resignation the respondent asked the claimant to sign a letter acknowledging its acceptance of her resignation and attempting to make payment of her final month's salary conditional on her attending a hearing on its behalf on 25 April 2022. The claimant signed the letter knowing it to be of no legal effect because she found Mr Grant to be a bully and did not want to get into conflict face to face. The respondent did not raise conduct or competence issues at that time. It then withheld payment of the March 2022 pay.

17. Having not been paid her final month's salary on 22 March 2022, On 1 April 2022 the claimant contacted ACAS and subsequently brought this complaint. She did not attend a hearing for the respondent on 25 April 2022.

Relevant Law

Section 13 Employment Rights Act provides:

- (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.**
- (2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—**
 - (a) 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**
 - (b) 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.**
- (3) 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 the wages properly payable by him to the worker on that occasion (after 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.**
- (4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.**

Section 8 Employment Rights Act provides:

- (1) [A worker] has the right to be given by his employer, at or before the time at which any payment of wages or salary is made to him, a written itemised pay statement.**
- (2) The statement shall contain particulars of—**
 - (a) the gross amount of the wages or salary,**
 - (b) the amounts of any variable, and (subject to section 9) any fixed, deductions from that gross amount and the purposes for which they are made,**
 - (c) the net amount of wages or salary payable, . . .**

- (d) where different parts of the net amount are paid in different ways, the amount and method of payment of each part-payment[, and
- (e) where the amount of wages or salary varies by reference to time worked, the total number of hours worked in respect of the variable amount of wages or salary either as—
 - (i) a single aggregate figure, or
 - (ii) separate figures for different types of work or different rates of pay].

18. In Agarwal v Cardiff University and another [2018] EWCA Civ 1434 the Court of Appeal decided that an employment tribunal has power to determine relevant provisions of a contract of employment.

Application of the Law

19. First, I have to decide what were the terms of the contract between the parties. There was a document in the bundle which the respondent said was the written contract of employment. It was undated and unsigned. There was also a Handbook in the bundle, again undated and unsigned. There was no evidence other than the respondent's assertion, which I reject because it is wholly uncorroborated by any dated document, to substantiate an argument that the Handbook formed part of the contract of employment, nor any evidence to show what date the Handbook had been drafted and circulated.

20. The employment contract and Handbook documentation that has been included in the bundle is not contractual in effect. The terms in that documentation are therefore irrelevant. I accept the oral evidence of the claimant that she had entered a contract of employment to be paid at £ 3750 gross per month. This was corroborated by the respondent which did not dispute that this had been the gross monthly pay and the wages properly payable on appointment.

21. I find that the parties entered an oral contract of employment and I interpret its terms to be that the respondent would pay the claimant her salary of £ 3750 gross per month subject to lawful deductions.

Section 13 provides that an employer shall not make deductions (other than the lawful ones for tax and national insurance) unless:

“the worker has previously signified in writing his agreement or consent to the making of the deduction”

22. The respondent has not been able to show be a signed written agreement by which the claimant consented to have a deduction, in effect the whole of her pay, withheld for March 2022. So, in answer to the first question on the list of issues, the respondent did not have a contractual right to withhold pay in March 2022 and that pay is due to the claimant. Her complaint succeeds.

23. Second, the question of the failure to provide itemised pay statements. Mr Grant shifted position when giving evidence on this point. In the Response Form the respondent had said that the pay slips were available online and in evidence he said that they were emailed individually by alternately the Xero system or a member of his staff, his position shifted, to each member of staff each month. He sought to explain his shift in position when it was put to him under cross examination saying it was a typographical error in the Response Form and when

challenged that it wasn't a typographical error but a clear statement he became rude saying to the claimant "I'm embarrassed to have employed you".

24. When asked to agree that he had not provided pay slips he said that he had and could provide proof that they had been sent by the Xero system to the claimant. He was then asked why that proof was not in the bundle of documents so the date and address could be checked and he reluctantly agreed that they were not in the bundle and that he had not provided any proof that Xero generated email payslips to the claimant. That was a significant admission and omission and very persuasive for me. If the system had generated emails and sent them to the claimant, or any other member of staff, why weren't there copies of them in the bundle? That led me to conclude that they had not existed at the time.

25. There were payslips in the bundle that Mr Grant had produced. I find them to be unreliable documents because (i) they are shoddy with a lack of capitalization in the claimant's (ii) they bear the claimant's former address in Ireland before she came to work for the respondent and (iii) there is nothing on the face of them to show when they were produced and (iv) they do not as the respondent alleged, appear to have been generated by Xero software but bear the name of an organization called Datatel Solutions, Preston.

26. The law gives the claimant the right to be given payslips. Section 8 says

[A worker] has the right to be given by his employer, at or before the time at which any payment of wages or salary is made to him, a written itemised pay statement

I accept the claimant's oral evidence that she did not receive itemised pay statements for January, February or March 2022. Her complaint succeeds.

Conclusion

27. I gave oral judgment on 6 July 2022 in the above terms and made the following judgment which was sent to the parties on 12 July 2022:

The respondent is ordered to pay to the claimant £4986.82 made up as follows:

- a. For unauthorised deduction from pay the gross monthly pay due to the claimant in March 2022 was £ 3750 less £ 707.70 for annual leave taken in excess of entitlement at that time being £ 3042.30*
- b. For failure to provide itemised pay statements the claimant is awarded the aggregate of the unnotified deductions made being the difference between the gross pay to which she was entitled £ 3750 and the amount the claimant received of £ 2777.94 being £ 972.06 for each of the months of January and February 2022.*

$$£ 3042.30 + £ 972.26 + £ 972.26 = £ 4986.82$$

Employment Judge Aspinall

Date 14 September 2022

REASONS SENT TO THE PARTIES ON

15 September 2022

FOR THE TRIBUNAL OFFICE