



THE EMPLOYMENT TRIBUNALS

Claimant: Miss D Makarawicz

Respondent: Scarpetta Ltd

Heard at: East London Hearing Centre (Cloud Video Platform)

On: 18 October 2022

Before: Employment Judge Martin

Representation:
Claimant: Mr A Burr (Counsel – Direct Access)
Respondent: Mr U Jasson (Director of Respondent Company)

JUDGMENT

1. The Claimant's complaint of unlawful deduction from wages is well founded and the Claimant is awarded the sum of £1607.24 (net).
2. The Claimant's complaint of breach of the Working Time Regulations (holiday pay) is also well founded and the Claimant is awarded the sum of £624.00.

REASONS

1. The Claimant and Mr U Jasson both gave evidence. The Tribunal was provided with a separate bundle of documents from both parties marked C1 and P1.
2. Section 13(1) of the Employment Rights Act 1996 provides that an employer shall not make a deduction from the wages over a worker unless the deduction is required or authorised or previously agreed in writing.
3. Section 13 (3) of ERA 1996 provides "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, 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. Regulation 14 (1) of the Working Time Regulations 1998 provides what occurs when a worker's employment is terminated during the course of his leave year and on the date on which the termination takes effect, the proportion he has taken of the leave to which he is entitled in the leave year differs from the proportion of the leave year which has expired.

5. Regulation 14(2) WTR 1998 provides that "where the proportion off leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave."

6. The Claimant was employed by the Respondent as a general manager. The Respondent is a restaurant business with a small number of outlets in London. The Claimant commenced employment with the Respondent on 24th August 2021.

7. The Claimant's contract of employment is in the bundle of documents produced by the Respondent - P9. It states it was issued on 10 August 2021. It states that the Claimant commenced employment with the Respondent on 24th August 2021. Under hours of work, it states that her normal hours will be 45 hours, being 9 hours a day 7:00am to 10:00pm. It states that she may be required to work such additional hours as may be necessary to satisfactorily perform her duties.

8. It refers to the right of the Respondent to alter her working hours, but also makes reference to the 48 hour rule under the Working Time Regulations. Under Remuneration, the contract states that overtime is not paid. It states that the employee acknowledges and agrees that they will not receive further remuneration in respect of additional hours required for the proper performance of their role. The Claimant said that there had been a subsequent change to her working hours to 40 hours.

9. The Claimant resigned from her position on 18th October 2021. She was asked to work her notice and also asked to extend that notice period.

10. During the period of her notice, the Claimant said that she had to work substantial additional hours. The Respondent said that she had support from another manager as they had closed that outlet for certain periods. The Claimant said that the other manager was also working at the site where she was based, and that other manager was pregnant and struggling to work the hours she was being asked to work. The Claimant also said that during this period, another manager left, so she was largely having to cover the three sites.

11. The Claimant said in evidence that during that three-week notice, she worked substantial additional hours over and above her normal working hours. She said that for the week commencing 27th November she had worked 38.5 hours over her normal hours; in the week commencing 4th December she had worked 35 additional hours and on 11th December she had worked an additional 9 hours. She was claiming a total of 82.5 hours additional hours at the rate of £26.00 an hour making a total of £2145.00 (gross).

12. The Respondent did not dispute that the Claimant had worked substantial additional hours during this period. The Respondent operated a clocking on system, which Mr Jasson said that the Claimant did not use. He said he therefore did not really

know how many additional hours the Claimant was working. The Claimant said that she was a manager and was not using that clocking on system all the time but that she did use it on occasion. Mr Jasson also said that the Claimant had never raised with him during that period the fact that she was apparently working substantial additional hours. He said that she should have done so in accordance with her contract of employment. The Claimant on the other hand said that she did raise these matters with the Respondent about the number of additional hours which she was working.

13. The Claimant requested to be paid her additional hours by way of overtime. There is correspondence in the form of emails to that effect in the bundles before the Tribunal from both the Claimant and the Respondent.

14. The Respondent paid the Claimant a bonus of £500 in her payslip for November 2021, which he said was to compensate the Claimant in part for those additional hours. That document is at p5 of the Respondent's bundle.

15. The Claimant requested that she be paid all of the additional hours which she had worked. The Respondent suggested in evidence to the Tribunal that there had been some negotiations between the parties to try and resolve the matter. The Claimant said that the negotiations did not resolve the matter. The issue of any negotiations or settlement attempts are not a matter for this Tribunal.

16. The Respondent subsequently issued a final pay slip to the Claimant on 28th January 2022, which he said had been raised following the negotiations to which he referred. That document is not marked "without prejudice" and clearly states that the Claimant would be paid a bonus of £2000 which appeared to relate in the same way as the November payslip to a payment for additional hours. The payslip states that the £200 is gross taxable pay and that net sum of £1607.24 would be paid on 31st of January 2022. Those monies were not paid to the Claimant.

17. The Claimant said that she did not take any holidays during the course of her employment. The Respondent said that the Claimant had taken three days holiday. He relied upon an exchange of text messages, which are in the bundle produced by the Respondent at P10. There is a text from the Claimant identifying three dates; namely Saturday the 14th of August, Saturday the 21st of August and Tuesday the 24th of August which she states that she wishes to have as leave. She was told to put those onto the system. The Claimant says that these were not requests for holiday. She says that this was a text indicating the days that she was not available prior to her commencing employment with the Respondent. She says that these were days where she was not available in the rota, but she was not requesting them as holiday. The Claimant says but that those dates were not put through, so far as she was aware on the system as annual leave.

18. This Tribunal accepts the Claimant's evidence that the texts which she sent were not requests for holiday. Indeed, the Tribunal notes that, at that stage, according to the Claimant's contract of employment and her oral evidence she had not commenced employment with the Respondent prior to those dates. Therefore, it is difficult to see how those days could have been annual leave. The Tribunal finds that the Claimant had accrued three days annual leave for which he was not paid by the

respondent. Accordingly, the Claimant is entitled to 3 days accrued, but untaken holiday pay at a daily rate of £26.00.

19. This Tribunal notes that the Claimant's contract of employment specifically states that she is not entitled to overtime and therefore the Tribunal does not consider that the Claimant is entitled to a payment for overtime on the face of it. However, the Tribunal also notes that the Respondent issued the Claimant with a pay slip on 28th January 2022 but did not pay the sums set out in that pay slip to the Claimant. Therefore, those monies are payable to the Claimant as outstanding wages. The Claimant is therefore entitled to outstanding wages in the sum of £1607.24 net as set out in that pay slip. By issuing the payslip to the Claimant, the Respondent had effectively agreed to pay those monies to the Claimant but failed to do so.

20. For those reasons, the Claimant's complaints of unlawful deduction from wages and holiday pay are both upheld.

Employment Judge Martin

10 November 2022