



EMPLOYMENT TRIBUNALS

Claimant: Ms M Mata

Respondent: Niha Cuts and Beauty Limited

Heard at: London South in person

On: 5 October 2022

Before: Employment Judge Kumar

Representation

Claimant: in person (aided by Ms Mazza, an Italian translator arranged by the tribunal)

Respondent: Mr I Tayab

RESERVED JUDGMENT

1. The claim for unlawful deduction of wages (tax and national insurance) partially succeeds. The respondent is ordered to pay the claimant £346.35 net.
2. The claim for unlawful deduction of wages (overtime) succeeds. The respondent is ordered to pay the claimant 161 hours' overtime, amounting to £1,265 net.
3. The claim for unlawful deduction of wages (sick pay) is dismissed because no such deduction was made.
4. The claim for unlawful deduction of pension is dismissed as no such deduction was made.

REASONS

Introduction

1. By way of an ET1 presented on 18 January 2020 the claimant brought a claim for unlawful deduction from wages and holiday pay. The claim for holiday pay was conceded by the respondent at a hearing that took place before Employment Judge Khalil on 6 October 2020 and on 16 May 2020 Employment Judge Self made an order that the respondent pay to the claimant £731.10 in respect of unpaid holiday pay. The claim in respect of unlawful deduction from wages was resisted by the respondent.

2. The claimant is Ms Manjola Mata. She is a hairdresser. The respondent is Niha Cuts and Beauty Limited. The respondent operates hair salons in London.

Preliminary

3. The claimant's complaint has four aspects i) a deduction of £815.29 from the claimant's December 2019 pay; ii) a deduction from the claimant's October 2019 pay; iii) a deduction related to unpaid overtime; and iv) a deduction in respect of the a repayment made relating to the claimant's pension. The claimant complains that these were unlawful deductions from wages in that the respondent failed to pay the claimant her properly payable wages contrary to section 13 of the Employment Rights Act 1996.
4. The respondent denied that there had been any unlawful deduction from the claimant's wages.
5. The claimant appeared in person with an interpreter. Mr I Tayaab, a director of the respondent, appeared for the respondent. No accommodations were sought.
6. I heard evidence from the claimant and from Mr Tayaab. I read the written statements of the claimant and Mr Tayaab and I was referred to documents contained within a bundle.
7. I identified the list of issues as follows and the parties agreed these were the outstanding issues:
 - 1) Did the respondent make an unauthorised deduction of £815.29 from the claimant's December 2019 pay? The respondent said this was for underpaid tax from August to December 2019.
 - 2) Did the respondent make an unauthorised deduction from the claimant's October 2019 pay. The claimant says she was sick for 3 days. The respondent said this was an unauthorised absence as the claimant provided no or insufficient medical certification.
 - 3) Was the claimant entitled to pay for overtime hours? The claimant says she worked 165 overtime hours between August and December 2019? The respondent said no overtime hours were paid as it had no record of when the claimant clocked in and clocked out to support the claim.
 - 4) Did the respondent make an unauthorised deduction of £3.56 in respect of the claimant's pension? The claimant said that she had opted out of the pension scheme but contributions had been made. She had received repayment from the respondent for these but the repayment was £3.56 short. The respondent said that repayment had been made in full.

Findings of Fact

5. I made findings of fact in relation to those matters relevant to the issues to be determined on the balance of probabilities.

6. The claimant was employed by the respondent from 1 August 2019 until 28 December 2019 as a hairdresser. She was employed to work a 35 hour week over 5 days. Her pay was £1,320 per calendar month. The claimant and the respondent both signed a contract of employment on 1 August 2019. The relevant sections of the contract are reproduced below:

“Working Hours

The working hours are 35 hours per week

Overtime payments

The additional payments will be paid for overtime worked.

Payment Frequency

The Employee will be paid monthly of £1320.00 pcm 5 days a week.

Overpayments

If the Employer makes an overpayment to the Employee to which he is not entitled, or which is more than that to which he is entitled, the Employer has the right to recover the overpayment by deductions from the Employee’s salary or from other payments due to him. Any deductions will normally be made over the same period that the overpayment was made. It is in the Employee’s interests to check his pay slips regularly.

...

Sickness

The Employee is required to report any sickness absence as soon as is practicably possible to his immediate superior.

The Employee must, if requested, provide a medical certificate of sickness signed by a registered medical practitioner.

Sick pay entitlement is full pay for 30 continuous sick-leave days and at the Statutory Sick Pay rate thereafter up to the statutory number of total sick-leave weeks.”

The December 2019 deduction

5. The claimant’s wage slip for December 2019 shows that the sum of £815.29 was deducted from her pay. The respondent’s explanation of this deduction was that the claimant had inadvertently been paid sums that were due to HMRC by way of tax and national insurance contributions and that these sums were accordingly deducted from her final pay.
6. Within the bundle of documents were the claimant’s wage slips and also screenshots produced of payments into her bank account. There was no dispute between the parties as to the sums the claimant had received from the respondent into her bank account.
7. The claimant received her payslip each month by WhatsApp message. The net sums shown as due on the claimant’s payslips, with the exception of the one for December 2019 do not correlate to the sums she received into her bank account.
8. The respondent produced a schedule of pay for the tribunal which confirmed the sums paid and the sums that were payable according to the claimant’s payslips. Within the bundle was also an email from the respondent’s accountant which confirmed that the deduction related to tax and national insurance that had been paid in error to the claimant rather than HMRC. I was not provided with any documentary evidence by the respondent as to

how the sum of £815.29 deducted from the claimant's December pay had been calculated. Mr Tayaab was unable to assist the tribunal with the calculation explaining that this was carried out by the respondent's accountant.

9. Within the bundle two different versions of the claimant's December payslip was produced. The second took into account a credit in respect of repayment of the claimant's pension contribution stated to be £76.50.
10. The claimant's revised payslip shows the year-to-date figures. The claimant received total gross pay of £5860.38. The payslip shows the total tax deducted as £196.20 and the total employee national insurance deducted as £272.74. The gross pay figure and the total tax deducted correspond to the claimant's P45 dated 7 October 2020. A P45 does not show national insurance.
11. The total figure for tax and national insurance was therefore £468.94. The respondent deducted £815.29 marked as an 'overpayment' on the claimant's December 2019 payslip. This leaves a sum of £346.35 deducted from the claimant's wages without explanation.

Sick pay

5. The claimant's case was that she had not been paid for a period of three days from 20 October 2019 to 22 October 2019 when she was off work on account of ill-health.
6. On 20 October 2019 the claimant had notified her manager, Ms Ahmeti, by WhatsApp message that she had hurt her finger, that it was swollen, that she had been to the hospital and she was unable to work. The claimant also sent a photograph to her manager of a document from Croydon Health Services NHS Trust showing that the claimant had visited Accident & Emergency on 19 October 2019. On account of her injury the claimant said she had been unable to work on 20 and 21 October and her manager had also told her not to come to work the following day in order to fully recover. The respondent said that the claimant was required to provide a sick note under her contract to be paid for time off on account of illness. When questioned by Mr Tayaab, the claimant's oral evidence was that she was not asked to provide a sick note by the respondent and that in any event that when she had seen her GP after attending hospital he had told her she would only be provided with medical certificate if she were off for a longer period of time. In his oral evidence initially Mr Tayaab indicated the employment contract required the claimant to produce a doctor's note in order to receive sick pay. He then said that it was self-evident that an A&E document was insufficient and that there needed to be a doctor's note. Subsequently he told the tribunal that there were text messages from him or from the claimant's manager requesting a doctor's note but that they were on his other phone and were not something he had produced for the tribunal. I have no doubt that if such text messages had been sent the respondent he would have produced them and I am satisfied on the balance of probabilities that the claimant was not asked to provide a medical certificate.
7. Mr Tayaab's oral evidence (which ran somewhat contrary to that within his

witness statement) was that he did not know if deductions had been made from the claimant's wages for three days in October. In fact, the claimant's payslip for October showed the same pay due as for September and November, suggesting to me that she was paid for her full hours under her employment contract. I am satisfied that in fact no sum was deducted from the claimant's pay in October 2019 on account of her sickness absence.

Overtime

8. The claimant's case on overtime was that over the course of her employment she had worked 165 hours' overtime which she had not been paid for. She provided to the tribunal a breakdown of her hours. The respondent did not dispute that the claimant had worked overtime but asserted it had no record of the hours that the claimant had worked as she had not provided these. I was taken to the sign in sheets from the salon. Mr Tayaab said that it was the usual practice for employees to note down their hours in order to claim overtime and that this is what the claimant should have done. Having considered the sign in sheets it is apparent that only one of the of the employees, whom Mr Tayaab informed me was a beautician, was in the habit of noting down the hours she worked and the others did not. It was common ground that the beautician was on a different contract to the hairdressers. The claimant said that she had not been told to write in her hours but only to sign the sheet. Mr Tayaab confirmed in evidence that although there were staff handbooks in the salons these did not contain a policy on overtime and the only document referencing overtime was the employment contract.
9. When asked how the staff would know that they needed to write their times on the sign in sheet Mr Tayaab informed me that the sign in sheet is located on the wall in the staff area with a pen attached. I note that the document referred to did not indicate anywhere that times need to be included and that the majority of employees simply signed in the relevant column to indicate the days they had worked. It is of note that Mr Tayaab did not tell the tribunal, in either his written evidence or in his oral evidence, that the claimant had at any time been told she needed to note down her start and end times in order to claim overtime pay.
10. Mr Tayaab explained in his oral evidence that the sign in sheets were sent to the respondent's accountant who had copies of all the employment contracts and arranged for payment of the employees accordingly. It is apparent from the WhatsApp exchanges between the claimant and Mr Tayaab that the claimant was asking for her overtime hours to be paid by the claimant. There were no messages within the bundle from Mr Tayaab responding to the claimant's complaints about not being paid overtime telling her that she was required to write her hours on the sign in sheet. The claimant said that in November 2019 she informed the respondent that she would no longer work overtime and would only work her contracted hours. The WhatsApp messages confirmed this to be the case. It was common ground that Mr Tayaab had asked the claimant to work some overtime hours in December 2019 and had informed the claimant that she would be paid. Mr Tayaab said that the claimant was paid for the overtime hours she worked in December. When asked questions by the claimant Mr Tayaab accepted that when a dispute over the claimant's overtime arose he had said that he would produce evidence of her hours

from the CCTV recordings. I note that there is reference to this in the WhatsApp exchanges that were before the tribunal referencing that Mr Tayaab could produce CCTV recordings and eyewitnesses to the hours the claimant had worked. Mr Tayaab explained that the recordings were only retained for 30 days. I find it somewhat unlikely that when the dispute over overtime first arose that Mr Tayaab would not have checked the CCTV recordings to confirm the claimant's hours in so far as he could at that time or sought to preserve them. I also note that the respondent did not call any witnesses apart from Mr Tayaab.

11. Mr Tayaab referred to a centralised rota within his witness statement. He said in his statement "*We have a centralised Rota and [the claimant] and everyone is aware of their working hours, Manjola's overtime hours were not in the Rota*". When asked about the rota which was not in the bundle, Mr Tayaab confirmed that he meant the salons used the calendar system on a mobile App by the name of Treatwell and that contained the bookings and the identity of the staff member booked. The 'centralised rota' referred to was the calendar within the App. Given that Mr Tayaab was asserting that this calendar would show the claimant's hours and that no overtime hours were shown I would have expected that the Treatwell calendar and to have been produced in evidence by the respondent. They were not.
12. I find that the claimant was not told to write her hours on the sign in sheet and that if she had been told she would have done so in order to be paid overtime. I have no hesitation based on the evidence in finding that the claimant worked overtime in excess of her contracted hours and that she was entitled to be paid for those hours by virtue of her employment contract which did not provide that she wrote her hours on the sign in sheet. Of more difficulty is determining how many hours of overtime the claimant worked. The only evidence before the tribunal of the claimant's overtime hours was provided by the claimant. For the tribunal the claimant produced a detailed breakdown of her hours asserting a total of 165 hours worked as overtime. A separate less detailed breakdown had also been sent to Mr Tayaab by the claimant in their WhatsApp exchange in January 2020 which asserted "*total hours overtime 161 hours*". Taking the WhatsApp exchange into account and the evidence before the tribunal I prefer the claimant's breakdown of hours that were provided in January 2020 to that which she produced for proceedings on the basis that these were the hours she was claiming contemporaneously from the respondent. No response from Mr Tayaab disputing those hours was produced for the tribunal which I would have expected if those hours were disputed. On the balance of probabilities I find that the claimant worked 161 hours overtime as set out in her message and not 165 hours as now claimed.

Pension

13. The claimant's payslips show deductions to a Nest pension but it is unclear if and when contributions were made. The claimant confirmed that she did not wish to contribute to the pension and the respondent agreed to repay her the sums that had been contributed. The claimant's revised payslip for December 2019 showed a repayment of £76.50. As can be seen from the claimant's bank statements she received £563 on 3 January 2020 and £72.94 on 25 February 2020 totalling £634.94. The net sum the claimant was due according to the revised December 2019 payslip was £635.94

which is the sum she received. I therefore find that there was no underpayment in respect of pension.

The Law

14. 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.
15. Section 13(3) ERA provides that the total amount of wages paid on any occasion by an employer to a worker employed by them is less than the total amount of the wages properly payable by him that amounts to a deduction for these purposes.

Conclusions

Did the respondent make an unauthorised deduction of £815.29 from the claimant's December 2019 pay?

16. The respondent was contractually entitled under the employment contract to deduct from the claimant's wages any overpayment which she was not entitled to. Moreover the respondent would have been entitled to deduct tax and national insurance as this was authorised by statutory provision.
17. However the sum deducted by the respondent is in excess of the sum that due by way of tax and national insurance. The respondent did not assert that a lawful deduction had been made for any other purpose. I therefore conclude that the sum deducted in excess of the tax and national insurance due was an unauthorised deduction. The sum of £195.20 was lawfully deducted for tax and the sum of £272.74 for national insurance. Accordingly the sum of £346.35 was an unauthorised deduction.

Did the respondent make an unauthorised deduction from the claimant's October pay?

18. The claimant was contractually entitled to be paid for sickness absence without providing a medical certificate unless she was specifically asked for one by the respondent. This was provided for in the employment contract which stated "*The Employee must, if requested, provide a medical certificate*". On this occasion the claimant was not requested to provide a medical certificate and accordingly she was not required to produce one in order for her to be paid. However, as set out in my findings it is evident from the claimant's payslip that no deduction from the claimant's wages was made for the days when the claimant was absent. There has therefore been no unlawful deduction in respect of the claimant's October pay.

Was the claimant entitled to pay for overtime hours?

19. By virtue of the employment contract the claimant was entitled to be paid for overtime. There was no requirement for the claimant to annotate the salon's signing in sheet with her start and finish times in order for her to be

paid for overtime and in accordance with my findings she was not asked or told to do so. I have found that the claimant worked 161 hours overtime between 1 August 2019 and 28 December 2019. She is therefore entitled to be paid for 161 hours overtime. The gross sum due is £1,400.70 (£8.70 X 161 hours) and the net sum (using tax code 1250L) is £1,265 (£7.86 x 161).

Did the respondent make an unauthorised deduction in respect of the claimant's pension?

20. The total gross sum due by way of repayment of pension contributions was £76.50. This is accounted for in the calculation contained within the claimant's revised December 2019 payslip. The total due to the claimant as set out in the payslip was £635.94. The respondent received this exact sum (£563+ £72.94). There was therefore no unauthorised deduction.

Employment Judge Kumar
Date 19 December 2022