Case No: 2300802/2022

EMPLOYMENT TRIBUNALS

Claimant: Miss L Reeves

Respondent: Dr Shahla Imani

Heard at: London South **On:** 23rd August 2022

Before: Employment Judge Reed

Representation
Claimant: Did not attend
Respondent: Did not attend

JUDGMENT having been sent to the parties on 23rd August 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

Introduction

1. This is a claim for unauthorised deductions of wages, pursuant to s13 Employment Rights Act 1996.

2. The Claimant complains that she was only paid 50% of the wages that she was entitled to for work done in November 2021.

Procedure, documents and evidence heard

3. Neither party attended the hearing.

4. No explanation for non-attendance was received from the Claimant

5. The Respondent wrote to the Employment Tribunal by email on the 20th July 2022. In that email she said that she was not available on the 23rd August, because she was away. On instruction from Employment Judge Freer, the Tribunal staff replied on 22nd August 2022 indicating that 'the Respondent needs to make a postponement application if there is a request for the hearing not to go ahead'. The letter went on to indicate that the application should

include 'full reasons and documentary evidence of unavailability.' The letter also noted that, if the Respondent was not present a decision might be made in their absence. No application to postpone was made and no further evidence was provided.

6. Given that neither party to the claim attended I considered either dismissing the claim under rule 47 of the Employment Tribunal Rules or adjourning the hearing to give the parties a further opportunity to attend.

7. I concluded that, in the circumstances, it would be unjust to dismiss the claim, despite the fact that the Claimant had not attended and provided no explanation. This is because, as detailed below, much of the factual basis of the claim was not in dispute and much of the defence to the claim put forward by the Respondent appeared to me to have little prospect of success.

8. I also concluded that it would not be appropriate to adjourn. The Claimant had not provided any explanation for her non-attendance. The Respondent's explanation was limited to a simple assertion that she was not available, without any explanation. She had not complied with Employment Judge Freer's instruction to provide a full and evidenced postponement request. Although that instruction had been sent only the day before this hearing, the Respondent had been referred to the guidance provided to parties through Practice Directions and Practice Statements on 13th April 2022. This includes a copy of the Presidential Guidance on seeking an adjournment.

9. In any event, I do not think it is reasonable for a party to proceed on the assumption that a single line assertion that they are unavailable for a legal hearing is sufficient to secure a postponement. It should have been obvious to a professional employer, such as the Respondent, that more was likely to be required. Or, at any rate, that it would be prudent to make some enquiry as to the appropriate method for seeking an adjournment. Even a cursory enquiry would have made it apparent to the Respondent that a much fuller explanation and supporting evidence was required.

10. I also took account of the nature of the case. As noted above it is one where much of the factual basis was not in dispute and much of the defence to the claim appeared to me to have little prospect of success. I also took into account that it is of relatively modest value and that adjourning today would delay the resolution, not only of this claim, but other cases that would be delayed if a further hearing was required. Taking all of these factors into account and bearing in mind the overriding objective of the Tribunal Rules to deal with cases fairly and justly, I concluded that it was not appropriate to adjourn.

Findings of fact

11. Much of the factual background to this claim is not in dispute. In her ET1 the Claimant says that she worked for the Respondent, but received only 50% of the pay she was entitled to at the end of November 2021.

12. In subsequent documentation the Claimant sets out her claim in more detail. She says that the relevant pay period was 21st October 2021 to 20th November 21. She produces a table of hours that she says that she worked. Overall this indicates that she worked 189.5 hours at a rate of £9.50 an hour.

13. In her ET3 the Respondent does not dispute the fact that there was a deduction of wages or seek to challenge the Claimant's account of hours worked. The Respondent accepts that a deduction was made, which she suggests was of £800.

14. I accept the Claimant's account of her rate of pay and hours worked for the Respondent. It is supported by the available documentary evidence and is not challenged by the Respondent. This means that I am satisfied that she worked for 189.5 hours during the relevant period. That figure does not appear to include any allowance for a lunch break. If the Claimant had been paid £9.50 for 189.5 hours, she would have been entitled to receive £1,800.25 a month – which is somewhat more than either the Claimant or Respondent suggest. On the balance of probabilities, therefore, I conclude that the Claimant was permitted an hour for lunch and this was unpaid. This reduces the number of hours to 163.5 hours or £1,553.25.

15. I conclude that the Claimant was paid half of this sum, with the remaining £776.15 deducted. This is somewhat more than the Claimant has calculated, but she has approached the calculation net of tax rather than gross of tax. It is somewhat less than the Respondent says that she has deducted in her ET3, but I concluded it is a more accurate figure given the documentary material I have and the positions of the parties.

Matters raised by the Response

16. The Response raises a number of factual allegations that I do not consider relevant to the resolution of this claim.

17. First, there is reference to a previous period of employment, during which Miss Reeves is said to have behaved unsatisfactorily before resigning in February 2020. Whatever occurred at that time it is not relevant to whether Miss Reeves was entitled to be paid for work done in October and November 2021. It is therefore not relevant to this claim.

18. Second, there is criticism of Miss Reeves in relation to the second period of employment, which ended in November 2021. Dr Imani suggests that Miss Reeves begged to be reemployed and apologised for her previous behaviour, only to resign at a time that Dr Imani was short of staff and her absence was damaging to the business. Further, she says that she refused to work out her notice period. Again, whether this is true or not, it is not relevance to whether Miss Reeves was entitled to be paid for the work that she had done in October and November 2021.

19. Finally, Dr Imani suggest that Miss Reeves was responsible for damaging her car on 30th November 2021 in revenge for not having paid the November wages in full. Again, whether this allegation is true or not, it has no relevance to the question of whether there had been an unauthorised deduction from wages in relation to the work done in October and November 2021.

20. For the avoidance of any doubt I have not heard any evidence on the allegations above and reach no findings of fact regarding them. The point is that, regardless of whether the allegations raised by Dr Imani are true or false,

they do not affect the question of whether there was an unauthorised deduction of wages in relation to Miss Reeves pay for November.

21. The single issue raised in the Response that appears to me to be a potential defence to the claim is set out in the ET3 as follows:

> *On 28th of November which was a Sunday, I sent her a polite text and told her clearly that I will have to withhold £800 of her wage and pay her on the 10th which is her last day of work. This is also written in their contract.*

22. I take this as an assertion that there was a contractual clause in a written contract provided to Ms Reeves that permitted the deduction.

23. It is, however, no more than a bare assertion that such a clause exists and has that effect. I have not been provided with a copy of the contract. There is no detail as as to a) how the employment contract was formed; b) the content of that contract; c) the nature of the clause; or d) how it operated to authorise the deduction of approximately £800 in this situation. The assertion is in correspondence, rather than in sworn evidence to this Tribunal.

24. I bear in mind that, in my view, such a clause would be unusual, particularly in the context of a relatively junior and modestly paid employee. It is certainly not a type of contractual clause that is routine or would generally be expected to be in a contract of this type.

25. I also note that any such clause would be likely to be incompatible with the National Minimum Wage legislation.

26. In broad terms, the National Minimum Wage Act 1998 and the National Minimum Wage Regulations 2015 require a worker to be paid no less than the national minimum wage (at the relevant time £8.71 per hour).

27. Calculation of both the time that a worker has worked and the remuneration received during a pay reference period for these purposes can be factually and legally complex. In the absence of evidence, I have not sought to make a precise calculation. It is, however, readily apparent that if the Claimant worked approximately 163.5 hours, on the basis that she would be paid £9.50 per hour and there was a deduction of about half that amount / approximately £800 as the Respondent suggests, she would be paid far below the National Minimum Wage.

28. Any contractual clause that allowed this would be void in so far as it operated to limit the provisions of the National Minimum Wage Act 1998. See section 49 of the NMW Act 1996:

> **49 Restrictions on contracting out**
>
> (1) Any provision in any agreement (whether a worker's contract or not) is void in so far as it purports—
>
> (a) to exclude or limit the operation of any provision of this Act; or
>
> (b) to preclude a person from bringing proceedings under this Act before an employment tribunal.

29. This would not prevent such a clause existing and operating to the limited extent that it could without infringing the national minimum wage. But, in my view, it is a further reason making the existence of such a clause less likely.

30. In addition such a clause would risk being unenforceable on the basis of it being a penalty clause, see *Cavendish Square Holding BV v Talal El Makdessi* [2015] UKSC 67. Put simply this would mean that the clause was unenforceable because the clause was a mechanism for punishing an employee who did not work their notice, rather than seek an appropriate deterrent effect. Given that I have not been provided with detail of the alleged clause or how it was arrived at it is not possible to assess this possibility. But, again, I find that the potential legal difficulties with such a provision is a factor suggesting that that contract did not include such a clause.

31. Considering the limited available information as a whole, therefore, I do not accept that such a clause existed in the Claimant's contract. I reach that conclusion on the balance of probabilities, that is that it is more likely to be true than the alternative.

The Law

32. Sections 13 and 27 of the ERA 1996 provide, so far as relevant, as follows:

> **13 Right not to suffer unauthorised deductions**
>
> (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….
>
> (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.
>
> **27 Meaning of 'wages' etc**
>
> (1) In this Part 'wages', in relation to a worker, means any sums payable to the worker in connection with his employment, including—
>
> > (a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise …

Conclusion

33. Here, it is accepted that there was a deduction made from the Claimant's wages and I have rejected the Respondent's argument that it was authorised by her contract.

34. Therefore, for the reasons set out above, I conclude that the Respondent did make a deduction from the Claimant's wages of £776.15 gross in respect of work done between 21st October 2021 and 20th November 2021.

Employment Judge Reed
15 December 2022