



EMPLOYMENT TRIBUNALS

Claimant: Miss A Lavar
Respondent: AVY Ltd
Heard at: East London Hearing Centre (remotely, by video)
On: 26 October 2022
Before: Employment Judge Hook

Representation

Claimant: In person
Respondent: Mrs A Tsuiba, chief executive of the respondent company.

JUDGMENT having been sent to the parties on 31 October 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

1. In this case the claimant brought claims for holiday pay, unlawful deduction from wages and for damages for failure to provide a written contract. The claimant also asked to be awarded compensation for her preparation time for the hearing and for a 15% compensatory uplift to her award.

BACKGROUND

2. The claimant worked at a café run by the respondent company. In her claim form she said she began work on 7 February 2022 and this ended on 4 June 2022. In oral evidence she said she in fact started working at the café in January. For the purposes of this case this does not make a material difference. She said in her claim form that she worked about 43 hours per week and earned £450 per week gross. She was paid fortnightly and her pay slips were produced in evidence.

HOLIDAY PAY

3. The issue of holiday pay can be dealt with straightforwardly. In her claim form, the claimant said she was owed holiday pay to the sum of £351 gross.

4. The respondent very fairly conceded that holiday pay was owed and told the Tribunal that they had calculated this to be £488.73 gross, so more than the claimant had suggested.
5. The claimant was willing to accept this figure for the holiday pay. The parties indicated that they were both content for the Tribunal to give judgment in favour of the claimant in the sum of £488.73 gross, in respect of the holiday pay claim.

PROVISION OF A WRITTEN EMPLOYMENT CONTRACT

6. A second issue is the provision of a written employment contract or written statement of particulars to the claimant.
7. It is a matter of law that an employee has, from day one of their employment, a right to be provided with written particulars of employment and the evidence of both parties is that this did not happen.
8. The respondent's evidence is that these documents were provided on 15 February 2022 and then taken away by the claimant and returned with her signature on 25 February 2022. The claimant says that the contract was provided to her on the 25 February 2022, she took it away to read and returned it a couple of days after that.
9. The claimant drew the Tribunal's attention to several WhatsApp messages (translated from Russian, her first language) where she appears to ask for her contract and which appear to support her version regarding when it was provided.
10. In the Tribunal's view the weight of evidence points to it being more likely that the contract was provided on 25 February 2022 rather than earlier. In making that finding the Tribunal notes that the respondent was not able to produce any documentary confirmation of the contract being provided on a certain date. The Tribunal was also told that CCTV in the café might have covered the provision of the contract document but it was not possible to produce this in evidence.
11. The claimant asks to receive an award for her written contract not being provided to her sooner.
12. As a matter of law, the Tribunal is not able to make such an award in this case.
13. The law provides that where a claimant brings a claim for another cause of action, the types of which are set out in Employment Act 2002, schedule 5, then regardless of whether that claim succeeds and where the employer has failed to provide written particulars of employment the Tribunal should make an award unless it would be unjust or inequitable to do so.
14. In this case the claimant left her employment on 4 June without giving any notice as required by her contract and in my view this would be a possible argument that it would not be just or equitable to make such an award.

15. However, in any event, for such an award to be made the employer must be in breach of their obligation at the time the proceedings have begun. Where the employer has complied with its obligations to provide written particulars of employment, even belatedly, before the proceedings have begun, the Tribunal has no power to make such an award, see Govdata Ltd v Denton UK EAT/0237/18/BA.
16. Therefore, the Tribunal has no power to make an award to the claimant in respect of the provision of her written employment contract and that part of the claimant's claim is dismissed.

UNLAWFUL DEDUCTION FROM WAGES

17. The third part of the case concerns a deduction from the claimant's wages.
18. It is agreed between the parties that on 3 June 2022, in the late afternoon, the claimant was closing the respondent's premises. Part of the closing procedure is to lower several shutters around the outside of the café. Each of these shutters is controlled by a remote control device.
19. It is agreed that the claimant lowered one of the shutters when there was a bicycle propped up against the window. The shutter hit the bicycle and was damaged. Technicians had to be called to repair the shutter.
20. The evidence before the Tribunal revealed that the claimant had been inside the café, behind the bar, when she closed the shutter using the remote control fob. She had been instructed that she should go outside to close the shutters. If she had gone outside she would likely have seen the bicycle, removed it and the damage would not have occurred. There was also another member of staff present in the café with the claimant, this was a more senior member of the respondent's staff who had worked at the café for a longer period of time.
21. The respondent's evidence was that the cost of the shutter repair was £180. The repair company had invoiced £240 but was willing to discount this by £60 if they were paid in cash. The respondent paid £180 cash to the repair company and then deducted this amount from the claimant's wages. This is self-evidently a significant sum for the claimant who at that time was earning £11 per hour.
22. The respondent said that similar damage had been caused twice before by other employees who had also been made to pay for the cost of repair from their wages.

The claimant's position

23. The claimant objects to the deduction from her wages for this damage and says this was an unlawful deduction from her wages.

The respondent's position

24. The respondent relies on a provision of the employment contract. Term 20.3 says that the company

“reserves the right to deduct from your wages or payments any sums owed to it in relation to any damage to any property of the company caused by you.”

25. The respondent contends that the claimant caused the damage to the shutter (which is property of the company) and that it is entitled to deduct a sum in relation to this damage.

Legal principles and the Tribunal's findings

26. The contract term must be construed in accordance with ordinary contractual principles. The Tribunal will give effect to what it finds the parties intended when they made the contract. The employer had the leading role in drafting the contract and relies on the contract in justifying the deduction. Any ambiguity falls to be determined against the employer, within reason.
27. The Tribunal finds, on the evidence, that the claimant was somewhat reckless as to damaging the shutter. She took a risk by closing it without going outside to have a clear view and damage, which was a reasonably foreseeable risk, was caused.
28. The Tribunal also finds, however, that the claimant was not solely to blame for the damage caused. When she failed to follow the correct procedure (by not going outside before lowering the shutter) it was open to the respondent's other, more senior, staff member present to intervene and stop her doing so, for example, to remind the claimant she should not lower the shutter without going outside or to go outside herself to see if it was safe to lower the shutter. No doubt, the respondent has instructed all of its staff to at least give a warning if a member of staff sees a colleague doing something unsafely or improperly.
29. The Tribunal takes into account the evidence from the respondent that two other staff members had lowered shutters without going outside, resulting in damage, and that this was known to all the staff. With that in mind it is more surprising that the senior member of staff left the claimant to make the mistake that she made.
32. Given that there had been two similar incidents it is surprising that, on the evidence, the respondent had not investigated modifying the shutter system to prevent this type of damage. For example, the respondent might have investigated whether the system could be adapted so the remote control (and therefore the employee holding it) would have to be outside to activate the shutter's descent or, alternatively, require a button or switch outside to be activated for the shutters to close. It might be the case that such adaptation is not reasonably technically possible but on the evidence such steps were not investigated. The respondent's approach to the recurring issue of damaged shutters was solely to make a deduction from the wages of the staff member concerned.

33. Reading the contract term, the Tribunal finds that it cannot have been the intention of the parties, when they agreed to the contract of employment, to make the claimant strictly and solely liable for any damage even if where there is another significant, contributing cause of said damage.
34. The Tribunal finds that the proper construction of term 20.3 is to hold the claimant responsible, and liable for a deduction from her wages to the extent that she has contributed to the causation of damage or is reasonably blameworthy for the damage. The term authorises deduction from her wages to that extent.
35. The Tribunal finds as a fact that the claimant was not solely to blame for the damage to the shutter which was contributed to by the inaction of the other employee of the respondent present.
36. The Tribunal finds that a 50% apportionment of the damage to the claimant would be fair, reasonable and consistent with the meaning of term 20.3.

Conclusion

37. The respondent has wrongly and without authorisation, and therefore unlawfully, deducted £90 from the claimant's wages. To that extent the claimant's claim for unlawful deduction of wages is well founded and succeeds.

FURTHER APPLICATIONS

38. The claimant raised the issue of receiving a compensatory award of a 15% uplift to her award for grievance procedures not being followed, she said.
39. Since giving oral reasons in relation to this, the Tribunal has reflected on this and proposed to reconsider this aspect of the damages. The parties are requested to send written submissions on whether an uplift should be made (regarding the award unlawful deduction of wages) due to any failure to follow grievance procedures within 14 days from when these written reasons are sent to the parties.
40. The claimant also asked for compensation for her time in preparing her case. She says she expended 30 hours for this case and asks for an award based on an hourly rate of £41 per hour.
41. The Employment Tribunal is a jurisdiction in which costs, whether for legal representation or for a litigant in person's preparation time, are not usually awarded. There are certain circumstances where the Tribunal will consider an award of this type, as set out in Employment Tribunal Rules, rule 76. Those circumstances have not arisen in this case. The claimant's request for compensation for preparation time is dismissed.

CONCLUSION

42. For the reasons given, the claimant's claim for holiday pay is well founded and the respondent shall pay her the sum agreed £488.73 and the claimant's

claim for unlawful deduction from wages is also well founded for which the respondent shall pay her £90.

43. The claimant's claim for an award for failure to provide her with an employment contract is not well founded and is dismissed, as are her ancillary applications for a compensatory award and a sum for her preparation time
44. The total due to the claimant from the respondent in relation to this case is £578.73.
45. Whether an uplift applies to the award for unlawful deduction from wages will be further considered by the Tribunal.

**Employment Judge Hook
Dated: 24 January 2023**