EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104554/2022

Held in Glasgow on 23 and 24 January 2023

Employment Judge J Young

Ms B Storrie	**Claimant** **In Person**
Black Pearl Pub Co Ltd	**Respondent** **Not present and** **Not represented**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is:

1. that under s111 of the Employment Rights Act 1996 the Tribunal does have jurisdiction to hear the claimant's complaint of unfair dismissal;

2. that the claimant was unfairly dismissed under and in terms of s104 of the Employment Rights Act 1996 and the Employment Tribunal orders that the respondent shall pay to the claimant a monetary award of **Eighty Six Pounds and Sixty Four pence (£86.64)**; there being no prescribed element under the Employment Protection (Recoupment of Benefits) Regulations 1996;

3. that the complaint under s23 of Employment Rights Act 1996 is well founded and the respondent is ordered to pay to the claimant the sum of **One Thousand and Seventy Five Pounds and Eighty Pence (£1075.80)** being an unauthorised deduction from wages under s13 of the same Act;

4. that the respondent is ordered to pay to the claimant the sum of **Two Hundred and Seventy Two Pounds and Fourteen Pence (£272.14)** being pay due in respect of holidays accrued but untaken to date of termination of employment.

5. that the respondent is ordered to pay to the claimant the sum of **Three Hundred and Forty Six Pounds and Fifty Eight Pence (£346.58)** under s38 of Employment Act 2002 in respect of failure to provide written statement of initial employment particulars.

REASONS

Introduction

1. In this case the claimant presented a claim to the Employment Tribunal on 18 August 2022 complaining that she had been unfairly dismissed; was due sums by way of unauthorised deductions from pay (relating to tax deductions); notice pay; pay for holidays accrued to date of termination but untaken; and an award for failure to provide a statement of particulars of employment. She stated that she had been seeking to have her pay regularised for some time but that had not been attended to by the respondent who then dismissed her on 25 March 2022 after she made continued enquiry.

2. The claimant made application for early conciliation on 9 June 2022 and a certificate was issued by ACAS on 20 July 2022. In accordance with the rules on presentation of claims the claimant had one month from the date when she received (or was deemed to received) the early conciliation certificate to present her claims. In this case the early conciliation certificate was sent by email and so the claimant had one month from 20 July 2022 to present her claim form (ET1) and she did so on 18 August 2022.

3. However, the early conciliation certificate provided by ACAS identified the prospective respondent as "*Black Pearl Pub Company Limited*" whereas the claim form intimated by the claimant identified the respondent as "*Montford Bar and Kitchen (Black Pearl Pub)*". The address of the respondent was correct in each case.

4. By letter of 24 August 2022, the claim presented by the claimant on 18 August 2022 was rejected for the following reason:

"*You have provided an early conciliation number, but the name of the respondent on the claim form is different to that on the early conciliation certificate.*"

5. The claimant sought reconsideration of that decision by application on 5 September 2022 and submitted an amended claim form with the name of the respondent altered to comply with the early conciliation certificate. By letter of 7 September 2022, the claimant was advised that her application for reconsideration was successful with the presentation date of the claim form now 5 September 2022. That was beyond the time limit for presentation of one month from receipt of the early conciliation certificate. For the Tribunal to have jurisdiction to hear the claims it then becomes necessary to consider if it was reasonably practicable for the claimant to present the claim form in time

6. The further issue on jurisdiction arises in the claimant having continuous employment in the period 10 March 2021 to 25 March 2022 being less than the qualifying period for an ordinary claim of unfair dismissal of two years' employment. The issue is then whether or not the claimant was dismissed for "*asserting a statutory right"* in which case the two year qualifying period of employment did not apply to the complaint of unfair dismissal. There is no qualifying period in respect of the other complaints made.

7. By letter of 7 September 2022, a copy of the claim and a blank response form (ET3) was sent to the respondent with advice that any response must be made by 5 October 2022 or, if an application for extension of time to submit that response was sought, such application should also be made by 5 October 2022.

8. The response form was received by the Tribunal on 6 October 2022 and, by letter of 11 October 2022, the respondent advised that the response was rejected under Rule 18 of the Employment Tribunal Rules of Procedure 2013 because the response had not been presented within the statutory time limit of 5 October 2022 and no application/further application for an extension of time had been made. Accordingly, the respondent was advised that the claim would proceed as undefended and that they would only be able to participate

in any hearing to the extent permitted by an Employment Judge. The respondent was advised that they had a right to apply for a reconsideration of the decision to reject their response and, if they wished to make such an application, should do so in writing within 14 days of the date of the letter. No application for reconsideration was made.

9. A notice of hearing was issued by the Tribunal to both claimant and respondent on 17 November 2022. The notice to the respondent of the hearing of 23 January 2023 advised that the notice was being sent "*for information only*" and that the respondent was "*entitled to attend the hearing but will only be able to participate to the extent permitted by the Employment Judge who hears the case*". At the hearing no appearance was made by or on behalf of the respondent.

10. Against that background the issues for the Tribunal were:

    i. Was it reasonably practicable for the claimant to have presented her claim to the Employment Tribunal within the appropriate time limit, i.e. by 20 August 2022?

    ii. If the Tribunal is satisfied that it was not reasonably practicable to present the claim within the appropriate time period, was it presented within such further period as the Tribunal considers reasonable?

    iii. Was the claimant dismissed for asserting a statutory right and thus did not require the qualifying period of two years employment with regard the claim for unfair dismissal?

    iv. Was the claimant unfairly dismissed by the respondent and, if so, what compensation should be awarded (including any uplift for failure to follow procedure)?

    v. Did the claimant suffer an unauthorised deduction from her wages and, if so, in what amount?

    vi. What pay, if any, is due to the claimant in respect of holidays accrued to date of termination of employment but untaken?

vii. Was the claimant supplied with a statement of initial employment particulars within the appropriate time period under Section 1 of the Employment Rights Act 1996 (ERA)? If not what award should be made to the claimant under Section 38 of the Employment Act 2002 of between two weeks' and four weeks' pay.

viii. Is there any pay due to the claimant for failure to provide notice of termination of employment?

The hearing

11. At the hearing I heard evidence from the claimant and on conclusion of her evidence I directed that she provide copies of documents in her possession showing pay over the period of her employment; staff rotas over the period of her employment; P60 information; and any posts put on Facebook or other social media which related to her employment.

12. From the evidence and documents subsequently produced I was able to make findings in fact on the issues.

13. The claimant commenced employment with the respondent on bar duties from 10 March 2021. Initially she worked 16 hours a week being 8 hours on both a Friday and Saturday. There was no set shift pattern and although requested no contract issued to her identifying hours of work or other terms. She was called upon to work *"as required".* Initially pay was at the rate of £6.90 an hour which was paid to her bank account each fortnight.

14. In or around July 2021, after leaving college, her hours increased. The hours varied in working a mix of day shift and late shifts on Monday, Thursday, and also Friday/Saturday. She advised that her hours worked could reach 52 per week but averaged around 30 hours per week. The hourly rate increased around February 2022 to £8.91 per hour.

15. She asked for but was unable to view any payslips until early 2022 and then found fault in the details provided. She was continually subject to deductions for tax and did not consider that her earnings brought her into the tax

threshold. The payslips viewed all showed deductions for tax and National Insurance.

16. She made enquiries by telephone with HMRC as to how to get a rebate for tax deductions and was told that HMRC were unable to help as it held no record of her employment with the respondent. She was told she needed to discuss matters with her employer. She asked the owner to contact HMRC to give details of deductions and employment record. She made this request around mid-February 2022. She made the enquiries again in March 2022 with personnel within the respondent's business and was told that matters were being attended to by the owner. She spoke to the owner's daughter on 24 March 2022 about the matter and the following day she was dismissed by the owner when he advised that he had "*decided not to keep you and you can go home*".

17. The matters narrated within the ET3 response received from the respondent were put to the claimant, namely:

    i. "*Ms Storrie gave us an incorrect NI number and address and our payroll had to sort out over a period of time.*" The claimant advised that she had given the correct NI number three times over the period of her employment. She had given the correct address.

    ii. "*We have issued a P45 and P60*". The claimant advised that she had received a P60 "*a couple of weeks after [she] left*" but had still not received a P45.

    iii. "*Access to payslips are online via a portal supplied by our accountant*". The claimant advised that, as she kept requesting access to payslips, an account was set up from January 2022 which was done by "*app on my phone*".

    iv. "*P45 and P60 are available from the online portal that all employees have access to. Never at any point was Ms Storrie refused this info*". The claimant advised that she received the P60 but had never received the P45. The P45 which was attached to the response

submitted by the respondent had never been sent to the claimant and she had no information as to why the details of her earnings in that employment were stated as being £95. Neither did she know why the leaving date had been inserted as 3 April 2022 or why the date of that P45 was 16 September 2022 being after she had lodged her ET1 and some six months beyond date of termination of her employment.

v. "*Her conduct on social media resulted in our action. She was insulting and abusive about her employer. Foul language was used on social media. She spread wrong information about her employer not pay* [sic] *tax or NI*". The claimant disputed this assertion. She advised that she was "*on Facebook*" and had never posted any abusive message about the respondent. She had raised the issue of how to resolve tax matters but not under reference to identity of her employer. She would provide copies of any posts.

18. The claimant had not been spoken to about holiday pay or being advised of any requirement to take holidays. She had been absent for two weeks in July 2021 as a result of COVID but had received no sick pay or other pay at that time. She had also suffered a broken arm over December 2021 and was unable to work shifts. The portal showing payslips and other information was now closed to her.

19. She was able to gain employment shortly after her employment was terminated by the respondent. She commenced that new employment on 3 April 2022. In that position her hourly rate increased as did her hours. She had since left that employment and found other employment from October 2022. She had not had any difficulties with tax or the issuing of P45 from those employers.

20. The claimant explained that the public house operated by the respondent was called "*The Montford*" and, in completing the original ET1, she had stated the name of the public house with the respondent name in brackets as she thought that was the correct way of dealing with the matter. She then presented her claim form in time. On being advised that it was rejected

because the name of the respondent was not the same as that on the early conciliation certificate, she had responded to the Tribunal immediately and, shortly after, had received intimation that on reconsideration the claim was accepted with the presentation date of 5 September 2022. She had no reason to think before being advised of the rejection of her form that she had not presented it in time.

Documentation

21. As indicated the claimant produced no documents at the hearing but it was clear from her evidence that she had retained certain payslips; P60; staff rotas; and "*posts"* on her phone concerning the queries she had on tax issues. I directed that, so far as in her possession, those documents should be produced and she did so. The respondent had attached a P45 to their ET3 response. The documents produced consisted of:

    i. Document from the respondent giving "*employment details*" for the claimant (undated) and notifying of documents available on their portal and stating that "*leave used*" amounted to "*zero days*" and "*leave remaining*" was "*52.47 days*".

    ii. Document (undated) stating to be P60 showing that earnings in the period amounted to £5293.94 and that tax deducted amounted to £1056.80.

    Payslips (22 in number) covering the period 15 May 2021 - 19 March 2022 showing pay per fortnight in that period with number of hours worked and hourly rate of pay. The payslip for the fortnight to 19 March 2022 showed gross pay for the period of £5293.94 together with the deduction of tax of £1056.80 (in common with P60 document) .The payslips for the fortnights ending 8 January 2022 and 22 January 2022 showed a payment of "*12 hours at £6.56 per hour (holiday)*" giving a total payment for those hours of "*£157.44*". Those payslips showed a change in the rate of pay for the claimant from £6.56 per hour to £8.91 per hour commencing in the payslip for fortnight ending 19 February 2022 meaning that pay from 4 February 2022 was at the rate of £8.91

per hour. No payslip for the period beyond 19 March 2022 was produced.

iii. Four social media "posts" of 23 March 2022 on tax issues concerning the claimant's employment.

iv. Shift rota sheets (23 in number).

v. The P45 attached to the response from the respondent dated 16 September 2022, advised that the claimant's leaving date was 3 April 2022 and that total pay to date amounted to £95 with tax deducted of £19. Her National Insurance Number was given and PAYE reference number. The tax code at leaving date was specified as "*OT*".

Conclusions

Issue of time bar

22. In each of the complaints made by the claimant, time bar operates.

23. Subject to extensions of time for early conciliation, an unfair dismissal claim requires to be lodged within three months of the effective date of termination. That applies to a claim for unfair dismissal for asserting a statutory right. (s111(2) ERA)

24. A claim of unlawful deduction of wages must be presented within three months from the date of the last deduction or last payment. In this case the employer states that the last payment was made on 3 April 2022. (s23(2) ERA)

25. For breach of contract (notice pay) the claim requires to be presented within three months of the effective date of termination. (Art.7 of Extension of Jurisdiction (Scot) Regs 1994)

26. The right to payment in lieu of holiday on termination of employment is three months from the date the payment should have been made. (Reg 30(2) 0f Working Time Regs 1998)

27. The right to compensation for failure to be provided with a statement of terms and conditions of employment is one which arises when a claim is made to an Employment Tribunal and no time limit applies, but it is reliant on other claims being made timeously.

28. Where time bar operates, the saving provision in each case is that time can be extended if the Tribunal considers that it was "*not reasonably practicable*" to present the claim in time and if so was the claim presented in such further time as was reasonable.

29. In this case the claimant made early conciliation application to ACAS on 9 June 2022 which was within time in each of the claims. She could not present her claim to the Tribunal before receiving a certificate on early conciliation from ACAS which was on 20 July 2022. She then had one month in which to lodge her claim. She presented her claim within time on 18 August 2022. Because that claim (first claim) was rejected and then corrected and accepted on reconsideration (second claim) the relevant date for limitation purpose is the presentation date of the second claim of 5 September 2022. Presentation of the claims on that date is out of time for all the claims and so the claimant's only recourse is to seek an extension of time under the relevant escape clause.

30. This issue of a claim being presented in time but rejected and on reconsideration accepted and then beyond the time limit, was dealt with in *Adams v British Telecommunications Plc* UKEAT/0342/15. The considerations here are very similar. In that case it was stressed that the Tribunal's attention should be on the question of whether or not it was reasonably practicable to have presented the second claim in time.

31. The question of what is or is not reasonably practicable is a question of fact for the Employment Tribunal. I accept that having lodged the first claim on 18 August 2022 the claimant believed it to be complete and correct. The claimant would have had no reason to lodge a second claim in those circumstances. The claimant could not have been aware of the mistake that she made in not correctly inserting the name of the proposed respondent until after the

limitation period expired because the period expired before she was advised of the problem. In the period between 18 August 2022 and receipt of the Tribunal letter of 24 August 2022, she was under the mistaken belief that the first claim had been correctly presented without any defect. She then sought to correct matters and, after some correspondence regarding the proper method of correction, she made the correction and application for reconsideration on 5 September 2022. The reconsideration allowed presentation on that date.

32. The question for the Tribunal then in those circumstances is not whether the mistake originally made on 18 August 2022 was a reasonable one, but whether her mistaken belief that she had correctly presented the claim on time and did not therefore require to put in a second claim before expiry of the time limit was reasonable having regard to all the facts and all the circumstances. I consider from the evidence given the claimant's error was genuine and unintentional. In my view it was understandable in completing the claim form herself that she entered both the name of the public house in the ET1, given that was where she worked, and the name of the respondent to the question asked.

33. What also has to be considered is that the claimant did not lodge her first claim until late in the day. She had one month from 20 July 2022 to do so. Her claim is reasonably detailed and contains calculations of sums which she considers are due. Had she lodged the claim within a few days of receiving the ACAS certificate that might have meant that she had time to correct her error and resubmit in time, but I did not consider that a factor which outweighed the considerations narrated namely that she had no reason to think that her second claim was necessary and required to be submitted before expiry of the time limit. In the circumstances I consider that it was not reasonably practicable to have submitted the second claim in time and she submitted that claim within such further period as was reasonable. Accordingly, I consider that the Tribunal has jurisdiction to hear the claims made.

Claim of unfair dismissal

34. Under Section 104 of ERA an employee's dismissal is automatically unfair if the reason or principal reason for the dismissal was that the employee alleged that the employer had infringed a relevant statutory right – s104(1)(b). Such a claim for unfair dismissal can be brought whatever his or her length of service. The two-year qualifying period normally required to bring an unfair dismissal claim does not apply.

35. In a claim brought under Section 104 there are three main requirements:

    i. The employee must have asserted a relevant statutory right;

    ii. the assertion must have been made in good faith; and

    iii. the assertion must have been the reason or principal reason for the dismissal.

36. One of the relevant statutory rights afforded by s104(4)(a) of ERA is the right to the protection of wages under Sections 13, 15, 18, and 21 of ERA.

37. Section 13 of ERA advises that an employer is not to 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 that the worker has previously "*signified in writing his agreement or consent to the making of the deduction*".

38. In this case the issue is whether or not the treatment of deduction for tax by the respondent was an unauthorised deduction.

39. The claimant's earnings according to the P60 and the wage slip for the period to 19 March 2022 put her gross earnings at £5293.49, well below the personal allowance of £12750 for the tax year and, on that basis, no tax was payable.

40. The same National Insurance Number and tax code of "*OT w1m1*".is retained throughout the sequence of payslips for the period ending 19 March 2022 and the same tax code appears on the P60 which was issued which would

represent earnings in the tax year to 5 April 2022. The same National Insurance Number is utilised in the P45 issued 16 September 2022. The tax code at leaving date is stated to be "*OT*".

41. The tax code "*OTw1m1*" signifies a non cumulative tax code and so tax is determined without taking into account any tax already paid or how much personal allowance has been used up and can result in overpayment of tax. The remedy is to have HMRC make the necessary alteration and tax overpaid would be recovered in succeeding pay. The claimant's position is that she contacted HMRC for this purpose but they advised that there was no record of any payments to them as there was no record of her being employed by the respondent.

42. In the ET3 lodged by the respondent it is stated that the claimant gave "*incorrect NI number and address and our payroll had to sort out over a period of time*". The claimant denied that there was any misinformation supplied or that the respondent was awaiting any particular information. I found the claimant to be generally credible in her evidence and there is support for her position in that the National Insurance Number appearing on the wage slips, P60, and P45 are consistent and never varied. If the case was that there was some difficulty in obtaining the correct NI number, then there was never any change in that number through the period from 29 May 2021 until 19 March 2022 or thereafter. If there had been a period where matters required to be "*sorted out*" then I would have anticipated a change in that number over the period, but there was none. Neither was there any indication that the claimant's address was a difficulty.

43. Even if there had been a difficulty in obtaining information the tax deducted required to be paid to HMRC and the claimant's position was that on enquiry there was no record that payment of tax deducted was ever made to HMRC or that she had been listed as an employee in the PAYE records. There is no appearance here by the respondent to establish any fact of payment. As advised, I found the claimant to be generally credible and accepted her evidence that there was no record of payment. Her position that she had made the enquiry of HMRC and been told they held no record of payment is

supported by her pre dismissal "post" of 23 March 2022 which narrates the information received.

44. I take the view that for a deduction for tax to be authorised by statutory provision then not only should there be a deduction under the statutory tax rules but that tax deduction should be paid to HMRC in accord with the statutory duty. If not there is no statutory provision for the deduction from wages and it is unauthorised. That would mean that the claim was within one of the "*relevant*" statutory rights referred to in Section 104(4) of ERA.

45. An employee asserts a relevant statutory right either by bringing proceedings to enforce the right or, as is relevant in this case, by alleging that the employer has infringed the right – s104(1)(b) of ERA. I accepted the claimant's evidence that she had been seeking to resolve the deductions from her wages with the respondent and asserting the right that the deduction was unauthorised. As advised the social media posts produced show pre dismissal query on that issue in seeking advice on the tax position. That includes the information received form HMRC on payments. That would support her claim that she was raising the issue of deductions with her employer. Given the level of her earnings, it seemed clear that no tax should be deducted and that the claimant was asserting a statutory right, namely that the deduction was unauthorised either because (a) her earnings were below the tax threshold and so there should be no deduction or (b) because HMRC were not receiving any of the deducted amounts purporting to be tax deductions.

46. I also considered that the representations were being made in good faith by the claimant and she believed from information received from HMRC that any tax deductions were not being paid. There was no evidence to the contrary before the Tribunal.

47. The final matter is whether the assertion of a statutory right was the "*reason or principal reason*" for dismissal.

48. There was no dismissal letter. Dismissal of the claimant came after she had made further representation about the tax position and deductions being made. The respondent position in the ET3 lodged late was that her "*conduct*

on social media resulted in our actions. She was insulting and abusive about her employer. Foul language was used on social media. She spread wrong information about her employer not pay [sic] *tax and NI*".

49. The posts produced by the claimant as directed fall short of that described by the respondent. There is no foul language being used and neither can the posts be said to be "*insulting and abusive about her employer*". The posts seek advice from others on her Facebook page about how the matters might be resolved. There is no mention of the respondent by name. The particular post produced of 23 March 2022 states:

"*Does anybody know how to go about getting tax codes sorted? Been on phone to HMRC all morning who are now telling me I've no been working for the past year but they have been taxing me every wage. App am down as unemployed? When I log into the website it only shows my last two employers and not the one I'm with the now.*"

50. The reason being given by the respondent for dismissal does relate to the tax position. The reason for dismissal concerns the claimant raising that issue. However, in the post produced (and again there is no counter evidence) there is nothing which could be described as "*foul language*" or "*insulting and abusive*" about the employer. So in the absence of that reason given by the respondent being established I accept that the reason or principal reason for dismissal was that the claimant was asserting a statutory right, namely the unauthorised deductions from her wages.

51. That means that she succeeds in her claim of unfair dismissal as a dismissal under s104 of ERA is automatically unfair.

Compensation for unfair dismissal

52. In a successful unfair dismissal claim a remedy is an award of compensation made up of a basic award and a compensatory award – Section 118(1)(a) and (b) of ERA.

53. A basic award depends on an employee's age; length of continuous service; and the relevant amount of a week's pay. The claimant in this case was under

22 at dismissal and had one full year of continuous service and so is entitled to one half week's pay. Calculation of a week's pay is made in terms of Sections 220-229 of ERA.

54. In this case the claimant had no normal working hours and a week's pay is therefore calculated according to the average weekly renumeration over a 12-week period prior to termination. Considering the payslips produced, the average weekly pay over the 12-week period prior to termination was £2079.54 ÷ 12 = £173.29. A half-week's pay is therefore £86.64.

55. The compensatory award is intended to reflect the actual loss that an employee suffers as a consequence of being unfairly dismissed and, to that end, Tribunals are directed to award "*such an amount as the Tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer*" – s123(1) of ERA.

56. When assessing what an employee has actually lost, the Tribunal looks at the net renumeration that the employee would have continued to receive if the dismissal had not occurred. In this case, the claimant advised that she found other employment which commenced 3 April 2022 and in that job her earnings were better than with the respondent. Accordingly, the gap in wages is only between 23 March and 3 April 2022.

57. To assess whether the claimant has suffered any loss of wages brings into account whether or not the claimant received a notice payment from the respondent taking her paid position up to 3 April 2022.

58. The information supplied by the claimant included a document from the respondent indicating that a payslip up to 3 April 2022 was available. That payslip was not produced. In the ET3 response from the respondent it is stated "*she did not work notice period, however, payroll paid her for this week*". That would appear supported by the P45 which was attached to the ET3 response indicating that in the tax year commencing April 2022 a sum of £95 was paid to the claimant (with a tax deduction of £19). In those circumstances, I was satisfied that a payment had been made to the claimant

representing notice pay to 3 April 2022. Accordingly, I considered that the claimant had been paid to 3 April 2022 and, given that she commenced a job from that date, there was no financial loss by way of compensatory award arising out of the unfair dismissal.

59. In the initiating claim by the claimant, reference is made to a claim for an uplift for breach of the ACAS code of practice. That adjustment only applies to compensatory awards and not to basic awards made under the legislation. Accordingly, given there is no compensatory award being made in this case, no adjustment or failure to follow the ACAS code can be made (s124(A) ERA).

60. I accepted no benefits were paid to the claimant and so the Employment Protection (Recoupments of Benefits) Regulations 1996 do not apply (Reg 4).

Notice pay

61. A claim is made for notice pay. The claimant received no notice of the termination of her employment and she should have received statutory notice of one week. This claim therefore is for pay in lieu of notice. However, as indicated, I considered that the claimant has been paid notice pay in the period to 3 April 2022 and thus no award arises in respect of this claim.

Unauthorised deduction from wages

62. Section 13 of ERA advises that an employer shall not make a deduction from wages of a worker employed by him unless either 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 signed consent to that deduction*".

63. I have rehearsed that position in the findings in respect of the claim of unfair dismissal. Tax is an authorised deduction, but in this case the evidence available is that tax deductions were not being paid to HMRC.

64. Accordingly, I considered that there had been an unauthorised deduction from wages and, in those circumstances, the complaint under Section 13 succeeds. The claimant is then entitled to the amount of the deduction in

wages which, in terms of the P60 for the tax year to April 2022, is £1056.80. In addition, according to the P45 lodged, the sum of £19 was deducted from payment due to the claimant in the succeeding tax year. The combined amount of deductions therefore amounts to £1075.80 which is the amount payable by the respondent to the claimant by way of unauthorised deduction from wages.

65. Even if the deductions could be said to be authorised albeit tax deductions not paid to HMRC I consider the claimant would still be entitled to recovery of tax deducted but not paid as a contract claim under the provisions of Article 4 of the ETs Extension of Jurisdiction (Scot) Order 1994.

Holiday pay

66. Workers with no regular hours or zero-hour contracts are entitled to paid holiday. The reference period has to include the last 52 weeks for which they actually earned and so excludes any weeks where no work was performed. That may mean that the actual reference period takes into account pay data from further back than 52 weeks. A paid week includes a week in which the worker was paid any amount for work undertaken during that week and only if no pay at all is received should it be discounted.

67. From the information available in this case there appear to be no weeks where there were no earnings in the tax year April 2021/April 2022. The P60 shows earnings for that 52-week period of £5293.94 which would make a weekly wage £5293.94 ÷ 52 = £101.81 (Employment Rights (Employment Particulars and Paid Annual Leave) (Amendment) Regulations 2018 – Regulation 10).

68. The claimant received no statement of particulars of employment and so the leave year would be determined in accordance with Regulation 13 of the Working Time Regulations 1998 (WTR) meaning the claimant's first leave year was 10 March 2021-9 March 2022 and the subsequent leave year would commence 10 March 2022. Termination of employment then took place 25 March 2022.

69. Regulation 16 of WTR advises that a worker is entitled to be paid in respect of any period of annual leave to which he is entitled at the rate of a week's pay in respect of each week of leave. Regulation 14 of WTR advises that payment in lieu of holidays can be made on termination of employment.

70. Considerable case law has resulted on whether leave can be carried forward from one leave year to another under WTR. Under *Max-Planck-Gesellschaft v Schimizu* [2019] 1CMLR1233 the European Court advised that untaken leave can be carried forward from one leave year to another unless an employer can show that it took reasonable steps to facilitate the timely taking of the leave and drew the worker's attention to the risk of losing any untaken leave if he or she did not take the leave before the end of the particular leave year.

71. There was no evidence here that the respondent in this case took reasonable steps to facilitate the taking of leave or draw the attention of the claimant to the risk of losing untaken leave in the leave year 10 March 2021-9 March 2022. I accepted the claimant's evidence that there had been no steps taken by the respondent to facilitate the timely taking of leave or attention drawn to the risk of losing entitlement to leave if it was not taken before the end of the leave period. It would appear that certain payments entitled "*holiday pay*" were paid to the claimant in the payslips of 8 January 2022 and 22 January 2022 being 12 hours in each period resulting in payment of £78.72 in each period. It may have been that the payment was to represent time taken when the claimant was absent due to injury to her arm. In any event the payment would not exhaust the leave entitlement in the year to 9 March 2022 and a balance was due.

72. That would mean that in a calculation of holiday pay as at date of termination the claimant would be entitled to carry forward leave of 4 weeks for the year to 9 March 2022 into the leave year for the period 10 March 2022 – 25 March 2022 (the amount paid being under deduction of the amount of holiday pay received). Under *Sood Enterprises Limited v Healy* [2013] IRLR865 the maximum period which can be carried forward into a succeeding leave year is four weeks under Regulation 13 of WTR. However, in the short period of

the succeeding leave year (10 March 2021 – 25 March 2022) the claimant is entitled to a proportion of 5.6 weeks of leave being 2/52 x 5.6 = 0.22 weeks.

73. Accordingly, the amount due for holiday accrued but untaken on termination is 4.22 weeks x £101.81 = £429.63 - £157.49 (the amount paid in the leave year to 9 March 2022) = £272.14.

74. While it is noted on the P60 that "*leave remaining*" is "*52.47 days*", there is no information on how that figure is reached and the calculation made of the amount due is made on the basis of the statutory formula. On any view, leave remaining could not be "*52.47 days*" as that would result in more weeks of leave due than that to which the claimant was entitled.

Failure to provide a statement of particulars of employment

75. Under Section 38 of the Employment Act 2002, if a Tribunal makes an award in proceedings such as those at issue here and when those proceedings began there had been a failure to give a written statement of initial employment particulars to the employee, then a Tribunal (unless there are exceptional circumstances) must increase the award by two weeks' pay and, if it considers it just and equitable under all the circumstances, by four weeks' pay. For this purpose, a weeks' pay is in the sum of £173.29. I do not consider there to exceptional circumstances and given a statement would in this case only have assisted in clarifying holiday entitlement consider it appropriate that to award the minimum of two weeks' pay, being the sum of £346.58.

76. In summary therefore the following sums are due:

    i. In respect of the claim of unfair dismissal, the sum of £86.64

    ii. In respect of the claim of unauthorised deduction of wages, the sum of £1075.80.

    iii. In respect of pay due for holidays accrued but untaken to date of termination of employment, the sum of £272.14.

iv. In respect of the failure to provide written particulars of employment to the claimant, the sum of £346.58.

Employment Judge: Jim Young
Date of Judgment: 22 February 2023
Entered in register: 23 February 2023
and copied to parties