



EMPLOYMENT TRIBUNALS

Claimant: Ms D Danielak

Respondent: Ridge Crest Cleaning Limited

Heard at: Bristol Employment Tribunal via Video Hearing
On: 20 January 2023

Before: Employment Judge Youngs

Representation

Claimant: Miss E Danielak, the Claimant's daughter

Respondent: Mr Beach, Managing Director of the Respondent

JUDGMENT

1. The Claimant's claim for breach of contract succeeds. No award of compensation is made.
2. The Claimant's claim for unlawful deductions from wages succeeds. The Respondent is ordered to pay to the Claimant:
 - a. £35 by way of deduction for DBS costs; and
 - b. £659.83 by way of gross pay, from which tax and national insurance is to be deducted.
3. The Claimant's claim for holiday pay succeeds. The respondent is ordered to pay to the Claimant £170.50 by way of gross pay, from which tax and national insurance is to be deducted.

REASONS

Claims and parties

1. By a claim form presented on 17 September 2021 the Claimant brought a claim for notice pay and wages.
2. The Claimant's claims were clarified by email of 14 October 2021. She claimed:
 - 2.1. Notice pay on the basis that she resigned giving notice that her

- employment would terminate on 4 June 2021. The Respondent terminated her employment on 28 May 2021, without notice.
- 2.2. Unlawful deduction of £35 relating to the cost of a DBS check.
 - 2.3. Unlawful deduction from wages based on the Claimant not being paid the national minimum wage for hours worked in accordance with her contract of employment.
 - 2.4. Holiday accrued and outstanding on termination had been miscalculated based on the Claimant working term-time only, when she should receive 28 days holiday per year (based on Brazel v Harpur Trust).
3. The Respondent denied the Claims and asserted that:
 - 3.1. The Claimant refused to work her notice and was therefore not entitled to be paid it.
 - 3.2. The Claimant had agreed that DBS costs would be reclaimed by the Respondent if the Claimant's employment terminated within 12 months.
 - 3.3. The Claimant was paid the national minimum wage. She had moved onto an annualised hours contract, to spread her term-time wages over a year.
 - 3.4. Holiday pay is calculated pro rata for term time only employees.

The issues

4. At the start of the hearing the issues were discussed and agreed with the parties as follows:
 - (1) Was the Claimant entitled to be paid notice pay?
 - (2) Was the Respondent entitled to deduct £35 from the Claimant's wages in respect of the DBS check undertaken? If the deduction were otherwise lawful, was the Respondent entitled to reduce the Claimant's pay below the national minimum wage by making this deduction?
 - (3) Was the Claimant paid at least the national minimum wage for hours worked?
 - (4) What was the Claimant's holiday entitlement and did she receive less holiday than she was entitled to?
 - (5) If the Claimant is successful, how much is the Claimant owed?

Procedure, documents and evidence heard

5. The hearing proceeded remotely via Video Hearing. Neither the Claimant nor the Respondent brought witnesses to the Tribunal to give evidence. Whilst witness evidence may have assisted in relation to whether the Claimant refused to work her notice, taking into account the Overriding Objective, the ability of the parties to make submissions, and proportionality, the Judge determined that the hearing would proceed. There is no requirement on either party to call witnesses.
6. Neither party had disclosed all documents relevant to matters in issue. The Tribunal took into account that neither party was represented. During the course of the hearing a number of documents were disclosed, which the Tribunal allowed into evidence and took into account. This included the Claimant's contract of employment and a schedule of work / leave. The Tribunal was assisted by a schedule of hours worked. Whilst the Respondent disputed that the Claimant was underpaid for this period (because she was on

an annualised hours contract) the hours of work was not disputed before the Tribunal.

7. The Tribunal heard submissions and arguments from both parties.
8. A final decision was reserved.

The law

9. Sections 13(1)-(3) of the Employment Rights Act 1996 (“ERA”) provide that:
 - (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.*
 - (2) *In this section “relevant provision”, in relation to a worker’s contract, means a provision of the contract comprised –*
 - (a) *in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or*
 - (b) *in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.*
 - (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.*
10. “Wages” is defined in section 27 of the ERA.
11. Tribunals dealing with unlawful deduction claims have jurisdiction to resolve any issue necessary to decide whether a sum claimed is properly payable pursuant to section 13, including an issue as to the proper construction of the worker’s contract (*Agarwal v Cardiff University and another* [2018] EWCA Civ 1434).
12. Section 1 of the National Minimum Wage Act 1998 (“NMWA 1998”) requires a person who qualifies for the national minimum wage to be remunerated in respect of work in any pay reference period at a rate which is not less than the national minimum wage.
13. Where a worker who qualifies for the national minimum wage is actually paid less than the national minimum wage in any pay reference period, section 17 of the NMWA 1998 requires the Claimant to be paid the difference plus additional remuneration to bring up to the minimum wage to be calculated in accordance with the formula: The difference between the pay received and the

pay should have received divided by the rate of the national minimum wage that was payable during pay reference period multiplied by the rate payable at the determination.

14. Section 28 of the NMWA 1998 reverses the usual burden of proof and creates a presumption that the claimant qualifies for the national minimum wage at the relevant time, and that the claimant was remunerated at less than the national minimum wage, unless the contrary is established.
15. Pursuant to sections 1 and 2 of the NMWA 1998, the determination of the hourly rate of remuneration and the applicable minimum rates is set out in the National Minimum Wage Regulations 2015 (“NMWR 2015”).
16. Regulation 4 of the NMWR 2015 (as updated by the subsequent Regulations), specifies the national minimum wage for the Claimant (who was over 25 at all material times). The relevant rates were as follows:
 - (i) between April 2020 and March 2021: £8.72/hr
 - (ii) between April 2021 and March 2022: £8.91/hr
17. Regulation 7 of the NMWR 2015 specifies that to determine the hourly rate at which a worker is to be treated as having been remunerated in any pay reference period, the remuneration in the pay reference period is to be divided by the hours worked in the pay reference period. “Hours” includes fractions of an hour – Regulation 3.
18. Regulations 8, 9 and 10 specify how the remuneration paid in any pay reference period is to be ascertained and Regulations 11 to 16 deal with deductions which reduce the remuneration.
19. For salaried hours of work, Regulations 21 to 29 apply. The relevant provisions are referred to further in the conclusions below.
20. As referred to above, pursuant to section 13(1) of the Employment Rights Act 1996 an employer must not make an unlawful deduction from wages. Failure to pay less than the applicable national minimum wage pursuant to the NMWA 1998 and the NMWR 2015 amounts to an unlawful deduction.
21. Under the Working Time Regulations 1998, every worker is entitled to a minimum of 5.6 weeks paid annual leave (based on their normal week). The Court of Appeal in *The Harper Trust v Brazel* [2019] EWCA Civ 1402 held that the calculation in the Working Time Regulations was a straightforward exercise of identifying a week’s pay in accordance with the provisions of S.221 to 224 of the Employment Rights Act and multiplying that figure by 5.6 to work out the holiday pay due for a year. The Supreme Court in *The Harper Trust v Brazel* [2022] UKSC 21 upheld the Court of Appeal. For a term time only worker, as in the *Brazel* case, only the weeks in which the worker actually work are used to calculate a week’s pay. Non-working weeks are ignored in calculating a week’s pay for these purposes.
22. A week’s pay for a worker with normal working hours is simply their normal pay.

Findings of fact and conclusions

23. I have set out my findings of fact and conclusions together, in order to assist the parties, who are both unrepresented, in understanding my conclusions in relation to what are complex legal matters.
24. The Claimant was employed by the Respondent from 24 August 2020 as a cleaner. The Claimant was paid fortnightly.
25. She resigned on 28 May 2021 giving a week's notice for her employment to terminate on 4 June 2021. The Respondent brought forward the termination of her employment to 28 May 2021.

DBS Check Costs

26. The Claimant entered into a contract of employment with the Respondent, which set out the terms of her employment. The Claimant agreed that she had a copy of this contract and I find that she entered into it prior to commencement of employment on the basis that also on 19 August 2020 she signed an agreement relating to the repayment of certain costs ("the Costs Agreement").
27. The Costs Agreement confirms that if the Claimant left her employment within 12 months of her start date, the Respondent would recover from the Claimant the cost it incurred in carrying out a DBS in respect of the Claimant, and the Claimant agreed to reimburse the Respondent for that cost accordingly. The cost is stated to be £75. The Claimant's contract of employment (which the Claimant confirmed she had) includes an agreement that "where [the Claimant] entered into a separate agreement with the [Respondent]", the Respondent may deduct from the Claimant's pay "any outstanding costs detailed in the agreement". The contract of employment also contains an agreement that "any other sums owed" by the Claimant to the Respondent may be deducted from the Claimant's wages.
28. On the face of the documentation, therefore, the Respondent was entitled to recover the DBS costs from the Claimant, whether by asking her to repay it or by deducting those costs from her pay.
29. However, the NMW Regulations provide that certain deductions from wages operate to reduce the worker's pay, and must not reduce it below the national minimum wage. Both the Claimant and the Respondent agree that the Claimant was not paid more than the national minimum wage. Regulation 13 states that deductions made by an employer in respect of the worker's expenditure or in respect of money due from the worker *in connection with the employment* will reduce a worker's pay for the purposes of calculating whether the national minimum wage has been paid. The DBS check costs were incurred in connection with the Claimant's employment. As the Claimant was at most being paid the minimum wage throughout her employment, a deduction of these costs reduced her pay below the minimum wage and therefore was not lawful, even though the Respondent may have a valid claim for recovery of that money.
30. I therefore conclude that the Claimant has suffered an unlawful deduction from her wages. She has claimed £35 in this regard.

31. I make no finding as to the reasonableness or enforceability of the Costs Agreement, as this is not necessary for the resolution of the limited issue before me.

The Claimant's pay – annualised hours?

32. The Claimant was initially paid hourly at the national minimum wage, which was £8.72 on commencement of employment. From 24 August 2020 to 25 November 2020 it is agreed that the Claimant was paid the national minimum wage. She was not treated as an annualised hours worker at this time.

33. The Claimant worked 43 weeks a year, initially working 17.5 hours a week, spread evenly over 5 days, ultimately moving to 22.5 hours a week spread evenly over 5 days (so when she was working 45 hours a fortnight (from 29 March 2021), she worked 4.5 hours a day over five days, Monday to Friday).

34. As the Claimant was a term-time only employee, to enable her to be paid throughout the year, the Respondent moved the Claimant to "annualised hours" payments from 26 November 2020. Had she remained employed for longer, she would have been paid in non-term time during periods of holiday and non-working weeks that were not holiday, but this was not the case for the Claimant.

35. The National Minimum Wage Regulations 2015 ("NMW Regulations") permit annualised hours payments where strict conditions are fulfilled. Annualised hours workers, if certain conditions are met, fall within a category of worker referred to in the NMW Regulations as "salaried hours" workers. I find the Respondent intended the Claimant to be a salaried hours worker.

36. Under the NMW Regulations, a worker is performing salaried hours work when all of the following apply:

- 36.1. they are paid under their contract for an ascertainable basic number of hours per year (the basic hours);
- 36.2. they are entitled to an annual salary for those hours;
- 36.3. they are entitled to no other payment for the ascertainable basic hours except a performance bonus and/or, from 6 April 2020 a salary premium;
- 36.4. they are paid either in equal instalments, which can be two-weekly.

37. The HMRC Manual clarifies that, in relation to the requirement for an ascertainable basic number of hours a year, "where a contract specifies a minimum number of hours to be worked plus further hours as necessary or when required, it is not possible to ascertain the exact number of basic hours to be worked from this information alone. In order to meet this condition, the employer should satisfy you of the total number of hours the worker is contracted to work in a year".

38. The Claimant's contract of employment states that she will work 17.5 hours a week for 43 weeks per year, but goes on to say "In addition to your normal hours of work, you are required to work any necessary additional hours for the proper performance of your duties". On this basis, the contract does not satisfy the strict requirements to be a salaried hours contract.

39. Further, it is unclear from the contract whether the Claimant's 17.5 hours for 43 weeks includes or excludes annual leave.
40. I conclude that the Claimant was not a salaried hours worker for the purposes of the NMW Regulations. She was therefore entitled to be paid the national minimum wage for hours worked.

National Minimum Wage – what was the Claimant paid and what should she have been paid?

41. The Claimant was paid the equivalent of £7.77 an hour from 26 November 2011 to 1 April 2021, and then £7.95 from 2 April until the termination of her employment. The national minimum wage increased to £8.91 from 6 April 2021. The Respondent does not dispute that the Claimant is entitled to the national minimum wage, but submits that the Claimant was paid the national minimum wage.
42. Based on the schedule of hours before me, and based on the Claimant's pay covering a fortnight ending on a Friday, from 26 November 2020 to 2 April 2021, the Claimant worked (excluding paid annual leave) for a total of 232 hours. She was paid a total of £1,491.84 in respect of this period (again, excluding periods of annual leave). This amounts to a rate of 7.77 an hour. The national minimum wage for this period was £8.72 per hour to 31 March 2021, and then £8.91 from 1 April 2021. If the Claimant had been paid at the applicable national minimum wage rate, she would have received £2,024.75 (taking into account the minimum wage hourly increase for 4.5 hours worked on each of 1 and 2 April 2021).
43. Based on the schedule of hours before me, from the period 5 April 2021 to 28 May 2021 the Claimant worked (excluding paid annual leave) for a total of 152.5 hours. She was paid £1,229.18 for those hours. If the Claimant had been paid at the national minimum wage rate of £8.91, she would have been paid £1,356.10.
44. The Claimant's total pay for the period 26 November 2020 to 28 May 2021 was therefore £2,721.02. At national minimum wage rates, she should have been paid £3,380.85. This is a difference of £659.83.
45. I note that had the Claimant been a salaried hours worker within the meaning of the NMW regulations, on termination during a calculation year (as defined in the NMW Regulations) for salaried workers a calculation has to be done to check whether the employee has worked proportionately more than their pro rata annual hours for the proportion of the annual leave year in which they were employed. The Claimant has worked proportionately more than her pro rata annual hours (based on a calculation year start date of 26 November, when she was put on annualised pay, and based on 43 weeks, excluding annual leave, and taking into account the increase in annual hours at various points in the calculation year).
46. For the avoidance of doubt, the Respondent genuinely believed it had paid the Claimant the national minimum wage on the basis of the Claimant being paid as an annualised hours employee. However, the Claimant did not receive any

pay in non-term time other than her entitlement to paid annual leave, so she did not receive the benefit of continuing to be paid when she was neither working nor on annual leave.

Holiday pay accrued and outstanding on termination of employment

47. The Claimant was entitled to annual leave under the Working Time Regulations, which is the equivalent of 5.6 weeks a year. When she was working, the Claimant worked five days a week. Applying the principal set out in Brazel, her annual holiday entitlement was 5.6 weeks at her normal weekly pay.
48. The holiday year ran from 1 January to 31 December each year. Carry over of statutory annual leave is not permitted (and there are no exceptions that were suggested to apply in the Claimant's case). Therefore, holiday accrued prior to 1 January 2021 is not relevant in calculating accrued outstanding holiday on termination in the 2021 holiday year.
49. In the 2021 holiday year, the Claimant was employed for 148 days. There being 365 days in the year, she was employed for 40.56% of the annual leave year. She therefore accrued 40.56% of 5.6 weeks' leave, which is 2.27 weeks' annual leave.
50. Whilst I did not have a copy of the staff handbook, I accept the Respondent's position, which the Claimant did not dispute, that the Claimant was taking holiday during non-term time weeks when she was not working.
51. On the basis of the schedule of hours, the Claimant was paid for 1.4 weeks' (12 days') holiday in the 2021 annual leave year.
52. I therefore conclude that she was therefore due a payment of 0.87 weeks' pay on termination. The Claimant worked 22.5 hours a week on termination. She is due pay for 22.5 x 0.87 hours' leave untaken as at the termination date. This comes to 19.575 hours leave, which at the national minimum wage rate of £8.91 is £170.50.

Notice pay

53. The Claimant gave one week's notice of termination on 28 May 2021, for her employment to terminate on 4 June 2021.
54. The Respondent's case is that on receipt of her notice letter, the Respondent asked the Claimant to come in to work in her one week notice period, that the Claimant refused, and that therefore she was not entitled to be paid and her employment was terminated the same day because of that.
55. On behalf of the Claimant it was submitted that the Claimant was due to be on leave for the week of her notice period and that she did not work for that reason.
56. The Respondent submitted that the Claimant's submissions should be accepted because the Claimant was not before the Tribunal to give evidence and the submissions for the Claimant were simply hearsay. However, Mr

Beach was not the person who received the Claimant's notice and discussed it with her on 28 May 2021. Whilst Mr Beach did not accept that the Claimant was due to be on leave, the Respondent did not have any live evidence as to the position regarding leave.

57. During the hearing the Claimant's representative produced a copy of a rota that was displayed at the Claimant's place of work. This showed that the Claimant was not due to work in the week that was her notice period. The Respondent did not dispute that that document was displayed on the wall at the Claimant's workplace, but disputed its meaning.
58. Based on the document before the Tribunal and taking into account the submissions of the parties, I find that prior to 28 May 2021, the Claimant was not expecting or expected to work in the period 29 May to 4 June 2021.
59. The Respondent had the contractual right not to pay notice in the event of gross misconduct by the Claimant, but I find that the Claimant did not commit gross misconduct (or a fundamental breach) by saying that she would not be able to work on a week that she was not scheduled for work.
60. The Respondent had the contractual right to pay in lieu of notice, but no payment was made.
61. I conclude that there was a breach of the Claimant's contract as regards the Claimant's notice period.
62. However, had the Claimant remained employed on annual leave from 29 May to 4 June 2021, she had not accrued sufficient annual leave to cover the whole of that period. The Respondent was entitled to deduct annual leave taken but not accrued as at termination, and the Claimant's entitlement to holiday pay has been dealt with under that head of claim. The Claimant therefore has no separate loss that has not already been compensation for, and therefore is not entitled to any additional compensation as a result of this breach of contract.

Employment Judge Youngs
Date: 17 February 2023

Judgment sent to the Parties on 03 March 2023

For the Tribunal Office

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.