



## EMPLOYMENT TRIBUNALS

### Claimant

Ms E Bulmer

### Respondent

Shine Bright Day Care and Out of School Club Ltd

Heard at: Leeds

On: 7 March and 3 May 2023

Before: Employment Judge Davies

### Appearances

For the Claimants:

In person

For the Respondent:

Mrs A Ralph (Croner Consulting) (7 March 2023)

Ms A McDonald (3 May 2023)

## JUDGMENT

1. The Claimant's complaint of unauthorised deduction from wages is well-founded and succeeds. The Respondent shall pay the Claimant the total sum of **£3791.42** (i.e. £2597.50 for September and October 2022 plus £1193.92 for November and December 2022).
2. That is a net sum and the Respondent is responsible for separately paying any tax and National Insurance due on that sum in addition.
3. The Respondent must also pay the Claimant **£6.45** in respect of financial losses attributable to the non-payment of her wages.

## REASONS

### Introduction

1. This was a complaint of unauthorised deduction from wages brought by the Claimant, Ms E Bulmer, against her former employer, Shine Bright Day Care and Out of School Club Ltd. The Respondent is owned and run by Ms A McDonald.
2. The Claimant represented herself. On the first day of the hearing, the Respondent was represented by Mrs A Ralph, litigation consultant with Croner Consulting. It became clear that the case had not been properly prepared. There was a PDF file of documents, but it was incomplete. Both Ms Bulmer and Ms McDonald referred to text/WhatsApp messages and other documents that had not been disclosed or included in the file. I heard some evidence from Ms Bulmer and Ms McDonald, but it became clear that it was necessary to adjourn the hearing so that all relevant evidence could be disclosed and included in a file, and witness statements could

be prepared. I made very clear orders about that and adjourned the hearing to 3 May 2023.

3. Croner Consulting came off the record on 2 May 2023 and Ms McDonald represented the Respondent at the hearing on 3 May 2023. When the hearing started, it became clear that my orders had not been complied with. Ms Bulmer had disclosed her relevant evidence to the Respondent's representative. Mrs Ralph had sent her a draft file on 13 April 2023, with no page numbers or index. She asked Ms Bulmer to send clearer copies of some documents and said that she would then send a finalised file. Ms Bulmer sent clearer copies, but no revised file was ever produced. The file was not uploaded to the Tribunal's document upload centre, as I had ordered. I only received a copy because Ms Bulmer emailed it to the Tribunal the day before the hearing started. Much of what was in the file had also been in the file used on the first day of the hearing.
4. Ms McDonald had sent a series of emails to the Tribunal and Ms Bulmer at 6pm on 2 May 2023, attaching streams of text/Whatsapp messages. They were not in any identifiable order, many of them were undated and they had no page numbers or index. She said that this was her evidence. Many of those messages were already in the file of documents.
5. Ms Bulmer had sent brief witness statements to Mrs Ralph on 26 April 2023. That was not done by the date I ordered on 7 March 2023, but was a week before the adjourned hearing. Ms McDonald sent brief witness statements to Ms Bulmer in the evening of 2 May 2023.
6. Ms McDonald told me that she thought her representative had prepared everything. She had not provided her with a copy of the file of documents or the Claimant's evidence. Ms Bulmer emailed them to her at that stage.
7. I decided not to allow the Respondent to rely on the evidence that had been emailed across the evening before. I had made very clear case management orders, to make sure that precisely this did not happen again. It was not fair to Ms Bulmer to admit late evidence in this way. The evidence was not in a form that could quickly be processed because of the lack of dates, coherent order and index. Much of it was, in fact, already in the file of evidence.
8. Nor was it consistent with the overriding objective to adjourn the hearing again, when what was at issue was around three months' wages, much of which Ms McDonald admits is owed to Ms Bulmer. I acknowledged that this meant that Ms McDonald would have to deal with the revised file of documents and witness statements that had not been provided to her by her legal representative. Ms McDonald did not want the hearing to be adjourned. I gave her time to read the documents, in the context that many of the documents in the file had been included in the previous version. I explained to Ms McDonald that her position was different from Ms Bulmer's, because Ms Bulmer had provided her evidence to the Respondent's then legal representative, whereas that representative had not provided the Respondent's evidence to Ms Bulmer. I explained to Ms McDonald that if her legal representative has let her down, she needs to take that up with them.

9. I decided to allow Ms Bulmer's two witnesses who had provided statements and attended the hearing to give evidence. Although they were not provided by the date I ordered, their witness statements were provided a week before the hearing. That was enough time for the Respondent to deal with them. They were only short. The Respondent was legally represented at that time. I decided not to admit the statements from Ms Bulmer's witnesses who had not attended the hearing, because I had made clear that any witness who provided a statement would need to attend the hearing to be cross-examined. I decided not to admit the statements from the Respondent's witnesses. This was for the same reasons I did not admit the Respondent's late documentary evidence.
10. On 3 May 2023 I therefore heard more evidence from Ms Bulmer and Ms McDonald, and I heard evidence from Mrs Parker (Ms Bulmer's mother) and Miss Stones (her former colleague) on Ms Bulmer's behalf.

## **Issues**

11. By the end of the first day of the hearing, it was agreed that the Respondent had not paid Ms Bulmer her full wages for September and October 2022. The dispute was whether Ms Bulmer was entitled to any wages for November or December 2022. The issues for me to decide were:
  - 10.1 When did Ms Bulmer's employment with the Respondent end?
  - 10.2 What wages were properly payable to her for the period from 1 November 2022 to the termination of her employment?
  - 10.3 Did she suffer losses attributable to the non-payment of her wages?

## **Findings of fact**

12. Ms Bulmer started working for the Respondent as an HR and Finance Assistant on 11 July 2022. She should have been paid on 28<sup>th</sup> of the month, a month in arrears, i.e. she should have been paid July's wages on 28<sup>th</sup> August and so on.
13. She was a salaried employee. Her hours of work were 40 per week and her salary was £20,800. Her contract said that she would be paid her salary monthly in arrears. Her gross monthly salary was therefore £1733.33. She was entitled to 28 days' holiday per year plus bank holidays, and the holiday year ran from 1 April to 31 March. If she had taken more holidays than she had accrued in the holiday year when her employment ended, her contract said that the Respondent could make a deduction from any outstanding pay. If she was absent on sick leave, she would not be paid for the first three days and would then receive statutory sick pay.
14. Prior to November 2022 Ms Bulmer took a total of 12 days' annual leave.
15. The parties agree that Ms Bulmer should have been paid £1483.41 net for her September 2022 wages on 28 October 2022. She should have been paid £1514.09 net for her October 2022 wages on 28 November 2022. She was not paid those sums. She was paid £100 on 4 November 2022 and £300 on 3 December 2022. The outstanding wages have never been paid. She is therefore owed £2597.50 for her wages earned in September and October 2022 wages.

The failure to pay her wages was a fundamental breach of contract by the Respondent.

16. The disputed issue between Ms Bulmer and the Respondent is whether she is owed any wages for November and December 2022. Ms Bulmer says that she remained an employee until 4 December 2022, when she had Ms McDonald had an argument, after which she did not speak to or communicate with her again. Ms McDonald originally said that Ms Bulmer stopped being an employee on 31 October 2022, because that was the last day she attended work. She conceded on the second day of the hearing that that was incorrect, but she was unable to say when Ms Bulmer's employment ended. She did not suggest that she had expressly dismissed her at any stage prior to 4 December 2022.
17. I find that Ms Bulmer's employment ended during the weekend of 3/4 December 2022, as explained below.
18. Ms Bulmer needed an operation in November 2022. She took a week's annual leave to cover that, so that she would still be paid. Her evidence was that she returned to work on 7 November 2022. After that, apart from 9 November 2022 (when she was sick) and 17 November 2022 (when she was absent to look after her son) she was working every day, although some of this was working from home.
19. Ms McDonald said that Ms Bulmer was not permitted to work from home, and that there was not enough work for her to do from home. She was not working and she should not be paid.
20. I preferred Ms Bulmer's evidence, that she was either at work on the Respondent's premises, or working from home with Ms McDonald's knowledge and her express or implied agreement, until the weekend of 3/4 December 2022. The evidence in the file and other evidence was entirely consistent with that. In particular:
  - 19.1 On Tuesday 8 November 2022 Ms Bulmer and Ms McDonald exchanged messages about payments into the business. Ms Bulmer told Ms McDonald that she had rung the majority of parents, sent emails and been catching up on her emails after her week off. Ms McDonald sent Ms Stone a message that day, confirming that Ms Bulmer dealt with the payments that were due in, chasing fees etc.
  - 19.2 On Wednesday 9 November 2022 Ms Bulmer told Ms McDonald that she was not coming into the office that day. Ms McDonald confirmed that this would be classed as a day's sickness absence. She still sent Ms Bulmer some work-related questions, and Ms Bulmer answered them.
  - 19.3 On Thursday 10 November 2022 Ms Bulmer told Ms McDonald that her wounds were infected but that she was in the office. They exchanged messages about payments that had come in and how the Respondent was going to make payments to staff. Ms McDonald sent Ms Bulmer a message later on, asking her if she was on lunch because she had just got there to see her. Ms Bulmer replied to say that she had gone home in pain. Ms McDonald asked her in future to let her know what she was doing. Ms Bulmer replied to say that she was still working, just from home. Ms McDonald replied to say that she hoped she felt better soon. Ms

- McDonald knew that Ms Bulmer was working from home that afternoon and she did not tell her that was not allowed or that she must come into work.
- 19.4 On Friday 11 November 2022, Ms Bulmer emailed Ms McDonald to say that she would not be in work because of the infection. She said that she had no money for a prescription. Her evidence was that she worked from home.
  - 19.5 On Monday 14 November 2022, Ms Bulmer and Ms McDonald exchanged work-related messages during the day. They discussed who should be paid with the limited funds that had come in and agreed that everybody who had not had something would be paid £100 each.
  - 19.6 On Tuesday 15 November 2022, Ms Bulmer and Ms McDonald exchanged work-related messages during the day.
  - 19.7 On Wednesday 16 November 2022, Ms McDonald asked Ms Bulmer to work downstairs that day and she agreed to do so. They exchanged work-related messages.
  - 19.8 On Thursday 17 November 2022, Ms Bulmer messaged Ms McDonald to say that she would not be in work because her son was ill. Later that day Ms Bulmer messaged Ms McDonald to ask if she had managed to get a loan because she (Ms Bulmer) now had no money and her phone had been cut off. Ms McDonald said that she had not.
  - 19.9 On Friday 18 November 2022, Ms Bulmer messaged Ms McDonald to say that she would not be in work again. Her evidence to the Tribunal was that she worked from home. Ms McDonald and a colleague exchanged messages about the rota that day, the colleague expressing concern about Ms Bulmer and Ms McDonald working in the baby room. Although Ms Bulmer did not in fact attend the premises that day, this demonstrated that Ms Bulmer was still regarded by Ms McDonald as a member of staff.
  - 19.10 On Monday 21 November 2022, Ms Bulmer messaged Ms McDonald to say that she would be working from home because she had car problems. She told Ms McDonald she would work on the website and updating Bright HR. Ms McDonald told her that it was no good texting after 9am to say that she would be working from home. She identified a list of things that needed doing. Ms Bulmer replied to say that she had only realised her car tyre was flat when she went out to do the school run. She could not reinflate it. She was unable to call anyone to fix it because her phone had been cut off. She would be in the office when she had her wage and could pay for it to be fixed. She said that she could do the majority of the tasks identified by Ms McDonald from home. Ms McDonald replied, "OK let me know what you do and can you send letters out for payment that are overdue." Again, that can only be read as agreement from Ms McDonald that Ms Bulmer could work from home. They exchanged work-related messages during the day and Ms McDonald asked Ms Bulmer at the end of the day what she had done. Ms Bulmer told her.
  - 19.11 On Tuesday 22 November 2022, Ms Bulmer was copied in on emails between Ms McDonald and Ms Brierley about Ms Brierley's outstanding wages. Although Ms McDonald said in evidence that she just "replied to all", I did not accept that evidence. Ms McDonald continued to exchange work-related messages with Ms Bulmer after that (see below) and it was clear that she was still treating her as an employee.

- 19.12 On Thursday 24 November 2022 Ms McDonald asked Ms Bulmer to send her the accounts she did on a monthly basis. Ms Bulmer said that she had not had time to do 2021-22 yet. They exchanged messages about it.
- 19.13 On Friday 25 November 2022 Ms Bulmer and Ms McDonald exchanged some work-related messages.
- 19.14 On Monday 28 November 2022 Ms McDonald asked Ms Bulmer to tell her how many days and hours she had worked the previous week, so that she knew how much to pay her. Ms McDonald asked Ms Bulmer to send all the wage slips over, and for confirmation that she had deducted an overpayment previously made to her from her own wage slip. Ms Bulmer queried that, and asked when she was going to receive her wages [which were now a month late]. Ms McDonald told her that she would be receiving her wage. Ms McDonald asked her to send the wage slips over again and Ms Bulmer said that she would do so, but that Ms McDonald had already received them from the accountant. Ms Bulmer asked whether she would be receiving her wages that day. Ms McDonald said that she would “provide a further update when it has been done.”
- 19.15 On Tuesday 29 November 2022 Ms Bulmer still had not been paid September’s wages, and October’s wages were now overdue. She asked Ms McDonald when she would receive her wages so she could come back into work. Ms McDonald told her that what money came in that day would pay her wages. Ms Bulmer said that she felt like her life had been put on hold and she just wanted to get back to work. Ms McDonald said that she understood. They exchanged work-related messages.
- 19.16 On Wednesday 30 November 2022 Ms Bulmer messaged Ms McDonald to say that she had seen that payments had been made into the business yesterday and to ask why she had not been paid. She said that she understood Ms McDonald was facing difficulties but that she needed to be paid and that she would rather Ms McDonald did not lie to her. She said that she did not want to leave, she just wanted to get her life back. It does not appear that Ms McDonald replied.
- 19.17 On Friday 2 December 2022 Ms Bulmer sent another message saying that she needed her money and asking how Ms McDonald could just ignore her after she had gone two months without a wage. Ms McDonald said that she was not ignoring her and had a lot to deal with. She sent her details of the bank balance and asked, “What do you want me to do?” They had an increasingly heated exchange of messages that day. Ms Bulmer pointed out that Ms McDonald had told her on Tuesday that whatever came in that day would pay her wages, and yet although she could see that almost £3500 had come in, she still had not been paid anything. She accused Ms McDonald of lying to her. Ms McDonald was unapologetic. She said that the rent and insurance had to be paid.
- 19.18 Matters deteriorated over the weekend. Ms McDonald was asking Ms Bulmer for the Respondent’s social media passwords and Ms Bulmer was refusing to provide them because she had not been paid for the work she had done on the social media. Ms Bulmer said in a message on Sunday 4 December 2022 that she would respond to work-related text messages after she had been paid what she was owed. She called Ms McDonald “inhuman” and “evil.” Ms McDonald then called Ms Bulmer “pathetic” and “evil” and told her that she would ensure that people who had left and who deserved their pay would be paid “not some so called finance lady who

clearly doesn't have a clue about finances because if you did certain precautions would have been taken."

- 19.19 Ms Bulmer then posted derogatory comments about Ms McDonald and the business on social media. She wrote that she no longer worked there.
21. All of that evidence was consistent with Ms Bulmer still being employed by the Respondent until the weekend of 3/4 December 2022. Until 21 November 2022 she had some instances of sickness absence, and some instances of working from home because of the after-effects of her operation. It seemed to me from the messages that Ms McDonald must be taken to have agreed to that. On 21 November 2022, Ms Bulmer made clear that she could not attend work because she had not been paid and could not afford to have her car repaired. Again, at no point did Ms McDonald say that she was not permitted to work from home. On the contrary, she expressly agreed – "Ok let me know what you do" – and then regularly exchanged work-related messages with Ms Bulmer and asked her what she was doing or had done. Ms Bulmer clearly continued to do work-related activities.
22. Ms McDonald asserted in cross-examination of Ms Bulmer that there was not enough work for Ms Bulmer to do from home to keep her fully occupied. Ms Bulmer disagreed and identified the work she did. In any event, under her contract Ms Bulmer was not an hourly paid worker, she was a salaried worker. Her basic pay therefore did not depend on what work she completed on a working day.
23. Ms McDonald did not expressly dismiss Ms Bulmer at any point. She was in fundamental breach of contract by not paying Ms Bulmer her wages from 28 October 2022 (September's wages) onwards. As late as Tuesday 29 November 2022 Ms Bulmer expressly confirmed that she did not want to leave. However, she continued not to be paid, and over the weekend of 3-4 December 2022 Ms McDonald told her that she would not prioritise paying her, and Ms Bulmer announced publicly that she no longer worked for the Respondent. It seemed to me that her employment came to an end that weekend when she accepted the Respondent's fundamental breach of contract. Ms Bulmer's last working day was therefore Friday 2 December 2022.
24. In her claim form, Ms Bulmer claimed for £377 late payment charges on direct debits caused by the non-payment of her wages. The bank statements she provided only refer to three late payment charges, of £2.15 each. I therefore find that the non-payment of her wages caused additional losses of £6.45.

## **Legal principles**

25. The right not to suffer unauthorised deductions from wages is governed by s 13 Employment Rights Act 1996. Where the total amount of wages paid on any occasion is less than the total amount of wages properly payable, after permitted deductions, the shortfall is treated as an unauthorised deduction. Deductions from wages are permitted if they are authorised by a written term of the employee's contract of which the employee has a copy prior to the deduction being made.

26. Under s 23 Employment Rights Act 1996, an employee can complain about unauthorised deductions in the Employment Tribunal. Under s 24, if the Tribunal finds that an unauthorised deduction was made, it must make a declaration and order the employer to pay the worker the amount of the deduction. It may also order the employer to pay the worker compensation for financial losses attributable to the failure to pay the wages.
27. The employment relationship is governed by the contract of employment. It comes to an end if it is terminated by one or other party. That might include an express dismissal by an employer; a “constructive dismissal”, where an employee resigns because an employer has fundamentally breached the contract; or a resignation, where the employee resigns, with or without notice. If the employment relationship has not ended, the employer remains bound to pay wages in accordance with the terms of the contract.

### Application of the law to the facts

28. As noted above, there is no dispute that the Respondent failed to pay the Claimant all but £400 of her wages for September and October 2022 and that the net amount outstanding is **£2597.50**.
29. For the reasons explained in the findings of fact above, I find that Ms Bulmer’s employment ended over the weekend of 3-4 December 2022, and that her last working day was 2 December 2022.
30. She has not been paid at all for wages earned in November or December 2022. In November 2022, she had five days’ annual leave, for which she should have been paid at her normal rate. She had two days’ sickness absence, for which she was not entitled to be paid. Subject to any permitted deductions, the wages payable to her were therefore one month’s wages, less two days’ pay. One month’s gross wages was £1733.33 and two days’ gross pay was £160. The gross wages payable for November 2022 were therefore £1573.33. In December 2022, Ms Bulmer worked two days. Subject to any permitted deductions, the wages payable to her were therefore two days’ pay, i.e. £160 gross. For ease of calculation, if the two days’ pay for December are combined with November’s wages, Ms Bulmer should have had a full month’s pay.
31. Ms Bulmer accrued her holiday at the rate of 1/12 of the annual entitlement for each month of service in the holiday year. That was consistent with the Working Time Regulations, which say that in the first year of employment workers accrue 1/12 of their entitlement on the first day of each month of the holiday year. On the date her employment ended, Ms Bulmer had accrued 5/12 of her 28 days’ annual leave entitlement, because she accrued 1/12 on each of 1 August, 1 September, 1 October, 1 November and 1 December 2022. The amount of leave accrued was 11.66 days, which is rounded up to 12 days under the Working Time Regulations 1998. Ms Bulmer took 12 days’ leave prior to November 2022. She then took a further five days to cover her operation. When her employment ended she had therefore taken five days’ more leave than she had accrued. The Respondent was entitled under her contract to deduct that from her outstanding wages. The Respondent was therefore entitled to deduct £400 gross from her outstanding wages.



32. The gross amount payable to Ms Bulmer for November and December 2022 was therefore £1333.33. On the basis that the first £1047.50 was not taxable, and that tax was payable at 20% after that, the tax payable on that sum was £57.17. Based on previous payslip, the National Insurance was £82.24. The net sum payable is therefore **£1193.92**.
33. The Respondent must also pay Ms Bulmer **£6.45** for the late payment charges on direct debits caused by the non-payment of her wages of which she provided evidence.

**Employment Judge Davies  
9 May 2023**