



EMPLOYMENT TRIBUNALS

Claimant: Ms A Fountain

Respondent: Theatre Experiential Agency Ltd

Heard at: London South Employment Tribunal (by CVP)

On: 5 April 2023

Before: Employment Judge T Perry

Representation

Claimant: In person

Respondent: Mr Barry Duncan

RESERVED JUDGMENT

1. The Claimant's claims for arrears of pay and commission fail and are dismissed

CORRECTED REASONS

Claim and issues

2. The Claimant brings claims of unlawful deduction from wages and breach of contract.
3. The Claimant says she worked but was not paid for 27 May 2022 and 3 June 2022. The Claimant says she was promised commission of £50 for each person she referred to the Respondent who worked at least one full shift at the Mayflower Cruise Terminal.

Evidence

4. I heard evidence under affirmation from the Claimant and Mr Glenn Brighty and for the Respondent from Mr Duncan.

5. I had no access to a bundle of documents but the Claimant provided a series of photographs and one PDF document. Mr Duncan had previously been provided with these.

Findings of fact

6. The Respondent is an Isle of Mann based company providing agency workers for promotional events.
7. The Claimant works regularly in this industry.
8. The Claimant worked two days for the Respondent at the Mayflower Cruise Terminal in April 2022 and was paid for these.
9. Mr Brighty reached a commercial arrangement with the Respondent to be paid commission for candidates provided to work at the Mayflower Cruise Terminal. The arrangement was between Mr Brighty and the Respondent. The Claimant may have assisted in providing names to Mr Brighty but was not a party to this agreement.
10. The Claimant was then asked by Keith Trickett, the Respondent's UK representative, to work for two days on 27 May and 3 June 2022 at the Bestway cash and carry in Brighton. The rate was agreed as £100 a day plus £20 for travel expenses.
11. The Respondent's systems require workers to check in on arrival at site via an app and to check out. The system enables workers to provide pictures via the app to show where they are – specifically a photo of the till showing the date and time.
12. On 27 May 2022, the Respondent's system shows the Claimant checking in at 8:41 and checking out at 16:51. I was also provided with a picture taken by the Claimant of the check in sheet at the cash and carry showing her arriving at 8:45. The Claimant says she only took this phot to get the details of someone else on the sign in sheet but there is only the first name of one other person shown on the sheet.
13. The Respondent says that it was later told by the Kiosk Manager for Bestway, Mia, that the Claimant left after 15 minutes.
14. On 3 June 2022, the Respondent's system shows the Claimant checking in at 9:12 and checking out at 17:47. The Respondent was suspicious

because of a lack of till sales and at 12:01 asked the Claimant for a picture of the till. The Claimant provided a photo at 12:53, but Bestway said this was not their till.

15. Mr Trickett messaged the Claimant at 13:23 to say that the Kiosk manager said there was nobody in the store. Mr Trickett messaged the Claimant at 15:13 to point out that Bestway had said the till in the picture was not theirs. The Claimant replied at 15:56 that it was the main till. Mr Trickett asked at 15:57 if the Claimant was at the right place with Mia. The Claimant did not reply until 18:10 to say she had not seen Mia. Mr Trickett asked whether the Claimant had been at the right store.
16. In deciding whether the Claimant was at the store on 27 May and 3 June 2021, I have limited evidence before me. However, I find on balance that the Claimant was not at store (other than possibly for a brief period to sign in on both days). I find the evidence that Bestway clearly thought the Claimant was not there on both days and that the till pictured on 3 June was not theirs to be compelling. I also find that on 3 June 2022 had the Claimant been in place she could have simply sent a picture of herself to Mr Trickett to prove where she was. That the Claimant did not do this suggests that she was not, in fact, where she said she was.

The Law

17. The right not to suffer unlawful deduction from wages is contained in section 13 Employment Rights Act 1996.
18. In order to amount to wages a sum has to be payable under the worker's contract or otherwise (per section 27(1)(a) Employment Rights Act 1996).
19. The phrase "payable under the worker's contract or otherwise" was considered by the Court of Appeal in **New Century Cleaning Co Ltd v Church** [2000] IRLR 27. In **Church** a majority of the Court of Appeal held that it was necessary for a worker to show that there was some legal entitlement to the sum in question, although the entitlement need not necessarily arise from an express term in the contract.

Conclusions

20. As I do not find that the Claimant worked on 27 May and 3 June 2021 the Claimant has no sums payable as she had no legal entitlement to be paid.

Accordingly, there can be no unlawful deduction and the Claimant's claim fails.

21. As to the claim in respect of commission, I do not find that the Claimant was a party to this agreement, which was between Mr Brighty and the Respondent. The Tribunal has no jurisdiction to consider that commercial claim and it is dismissed.

Employment Judge **T Perry**

Date: 06 April 2023

Date of corrected Judgment: 25 May 2023