



EMPLOYMENT TRIBUNALS

Claimant: Ms K Collins

Respondent: Amaze Umbrella Limited

Heard at: Croydon Employment Tribunal (by video) **On:** 6 July 2023

Before: Employment Judge Evans (sitting alone)

Representation

Claimant: in person

Respondent: Mr Keeling, managing director of respondent

JUDGMENT

1. The claimant's claim that the respondent made unauthorised deductions from her wages fails and is dismissed.
2. The claimant's claim that she did not receive the holiday pay to which she was entitled either during or on the termination of her employment fails and is dismissed.

REASONS

The judgment sent out above was given orally with reasons at the conclusion of the hearing on 6 July 2023. The respondent has requested written reasons. These are those reasons.

Preamble

1. The claimant presented a claim against the respondent in respect of holiday pay and unauthorised deductions from wages on 25 January 2023 following the termination of her employment on 14 December 2022.
2. The claim came before me with a listing of two hours on 6 July 2023. I had the following documents before me at the hearing. First of all, the claimant had sent in a zip file

containing numbered documents 1 to 14 and also contracts B, C and D. She had also produced a schedule of loss and a witness statement.

3. The respondent had not provided (or at least the tribunal had not received) any documents before the hearing but at the beginning of the hearing the respondent emailed through a number of emails from November 2022, a letter dated 12 November 2020 to the claimant and also an email from the claimant to the Tribunal dated 30 May 2023. I admitted these documents because the claimant would have seen them all previously.

The issues

4. The claimant asserted that the respondent had made unauthorised deductions from her wages by failing to pay her at £110 (initially) or £120 (subsequently) a day. She also asserted that the respondent had breached the Working Time Regulations 1998 by paying her rolled-up holiday pay.
5. The respondent agreed that it had not paid the claimant £110 (initially) or £120 (subsequently) a day. The respondent said that this was because the claimant was entitled only to be paid the national minimum wage plus a small amount of commission. The respondent also agreed that it had paid the respondent rolled-up holiday pay but contended that this was permitted.
6. It was agreed that I would consider:
 - 6.1. Whether the claimant was entitled to be paid at the rate of £110 per day until 1 April 2022 and thereafter £120 per day. If she were so entitled, her claim for unauthorised deductions would succeed and I would then go on to consider the amount which had been deducted. Alternatively, if she were entitled to be paid only the national minimum wages plus a small amount of commission, it was agreed that her claim would fail.
 - 6.2. Whether the respondent had breached the Working Time Regulations 1998 by paying the claimant rolled up holiday pay. If it had, I would go on and consider the amount due to the claimant under the Working Time Regulations 1998 in respect of holiday taken during her employment and in respect of accrued but untaken holiday on the termination of her employment. On the other hand, if the respondent had not breached the Working Time Regulations 1998 by paying her rolled-up holiday pay, it was agreed her claim would fail.

The Law

Unauthorised deductions from wages

7. Section 13 of the Employment Rights Act 1996 (“the ERA”) provides that an employer may not make a deduction from the “wages” of a worker unless the deduction is required or authorised by virtue of a statutory provision or a relevant provision of the

worker's contract or the worker has previously signified in writing their agreement or consent to the making of the deduction.

8. "Wages" means any sums payable to a worker in connection with their employment, including any fee, bonus, commission, holiday pay or other emolument referable to their employment, whether payable under their contract or otherwise (section 27 of the ERA).
9. The question in this case was what the "wages" which were properly payable to the claimant were. If they were the national minimum wage and a small amount of commission, the respondent would have made no unauthorised deductions. On the other hand, if they were £110 (or £120) a day, the respondent had paid the claimant less than that and consequently unauthorised deductions would have been made.

Holiday pay due under the Working Time Regulations 1998

10. In Robinson-Steele v RD Retail Services Ltd and two others 2006 ICR 932 the ECJ concluded that rolled up holiday pay amounted to a breach of Article 7(2) which provided that except where the employment relationship is terminated the minimum period of paid leave may not be replaced by an allowance in lieu. However, Article 7 did not preclude employers setting off genuine holiday payments paid under the rolled-up method against a worker's entitlement to payment when he or she actually takes leave. However, such sums had to have been paid 'transparently and comprehensibly, as holiday pay'. The burden is on the employer to prove such transparency and comprehensibility.
11. The Employment Appeal Tribunal considered what was required in order to show that additional sums had been paid in 'transparently and comprehensibly, as holiday pay' in Lyddon v Englefield Brickwork Ltd 2008 IRLR 198, EAT. The question was whether there was a "transparent and comprehensible agreement" about the amount of the claimant's salary allocated to holiday pay. It concluded in that case that there was, even though the employee had simply been told that his daily rate of £135 included holiday pay. This was because his payslips set out his basic wage, the additional holiday pay, statutory deductions and total net pay.

Findings of fact

12. The arrangements concerning the work of the claimant at Bournemouth University during the period covered by the claim were complicated. In particular there were a number of contracts.
13. First, there was the contract of employment between the claimant and the respondent. Secondly, there was a contract between Talent Hub Resourcing Solutions Ltd and the respondent. Thirdly, there was an agreement for work finding services between Talent Hub Resourcing Solutions Ltd and the claimant. The claimant had also provided a

variety of correspondence. Some of this correspondence from the respondent included references to rates of pay of £110 or £120.

Conclusions

14. I am entirely unsurprised that the claimant found these arrangements confusing. However, her claim is against the respondent and the correct analysis of her contract of employment with it and the other related documents is as follows:

14.1. The day rate of £110 (subsequently £120) was the rate payable by Talent Hub Resourcing Solutions Ltd to the respondent, **not** the rate payable by the respondent to the claimant;

14.2. The pay entitlement of the claimant as an employee of the respondent was set out in her contract of employment with the respondent. The definition of “pay rate” in section 1 when read together with section 9 (“payment”), shows that the claimant was entitled to be paid the national minimum wage plus commission (if any, which would depend upon the day rate) plus rolled up holiday pay. She was not entitled to be paid either £110 or £120 per day under her contract of employment;

14.3. Further, the payslips which the claimant has provided (documents 7 and 8) show that this was what she had been paid. That is to say she was paid an hourly rate plus rolled up holiday pay as set out in her contract of employment. Consequently she was paid in accordance with her contract of employment.

14.4. It is to be noted that her payslips identified separately her basic pay, her commission, her holiday pay, her student loan repayment, her auto-enrolment pension contributions, the income tax deducted on a PAYE basis and employee national insurance contributions deducted.

15. In light of this analysis of the documentation, the respondent paid the claimant the wages that she was entitled to under her contract of employment and no unauthorised deductions were made from her pay. Her claim of unauthorised deductions from wages therefore fails and is dismissed.

16. Turning to the question of holiday pay, I find that the respondent did pay rolled up holiday pay to the claimant. I find that there was a transparent and comprehensible agreement in relation to the payment of rolled up holiday pay: there are detailed provisions in clauses 9 and 10 of the contract of employment and holiday pay is clearly marked in the wage slips. These terms reflected a mutual agreement for genuine holidays representing a true addition to the contractual rate of pay for the time worked. Accordingly, the respondent was entitled to set off the sums so paid against the claimant’s entitlement to holiday pay under the Working Time Regulations 1998 and so the claimant received the holiday pay to which she was entitled under the Working Time regulations 1998 and her claim in that respect fails too.

Employment Judge Evans

Date: 17 July 2023

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