



EMPLOYMENT TRIBUNALS

Claimant: Mrs E Cook

Respondent: Peak Paye Ltd (in voluntary liquidation)

Heard at: Bury St Edmunds (via CVP)

On: 7 September 2023

Before: Employment Judge Graham

Representation:

Claimant: Mrs E Cook

Respondent: Did not attend

JUDGMENT

Employment Tribunals Rules of Procedure 2013 – Rule 21

1. The Respondent has made an unauthorised deduction from the Claimant's wages and is ordered to pay the Claimant the sum of **£110.20**.
2. The Claimant was dismissed in breach of contract in respect of notice and the Respondent is ordered to pay damages to the Claimant in the sum of **£1103.13**.
3. The claim for unauthorised deduction from the Claimant's wages in respect of Statutory Maternity Pay ("SMP") is adjourned generally for 6 months until **7 March 2024** or until further Order.
4. The claim of pregnancy and maternity discrimination fails and is dismissed.

REASONS

Introduction

1. The claim was issued in the Watford Employment Tribunal on 14 January 2023. The Respondent failed to present a valid response on time. It was necessary to hold a hearing today as it was not possible to make a determination of the claim solely on the papers. The Claimant was in attendance, the Respondent did not attend. I was content that the Respondent had notice of the hearing, and I therefore proceeded in the absence of the Respondent.
2. Some time was spent clarifying the issues in the case with the Claimant. It was understood that the Claimant's complaint of discrimination arose out of the decision to place the Respondent business into creditors' voluntary liquidation. The Claimant said that this impacted all staff, both men and women, however the detriment to her was worse as she was pregnant and it meant that it impacted her ability to qualify for SMP.
3. I confirmed at the start of today's hearing that the Tribunal does not have jurisdiction to decide the Claimant's entitlement to SMP, that jurisdiction rests with HMRC - ***Hair Division Ltd v Macmillan EAT 0033/12***. My function with respect to that aspect of the claim was to make a decision as to the effective date of termination of the Claimant's employment with the Respondent which HMRC can use to determine the Claimant's entitlement to SMP. If the Claimant is found to have such an entitlement, then she may pursue her claim for unauthorised deductions from wages. I have therefore adjourned generally that aspect (and only that aspect) of this claim for a period of six months from the date of this judgment until 7 March 2024 or until further Order. In the event that the Claimant does not pursue the claim within that time it may be dismissed by the Tribunal.

Findings of fact

4. The Claimant commenced employment with the Respondent on 23 February 2022. The Claimant worked as a learning mentor/teaching assistant. The Claimant's hourly wage was £9.50 per hour. The Respondent was an umbrella company and seconded the Claimant to ELS Education which is an educational establishment. I was referred to a contract of employment between the Respondent and Claimant dated 23 February 2022. Paragraph 12.3.2 records that after one month's service, the Claimant was entitled to three weeks' notice from the Respondent.
5. On 6 October 2022 the Respondent informed the Claimant (and other staff) that it was having payment issues and recommended that she move to a new umbrella company. The Claimant was told that her pay structure and take home figure would remain the same. The Claimant moved to a new umbrella company on 7 October 2022.
6. The Claimant queried with the Respondent whether this would impact her SMP. The Respondent suggested that it would not and it gave the Claimant a "transfer code" to use so that she would not lose out. On 10 October 2022 the Respondent informed the Claimant that she would not qualify for SMP due to lack of continuous service.
7. On 13 October 2022 the Claimant sent the Respondent her MATB1 form and desired dates for maternity leave. On 18 October 2022 the Respondent informed the Claimant that she would not be eligible for SMP again due to lack of continuous service, and secondly because the Respondent would become "defunct" by January 2023 and not in

a position to pay her. The Claimant stated her intention to proceed with a statutory payment dispute with HMRC.

8. I have been provided with a copy of an email dated 27 October 2022 from the Respondent to the Claimant which stated:

“Hi Evelyn,

Following recent uncertainties, we’ve had to take a look at our business structure and make some difficult decisions.

As a result, we are no longer in a position to be able to offer payroll services.

We are in the process of issuing P45s to our contractors in the coming weeks.

It has been a pleasure working with you and we wish every success in the future.

King regards

The Peak Paye team

9. Whereas the Claimant indicated in her ET1 that her employment ended on 4 October 2022, I consider that is an error. It is clear that the Respondent was giving the Claimant notice of termination on 27 October 2022, and that her notice period was three weeks as per paragraph 12.3.2 of her employment contract. I therefore find that the Claimant’s effective date of termination was **17 November 2022**.
10. The Claimant was not paid her notice by the Respondent. I have been provided with the Claimant’s payslips and note that her weekly pay was on average £367.71. I therefore calculate the Claimant’s notice pay to be **£1103.13**.
11. The Claimant continued to engage with the Respondent about missing payments, specifically payments for 18 July 2022 when she attended an ante-natal appointment, and also pension contributions for the following periods:
- 31/08/22 - 06/09/22
14/09/22 - 20/09/22
21/09/22 - 27/09/22
28/09/22 - 04/10/22
12. On 29 December 2022 the Respondent confirmed by email that the Claimant was entitled to these payments but it was unable to pay them as it was now in liquidation.
13. Having considered the Claimant’s pay slips and her hourly rate I am able to make the following calculations:

13.1 On 18 July 2022 the Claimant was entitled to payment for six hours at £9.50 per hour which amounts to **£57**.

13.2 The Claimant's average employer pension contributions were £13.30 per week. Four weeks at £13.30 amounts to **£53.20**.

14. I have therefore found that the Respondent made unauthorised deductions to the Claimant's wages of **£110.20**.

15. I have gone on to consider the Claimant's claim for discrimination. The burden of proof as regards this complaint is on the Claimant, however I find that the Claimant's treatment was not because she was pregnant (nor because she intended to exercise her rights with respect to ordinary or additional maternity leave) but because of the financial situation in which the Respondent found itself in resulting in a voluntary creditors' liquidation. I accept that the decision to do so could in theory negatively impact upon the Claimant's entitlement to SMP, however I cannot find that this was done because of the Claimant's pregnancy (or because she intended to exercise her rights referenced above). The Claimant has not demonstrated facts from which the Tribunal could decide, without any other explanation from the Respondent, that discrimination has taken place. As such the burden of proof has not shifted and this complaint must fail.

16. It will be a matter for HMRC to decide upon whether the Claimant was entitled to SMP based upon the effective date of termination I which I have found above.

Employment Judge Graham

Date: 7 September 2023

JUDGMENT SENT TO THE PARTIES ON
18 October 2023

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AND ENTERED IN THE REGISTER

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FOR THE TRIBUNAL OFFICE