Case No: 2408536/2022
2401175/2023

EMPLOYMENT TRIBUNALS

Claimant: **Ms Jade Burton**

Respondent: **Soul Hair Limited**

Heard at: **Liverpool (Remote)** **On:** **7th& 8th September 2023**

Before: **Employment Judge Greer**

Representation

Claimant: Mrs Ferrigno (Legal Representative)
Respondent: Ms Evans-Jarvis (Solicitor)

JUDGMENT

The Judgment of the Tribunal is that:

1. The complaint of unauthorised deduction from pay on 27th June 2022 contrary to Part II Employment Rights Act 1996 is not well-founded and is dismissed.

2. The complaint of unauthorised deductions from pay on:

   31st July 2021
   31st October 2021
   31st January 2022
   28th February 2022
   30th April 2022

contrary to Part II Employment Rights Act 1996 is well-founded. The Respondent is ordered to pay to the Claimant the gross sum of £78.11.

3. The Claimant's claim to have been paid less than the National Minimum Wage is not well founded and is dismissed.

4. The Claimant's claim for unpaid holiday pay was withdrawn under Rule 51 and is therefore dismissed pursuant to Rule 52.

5. The Claimant's claim for breach of contract, and the Respondent's counter claim, were withdrawn under Rule 51 and are therefore dismissed pursuant to Rule 52.

REASONS

Background

1. The Claimant was employed by the Respondent, initially as an apprentice and later as a assistant between 20th August 2015 and 28th June 2022.

2. The Claimant started the ACAS early conciliation process on 14th July 2022. The ACAS certificate was issued on 25th August 2022. The claim was presented, in time, 22nd October 2022.

The hearing

3. The hearing took place by way of a video hearing over the Cloud Video Platform. The Claimant was represented by Mrs Elizabeth Ferrigno (an HR Consultant). The Respondent was represented by Ms Evans-Jarvis (a Solicitor).

Preliminary Matters

4. At the beginning of the hearing, I heard a number of submissions from Mrs Ferrigno. She expressed her unhappiness with the way in which the Respondent's solicitors pursued the case on behalf of their client. She made a number of observations about documents in the bundle, in particular a contract of employment, which she said was a forgery. She was displeased that she had not been afforded an opportunity to inspect a paper copy of this contract.

5. I asked whether she was making an application for the hearing to be adjourned and re-listed at an in-person hearing that would allow the parties to inspect paper copies documents. Mrs Ferrigno told me that her client was keen to have her matter determined and she did not wish to press such an application. She asked me to take this into account when considering the weight to be attached to the Respondent's version of the contract

6. Mrs Ferrigno then told me that in order to support the argument that documents can be forged with ease, she wished to introduce into evidence a Bank Statement that she herself had forged using Microsoft Word. I refused this application. I explained that I did not find this evidence to have any probative value; no specific evidence was necessary to support the proposition that documents can be forged. This evidence would not assist the Tribunal in determining whether the documents in this case were forged.

7. Finally, Ms Ferrigno asked me to strike out the Respondent's response and enter default judgment in her client's favour. She said that the Respondent had conducted proceedings in a scandalous, unreasonable or vexatious way. She candidly accepted, however, that any defects in the Respondent's case preparation had been remedied by the morning of the hearing and her client believed that she could have a fair hearing in spite of the historical defects in case preparation. I considered the guidance in the case of **Bennett v Southwark London Borough Council 2002 ICR 881, CA**.

Given that the Claimant accepted that she would not be deprived of a fair hearing were the matter to go ahead, I determined that striking out the Respondent's response would not be proportionate in the circumstances.

The Issues

8. This matter previously went before Employment Judge Allen on 4th April 2023. At Annex List of Issues (in the bundle at page 209) Judge Allen set out a list of issues being pursued by each side. At the hearing before me, the Claimant's representative, quite properly, recognised that a number of the claims advanced in the original claim did not have a realistic prospect of success and she withdrew them (those at 1.5, 1.6, 2.1 and 2.2). In response, taking a pragmatic view, the Respondent's representative withdrew the contractual counter claim (at 3.1 – 3.4).

9. In respect of the claim that the Claimant was paid less than the national minimum wage, the Claimant's representative told me that the dispute was not over whether the Claimant was paid the appropriate hourly rate. Rather, it was said that the Claimant worked 1 hour and 15 minutes per week for 7 weeks for which she was not paid. Nonetheless, Mrs Ferrigno did not withdraw the claim that the Claimant was paid the wrong hourly rate and asked me to resolve this issue.

10. This left the following remaining issues for the Tribunal to determine:

    1.1 Upon which statement of terms of employment and guidelines on terms and conditions of employment in salons was the claimant engaged? The parties disagree about which document this was and have provided differing versions.

    1.2 Did the respondent make an unauthorised deduction from the claimant's final wages for training costs? The claimant alleges that an unauthorised deduction of £2,800.00 was made for training costs and the respondent was not authorised to make the deduction. The respondent contends that it was authorised to make any deduction made for training costs by clause 13.8 of the statement of terms and the training costs it incurred. Issues relevant to the determination of this issue may include:

        1.2.1 What the relevant clause provided regarding repayment and for what period;

        1.2.2 Whether the training costs claimed were in fact incurred;

        1.2.3 What the position is regarding VAT incurred and whether that was genuinely a cost incurred by the respondent and whether it can be recovered from the claimant; and

        1.2.4 Whether all of the costs incurred were for the benefit of the claimant (rather than for other courses attended by others).

    1.3 Did the respondent make an unauthorised deduction from the claimant's final wages for an alleged under-charge? The claimant

alleges that an unauthorised deduction of £330 was made. The payslip records the deduction as being for under-charged friend. The respondent contends that it was authorised to make the deduction made for the alleged undercharge by clause 13.9 of the statement of terms and because it says money was owed to the respondent. Issues relevant to the determination of this issue may include:

1.3.1 The terms which applied to the respondent's family and friends discount scheme and the way in which it was operated;

1.3.2 Whether the claimant undercharged a friend on the relevant day outside the terms of that scheme or the way in which it operated;

1.3.3 Whether the respondent was entitled to the sum deducted; and

1.3.4 Whether the respondent was authorised by clause 13.9 to make the deduction made.

1.4 For each and every occasion upon which the claimant alleges that she was not paid the full salary to which she was entitled with reference to the minimum wage, were the wages paid to the claimant on each date less than the wages she should have been paid? Issues relevant to this decision may include:

1.4.1 What hours were worked in the relevant period;

1.4.2 Applying the relevant minimum wage rate what was the national minimum wage which should have been paid to the claimant for the relevant period;

1.4.3 Was the amount paid to the claimant less than that she was entitled to, applying the national minimum wage; and

1.4.4 Were there any authorised deductions made (being deductions which the respondent was entitled to make to the minimum wage payable)

The Evidence

11. I was assisted by a carefully prepared agreed bundle of 211 pages. I heard evidence from the Claimant, Mrs Nichola Burton, Ms Alexis-Leah Boyle and Ms Vitina Seminara. They were each cross-examined.

12. During her evidence, The Claimant became upset when asked a question by the Respondent's advocate in which she was asked to read a large passage of text. We took a short break. Upon return, the Claimant told me that she is dyslexic and she found being asked to read out load to be difficult and upsetting. The Respondent's advocate told me that she is also dyslexic. Ms Seminara also volunteered that she is dyslexic. In the circumstances, I decided to make reasonable adjustments that might assist the Claimant and Ms Seminara in giving evidence. I adopted those

adjustments set out at page 411 of the Equal Treatment Bench Book. In particular, I asked both advocates not to ask the witnesses to read through large parts of documents and comment on them. We took breaks at 45 minute intervals. Each witness was given additional time to compose their answers.

13. After hearing the evidence, I heard helpful submissions from each advocate. At the end of the hearing I gave my judgment and reasons.

The Law

14. Section 13(1) of the **Employment Rights Act 1996 (ERA)** states that an employer must not make a deduction from the wages of a worker unless:

> the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract — S.13(1)(a), or
>
> the worker has previously signified in writing agreement to the deduction — S.13(1)(b).

15. The second limb of S.13(1)(a) **ERA** permits deductions where they are authorised by 'a relevant provision of the worker's contract'. This phrase is defined in S.13(2) as a provision contained in:

> one or more written contractual terms of which the employer has given the worker a copy before the deduction is made — S.13(2)(a) or
>
> one or more contractual terms (whether express or implied and, if express, whether oral or in writing) whose existence and effect (or combined effect) the employer has notified to the worker in writing before the deduction is made — S.13(2)(b)

16. Section 13(2)(a) applies to written terms authorising deductions which have been entered into before the deduction has been made. The provision is satisfied if the employer gives a copy of the contract containing the relevant term to the worker.

17. In **Bear Scotland Ltd v Fulton and anor; Hertel (UK) Ltd and anor v Woods and ors (Secretary of State for Business, Innovation and Skills intervening) 2015 ICR 221, EAT**, Mr Justice Langstaff, then President of the EAT, held that whether there is a 'series' of deductions is a question of fact, requiring a sufficient factual and temporal link between the underpayments. This, he said, meant that there must be a sufficient similarity of subject matter, so that each event is factually linked, and a sufficient frequency of repetition. He also held that a gap of more than three months between any two deductions will break the 'series' of deductions.

The Facts

18. Whilst I am bound to be selective in the references that I make to the evidence that I have seen and heard, I have taken all of the evidence into

account when reaching my findings to the balance of probabilities, which is to say, which is more likely.

19. I have only made findings of fact on contested matters to the extent that it has been necessary in order to resolve the legal issues in dispute between the parties. If I have not resolved an issue in dispute between the parties, it has because I have found the dispute to be immaterial to the outcome.

Background

20. The Claimant is, as at today's date, 24 years of age. She experienced and highly skilled hair stylist with particular expertise in colouring and the art of balayage.

21. On 20th August 2015, then 16 years of age, the Appellant commenced employment with the Respondent, initially as an apprentice and later as an assistant. There is no dispute over the fact that the Claimant was very good at her job, throughout her time with the Respondent. She left her employment, on notice, on 28th June 2022.

The contract

22. It is common ground between the parties that around the beginning of August 2015, the Claimant signed a contract of employment with the Respondent. She took that contract home, read it over with her mother, signed it, and then returned it to the Respondent. She took a photograph of the contract on her phone. What is in dispute is which version of the contract is the correct one. Each party has provided a copy of what they say is the correct version of the contract. The contracts are largely identical. Both versions of the contract are before the Tribunal, and for the purposes of my judgment, I do not set them out in full. But I have closely analysed both versions of the contract.

23. Where they differ is over the terms on which an employee is to repay the employer if that employee leaves employment within 6 months of completing a training course funded by the employer. This is dealt with at 13.8 in each version of the contract. The version said by the Claimant to be the real contract says this (bundle, Page 71):

> *Where such fees are paid in advance of the date of the actual course, they will be deemed to be incurred in the relevant period i.e. the six months preceding the termination date.*

24. The contract says that it is only fees for which a receipt is provided that the employee is liable to be paid. The version said by the Respondent to be the real contract (at Page 80) says this:

> *You agree that if the employer provides such funding and your employment terminates for whatever reason while the course is ongoing, or in a specified period of time after completion, that you will refund the employer the fees, expenses and other costs in accordance with the following scale:*

While the course is on-going or up to after completion of the course – 100%

25. There then follows a sliding scale after which the portion of the fees to be refunded decreases. If an employee were to leave the employer more than 12 months after the completion of the course, they would be required to pay nothing at all.

26. There is no dispute over what is said at paragraph 13.9 of the contract. The operative paragraph says this:

> *There is an obligation and a requirement on the employee to repay the employer all money that may have been received over and above that to which they are entitled as a consequence of error or mistake or otherwise by the employer notwithstanding the cause of that error or mistake and to repay any loans however called any any money due to the employer by the employee.*

27. For reasons that I will explain, it is not necessary for me to determine which version of the contract is the correct one and how it is that both sides have different versions of the contract.

The Training Course

28. In 2021, the Claimant commenced the Wella Master Colour Programme. I am told that this course is the equivalent of degree level and those who undertake it are considered experts in the field of hair colouring. It is a mark of prestige for those who have completed it, and a valuable asset to any salon that employs someone with this qualification. Those who complete this course are masters in their craft.

29. The course is taken in stages through a series of in-person sessions conducted in Manchester. Stages 1-3 involve tuition and Stage 4 is a practical examination. It is after the completion of all 4 stages that the student is entitled to the qualification. Whilst the students develop skills over the course of the tuition, it is the completion of the final stage that entitles the candidate to market themselves as having gained the qualification. There is no award and no accreditation to be had from completing individual stages.

30. The Claimant graduated from the course and had her graduation dinner on 6th June 2022.

31. I am satisfied, on balance, that the Respondent paid Wella £2,880 (inclusive of VAT) for the course fees towards the commencement of the course. This is because I have seen an invoice dated 22nd September 2021 (page 108) and transaction details dated 22nd October 2021 showing that money was transferred to Wella electronically by the Respondent. Whilst it is suggested that one or other of these documents is a forgery, I have seen no evidence to suggest that this is the case. Moreover, I am of the settled view that Wella would be unlikely to allow the Claimant to complete the course and allow her to graduate unless and until the course fee was paid.

32. It is suggested that the Respondent did not pay for the course but that it was entitled to send an employee to the course in exchange for points under a loyalty scheme. However, this assertion is based entirely on speculation and conjecture and I have seen no evidential basis to support such a conclusion.

33. For reasons that I will explain, it is not necessary for me to determine whether the document at page 110 is authentic or a forgery.

The Friends and Family discount

34. The Respondent alleges that the Claimant abused a scheme operated by the Respondent entitling a stylist to provide treatments to their friends and family at a reduced rate. The Respondent says that the Claimant abused this scheme by treating friends who had not been authorised by the salon, in breach of the policy. I have not been provided with a copy of the policy, which the Respondent says is a written document and is available for inspection in the Salon. For reasons that I will explain later in my determination, I do not find it necessary to make any specific finding of fact on this point.

The Claimant's working day between July 2021 and June 2022

35. It is said that the claimant conducted 15 minutes extra work per working day in 7 separate weeks spanning the period of July 2021 until June 2022. There is no dispute over the fact that the Claimant came to the salon 15 minutes before her work was due to start on these days. What is in dispute is whether or not she worked during those 15 minutes.

36. I have carefully considered the evidence that I have heard. I am able to make a finding of fact only in respect of this claimant and in respect of this narrowly defined period of time. I do not make any specific fact as to any other employee of the Respondent and at any other period of time.

37. I find that the claimant did attend the salon 15 minutes early on each of her 5 working days on each of the following weeks.

    31/07/21 Week 1
    31/10/21 Week 5
    31/01/22 Week 4

    28/02/22 Week 4

    30/04/22 Week 3
    30/04/22 Week 4
    27/06/22 Week 5

38. During each of these weeks she attended work 15 minutes before the salon opened in order to prepare for her day of work. She prepared towels and other equipment that she needed for her work. I accept that evidence because I have heard evidence from Ms Boyle who says she witnessed the Claimant doing that work on those days.

39. As I have explained, I cannot and do not make any specific finding of fact over what anyone else in the salon was doing at that time.

40. I have not seen a payslip for January 2022, but I have seen a payslip for every other month. Whilst the payslips do not state the hourly rate of pay, I am satisfied that the pay was calculated using the applicable national minimum wage at that time.

The final payslip

41. The Claimant's final payslip is at Page 187 of the final bundle. It's authenticity has not been disputed. It tells me that the Claimant's final pay, before deductions, should have been £2,061.41. The Respondent deducted from that £330 described as "under-charged friend" and £2,880 described as course fees. The net pay is -£1,510.57.

Conclusions

Issue 1: Training Fees

42. The Claimant's final gross pay, before deductions ought to have been £2,061.41. The question for the Tribunal to determine is whether the deductions from the Claimant's final pay were lawful.

43. On any version of the contract, the Respondent was entitled to deduct the course fee from the Claimant's final wage. This is because the Claimant resigned from her employment less than one month after she completed the course. On any version of the contract, this entitles the employer to be refunded in full for the cost of the course. The employer did not need any additional written permission to make a deduction.

44. It is therefore not necessary to determine which version of the contract is the correct one, and whether the Claimant gave further written permission prior to embarking on the course. On any view of the contract, the Respondent was entitled to recover the course fees from the Claimant's final pay.

45. What differs is whether it allows the Respondent is permitted to pursue the Claimant for this fee as a debt. Over the course of these proceedings the Respondent has advanced a version of the contact that does not allow the Respondent to pursue the Claimant after the end of her contract. In these proceedings the Respondent has advanced the case that the version of the contract which does not permit the Respondent to pursue this as a debt is the correct one. Whilst I do not decide the issue, it seems to me quite proper that the contractual counter claim was withdrawn. Had it been necessary to determine this issue, I would have found against the Respondent.

46. The Claimant accepts that the employer was entitled to make a deduction from her final pay but is not happy with the manner in which the Respondent went about it. She says that the Respondent should have paid her in full in June 2022 and agreed to stagger repayments in the months that followed. This does not change the position in law or under the contract.

47. As I have found, the course fee was £2,400 net of vat. Ms Seminara told me, and I accept, that the company reclaimed the VAT payable as part of its return. It was therefore wrong of the Respondent to use a gross figure including VAT in calculating the amount to be paid to the Claimant.

48. I therefore find that the Respondent was entitled to deduct £2,400 from the claimant's final pay. The claimant's final pay was less than £2,400. Therefore, whilst the amount of the deductions was incorrectly calculated, this was immaterial to whether there has been an unlawful deduction.

Issue 2: Undercharging customers

49. The Respondent says that she was entitled to deduct from the Claimant's final wage amounts that the Claimant had undercharged customers for hair treatments. It is said that 13.9 makes provision for this.

50. I have carefully analysed 13.9 of each version of the contract. This does not operate in the manner in which the Respondent asserts that it does. This clause deals with overpayments and loans. It does not deal with employees undercharging customers. In such circumstances, there is no provision under the contract, and no lawful basis on which the employer could have deducted £330 from the Claimant, whether or not the Claimant had undercharged customers in the manner suggested by the Respondent. The Respondent had no lawful basis to deduct this £330 from the Claimant's pay.

51. I therefore find that the Respondent deducted £330 from the Claimant's final pay unlawfully.

52. However, as I have already found, the Respondent was entitled to make deductions from the Claimant's pay relating to the repayment of course fees. Therefore, whilst the calculation was wrong, there has been no unlawful deduction of wages.

53. In my view, the correct final balance on the Claimant's final pay ought to have been (£338.59) rather than (£1,510.57). However, there is no contractual counter claim before me, this aspect of the Respondent's claim having been withdrawn. In any event, the contract preferred by the Respondent does not entitle this sum to be pursued as a debt.

Issue 3: Did the Appellant work 15 minutes per day more than she was paid?

54. The Claimant says that there were 7 weeks within the 2 years prior to her claim being issued that she was not paid for this time. On the facts, as I have found them to be, I find that she did work 1.25 hours for which she was not paid. She was entitled to be paid the applicable national minimum wage for each of these weeks.

55. Between July 2021 and January 2022 the Claimant was 22 years of age. At that time the applicable National Minimum Wage was £8.36.

56. In February 2022 the Claimant was 23 years of age. The Applicable National Minimum Wage was £8.91.

57. Between April and June 2022 the Claimant was 23 years of age. The Applicable National Minimum Wage was £9.50.

58. The Claimant worked 1.25 hours for which she was not paid in the following weeks: I set out the week and the applicable minimum wage in the following weeks:

    Period ending 31/07/21 Week 1
    Period ending 31/10/21 Week 5
    Period ending 31/01/22 Week 4
    Period ending 28/02/22 Week 4
    Period ending 30/04/22 Week 3
    Period ending 30/04/22 Week 4

59. The Respondent ought to have paid the Claimant for her time. £78.11 gross was deducted from her wages unlawfully.

Issue 4: National Minimum Wage between July 2021 and June 2022

60. For the reasons that I have given, I am satisfied that the claimant was paid the correct hourly rate during the period that she alleges that she was not.

_____

Employment Judge Greer

_____

Date 25th October 2023

JUDGMENT & REASONS SENT TO THE PARTIES ON

26 October 2023

FOR THE TRIBUNAL OFFICE