



EMPLOYMENT TRIBUNALS

Claimant: Miss E Dackauskaite

Respondent: The Wellness Practice Limited

Heard at: London South (Croydon) via CVP **On:** 3 November 2023

Before: Employment Judge Wright

Representation:

Claimant: In person

Respondent: Mr A Scott - counsel

RESERVED JUDGMENT

The respondent has conceded the sum of £727 (£250 for the uniform and £477 for training) is due to the claimant and stated that it had transferred that sum to the claimant towards the end of the hearing.

The Tribunal makes a declaration that the respondent is in contravention of s.15 Employment Rights Act 1996 (ERA) and it is to repay to the claimant the sum of £60.00.

The complaint of unauthorised deductions from pay contrary to Part II Employment Rights Act 1996 is well-founded. The respondent made an

unauthorised deduction from the claimant's pay in respect of the period 13/12/2022 to 30/12/2022. The respondent is ordered to pay to the claimant the gross sum of £1,639.70 deducted from pay. The claimant is to account to HMRC.

REASONS

1. By a claim form presented on the 12/3/2023 the claimant made a claim for 'other payments' which comprised (on her case) underpayments and refund of monies she had paid to the respondents.
2. The claim was due to be heard on 4/9/2023 and was postponed on that occasion due to the unavailability of one of the respondent's witnesses.
3. At this hearing, the Tribunal heard evidence from the claimant and from the respondent from: Angela Onions (Accounts and Administrator); Luke Watkins (Health Associate); and Christian Farthing (Owner and Director). There was a 137-page bundle. The evidence and submissions took up most of the hearing, such that the judgment was reserved.
4. The claimant had not prepared questions for the respondent's witnesses. After she was cross-examined, a short break was taken for her to re-focus. She was not able to formulate questions for the respondent's witnesses and the Tribunal put (as it was understood) her case to the respondent's witnesses; without objection from the respondent.
5. There are three elements to the claimant's claim (as recorded in the Order from the 4/9/2023). The first is a refund of the sum of £787 paid to the respondent. It was not in dispute that the claimant had paid £500 in cash on the 18/11/2022 and £287 on the 28/11/2022.
6. It was also not in dispute that these sums represented payment (described by the respondent as a deposit) of: £477 for training; £250 or payment of a uniform; and £60 for a DBS check.
7. The respondent relied upon its 'training agreement' and 'uniform' agreement. In evidence, the respondent said these monies would be repaid after 12 months in employment (the uniform agreement provided for repayment after nine months).
8. The training appeared to be 'on the job' training and the uniform was a 'team polo shirt, team jacket' (and possibly a gilet – it is not clear from the contract) (page 77). It was not apparent that there was any specific or additional cost to the respondent in providing these items, other than the base cost.

9. At the outset of the hearing, Mr Scott conceded the payments in respect of training and uniform. He relied upon the authority of HMRC v ANT Marketing Ltd UKEAT/0051/19/OO. When the timing for a refund of these payments was being discussed at the conclusion of the hearing, Mr Scott then appeared to be relying upon an off-set argument, by reference to the National Minimum Wage (NMW). At the same time this discussion was taking place, Dr Farthing stated that the payment had been sent to the claimant.
10. There is no off-set or NMW argument. The authority is not relevant (it relates to permitted deductions for NMW purposes). These are payments which the respondent has informed the claimant she needed to pay to it, if she wished to commence employment.
11. Notwithstanding s.15 ERA, there is no justification for these payments.
12. In respect of the payment for the DBS check, Mr Scott argued that this was personal to the claimant (presumably he meant that the check was personal to the claimant and that if she left employment, she would retain the check until it expired) and so it was justified. The respondent did not concede this sum should be refunded to the claimant.
13. There is no evidence in respect of the DBS check in the bundle to show that the respondent ever applied for it on behalf of the claimant. There was no document or confirmation from the DBS that the claimant could refer to or rely upon in future. There was nothing to say why the claimant could not have applied personally for the check and to make the payment directly to the DBS. If it were the case that the employer has to make the application on behalf of the employee, then again, there was nothing to show that this had been done. There was no invoice from the respondent to the claimant to account for this sum.
14. The respondent had written to the claimant on the 14/11/2022 setting out the terms of her induction (page 60). That letter did not set out the sum required in respect of the DBS check. There was no evidence from the respondent that an application had been made to the DBS and that the claimant had successfully (or not) passed the check. It is surprising that on the respondent's own case, the claimant worked for it for three days from the 28/12/2022 to 30/12/2022, yet she does not appear to have had a valid DBS check.
15. The conclusion of the Tribunal is that the respondent requiring payment of this sum from the claimant is a contravention of s.15 ERA and the sum should be repaid to the claimant.

16. The second element of the claim was the claimant's remuneration during the 'training' period. As an aside, had it been relevant to the claim that the claimant's employment commenced at the start of the training period, rather than at a later date, it is not clear how the respondent would have defended that claim. The relevant matter is however the correct rate of pay.
17. The claimant contends for an hourly rate of pay of £11.11 per hour. She bases this on the commencing induction letter of the 14/11/2022 (page 60). Dr Farthing's evidence was that 'it is verbally agreed that any paid training carried out is paid at a rate of £9.50 per hour' (a basic rate), rather than the rate set out in the contract of employment. In respect of pay, all that letter states is 'Salary £26,000 per annum based on a 45 hour week'. It is the respondent's case that an hourly rate of £9.50 was orally agreed. The letter refers to a two-week induction period and for continuous employment to start on 12/12/2022. The letter gives hours of work of 42-45 hours, with timings set which are said to be 'projected/estimated'.
18. There is no evidence that the respondent set the hourly rate at £9.50 during any induction period. It would have been a simple matter for the induction letter to have specified this. The written document gives the rate of pay. Any amendment to this should have been specified in writing s.4 ERA. The Tribunal finds hourly rate should have been paid at £11.11.
19. The claimant's claim in respect of the hours worked during this period was not consistent. Based upon the messages exchanged, the time-sheets and the respondent's notes of the training times, the parties' position was the claimant worked the following dates/times:

| | respondent's records | claimant's time-sheet |
|------------|----------------------|--|
| 16/11/2022 | 3.5 hours | 4 hours |
| 18/11/2022 | 3 hours | 3 hours |
| 28/11/2022 | 1.5 hours | 4 hours |
| 2/11/2022 | 2.5 hours | 2.5 hours |
| 7/12/2022 | 3.5 hours | 3.5 hours |
| 9/12/2022 | 2.5 hours | 4 hours |
| | 21 hours in total | [claimant's time sheet number 2 incorrectly gave the total hours of <u>27</u> whereas it should be 21] |
| 12/12/2022 | -- | 3 hours |
| 13/12/2022 | 2.5 hours | 3 hours |

| | | |
|-------------|----------|---|
| Total sheet | 19 hours | [6 hours according to claimant's time number 1] |
|-------------|----------|---|

20. It is not clear why the time sheets are not chronological and time sheet number 2 pre-dates time sheet number 1.
21. There is a time-sheet (number 2) from the claimant claiming 27 hours in respect of the period 16/11/2022 to 9/12/2022, however the time-sheet is dated 15/12/2022 by the respondent and 16/12/2022 by the claimant. In addition, the arithmetic is incorrect on the time sheet and the hours claimed totalled 21, not 27. There was a second time sheet which gave hours of 6 in total (12/12/2022 3 hours and 13/12/2022 3 hours, however, when the breaks are taken into account, the claimant worked 2.5 hours on each day). The claimant was then paid for 27 hours at the rate of £9.50 with a process date of 15/12/2022. It is unclear how a payslip and BACS payment could have been generated prior to the claimant having signed the time-sheet.
22. Although this is all suspicious, the end result is that according to the respondent's records, the claimant worked 19 hours whereas the claimant's time sheets in total give the total hours worked of 27.
23. There is a further time sheet provided by the claimant, which is not numbered and is only signed and dated (15/12/2022) by her and not the respondent covering the period 16/11/2022 to 9/12/2022 (page 103). If the claimant's employment started on the 12/12/2022 the 9/12/2022 would be the last working day prior to that and the claimant was not scheduled to work on Saturday or Sunday. According to that time sheet, the claimant worked the following dates and items:

| | |
|------------|-----------|
| 16/11/2022 | 3.5 hours |
| 18/11/2022 | 6.5 hours |
| 28/11/2022 | 6.5 hours |
| 2/12/2022 | 2.5 hours |
| 7/12/2022 | 3.5 hours |
| 9/12/2022 | 6.5 hours |
| Total | 29 hours |

24. There is then a second time sheet dated 15/12/2022, which is not numbered or signed by the respondent in the additional documents (page 7 of those documents). The claimant's hours are set out as:

| | |
|--------------------------|------------|
| 10/12/2022 | 4.5 hours |
| 11 ¹ /12/2022 | 11.5 hours |
| 12 ² /12/2022 | 9.5 hours |
| 13 ³ /12/2022 | 9.5 hours |
| 14 ⁴ /12/2022 | 11.5 hours |
| Total | 46.5 hours |

25. None of these dates or times correlate to the hours of work provided for in the contract.
26. The claimant contends that her employment commenced on the 12/12/2022 and that the respondent reissued the contract with a start date of 28/12/2022 to avoid paying her for the period 12/12/2022 to 27/12/2022 (page 69). The respondent's evidence was that the contract was reissued on the 23/12/2022 and gave a start date of 28/12/2022 (page 76).
27. The respondent's handwritten note (which is not entirely legible and has not been transcribed as would be expected if it sought to rely upon it) of 13/12/2022 seems to record that the claimant wished to delay her formal start date to the 28/12/2022 (there is also a reference to 23/12 but the surrounding words are not legible) (page 65). If that is correct, it is not clear why the respondent did not reissue the contract until the 23/12/2022 at 14.04 (this email was disclosed during the course of the hearing). When referring to this, Dr Farthing went onto say that there was a Christmas party that day, it ended and there was 'no one in the building' after 14.00.
28. If the claimant had asked to postpone the formal start date in the contract to as late as possible in 2022 (Dr Farthing said that date was the 28/12/2022, hence that date being selected), why would he wait until shortly after a Christmas party had ended to send out an amended contract? This is particularly relevant as his own handwritten notes record that the discussion was had on the 13/12/2022 and that the claimant wanted to delay the start date and this was discussed on that date (page 65). The respondent is legally obliged to confirm the change in writing

¹ The claimant gives the day as Monday and the date as 11/12/2022, it assumed this date is incorrect and it should refer to Monday 12/12/2022.

² Tuesday 13/12/2022.

³ Wednesday 14/12/2022.

⁴ Thursday 15/12/2022.

- (and indeed it is in breach of s.4 ERA) at the 'earliest opportunity'. The earliest opportunity would have been via email (or even in a WhatsApp message) on the 13/12/2022 following the discussion. Alternatively, the following day, not some 11 days later.
29. It is the respondent's case that the claimant requested the delayed start as she was not ready to commence her role. Putting aside any issues regarding whether or not the claimant's employment had actually commenced when she began to perform her role (whether or not that was training or an induction), the issue for this Tribunal is not the start date, but is whether or not the claimant has been paid correctly.
30. The time sheets the claimant relies upon reflect her calculation of hours she worked, which she set out in an email to the respondent on the 5/1/2023 (page 83).
31. There is no evidence to corroborate this. Furthermore, the hours the claimant has claimed do not correspond to either contract (the hours are the same in both contracts).
32. Neither party's evidence was satisfactory and the Tribunal does not accept either side has been entirely frank and honest with it. There are however legal obligations which fall upon the respondent with which it has not complied. In short, the onus is on the respondent not the claimant.
33. Based upon the evidence heard, the Tribunal has decided that on the balance of probabilities, that the claimant did do some work for the respondent between the 13/12/2022 and 30/12/2022 (the termination date). It is not clear what hours (as opposed to what tasks she performed) she worked during that period. Taking into account the overriding objective and in applying proportionality, it is considered the most effective way of addressing this is to apply the contractual hours at the hourly rate of £11.11. The contractual hours are set out in the 'training agreement' offer letter dated 14/11/2022 (page 61). There is nothing in that document to suggest that these hours do not apply during any training period and indeed, there are hours set aside (on Tuesdays, Wednesdays and Fridays) for 'Development Training' both in that document and in the contract.
34. The payslip dated 15/1/2023 records that the claimant was paid for 27 hours at an hourly rate of £9.50, totalling £256.50 gross. That does not accord with the respondent's own case that the claimant worked between 28/12/2022 and 30/12/2022 and that prior to that period she was paid at a training rate of £9.50 as she was also paid at the rate of £9.50 on 15/1/2023. There is no explanation from the respondent or this. Tax has been paid on that sum of £27.80.

35. Contractually, the claimant was to be paid an hourly rate of £11.11 for the hours set out in the various documents. The hours on a Tuesday and Wednesday differ between the contracts and the training agreement from 12.30 to 16.00 on both days to 13.00 to 16.00. Therefore the hours will be taken from the contract which gave a start date of 12/12/2022.
36. The Tribunal therefore finds that contractually, the claimant was entitled to be paid for the contractual hours from the 12/12/2022, less the sum paid on the 15/1/2023.
37. The total hours is therefore 124.5 (working days from 13/12/2022 to 30/12/2022) x £11.11 = £1,383.20 less £256.50 = £1,639.70 gross. As this is a gross payment, the claimant is to account to HMRC.
38. This Tribunal heard evidence of questionable practices from the respondent in terms of compliance with employment statutes. Dr Farthing said that it was important to him not to be in breach of the NMW. It is assumed that the same applies to breaches of employment legislation and the respondent should consider undergoing an audit to ensure future compliance with its legal obligations and to correct these breaches in going forwards.

3 November 2023

Employment Judge Wright

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