



EMPLOYMENT TRIBUNALS

Claimant: Ms C Barber

Respondent: Gastro Pubs Limited T/A Middletons Steakhouse and Grill

Heard at: Watford Employment Tribunal, by video

On: 28 November 2023

Before: Employment Judge Annand

Representation

Claimant: Ms Barber, in person

Respondent: Mr Gilmour, Trainee solicitor

RESERVED JUDGMENT

1. The Claimant's claim for unauthorised deductions from wages is well founded and succeeds.
2. The Respondent is ordered to pay the Claimant a net payment of £2025.76. The Respondent is liable to pay the tax and national insurance owed on this payment to HMRC directly.

REASONS

Introduction

1. The Claimant was employed by the Respondent as a Head Chef working in the Middletons Steakhouse and Grill. Her employment commenced in January 2022, and her employment ended on 21 March 2023, when she resigned with immediate effect.
2. On 21 April 2023, the Claimant submitted a Claim Form to the Tribunal in which she brought a claim for unauthorised deductions from wages.

3. I held the final hearing in the Claimant's case on 28 November 2023 by video. I was provided with a bundle of 59 pages and three witness statements. The hearing was listed for 3 hours. We were able to hear the evidence of all three witnesses, the Claimant, and Mr Rakstelis and Mr Ellis for the Respondent, and hear both parties' submissions within the time allocated for the hearing, but there was not time for me to give judgment at the end and so I reserved my judgment.
3. At the start of the hearing, I had a discussion with the Claimant and Mr Gilmour for the Respondent about the Claimant's claims. In her Claim Form, the Claimant had indicated she was claiming for the failure to pay her £2045 in wages which were owed to her. In the Respondent's Response it set out that the Respondent was entitled to withhold the Claimant's pay under the terms of her contract. The relevant terms of the Claimant's contract were similar to the wording in sections 17 to 22 of the Employment Rights Act 1996, which relate to the deduction from wages for cash shortages or stock deficiencies for those in retail employment. I asked Mr Gilmour if the Respondent was arguing that these sections applied in this case. He confirmed that the Respondent did not consider these sections were applicable as the Claimant's employment did not meet the definition of retail employment set out in the Act. If that is correct, then the Claimant's claim for unauthorised deductions from wages is to be determined under section 13 of the Employment Rights Act 1996.
4. When writing up this judgment, I noticed that the Claimant brought her claim against Middletons Steakhouse and Grill. However, the name of the Respondent on the paperwork presented to me at the hearing, including the name set out in the Claimant's contract of employment, is Gastro Pubs Limited T/A Middletons Steakhouse and Grill, and therefore I ordered the amendment of the Respondent's name to reflect that this is the correct Respondent.

Findings of fact

4. The Claimant had previously worked for the Respondent for a number of years before resigning in 2020. In October 2021, the Claimant was employed again by the Respondent. She was employed as Head Chef. On 11 October 2021, the Claimant signed a contract of employment with the Respondent.
5. The contract of employment which the Claimant signed contained the following term:
 8. Deductions

The Company reserves the right to require you to repay to the Company by deduction from your pay:

- any fines, penalties or losses sustained during the course of your employment and which were caused through your conduct, carelessness, negligence, recklessness or through your breach of the Company's rules or any dishonesty on your part;
- any damages, expenses or any other monies paid or payable by the Company to any third party for any act or omission by you, for which the Company may be deemed vicariously liable on your behalf;
- the costs of any personal calls made by you on Company telephones, without prior authorisation from the Company;
- on termination of employment, any holiday pay paid to you in respect of holiday granted in excess of your accrued entitlement;
- any other sums owed to the Company by you, including, but not limited to, any overpayment of wages, outstanding loans or advances, or relocation expenses;
- any deductions otherwise entitled under this contract;
- where you have entered into a separate agreement with the Company, any outstanding costs detailed in the agreement.

You authorise the Company to make any such deductions from any and all monies owing to you by the Company.

You authorise the Company to make deductions from your pay to compensate for cash shortages and / or stock deficiencies during shifts worked by you, whether or not these can be attributed to you personally.

The Company may only deduct up to 10% of the gross amount payable to you on the payday upon which any deduction is made. The Company can make a series of similar deductions on each subsequent payday until the value of each cash shortage or stock deficiency is repaid. The maximum time period in which the Company can make such a deduction or begin to make a series of deductions is 12 months from the time the Company could reasonably have known of the cash shortage or stock deficiency.

6. In the bundle of documents was a photograph of the first and second page of the Claimant's contract of employment, and a photograph of the final page. There was not a copy of the full contract. Also in the bundle of documents was an unsigned contract of employment, although it related to employment at the Crown Inn, rather than the Middleton Steakhouse and Grill. The Respondent said this was a standard set of the terms and conditions. It contained the same wording at paragraph 8 as set out above, under the heading, "Deductions". However, it also contained a further paragraph at the end, which stated: "Should your employment be terminated, for any reason, while a part of any cash shortage or stock deficiency remains outstanding, the Company reserves the right to recover

the balance in full from your final pay.” As I was not provided with a photo of the third page of the Claimant’s contract of employment, I do not know if this paragraph was contained within the contract she signed. The Respondent’s position is that it was an oversight that a photograph of this paragraph was not included in the bundle, and if a picture of the following page of the contract had been provided it would have contained this additional paragraph, as all the contracts of employment are the same.

7. As Head Chef, the Claimant’s duties included carrying out training in the kitchen, producing the kitchen rota, ordering the food, and completing a weekly stock take on a Monday. The information from the stock take was put into a digital system. The Claimant had to manually type in the amounts of the various products after they had been counted. The Claimant’s evidence to the Tribunal was that she did the stock take each week with the assistance of the Sous Chef, and that she often asked questions and raised queries with Mr Ellis about the stock take procedure. Mr Ellis confirmed he had discussed various issues around completing a stock take with the Claimant on numerous occasions over the phone.
8. On 20 March 2023, the Claimant and Mr Rakstelis, the Respondent’s General Manager, carried out the stock take. The Claimant counted the food items and Mr Rakstelis counted the drink items. Later that day, when the Claimant had left, the Executive Chef, Mr Mott, contacted Mr Rakstelis and asked that he recount the food stock as the holding figures were too high. Mr Rakstelis’ evidence was that he carried out a food stock take and found the figures submitted earlier that day by the Claimant were inaccurate. Mr Rakstelis informed Mr Mott of this. Mr Mott asked that the stock take was done again with the Claimant the following day.
9. Mr Rakstelis contacted the Claimant to tell her that they would need to carry out the stock take again the following day together. The Claimant offered to come in that evening to re-do the stock take but Mr Rakstelis declined on the basis that he would not have time and was feeling tired. He said that they would do it at 9am the next morning. The Claimant’s evidence was that she had offered to return to work on the Monday evening as the figures would be different when re-counted the next day as there would be further sales and deliveries in the meantime.
10. The Claimant’s evidence to the Tribunal was that when she arrived the next morning, she immediately resigned with immediate effect. She said she offered to explain her reason to Mr Gott if he wished to call or email her, but he did not do so. Mr Rakstelis’ evidence to the Tribunal was that the Claimant attended, and they started to do the further stock take together. He said the Claimant had said she was aware that there was food missing and she said it was around £1,600 to £1,800 worth of stock short. The Claimant denied she had said this.

11. The Claimant's oral evidence to the Tribunal was that she was aware that there were some discrepancies in respect of the stock figures. In respect of the bags of frozen prawns, she accepted she had probably entered the figure incorrectly some time previously, and when she had realised this error, she had not owned up to it because she did not want to get in trouble but planned to get the figure back to being accurate over time. The Claimant denied that she had stolen any products, and her evidence was that there were issues with the system which meant that the inaccuracies were not solely down to any errors on her part.
12. The Respondent disputed that the discrepancy was the result of an accidental error as there were errors in respect of a range of different products.
13. Mr Ellis is the Respondent's Operations Manager. Mr Ellis' evidence to the Tribunal was that once Mr Rakstelis had done a re-count there was an unexplained stock variance of £3,769.07. His evidence was that it was obvious that the Claimant had inflated the count figures when she had done the stock take on Monday for many products in order to hide the defects. He said it was also clear, given the extent of the variance, that she had not been properly managing the stock for some time.
14. The Claimant was due to be paid her monthly wages on the final day of the month in March. On 31 March 2023, she did not receive any payment. The Claimant was also not provided with a final payslip for her pay in March 2023.
15. On 1 April 2023, the Claimant sent an email to the Respondent asking why she had not been paid and asking when she would be paid.
16. On 3 April 2023, Mr Ellis emailed the Claimant. In the email he referred to the Claimant's resignation on 21 March 2023. He said that she had admitted to Mr Rakstelis that she had falsified the food account reports and that was why she was resigning. He noted that on investigation the Respondent had discovered the total amount of missing stock was £3,769.07. He referred to her contract of employment, and paragraph 8 relating to deductions. He noted that the company would seek to be reimbursed for the total amount owed. He said her final pay was £2,025.76 but this would be deducted from the total amount she owed. He asked her to contact him by 10 April 2023 to discuss how she wished to pay the remaining £1,743.31 which she owed. The Claimant disputed she had said that she had falsified the food figures.
17. In his witness statement, Mr Ellis stated the following clause was relied upon by the Respondent to justify withholding her wages for March 2023:

“You authorise the Company to make deductions from your pay to compensate for cash shortages and / or stock deficiencies during shifts worked by you, whether or not these can be attributed to you personally.

Should your employment be terminated, for any reason, while a part of any cash shortage or any stock deficiency remains outstanding, the Company reserves the right to recover the balance in full from your final pay.”

18. This was the same paragraph that was referred to by the Respondent in its Response as the justification for deducting all of the Claimant’s final wages payment on 31 March 2023.

The relevant law

Unauthorised deduction from wages

19. Section 13(1) of the Employment Rights Act 1996 (ERA 1996) states, “An employer shall not make a deduction from wages of a worker employed by him unless— (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker’s contract, or (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.” As a result, there are three types of authorised deduction: (i) Deductions made by virtue of a statutory provision: section 13(1)(a), (ii) Deductions made under a “relevant provision” of the worker’s contract: section 13(1)(a), and (iii) Deductions to which the worker has previously signified his or her agreement in writing: section 13(1)(b).
20. Section 13(3) states, “Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker’s wages on that occasion.”
21. Deciding whether wages are ‘properly payable’ will require employment tribunals to resolve any disputes as to the meaning of a contract, including questions of interpretation and implication (*Agarwal v Cardiff University and anor* [2019] ICR 433, CA)
22. For section 13(2)(a) ERA 1996 to be satisfied, it is not enough that there is a contractual provision that would have authorised the deduction in the contract of employment. The deduction must actually have been made under that provision (*London Underground Ltd v Jaeger* EAT 805/97).
23. Sections 17 to 22 ERA 1996 relate to when an employer makes a deduction from wages, or demands payment, from a worker in retail employment on

account of one or more cash shortages or stock deficiencies. Under section 18(1) ERA 1996, any such deduction from the wages payable on any pay day must not exceed one tenth of the gross amount of the wages payable on that day. Any deduction must also comply with the requirements of section 13, in that the deduction must be authorised by statute, a relevant provision in the worker's contract, or by the worker's written consent.

24. The one-tenth cap only operates to limit the rate at which deductions can be made from the gross wages of retail workers during their employment. Under section 22(2) ERA 1996, once the employment comes to an end there is no limit on the amount that can be deducted from the final instalment of wages to cover cash shortages or stock deficiencies.
25. Section 17(2) ERA 1996 stipulates that retail employment means employment involving (whether on a regular basis or not):
- the carrying out by the worker of retail transactions directly with members of the public or with fellow workers or other individuals in their personal capacities, or
 - the collection by the worker of amounts payable in connection with retail transactions carried out by other persons directly with members of the public or with fellow workers or other individuals in their personal capacities.
26. Under section 17(3) ERA 1996, 'retail transaction' is defined as the sale or supply of goods or the supply of services, including financial services.
27. Under section 17(1) ERA 1996, 'stock deficiency' is defined as a stock deficiency arising in the course of retail transactions.

The Tribunal's Conclusions

28. The parties are agreed that the Claimant's final wages payment in March 2023 would have been £2,025.76 if the Respondent had not deducted this amount in full.
29. The key issue for the Tribunal then is whether the Respondent was entitled to withhold that final payment from the Claimant under the terms of her contract of employment. I am not concerned with how the discrepancies in the stock take came about. I make no factual findings about who or what was to blame for the issues that arose. That is not what I am required to do. The Claimant earned her wages by working for the Respondent in March 2023. The Respondent is only entitled to withhold her wages if the terms of the Claimant's contract of employment permitted that.
30. Although the Claimant's contract of employment was drafted as if sections 17 to 22 of the Employment Rights Act 1996 (relating to deductions made to the wages of those working in retail employment) were applicable, I have

concluded that the Claimant was not in “retail employment”. She did not, in her role as Head Chef, carry out retail transactions directly with members of the public or with fellow workers or other individuals in their personal capacities. She did not collect amounts payable in connection with retail transactions carried out by other persons directly with members of the public or with fellow workers or other individuals in their personal capacities. As a result, I did not find that sections 17 to 22 of the Employment Rights Act 1996 were applicable in this case.

31. The relevant term of the Claimant’s contract, which the Respondent relied upon to make the relevant deduction from the Claimant’s wages, states –

“You authorise the Company to make deductions from your pay to compensate for cash shortages and / or stock deficiencies during shifts worked by you, whether or not these can be attributed to you personally.

...

Should your employment be terminated, for any reason, while a part of any cash shortage or stock deficiency remains outstanding, the Company reserves the right to recover the balance in full from your final pay.”

32. I do not consider that this term of the Claimant’s contract permitted the Respondent to withhold the Claimant’s wages.

33. Firstly, this term of the contract entitled the Respondent to make deductions from the Claimant’s wages for “stock deficiencies”. Mr Ellis’ evidence to the Tribunal was that the Respondent believed the Claimant had “inflated the count figures for many products” (para 5 of Mr Ellis’ witness statement). The Respondent calculated that the difference between the Claimant’s figures, when she did the stock take on Monday, and Mr Rakstelis’ figures, when he did the stock take on Tuesday, as having a cash value of £3,769.07. However, if the Claimant’s figures were inflated, the value of the difference between the two counts does not represent the amount of any “stock deficiencies”. If the Claimant’s figures were wrong then the Respondent does not know exactly what “stock deficiency” there was, and when they arose. The figure of £3,769.07 only represents the financial value of the difference in the figures. The Respondent has not demonstrated what the actual stock deficiencies were. The Respondent may well argue that they are unable to identify the exact amount of any stock deficiencies as the Claimant put in incorrect figures, and therefore they cannot calculate what the actual loss amounted to. However, the Respondent is only entitled to withhold payment of the Claimant’s wages for “stock deficiencies” and not for the difference, in financial terms, between one set of stock take figures and another.

34. Secondly, the term states “You authorise the Company to make deductions from your pay to compensate for cash shortages and / or stock deficiencies *during shifts worked by you*, whether or not these can be attributed to you personally” [Italics added]. When I asked Mr Ellis how he knew that any stock deficiencies arose on the shifts the Claimant had worked, he said that as the Head Chef she was responsible for the stock take. He conceded that the only way they could have known if there were any stock deficiencies on the shifts the Claimant had worked would be if they had done a stock take every day, but they did not do that. The contract did not permit the Respondent to withhold payment for any discrepancies that arose as a result of the weekly stock take, but specifically for stock deficiencies which occurred during the shifts she had worked. As the Respondent was unable to demonstrate what, if any, stock deficiencies arose on shifts that the Claimant had worked, they were not entitled to withhold her pay under this term of her contract.
35. Thirdly, I was not provided with any evidence which showed that the following paragraph was contained within the Claimant’s contract of employment: “Should your employment be terminated, for any reason, while a part of any cash shortage or any stock deficiency remains outstanding, the Company reserves the right to recover the balance in full from your final pay.” This paragraph was contained within the Respondent’s standard contract of employment, but I was only provided with a photograph of pages 1 and 2 of the Claimant’s contract, and the final page. This paragraph did not appear in those pages. In the Claimant’s contract, the paragraph which permitted the deduction (“You authorise the Company to make deductions from your pay to compensate for cash shortages and / or stock deficiencies during shifts worked by you, whether or not these can be attributed to you personally”) was immediately followed by a paragraph which limited any deduction to 10% of the gross amount owed (“The Company may only deduct up to 10% of the gross amount payable to you on the payday upon which any deduction is made.”). Therefore, in the absence of the final paragraph which permitted any outstanding amounts to be taken from the final pay, the Respondent would have been limited to deducting no more than 10% of the gross amount of pay owed that month. However, for the reasons set out above, I do not find that this term of the contract permitted the Respondent to make a deduction from the Claimant’s wages. They have not shown what stock deficiency arose, and they have not shown what, if any, stock deficiencies occurred on shifts that the Claimant worked.
36. For these reasons, I find that the Respondent’s deduction of the Claimant’s wages was not authorised by the term of the contract which the Respondent seeks to rely upon and I therefore uphold the Claimant’s claim for unauthorised deduction from wages.

37. The Respondent made submissions regarding the failure to provide the Claimant with a final payslip. However, the Claimant did not bring a claim for a failure to provide her with a payslip and therefore I do not make any findings in this respect.
38. Mr Ellis' evidence to the Tribunal was that the Claimant's final payment of £2,025.76 was a net figure. I therefore order that a net payment of £2,025.76 is made to the Claimant, and that the Respondent is liable to pay the tax and national insurance owed on this payment to HMRC directly.
39. Finally, I apologise to the parties for the delay in producing this judgment. Unfortunately, after the hearing, I was unwell, which is why it has taken longer than anticipated for the judgment to be sent out.

Employment Judge Annand

Date: 11 December 2023

JUDGMENT SENT TO THE

PARTIES ON 28 December 2023

FOR THE TRIBUNAL OFFICE

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