



EMPLOYMENT TRIBUNALS

Claimant: Miss M Xenophontos

Respondent: Xcellorate Limited

Heard at: London Central (by CVP)

On: 21 March 2024

Before: Judge Miller-Varey

Representation

Claimant: In person

Respondent: Was not represented nor present

JUDGMENT

The judgment of the Tribunal is as follows:

1. The complaint of unauthorised deductions from pay contrary to Part II Employment Rights Act 1996 is well-founded. The respondent made a series of unauthorised deductions from the claimant's pay between 23 May 2023 and 13 June 2023.
2. The respondent is ordered to pay to the claimant the **net** sum (this means **without** any money taken off) of **£1760.33** deducted from pay.
3. The complaint of breach of contract in relation to notice pay is well-founded. The Respondent is ordered to pay the Claimant the sum of **£2708.33** as damages for breach of contract. This figure has been calculated using gross pay to reflect the likelihood that the Claimant will be taxed upon it as Post-Employment Notice Pay.
4. The complaint of breach of contract in respect of a purchased travel ticket is not well-founded and is dismissed.

REASONS

Background

1. The Claimant was employed by the Respondent from 23 May 2023 until 13 June 2023 in the role of social media executive. She seeks compensation for unlawful deductions from wages and wrongful dismissal/breach of contract for unpaid notice pay and other losses.

Procedure

2. The hearing took place by video. There was no attendance by or on behalf of the Respondent Xcellorate Limited who had been sent notice of this hearing by the Tribunal on 9 February 2024. The clerk tried the telephone number held for Bert Hussein (a now former company director of the Respondent) who in turn provided email details for Simon Raw, a current director of the Respondent. This email produced a delivery-failure message.
3. It was in the interests of justice to proceed in the Respondent's absence. There is no information available to explain the absence of the Respondent, still less to adequately explain it. An adjournment would be unfair to the Claimant and would unjustifiably waste Tribunal time.
4. The Claimant provided a schedule of loss and a copy of her contract with the Respondent.

The Issues

5. The issues were whether the Respondent is liable for these sums:
 - a) £1624.92, representing unlawful deductions from wages between 23 May and 12 June 2023 (the Claimant confirmed that she had only confined her claim in the Schedule of Loss in this way because she had not managed a complete day of work on 13 June before having her employment terminated);
 - b) £2708.33 representing damages for breach of contract in not paying the Claimant 4 weeks' notice pay; and
 - c) £44.76 representing an extended travel ticket purchased by the Claimant in the expectation of her employment continuing.
6. There is no ET3 filed from the Respondent. However, the assessment of damages is a judicial matter. Whilst not "taking the part" of the absent Respondent, I must be satisfied there is some legally proper basis to award the figures claimed. Accordingly, I should not ignore any manifest impediments to the claim or calculation of quantum, simply because it has not been pleaded.

7. The only such issue I identified in this case relates to the contractual termination and notice provisions in the written employment contract. On their face they permit termination without notice during a probationary period, which I calculate would be due to last until 23 November 2023.
8. I therefore deal with this issue too.

Findings of Fact

9. The Claimant's employment spanned the period 23 May 2023 to 13 June 2023.
10. She worked - substantially - under a written contract of employment dated 23 May 2023 by which she was entitled to a basic monthly salary of £2708.33 per calendar month, accruing from day to day at a rate of £135.41. The contract provides that the Claimant is to be responsible for her own income tax.
11. It was agreed orally between the parties at the commencement of the Claimant's employment that this term in the contract was of no effect as between the parties:

Clause 11.3

Your employment is subject to a probationary period of six (6) months. Xcellorate Ltd can terminate the agreement without notice in this time period.

12. I reach that factual conclusion having noted the contractual term and raised with the Claimant whether she accepted that she was in the probationary period. She disputed that. She told me, and I accept, that she had previously done an enormous amount of unpaid work for the Respondent over a two-month trial period. That fact is rehearsed, unprompted, in her ET1 as well. I find that adds credence to the Claimant's account.
13. When presented therefore with the standard contract, including a probationary period, the Claimant queried this. Mr Hussein, on behalf of the Respondent, agreed the provision was simply part of the pro forma contract and that it did not apply to her. The parties expected and

intended that a rectified contract would be signed. In the event, that did not happen.

14. The Claimant was employed for 10 days. On the eleventh day (13 June 2023) she attended work. She was late by 20 minutes but ready, able and willing to perform her duties for the day. When her manager arrived, he terminated her employment forthwith.

The Law

15. This is a short summary of the law proportionate to and relevant to the issues that arise in this case.

16. s.230(3) of the Employment Rights Act 1996 (ERA) provides that a worker includes someone who has worked under a contract of employment.

17. s.13(3) provides that:

13(3) 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.

18. Bringing those two parts together s.1 ERA prohibits an employer making a deduction from wages of a worker it employs, unless it is required, authorised under a statutory provision or the worker has previously signified his agreement or consent to the making of the deduction.

19. There is **great** deal of case law relevant to the construction and interpretation of employment contracts. It not proportionate to rehearse it all here. Suffice to say, it is very well-established that if there are allegations that a written contract does not represent the actual terms agreed then the Tribunal should be realistic and worldly-wise. Ultimately what matters is the true intention of the parties.

Conclusions

20. I am amply satisfied that Claimant was not paid her wages at any point. None of the riders to s.1 ERA apply (i.e., the deduction was not required, authorised or agreed in writing).

21. The amount not paid constitutes an unlawful deduction from wages. Following the principle that the Claimant was ready willing and able to work on 13 June, the deduction extends to that date. She is therefore due the amount of £1760.33.
22. The written contract does not purport to be exhaustive; there is no entire agreement clause. Given the clear oral agreement reached between the parties, the probationary period does not apply.
23. The Respondent was therefore obliged to give the Claimant either her four week notice, or a payment of the equivalent amount, in lieu of notice. It did neither.
24. The notice period to which she was entitled was 4 weeks. The sum of £2708.33 is therefore due by way of damages.
25. The purpose of contractual damages is to put the Claimant in the position she would have been in had the contract been performed. Had the contract been performed, the Claimant would not have been able to recover the cost of her extended travel ticket from the Respondent. It was an expense she incurred in order to fulfill her employment duties. The Claimant accepted this in evidence. She had no entitlement under the written contract to reimbursement for travel either. The claim is therefore not sound and is dismissed.

Tribunal Judge A Miller-Varey

(acting as an Employment Judge)

28 March 2024

Sent to the parties on:

10 April 2024

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For the Tribunals Office

Notes

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Recording and Transcription

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<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>