IN THE EMPLOYMENT TRIBUNAL (SCOTLAND)

Judgment of the Employment Tribunal in Case No: 4104060/2024 Heard at Edinburgh on the 6th of June 2024 at 11 am

Employment Judge J G d'Inverno

Miss C Stockman	**Claimant** **Represented by:** **Mr J O Dalrymple,** **Citizens Advice Bureau**
All Seasons Philipburn Ltd	**Respondent** **Represented by:** **Adrian Leopard,** **Director**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:

(First) The claimant's complaint, advanced in terms of section 13 of the Employment Rights Act 1996, of the unauthorised deduction from her final wage of the gross sum of £715.36 due to her in compensation for 6.2 days of accrued but untaken paid annual leave entitlement outstanding upon termination of her employment, succeeds.

(Second) That the respondent shall pay to the claimant the gross sum of £715.36 being a sum equivalent to the amount of the unauthorised deduction made.

(Third) That the payment being received by the claimant without deduction of PAYE and National Insurance contribution, the claimant shall account to His Majesty's Revenue and Customs for the appropriate amounts of National Insurance contribution and Income Tax in relation to the sum, once received.

Employment Judge:	**d'Inverno**
Date of Judgment:	**18 June 2024**
Entered in register:	**18 June 2024**
and copied to parties	18/06/2024

I confirm that this is my Judgment in the case of Stockman v All Seasons Philipburn Ltd and that I have signed the Judgment by electronic signature.

REASONS

Introduction

1. In this case the claimant advances a complaint of the making, by the respondent of an unauthorised deduction from her final wage in respect of 6.2 days of accrued but as yet untaken paid annual leave outstanding as at the Effective Date of Termination of the employment effective by her resignation, without notice, as at the 20th of December 2023.

Matter Agreed as binding upon the Tribunal for the purpose of the Hearing

2. In the course of Case Management Discussion conducted at the outset of the Hearing, the following matters were confirmed by parties' representatives and or agreed by parties' representatives as not in dispute for the purposes of the Hearing and are recorded thus:-

(a) The correct version of the Contract of Employment which was signed by the claimant and which regulated her employment with the respondent was that produced at pages 61 to 67 of the Hearing bundle.

(b) That Contract includes at clause 23.1 a provision entitling the respondent to deduct from the claimant's final payment of salary a sum representing, amongst other matters, indebtedness arising by reason of overpayment of wages.

(c) Let it be assumed such indebtedness and overpayment were to be established, a deduction made for that purpose would fall within the terms of section 13(1)(a) and (2)(a) and thus would be an authorised deduction not otherwise protected by the terms of section 13, of the Employment Rights Act 1996 ("ERA").

(d) A deduction made for that purpose, let it be assumed that an overpayment of wages were to be established, would separately fall within the terms of section 14(1)(a) of the ERA 1996, being a deduction made by the employer where the purpose of the deduction is the reimbursement of the employer in respect of an overpayment of wages and thus, would be an "Excepted Deduction" not falling within the protection of section 13.

(e) As at the Effective Date of the Termination of the claimant's employment, that is as at the 20th of December 2023, the claimant's accrued but as yet untaken paid annual leave entitlement was 52.7 hours or 6.2 days in the relevant holiday year which commenced on 1st October 23 and ran to 30th September 24.

(f) The gross value of the claimant's accrued but untaken holiday entitlement is £715.36.

(g) The respondent made a deduction of £715.36, being a sum equivalent to that holiday entitlement, from the claimant's final wage.

(h) That in the period 1st October to 20th December 2023, the claimant had otherwise received the appropriate monthly portion of her contracted annual salary of £30,000 gross without any deductions other than those made in respect of PAYE and Employees National Insurance contribution.

The Respondent's Position

3. The respondent averred that the claimant had been overpaid in the period 1st October to 20th December 2023 to an extent greater than £715.36, that amount being the agreed value of the claimant's accrued outstanding paid annual leave entitlement and thus,

(a) That the respondent had entitlement in terms of Clause 23.1 of the Contract of Employment to recover that overpayment;

(b) That that contractual provision fell within the terms of section 13(1)(a) and 13(2)(a) of the ERA and thus, was not an unauthorised deduction; and separately,

(c) That the deduction being one made for the purpose of the reimbursement of the employer in respect of an overpayment of wages, fell within the terms of section 14(1)(a) of the ERA and thus "was separately an "excepted deduction"".

4. The respondent averred that the overpayment had occurred by reason of the claimant not working in the period 1st October to 20th December 2023, a minimum of 42.5 hours per week across 5 days out of 7.

5. The respondent averred that in the relevant period:-

(a) The claimant had worked only 346 hours as opposed to 488 hours that being the number of hours which she would have worked had she worked for 42.5 hours in each of the said weeks within the period.

(b) That the claimant had thus "short worked" by 142 hours in the period, that being equivalent to 16.7 days, which allowing for the claimant's 6.2 days of holiday pay resulted in her having been overpaid by some 10.5 days which had a gross value of in excess of £850, that being a sum which exceeded the value of the deduction made, £715.36 (circa 17%).

(c) That at a meeting with the claimant, amongst others, which took place on the 4th of October 2023 the respondent's Directors and the claimant agreed to a variation of her normal working hours in an early shift from a previous start time of 0630 to a new start time, initially of 30 minutes and, from on or about 8th October 2023, of 15 minutes before the time of the first breakfast to be served on any particular day, and from her previous finish time of 1400 to a new finish time of after 1430 occurring variably but in proportion to the amount of time after the original start time of 0630 which had occurred on any particular day.

The Claimant's Position

6. The claimant's position was:-

(a) That no overpayment of her wages had occurred.

(b) She had been paid throughout the period in accordance with her entitlement under her Contract of Employment which at Clause 5.1 stated that her normal hours of work were from 0630 to 1430 (that is 8 hours) if working an early shift and from 1400 to 2300, that is 8 hours, if working a late shift, 5 days per week out of 7 with half an hour break for lunch, 40 hours per week,

(c) In reciprocation she was entitled to be paid her annual salary of £30,000 gross (after deduction of PAYE and National Insurance contribution) payable in equal monthly instalments, in arrears on the 10th of each month (Clause 6.1).

(d) In terms of Clause 5.1, the hours set out therein were to be her normal working hours, unless otherwise agreed (the claimant's emphasis) between her and the company,

(e) That she had not agreed any variation of her working hours,

(f) That her entitlement to receive her salary did not fall to be calculated by way of an hourly or daily rate of pay, nor was it tied to her doing so (see Clause 5.2 in her Contract) which stated that she was required to work such additional hours in excess of her normal hours of work as were reasonably necessary for the proper performance of her duties and to meet the needs of the company's business, and in respect of any such additional hours no extra payment would be made

(the claimant's emphasis) unless expressly authorised by her Line Manager.

7. That the respondent had never required, at any time during the course of her employment, her to prove, vouch or even submit the hours which she had been in attendance in the work place for the purposes of payment of her salary. Nor had they ever raised with her, prior to her resignation, any issue of overpayment of her wages, or any question of deduction from them.

Sources of Oral and Documentary Evidence

8. The Tribunal had before it a Joint Hearing Bundle produced by parties, some pages of which with better reproduction were replicated by the respondent's representative in an additional Bundle. The Bundle extended to some 127 pages to some of which the Tribunal was referred in the course of evidence and submission.

9. The claimant gave evidence on her own behalf, on oath, and answered questions put in cross examination and by the Tribunal. The respondent's representative and Director, Mr Leopard, gave evidence on behalf of the respondent, on oath, and answered questions put in cross examination and put by the Tribunal. He separately relied upon the statement which he had incorporated within the Response Form ET3.

The Issue Requiring Determination

10. The mixed issue of fact and law, requiring investigation and determination by the Tribunal at the Hearing, was whether the deduction made by the respondent from the claimant's final wages in an agreed amount of £715.36 that being an amount equivalent to the agreed gross value of the claimant's accrued, but as at the date of determination of her employment untaken, paid annual leave entitlement of 6.2 days and which would have been otherwise payable to her as part of her final wage, was an unauthorised deduction in terms of section 13 of the Employment Rights Act 1996 ("the ERA").

11. Standing the matters which were the subject of agreement between the parties for the purposes of the Hearing the sub issue of fact which required to be determined was whether, in the relevant period 1st October to 20th December 2023, the respondent had overpaid the claimant to the extent at least of £715.36 gross, thus rendering the admitted deduction an authorised deduction in terms of section 13(1)(a) and 13(2)(a) of the ERA and separately an "excepted deduction" in terms of section 14(1)(a) of the 1996 Act.

Findings in Fact

12. On the oral and documentary evidence presented, the Tribunal made the following essential Findings in Fact, restricted to those relevant and necessary to the Determination of the mixed issue of fact and law and the sub issue of fact which were before it for determination.

13. As at the date of transfer of her Contract of Employment to the respondent the claimant's normal working hours were from 0630 to 1430 on an early shift and from 1400 to 2300 on a late shift, working 5 days (shifts) per 7 days Monday to Sunday, which was equivalent to 40 hours per week. In terms of her Contract of Employment variation of those normal hours of work required agreement between the claimant and the respondent.

14. In terms of her Contract of Employment the claimant was required to work such additional hours in excess of her normal hours of work as were reasonably necessary for the proper performance of her duties and to meet the needs of the company's business. The claimant had no entitlement to extra payment for any such additional hours worked, unless expressly authorised by her Line Manager.

15. The respondent reserved the right to require the claimant to work different hours from her normal hours of work according to the needs of the business, which might involve the claimant in working shorter or longer hours of work or

working on different days of the week or at different times of the day, in accordance with operational requirements. It was a condition of the claimant's employment that she agree to work different hours if requested to do so by the company.

16. In reciprocation for working and performing the duties of her appointment, the claimant was entitled to receive an annual salary of, at first £27,000 but thereafter £30,000 per annum, payable in equal monthly instalments in arrears, on the 10th day of each month for the prior month up to and including the last day of the month.

17. The claimant's right to receive her salary was not tied, in terms of her Contract of Employment, to the number of hours which she works in any particular pay period. The Contract does not accrue to the claimant entitlement to be paid her salary on an hourly or cumulative basis.

18. The claimant was not required to vouch her hours of work or indeed to submit a statement of the number of hours which she had worked in any week, for the purposes of being entitled to and receiving the proportionate part of her annual salary.

19. At no time in the course of her employment did the respondent require the claimant to submit hourly worksheets or vouch the number of hours which she had worked in any particular week or on any particular day.

20. At no point in the course of her employment and or prior to her resignation did the respondent raise with the claimant any issue regarding overpayment of her salary by reference to the number of hours worked by her.

21. The respondent nevertheless presumed that the claimant, as a Duty Manager, would herself maintain a record of the number of hours worked by her in any week or on any day.

22. The claimant did maintain such a record in a notebook which she kept in the coffee table by the sofa at home. It was her daily practice to note from the clock in her motor vehicle, the time at which she arrived at work on an early or late shift and likewise, to note on the same clock the time at which she set off from the premises at the end of a worked shift.

23. It was the claimant's daily practice to make herself a coffee or tea immediately on arrival at home and then to sit on the sofa and update her record of hours worked in the notebook and using the pen, both of which she kept in the drawer of the table by the sofa, for that specific purpose.

24. Photocopies of the record of her hours worked in the period 1st October to 20th December 23 are produced by the claimant at pages 88 to 90 of the bundle.

25. Those pages show the claimant as having recorded a total of 516 hours worked in the period 1st October to 20th December 2023.

26. It was the claimant's position in evidence that she aimed to arrive at 6 am on days where she worked the early shift with a view to ensuring that all was ready for the start of her shift.

27. The routine which she stated she followed was to open up the premises then switch on the computer, but not log into it until she had completed certain other duties which variously included on certain days:-

- Emptying the dishwasher
- Emptying bins
- Putting milk and butter on the breakfast tables
- Checking the Laundry Room in relation to towels and kitchen cloths
- Helping take orders from customers
- Serving breakfast and thereafter tidying up the kitchen and dining area

28. The respondent operates a computer software program for the purposes of making and recording hotel bookings and for the preparation and issuing of invoices.

29. Persons accessing the software must do so through a computer and by logging into the system. The software records the time at which a user logs in.

30. The time at which the claimant logged into her computer was not a reliable indicator of the time at which the claimant first attended at the work place on any particular day.

31. The software is not designed to keep a record of staff's attendance at the work place or the times at which they start and finish work on any particular day.

32. At pages 91 to 93 complemented by the print outs at pages 94 to 100A, the respondent's representative has compiled and produces his "estimate of the hours likely to have been worked by the claimant in the period 1st October to 20th December 2023" which he has extrapolated based upon a combination of the record of the times in which the claimant signed into the software system and the times recorded for the serving of the first breakfast on the days following after the 8th of November 2023. The total hours which the respondent's representative estimates, by that mechanism, the claimant to have worked in the period was 346 hours. That in his contention falls to be viewed as 142 hours "short worked" when measured against the claimant's "normal hours of work" as per her Contract of Employment.

33. It was the claimant's practice to log out of the system and switch off the computer as her last act before leaving the premises at the end of a working shift.

34. On the above basis the claimant accepted that the signed off per computer times which were recorded on the software system and are shown in the ante penultimate columns on pages 91 to 93, were likely to be a more accurate indicator of the time at which she finished work than the "signed in per computer time" was of the time at which she commenced working.

35. The clamant accepted in evidence that from the 4th of December up until the 12th of December 23, her own records indicated that she ceased working at 3 pm whereas the signed out per the computer was recorded at 2 pm and that on one day in that period, the 10th of December, her records showed her as finishing work at 4 pm whereas the sign out from the computer took place at 2 pm.

36. The claimant also accepted in evidence that in comparison with the computer recorded sign in and sign out times her record contained a number of apparent errors on her part which she was unable to explain other than by postulating that there had been shift swaps which were not accurately reflected in her record.

37. The claimant indicated that on at least one occasion, when she was shown in one or other of the records as being on a "day off", she had in fact attended at the premises and worked for part of that day.

Discussion and Determination

38. In circumstances where an alleged unauthorised deduction from wages arises via the mechanism of the withholding, by the employer, of a particular sum then, in order to fall within the protection against unauthorised deductions which is contained within section 13 of the EqA, a claimant must first show some entitlement in law, whether in contract or otherwise, to receive the payment in question at first instance.

39. In the instant case, it was a matter of agreement between the parties that that entitlement was established being an entitlement, arising on the termination of the claimant's employment to receive payment in lieu of 6.2 days of accrued, but as at the date of her resignation as yet untaken paid annual leave entitlement. Thereafter, it is for the deducting employer to establish that the deduction is an authorised deduction in terms of section 13(1)(a) and (2)(a) of the Act, or, is an exempted deduction in terms of section 14(1)(a). In the instant case the respondent offers to do so by reason of, the purpose of the deduction being the reimbursement of the respondent in respect of an overpayment of wages attributable to an error on the part of the employer affecting the computation by them of the gross amount of wages properly payable to the employee (section 13(4)). It is for those reasons that the sub issue of fact requiring determination before the Tribunal was whether or not there had occurred an overpayment of the claimant's wages in the period 1st October to 20th December 2023 which had resulted from an error in computing, on the part of the respondent, of the gross amount of wages properly payable to the claimant.

40. The onus of proving, on the balance of probabilities, that such an erroneous overpayment had occurred and in what particular amount, sits with the respondent. It is not sufficient for the respondent to identify and point to errors, inaccuracies and or discrepancies appearing in the records kept by the claimant of her hours worked or to suggest that the claimant's oral evidence was insufficiently reliable to establish the actual number of hours which she had worked. The occurrence of an overpayment, absent which it cannot be said that a deduction was serving the purpose of reimbursement of the employer, is not a matter for the claimant to disprove, rather it is a state of fact which the respondent requires to prove.

41. It was the respondent's submission that if the claimant's evidence was "not sufficient to topple" the respondent's assertion of overpayment, then her complaint of unauthorised deduction/claim for outstanding holiday pay should fail. That submission, unfortunately, misconstrues where the burden of proof sits on the matter. I did not find the respondent's Director to be an untruthful

or unreliable witness. He frankly conceded, from the outset, that he was not in a position to prove what hours the claimant had actually worked in the period but rather, had required to make an estimate of these based on those statistics which were recorded in the software program and upon a number of assumptions on his part. He effectively was expressing an opinion as to the hours worked and inviting the Tribunal to accept that opinion evidence on the basis of his expertise and experience as a forensic accountant.

42. The respondent's burden of proof is not capable of being discharged on the basis of such opinion evidence and, on the evidence of fact presented, the Tribunal has been unable to hold that the respondent has discharged its burden of proof and established on the preponderance of the evidence and on the balance of probabilities, that an overpayment had occurred, and far less in what particular amount.

43. Further, on the evidence presented the Tribunal was unable to make any Finding in Fact as to the error said to have been made by the respondent in computing the gross amount of the pay properly payable by the respondent to the claimant on any particular occasion. The evidence presented tended to show, rather, that the respondent paid to the claimant in the period the sums of money which they intended to pay to her, namely a proportionate share of her annual salary entitlement as per Clause 6.1 of the claimant's Contract of Employment. The evidence does not go to show that any error in computing the sums due to be paid to the claimant occurred at the material times.

44. Separately and in any event, let it be assumed that the respondent had established the hours which the claimant had in fact worked in the period such as to support a Finding in Fact which specified the same, the Tribunal did not consider that that would result in the establishment of an overpayment. The claimant's right to receive her salary is nowhere expressly stated in the Contract to be dependent upon her working any particular number of hours in any particular time period, whether that be in the course of a week or the course of a day. Nor is her remuneration expressed by reference to an hourly rate of pay. The Contract, at Clause 5.2, makes clear

that the claimant is required to work such hours as are reasonably necessary for the proper performance of her duties and to meet the needs of the company's business and to do so for no extra or additional payment. While a failure on the part of the claimant to work particular hours, let it be assumed that it was found established that she had been expressly directed to do so, which the Tribunal has not found, might have the potential to result in the respondent subjecting the claimant to a disciplinary process it would not, of itself, entitle the respondents to retrospectively categorise a payment to the claimant of her regular salary as an overpayment. Nor would it, of itself, establish the occurrence of any such overpayment.

45. For the above reasons the Tribunal concludes that the claimant's complaint of unauthorised deduction from her final wage of the gross sum of £715.36, due to her in compensation for accrued but untaken paid annual leave entitlement, succeeds and that the respondent be ordered to pay to the claimant, forthwith, a sum equivalent to the amount of the deduction.

46. As the payment will require to be made gross, the claimant will be obliged to account to His Majesty's Revenue and Customs for Employee's National Insurance contribution and Income Tax due on the sum.

Employment Judge: **d'Inverno**
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