EMPLOYMENT TRIBUNALS

Claimant: **Mr Jeff Kit Chu**

Respondent: **Artful Blend Limited**

Heard at: **East London Hearing Centre (via CVP)**

On: **29 April 2024**

Before: **Employment Judge Suzanne Palmer**

Representation

For the Claimant: In person

For the Respondent: Mr Randeep Sohal, owner and director

JUDGMENT

The judgment of the Tribunal is as follows:

Wages

1. The complaint of unauthorised deductions from pay contrary to Part II Employment Rights Act 1996 is well-founded, in that the Respondent made an unauthorised deduction from the Claimant's pay in respect of wages due on or around 30 November 2023 in respect of the pay period 1 to 30 November 2023.

2. The Respondent shall pay the Claimant £802.50, which is the net sum due to him, consisting of:

a. £240 deducted in respect of purported "*breakages/ negligence/ wastage/ stock mismanagement/ loss of business"*;

b. £562.50 deducted in respect of purported "*overpayment"*.

Holiday pay

3. The complaint in respect of holiday pay is well-founded. The Respondent failed to pay the claimant his full entitlement of holiday accrued but not taken as at the date the Claimant's employment ended on 17 November

2023, as required by regulation 14(2) and/or 16(1) of the Working Time Regulations 1998.

4. The Respondent shall pay the Claimant the sum of £187.92, representing 18 hours of holiday at the rate of £10.44 per hour net.

Notice pay

5. The complaint of breach of contract in relation to notice pay is well-founded.

6. The Respondent shall pay the Claimant the sum of £175 as damages for breach of contract, representing the difference between what the Claimant should have received, namely 2.6 weeks' pay at the rate of £500 per week gross, less the sum of £1,125 gross which he was paid on 30 November 2023. This figure has been calculated using gross pay to reflect the likelihood that the Claimant will have to pay tax on it as Post Employment Notice Pay.

Conclusion

7. The total sum the Respondent shall pay to the Claimant under this judgment is therefore £1165.42, consisting of the following:

a. Unpaid wages (paragraphs 1 & 2 above): £802.50;

b. Holiday pay (paragraphs 3 & 4 above): £187.92;

c. Breach of Contract (notice pay) (paragraphs 5 & 6 above): £175

8. The Respondent is ordered to pay the Claimant the sum of £1,165.42 within 14 days of the date this judgment is sent to the parties.

REASONS

Introduction

1. The Respondent operates a business in the hospitality sector. The Claimant was employed by the Respondent to work as a store manager. His employment commenced on 5 March 2023.

2. The Claimant's employment continued until he resigned by email dated 13 October 2023. He gave notice that his resignation would take effect on 17 November 2023. It was agreed by both the Claimant and the Respondent that this date complied with the minimum notice which the Claimant was required to give under his contract of employment.

3. Following the termination of his employment, the Claimant was provided with a final payslip on 30 November 2023 which set out, amongst other things, the wages he was being paid in respect of the final part of his notice period in

November 2023, and the amount he was being paid for holiday leave accrued but not taken at the date of termination. A number of deductions were also set out in the payslip. Those deductions, together with alleged underpayment in respect of both notice pay and holiday pay, formed the basis of the Claimant's complaint to the Tribunal, presented on 2 January 2024.

4. In a nutshell, the Claimant claims that the Respondent was not entitled to make the deductions he did and had not paid him the wages and holiday pay to which he was entitled in his final pay.

5. The Respondent claims that it was entitled to make the deductions it did by virtue of provisions in the contract of employment, and because the Claimant had been overpaid throughout his employment. It claimed that the Claimant was only entitled to 140 hours of holiday because his employment commenced a month before the start of the annual leave year and leave could not be carried forward. It also claimed that the Claimant had been paid in full for the hours he worked in November 2023.

Claims and Issues

6. In his claim form dated 2 January 2024, the Claimant asserted that:

    6.1. His accrued holiday leave on termination was 157.3 hours rather than the 140 hours for which he had been paid.

    6.2. The Respondent was not entitled to make the deductions it had, in the sum of £300, in respect of "*Deductions (uniform / breakages / negligence / wastage / stock mismanagement / loss of business)"*.

    6.3. The Respondent was not entitled to make the deductions it had, in the sum of £562.50, in respect of "*Overpayment (45 hrs @ £12.50)"*.

    6.4. His wages in respect of November 2023 ("*90 hours @ £12.50"*) were less than his contractual entitlement.

7. In its response dated 27 March 2024, the Respondent asserted that:

    7.1. The Claimant's last day of service was 16 rather than 17 November 2024, because although his notice expired on 17 November he had not been rostered to work on that date.

    7.2. Based on his average rostered hours throughout his employment, the Claimant had in fact worked 36.79 hours per week rather than the 40 hours per week which was the basis of his contractual salary. He had therefore been overpaid throughout his employment by a total of 45 hours. His gross salary should be £23,913.50 per calendar month, rather than the 40 hours per calendar month specified in his contract of employment.

    7.3. The Claimant was not entitled to holiday pay for the period from 5 to 31 March 2023 because he had joined part-way through the Respondent's leave year (which runs from 1 April to 31 March) and the

Respondent's contractual holiday pay provisions do not permit accrued holiday to be carried over to the following leave year.

8. I therefore identified the issues for me to resolve as follows:

   8.1. What was the Claimant's last day of employment?

   8.2. To what pay was the Claimant contractually entitled?

   8.3. Was the Respondent entitled to make the deductions for "overpayment"?

   8.4. How much annual leave was accrued but not taken at the date of termination?

   8.5. In particular, was the Claimant entitled to payment in respect of any annual leave days accrued but not taken and carried over from March 2023 into the leave year commencing on 1 April 2023?

   8.6. To what pay was the Claimant entitled during his notice period?

   8.7. Was the Respondent entitled to make deductions in respect of "*uniform / breakages / negligence / wastage / stock mismanagement/ loss of business"*?

Documents and evidence

9. Prior to the hearing I received no documentation other than the claim and response forms and correspondence between the parties and the Tribunal. The Respondent's response included a copy of the Claimant's contract of employment and a schedule of the hours he worked during his employment.

10. At the outset of the hearing the Claimant informed me that he had sent a bundle containing his contract of employment and his payslips to the Tribunal a week before the hearing in compliance with the Tribunal's directions. A copy of that was located and provided to me. No other documents were provided by either party.

11. During the hearing Mr Shohal told me that the schedule of hours worked, and calculation of the alleged overpayment, were carried out by the company's accountant.

12. Mr Shohal also told me that the Respondent had at some stage prepared a breakdown of the various matters included in the general category of "deductions" of £300 in the final payslip. He said that these matters had been alluded to in various earlier WhatsApp messages and informal conversations with the Claimant during the course of the Claimant's employment. He accepted that these conversations were not minuted and that no formal disciplinary action was ever taken against the Claimant. He accepted that the alleged basis for the deductions had not been mentioned in the response form and that no documentary evidence about the deductions had been provided to the Tribunal. He explained that his main focus had been with other aspects of the case. He told me that the Claimant was provided with four items of uniform which cost £15 each.

Fact-findings

13. I make the following findings of fact:

13.1. On 5 March 2023 the Claimant signed a contract of employment drawn up by the Respondent.

13.2. That contract contained, amongst other provisions, the following:

13.2.1. In respect of salary:

"*Your salary is **£26,000 per annum based on 40 hours per week.** This is payable monthly. Payment is made net of deductions for tax and National Insurance contributions. Pay periods are available from your line manager".*

13.2.2. In respect of working hours:

"*Your basic hours of work will vary according to the needs of the business and may include evenings and weekends. You will be advised of your working hours, if available, on a weekly basis. On any day that you work more than six hours (e.g. from 9.00 am to 5.30 pm) you will be entitled to a 30-minute unpaid break…"*

13.2.3. In respect of deductions:

"*The Company reserves the right to require you to repay the Company by deduction from your pay; any fines, penalties or losses sustained during 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; any other sums owed to the Company by you, including, but not limited to, cost of uniform, equipment which has not been returned, outstanding loans or advances; any deductions otherwise entitled under this contract. You authorise the Company to make any such deductions from any monies owing to you by the Company".*

13.2.4. In respect of probation:

"*The probation period will last until 30th April 2023 and any holidays taken will be unpaid during this time (unless otherwise agreed). At the end of your probationary period your performance will be assessed and, provided that you have reached the criteria necessary for the fulfilment of your role's objectives, your position will be confirmed…"*

13.2.5. In respect of notice:

"*The period of notice for either party during your probationary period is two weeks. Thereafter, the period of notice required by both parties to be given in the case of termination of employment is three weeks; thereafter, the Company will give you an additional week's notice for each 6 months of service up to a maximum of 12 weeks after the completion of 12 years' service… If your employment commences or terminates for any reason part way through a holiday year, your entitlement during that holiday year will be calculated on a pro-rata basis rounded up to the nearest whole day"*

13.2.6. In respect of annual leave:

"*… The holiday year runs from 1st April to 31st March. All holiday pay is paid at normal basic rate… No accrued but untaken holiday may be carried forward to the next holiday year. At the end of each holiday year, any untaken holiday will be lost…"*

13.3. The Claimant was paid wages monthly in arrears, with a payslip being provided at the end of each month. Apart from March 2023, which was a part-month, in each month from April to October 2023 inclusive the payslips show that:

13.3.1. The wages paid were in the same sum (£2,166.66), which is one twelfth of £26,000.

13.3.2. No breakdown of hours worked is included in the payslip and no reference is made in the payslip to an hourly rate.

13.3.3. No deductions were made save in respect of tax and national insurance.

13.4. The Claimant had no control over the hours he worked: he was allocated his shift days and times (usually working on 5 days each week) on a weekly roster.

13.5. The Claimant was never told that his pay would vary or be subject to deductions if his hours differed from the 40 hours per week set out in his contract.

13.6. No formal disciplinary action was ever taken against the Claimant in respect of any alleged negligence, carelessness or loss caused by him, or any other alleged misconduct.

13.7. The hours which the Claimant actually worked each week varied according to his working pattern for the week set out on the roster. In some weeks between April and October he worked in excess of 40 hours, in others he worked fewer than 40 hours.

13.8. The Claimant did not take any annual leave, whether paid or unpaid, throughout his employment with the Respondent.

Law

14. Section 8 of the Employment Rights Act 1996 (ERA) provides that an employee is entitled to receive an itemised payslip, on or before the time of payment, which includes particulars of, amongst other things:

    14.1. *"the gross amount of the wages or salary"*

    14.2. "*the amounts of any variable, and … any fixed, deductions from that gross amount and the purposes for which they are made"…*

    14.3. *"where the amount of wages or salary varies by reference to time worked, the total number of hours worked in respect of the variable amount of wages or salary…"*

15. Section 13 ERA provides that employers shall not make deductions from a worker's wages unless:

    15.1. "*the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the employer's contract",* or

    15.2. *"the worker has previously signified in writing his agreement or consent to the making of the deduction".*

16. Section 13 ERA does not apply where the purpose of the deduction is the reimbursement of the employer in respect of an overpayment of wages (s14).

17. Regulation 13 of the Working Time Regulations 1998 (WTR) set out a worker's entitlement to annual leave.

18. Regulation 16(1) specifies that the right under Regulation 13 is to paid leave.

19. In relation to interpreting the written terms of a contract, the general rule is that I should not look beyond the written document itself unless it is said that it does not reflect the parties' true agreement or is a sham. The starting point is that the words of the contract should be interpreted in their grammatical and ordinary sense in the context. Generally, only if the written terms are unclear or ambiguous will it be necessary to look beyond them in order to interpret the parties' intentions.

20. In relation to holiday pay, I bear in mind recent authority in a number of cases that the entitlement to the basic 4 weeks of leave under WTR Reg 13 can be carried over to the following leave year in situations where the worker was either prevented from or unable to take leave during the leave year to which the entitlement relates. On termination of employment, an employee can therefore be entitled to payment in respect of accrued leave entitlement from the previous leave year as well as the year in which the termination falls. The circumstances in which this may be done include when the employer has prevented the employee from taking their leave entitlement (*King v Sash Window Workshop* [2018] IRLR 142 ECJ), and where the employer has not taken sufficient steps to encourage workers to take their leave entitlement (*Kreuziger v Land Berlin Case* C-619/16 ECJ). It can also include situations where leave has been taken but it was unpaid (*Smith v Pimlico Plumbers Ltd* [2022] EWCA Civ 70).

Conclusions

What was the last day of service?

21. I consider that the Claimant's last day of service was 17 rather than 16 November 2023. That was the date he specified in his letter of resignation, which was accepted by the Respondent. It was also the date which, it is common ground, meant that he was complying with his contractual requirement as to minimum notice.

22. I do not consider that the mere accident of the Claimant not being rostered to work on his final day alters the effective date on which his contract terminated. Taken that to its logical conclusion, that would entitle an employer to reduce an employee's entitlement to contractual notice pay unilaterally, simply by putting them on some form of shift pattern or unpaid leave arrangements which meant that they did not attend work for the final part of their employment. I do not consider that the effect of the final day being a non-rostered day should be any different from the position if the Claimant was, for example, rostered on the final day but not on the penultimate day. He worked a variable pattern involving 5 working days and 2 non-working days per week. In my judgment, the precise arrangement of that pattern on his final week makes no material difference to his employment status up to and including the end of his notice period.

23. I therefore find that the Claimant was employed until 17 November 2023 and that he was entitled to payment until that date.

To what pay was the Claimant contractually entitled?

24. I find that the Claimant was contractually entitled to be paid on the basis clearly set out in the salary provisions in his contract of employment, namely a fixed monthly salary which equates to one twelfth of the expressly stated annual salary of £26,000 per annum gross.

25. Nothing in the clear express term in relation to salary suggests that the Claimant's rate of pay would vary according to the hours he actually worked in any given week. His annual salary appears to have been determined on the basis that, over the course of a year he was anticipated to work on average 40 hours per week. The pattern of his rosters suggest that this was a reasonable estimate on the part of his employer: over the 8 months or thereabouts for which the Claimant was employed, he appears to have worked more than 40 hours per week in some weeks, and less than 40 in others. The only reason for the difference in hours appears to be the shifts which the Respondent rostered the Claimant to work, and over which he had no control.

26. There is nothing in the contract itself, or in the way in which the parties conducted themselves under that contract throughout the Claimant's employment, to suggest that there was ever any intention, agreement or understanding on either side that the Claimant would be entitled to less money if he worked fewer than 40 hours in a particular week, or more money if he worked more than 40 hours.

27. I do not consider that the contractual provisions in relation to "working hours" in any way alter the contractual entitlement in terms of salary. They simply appear to recognise that the Respondent's business needs in respect of an employee's hours could vary slightly from week to week.

28. I consider that the payslips provided by the Respondent undermine the position it has adopted in these proceedings. Those payslips make no reference to the hours actually worked, or to an hourly rate. They show the same fixed salary being paid to the Claimant every month in accordance with the express contractual provisions about salary.

29. In my judgment, the Claimant was therefore entitled under the contract of employment to receive wages of £2,166.66 gross pay, or £1808.82 net pay, per calendar month.

Was the Respondent entitled to make deductions for "overpayments" of 45 hours at £12.50 per hour in the final payslip?

30. It follows from my conclusion in respect of the entitlement to wages that I consider that the Respondent was not permitted to make deductions for "overpayments" because in reality there had been no overpayments.

31. The Respondent invited me to find that, notwithstanding the contractual salary provisions in the contract, the Claimant was only entitled to be paid for the hours he had actually worked, and a spreadsheet provided by the Respondent's account for the 8 months of the Claimant's employment showed that his average weekly hours over that period were 36.79 rather than 40.

32. I note in passing, although I do not consider that I am required to resolve the issue because I do not accept the Respondent's primary argument, that even if the Respondent is right, what appears to have been deducted is gross pay, when what was actually paid to the Respondent in respect of those hours was net pay, so the Respondent appears to be seeking to recover more than it claims to be entitled to.

33. I was not persuaded by Mr Shohal's assertion that the parties intended that the Claimant would be paid only for hours actually worked. I put to him a hypothetical case of an employee who worked in the role for 5 years before leaving: I asked whether the same exercise would be done to make adjustments to the final payslip in such a case, going back over the entire 5 year employment period. Initially, he said that it would. When I put to him that this would mean that there had been inaccurate P60s and tax and national insurance contributions over a number of financial years, he then said that he thought the exercise would be done annually in such a case. I accept that this was only a hypothetical example, but it appears to me to reveal the inherent improbability of the parties having intended or understood such a contractual arrangement to be in place, and the unworkability of such an arrangement.

34. Based on my conclusion that the Claimant was entitled to payment of a fixed monthly salary, I conclude that he was not overpaid and that the Respondent was not entitled to make the deduction of £562.50 from his final pay.

How much annual leave was accrued but not taken at the termination of employment? In particular, was the Claimant entitled to leave which had accrued but was not taken in March 2023, which fell into the previous leave year?

35. When considering this issue, I have had regard to the recent case law identified above, and to the provisions of the contract in respect of the probationary period. The contract is clear that, unless permission is given, an employee in their probationary period is not entitled to any paid leave, only to unpaid leave.

36. In my judgment, this contractual provision is not consistent with the Claimant's rights under the WTR, as clarified by the case law. Whilst it does not amount to an express denial of the right to leave, it amounts to a general refusal (subject to permission being given) to allow paid leave during that probationary period. It also amounts to a discouragement of, or at least a failure to encourage, the employee to take their entitlement to paid leave at the time the right accrues.

37. I therefore consider that the Claimant was effectively prevented, during his probationary period, from taking the paid leave to which he would otherwise have been entitled under the WTR. The probationary period was in place from when he started in early March 2023 until 30 April 2023, which was in the Respondent's next leave year. The Claimant was therefore prevented from taking any paid leave accruing in March 2023 in the leave year when it accrued. In my judgment, he was therefore entitled to be paid for that leave on termination of his employment during the following leave year. It is common ground that he took no annual leave throughout his employment.

38. It follows that my conclusion is that the Claimant was entitled to all annual leave which accrued between 5 March 2023 and 17 November 2023. Using the ready reckoner on the Government website, that was 158 hours of annual leave. On termination of his employment, the Claimant was credited in his final payslip with accrued annual leave of 140 hours. That leaves a shortfall of 18 hours, at a gross rate of £12.50 per hour or a net rate of £10.44 pr hour.

To what pay was the Claimant entitled during his notice period?

39. It follows from my earlier conclusions in respect of termination date and salary that I consider that the Claimant was contractually entitled to continue to be paid based on his monthly salary of £2166.66 gross, £1808.82 net, until his final day of employment.

40. The Claimant continued to be paid at that rate (subject to the purported "overpayment" recovered in the final pay) until 31 October 2023. However, for the period from 1 to 17 November inclusive (2.6 weeks) he was only credited with 90 hours of work (gross pay of £1125). Based on his contractual pay rate, which equates to 40 hours per week, he should have been paid gross pay of £1300, meaning that there was a shortfall of £175 gross, or £140 net.

Was the Respondent entitled to make deductions in respect of "uniform / breakages / negligence / wastage / stock mismanagement / loss of business"?

41. I consider that the issue of uniform is separate from the other issues here. There does appear to be some provision in the contract of employment for the

Respondent to make deductions on termination in respect of uniforms supplied to employees. On the basis of the information provided by Mr Shohal, this amounted to £60 in this case and I consider that this deduction was justified.

42. I consider the position to be very different in respect of the remaining items. I am mindful that the burden of proof rests on the Respondent to demonstrate that it was entitled to make the deductions in accordance with the contractual provisions upon which it relies.

43. I note the absence of any reference to this matter in the response form. I further note that no detail has been provided in oral evidence and no documentary evidence whatsoever in relation of these deductions has been put before me. There is insufficient evidence available to me for me to be able to draw any conclusion that the other (non-uniform) alleged aspects of this particular deduction fell within the contractual provision relied on by the Respondent. That contractual provision is broadly and generally worded. I have not been provided with any details of how the sum is broken down, what the Claimant is alleged to have done, how that is said to fall within the categories of behaviour set out in the contractual provisions. There is nothing to demonstrate or quantify any loss allegedly caused by such matters. I note that the Claimant appears to have passed his probationary period and that no formal disciplinary proceedings were ever taken against him during the period he was employed.

44. I conclude that the Respondent has not discharged the burden of proof in order to demonstrate that it was entitled to make the deduction, save in respect of uniform. I therefore find that the sum of £240 was an unauthorised deduction from the Claimant's wages.

Conclusion and remedy

45. It follows from the above discussion that I consider that:

    45.1. Save for the sum of £60 in respect of uniform, the deductions purportedly made in the final payslip in respect of alleged overpayment of wages and alleged negligence, mismanagement etc. were unauthorised deductions.

    45.2. I therefore make a declaration to that effect, and order the Respondent to pay the Claimant, in respect of those unauthorised deductions, the sums of £240 (alleged negligence, mismanagement etc.) and £562.50 (alleged overpayments). Both of these are net sums, giving a total of £802.50 net.

    45.3. I consider that the Respondent failed to pay the Claimant the full amount of annual leave which was accrued but not taken at the date of termination, and should have paid him for 158 hours rather than 140 hours, at a rate of £12.50 per hour gross or £10.44 per hour net. This equates to a net figure of £187.92.

    45.4. I consider that the Respondent failed to pay the Claimant the pay to which he was contractually entitled during the notice period. In the period from 1 to 17 November 2023 (2.6 weeks) he should have continued to be paid

at the rate of £2166.66 per month gross, or £1808.82 per month net. This equates to £500 per week gross, or £1,300.

45.5. The Claimant was only paid £1,125, so there is a shortfall of £175 gross or £140 net. I am mindful that notice pay is generally treated as post employment pay and that the Claimant is therefore liable to be required to pay tax on this sum. It should therefore be grossed up and I award the sum of £175 as damages for breach of contract in respect of notice pay.

Employment Judge Suzanne Palmer
Date: 1 May 2024