



EMPLOYMENT TRIBUNALS

Claimant: Ms K Ferenczi
Respondent: Capel Estates Ltd
Heard at: East London Hearing Centre (by Cloud Video Hearing)
On: 26 April 2024
Before: Employment Judge S Iman

Representation

For the claimant: Neither present nor represented
For the respondent: Mr Khan

JUDGMENT

Judgment was sent to the parties on 20 May 2024 and reasons having been requested in accordance with Rule 62(3) of the Employment Tribunal Rules of Procedure 2013.

WRITTEN REASONS

1. The claimant's claims were for unauthorised deduction of wages and breach of contract in relation to notice pay.
2. These reasons are produced at the request of the claimant. An oral judgement was issued in respect of this claim on the date the matter was listed for a final hearing with a judgement being issued on specifying the gross amount of **£2087.12**.
3. I have reconsidered my decision of my own initiative in accordance with Rule 70 of the Employment Tribunal Rules of Procedure 2013, and only amend the final amount owed to **£2172.62**.

Preliminary matters

4. Miss Ferenczi did not attend the final hearing. No explanation or correspondence was sent to the Tribunal in respect of her non- attendance and there was no application to postpone proceedings.

5. Mr. Khan explained that the respondent had remained in communication with the claimant throughout the ACAS process and they had received communications as recently as last week and therefore considered that the claimant was aware of the proceedings today.
6. The Tribunal satisfied itself that the notice of hearing had been served appropriately on the claimant on the 13 February 2024. The Tribunal bore in mind that the final hearing had initially been listed for 12 April 2024 and had already been postponed earlier this year at the request of the claimant due to it being listed during school term time.
7. The Tribunal had no telephone contact details for Miss Ferenczi and therefore the Tribunal sent an email to Miss Ferenczi at 12:08 notifying her that the final hearing had started at 12 noon and requested that she join the hearing. No response was received to this email.
8. The Tribunal further noted that Miss Ferenczi had also written to the Tribunal on the 19 February 2024 seeking advice on whether she;

“would be able to make adjustments to my claim as I haven’t put any figures for the amount claimed. Also, I would like to respond to the latest claim by the respondent. Can you please advise if, I need to use a form or simply I am able to put it through by writing?”
9. The Tribunal responded on the 14 March 2024 stating that the claimant could apply in writing to amend the claim and could also provide comments in writing in respect of the respondents position but that no special form was required. No further correspondence was received from the claimant. The Tribunal satisfied itself that Miss Ferenczi had had an opportunity to provide further details and documents and had not done so.
10. Having had regard to all the circumstances, the Tribunal concluded that it was in the interests of justice for the matter to proceed in the absence of Miss Ferenczi in accordance with Rule 47 (Employment Tribunal Rules of Procedure 2013) and the overriding objective. The Tribunal concluded that Miss Ferenczi had been given sufficient notice to attend and had waived her right to attend.

Issues

11. The issues for the Tribunal to determine were;
 - i) Was there an employment contract in existence?
 - ii) What date did the claimants employment commence?
 - iii) What date did the claimants employment end?
 - iv) What was the claimant’s salary?
 - v) Was the claimant entitled to any holiday pay?
 - vi) Was the claimant entitled to any notice pay?
 - vii) Had the respondent carried out any unlawful deduction of wages?
 - viii) Was the respondent entitled to claw back holiday pay for leave that was taken but not accrued?

Contract of employment

12. Mr. Khan gave evidence to the Tribunal on behalf of the respondent. This was the only live evidence the Tribunal heard. Mr. Khan presented as a straightforward credible witness who was seeking to assist the Tribunal in the determination of the claim.
13. Mr. Khan in his evidence referred the Tribunal to a document titled *employment contract* which he stated had been signed by Miss Ferenczi on the 13 August 2023. Mr. Khan explained that this was a contractual document that had been signed by Miss Ferenczi and returned to the respondent via WhatsApp. His evidence was that this document contained the terms of the employment contract.
14. This document was sent to the Tribunal on the 24 April 2024. The Tribunal noted that the terms of the contract in this document aligned with the respondents submissions and references to the clauses in their ET3. Further, the contractual clauses had been referred to in the respondents ET3 and Miss Ferenczi had not provided any further detail clarifying her position. The document was relevant to the issues to be determined by the Tribunal and it was in the interests of justice for the document to be considered by the Tribunal.
15. The Tribunal noted that there were no detailed explanations provided by Miss Ferenczi save the brief outline contained in her claim form which stated:

“I have started working at the end of August and I haven’t received any payment whatsoever until I have left, which was on the 05 October 2023. I have tried to contact them many times and I was promised that I will get paid and it did not happen.”
16. In her claim form Miss Ferenczi has completed parts which in summary state that she worked as a nanny /housekeeper for 35 hours a week with a gross monthly salary of £2708. She indicates that her employment commenced on the 25 August 2023 and that she was bringing this claim for notice-pay, holiday pay and wages that were owed to her.
17. Mr. Khan in his evidence on behalf of the respondent, maintained that the claimant’s gross monthly salary was £2600. He went on to explain that the date the claimant commenced employment was 25 August 2023 and her last date of employment was 04 October 2023. It was accepted that the claimant’s weekly hours were 35 hours.
18. Both parties were in agreement that the date the employment commenced was the 25 August 2023 and further, the Tribunal noted that this date was also reflected in the document titled contract of employment. The parties also agreed that the claimant worked 35 hours a week which was also reflected in the document titled contract of employment.
19. Mr. Khan accepted that Miss Ferenczi had not been paid by the respondent. However, he explained that the respondent had been unable to make

payment as Miss Ferenczi did not forward her bank details to the respondent. Further, he explained that the respondent wanted to pay Miss Ferenczi what she was owed but did not agree nor understand how she had arrived at the figures that she had set out in her claim form in respect of her salary.

20. In respect of the document titled employment contract he explained that this document had been signed and returned before Miss Ferenczi's employment commenced. Further, though the document had not been countersigned by a representative for the respondent, this was the employment contract that was in place at relevant time and the terms had been accepted by both the respondent and the claimant.
21. Mr. Khan reiterated that the Miss Ferenczi's monthly salary was £2600 gross as reflected in the contractual document and that Miss Ferenczi had provided no explanation as to how she arrived at the figure of £2708 in her claim form.
22. Mr. Khan explained that he was keen to pay Miss Ferenczi the amount that was due to her but Miss Ferenczi had provided no explanation as to why she considered that the amounts specified in the ET3 response were incorrect.
23. The Tribunal accepted the evidence of Mr. Khan and accepted that the document submitted to the Tribunal was the only employment contract that was in place at the time between the claimant and the respondent and therefore this was the relevant agreement in place during the claimant's employment.
24. The Tribunal was satisfied that the contract had been signed by the claimant on the 13 August 2023 and returned to the respondent. Therefore, the contractual terms within the contract were the terms in place at the relevant time.
25. The employment contract sets out that Miss Ferenczi's role was that of personal assistant and that her employment commenced on the 25 August 2023 and that her normal hours of work were approx. 35 hours a week over a 7 day period (Sunday- Saturday). Her salary was £2600 (gross) payable in equal monthly installments in arrears on or before the last working day of each month. Therefore, the Tribunal concluded that these terms captured her salary and working arrangements.
26. In respect of when Miss Ferenczi contract employment ended. Mr. Khan explained that it was the 04 October 2023 as Miss Ferenczi had not returned to work on the 05 October 2023.
27. Mr. Khan in his evidence maintained what was set out in the respondent's ET3 response and also in the contract at clause 4.1 that Miss Ferenczi was required to give one week's notice in writing should she wish to leave. He explained that on 05 October 2023, the respondent received a WhatsApp message which stated "*I have left, I am sorry, I cannot work for you any longer. All the best, key is in the chimney pot.*"

28. Therefore, in light of the notice owed Mr. Khan maintained Miss Ferenczi worked for one month and nine days and in light of the notice pay owed to her employer she was entitled to a payment of one month and two days.
29. The Tribunal accepted that the last day of employment was the 04 October 2023.
30. In respect of the holiday pay Mr Khan maintained that Miss Ferenczi had taken 10 days full holiday for 01 September 2023 to 04 October 2023 and therefore referred the Tribunal to **clause 8.6** of the contract.
31. **Clause 8.6** states that:

On termination of your employment, holiday pay will be given for earned and unused days of holiday entitlement in that holiday year only. Unless required by law, on termination you have no right to be paid for holiday accrued but not taken in previous holiday years. If, on termination you have taken more holiday than you have earned in that year, the Employer shall be entitled as a result of your agreement to the terms of this contract to deduct the value of the unearned holiday from any final payment of salary made to you.

32. Mr. Khan's position in his evidence was that Miss Ferenczi was entitled to 2 days holiday, but that in accordance with the contractual terms the respondent was entitled to claw back the 8 days paid leave that had not been accrued.
33. The Tribunal was satisfied that there was a clear express contractual term that entitled the employer to claw back the payments for holidays taken but not accrued and the Tribunal did not consider that the term was unreasonable or penal in nature. Further, in respect of the holiday pay the Tribunal concluded that Miss Ferenczi had accrued 3 days holiday pay.
34. In respect of the notice pay the Tribunal accepted that the Employer was entitled to one week's notice in accordance with the requirement of the contract which sets out at **clause 4.1**;

During any probationary period, your employment may be ended either by you giving the Employer or the Employer giving you one week's written notice.

35. The Tribunal accepted that Miss Ferenczi was in her probationary period which was captured in **clause 3.1** of the contract, namely that *the first six months of your employment will be a probationary period*. The Tribunal accepted that the respondent had not been given one weeks notice written/otherwise as per the contractual terms.

Remedy

36. An employer is unable to deduct from the wages of a worker employed unless this is authorised by statute or contract, or where the worker has previously agreed to the deduction in writing (*section 13(1) Employment Rights Act 1996*). Wages must be 'properly payable' to count as a deduction

(section 13(3)). Determining whether wages claimed are 'properly payable' requires the tribunal to consider the circumstances of the case and what the contract of employment means for those circumstances (*Agarwal v Cardiff University and anor* [2019] ICR 433 CA; *Delaney v Staples (t/a De Montfort Recruitment)* [1991] ICR 331 CA).

37. It is well established law that salary pay and holiday pay meet the definition of wages as set out in section 27 of the Employment Rights Act 1996 and as such are payable in connection with an individuals employment . Mr Khan accepted that payment had not been made to the claimant in respect of salary and holiday pay and that this was owed to Miss Ferenczi.
38. The Tribunal concluded that there had been an unlawful deduction of wages and the claim was well founded in that regard. Therefore the respondent is ordered to pay the clamant the amount of **£3369.32** (salary owed for period 25/08/2023- 04/10/2023) minus **£598.35** (clawback for 7 days holiday taken but not accrued) minus **£598.35** for (1 weeks notice entitlement) = **£2172.62** gross pay. The respondent is responsible for deducting tax and national insurance contributions owed to His Majesty's Revenue and Customs
39. The claim in respect of breach of contract and notice pay is not well founded and is dismissed.

Employment Judge Iman
Dated: 12 July 2024