EMPLOYMENT TRIBUNALS

Claimant: Miss E Andraous

Respondent: The Nail and Beauty Zone Ltd

Heard at: **Croydon (via CVP)** **On:** **27 October 2024**

Before: **Employment Judge Leith**

Representation
Claimant: In person
Respondent: Mr Lumsden (Director)

JUDGMENT

1. The Respondent made unauthorised deductions from the Claimant's pay in July, August and September 2023. The Respondent is ordered to pay the Claimant the gross sum of **£606.37** in respect of the amount unlawfully deducted.
2. The complaint of failure to pay accrued but untaken annual leave on termination fails and is dismissed.
3. The Respondent was in breach of contract by failing to pay employer and employee pension contributions into the Claimant's pension scheme when deducted. The sums having subsequently been paid in to the Claimant's pension scheme, no award is made for damages.

REASONS

Claims and issues

1. The Claimant claims unauthorised deduction from wages, failure to pay accrued but untaken annual leave, and breach of contract.

2. In respect of the complaint of unauthorised deduction from wages, the Claimant's case was that she was underpaid throughout her employment. Her case was that this was because, in essence, the Respondent had undercalculated or under recorded the time when she was actually carrying out treatments, for which she was entitled to be paid at a higher hourly rate. Her case was that this was starkest in the months of July and August 2023. The Respondent's case was that the Claimant was paid correctly throughout her employment.

3. In respect of the complaint of failure to pay for accrued but untaken annual leave, the Claimant's case was that she was not paid for the holidays she took. The Respondent's case was that the Claimant was correctly paid for the annual leave that she took, and when her employment was terminated, she had taken more annual leave than she had accrued.

4. In respect of breach of contract, the Claimant's case was that pension contributions which were deducted from her pay were not paid into the pension scheme. The Respondent's case was that the pension payments had not been paid into the scheme on a month-by-month basis but had subsequently been paid in correctly.

Procedure, documents and evidence heard.

5. The claim was issued on 31 October 2023. It was served on the Respondent under cover of a letter dated 3 November 2023, and listed for hearing on 15 February 2024. The notice of hearing was accompanied by standard directions requiring the Claimant to produce a document setting out how much she was claiming and how that was calculated, together with all supporting documents and evidence, then the Respondent to disclose all of its relevant documents and evidence to the Claimant.

6. The claim apparently did not come to the attention of the Respondent, as it had not been served on the registered office address. It was therefore reserved on the registered office address. The hearing listed for 15 February 2024 was consequently postponed.

7. In the interim, on 1 February 2024, the Respondent submitted a response (which was accepted by the Tribunal). The Claimant then produced a four-page document responding to the assertions set out in the response. She also produced a document entitled "Pay understanding", which set out what she had actually been paid, and why she believed it to be wrong. That document did not set out in terms what she said she ought to have been paid.

8. On 11 February 2024 the Claimant sent the Respondent (and the Tribunal) various emails attaching the documents she intended to rely on. Some of these were photographs from the respondent's diary system. The Claimant's case was that they would demonstrate the time she had spent carrying out treatments (and for which she was consequently entitled to be paid at a higher hourly rate). Mr Lumsden replied to the Claimant (and the Tribunal) indicating that he considered that the Claimant had breached data privacy laws by taking those photographs. He indicated that he had reported the breaches to the Information Commissioner's Office. He instructed the Claimant to delete the images and asked the Tribunal also to delete them.

9. The claim was relisted for hearing; the Tribunal once again issued standard directions with the notice of hearing.

10. The Respondent applied on 5 June 2024 for the claim to be struck out, on the basis that the Claimant had not complied with the directions made by the Tribunal. The Respondent's position was that the Claimant had failed to comply with both the order to produce a document setting out how much she was claiming and how the amount was calculated, and the direction to disclose the documents she relied upon. Having considered the application, I decided not to strike out the claim.

11. I reached the decision not to strike out the claim because I was satisfied that the Claimant had complied in substance with the Tribunal's order, by the documents she had submitted on receipt of the Respondent's response (and then the documents she disclosed on 11 February 2024). The "pay understanding" document did not set out a precise figure or calculation for the loss claimed. The Claimant's position was that the reason she was unable to do so was because of the somewhat opaque way that the Respondent had calculated her pay. I considered that that was not unreasonable, particularly for the period after 1 July 2023. What the Claimant had done was to explain why she had reached the view that her pay had been calculated incorrectly. I was satisfied that in the circumstances, that constituted compliance with the Tribunal's order, and that the gateway test for striking out the claim was therefore not made out. I considered that in any event, it would be wholly disproportionate to strike out the claim. It was reasonably clear what the Claimant was claiming. Inevitably, the Respondent would have considerably more information available to it regarding the calculation of the Claimant's pay than the Claimant herself. There was no real forensic disadvantage to the Respondent, and no reason a fair trial was not possible. So even if I had considered that the gateway test had been made out, I would not have exercised my discretion to strike out the claim.

12. The Respondent produced a combined bundle of 81 pages. This did not, however, include the documents disclosed by the Claimant in February 2024. The Claimant was given the opportunity to tell the Respondent if here were any documents she wished to add to the bundle before it was finalised. She did not do so. Given the threatening response she had been met with when she disclosed the documents in February 2024, that is perhaps unsurprising.

13. I adjourned the hearing for around half an hour to allow the Claimant to resend those documents to the Tribunal. They consisted of eight emails in total, each with a number of attachments:
    - 13.1. The Claimant's grievance of 3 September 2023.
    - 13.2. Screenshots of client reviews received by the Claimant.
    - 13.3. Screenshots of reviews of the Respondent as a place to work.
    - 13.4. Emails and letters regarding the Claimant's pension.
    - 13.5. Screenshot of the Claimant's performance against service targets.
    - 13.6. Photographs of the Respondent's premises.
    - 13.7. Photographs from the Respondent's internal newsletter.

13.8. Photographs of the Respondent's whiteboard showing team members' performance against Key Performance Indicators.

13.9. WhatsApp messages with colleagues; and

13.10. Photographs of Respondent's the work diary for various dates during the Claimant's employment (these were referred to as the "Snapchat attachments").

14. Neither party had tendered witness statements. That is not a criticism; they had not been expressly directed to do so. As there were no witness statements, I did not hear any sworn evidence. The case was in any event one which was well captured within the various documents put before the Tribunal. I asked both the Claimant and Mr Lumsden questions to clarify their respective cases. I then allowed both to make submissions, summing up their respective cases.

15. During his submissions, Mr Lumsden suggested that the Respondent was at a "huge disadvantage" because the Claimant had not set out in detail how she calculated her claim. This appeared to be an attempt to reopen the strike out application, which I had already dealt with. The Respondent had an obvious informational advantage when it came to questions of how the Claimant's pay was calculated. Indeed, as it became apparent, the Respondent's own calculations were in places more generous to the Claimant than mine (albeit by very small amounts of money). I have preferred my calculations, and I have not held those instances where the Respondent's own case was that there was an underpayment to be a concession by the Respondent that it had made unauthorised deductions from the Claimant's wages. To repeat, I do not consider that the Respondent was at any forensic disadvantage in the litigation by reason of the way the Claimant set out her case.

16. Mr Lumsden also accused me of helping the Claimant to make her case. Insofar as that was a reference to giving the Claimant the opportunity to submit the documents she had previously disclosed to the Respondent, the submission was misconceived. The documents had been disclosed to the Respondent in February. The Respondent was very well aware that the Claimant intended to rely upon them. I carefully tested both the Claimant's case and the Respondent's case during the hearing, with reference to the documents that the parties had submitted. Again, that did not favour either side – it simply allowed me to understand the parties' respective cases.

17. There was not time within the two hours listed for the hearing to deliver an oral judgment. I therefore reserved my judgment, which I give now with reasons.

Factual findings

18. I make the following findings on balance of probabilities.

19. The Claimant was employed by the Respondent from 7 March 2023 to 13 September 2023 as a Spa Therapist.

20. The Claimant's contract provided as follows regarding her rate of pay (under the heading "Your Pay"):

> "Your salary will be £11 per hour, non-booked rate £10 per hour and booked rate £12 per hour. Basic rate is paid for holidays and training which will be payable in instalments in arrears on or before the last working day of each month. Payment will be made by direct credit transfer to a bank or building society account nominated by you. The company's pay period runs from 18th of the previous month to 17th of the salary month.
>
> You authorise the Company to deduct from your salary including final salary any sums due from you to the Company, including but not limited to any overpayment of salary, commission, bonus, training costs, incentive, expenses, no notice period penalty, payment for hours not worked and payment for holidays taken in excess of entitlement."

21. Under a separate section entitled "Staff Bonus", the contract said this:

> "From time to time, the company offers discretionary bonus schemes to staff based upon meeting or exceeding set performance targets. Any applicable schemes will be explained fully to you when you start.
>
> All bonus schemes are discretionary and do not form part of your formal terms and conditions of employment."

22. The contract said this regarding holidays:

> "Your annual holiday entitlement for the year from 07/03/23 to 31st March 2023 is 2 days including bank holidays. The holiday year runs from 1 April to 31 March each year. Holiday allowance accrues on a 1/12th basis for each month worked.
>
> Thereafter your holiday entitlement will be 29 days per year including bank holidays. You may only take holidays on dates that you agree in advance with the directors of the Company. Unused holiday entitlement may only be carried to the following holiday year at the discretion of the directors of the company."

23. And this regarding pensions:

> "The company offers all employees an automatic enrolment workplace pension scheme, where contributions are automatically deducted from your monthly salary. The company also contributes to employee's pension scheme in accordance with government legislation."

24. And this regarding disciplinary proceedings:

> "Your entitlement to any discretionary bonuses, prizes or other staff benefits of this nature which are from time to time offered by the Company will cease from the start date of any disciplinary proceedings brought by the Company in connection with your employment."

25. And this regarding notice periods:

> "Your entitlement to any discretionary bonuses, prizes or other staff benefits of this nature which are from time to time offered by the Company will cease from the start date of your notice period. "

26. And this regarding training:

> "From time to time, as business needs dictate, the Company may require you to attend training courses. The Company will fully fund any such training. You agree to:
>
> - display appropriate professional and courteous behaviour at all times when training with external training bodies, including times when not attending courses if the course involves travelling away from your normal place of work.
>
> - ensure that you fully attend all training courses you are booked to go on unless due to sickness. If you are sick, you must inform the Company and the training provider at the earliest opportunity. You agree to reimburse the company for any training courses that you were booked on but have not attended for any reason other than sickness, including self-inflicted sickness, unless otherwise agreed at the discretion of the directors of the Company.
>
> - reimburse the Company either via deduction from your final salary or a repayment by you to the Company the cost of any training courses and related expenses including any salary paid to you whilst attending training courses if you terminate your employment, or your employment is terminated for reasons of a disciplinary nature, within 6 months (if total course cost, including expenses and VAT, is less than £300) or 12 months (if total course cost, including expenses and VAT, is greater than £300) of completion of the course."

27. And this regarding varying the contract:

> "The Company reserves the right to alter the terms and conditions displayed in this contract or the offer of employment letter, as business needs or changing statutory regulations dictate. You will be provided with written notification of any changes."

28. The Claimant signed her contract of employment (electronically) on 27 March 2023.

29. The Respondent's case was that the contracts of all staff (including the Claimant) were varied with effect from 1 July 2023, to provide that they would no longer be paid at an increased hourly rate of £12 per hour while carrying out procedures. Instead, they would be entitled to commission. There was no evidence before me of any discussion or negotiation with the Claimant regarding the change. Nor was there any evidence of the change even being notified to the Claimant in writing. There was no evidence regarding why the Respondent was making the change. There was no evidence either of how the commission arrangements would work or how commission would be calculated.

30. On 31 July 2023, the Claimant emailed "Amanda" of the Respondent as follows:

> "So, I have sat down and added all my hour up, booked, non-booked and holiday hours. I'm trying to figure out exactly what they've done here but it's so difficult to understand.
>
> So they have me for only 15 hours booked, when I've actually done 56 hours and 10 min form the 18th June till the 17th July.
>
> Non-booked I've done 55 hours and 30 mins when they have me down for 97 hours.
>
> Holiday hours they have correct at 48 hours.
>
> So there is definitely a big mess up here.
>
> Can you please check this put for me as I'm struggling to understand what they've done and get this sorted for me ASAP. I have attached my payslip for this period. I normally get paid around £1,600+ after deductions and this month I hot paid £1,456.30".

31. On 3 September 2023, the Claimant raised a grievance. She said this:

> "I am writing to raise a formal Grievance in regard to my pay this month, 31st August 23 and previous months since I started. I have yet again been under paid and have not been paid for my days of holiday taken during this period. This has been an ongoing situation with pay since I started back in March and every month there is a discrepancy and mess up with the pay which is not acceptable or legal. For this month I have not been paid for my 5 days of holiday taken which leaves me short of pay by £440. Also I am a full timer working 40 hours per week at a rate of £11 per hour as it clearly states this in my contract "Your salary will be £11 per hour, non-booked rate £10 per hour (£10.42 now minimum wage) and booked

rate £12 per hour" meaning my monthly pay should not be any less than £1,760 before deduction and without adding on any booked hours at £12 per hour, unless I have any sickness or absence that is non paid. The majority of the time I am busy and do lots of booked hours so this total should be more after adding booked hours. I have only had 1 sick unpaid day last month; this is the only thing other than tax and national insurance that should have been deducted from my pay. I was also under paid by 41 booked hours at £12 per hour last month, July 2023 as I have done 56 booked hours and was only paid for 15. I was told I would get this back in August's pay which I have not. These are hours I have worked and done in treatments (booked hours) as agreed in my contract so should not under no circumstances and without my consent or previous agreement been deducted from my pay.

For August's paycheck I have done 67 booked hours and 20 minutes. 59 non booked hours and 30 minutes. 40 hours of holiday (5 days, 8 hours a day). This is what I should of got paid:

Booked hours: 12 x 65 - £804.
Non booked hours: 10.42 x 59 = £614.78
Holiday – 11x40 - £440
TOTAL: £1,858.78 before deductions of national insurance and tax and not counting the odd 30 min and 20 min above. This also should of included the 41 booked hours that I did last month but was not paid for and was told will be added to August's pay check and hasn't been added, so that's 12 x 41 = £492.

Overall, I should have got paid: £1,858.78 + £492 = £2,350.78 in total before tax and national insurance being deducted and I only got paid £1,216.91 meaning I'm yet again way under paid and money is being deducted from my pay that shouldn't be.

There is definitely a mess up in the pay and would like for this to seriously be looked into by the highest member of management at payroll and for all my pays to be looked into further from when I first started in March, as I don't believe I am being paid correctly. I would also like for the Money I have been under paid by to be paid into my account immediately within the next 5 working days by the end of 8/9/23 and everything else mentioned above also sorted and explained by then please."

32. The Claimant's employment ended on 13 September 2023. The Respondent's case was that the Claimant's employment was terminated for "reasons of a disciplinary nature". The Respondent's case was that this followed two warnings to the Claimant regarding her attitude and behaviours. The Claimant's case was that this was not the real reason for her dismissal. There was no evidence before me from the Respondent regarding the Claimant's dismissal – for example, the warnings allegedly given to her, or her dismissal letter. Nor was there any evidence regarding

the reasons for which the decision was taken to dismiss the Claimant. Mr Lumsden explained that the Claimant was given one weeks' notice, although again there was no evidence regarding this before me.

33. The Claimant provided evidence showing that she received good feedback from customers, and that she was generally meeting her Key Performance Indicators in the role and performing above others in the team.

34. There were a number of emails before me regarding the Claimant's pension contributions. I do not need to deal with them, given that it is common ground that the Claimant's pension contributions were not paid into the pension scheme in a timely fashion. The Claimant accepted that the payments were paid into the pension scheme eventually (up to 6 months late).

35. The Respondent provided evidence in the form of extracts from their Zenoti system, which records the hours attended work, unpaid break times, and hours when the employees is in treatment with a client.

36. The Claimant's payslips were also in evidence before me. The evidence of the payslips and the Zenoti system regarding the Claimant's pay and working hours during her employment was as follows:

<u>March 2023</u>

37. Payslip:
    - 37.1. 19 booked hours (at £12 per hour).
    - 37.2. 26 non-booked hours (at £10 per hour).
    - 37.3. 18.92 training hours (at £11 per hour).

38. Zenoti system:
    - 38.1. One day holiday (eight hours).
    - 38.2. 64 hours worked in total.
    - 38.3. 15 hours and 26 minutes serviced (booked) hours).

<u>April 2023</u>

39. Payslip:
    - 39.1. 76 booked hours (at £12 per hour).
    - 39.2. 40.50 non-booked hours (at £10 per hour).
    - 39.3. 3 training hours (at £11 per hour).
    - 39.4. 40.50 non-booked hours from April 2023 (at £10.42 per hour).
    - 39.5. 8 holiday hours (at £11 per hour).

40. Zenoti system:
    - 40.1. One day holiday (eight hours), taken on 27 March 2023 (so that the Claimant had taken the two days she was entitled to take within the leave year ending on 31 March 2023).
    - 40.2. 160 hours worked in total.
    - 40.3. 75 hours and 25 minutes serviced (booked) hours).

41. The Respondent's case was that the Claimant had been underpaid by one hour of time, but overpaid on booked hours 0.59 of an hour, so overall underpaid by 52p.

May 2023

42. Payslip
    - 42.1. 43 booked hours (at £12 per hour)
    - 42.2. 8 training hours (at £11 per hour)
    - 42.3. 107 non-booked hours (at £10.42 per hour)
    - 42.4. 16 holiday hours (at £11 per hour)
    - 42.5. Tips of £16.12

43. Zenoti system:
    - 43.1. Two days holiday (sixteen hours).
    - 43.2. 173 hours in total at work. On one day when she worked a 9-hour shift, three days when she worked a 7.5 hour shift and one day when she worked a 6.5 hour shift she was not recorded as having taken a break. Accounting for the shifts where she was recorded as having taken an unpaid break, she was therefore recorded as having worked for 158 hours in total.
    - 43.3. 43 hours and 15 minutes serviced (booked) hours.

44. The Respondent's case was that there was an error with the breaks that were recorded, and that the Claimant had in fact taken 2.5 hours' worth of unpaid breaks which were not recorded (and for which she was consequently paid).

June 2023

45. Payslip
    - 45.1. 56 booked hours (at £12 per hour).
    - 45.2. 82.92 non-booked hours (at £10.42 per hour).
    - 45.3. 5.08 training hours (at £11 per hour).
    - 45.4. 32 holiday hours (at £11 per hour).

46. Zenoti system:
    - 46.1. Four day's holiday (32 hours).
    - 46.2. One day sick leave.
    - 46.3. 144 hours and 45 minutes worked in total.
    - 46.4. 55 hours and 50 minutes serviced (booked) hours.

47. The Respondent's case was that the Claimant was underpaid by 0.91 hours at the rate of £10.42 per hour (a total of £9.48).

July 2023

48. Payslip
    - 48.1. 15 booked hours (at £12 per hour).

48.2. 97 non-booked hours (at £10.42 per hour).
48.3. 48 holiday hours (at £11 per hour).

49. Zenoti system:
    49.1. Six days holiday (48 hours).
    49.2. One day sick leave.
    49.3. 112 hours worked in total.
    49.4. 49 hours and 35 minutes serviced (booked) hours.

August 2023

50. Payslip:
    50.1. 127 monthly hours (at £10.42 per hour)
    50.2. Commission of £21.60

51. Zenoti system:
    51.1. Five days holiday (40 hours).
    51.2. One day sick leave.
    51.3. 126 hours and thirty minutes worked in total.
    51.4. 60 hours and 20 minutes were serviced (booked) hours.

September 2023

52. Payslip:
    52.1. 96 monthly hours (at £10.42 per hour)
    52.2. 16 holiday hours (at £11 per hour)
    52.3. A deduction of 35 training hours (at £11 per hour)

53. Zenoti system
    53.1. Three days holiday (24 hours).
    53.2. Three days sick leave.
    53.3. 95 hours and 45 minutes worked in total.
    53.4. On the Zenoti system extract in evidence, it was impossible to see how many of those were serviced (booked) hours, because the table had been cut off in a way which left the relevant column invisible.

54. The Claimant notified ACAS under the early conciliation process of a potential claim on 8 September 2023 and the ACAS Early Conciliation Certificate was issued on 20 October 2023. The claim was presented on 31 October 2023.

Law
Unauthorised deduction from wages

55. Section 13(1) of the Employment Rights Act 1996 provides that an employer shall not make a deduction from wages of a worker employed by him unless 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 the worker has

previously signified in writing his agreement or consent to the making of the deduction. A deduction occurs where the total amount of wages paid on any occasion by an employer to worker is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions).

56. An employee has a right to complain to an Employment Tribunal of an unlawful deduction from wages pursuant to Section 23 of the Employment Rights Act 1996.

57. A claim about an unauthorised deduction from wages must be presented to an employment tribunal within 3 months beginning with the date of payment of the wages from which the deduction was made, with an extension for early conciliation if notification was made to ACAS within the primary time limit, unless it was not reasonably practicable to present it within that period and the Tribunal considers it was presented within a reasonable period after that.

58. In order to determine what wages are "properly payable", the Tribunal may need to interpret the contract of employment (*Agarwal v Cardiff University and anor* [2019] ICR 433).

59. Where a contract contains a flexibility clause giving the employer flexibility to vary the contract, such a clause should generally be construed strictly (*Wandsworth London Borough Council v D'Silva and anor* [1998] IRLR 193).

60. Implied terms within an employment contract may supplement the express terms but cannot contradict them (*Johnson v Unisys* [2001] ICR 480). However, there is a distinction between implying a term that negates an express term, and implying a term that controls the exercise of a discretion which is conferred by an express term (*United Bank v Akhtar* [1989] IRLR 507). An employer may not exercise a flexibility clause irrationally or perversely (for example, *Birmingham City Council v Wetherill and ors* [2007] IRLR 781, and *Braganza v BP Shipping Ltd and anor* [2015] ICR 449).

Holiday pay

61. Regulation 13 of the Working Time Regulations 1998 provides that workers are entitled to four weeks of paid annual leave per year. Regulation 13A provides for an additional entitlement of 1.6 weeks of paid annual leave per year.

62. For the purpose of both regulations 13 and 13A, the leave year starts on the anniversary of the first day of the worker's employment, unless a relevant agreement provides otherwise.

63. Regulation 15A provides that during the first year of employment, a worker can only take the annual leave that they have accrued. Leave accrues at one twelfth of the annual entitlement on the first day of each month of that

year. Regulation 15A(3) provides that any fraction of a day accrued is rounded up to the nearest half day. Significantly, regulation 15A refers to the first year of employment, rather than the first leave year of employment.

Breach of contract

64. The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 provides that Employment Tribunals have jurisdiction to consider certain complaints of breach of contract. The Tribunal only has jurisdiction where the claim is brought by an employee, and where the claim arises or is outstanding on the termination of the employee's employment.

65. A claim of breach of contract must be presented within 3 months beginning with the effective date of termination (subject to any extension because of the effect of early conciliation) unless it was not reasonably practicable to do so, in which case it must be submitted within what the Tribunal considers to be a reasonable period thereafter.

Conclusions

66. I deal first with the complaint of unauthorised deduction from wages. In order to do so, it is necessary to consider the Claimant's contract of employment.

67. The drafting of the pay clause was not entirely clear. The way the Claimant was paid at the start of her employment appeared to be in line with her own understanding of what she was entitled to get paid (as she described it in her grievance) – namely:

    67.1. £10 per hour for every hour spent at work but not delivering a treatment or receiving training.
    67.2. £12 per hour for every hour spent delivering a treatment (referred to as either "booked hours" or "service hours").
    67.3. £11 per hour for time spent on training and holidays.

68. The Respondent's response described the £12 rate of pay as follows:

> "The company runs a discretionary bonus/commission scheme. Prior to 1 July 2023, the commission scheme was based on a bonus of £1 per hour from the employee's basic rate of pay for the time they are in service with a client.
>
> This you can see on the payslip as 'booked hours' – this hourly rate includes the discretionary bonus £1 per hour."

69. During the hearing, when Mr Lumsden was taken to the relevant part of the contract, he described the booked rate as being the "staff bonus" and explained that that was the Respondent's interpretation of the contract. That is, in my judgment, at odds with what the Claimant's contract said on its face. The contract did provide for a discretionary bonus scheme, but that was entirely separate. While the drafting of the pay clause was not a model

of clarity, it did not suggest or imply that the £12 rate was a bonus or commission rate. Nor did it suggest that it was in any way discretionary. I find that it was not. It was an absolute contractual entitlement in respect of hours when the Claimant was delivering a treatment.

70. From 1 April 2023, the National Minimum Wage rose to £10.42 per hour (for workers aged 23 and above). From that date, the Respondent paid the Claimant at that rate for hours spent at work but not delivering a treatment or receiving training. Given the way in which the National Minimum Wage Regulations 2015 operate, they were perhaps not required to do so by those Regulations. But it is clear that that is what they did, and clear also that that is what the Claimant understood that they did. I find that that constituted a variation to the Claimant's contract, so that from 1 April 2023 that became the rate to which she was entitled while not delivering a treatment or receiving training.

71. Within its response, the Respondent said this regarding the position from 1 July 2023:

> "From 1 July 2023, the commission scheme was updated to be a percentage of the sales taken by a therapist in the month. The commission on the new scheme is paid one month in arrears. So, the commission from 1 July to 31 July was paid on 31 August 2023."

72. That was, of course, predicated on the £12 per hour rate being a discretionary bonus or commission. I have already explained why I have found that that is not the correct interpretation of the contract.

73. Mr Lumsden also noted in submission that the Claimant's contract included a contractual variation clause, which allowed them to make the change that they did. I have carefully considered the variation clause.

74. The clause in question provided that the Claimant would be given written notification of any changes made to her contract. There was no evidence before me that the Claimant had been given such notice. Both her email of 31 July 2023 and her grievance of 3 September 2023 were inconsistent with her having received such notice, since they both referred to the position as it was in her contract of employment. If she had received a letter notifying her of a variation in her contract, I consider it would have been surprising if she had not referenced it in either of those emails. The 31 July email, in particular, appeared to express genuine surprise about the way she had been paid.

75. Mr Lumsden suggested for the first time in his closing summary that he could provide evidence of notice being given to the Claimant, or a witness to attest that notice had been given. There was no explanation why that evidence could not have been disclosed along with the Respondent's other disclosure. It was abundantly clear that the issue was in dispute. In her "pay summary" document, the Claimant referred to the three hourly rates set out in her employment contract – as she had done in her grievance.

76. Even evidence that the Claimant had been given notice that her contract was being varied did exist, allowing it to be adduced for the first time so close to the end of the hearing would have put the Claimant at a significant forensic disadvantage. It would not have been in the interests of justice to adjourn the hearing at that late stage to allow further evidence to be adduced. I can, of course, only decide the case on the evidence before the Tribunal.

77. I consider that the most likely explanation why no evidence was adduced of the Respondent giving written notice to the Claimant that her contract was being varied to remove the £12 per hour rate is that no such evidence did in fact exist. The Respondent's entire case was predicated on the £12 per hour rate being a discretionary bonus or uplift, not part of the Claimant's contractual remuneration. In the circumstances, it would have been surprising if they had sought to vary the Claimant's contract to remove it. Logically, there would have been no reason for them to do so, since they apparently did not regard it as part of the Claimant's contract. Mr Lumsden's submission regarding the variation clause appeared to be an afterthought – it was simply not how the Respondent had set out its case.

78. I find the Claimant was never given written notice that her contract was being varied under the terms of the variation clause. That means that the variation clause was not correctly exercised in changing the pay terms. That in turn means that the purported variation failed.

79. In any event, the variation clause it did not give the Respondent an unfettered right to vary the Claimant's contract of employment. It allowed the Respondent to vary the terms "as business needs or changing statutory regulations dictate". There was simply no evidence before me that the removal of the £12 rate of pay was dictated by either business needs or changing statutory regulations. There was no evidence at all regarding the reason for the change. Nor was there even an explanation for it in the response to the claim – the response merely referred to the "commission scheme being updated", without explaining why the change was made.

80. Since the variation clause sought to give the Respondent a broad right to change any term of the contract, it must be construed relatively strictly. I am not in a position to find that the removal of the £12 was dictated by either business need or changing statutory regulations. It follows therefore that I would have concluded in any event that it was not a permitted exercise of the variation clause.

81. Finally, and for completeness, the Claimant complained about the reduction in her pay promptly. It was abundantly clear that she had not, by continuing to work for the Respondent, agreed to her pay being reduced.

82. It follows then that from 1 July 2023, the Claimant's contract of employment remained unchanged.

83. The Claimant's case was that the Respondent under-recorded her serviced hours. Her case was, in summary, that she believed she had been much busier undertaking treatments than the Respondent's figures would suggest.

84. The Claimant had produced some photographs from the Respondent's diary system as evidence that her service hours were incorrectly recorded on the system. During the hearing, I checked four dates at random. On each of those, the appointments shown for the Claimant were consistent with what was recorded on the Respondent's Zenoti system. I informed the Claimant of that, and asked her to direct me to any dates where she said the Respondent's figures would diverge from the photographs, she had taken of the diary system. She said that there were none. She said that she had been unable to take photographs of the diary system on the dates where she had been particularly busy (and where she thought the dates in the Zenoti system were consequently wrong). She did not provide any specific dates in respect of which she suggested that the information recorded in the Zenoti system was incorrect.

85. The Claimant also noted that she had met or exceeded her Key Performance Indicators, which she said was also evidence that she must have spent more time delivering treatments than the Respondent's figures suggested.

86. There was simply no evidence before me that the figures in the Respondent's system were incorrect. The fact that the Claimant was meeting her Key Performance Indicators does not, without considerably more context, undermine the Zenoti data. Indeed, as the Claimant appeared to accept, the evidence she had obtained from the diary system supported rather than undermining the Respondent's figures. I find that the figures from the Respondent's Zenoti system accurately captured the Claimant's service hours.

87. Having reached those conclusions regarding the Claimant's contractual entitlement to pay, and regarding the accuracy of the Zenoti system data, I now turn to consider whether the Claimant was paid correctly in each month of her employment.

March 2023

88. For March 2023, the figures captured on the Zenoti system for serviced hours were actually lower than those on the payslip. The overall hours were correct. It follows that the Claimant was not underpaid in March 2023.

April 2023

89. For April 2023, the overall figure for hours worked captured on the Zenoti system was consistent with that on the payslip. The figure for service hours was slightly higher on the payroll than on the Zenoti system, which appeared

to be because the figure had been rounded up to a whole number. It follows that the Claimant was not underpaid in April 2023.

May 2023

90. For May 2023, the Claimant worked 158 hours. There was no evidence before me that the Claimant had taken a break on the days where no break was recorded on the Zenoti system. In the absence of evidence to the contrary, I find that the hours captured on the Zenoti system were correct. Therefore, the overall figure for hours worked on the Zenoti system was consistent with that on the payroll. The Claimant was paid for 43 service hours. She worked 43.25 serviced hours (the difference in financial terms would have equated to 39p). The serviced hours figure appeared to have been rounded down. That is consistent with the rounding that occurred in other months to the Claimant's benefit. Overall, I therefore conclude that the Claimant was not underpaid in May 2023.

June 2023

91. For June 2023, the overall figure for hours worked captured on the Zenoti system was consistent with that on the payslip. The payslip recorded 56 serviced hours, whereas the figure on the Zenoti system was 55 hours and 50 minutes. Again, that appeared to have been rounded up, to the Claimant's advantage. It follows that the Claimant was not underpaid in June 2023.

July 2023

92. For July 2023, the overall figure for hours worked captured on the Zenoti system was again consistent with that the payslip (112 hours). However, the Zenoti system showed that the Claimant completed 49 hours and 35 minutes of treatments, whereas she was only paid for 15 hours at the higher rate. This was attributable to the unilateral change that the Respondent had made to the Claimant's pay arrangements from 1 July 2023 (around halfway through the pay period, which ran from 18 June to 17 July).

93. Based on the Zenoti figures, she should have been paid as follows:

    93.1. 49.58 hours at £12 per hour = £594.96
    93.2. 62.42 hours at £10.42 per hour = £650.42
    93.3. 48 hours holiday at £11 per hour = £528

    Giving a total of £ 1,773.38 gross.

94. The total gross sum paid to the Claimant was £1,718.74. So, she was underpaid by £54.64 (gross).

August 2023

95. For August 2023, the overall figure for hours worked captured on the Zenoti system was slightly lower than that on the payslip – the payslip said 127 hours, but the Zenoti system recorded 126.5. Once again, this appeared to have been rounded up. On the payslip, all of those hours were paid at £10.42.

96. The Claimant was still in her first year of employment, so she was only entitled to take her statutory annual leave as it accrued, by virtue of regulation 15A of the Working Time Regulations 1998. The Claimant's contract provided for accrual at one twelfth of her annual leave entitlement per month. The Claimant's contract did not explicitly deal with how fractions of days would be treated. The relevant part of the contract otherwise mirrored the provisions of the Working Time Regulations 1998. I therefore find that the contract was intended to mirror those provisions. Therefore the effect of the clause was that for accrual purposes, fractions of days would be rounded up to the nearest half day.

97. In the five months from April to August 2023, the Claimant accrued 12.5 days leave (29/12 x 5, giving 12.083, which rounded up to 12.5). She had taken 12 days prior to August 2023 (two days in May, four days in June and six in July - the day paid in April's pay slip was taken on 27 March, from the previous year's entitlement). So as of August 2023, she had 0.5 days available.

98. There was no evidence before me regarding what had been agreed with the Claimant regarding how she would take the leave in August (that is, whether it was agreed that some of it would be taken unpaid). The Zenoti system recorded the leave as holiday, in the same way as the other annual leave (for which she was paid). She had accrued and was entitled to take 0.5 days paid annual leave in August 2023. So, I find that is what she should have been paid in respect of the 5 days leave she attempted to take.

99. Using the figures from the Zenoti system, the Claimant should have been paid as follows:

    99.1. 60.33 hours at £12 per hour = £723.96
    99.2. 65.67 hours at £10.42 per hour = £684.28
    99.3. 4 hours annual leave at £11 per hour = £44
    99.4. A total of £1,452.24.

100. The payslip also included a sum of £21.60 for commission. I accept that the commission was introduced to replace the £12 per hour rate. I therefore conclude that, had the Respondent continued to apply the correct pay terms to the Claimant, they would not also have made the commission payment.

101. The total gross sum paid to the Claimant was £1,344.94. So, she was underpaid by £107.30.

<u>September 2023</u>

102. For September 2023, the overall figure for hours worked captured on the Zenoti system was again slightly lower than that on the payslip – the payslip said 96 hours, but the Zenoti system recorded 95.75 hours.

103. It was not possible, on the Zenoti system extract in evidence before me, to see how many of those were booked hours. The figure was not shown on the payslip, because of the change the Respondent had made to the way it was paying the Claimant. On the evidence before me, I consider that the best guide to how the Claimant's hours would have broken down in September is the breakdown between booked and non-booked hours in previous months. Over the course of her employment, the Claimant spent approximately 41% of her time undertaking booked hours (excluding holidays and training). So that would equate to:

103.1. 39.26 hours of booked work at £12 per hour = £471.12
103.2. 56.49 hours of non-booked work at £10.42 per hour = £588.63

Giving a total of £1,059.75

104. Importantly, although one week of September would have been the Claimant's notice period, she was still entitled to the £12 per hour rate for time spent delivering treatments during her notice period. That is because the £12 per hour was not a "bonus, prize or other staff benefit" – it was her contractual rate of pay.

105. The Claimant took three days annual leave, in respect of which she was only paid for two days.

106. For the period from April to September 2023, the Claimant would have accrued 14.5 days annual leave (29/12 x 6 = 14.5, so no rounding required). She had been paid for 12 days annual leave. Had she been paid correctly for the annual leave she took in August 2023; she would have taken 12.5 days paid annual leave. It is right that I treat September's pay on that basis, to avoid double recovery. The Claimant would therefore have been entitled to be paid for two days annual leave (16 hours at £11 per hour, a total of £176).

107. That means that the total gross sum the Claimant should have been paid, prior to any deductions, was £1,235.75.

108. From that, the Respondent sought to deduct 35 hours training pay at £11 per hour (£385). The Respondent's case is that the authority to do so came from the clause in the contract dealing with training costs.

109. In order to consider that, it is necessary to look at the clause in question. The clause refers to the employee being required to attend a "training course". The contract did not define what constituted a training course. I bear in mind, of course, that any ambiguity in the clause must be construed against the party that relies on it. In this case, that is the

Respondent (who is also the party who drafted the contract). Read as a whole, I consider that the clear implication of the clause is that it applied to training course delivered by an external trainer. I therefore conclude that the clause did not permit the Respondent to recoup sums paid to an employee while receiving internal on-the-job training.

110. There was nothing in evidence before me to suggest that the Claimant was enrolled on an external training course. The only sums the Respondent sought to deduct were for the Claimant's pay when undertaking training. That strongly suggests that the training in question was internal training rather than an external training course. It follows that the clause did not permit any deduction for those costs.

111. I would in any event have concluded that, in the absence of any evidence at all regarding the reason for the Claimant's dismissal, I could not be satisfied that the Claimant was dismissed for "reasons of a disciplinary nature". Mr Lumsden submitted that the Respondent did not call any evidence regarding the dismissal because it did not realise that the dismissal was in issue. The Claimant, in her response to the ET3, had made it entirely clear that the reason for the dismissal was in issue. But in any event, it was the Respondent that sought to rely on a contractual authority to deduct sums from the Claimant's pay. It was therefore for the Respondent to make good that argument, by showing it had the right to make the deduction. It did not do so. So I would in any event have found that the deduction was not one permitted by the Claimant's contract.

112. It follows that the Respondent was not permitted to deduct the training sum from the Claimant's September pay.

113. The Respondent did not seek to deduct any sums for annual leave taken but not accrued upon the termination of the Claimant's employment. The Claimant was paid for two days annual leave taken in September 2023.

114. The Claimant's gross pay in September 2023 was £791.32. It follows that she was paid less than the sum she was entitled to, by £444.43.

<u>Summary – unauthorised deduction from wages</u>

115. It was not suggested to me that the Respondent had any other lawful basis to deduct sums from the Claimant's pay in July, August or September 2023, save in respect of income tax, national insurance and pension contributions.

116. I therefore conclude that the Respondent made unauthorised deductions from the Claimant's pay totalling £606.37, made up as follows:

116.1. For July 2023, £54.64
116.2. For August 2023, £107.30
116.3. For September 2023 £444.43

Accrued but untaken annual leave.

117. The Claimant's employment terminated on 13 September 2023. Her leave year had started on 1 April 2023. The provisions regarding accrual for the purpose of taking leave do not apply for the purposes of compensation for leave accrued but not taken. As at the termination date, the Claimant was 165 days into the leave year. She had therefore accrued 13.1 days (165/365 x 29).

118. She had taken 14 days paid annual leave during the leave year (2 days in April 4 in May, 6 in July and 2 in September). It follows therefore that she had no accrued but untaken annual leave at the point that her employment terminated. This element of the claim fails and is dismissed.

Breach of contract

119. I can deal with this element of the claim briefly. It was common ground that the Claimant's pension contributions were not paid into the pension scheme in a timely manner. It was a term of the contract that the Respondent would pay its contributions into the scheme. Although not express, I consider it was an implied term that the sums would be paid in on a month-by-month basis. That is, it seems to me, so obvious that the parties would not consider it would have needed to be expressly written into the contract. The Respondent was deducting monies from the Claimant's pay as pension contributions and adding its own contribution to those monies. It is unthinkable that the contract would be intended to allow them to hold onto those monies indefinitely, much less use them for any other purpose.

120. I find therefore that there was a breach of contract by the Respondent. But in this case, the contributions were, belatedly, paid into the pension scheme. There was no evidence before me that the Claimant was caused any loss by the delay in paying the sums in to the scheme. So, it follows that the breach of contract caused no loss to the Claimant, and I award no damages.

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Employment Judge Leith

30 October 2024

Date

JUDGMENT & REASONS SENT TO THE PARTIES ON

6 November 2024

FOR THE TRIBUNAL OFFICE

P Wing

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