EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103177/2022 Hearing by Cloud Video Platform (CVP) at Edinburgh on 23 August 2022

Employment Judge: M A Macleod

Anna Rutkowska	**Claimant** **In Person**
EE Limited	**Respondent** **Represented by** **Mr J Gunnion** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant's claims fail, and are dismissed.

REASONS

1. The ciaimant presented a claim to the Employment Tribunal on 22 June 2022, in which she complained that she had been unlawfully deprived of a number of payments to which she claimed to be contractually entitled.

2. The respondent submitted an ET3 in which they resisted all claims made by the claimant.

3. A Hearing was listed to take place on 23 August 2022 by Cloud Video Platform (CVP). The claimant appeared on her own behalf, and Mr Gunnion appeared for the respondent

4. The claimant gave evidence on her own account, and called as a witness Ana-Elyse Finnie. The respondent called no witnesses.

5. A bundle of documents was prepared and presented to the Tribunal, and reference was made to some of these documents during the course of the Hearing.

6. Based on the evidence led and the information provided, the Tribunal was able to find the following facts admitted or proved.

Findings in Fact

7. The claimant, whose date of birth is 23 August 1998, commenced employment with the respondent on 18 November 2019. She was offered employment by letter dated 11 November 2019 (30). Attached to that offer was a statement of terms and conditions of employment (31ff).

8. The claimant's job title was Customer Advisor, and her benefit band was said to be Band A.

9. Her annual basic salary was £5,429, and her normal place of work was the respondent's retail store in Peterhead. She was contracted to work 12 hours per seven day week, though her exact hours each week were dependent upon her shift pattern.

10. She was entitled to 25 days' paid holiday per holiday year, which was pro-rated if she worked part time or joined part way through the leave year. Similarly, if she were to leave part way through a leave year, her holiday entitlement would be calculated on a pro-rata basis, and a payment in lieu of untaken holiday may be paid to her basis on her entitlement plus any holiday carried forward from the previous year.

11. The holiday year itself was said to run from 1 April to 31 March.

12. The claimant's notice period was said to be 4 weeks, which would increase after 4 years' service.

13. On 21 August 2021, the claimant's team was moved from Peterhead to Fraserburgh, and her hours were to increase to 25 per week. At that time, Darren Ireland was the store manager in Peterhead, and Lome Learmonth in Fraserburgh. There was no written confirmation to the claimant of her change in hours (though before me there was no dispute by the respondent that she had increased her hours to 25 per week at that time).

14. The claimant worked most of her time in Fraserburgh, but also covered a shift each week in Peterhead. As a result, her worked hours tended to be approximately 30 per week, for which she was paid in full. Overtime was paid at the standard hourly rate.

15. In November 2021, the claimant was asked by the manager in the Peterhead Store to return to working there. By that stage, that manager was Ana-Elyse Finnie. She was aware that the claimant was employed on the basis of 12 hours per week, but understood that her basic contracted hours had been increased to 25 per week. Ms Finnie sought to persuade her senior manager to allow the claimant to increase her contracted hours to 35 per week, but this was declined.

16. The claimant understood that she was being offered a return to the Peterhead store and that that was likely to involve an increase in the number of hours which she could expect to work each week. However, in my judgment, on the basis of the evidence of Ms Finnie, there was no offer, verbal or written, to the claimant at that time in November 2021 to increase her basic contracted hours from 25 to 35, and no agreement by the respondent that they would do so. Again, if she worked beyond her contracted hours, she was paid in full for those worked hours.

17. On 22 November 2021, the respondent announced that they were intending to close all retail stores within Argos stores, which included both Peterhead and Fraserburgh stores. On 25 November 2021, an email was sent to the claimant by John Martin of the respondent (57), setting out the options

which they were prepared to offer the claimant. She was given until 10 December 2021 to submit her preference to the various options available.

18. The options were:

- Option 1 - to take voluntary redundancy on EVS (Enhanced Voluntary Severance) terms, with support to find a new role outwith the respondent's business, and opt out of future formal consultation;
- Option 2 - to take voluntary redundancy on EVS terms, without support to find a new role outwith the respondent's business, and opt out of future formal consultation;
- Option 3 - to proceed with future formal consultation to discuss the alternative options available to her.

19. Attached to that document was a Redundancy Schedule (60) proposing a total gross EVS payment of £1,390.39. This was calculated on the basis that she was still contracted to work 12 hours per week, as opposed to 25.

20. This became apparent to the respondent. On 23 November 2021, Tracey Dawe, of HR Services, wrote to Cheryl Cummins to advise that a SAP form to increase the claimant's hours was submitted in August but had not been completed. She asked if Ms Cummins could confirm if that had been completed so that she could revise her statement (69).

21. On 2 December 2021, the claimant wrote to Mr Martin, copied to Martin McEvoy, (76), saying that while she knew that the possibility of obtaining a 40 hour contract was low, she needed a minimum of 30 hours to be able to commit to the travelling, and indicated that she would be willing to go to the Aberdeen or Elgin stores.

22. The claimant was, on 4 March 2022 (104), offered an EVS payment of £2,910.84, which was based on her 25 hours contract.

23. The letter of offer stated:

"Further to your voluntary request to leave the Company with Redundancy terms, I can confirm that the company has accepted and approved your request on 31 January 22. By opting to accept these EVS terms you have confirmed your agreement to the EVS terms as full and final satisfaction of your redundancy entitlements. You are also confirming your agreement to your employment with EE ending by reason of redundancy on 4 March 2022."

24. The letter went on to confirm that the attached "draft Redundancy Statement and subsequent final Redundancy Statement", which would be issued to her 14 days before the termination date, would detail the payments which the claimant would receive as a result of acceptance of the EVS terms.

25. The claimant accepted the EVS payment of £2,910.84 as set out in the Schedule, and her employment ended on 4 March 2022.

26. In her March salary, the claimant received salary for 24 hours' work, in the sum of £193.24 (125), variable holiday pay of £3.99 and retail commission (which is not the subject of these proceedings) £1,066.97.

27. Her redundancy payment of £2,910.84 was paid to her at the end of April 2022 (126).

28. Following her redundancy, the claimant wrote to the respondent A copy of that email is not available, but it was quoted in full by Martin McEvoy in an email elated 12 April 2022 to Mark Lewis (112), when he asked Mr Lewis if this matter had ever been sorted:

"Hi,

My name is Anna Rutkowska and I'm having issues with my pay from EE. from February and start of March. I have been made redundant by EE on 04/03/2022.

What it is, on 22/11/2021 I moved back to the Peterhead store (4846) to do a 35hr contract however on that same day we all found out that the store is

closing and we're losing our jobs. So my contract never went ahead however I need my contract to be back dated to 35hr from 22/11/2021 until 04/03/2022, I worked hard and done 35hrs+, however all my bonuses, holiday pay and redundancy is based of a 25hr contract that I got in December that was back dated from 02/08/2021. Also because I was only contracted 25hrs and worked more than that at least 35hrs, I have not been paid for my overtime for February this is also a reason why I just want the contract changed. My manager has been signing my rota off every week with the hours that I actually worked. I have lost around 25/30 hrs of overtime for February. This is why I need the contract changed for that period and get my overtime paid, my bonuses recalculated as I only got them based of a 25hr contract, my salary back dated from 22/11/2022 and my redundancy packaged (sic) recalculated.

And 01/03/2022 until 04/03/2022 to be paid for full contracted hours which will be based on 35hr as I have not even been paid for the 25hrs that I was contracted and we were told we will get full contracted hours paid for that week, I received £193 for that week I spoke with one of your colleagues from hr on the phone and I have been told all this can be sorted but I need to send an email."

29. Mr Lewis replied to confirm that this was the first he had heard of this, and that he understood that her contracted hours were 25 and not 35 per week. Mr McEvoy advised (111) that he had explained to the claimant that her overtime had been paid, and that she had apologised.

Submissions

30. For the respondent, Mr Gunnion submitted that the evidence of Ms Finnie demonstrated that there was no contractual change to increase the weekly hours from 25 to 35. In addition, the EVS offer was discretionary, and it was up to the claimant to accept or reject it She challenged a number of aspects of the original offer but in the end she accepted the final offer in full and final settlement.

31. He argued that the respondent's position, that the payments made on termination were to be calculated on the basis of 25 hours per week, and not 35, was the correct position and that as a result, there was no unlawful deductions from the claimant's wages, nor was the redundancy payment incorrect.

32. He submitted that the claimant's argument relating to holiday pay was not well founded, and that the sums received by her in pay over the period in question were not sufficiently regular to form part of her holiday entitlement.

33. He referred, in general, to the terms of a written submission, which are referred to herein for brevity, and are duly considered by the Tribunal in reaching its conclusions.

34. The claimant argued that it was clear that she was doing overtime for a long time, as seen from her payslips and from the evidence of Ms Finnie. She said that there was never a formal request to change to a 35 hour contract. The store was closing down and the respondent, she said, did not fee! the need to put her up to the contracted hours which she was working. She did feel that she was used by the respondent simply to keep the shop running.

35. She said that she felt now that she had made a mistake in not putting in formal writing the issues she had with her terms and conditions. She said she had given all her evidence as best she could.

Discussion and Decision

36. The issues for determination in this case are:

1. Did the respondent make an unlawful deduction from the claimant's redundancy pay?

2. Did the respondent make an unlawful deduction from the claimant's salary in respect of pay for holiday accrued but untaken as at the date of termination of her employment?

3. Did the respondent make an unlawful deduction from the claimant's salary in relation to her final week's pay?

37. Section 13 of the Employment Rights Act 1996 prohibits employers from making deductions from the wages of employees except in certain circumstances. Section 13(3) is the applicable sub-section in the circumstances of this case, in that it provides that where the total amount of wages paid on any occasion by an employer "is less than the total amount of the wages properly payable to him", that shall be treated as a deduction from his wages.

38. Accordingly, in this case, the claimant complains that she was paid in respect of each of the heads of claim made, but that the amounts paid were less than those "properly payable".

39. It is necessary to address each of the heads of claim separately.

Did the respondent make an unlawful deduction from the claimant's redundancy pay?

40. The claimant complains that the redundancy payment - or, to put it more accurately, the EVS payment - was calculated incorrectly, as it was based upon her contracted hours being 25 per week, not 35 as she asserted.

41. The respondent's submission makes reference to the requirement for any offer on behalf of an employer to be made by a person carrying the necessary authority in order to become a binding contract. In my judgment, there are limits to this approach. If the person making the offer has ostensible authority to do so - in other words, that there is good reason for the recipient to understand that they do have such authority - then the employer is likely to be bound. A more fundamental limit to this approach in this case is that there Is no suggestion in the evidence, nor was it put to the claimant, that the person making the offer of the EVS payment lacked the authority to do so. Considerable reliance is placed by the respondent upon the terms of the offer letter, and its reference to being a full and final settlement, and as a result, the respondent's argument is less than clear on this aspect of the case.

42. In my judgment, the fundamental question is whether the claimant was paid the redundancy payment which she agreed to receive as part of the voluntary redundancy process. There was an offer of a redundancy payment, which required to be amended on several occasions to ensure that it took account of the increase in her basic contracted hours from 12 to 25, on 4 March 2022 (105). The claimant plainly accepted that offer. She queried the original offer on a number of occasions, but ultimately accepted that offer without condition.

43. The claimant may have felt that she had little choice, or that it was not a fair process. However, that is not the issue before the Tribunal in this case. The issue is whether or not there is a binding contract upon both parties reached voluntarily that the claimant's employment would end and that in exchange she would be paid a sum of money, agreed to be £2,910.84.

44. In reaching the conclusion I have, I have considered carefully the nature of the contract being entered into. The use of the words "full and final satisfaction of your redundancy entitlements" might imply that the claimant is waiving her right to proceed to an Employment Tribunal by reaching the agreement she did. I am satisfied, however, that that was not the meaning of these words, nor the intention of the respondent in executing this agreement. The claimant was offered voluntary redundancy on terms which she accepted. She was paid the redundancy payment which she was offered and to which she agreed. She therefore had a binding, concluded agreement with the respondent to receive the payment calculated as it was when her employment terminated.

45. The claimant now seeks to argue that she was in fact working 35 hours a week, on a contractual basis, and therefore that the calculation was underestimated.

46. There are two difficulties with the claimant's approach in this matter.

47. Firstly, the claimant did not receive a redundancy payment, but a payment agreed upon by her through offer and acceptance. As a result, how that figure was calculated cannot be strictly tied to the statutory calculation of

redundancy pay, or even the respondent's own contractual process for the calculation of redundancy pay in a compulsory redundancy situation. The payment was made on the basis of a free-standing agreement between employer and employee.

48. The claimant may now wish to argue that she felt pressured into accepting that offer, but in my judgment the evidence does not support such a conclusion. She queried the original sum presented by the respondent, until an improved offer was made. She did not query the figure which was presented to her on 4 March 2022. She now says that that figure was incorrectly calculated. However since she did not raise any questions about that at the time, and in her correspondence before termination of her employment made no mention of wanting the calculation to be based on a 35- rather than a 25-hour week.

49. Having accepted the offer, and received the sum which she had agreed, the claimant entered into a binding contract with her employer, which they fulfilled. There is therefore no basis for saying that a redundancy payment calculated on 35 hours per week was properly payable to her.

50. Secondly, there is no basis in the evidence for finding that there has been any agreement by the respondent to alter her weekly working hours in her contract from 25 to 35. Ms Finnie, who gave evidence on the claimant's behalf, did not state that she understood that the claimant's contracted hours had been altered to 35: in fact, she said the very opposite, that the claimant had wanted those hours to be amended but that they never were. The claimant's own evidence faltered somewhat on this point as well, and in my judgment did not convincingly demonstrate that there was an agreement, verbal or written, to increase her hours.

51. When she raised it with the respondent, none of those with whom she corresponded agreed with her assertion.

52. It is for the claimant to prove, on the balance of probabilities, that it is more likely than not that the respondent did agree to increase her contracted hours from 25 to 35 in November 2021. In my judgment, she has been

unable to discharge that burden, and therefore I cannot find that the respondent, at any stage, agreed to increase her hours to 35 per week, nor, further, that they agreed to make payment to her of an EVS payment calculated on that basis, in any event.

Did the respondent make an unlawful deduction from the claimant's salary in respect of pay for holiday accrued but untaken as at the date of termination of her employment?

53. The claimant's complaint before me about this was that she was only paid the sum of £3.99 in respect of holidays on termination of employment. She was unable to be specific about the number of days which were outstanding in her entitlement on termination. It is apparent, however, from the claimant's payslips, that her holiday pay was variable and was paid on a monthly basis. No evidence was led about the precise basis upon which holiday pay was calculated and paid in this way, but in my view the claimant was clearly being paid for holidays on an ongoing basis.

54. As a result, she has not discharged the burden of proof so as to demonstrate that she was deprived of any holiday pay during her employment or at the end of it. She seems to be suggesting in her claim that overtime payments should be taken into account, but has not shown to the Tribunal's satisfaction what difference, if any, that would or should have made to her holiday pay entitlement.

55. The evidence on this was so lacking in detail that I am unable to sustain the claimant's claim for outstanding holiday pay.

56. Did the respondent make an unlawful deduction from the claimant's salary in relation to her final week's pay?

57. As I understand it, the claimant's claim under this heading is that she was due to receive 25 hours' pay for her final week of work, and that she received £193.24, which, if divided by 25, brings out an hourly rate of £7.73, less than she should have been receiving.

58. The respondent's position appears to be that she worked 24 hours in that final week of employment, and that the correct sum was paid to her. That was the position adopted by the respondent in correspondence between HR and management on 27 April 2022 (117/8).

59. The claimant argues that she should have been paid £256.50 for that week, which brings out an hourly rate of £10.26.

60. If one takes her original starting salary of £5,429 per annum, based on a 12 hour week, the hourly rate was £8.70.

61. The payslips do not disclose how many hours the claimant worked each week, but they do demonstrate that her pay fluctuated according to the number of hours worked.

62. In my judgment, the evidence on this matter is very confused and unclear. The claimant did not clarify before me precisely how she calculated the figure which she was seeking, and the different hourly rates applied, apparently, at different times, make it impossible to understand the precise basis of payment of what would be "properly payable" by the respondent to the claimant.

63. In these circumstances, I am unable to find that the claimant has demonstrated that she was unlawfully deprived of pay during her final week of employment with the respondent, and accordingly that claim is unsuccessful.

64. The claimant's claims all therefore fail and are dismissed.

Employment Judge: M A Macleod
Date of Judgment: 31 August 2022
Entered in register: 2 September 2022
and copied to parties