



EMPLOYMENT TRIBUNALS

Claimant: Nora Cecilia Garcia Artica

Respondent: Alejandra De La Pena

Heard at: London Central (remote public hearing via CVP videolink)

On: 17/11/21

Before: Tribunal Judge J E Plowright acting as an Employment Judge

Representation

For the Claimant: Mr P. Edworthy

For the Respondent: Unrepresented but assisted by Mr M. Sindelar

JUDGMENT

The Judgment of the Tribunal is that:

- 1. The claimant's claim for an unauthorized deduction of wages on the basis that she was paid below the National Living Wage fails.**
- 2. The claimant's claim for an unauthorised deduction of wages on the basis that she was paid less than the £350 she was entitled to for her last week of work succeeds and the respondent is ordered to pay the claimant £150 (gross).**
- 3. The claimant is entitled to a payment as a result of the respondent's failure to provide a written statement of particulars of employment. The respondent is ordered to pay to the claimant 2 weeks gross pay of £700 (£350 x 2).**
- 4. In total, the respondent is ordered to pay the claimant £850 (gross).**

REASONS

Claim and Issues

1. The claimant worked as a cleaner performing various household duties for the respondent between the 5th August 2020 and the 18th September 2020. The claimant claims that she was paid below the national living wage for the duration of her employment. She also claims that she was not paid all that she was owed for her last week of work. She has brought a claim for unlawful deduction of wages.
2. The issues are as follows:
 - Was the claimant paid less than the national living wage for the period of her employment?
 - Was the claimant paid less than she was owed for her last week of employment? If so was the respondent entitled to deduct £150 from her final wages?
 - Did the claimant's employer fail to provide the claimant with a written statement of particulars of employment?
 - How much compensation is the claimant due if any?

Procedure/Procedure, documents and evidence heard

3. The Tribunal heard evidence from the claimant and the respondent. The claimant was assisted by a Spanish interpreter.
4. In addition, the claimant produced a 93 page bundle which included the witness statements of the claimant and the respondent, various WhatsApp messages between the claimant and the respondent and bank statements of the claimant.

Preliminary Issue

5. The respondent argued that the claimant had reached a settlement with the respondent whereby the claimant would be paid £200 for her last week of work and in exchange she would not pursue any legal claims against the respondent.
6. The respondent states that the agreement was a verbal one and also points to a WhatsApp message dated the 20th September 2020 which states the following when translated:

*Madam good morning
You didn't deposit me the money
And I am needing it urgently
Don't pay me all if you don't want*

*But pay me at least 200
I am only charging you my work
Thanks*

7. Under section 203 of the Employment Rights Act 1996 any provision in an agreement is void so far as it purports to exclude a claimant from bringing a claim under the Employment Rights Act 1996 unless a conciliation officer has taken action in accordance with sections 18 to 18C of the Employment Tribunals Act 1996 or a written agreement is entered into in accordance with section 203(3) of the Employment Rights Act 1996.
8. In this case, neither of those conditions apply. Although contact was made with ACAS by the claimant, no settlement was reached. Furthermore, there is no written settlement agreement. The message of the 20th September 2020 does not amount to a written settlement agreement. Therefore, I found that there was no settlement agreement which could legitimately preclude the claimant from bringing the claim that she has brought.

Fact-findings

9. The claim was presented in time. It is not in dispute that the claimant worked as a cleaner performing other household duties in addition to cleaning for the respondent between the 5th August 2020 and the 18th September 2020. It is not disputed that the Claimant was an employee and it is further not in dispute that this is a claim in respect of wages. Finally, it is agreed that there was no written contract or a written statement of particulars of employment.
10. There are two elements to the claim. Firstly, the claimant claims that she was paid below the National Living Wage throughout her employment. Secondly the claimant claims that she was only paid some of what she was owed for her last week of employment. I will deal with these two elements to the claim separately.

Was the Claimant paid below the National Living Wage?

11. The claimant says that she worked, on average, ten hours daily Monday – Friday without breaks and for that, per the terms of their oral agreement, the respondent would pay her £7 per hour. She says that she would start between 10 – 10:30 and would leave at 8pm. This would amount to approximately 50 hours per week. Occasionally, she would work on Saturdays when she was paid £10 per hour. The claimant claims that she should have been paid at least the National Living Wage of £8.72 per hour rather than £7 per hour.
12. The respondent says the claimant was paid weekly, namely £350 per week. The respondent says that she worked 40 hours per week (and often less than that), which would amount to £8.75 per hour which is above the National Living Wage of £8.72 for the relevant period.
13. The respondent says that she was very flexible with the claimant's schedule and the claimant would sometimes come in at 11am – 12pm taking a break of an hour or two in the afternoon. She goes on to say that between 27/08/20 – 03/09/20, the claimant worked a total of 9 hours but was still paid £350 for the week.

14. There is no written contract of employment between the claimant and the respondent. They both say that the contract was a verbal contract. Therefore, I must establish the terms of the contract relating to rate of pay.
15. I find that the claimant was paid £350 per week. The claimant accepted this in oral evidence. She accepted that she was not paid on an hourly basis but on a weekly basis. Her case however is that she was working 10 hours a day, five days a week and at £350 per week that would amount to £7 per hour.
16. According to her bank statement, the claimant was paid the following sums of money: £400 for Week 1, £380 for Week 2, £350 for Week 3, £400 for Week 4 and £375 for Week 5 and then a last payment of £200 for her final week of work. It was agreed that the reason why she would sometimes be paid more than £350 per week was to cover out of pocket expenses, such as grocery shopping.
17. The claimant states that she worked on average 10 hours per day (50 hours per week), from approximately 10am – 8pm each day. There are a number of WhatsApp messages which assist with her start times and finish times.
18. On the 28th August 2020, there is a message which states that she left at 3pm.
19. On the 1st September 2020, there is a message which indicated that she was at work by 10:12am. However, on the same date there is a message at 14:58 stating that she is leaving.
20. On the 2nd September 2020, there is message indicating that she was in work at 10:35am. On the same date there is a message indicating that she is leaving at 19:26.
21. On the 4th September 2020, there is a message indicating that the claimant was at work by 10:28am.
22. On the 5th September 2020, there is a message indicating that the claimant was leaving at 13:53.
23. On the 7th September 2020, there is a message indicating that the claimant was at work by 10:04am.
24. On the 8th September 2020, there is a message indicating that the claimant was at work by 10:29am.
25. On the 18th September 2020 where the claimant states that she will be arriving at 12 noon.
26. Without a written contract of employment it is difficult to work out what the working hours of the claimant were. However, when I consider the evidence of the WhatsApp messages, I find as a fact that there was a considerable degree of flexibility in the working hours of the claimant. When the respondent gave evidence, she said that the verbal agreement was that the claimant would work for eight hours a day but she did not mind if the work was done in less time. The claimant would still be paid £350 per week. She also said that she calculated that the claimant would be working 8 hours and she did not think it would be fair if the claimant worked more than 8 hours a day. I found the respondent to be an honest

and reliable witness in respect of this and I find that the claimant was employed for approximately 8 hours per day and often for less than that as can be seen from the messages above. There is no dispute that the claimant was nevertheless paid £350 per week, whatever hours she worked and that she was additionally paid out of pocket expenses.

Was a deduction made from the claimant's final week's pay?

27. The claimant and the respondent agree that the claimant was only paid £200 for her final week of work. The respondent acknowledges that her weekly pay was £350 per week but the respondent retained £150 because the claimant is said to have broken a vase.

The Law

28. In terms of the National Minimum Wage Act 1998, section 1, a worker is entitled to be paid at a rate not less than the national minimum wage. Section 2 states that a person qualifies for the minimum wage where they are a worker.

29. The National Minimum Wage Regulations 2015 set out how the rate is calculated. The applicable hourly rate is set each year.

30. Where a worker is entitled to be paid by reference to the time to be worked (such as in the claimant's situation) chapter 3 of the 2015 Regulations explain how the calculation is carried out. This is called time work and involves a calculation of the time (in hours) the claimant was working to ensure that for each hour the claimant worked, she receives the applicable minimum wage rate.

31. Under section 28 of the 1998 Act it is presumed that the claimant qualifies for the national minimum wage unless the contrary is established - section 28(1). It is also presumed that the claimant was paid less than the minimum wage for the period in question unless the contrary is established – see section 28(2).

32. A worker is entitled to be paid a sum equal to the national minimum wage for each hour worked within the relevant pay reference period (section 17).

33. In addition, a claim for failure to pay the national minimum wage is a claim for unlawful deductions of a wage under section 13 of the Employment Rights Act 1996 since the worker is entitled to be paid the applicable hourly rate for each hour worked, and paying the worker less than this results in an unlawful deduction from the wages due. In other words, the sum properly payable under a worker's contract by way of wages is the national minimum wage rate and a failure to pay this is a breach of section 13 of the 1996 Act, thereby allowing a Tribunal to order payment of the sum in question.

34. Where the employer has failed to pay the worker the relevant rate for each hour worked, the Tribunal is required to base the calculation upon the national minimum/living wage rate that applies at the date of calculation – section 17 (4) of the 1998 Act – even if the minimum wage rate was lower when the deduction took place.

35. Where the Tribunal finds the claimant was not paid the minimum wage for the period in question, the Tribunal can order the respondent to pay to the claimant the

balance (which would be at the current rate) for each hour when the (then applicable) minimum wage was not paid.

36. The applicable rate at the time in question was £8.72 per hour. As the claimant was over 25 she is entitled to the national living wage (which is the name for the higher rate of the national minimum wage).
37. 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 her 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.
38. 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.
39. Under Section 38 of the Employment Act 2002, where a Tribunal finds in favour of an employee in a complaint of unlawful deductions from wages and the Tribunal finds that the employer has failed to provide the employee with a written statement of employment particulars, the Tribunal must award the employee an additional two weeks' pay, unless there are exceptional circumstances which would make that unjust or inequitable, and may, if it considers it just and equitable in all the circumstances, order the employer to pay an additional four weeks' pay.

Conclusions

40. I find that the claimant was paid on a weekly basis at the rate of £350 per week. For the reasons I have already given, I find that this was for a maximum of 40 hours per week. That would amount to £8.75 per hour which was above the National Living Wage of £8.72 per hour. I therefore conclude that the claimant was paid above the National Living Wage of £8.72 per hour. Therefore, there was no unlawful deduction in respect of her claim to have been paid below the National Living Wage.
41. I have found that there was a deduction from the claimant's final week's wage. She should have been paid £350 for that week but was in fact only paid £200. The reason for that deduction was because she broke a vase. I find that this was not an authorised deduction under section 13(1) of the Employment Rights Act 1996 and nor was it an exempt deduction under section 14 of the Employment Rights Act 1996. It was therefore an unauthorised deduction and I find that the claim succeeds in this regard and that the claimant is owed £150.
42. It is not disputed that there was no written contract of employment or a written statement of particulars of employment and in those circumstances the provisions of section 38 of the Employment Act 2002 are applicable. The claimant only worked for the respondent for approximately six weeks. Therefore, I find that it is appropriate to award the claimant 2 weeks pay as a consequence of the failure by the respondent to supply the claimant with a written statement of particulars of employment. I therefore award the claimant $2 \times £350 = £700$ in this regard.
43. The total award payable to the claimant is therefore £150 gross + £700 gross which equals £850 gross.

DATE: 17/11/21

Tribunal Judge Plowright - acting as an Employment Judge

Sent to the parties on:

18/11/2021

For the Tribunal:

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