Case No: 2203571/2021

EMPLOYMENT TRIBUNALS

Claimant: Miss G de Lauro Oliveira

Respondent: Fortnum and Mason PLC

Heard at: London Central (by video) **On:** 3 May 2022

Before: Tribunal Judge A Jack, acting as an Employment Judge

Representation
Claimant: Miss Thomas, counsel
Respondent: Mr Alukpe, Curling Moore Solicitors & Associates

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The Respondent made an unlawful deduction from the Claimant's wages.

2. The claim for damages for breach of contract in respect of pension contributions fails and is dismissed.

3. The claim under the Working Time Regulations 1998 for pay in lieu of untaken holiday fails and is dismissed.

REASONS

Background: claims and procedure

1. By a claim form received on 29 December 2020 the Claimant brought a claim for unfair dismissal, breach of contract, unlawful deduction from wages and holiday pay.
2. The response form received on 15 July 2021 stated that the Respondent had already corrected errors in the Claimant's wages, and that it was therefore denied that any holiday payment or arrears of pay or any other payment was still owed to the Claimant. (Leave to file the ET3 out of time has already been given.)

3. Following oral judgment on the claim for unfair dismissal on 26 January 2022, the outstanding claims for breach of contract, unlawful deduction from wages and holiday pay were adjourned. Directions were made requiring the Respondent to disclose the Claimant's leave record for 1 July 2019 to 3 September 2020 inclusive, the Claimant to provide a revised schedule of loss and the Respondent to provide a counter-schedule.
4. The Respondent did not disclose the Claimant's leave record, stating that that it does not hold information relating to the leave taken by the claimant, and that the company which manages holiday for the respondent's employees does not retain the information. Case Management Orders made on 30 March 2022 stated that "I accept that the respondent has not failed to disclose documents which it holds or has control over, and there is therefore no failure by the respondent to comply with the directions". Revised directions were made, requiring (among other things) that the Claimant's revised schedule of loss "make clear … what monies, if any, the claimant considers to be outstanding, taking into account the payments already made to the claimant, and the respondent's calculations explaining the basis of those payments at pages 360-361, page 355 and pages 549- 550 of the hearing bundle".
5. The relevant witness statements are the statement from the Claimant herself and the first statement of Ms Clare Henshaw. The Respondent produced a bundle containing the pages from the original bundle which were relevant to the remaining claims, additional documents from the Respondent relating to payments made to the Claimant since the last hearing, and additional documents provided by the Claimant.
6. At the start of the hearing Mr Alukpe objected to what he described as the Respondent's failure to disclose the Claimant's leave record, criticised its failure to retain leave records, and sought an adjournment so that that failure could be investigated. I refused the application to adjourn on the basis that I considered that it was possible to deal with the case fairly and justly, and to properly consider the issues in the case, without the delay that an adjournment would inevitably involve. Although the Respondent did not accept the claim under the Working Time Regulations in respect of unpaid leave, this was not on the basis of a factual dispute about how much leave the Claimant had taken. It was rather on the basis of an argument that the Claimant was not entitled to the protection of the provisions of the Working Time Regulations enabling the carryover of leave, where leave was not taken because it was not reasonably practicable to do so as a result of the effects of coronavirus.

Findings of Fact

7. The Claimant was employed by the Respondent as a Purchasing Assistant from 3 September 2018 until 3 September 2020.
8. The main terms and conditions of her employment were contained in an agreement dated 1 August 2018. Her salary was initially £22,100 (bundle, p. 56, and as the claimant agreed in oral evidence). Her salary from 1 April 2019 was £22,542. Her leave year was 1 July to 30 June each year, and her leave entitlement was to 28 days including bank holidays. The agreement provided that the Claimant would not be paid in lieu of untaken holiday, except on the termination of her employment.
9. The Claimant was also a member of the Fortum and Mason's Tronc scheme, which distributes to staff proceeds of any discretionary service charge and card gratuities paid by customers of the Respondent. The

operator of the Tronc said in a letter to the Claimant in July 2018 (bundle, p. 52) that the Tronc was not part of the Claimant's Terms and Conditions of employment with the Respondent, and that the Tronc scheme is operated independently of the company. It was also explicitly said that payments from the Tronc are discretionary and an addition to the Claimant's basic pay from the company. It was expected that the Claimant would receive a distribution of £1,700 per annum from the scheme.

10. The Claimant's salary was miscalculated throughout the entire period of her employment. The Respondent's employment contracts usually include a provision that provides that salary is paid inclusive of any Tronc payment. The Claimant's contract did not include this provision, but her salary was calculated as though it did. The Respondent accepts that there was as a result an underpayment of salary.
11. The last day that the Claimant worked in the office, before she and her colleagues were sent home due to Covid 19, was 23 March 2020.
12. The Claimant was sent a letter by the Respondent on 9 April 2020 (bundle 748- 751). This stated that the Respondent would implement the government's furlough scheme and that the Claimant would become a furloughed worker from 10 April 2020. It also stated that the Claimant would continue to be paid her salary in full, and that she would continue to accrue holiday. It said this:

> "To avoid a situation where our team members accumulate holiday and are not then able to take it due to business need, when the current restrictions are lifted and we are able to return to work, we are asking all team members to take a sensible approach and to consider taking holiday over the next two months."

13. The Claimant was sent another letter on 28 April 2020 (bundle, p. 753-755). This stated that as the Respondent's owner was providing financial support, the Respondent would not enrol in the government's job retention scheme. The Claimant would as a result not be put on furlough leave. The Claimant was not required to work. However in all other respects her normal terms and conditions of employment would continue and she would continue to be entitled to receive her normal salary and benefits, including her holiday entitlement.
14. The Claimant and her colleagues returned to work at some point in June 2020, before the end of her leave year.
15. The Claimant did not take any leave while she was at home in the period from 24 March 2020 until the point in June when she returned to work. Her oral evidence, which I accept, was that she decided not to take her leave during this period because she was at home and not working (except for some training). This was the reason she did not take leave.
16. I also accept the Claimant's oral evidence that in the leave year 1 July 2019 to 30 June 2020, she took 5 days of annual leave (in addition to public holidays).
17. The last date of the Claimant's employment with the Respondent was 3 September 2020.
18. The Respondent wrote to the Claimant on 1 December 2020, accepting that an underpayment of £3,647.67 had been made, and setting out how this sum had been calculated (bundle, p. 360-361). £3,371.75 of the £3,647.67 was in respect of pay (bundle, p. 355). The rest of the £3,647.67 was due to increases to pay in lieu of notice and statutory redundancy pay, once these were calculated using the correct salary.

19. A payment to the Claimant of £3,647.67 gross was processed on 1 January 2021, and she received £2,618.61 after tax and national insurance had been deducted (bundle, p. 395).
20. This payment did not fully correct the position, however, as the underpayment of £3,647.67 had also impacted on the Claimant's pension contributions. The Claimant's employer pension contribution rate was 4%. 4% of £3,647.67 is £145.91. A payment in respect of the Claimant for employer's pension contributions was made to her pension provider on 5 November 2021 (bundle, p. 396). The total paid was more than £145.91, as it also included payment for an administrative charge to the pension provider. However £145.91 was paid in respect of employer pension contributions for the Claimant on 5 November 2021.
21. The Respondent's solicitor wrote to the Claimant's solicitor on 11 January 2022 explaining that the Respondent proposed to make a payment of £93.70, and setting out how that sum had been calculated (bundle, p. 549-550). £37.35 of this payment was in respect of holiday pay, as the Respondent accepted that the payment in lieu of holiday that already made had been miscalculated.
22. A payment to the Claimant of £93.70 gross was made on 28 January 2022, and the Claimant received £73.80 after tax and national insurance had been deducted (payroll documents, bundle p. 635 and 636). Although the Claimant's oral evidence was that she could not recall whether or not she received this payment, I find on the basis of these documents (which were sent by email to the Claimant's solicitor on 26 January 2022; bundle, p. 634), that is it more likely than not that the Claimant received this payment.
23. The Respondent's counter-schedule filed on 13 April 2022 accepted that, despite the payments already made, £62.43 gross remained due to the Claimant.
24. A payment to the Claimant of £50.03 was made on 29 April 2022 (bundle, p. 742a). The Respondent considers that £50.03 is the net sum due to the Claimant in respect of the gross sum of £62.43.

The Law

25. Section 13(1) of the Employment Right Act 1996 (ERA) states:

"*An employer shall not make a deduction from wages of a worker employed by him unless—*

> *(a) 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*
>
> *(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.*"

26. Section 13(3) ERA provides:
"*Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion*."

27. Section 23 ERA gives a worker the right to complain to an Employment Tribunal of an unauthorised deduction from wages. Where a tribunal finds a complaint under section 23 ERA well founded it shall make a declaration to that effect and shall order the employer to pay the worker the amount of any deductions made in contravention of section 13 ERA (s24(1)(a) ERA). However an employer shall not under s. 24 be ordered to pay to a worker any amount in respect of a deduction in so far as it appears to the tribunal that he has already paid that amount to the worker (s.25(3) ERA). (Section 24(2) ERA enables the Tribunal, where it has made a declaration that the complaint of unauthorised deduction from wages is well founded, to order the Respondent to pay to the worker such amount as the tribunal considers appropriate in all the circumstances to compensate the worker for any financial loss sustained by her which is attributable to the unauthorised deduction.)
28. Section 27 ERA defines "wages" for the purposes of these provisions. The EAT has held that pension contribution do not fall within the definition of "wages": *Somerset County Council v Mr C J Chambers* EAT 0417/12. Although entitlement to a pension is itself deferred pay, an employer's contributions to the pension fund on behalf of an employee do not amount to "wages". As s 27(1)(a) makes clear, "wages" means any sums payable to the worker in connection with his employment, it does not mean contributions paid to a pension provider on their behalf.
29. The Claimant relies on s. 69 of the County Courts Act 1984, which relates to the power of the county court to award interest on debts and damages.
30. Regulation 13(1) of the Working Time Regulations 1998 SI 1998/1833 (WTR) provides that a worker is entitled to four weeks of annual leave in each leave year. Where in any leave year it was not reasonably practicable for a worker to take some or all of the leave to which the worker was entitled under regulation 13 as a result of the effects of coronavirus (including on the worker, the employer or the wider economy or society), the worker shall be entitled to carry forward such untaken leave: regulation 13(10) WTR. Leave to which regulation 13(10) applies may be carried forward and taken in the two leave years immediately following the leave year in respect of which it was due: regulation 13(11) WTR.

Conclusions

Deductions from salary

31. I am entirely satisfied that the Claimant did not receive her full salary throughout the entire period of her employment. For the period 3 September 2018 to 31 March 2019 she was entitled to a salary of £22,100. She actually received a salary of £20,400. For the period 1 April 2019 to 4 September 2020 she was entitled to a salary of £22,542. She actually received a salary of £20.808. The Respondent accepted this in its letter of 1 December 2020 (bundle, p. 360). I accept that the error arose because the Respondent followed its usual practice of deducting Tronc payments from salary. However in the case of the Claimant there was no provision in her contract authorising this. Nor did the Claimant signify in writing her agreement to the making of the deductions before they were made. The deductions were therefore unlawful, and the Claimant is entitled to a declaration to that effect.
32. The question of what if any sums remain outstanding to the Claimant is more complicated. However, as is confirmed by the Respondent's summary

(bundle, p. 355), the correct amount of Tronc was paid throughout the Claimant's period of the employment. The error related entirely to the amount of salary paid. I therefore do not need to consider whether or not the Claimant had a contractual entitlement to Tronc payments, or whether these were part of her wages.

33. With respect to the differing calculations of the amount of pay that was unlawfully deducted in the revised schedule of loss and the counter-schedule, I accept that the Respondent's calculations are correct. The Claimant's revised schedule of loss calculated pay from 2018 on the basis of a salary of £22,542. However the Claimant's salary was £22,100 until 1 April 2019 (as I have found, and as indeed the Claimant herself agreed in her oral evidence). The revised schedule of loss overstates the number of days which the Claimant should have been paid for in her first payslip, given that she started work on 3 September 2018. The counter schedule is more generous to the Claimant than the Claimant's own schedule in respect of the payslip of 1 March 2019 (which is missing from the schedule of loss). In conclusion, I accept the detailed calculations in the counter-schedule and accept on this basis that the Claimant was underpaid the sum of £3,431.78 gross in respect of her salary over the period of her employment.
34. Remarkably, and contrary to the directions summarised in paragraph 4 above, the revised schedule of loss does not take into account the payment made to the Claimant by the Respondent on 1 January 2021. £3,371.75 gross was paid in respect of pay. The counter-schedule is therefore correct that, at the time that it was filed, £60.03 gross remained due to the Claimant in respect of pay.
35. However a further payment was made to the Claimant on 29 April 2022 of £50.03, which appears to be the net sum due to the Claimant in respect of the gross sum of £62.43. £60.03 of the total sum of £62.43 was is in respect of underpaid salary (and £2.40 of the total was in respect of pension contributions, which I deal with below).
36. It therefore appears that the Respondent has paid the amount of the deductions made from the Claimant's salary in contravention of s. 13. So it would be contrary to s. 25(3) ERA to order the Respondent to pay any amount in respect of these deductions. (No claim was made under s. 24(2), and Mr Alukpe did not refer me to any evidence of financial losses of the Claimant which are attributable to the deductions made from her salary.)

Interest

37. The Claimant claims interest on the amount of salary that was underpaid during the course of her employment, citing s. 69 of the County Courts Act 1984. However this Act does not apply to the Employment Tribunal, and the provisions relating to interest which do apply to the Employment Tribunal (regarding discrimination and unsatisfied judgments) are not relevant in this case. The claim for interest therefore fails.

Pension Contributions

38. The Claimant seeks employer's pension contributions for the salary that was not paid during her employment. This cannot be a claim for unlawful deduction from wages, as pension contributions are not wages: *Somerset County Council v Mr C J Chambers.* Indeed the Claimant's Grounds formulated the claim in respect of pension contributions as a claim for breach of contract. In response, the Respondent did not dispute that the

Claimant had a contractual entitlement to pension contributions, arguing instead that it would be inappropriate to award damages in respect of this element of the claim as the necessary payments had already been made.

39. As the Respondent observes, the Claimant's revised schedule of loss does not take into account the payment made by the Respondent to her pension provider on 5 November 2021. However the Respondent also accepts that 4% pension contributions would also have been payable in respect of the £60.03 arrears of salary which were outstanding at the time it filed its counter-schedule of loss: 4% of £60.03 is £2.40. However the £50.03 paid to the Claimant on 29 April 2022 appears to be the net sum due to the Claimant in respect of the gross sum of £62.43, and £2.40 of this was is in respect of pension contributions. In conclusion, as the £2.40 has been paid it would not be appropriate to order the Respondent to pay damages for breach of contract in respect of pension contributions.

Working Time Regulations Claim

40. The Claimant's contract of employment provided at clause 6.4 (bundle, p. 57) that untaken holiday could not be carried forward from one leave year to another, except in certain limited circumstances e.g. having been prevented from taking holiday in one leave year by sickness absence. The Claimant did not attempt to argue that any of these limited exceptions applied, and the evidence would not have supported any such submission. The Claimant relied instead on the WTR.
41. The Claimant did not take her full leave entitlement in in the leave year 1 July 2019 to 30 June 2020 and argues that, as this was due to coronavirus, she is entitled to carry over leave under the WTR. She did take five days leave in the leave year 1 July 2019 to 30 June 2020. The relevant test is whether in the leave year 1 July 2019 to 30 June 2020 it was not reasonably practicable for the Claimant to take some of the four weeks of leave to which she was entitled under regulation 13 as a result of the effects of coronavirus. The Claimant was at home on full pay for a period which began on 24 March 2020 and ended at some point in June 2020, before the end of her leave year. However the letter of 9 April 2020 encouraged her to take leave. The Claimant decided not to do so because she was at home and not working (except for training). However it would have been reasonably practicable for her to take leave during this period, and it would therefore have been reasonably practicable for her to take all of the leave to which she was entitled under regulation 13 during her leave year. It may well not have been reasonably practicable for her to travel during this period. But that is not the relevant test. The claim under the WTR therefore fails.

Dr A Jack

Tribunal Judge, acting as an Employment Judge

4 June 2022

JUDGMENT & REASONS SENT TO THE PARTIES ON

04/06/2022.

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FOR THE TRIBUNAL OFFICE