



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant
MISS J TOZER

AND

Respondent
THE HAIR VENUE

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: BRISTOL ON: 17TH DECEMBER 2021
(VIA VHS)

EMPLOYMENT JUDGE MR P CADNEY
(SITTING ALONE)

APPEARANCES:-

FOR THE CLAIMANT:-

FOR THE RESPONDENT:-

JUDGMENT

The judgment of the tribunal is that:-

- i) The claimant's claim for unpaid wages is well founded and upheld.
- ii) The claimant's claim for the failure to provide itemised pay statements is upheld.
- iii) The claimant is awarded £2263.12 in unpaid wages.

Reasons

1. By this claim the claimant brings claims of unlawful deduction from wages and the failure to provide itemised payslips.

Unlawful Deduction From Wages

2. The claimant was employed by the respondent as a hairdressing apprentice under a contract of apprenticeship from 7th September 2020 until 17th July 2021. The claimant 's case is that she was contractually entitled to be paid for a thirty hour week initially at £4.15 per hour rising to £4.30 by the end of her employment. She claims a total of £2263.12 for weeks during which she was not paid at all or where she worked fewer than thirty hours. She contends that there is no contractual right to provide fewer hours or to lay her off; that she was not asked to and did not agree to be furloughed; and that she never provided any written agreement to any deduction from her pay. It follows that there was no lawful basis to make any deduction from her pay under the provisions of s13 (1) (a) or (b) Employment Rights Act 1996.
3. There is little or no dispute of fact between the parties. There is no dispute as to the calculation of the amount owed. The dispute is purely as to whether the respondent was entitled not to pay her for hours she did not work, primarily because the salon was not legally able to open during periods of lockdown. Lockdown was imposed by the government between 2nd November and 4th December 2020 , and again from 4th January to 12th April 2021 during which time the salon wasn't open. It is not in dispute that the salon was required to close during these periods and that this was not the choice of the respondent. The claimant's salary was below the limit for her to pay any tax or national insurance and she was not paid via PAYE. As a result it would probably not have been possible for her to have been placed on the furlough scheme. Even if it were the respondent did not seek to do so and the claimant was not asked to agree to do so. When the lockdowns occurred it was explained to the claimant that she was not being furloughed. She states that she accepted this as effectively she had no choice in the matter. She continued to attend college remotely to continue with her studies during the periods of lockdown.
4. The respondent effectively contends that she was not entitled to be paid for the periods during which the salon had been forced to close and when she was not only not required to work but when requiring her to do so would have been unlawful; and that they were contractually only obliged to pay for the hours she actually worked.
5. There are two essential disputes in this case. First, who should bear the cost if the respondent is compelled to close and cease to trade during a time when the claimant is still employed by the respondent. Is it entitled not to pay the claimant

when for reasons and periods outside its control it is not able to trade; or is the claimant entitled to be paid in accordance with her contract during any period when she is ready willing and able to work her contracted hours? Secondly if the respondent is bound to pay the claimant in accordance with her contract what are its terms.

6. The first question is straightforward. As long as the employment contract subsists and as long as the employee is ready willing and able to work she is entitled to be paid in accordance with the contract. If for whatever reason the employer no longer has work for the employee to perform it is open to it to dismiss her by reason of redundancy, or to retain her. What is not open to it is simply to cease to pay her for that period unless there is some contractual provision entitling it to do so; generally for lay off or short time working.
7. It follows that the second issue will determine the outcome of this case. The claimant essentially relies on clause 6 of the contract:

“Your hours of work are:

Mon 9-5

Tue – Closed

Wed 9-3 or training hours

Thur 9-3 or 9-5

Fri- 9-5

Sat 9-4”

8. She submits that as a result she had a standard thirty hour week. From this the claimant contends that she was contractually entitled to be paid for those hours irrespective of the hours actually worked. The claimant contends that in essence the respondent misunderstood the furlough scheme. Whilst there was no obligation to furlough employees, and no obligation on an employee to accept being furloughed that in the absence of an employee being furloughed the contractual terms remained in place and an employee was entitled to full pay even if the employer could not provide work.
9. The respondent relies on clause 5 *“You will be paid on a weekly basis on the hours worked.”* They contend that this presupposes that the hours actually worked do not necessarily correspond with the hours of work set out in clause 5 and that only hours actually worked would be paid. In addition the contract includes a provision *“All clauses are subject to change, but will be discussed by employee and employer”*. They contend that the terms were changed either pursuant to that provision in that the claimant accepted that there was no furlough available during the periods of lockdown. In essence they contend that there was a contractual variation during lockdown by which the claimant was not required to attend work and they were not required to pay her. The

respondent's case is therefore, that whether by reason of clause 5 and/or the overarching provision for change by agreement that there was no obligation to pay during lockdown.

10. In respect of the first point, that there was an agreed contractual variation, there is no evidence that it was ever presented as anything other than a *fait accompli* or in which the claimant had any choice. In my view there is no evidence of any genuine agreement as to any contractual variation. There is certainly nothing in writing which would make any deduction lawful
11. That leaves the question of which party's interpretation of the contract is correct. In my judgement the question must be seen in context. The contract was one of apprenticeship which presupposes that the claimant would, apart from the specific study day be present and able to work and be trained. In those circumstances clause 5 cannot be interpreted as allowing or providing for the respondent not to allocate any hours of work to the claimant, or to interpret it as a form of zero hours contract. In addition clause 6 provides for variable hours on a Thursday. It is therefore possible to reconcile clauses 5 and 6 as providing for a minimum number of contractual hours which might vary from week to week depending on the hours worked on a Thursday; and which would result in variable amounts of pay reflecting the hours actually worked. This appears to me to be the most and indeed only logical interpretation of the inter-relationship of clauses 5 and 6 of the contract. It follows that in my judgement the claimant is correct to assert that the contract entitled her to a minimum thirty hour week.
12. It follows that the claimant is entitled to her unpaid salary in the sum of £2263.12.

Failure to provide Itemised pay Statements

13. Section 8 Employment Rights Act 1996 provides that a worker has a right to receive an itemised pay statement at or before the time at which payment is due. If the employer fails to do this the worker is entitled to a declaration as to the particulars which ought to have been given (s11 (1) and 12 (3)). If there have been any un-notified deductions in the thirteen weeks prior to the references to the tribunal may order the payment of a sum equivalent to the unnotified deductions. In this case any unlawful and/or unnotified deductions are already dealt with as unlawful deductions from wages and any further order would constitute double recovery. There is therefore no further order of compensation.

Employment Judge Cadney
Date: 29 December 2021

Judgment & reasons sent to parties: 10 January 2021

FOR THE TRIBUNAL OFFICE