



EMPLOYMENT TRIBUNALS

Claimant: Mrs. D Kearns

Respondent: Hartlepool United Football Club

Heard at: via Common Video Platform

On: 3rd November 2022, 10th
February 2023.

Before: Employment Judge Pitt

Representation

Claimant: In Person

Respondent: Mr Forster, Solicitor

RESERVED JUDGMENT

1. The claimants claim for Unlawful Deductions from wages succeeds.
2. The respondent shall pay £3168. gross.
3. The claimants claim for compensation for untaken annual leave succeeds.
4. The respondent shall pay the claimant the sum of £386.40 gross.
5. The respondent shall pay the claimant the a total of £3554.40 gross.

REASONS

1. This is a claim by Miss Danielle Kearns, date of birth 10 February 1986, in relation to her employment with Hartlepool United Football Club. The claimant was employed between the 19 July 2021 and 2 March 2022 as a bar manager. She was employed for 16 hours per week. She brings claims for unlawful deductions from wages for a substantial period of her employment with the respondent and compensation for accrued holiday pay that was not taken.

2. I had before me a bundle of documents which included the claimant's contract of employment, diary entries from her and numerous emails between her and members of the respondent's management team. I read witness statements

and heard evidence from the claimant, Natalie Cairns, her sister, Simon Dove a volunteer at the respondents, Michael Glenn Director of Orange Box Training Solutions Ltd, Mr Edwards who was a barman for the respondent, Helen Thompson who was a barmaid for the respondent, Alan Devon who was a music promoter. On behalf of the respondent, I heard from Stephen Hobin Chief Operating Officer with the respondent, Rose Stoker Head of Operations

The Issues

3. What hours did the claimant work?
4. Was she entitled to under her contract to be paid for those hours?
5. What was the claimants holiday entitlement?
6. Are any sums due to her as compensation for untaken holidays?

The Facts

7. In reaching my conclusions on the relevant facts I have taken into account the witness statements, the evidence, the pleadings and supplementary documents such as the claimant's diary and the document at page 168 onwards which sets out the hours the claimant worked and the respondents response to that. I have applied the civil standard of proof, the balance of probabilities and note the burden is on the claimant to establish her case.

8. The respondent is a football club, which plays in League 2. At the time of these events in July 2021 they had recently been promoted from the National League and were preparing for fans to be readmitted to the stadium following the Covid Pandemic. Although its primary business is that of football the respondent also has a number of bars offering hospitality when a football match was scheduled.

9. Following discussions with Ms. Stoker the claimant agreed to a contract working 16 hours per week. The written contract was not provided to the Claimant until December 2021. I am satisfied that the claimant indicated she wanted a contract for no less than 16 hours rather than for a maximum of 16 hours. Her hourly rate was agreed at £12. In relation to working over 16 hours it was agreed wherever possible that the claimant would reduce her hours on the following week. Although this was not discussed she would in effect that work 64 hours across any four-week period.

10. Having read the contract of employment the relevant clauses are:

11 Hours of work

Your working week will compromise of 16 hours. Your normal hours of work are flexible, subject to change and may involve working weekends, evenings and public holidays.

For those employees involved in matchday duties, normal working hours are extended to cover matchdays.

You will need to keep your days of work flexible depending on the needs of the business which may include working on banks holiday and weekends. At times the needs of the business will require

these hours to be modified and you will be expected to vary your hours accordingly.

14 Holiday Entitlement

The holiday year runs from 1st January to 31st December.

Your annual holiday entitlement in any holiday year is 23 days plus public holidays.

If you work part time your annual holiday entitlement will be calculated and applied on a pro rata basis

11. The claimant's role was to oversee the operation of 10 bars/kiosks within the ground this included: compiling staff rotas; ordering stock; ensuring stock was delivered to each of the bars; cleaning drink lines. She had approximately 30 staff who worked primarily on a match day. I accept that the duties set out in paragraph 3 of the claimant's witness statement are an accurate reflection of the duties she was to undertake. Although eventually provided with a contract of employment the claimant was never provided with a job description outlining what her job entailed.

12. Although it was anticipated that the Football Team would play a home game once a fortnight, I am satisfied that between September 21 and February 22 there were 23 home games which was an unusually high number. This was due to the football team being successful in a number of cup competitions.

13. I am satisfied that on the day of a home game the claimant would work approximately 12 hours to ensure the smooth operation of the hospitality those days. There were occasions when the claimant had to work for a Saturday and a Tuesday in the same week for example 7th and 10th August 2021. On such occasions it was not always possible for the claimant to recoup her additional hours.

14. The claimant also volunteered with a group called The Heart of our Club 1908. This is a group of volunteers who carried out various tasks such as painting the bar area. I am satisfied that the claimant has not claimed for any of the hours she was volunteering as part of this claim.

15. Mr. Hobin came into post in August 2021. Ms. Stoker was absent from work from 20th August 2021 for approximately 14 days due to COVID. Mr. Hobin accepted under cross examination that the claimant did carry out numerous duties that were usually the remit of Ms. Stoker during this period.

16. On 27 August Mr. Hobin texted the claimant acknowledging the work that she had done as follows "thanks for this week you have been amazing hasn't gone unnoticed. Spoken to Lee (Rust) and going to sort something out not through the books for you."

17. On 12th September 2021 the claimant emailed Mr. Hobin in relation to hours that she worked she indicated that she had worked 265.25 hours over her agreed hours. She also states "I'd like to think that I can do the bar manager role

on 16 hours a week providing the right staff /resources and support was in place. However, I might also be naïve in thinking so as there is more involved, I initially thought. I was thinking even if we could train staff to do one or other line clean or stock distribution that would keep my hours down to agreed. I know since joining the club I haven't actually managed to work and do my role under normal circumstances for one reason or the other (preseason setting up, then started sickness). Hopefully it might all calm down and work out, knows? I'm happy to play iby here.' Attached to that email was a list of the hours that the claimant had worked up until 11 September 2021.

18. Mr Hobin spoke to his board with regards to the hours and it agreed to pay the claimant the equivalent of 25 hours as a gesture of goodwill because of employees being due to illness and the claimant had been required to cover some extra hours.

19. On 5 October the claimant sent a further email to Mr Hobin regarding payment, she said that she was going to be paid for 125 hours and goes on "can someone update me on what's happening with the rest et cetera I have been led to believe that originally it was being paid cash rounded up to 250 hours to deduct any possible tax etc. However next time we spoke you said been paid by bacs as one off expenses and I'd be taxed I'm not sure what all the fuss is about why they have paid the correct amount.'

20. There were a number of conversations and between the claimant and Mr Hobin with regards to her payments the claimant was eventually paid the equivalent of 125 hours. She did not accept this and it was not formalised as part of an agreement which would exclude this Tribunal from adjudicating upon it.

21. The claimant submitted a resignation letter on 12 October 2021. She stated 'I have looked at the remaining fixtures and upcoming Christmas events and realise the job role and responsibilities both pre match and on match day will never be fulfilled on a 16 hour contract. Therefore, the issues have arisen around hours and pay will be a continuous accumulation throughout the season.' She attached a breakdown of all the hours she was owed.

22. Ms. Stoker advised the claimant to speak to Mr Rust (Senior Advisor). The claimant met with Mr Rust on 26th October 2021. She set out her issues. Mr Rust advised her that the respondent had only budgeted for 16 hours for the Bar manager role. The claimant indicated to Mr Rust she didn't really want to leave but because of the issues she had no option. She indicated she would stay if the correct support and contract were put in place.

23. On 28th October 2021 the claimant retracted her resignation with conditions. 'as long as the club can sort out my written contract and T/C's so that I have some stability around working conditions and what my role and hours will look like for the rest of the season.'

24. Between 20th December 2021 and 30th December 2021, the claimant was absent from work due to Covid.

25. The claimant continued to work over her 16 hours, and she kept Ms. Stoker informed of the hours she had worked. By email of 27th December the claimant again notified the respondent of the hours she had worked. Stating that it was clear that 16 hours was insufficient to carry out her work.

26. In response Ms. Stoker indicated she had sent the information to Mr Attwood the Financial Director and that she would discuss it further with Mr Hobin. It is clear that Ms. Stoker was unsure of how to proceed.

27. The claimant replied asking for a breakdown of everything paid and owed so she would be able to plan what she was doing. She concludes: 'Along with planning additional help with line cleans and stock to keep my hours in line with what has been agreed. That will prevent any hassle with pay/hours etc and then we all know where we stand.'

28. The claimant was absent from work due to 'stress' between 25th January 2022 and 4th February 2022. It was during this period the claimant decided to resign. She formally resigned on 2nd February 2022.

29. In addition to notifying Ms. Stoker the claimant also emailed Mr Rust setting out her reasons for stepping down. She stated that she had received no response to as suggestion that she discuss her resignation with Ms Stoker and wanted to bring it his attention.

30. The claimant followed up her resignation letter on 18th February 2022 with an email to Ms. Stoker and Mr. Attwood with regards to her notice period, hours owed and worked she was prepared to carry out.

31. Ms. Stoker replied on 23rd February indicating that the claimant would be paid for the hours worked at the end of the month. She went on that she was to sit down with Mr Attwood to discuss the spreadsheet provided by the claimant and her holiday entitlement.

32. On 28th February the claimant emailed Mr Raj the Chairman of the respondents setting out her concerns, pg 328 about her own wellbeing and not being paid for hours worked and the fact she had taken sick leave due to stress but also included allegations in relation to other matters at the respondents'. Having received no response the claimant sent a Formal Grievance to Mr Raj the Chairman of the respondents on 1st March 2022.

33. The grievance was dealt with by Mr Attwood on 24th March 2022. The outcome was sent to the claimant on 22nd April 2022. The claimant appealed the decision on 27th April 2022. As she heard nothing from the respondent, she contacted ACAS and started these proceedings on 12th June 2022.

34. The claimant was invited to an appeal on 13th July 2022 which was heard on 27th July 2022.

The Law

35. Employment Relations Act 1996 section 13 gives a worker right not to suffer an unauthorised deduction from their wages it reads as follows: -

“(1) and employer shall not make it deduction from wages of an employer 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 workers contract, or,

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

(3) 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 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 workers wages on that occasion.

36. 23 Section (1) a worker may present a complaint to an employment tribunal –

that his employer has made a deduction from his wages in contravention of section 30.

37. Wages is defined by section 27 (1) as “in this part wages in relation to a worker, means any sums payable to the worker in connection with his employment, including,

(a) any fee bonus, commission, holiday pay or other emolument ref ability his employment whether payable under his contract or otherwise.

38. In Delaney v Staples[1992] IRLR 191 it was emphasised that the normal meaning of wages should be kept in mind. Lord Browne Wilkinson said, “the essential characteristic of wages is that they are consideration for work done or to be done under a contract of employment if a payment is not preferable to an obligation on the employee under a subsisting contract employment it does not in my judgement fall within the ordinary meaning of the word wages.’

This case also confirms that where there is a complete failure to pay this will amount to a deduction.

39. The phrase “payable under [the workers] contract or otherwise” was considered in New Century Cleaning Company Limited V Church [2000] IRLR 20 7CA It is necessary for the worker to show a legal entitlement sum in question although the entitlement need not necessarily arise from an express term in the contract. It was in this sense that the phrase “whether payable under his contract or otherwise” had to be construed.”

40. In Cleeve Link Ltd V Bryla[2014] IRLR 86 confirms that the ordinary principles of contract law apply and may need to be considered by the employment tribunal in determining a deduction from wages

41. The definition of an emolument was discussed in Hochstrasser v Mayes[1960] AC376, and it concluded that an emolument was something in the nature of a reward for service, for “acting as all being an employee” and therefore constituted earnings.

42. Regulation 13 Working Time Regulations gives a worker an entitlement to annual leave of 4 weeks.

43. Regulation 14 gives a worker a right to compensation for annual leave which has not been taken as follows:-

(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired the employer shall make him a payment in lieu of leave in accordance with paragraph (3)

44. Regulation 16 sets out the payments due under Regulation 14 as a ‘weeks pay’

A weeks pay is calculated in accordance with Section 221-224 Employment Rights Act 1996 and with reference to the workers ‘normal working hours’. Where the pay varies according to the work done the ‘normal working hours are averaged across 12 weeks.

45. There has been much discussion concerning the definition of ‘normal working hours’ where overtime is concerned. The literal interpretation of the sections 221-224 do not necessarily permit the inclusion of overtime. However, this is without considering the Directive from which the Working Time Regulations derive. The claimant’s case is that her overtime was voluntary, i.e. it was not guaranteed by the employer nor was she required to do it.

46. In the case East of England Ambulance Service NHS Trust v Flowers & Others 2019 ICR 1454. The Court of Appeal set out that there is no basis to distinguishing between voluntary and non-guaranteed overtime payments for the purpose of calculation compensation under the Working Time Regulations.

Submissions

47. The claimant’s case is that she worked over her 16 hours on numerous occasions and has provided documentary evidence of this in the bundle (pg 30-37). She does not agree that she had to have this authorised before it happened but in any event at some period, she was asked to take on additional work.

48. The respondent’s case is that the claimant did not work more than the scheduled hours save for the occasions now accepted by the respondents it’s oral evidence that in particular the respondent casts doubt on the diary entries provided by the claimant.

Discussion and Conclusions

49. As set out above I concluded that the claimant did work over the hours that were discussed with her at her interview. I am satisfied that throughout her

employment she worked the hours for which she has set out in the document at page 30. She maintained a schedule of her hours and regularly forwarded these to Ms. Stoker. I do not accept that she has claimed for any hours when she was in fact volunteering for the. She did in fact work the hours which she has stated.

50. The question which I have to ask myself is this what is the sum that is properly payable under her contract of employment. As originally discussed, her contract was to be 16 hours per week roughly 64 hours every four weeks, and she would have time off to recover any payment any overtime she undertook. I am not satisfied at any time that the claimant was told she had to have her overtime hours authorised.

51. From the beginning there was a greater workload than either the claimant or Ms. Stoker anticipated. This was due to a variety of factors including; re-opening the stadium after lockdown and the number of matches which were played at home was greater than expected.

52. In relation to work over 16 hours I have heard no evidence that the claimant had to seek permission before she did so. The agreement was that she would take time off for any hours over the agreed 16. It is also clear that because of Ms. Stoker being absent the claimant took on even more work and was unable to take time off to compensate herself for this. This continue until she left the respondent's employment.

53. It is clear that during the period up to 11th September 2021 the respondent was aware the claimant was working beyond her contracted hours. Although it dispute's the number of hours it did not at the time indicate there was an issue with the work she was doing or that she should not do it, or that it had to be authorised.

54. I concluded that having indicated the work would be paid, as a gesture of goodwill, the respondent accepted she had carried out the work, but it didn't want to pay her for it. At this time, September – October 2021 there was no indication from Mr Hobin or Ms. Stoker that the claimant had to have additional work authorised by Ms. Stoker or anyone else.

55. It was following this that the written contract was issued. This did not stipulate that the claimant had to obtain permission to work additional hours. Nor was this set out on any other occasion when the issue of hours was raised.

56. The respondents case seems to be that I should imply into the contract of employment a term that the claimant is required to seek permission. I do not agree. The oral contract clearly envisioned that the claimant may work beyond her 16 hours in any one week and that she should limit her hours in the following week to ensure she didn't exceed 64 hours per month. However, the contract has not been expressed as working 64 hours in a four-week period rather a 16 hour week.

57. Clause 11 in the written contract is clear that employees must be flexible in their working and makes no reference to seeking permission for overtime.

58. I note that in its response to the claimant's schedule, the respondent simply made a blanket denial of her hours. This is clearly incorrect as was established in the cross examination of Mr Hobin. He readily accepted that there were times the claimant exceeded her 16 hours. Indeed, the Board seem to have recognised this too in offering the claimant the equivalent of 125 hours as a 'goodwill gesture'.

59. These assertions make me query the whole of the respondent's evidence. It has not provided any documentary evidence in relation to the hours worked, even though the claimant was diligent in submitting them to Ms. Stoker. Having reviewed the emails it appears that Mr Attwood simply paid the claimant 16 hours per week regardless of any paperwork she submitted.

60. I turn to the question of taking time off in following weeks to ensure the hours did not exceed 64. I am satisfied on the evidence that the opportunities for the claimant to do this were limited and therefore her hours worked regularly exceeded 16.

61. I have considered Section 27(1) Employment Rights Act 1996 and the phrase 'any sums due in relation to their employment 'in particular the reference to emoluments, and the definition of emoluments in Hochstrasser v Mayes[1960] AC376, as something in the nature of a reward for service, for "acting as all being an employee".

62. Reading Clause 11 of the employment contract and the need for flexibility together with the definition under section 27 Employment Rights Act and the decision in New Century Cleaning Company Limited V Church [2000] IRLR 207CA I have no hesitation in concluding that the claimant is entitled to be paid for the hours work over and above the 16 contracted hours.

63. I am satisfied that the claimant's claim does not include any work undertaken as a volunteer. The claimant attempted to be flexible in her working pattern but frequently this was not possible. There were occasions where the respondent at the least acquiesced in her working arrangements and during the period of Ms. Stoker's absence relied on her to carry out additional duties. Having raised the question of additional hours the respondent did not make it clear that the claimant needed permission to exceed 16 hours per week. Nor did it provide her with a job description to ensure she carried out only the work she was required to do.

64. The claimant is therefore entitled to be paid for the additional 264 hours she worked at £12 per hour is a total of £3168.

65. Turning to the question of the holiday pay. The holiday year was 1st January to 31st December. Under the contract the claimant is entitled to 26 days holiday per annum but this is reduced because her working hours were 16 per week. By 31st December 2021 the claimant had accrued 10.4 days holiday. For the period up to 2nd March the claimant accrued a further 1.73 days. This equates to 83.2 and 27 hours, a total entitlement of 110.2 hours.

66. Under the Working Time Regulations and the Employment Rights Act, the claimant does not accrue additional holidays for her overtime rather the rate at which she is compensated for untaken annual leave is increased.

67. I have reviewed the claimants schedule of hours worked (page 30), taking the 12 last weeks, i.e., from 6th December 2021 the claimant worked a total of 248 hours. At £12 per hour this is a total of £2,979. Her normal weeks' pay therefore is £248.25.

68. The respondent has paid compensation to the claimant for untaken leave the at the rate of £12 per hour, a sum of £1,322.4. The claimants' normal weeks' pay is £248.25. This equates to £15.51 per hour. Her compensation therefore should have been £1709.20. She has been underpaid by £386.40.

69. Accordingly I find both claims succeed.

Employment Judge AE Pitt

Date 22nd March 2023