Case Number: 2301238/2016

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE ELLIOTT (sitting alone)**

BETWEEN:

Ms S Hady

Claimant

AND

Ms R Harris trading as Spray Tan Angels

Respondent

ON: **13 March 2017**

Appearances:

For the Claimant: **In person**

For the Respondent: **In person**

JUDGMENT ON RECONSIDERATION

The Judgment of the Tribunal is that:

1. The judgment of 1 November 2016 is revoked and is taken again.
2. The claim is dismissed.

REASONS

1. This judgment was delivered orally on 13 March 2017.
2. By a claim form presented on 6 June 2016 the claimant Ms Samya Hady claims unlawful deductions from wages. The case was heard on 1 November 2016. The respondent did not appear. The claim was

unopposed and succeeded.

3. The claim was originally due to be heard on 5 September 2016. The claimant applied for a postponement on grounds of a family emergency. In addition the tribunal received a telephone call from the respondent on the morning of 5 September 2016 saying that she was unwell and would not be able to attend. The postponement was granted by Employment Judge Hall-Smith.

4. On 4 November 2016 the respondent applied for a reconsideration of the judgment.

5. This reconsideration hearing was originally listed for Friday 3 March 2017. The respondent made an application that the hearing take place on a Monday and this application was granted by Regional Employment Judge Hildebrand.

The issues

6. The issue for the tribunal was whether the respondent made unlawful deductions from the claimant's wages by failing to pay her for the periods relied upon by the claimant.

The name of the respondent

7. Ms Harris explained that Spray Tan Angels is her trading name. It is not a limited company. The name of the respondent was therefore changed to Ms R Harris trading as Spray Tan Angels.

Witnesses and documents

8. The tribunal heard from the claimant and from the respondent.

9. A break was taken so that the parties could make copies of the documents upon which they wished to rely. I had about 28 pages from the respondent and 2 pages from the claimant plus a list of dates for which she claimed.

10. I also offered the parties an opportunity to speak to each other to see if they could resolve matters. Neither party considered that this would be useful as they had tried previously to resolve matters without success.

Findings of fact

11. The claimant worked for the respondent as a trainee beauty therapist between the dates 4 November 2015 to 17 February 2016. I find that the claimant started work for the respondent on 4 November 2015 and not 2 November 2015 as asserted, because she signed a contract on 4 November stating that her employment began on 4 November 2015.

12. The claimant's case was that the respondent failed to pay her wages in the sum of £770.50 for the period 16 January 2016 to 17 February 2016 based on 115 hours at £6.70 plus £72.75 for two weeks in hand. Judgment was

given for the total amount as the claimant as unopposed at the last hearing.

13. As to the reason for non-attendance on 1 November 2016, the respondent produced a sick note dated 14 November 2016 in the name of Rebecca A Lee. It covered the period from 2 to 14 November. Ms Harris said the certificate was for herself in her maiden name. Ms Harris produced identification in that name to the claimant who was satisfied with it. I was therefore satisfied and find that the medical certificate related to the respondent.

14. The sick note was for a period commencing on the 2 November 2016. It did not cover the date of the hearing on 1 November 2016. Ms Harris said this was an error on the part of her GP. I heard oral evidence from Ms Harris who said she was in St Thomas's Hospital on the date of the hearing with the condition specified in the sick note. The claimant did not wish to challenge this evidence so I accepted it and proceeded to hear the merits of the case.

15. It is agreed that the claimant's rate of pay was £6.70 per hour. The respondent pays two weeks in arrears. It is also not in dispute that the last payment to the claimant of £207.70 was made into her bank account at the end of March 2016, received by her on 31 March 2016. The claimant accepts that this should be set off from the amount of her claim. Setting this off from the amount claimed of £843.25 reduced the amount of the claim to £635.55.

16. The claimant's position is that she was unpaid for 115 hours and that she was due to be paid for the first two weeks of her employment in the sum of £72.75 (subject to the deduction of £207.70).

17. The respondent produced a clocking in and out sheet for the claimant which the claimant had not seen before this hearing. I took a break to allow the claimant an opportunity to consider this document. Ms Harris said that it showed all the hours worked by the claimant and that staff are required to enter a pin number when they clock in and clock out and the information is then sent to payroll.

18. The claimant confirmed that the clocking in system was introduced in November 2015 after she joined. The respondent showed her how to use the system. It involved inputting a PIN number and selecting her name on a touch screen. It then showed a green light and confirmed that she had either been successfully clocked in our out. The claimant said that she never forgot to clock in our out. She always remembered to do so.

19. It was not in dispute that there were some teething problems with the new system in December 2015. The claimant accepted that those problems had been resolved by January and February 2016, the dates in respect of which she claims that she has not been paid.

20. The claimant produced a list of the dates for which she said she had not been paid. In January the dates were 16, 18, 21, 22, 23, 25, 26, 27, 29 and 30. For February the dates were 1, 3, 5, 13 and 17. The only date agreed by the respondent is 17 February 2016 as this appears in the clocking in record.

21. The claimant said that she kept her own record of hours worked and she transposed these into a spreadsheet which she sent to the respondent. The spreadsheet was not put before me. All I was shown by the claimant was a list of the dates for which she claims. The claimant said she kept her records in a notebook. The notebook was not put before me.

22. So far as the "two weeks in hand" or payment in arrears is concerned, the claimant relies on the respondent's handbook which says "*Relief workers will be paid on a monthly basis two weeks in arrears, into their allocated bank account. On termination, payments will be issued 6 weeks in arrears, into allocated bank account*". The claimant's last day of working for the respondent was not in dispute as 17 February 2016. I find that the claimant was paid for this on 31 March 2016 and this is shown by the payslip put forward by the claimant for £207.70. The payment was made exactly 6 weeks after termination in accordance with the terms relied upon by the claimant in the handbook.

23. There is a very substantial dispute of fact between these two parties as to whether the claimant in fact worked on the dates for which she claimed (other than 17 February itself). The burden of proof is on the claimant.

24. I asked the claimant a number of questions about her working practices to see whether there was evidence that might assist in the determination of this matter. The claimant's evidence was that she never forgot to clock in and out. She did not suggest that she worked on days when she might have forgotten to clock in or out. She accepts that by January and February the problems with the system had been sorted out. She does not therefore suggest that the clocking in system was defective by those dates.

25. I asked both parties if there were client records that might show that the claimant had appointments with particular clients on any of those dates. The respondent said she had checked her records and could not find any. The claimant could not remember the names of any such clients. I therefore had no evidence of any particular client or clients being treated by the claimant on any of those dates.

26. I asked the claimant how she could prove that she had worked on the dates claimed. Unfortunately for the claimant her reply was "I can't."

27. The burden of proof is on the claimant and I have to make a decision on a balance of probabilities. Bearing in mind that the claimant does not suggest that she ever forgot to clock in and out, that she can name no clients she treated on the dates in question, that she accepts that the

clocking in system was working in January and February 2016 and that she has no more than a typed list of dates, I find on a balance of probabilities that she has not satisfied the burden of proof and that her claim is not proven. I find on a balance of probabilities that she did not work on the dates claimed.

28. For the avoidance of doubt I do not find the claimant to be untruthful. I find that she has not satisfied the burden of proof and has not been able to prove that she worked on the dates for which she claimed and I find that she was paid at the end of March for the two weeks in arrears.

The law

29. Rule 70 of the Employment Tribunal Rules of Procedure 2013 provides that a tribunal may, either on its own initiative or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again.

30. Section 13(1) of the ERA provides an employer shall not make a deduction from wages of a worker employed by him 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.

Conclusions

31. Based on my findings above the judgment of 1 November 2016 is revoked and is taken again. Upon hearing the evidence from both sides, the claim is dismissed.

Employment Judge Elliott

Date: 13 March 2017