EMPLOYMENT TRIBUNALS

Claimant: Miss T Holyoake

Respondent: Eva Prejchova trading as Skin Guru

Heard at: **London South** **On:** **20th November 2018**

Before: **Employment Judge Tsamados (sitting alone)**

Representation
Claimant: In person
Respondent: In person

JUDGMENT

The Judgment of the Employment Tribunal is as follows:

1) The claimant has had the amounts of £930 gross and £610 gross unlawfully deducted from her wages;
2) The claimant is entitled to damages for breach of contract in respect of her notice entitlement in the sum of £1040 gross;
3) The respondent must pay to the claimant a total award of £2,580 gross.

REASONS

Written reasons were requested by the claimant at the hearing.

Claims and Issues

1. By a claim form presented to the Employment Tribunal on 20th August 2018, the claimant has brought complaints of unauthorised deductions from wages in respect of her wages for the month of June 2018, her accrued entitlement to annual leave and damages for breach of contract for her notice period.

2. In her response presented on 4th October 2018, the respondent accepted that the claimant was owed wages for June 2018 but not to the extent claimed, she denied owing any payment for accrued holiday, this having been paid to the

claimant as part of her monthly wages and that the claimant was not entitled to notice pay, having failed to return to work after 22nd June 2018.

3. The correct name of the respondent is Eva Prejchova trading as Skin Guru and the respondent's name is amended accordingly.

4. The issues to determine were as follows:

   3.1 What wages were properly payable to the claimant in respect of her entitlement to her June 2018 wages and her accrued holiday pay on termination of employment? What amount did she receive from the respondent and with regard to the holiday pay by reference to the Working Time Regulations 1998? Did the respondent have an authorised reason to make deductions from (including a 100% deduction) from those payments? If not what amount was deducted unlawfully?

   3.2 Whether the claimant was employed by the respondent as an employee and if on termination of employment she was entitled to damages for breach of contract I respect of her notice period? If so, in what amount?

Evidence

5. I heard oral evidence from the claimant and the respondent. Apart from four e-mails provided by the respondent, the parties had brought no documents with them. They both were under the erroneous belief that the matter was being dealt with by Acas and appeared to misunderstand the Tribunal's role in the matter and the need to provide evidence in support.

6. The e-mails consisted of one from a former employer of the claimant and three from the respondent's customers, all of which made adverse comments about the claimant's character and capably to do her job. As those persons were not present to give evidence I gave them no weight. But in any event they did not on the face of it appear to be relevant to the issues that I had to determine.

7. I was also shown copies of the claimant's pay slips, WhatsApp messages between the claimant and respondent sent on 22nd June 2018 and a handwritten note from the respondent to the claimant as to the way in which holiday was paid as part of the claimant's wages. These documents were on the parties' mobile telephones.

Findings

8. I set out below the findings of fact that I consider relevant and necessary to determine the issues that I was required to decide. I do not seek to set out each detail provided to the tribunal, nor make findings on every matter in dispute between the parties. I have, however, considered all the evidence provided to me and have borne it all in mind.

9. The claimant was employed as a Beauty Therapist by the respondent from 16th February 2018 until 22nd June 2018. She had no written contract of employment or particulars of employment.

10. The respondent paid the claimant on an hourly rate of £10 gross and had intended to employ her on a self-employed basis from March 2018 onwards. I asked the respondent what the difference was between employment on an hourly basis and being self-employed and she said that the claimant would be more responsible for her clients and would invoice for her services. However, the claimant did not agree to this proposed arrangement and the employment relationship continued with her being paid on an hourly basis.

11. The claimant worked what the parties described as "irregular hours". I was shown her pay slips for February to June 2018. She was paid £10 per hour gross and her work pattern was 1 week working 2 days and 1 week working 3 days. In addition, she worked alternate Saturdays and she also cover for the respondent on Tuesdays (when she travelled to Prague) but this determined on a week by week basis, if the claimant was able to dos so. The normal working day was 11 hours, but Saturdays were 8 hours per day. The claimant was also entitled to tips as well as commission on products sold.

12. The claimant was provided with pay slips showing that income tax and national insurance were deducted using the PAYE system. The claimant was entitled to holiday pay and required to give notice of termination of employment. It was evident that she was under the control of the respondent in terms of her working requirements. In the absence of anything further I find that claimant was employed by the respondent as an employee.

13. The pay slips contained the following information as to hours and payments made less deductions for income tax and national insurance (NIC):

    February 2018
    51 hours x £10 per hour = £510
    Plus tips £1
    Total paid = £511 gross and net

    March 2018
    91 hours x £10 per hour = £910
    Commission £13.30
    = £923.80 gross
    Less NIC £29.26
    Plus tax refund £96.80
    Total paid = £991.34 net

    April 2018
    144 hours x £10 = £1440
    = £1440 gross
    Less
    Tax £90.20
    NIC £88.56
    Total paid =£1261.24 net

    May 2018
    132 hours x £10 = £1320
    Plus commission £16
    = £1336 gross
    Less

Tax 69.60
NIC £76.08
Total paid = £1190.32 net

June 2018 (which the respondent sent to the claimant on 19th August 2018 but remains unpaid)
119 hours x £10 = £1190
Plus tips £10
= £1200 gross
Less
Tax £42.40
NIC £59.75
Total paid = £1097.84 net

14. The claimant resigned on notice in early June 2018 due to expire on 27th July 2018. The respondent wanted her to stay longer until the end of August 2018 but in the end 27th July 2018 was settled upon. However, having text the respondent on the morning of 22nd June 2018 to say that she had a migraine and would not be able to attend work, the respondent sent a text indicating that her employment was in effect terminated forthwith.

15. The text messages are set out below:

07.26 hours:

"Eva I won't be in today. I have a bad migraine. I've just got ready and been sick so I can't now drive. Sorry."

08.01 hours:

"You clearly are going to mess me around. Bring me the key today in my hand!! If not, I am going to change the lock and will take it from your wages."

10.39 hours:

"Don't threaten me Eva. I have a migraine… it can't be helped! If you don't want me to come back to work that's fine but your key won't be returned until I've been paid. In full. Plus my holiday that's owed. And if you want to go down the road of ducting (sic) money from my wages then I will take this further? (sic)"

16. Whilst the respondent suggested that she had good cause to react in the way that she did, citing various past problems with the claimant's performance and attendance at work, she said that she was not in fact dismissing the claimant but it was the claimant who had not come back to work. However, this was not supported by the wording of her text message, in particular requesting return of the keys to the work premises, which is in essence words equivalent to a dismissal and her subsequent action, very shortly after the message, in changing the locks. As the claimant said, how could she return given the respondent's text message and given that she changed the locks?

17. Further, I take into account that the respondent did not refer to matters giving rise to grounds for summary dismissal in her response and is in any event

arguing that the claimant dismissed herself by not returning to work after 22nd June 2018. To be fair to the respondent, there is a reference to "letters, text and correspondence from dissatisfied customers" being "available on request" but that is all. I also note that three of the four e-mails provided by the respondent today are from what could be described as "dissatisfied customers" but as I have indicated I attach no weight to them as they are written in general terms with no dates of events referred to and the authors are not here to give evidence.

18. The parties agreed that the claimant was entitled to 5 weeks' paid holiday per year. This is in fact less than the statutory entitlement of 5.6 weeks under the Working Time Regulations 1998. The respondent did not pay any holiday pay to the claimant at the time any holiday was taken. She was operating what can only be described as a very rudimentary system of paying rolled up holiday pay whereby she added an ad hoc number of hours each month to the hours actually worked by way of payment of holiday pay. This was not set out clearly to the claimant until belatedly in her employment. The respondent showed me a hand written note to the claimant on her mobile phone in which she had attempted to explain the method of payment to her. However, the claimant did not understand it. It was not clear to me what methodology was used. The respondent admitted that she kept no records of accrued holiday earned and it did seem as if an ad hoc number of hours were included in the claimant's monthly pay. I refer to paragraph 6.1 of the respondent's response which shows the number of hours allegedly worked by the claimant during February to June 2018 and the number of hours actually paid:

    "Feb – worked 45 hours page 51 hours
    March – worked 84 hours paid 91 hours
    April – worked 134 hours paid 144 hours
    May – worked 120 hours paid hundred 132 hours
    June – worked 90 hours paid 119 hours
    **Please note June pay is still outstanding*"*

19. The respondent had no evidence with her to support the calculation of hours worked as opposed to hours paid or how the number of hours of holiday had been determined. From what she said it was apparent that she had no knowledge of the statutory requirements to keep records of hours worked and holiday accrued and taken.

20. The claimant did not return to work from 22nd June 2018 onwards and has not been paid her June 2018 wages. She did not obtain any alternative work after leaving the respondent's employment until August 2018.

21. The claimant claims that she was not paid for June 2018 during which she worked 93 hours or for her notice period for which she says she would have worked 104 hours (4 Wednesdays and 4 Fridays at 11 hours per day, 2 Saturdays at 8 hours per day), or her accrued holiday pay which she says was 61 hours (using the Gov.Uk holiday calculator based on irregular hours worked of 511 hours – which I checked online during the hearing).

22. The respondent claims that the claimant is due to be paid 119 hours for June 2018 (90 hours plus 29 hours of holiday pay), has been paid all of her holiday as set out in her ET3 (this comes to a total of 64 hours) and was not entitled to

be paid for her notice period because she did not come back to work after 22nd June 2018.

Relevant Law

23. Section 13 of the Employment Rights Act 1996:

'(1) 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.

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(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 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…'

24. The Working Time Regulations 1998.

25. The Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994.

Conclusions

Notice

26. The Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 gives the Tribunal the power to determine complaints by employees in respect of damages for breach of contract arising or outstanding on termination of employment.

27. I find that the claimant was an employee. She was dismissed from work in circumstances where she was entitled to notice of termination. Given that she was leaving on 27th July 2018 in any event, her entitlement as damages for breach of contract would be for the 104 hours that she would have worked ordinarily at £10 per hour which amounts to £1040 gross.

Wages

28. Section 13 of the Employment Rights Act 1996 prevents an employer from making any deduction from wages unless it is: authorised by statute, for example income tax and national insurance payments; authorised by a relevant provision in the contract before the deduction was made; or it was previously agreed in writing by the worker that the deduction may be made. Wages include any sums payable in connection with employment, including holiday pay. A deduction includes 100% non-payment of wages.

29. The Working Time Regulations 1998 ("WTR") give workers the right to a minimum of 5.6 weeks' paid annual leave. If a worker works irregular hours or shifts, the calculation is probably based on the average number of hours / days worked each week. The Gov.UK website contains a calculator which determines the amount of leave entitlement for those working irregular hours and appears to me the most accurate method of assessment. There is no longer a provision for rounding up the leave entitlement if it does not work out as exact days.

30. If there is no collective or workforce agreement setting the dates of the holiday year and no written agreement between the employer and worker on this point, the leave year starts on the anniversary of the start of their employment.

31. On the termination of employment, a worker is entitled to receive a payment for any untaken holiday in the last holiday year, calculated proportionally to the leave year.

32. The practice of 'rolled-up' holiday pay is unlawful, ie simply increasing the basic wage to cover holiday pay, but not making any payment at the time holiday is taken (**Robinson-Steele v R D Retail Services Ltd; Clarke v Frank Staddon Ltd; Caulfield and others v Hanson Clay Products Ltd (formerly Marshall's Clay Products Ltd**) [2006] IRLR 386, ECJ). However, an employer may set off any sums actually paid in advance under transparent and comprehensive arrangements **(Robinson-Steele; Lyddon v Englefield Brickwork Ltd** [2008] IRLR 198, EAT).

June 2018 wages

33. I find that the claimant was lawfully due to be paid for 93 hours worked in June 2018 and was not paid her wages for that month at all. I therefore find that the respondent unlawfully deducted the amount of 93 x £10 per hour which amounts to £930 gross from the claimant's wages.

Holiday pay

34. I find that the claimant was lawfully due to be paid for 61 hours of accrued holiday and that the respondent's arrangement to pay rolled up holiday pay was not comprehensive and transparent. As a result the respondent is not allowed to set payments made in respect of holiday against the claimant's holiday entitlement. This means that the respondent has unlawfully deducted the amount of 61 x £10 per hour which amounts to £610 gross from the

claimant's wages.

Total Award

35. I make a total award to the claimant of £2,580 gross payable by the respondent.

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Employment Judge Tsamados
Date 22nd November 2018