



EMPLOYMENT TRIBUNALS

Claimant: Miss I Kosiba

Respondent: Allsafety Limited

Heard at: North Shields Hearing Centre **On:** 10 July 2018

Before: Employment Judge Johnson

Members: Miss E Jennings

Mr S Carter

Representation:

Claimant: In Person

Respondent: Mr T Wilkinson of Counsel

RESERVED JUDGMENT

1) The unanimous judgment of the Employment Tribunal is as follows:-

- (i) The claimants complaint of unauthorised deduction from wages is well founded and succeeds. The respondent is ordered to pay to the claimant the total sum of £988.70, being wages unlawfully deducted. That is a net amount and the respondent shall be responsible for the payment of any income tax and national insurance contributions there on.
- (ii) The claimants complaint of being automatically unfairly dismissed for reasons related to the National Minimum Wage contrary to Section 104 A of the Employment Rights Act 1996, is not well founded and is dismissed.
- (iii) The claimants complaint of being subjected to detriment for reasons related to the National Minimum Wage pursuant to Section 23 of the National Minimum Wage Act 1998, is not well founded and is dismissed.
- (iv) The claimants complaints of breach of contract (failure to pay

notice pay) is not well founded and is dismissed.

REASONS

- 1) The claimant attended in person and conducted these proceedings herself. The claimant gave evidence herself and also called to give evidence her partner Mr Honor Ahmad. The Tribunal had the benefit of assistance from an interpreter (Mr A Najim) whilst Mr Ahmad gave his evidence. The respondent was represented by Mr Wilkinson of Counsel who called to give evidence Mr Mark Turner (General Manager), Mr Mick Coleman (Operations Director) and Mr Hugh Edeleanu (Managing Director). There was an agreed bundle of documents marked R1, comprising an A4 ring binder containing 456 pages of documents.
- 2) By claim form presented on 12 December 2017, the claimant brought complaints against Allsafety Limited and Mr Hugh Edeleanu, alleging unauthorised deduction from wages, failure to pay accrued holiday pay, failure to pay notice pay, unlawful sex discrimination, automatic unfair dismissal for complaining about the National Minimum Wage and being subjected to detriment for complaining about the National Minimum Wage. At an earlier case management hearing before Employment Judge Garnon, the claimant acknowledged that she had no claims under the Equality Act, nor did she have any claims personally against Mr Edelanu. Those claims were dismissed upon withdrawal by the claimant. The remaining claims are that the claimant had for a period of time not been paid in accordance with the National Minimum Wage and accordingly that there had been an unlawful deduction from her wages contrary to Section 13 of the Employment Rights Act 1996. The claimant alleges that when she complained about not being paid the National Minimum Wage, she was subjected to various detriments by the respondent and ultimately dismissed for that reason.
- 3) At the start of this Hearing, Mr. Wilkinson for the respondent formally conceded that the claimant had, for a short period of time, been paid wages which when properly calculated, showed that she had been paid less than the National Minimum Wage. The respondent calculated that the claimant was owed the sum of £538.70. Mr Wilkinson conceded that Judgment should be entered in favour of the claimant for that amount. The claimant formally accepted that calculation. Following the evidence of the respondent's witnesses, Mr Wilkinson conceded in his closing submissions that the respondent also owed to the claimant a further £450.00, being rent for December 2017 for those premises which the claimant occupied, which rent should not have been deducted from the claimant's wages. Mr Wilkinson and the claimant agreed that the sum owed to the claimant by the respondent in respect of wages unlawfully deducted, amounted to £988.70. It was agreed that Judgment should be entered in favour of the claimant in that amount.
- 4) The remaining claims remained contested, namely that the claimant had

been subjected to detriment for complaining about not being paid the National Minimum Wage and that she was ultimately automatically unfairly dismissed for the same reason.

5) Finding of Fact

Having heard the evidence of the claimant and Mr Ahmad and the three witnesses for the respondent, having examined the documents to which it was referred and having carefully considered the closing submissions of Mr Wilkinson and Miss Kosiba, the Tribunal made the following findings of fact on a balance of probability.

- 6) The respondent company operates the theme park known as “Diggerland” at Langley Park in County Durham. The respondent operates a number of similar parks elsewhere in the country. Visitors can observe various pieces of agricultural and earth moving equipment in action and are permitted to operate certain items of machinery themselves.
- 7) The claimant is of Polish decent and was employed by the respondent from 30 January 2017 until 9 November 2018 as an office manager. A copy of her statement of terms and conditions of employment appears at page 124 in the bundle. It states that she will be paid a salary of £17,000.00 per annum. It states that her hours of work will “normally be from 8.00 to 17.00, equals 45 hours per week.” Dividing £17,000.00 by 52 weeks and again by 45 hours, gives an average rate of £7.27 per hour. As at the 1 February 2017, the National Minimum Wage rate was £7.20 an hour, increasing to £7.50 an hour on 1 April 2017.
- 8) The claimant`s evidence to the Tribunal was that once she had completed a probationary period, she was entitled to receive an increase in salary, provided that her performance was “satisfactory”. Nowhere in the bundle was this confirmed in writing. Nevertheless, the Tribunal accepted that the claimant genuinely expected to receive an increase in her salary once she had completed her probationary period of three months.
- 9) It is common ground that the work at Diggerland is seasonal in nature, in that the vast majority of hours are worked over the spring, summer and autumn period, with very few being worked over the winter period. The claimant accepted that she was likely to work far fewer hours over the winter period and that she would be expected to take her holidays over that period. Accordingly, she may well be required to work more than 45 hours per week in busy periods and far less at other times.
- 10) When she first accepted the offer of employment from the respondent, the claimant was living several miles away. Shortly after her employment commenced, she agreed to take a tenancy on a flat located on the Diggerland site, which the flat is owned by H.E. Group Limited (an associated company of the respondent). The rent for the flat was agreed to be £450.00 per month. It was agreed that this rent would be deducted from the claimant`s salary and paid by the respondent to H.E. Group Limited. The initial arrangement was that the claimant`s monthly salary would be reduced by the sum of £450.00, with that £450.00 being paid by the respondent to H.E. Group Limited. The effect of that arrangement was

that the claimant's gross salary was reduced, which in turn reduced her liability to both income tax and national insurance contributions. By doing so however, the respondent reduced the salary payable to the claimant to a rate which fell well below the National Minimum Wage.

- 11) The National Minimum Wage rate increased to £7.50 per hour on 1 April 2017. By the end of April, the claimant had completed her probationary period and considered that because she was performing well, then she should be paid an enhanced salary based upon her performance. The claimant considered that her work often exceeded her basic office management duties and hours and that this justified not just an increase due to the change in the National Minimum Wage, but a general increase to reflect her performance and commitment to the respondent's business.
- 12) The claimant's evidence was that she raised the question of the National Minimum Wage on a number of occasions with her supervisors Mr Turner and Mr Coleman, but without success. The claimant informed the Tribunal that she continued with her efforts to contact Mr Coleman about this matter throughout June and July.
- 13) Mr. Turner's evidence was that the claimant "seemed to be transfixed on the pay rise she was promised. She felt that the company was out to get her and that she was getting a raw deal and wouldn't be made a fool of and this had happened with a previous employer. She was not going to fall for it again." Mr. Turner's evidence to the Tribunal was that he sat down with the claimant on a number of occasions and tried to explain to her that she was being paid in accordance with the National Minimum Wage and that nobody intended to take advantage of her.
- 14) Mr Coleman's evidence was that he recalled the claimant mentioning to him matters relating to her salary and hours, sometime in May 2017 and that he had referred the claimant to the respondent's payroll department to resolve any such issues. At no time did the claimant raise any formal grievance or submit any written query or complaint about the calculation of her wages with regard to the National Minimum Wage.
- 15) Mr Edeleanu's evidence was that "after a few months" the claimant complained to him that she was being paid "just below the National Minimum Wage rate" which had risen by 30p per hour on 1 April 2017. The claimant requested a meeting with Mr Edeleanu to discuss matters relating to her salary. By e-mail dated 11 July (page 186) Mr Edeleanu wrote to the claimant:-

"Firstly I would like to thank you for the work you are doing at Diggerland Durham. Secondly I hope to be coming up to Durham in the not too distance future and would like to talk to you face to face on this subject including certain targets. Certainly I was hoping for a better improvement in visitor numbers coming to Diggerland Durham, and that is obviously one of your key tasks. Pending my visit to Diggerland Durham and our face to face chat, I am happy to implement a £200.00 per month additional payment (equating to £2,400.00 per annum) as an interim measure. When I come up we will be able

to chat face to face and I am sure that we will agree a satisfactory package going forward. I will implement this with effect from the end of this month (1 August 2017) and we will have a face to face chat in the not too distance future when I come up to Diggerland Durham.”

- 16) The claimant and Mr Edeleanu met at Diggerland Durham on Saturday 5 August. Following that meeting, Mr Edeleanu wrote to the claimant by e-mail dated 7 August, a copy of which appears at page 187 in the bundle. The letter states:-

“Following our discussions on Saturday I confirm your revised remuneration from 1 August 2017 at an annual figure of £19,000.00 for an average of 45 hours per week. All other conditions of your employment and position remains the same and I confirm that this is continuous employment. Thank you for carrying out your work accurately and diligently at Diggerland Durham which was very evident on my last visit. I was hoping that you would be able to join myself and Mark Turner for a meeting on marketing while I was up there but I think you had to leave early so I had the meeting with Mark Turner without you. Hopefully he has fully briefed you, but we must concentrate on increasing the visitor numbers to Diggerland Durham (one of your main roles) because currently the hoped for increase in visitor numbers at Diggerland Durham compared to last years visitors numbers has not materialised. Can you and Mark Turner please sit down and do your very best to ensure that Diggerland Durham is actively promoted in the area and we look forward to the visitor numbers increasing during the second half of the season.”

- 17) The claimant replied later that day stating:-

“I am afraid I cannot accept your offer unless all the aspects of our discussion are taken into consideration and are dealt with accordingly. I am still expecting your decision towards the past months as we discussed in regards in my salary being under the National Minimum Wage since April. Please what is your decision regarding this.”

- 18) Mr Edeleanu replied on 8 September (page 190) in the following terms:-

“I know that you are not accepting any new contracts until this has been resolved. How much (total) do you believe you have been underpaid due to NMW? Please give me your calculations.”

- 19) The claimant replied later the same day stating:-

“My salary is £17,000.00 a year with 45 hours per week which puts me in at £7.26p per hour. After the first remuneration we stated that I am working 28 hours a week and earning

£11,600.00 a year. However I am to continue my 45 hour work shift. With this I do not have to pay tax as the flat is deducted from it for which I am grateful. Nevertheless, with this I am working 28 hours for £7.96p per hour and another 17 hours for £6.10p per an hour (for the accommodation). Either that or I am paying £586.38 per month for my accommodation, which is £136.38p more than I have on the contract. I believe that I have been overpaying for the flat rent by £136.38p. This is not deducted towards my tax or national insurance. With the offer of £19,000.00 per year it would put me over the tax line and in the end my pay slips would be for less that I am receiving now. This way I cannot accept your offer as it would not solve anything. I understand this is a difficult issue, but I would like to know if my calculations are correct.”

20) Mr Edeleanu evidence to the Employment Tribunal was that it was understood that the claimant wished to consider at their meeting whether or not she had been paid less than the National Minimum Wage. Mr Edeleanu`s evidence to the Tribunal was that his proposed increase in the salary “would be sufficient to discharge any arrears from the previous period”. Mr Edeleanu confirmed that his offer to pay £200.00 per month in the interim was not in fact implemented, as the revised salary of £19,000.00 per annum was put in place with effect from 1 August. Mr Edeleanu`s evidence was that he considered that to be a reasonable figure based upon the discussions he had with the claimant at their meeting. £19,000.00 per annum for 52 weeks at 45 hours per week provides an hourly rate of £8.12, which is above the National Minimum Wage.

21) Following on from their meeting and exchange of correspondence, Mr Edeleanu formed the view that the claimant was conflating her true salary (whether £17,000.00 per annum or £19,000.00 per annum) with the adjusted figure, once her rent had been deducted. As a result, Mr Edeleanu decided that the claimant`s salary should be paid in full and that the respondent would no longer deduct the claimant`s rent from her salary (either from the top line, or the bottom line.) The claimant`s evidence was this decision was made without any discussion with her and without her prior approval or indeed her consent. The claimant`s view was that she would liable to additional income tax and national insurance contributions, as her gross salary no longer took into account the rent of £450.00 per month.

22) Mr Wilkinson for the respondent drew the claimant`s attention to the terms of the tenancy agreement in respect of the flat, a copy of which appears at page 129-136 in the bundle. That agreement clearly states that, in respect of the rent, “the method of payment will be standing order/direct debit/deduction from wages as nominated by the landlord.” It was pointed out to Mr Wilkinson by the Tribunal that the landlord is in fact H.E. Group Limited and not the respondent. Mr Wilkinson accepted that, but stated that the decision as to how the rent should be paid, was (according to the tenancy agreement) to be made by the landlord and not by the claimant or the respondent. Mr Wilkinson accepted that Mr Edeleanu controls both Allsafety Limited and H.E. Group Limited and therefore it was effectively his decision as to how the rent should be paid. Nevertheless, the Tribunal accepted that the claimant was not contractually entitled to have the rent deducted from her wages, either before or after income tax and national insurance contributions were calculated.

23) After the decision was taken that the rent should no longer be deducted from the claimant's salary, the claimant failed to pay the rent for the months of August – October inclusive. The claimant was contacted on a number of occasions by Mr Turner and Mr Coleman, enquiring as to when she was to pay the rent and if not, why not. The claimant's response was that she required a formal written demand for payment of the rent before she would pay it. The claimant considered inappropriate that work colleagues should be contacting her about her rent and further that the issue of the rent was inextricably entwined with her ongoing issues about the calculation of her salary.

24) Mr Coleman, Mr Turner and Mr Edeleanu all stated that there were certain aspects of the claimant's performance in her role as manager, which caused the respondent concern. Targets had been set for visitor numbers for Diggerland in Durham and the respondent's evidence was that those targets were not being met. The claimant accepted that it was part of her role to increase the numbers and to do so by attracting additional visitors through advertising, marketing and other such means. The claimant's evidence was that she undertook far more duties than were included in her official job description and that she actually worked more than the 45 hours per week referred to in her contract, in order to do so. The claimant challenged whether targets for the Durham Diggerland had been met, particularly when compared with other sites in the country. The Tribunal accepted the evidence of the respondent's witnesses about the accuracy of the targets and the shortfall in the number of visitors to the Durham site. In simple terms, the Durham site had failed to meet its targets.

25) The Tribunal also accepted the evidence of the respondent's witnesses to the effect that it had been common practice in the past for the role of manager as occupied by the claimant to be carried out during the busy periods in spring summer and autumn. It was unnecessary to have such a manager over the winter period. The claimant's evidence was that she had in place a number of ideas for improvements, which she intended to implement over the winter period, so that the park was ready to improve its visitor numbers during the 2018 season. The claimant's evidence for the Tribunal was that she was led to believe from the outset that hers would be a permanent appointment for at least 12 months and that this was reflected in the minimum term of the tenancy for the flat. The Tribunal found that there was no fixed term contract in term for the claimant and certainly no minimum period of time for which she was guaranteed employment by the respondent. Whilst the terms of the tenancy clearly stated that it would be for a period of 12 months, the Tribunal found that this was in no way whatsoever connected to the length of the claimant's employment.

26) The Tribunal accepted Mr Edeleanu's evidence that the respondent was disappointed with the visitors numbers at the Durham Diggerland site for the 2017 season. Mr Edeleanu came to the conclusion that the respondent could not sustain the claimant's salary over the quiet, winter period and that her employment would be terminated at the end of the visitors' season. On 2 November 2017, Mr Edeleanu attended a training meeting at the Komatsu factory in Birtley, together with other Diggerland staff. At the end of the meeting, Mr. Edeleanu invited the claimant, Mr. Coleman, Mr. Turner and Mr. Daniel Marsden to a brief discussion. During this discussion, Mr Edeleanu informed the claimant that she was being dismissed, with 1 weeks notice, effective from 9 November. Mr Edeleanu informed the claimant that he would be happy to consider an application from her to be re-engaged at the start of the next season in 2018. Mr Edeleanu asked the claimant to take any outstanding holiday during the weeks

notice.

27) The claimant`s evidence to the Tribunal was that in the course of this discussion, Mr Edeleanu had said to her that, “he never had so much trouble with any other worker” and that “my case involved too many people in the company.” It was accepted by Mr Edeleanu in cross examination, that this meeting had taken place in a common area in the Komastu factory, but Mr Edeleanu, Mr Turner and Mr Coleman all confirmed that no such comments had been made by Mr Edeleanu. The claimant accepted that she had failed to mention such comments in her subsequent grievance letter. No mention is made of any such comments in Mr Ahmads statement and he too accepted in cross examination that the claimant had not mentioned such comments to him. The Tribunal found it unlikely that any such comments had been made.

28) The claimant made a number of additional allegations about the manner in which she had been treated by other members of the respondent`s staff. The claimant attributed this treatment to the fact that she had questioned whether or not she had been paid in accordance with the National Minimum Wage rates. The relevant allegations are set out in paragraphs 10, 13, 14, 15, 16 and 18 of the witness statements. The allegations are:-

10 – this work environment put an extra pressure and stress on me, made me feel worthless and miserable and resulted in me working longer hours without taking my days off as usually any mistakes made during my absence at work would later bring me more bullying from head office

13 – I replied to that with a suggestion of £300.00 increase (or £9.50 per hour) as I felt my responsibilities were very very high and my duties included much more work than I was expecting at the beginning. Also I expressed my surprise at my key tasks as I was under the impression that I was supposed to provide help to the marketing department with the marketing and not to do all of it myself. Additionally, I was not aware of any targets and more importantly why only I was responsible for them. I suggested that we should discuss more details about the new contract during the face to face chat in August.

14 – Unfortunately the meeting in August did not reach a satisfactory conclusion or agreement to certain terms. Mainly I asked to be paid for the owing sum for the NMW for the previous months from April to August. Mr Edeleanu tried to explain to me that I did not work below the NMW at that time. With that I disagreed. The Mr Edeleanu said that with the new contract my rent would no longer be deducted from my wages. When I disagreed to that as well, Mr Edeleanu decided to leave the room shouting that he would get back to me on that.

15 - Later I wrote an email to Mr Edeleanu suggesting that he reconsiders paying me for the past months and without this I would not accept the contract. Regardless to my points, the new contract was put into practice with the August payroll without my consent to it. This I signalled multiple times to both Mr Colmman and Mr Edelenau trying to resolve this issue.

16 – In September with Mr Coleman we agreed that another meeting between Mr Edeleanu, Mr Coleman and myself should be set for the time after the season during the management meetings in November. We also agreed that I should wait with payments for my rent until then. In the meantime I was contacted for the rent money by other managers previously not involved in the dispute. This made me feel threatened and unwelcome at my work place and made the work environment even more stressful and uncomfortable.

18 – In the meantime I received phone calls also from Mr Coleman on behalf of Mr Edeleanu asking for my rent despite the mutual agreement we reached a few months earlier. These were witnessed by my partner and it was usually late evening or night when I received them. Mr Coleman also asked for an e-mail explaining why I was not paying the rent.

- 29) It was the claimant`s evidence that each of these amounted to a “detriment” and the reason why she was subjected to any such detriment was because she had complained that she was being paid below the National Minimum Wage. The claimant alleged that her treatment at the hands of other employees within the respondents organization, particularly those working at head office, amounted to “bullying”. However, the claimant failed to establish any causal connection between the alleged incidents of bullying and the fact that she had complained about the National Minimum Wage. It is for the claimant to prove that she has been subject to a “detriment”. In **Chief Constable of West Yorkshire Police v Khan (2001 ICR 1065)** the House of Lords established that “there must be a quality in the treatment that enables the complainant reasonably to complain about it. I do not think that it is appropriate to pursue the treatment and its consequences down to an end result in order to try and demonstrate that the complainant is, in the end, better off or at least no worse off, than she would have been had she not been treated differently. I think it suffices if the complainant can reasonably say that she would have preferred not to have been differently.” In **Shamoon v Chief Constable of the Royal Ulster Constabulary (2003 ICR 337)** the House of Lords said that a detriment exists if a reasonable worker would or might take the view that the treatment was in all the circumstances to his or her disadvantage.

30) The Tribunal found that the main thrust of the claimant`s complaints about her salary was that she believed that she was entitled to an enhanced salary based upon completion of her probationary period and what she considered to be her good performance. Nevertheless, the Tribunal accepted that the claimant had raised as an issue a genuine belief that she may have been paid below the National Minimum Wage. The Tribunal found that comments made to the claimant about her performance were in no sense whatsoever connected to her complaint that she was not paid in accordance with the National Minimum Wage. Comments made by employees at the respondent`s head office were similarly wholly unconnected to the question of the National Minimum Wage. Whilst the Tribunal accepted that the claimant did not wish to be pestered about her rent by work colleagues, the Tribunal found that the reason was being pestered for the rent was simply because she had failed to pay the rent and was again wholly

unconnected to any comments she may have made about being paid the National Minimum Wage.

31) With regard to her dismissal, the Tribunal accepted the respondent's witnesses, namely that the principal reason for her dismissal was because of the relatively poor performance of the Durham site over the visitor period, which led to a commercial decision by Mr Edeleanu that he could no longer justify the salary of an office manager over the winter period. The Tribunal found that it was reasonable for the respondent to conclude that it no longer required a manager over that period and that all of the duties which the claimant had been carrying out could be performed by other employees during that quiet period. Because the principal reason for the claimant's dismissal was not because she had raised the issue of the National Minimum Wage, then her complaint of automatic unfair dismissal is not well founded and is dismissed. The Tribunal found that the claimant was not subjected to any "detriment" within the definition set out above and further that such acts or omissions were wholly unconnected to the fact that she had complained about not being paid in accordance with the National Minimum Wage. For those reasons, the claimant's complaints of being subjected to detriment for raising the issue of the National Minimum Wage are not well founded and are dismissed.

Employment Judge Johnson

Date 14 August 2018

Note

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.