



EMPLOYMENT TRIBUNALS

Claimant: Mrs M Ferguson

Respondent: Tuck Inn Café UK Ltd

Heard at: Leeds

On: 17 November 2020

Before: Employment Judge Knowles

Representation

Claimant: Mr Ferguson (Claimant's husband)

Respondent: No attendance

JUDGMENT

The Judgment of the Employment Tribunal is that:

1. The Claimant's claim of unauthorised deductions from wages is well founded. The Respondent is ordered to pay to the Claimant the sum of £4,158.14.
2. Under the provisions of Section 38 of the Employment Act 2002, the Claimant award is uplifted by 4 weeks pay. The Respondent is ordered to pay to the Claimant £749.92.
3. The total amount that the Respondent is ordered to pay to the Claimant is £4,908.06.

REASONS

Issues

1. On 13 July 2020 the Claimant brought her employment tribunal claim for arrears of pay. The Claimant's claim is quite simple. She worked in the café from around 2003 and it changed hands in 2009 to owners who then in 2018 placed the business into the Respondent limited company. At the beginning of lockdown in the UK, Tuesday 24 March 2020, the café was required to shut. She understood she had been furloughed. She has received nothing from the Respondent since then and in her words 'gave up' and secured alternative employment which started 26 August 2020, resigning with immediate effect that day. Her claim is solely for her loss of wages.

2. The Respondent disputes the claim, stating that they applied under the Coronavirus Job Protection Scheme but were not granted an award due to technical reasons which they do not explain in their response.

3. The issues for me to determine are as follows:
- Were the wages paid to the claimant less than the wages she should have been paid?
 - Was any deduction required or authorised by statute?
 - Was any deduction required or authorised by a written term of the contract?
 - Did the claimant have a copy of the contract or written notice of the contract term before the deduction was made?
 - Did the claimant agree in writing to the deduction before it was made?
 - How much is the claimant owed?

Evidence

4. This hearing was undertaken by video using HMCTS's Cloud Video Platform.
5. I heard evidence from the Claimant.
6. The Claimant produced an email dated 15 October 2020 to the Respondent's representative, Regal Accountants, concerning the bundle of documents pursuant to the orders made by Employment Judge Shepherd at a telephone case management hearing 25 September 2020. The Respondent's representative replied 15 October 2020 stating "*Not sure why you are contacting us!!!! Please do not email us as we do not want to communicate with you directly*".
7. Accordingly there is no bundle of documents; the Respondent was ordered to prepare the bundle 29 October 2020 but the above-mentioned email is the full extent of their contribution to that end.
8. In the email, the Claimant had indicated a series of documents and text messages which she wished to bring to the tribunal's attention. She did so during the hearing through sharing the content with me.
9. The Claimant produced a witness statement in the form of an email sent to the Respondent 9 November 2020.
10. The Claimant also produced a schedule of loss dated 29 September 2020, also in the form of an email sent to the Respondent.
11. The Respondent has had full notice of the what the Claimant intended to produce at this hearing.
12. The Respondent did not attend the hearing. I note that they did not attend the telephone hearing on 25 September 2020.
13. The start of today's hearing was delayed until 10.45am in order that the Claimant could forward her documents to me and so the Employment Tribunal Office could contact the Respondent's representative concerning their non-attendance.
14. Their offices did not answer the telephone calls made.
15. The Employment Tribunal Office sent at 10.24am an email to the Respondent's representative notifying them of the adjournment to 10.45am and asking if they intended to attend. At 12.20pm, after the hearing had concluded, an account's clerk from the Respondent replied to the Employment Tribunal Office stating "*Mr I Khan has been attempting to connect but has had some problems and could not make a connection. Unfortunately, Mr I Khan has been self-isolating with Covid-19 symptoms and is not in the normal office*".

16. Despite the asserted problems connecting the Respondent's representative made no contact to the Employment Tribunal Office at all before the hearing began, which was 45 minutes after the time scheduled for it to begin.

17. No further communications have been received from the Respondent. No applications have been made by the Respondent either concerning their non-attendance or otherwise.

Findings of fact

18. I made the following findings of fact on the balance of probabilities.

19. The Claimant was employed as a Counter Assistant at the Tuck Inn Café in Doncaster. Her employment commenced around 2003. Mr Ali bought the business in 2008. The Claimant states that she just carried on working. In or around 2018 Mr Ali put the business into a limited company, the Respondent. The Claimant carried on working a normal. The specific date of commencement, which the Claimant does not recall, is not relevant to the issues.

20. The Claimant worked fixed shifts; 5 ½ hours Monday, and 6 hours on Tuesday, Friday and Saturday. She had a 30-minute unpaid break each day. Her working hours were therefore 21 ½ hours per week. She was paid the National Minimum then National Living Wage.

21. The Claimant's schedule of loss is calculated at 20 hours per week because the Respondent put that as her normal working week in their notice of appearance. The Claimant limited her calculation to that rather than face argument over the fact she worked 21 ½ hours per week. However, the Claimant's normal working week is 21 ½ hours.

22. Between 2008 and February 2020 the Respondent (and its predecessor Mr Ali) has failed to submit the Claimant's pay details to HMRC. Although pay details were submitted from February 2020 onwards, it appears that this was done retrospectively for the purposes of a claim under the CJRS. This may be the "technical issue" preventing a claim under the CJRS but in the absence of any evidence from the Respondent the technical issue is unknown.

23. The Claimant has never been provided with any statement of particulars of employment or any employment contract.

24. The Claimant has never received a payslip.

25. The Claimant was paid in cash. Her wages were the same every week.

26. The Claimant stated that she worked until the café was required to close under the lockdown requirements. Business closures were announced Monday 23 March 2020 and businesses, including café's, were required to close on 24 March 2020. I therefore find that the Claimant's last day of work was Saturday 21 March 2020. She states that she was paid as usual up to her last day of work.

27. The Claimant was told by Mr Ali that she would be furloughed. She understood that this would be at the 80% provided under the CJRS scheme, but she never discussed the amount she would receive with the Respondent.

28. The Claimant received no letter or agreement in writing concerning furlough.

29. The Claimant had to repeatedly contact the Respondent for updates because they made no contact with her and she received no pay. They communicated by text and the Respondent led her to believe she would be paid.

30. On 16 May 2020, when she contacted the Respondent, the Respondent told the

Claimant that she wouldn't get paid because she was not registered for PAYE purposes.

31. The Claimant cannot explain the Respondent's actions, but on 22 April 2020 she received a tax code from HMRC having never received one before. The Claimant telephoned HMRC to ask why. They told her that there was no record of her being in work until 21 February 2020, but the Respondent was now submitting to HMRC that she was employed and being paid.

32. The café re-opened on 4 July 2020. The Claimant asked the Respondent if she could return to work beforehand but received a message that because of their lack of money and because of her health, it would be best if she stayed at home. They took someone else on to replace her. Nonetheless, the Claimant was not dismissed by the Respondent.

33. HMRC told the Claimant that the Respondent continued to that they were paying the Claimant until on 20 August 2020 they notified HMRC that they wished to withdraw the submissions of pay made concerning the Claimant.

34. The Claimant states that she "gave up". She obtained alternative employment to begin on 26 August 2020. That day, she sent a text to the Respondent to tell them she was leaving. She asked for a P45. The Respondent has not sent a P45 to her.

Submissions

35. The Claimant submitted that the Respondent's response to the claim states that they would sort the problem by mutual understanding. But they have not tried to sort the problem at all. The Claimant states that she has suffered from great stress and though about claiming other things such as redundancy. However, she simply would like to receive her wages for the period she was prevented from working.

The Law

36. The law concerning the right not to suffer unauthorised deductions from wages is set out in Part II of the Employment Rights Act 1996.

37. The CJRS scheme is not relevant to the Respondent's obligation to pay the Claimant wages. The CJRS scheme is a matter between the Respondent and HMRC.

38. Section 13 of the Employment Rights Act provides as follows:

"13 Right not to suffer unauthorised deductions.

(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.”*

39. Under the Section 38 of the Employment Act 2002, where a tribunal makes an award for a breach of Section 13 of the Employment Rights Act 1996, and the tribunal finds that the employer was in breach of the duty under Section 1 of the Employment Rights Act 1996 to give a written statement of initial particulars of employment, the tribunal must make an award of 2 weeks pay and may, if it considers it just and equitable in the circumstances, make an award of 4 week's pay.

Conclusions

Were the wages paid to the claimant less than the wages s/he should have been paid?

40. The answer to the first question is clearly yes. The Claimant was not paid between 23 March 2020 and 26 August 2020. This is 22 weeks and 1 day (excluding the day of notice because it was with immediate effect and the Claimant began her employment elsewhere that day). She was ready and willing to work during this period.

Was any deduction required or authorised by statute?

41. There are no statutory provisions entitling the Respondent to withhold pay from the Claimant.

Was any deduction required or authorised by a written term of the contract?

42. There is no evidence in this claim of any deduction being authorised in writing by the Claimant. It matters not that she assumed that she would be paid 80% because that was what the Respondent could claim back under the CJRS. The Respondent reached no agreement with her concerning furlough, and no variation to her contract was agreed.

Did the claimant have a copy of the contract or written notice of the contract term before the deduction was made?

43. The Claimant had not statement of initial employment particulars or any employment contract, nor did she receive any statement of changes whatsoever.

Did the claimant agree in writing to the deduction before it was made?

44. As stated above there was no agreement to any reduction, whether that be to reduce her pay to 80% of normal pay or, as happened, to reduce it to nothing at all.

How much is the claimant owed?

45. The Claimant is owed 22 weeks and 1 day's pay.

46. For week commencing 23 March 2020, this is 21 ½ hours at £8.21 per hour (**£176.51**).

47. For week commencing 30 March 2020, this is 5 ½ hours at £8.21 (**£45.15**) and 16 hours at £8.72 (**£139.52**).

48. For week commencing 6 April 2020 to week ending 23 August 2020, this is 20 weeks times 21 ½ hours at £8.72 (**£3,749.00**).

49. For week commencing 24 August 2020, this is 5 ½ hours at £8.72 (**£47.96**).

50. The total amounts to **£4,158.14**.

Section 38 Employment Act 2002

51. The Respondent was in breach of the requirement to provide a written statement of initial employment particulars to the Claimant when she commenced these proceedings.

52. There are no circumstances which would make an award unjust or inequitable.

53. I consider that in the light of all the circumstances it would be just and equitable to increase the Claimant's award by the higher amount, 4 weeks' pay.

54. 4 weeks pay for the Claimant is **£749.92**.

Employment Judge Knowles

10 December 2020

JUDGMENT & REASONS SENT TO THE PARTIES ON

11 December 2020