



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms Sarah Poyser

**Respondent:** Nextsteps Development (1)  
Nextsteps @ Barnstaple CIC (2)

**Heard at:** Bristol (via VHS)

**On:** 9 January 2023

**Before:** Employment Judge Leith

## Representation

Claimant: In Person

Respondent: Miss Mallin-Martin (Counsel)

**JUDGMENT** having been sent to the parties and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

# REASONS

## Claims and issues

1. The Claimant claims unlawful deduction from wages, or in the alternative breach of contract, in relation to pay said to have been due to her during her employment with the Respondent, and accrued but untaken holiday pay which she says she was not paid on termination of her employment.
2. The issues were set out by EJ Cadney in his Case Management Order of 7 October 2022, as follows:

“45. The claim for unfair dismissal has been dismissed for lack of length of service.

46. The Claimant has clarified in her Particulars that the remaining claims are:

i) 5 months unpaid wages – March to July 2021 - £2500 x 5  
= £12,500;

ii) 6 x £500 shortfall in wages – August 2021 to January 2022 = £3,000 (£3,500 claimed in the Particulars but this appears to be an arithmetical error);

iii) £2269.00 -unpaid wages for February 2022;

iv) Unpaid holiday pay - £1812.50;

v) The claimant has confirmed that she is not pursuing a claim for unpaid notice pay.

The respondent's position is that:

i) The claimant commenced employment work with R2 on 1st August 2021 not 1st March 2021 (GoR para 1-3);

ii) Any shortfall in pay between August 2021 and January 2022 was accounted for in her final salary payment (GoR para 5);

iii) Any pay for February 2022, notice pay or holiday pay was accounted for in the final payment in that payment was recouped for taken but unaccrued holiday which exceeded any amounts owed (GoR para 6-7);

iv) Accordingly there are no sums owing to the claimant.”

3. At the start of the hearing, the Claimant clarified that she had never been employed by the First Respondent, and that her claim was against the Second Respondent. It was common ground that the Claimant had been employed by the Second Respondent, although there was a dispute over when that employment started.

#### Procedure, documents and evidence heard

4. I heard evidence from the Claimant. I also heard evidence on her behalf from Mrs Gudi Morris, formerly HR Coordinator with the First Respondent; Mr Ian Morris, formerly a Trustee of the First Respondent; and Mr George Pettigrew, previously a volunteer with the First Respondent and Director of its subsidiary, NextSteps at Bideford. Mr Pettigrew is also the Claimant's partner.
5. On behalf of the Respondents, I heard evidence from Louise Bensley, founder and Chief Executive Officer of the First Respondent at the relevant times.
6. All of the witnesses gave their evidence via pre-prepared statements and were questioned about their evidence. Mrs Morris, Mr Morris and Mr Pettigrew were unable to connect by video, and gave their evidence via telephone. On behalf of the Respondent, Miss Mallin-Martin took no objection to them giving their evidence in that way.

7. The Claimant additionally tendered a witness statement from Lesley Glover. Ms Glover's witness statement had not been exchanged along with the other statements. I did not admit it or permit her to give evidence, for the reason I gave orally at the time.
8. I had before me a bundle of 137 pages (the pagination running from page 1 to page 129).
9. At the conclusion of evidence, I heard oral submission from Miss Mallin-Martin (supported by written submissions), and from the Claimant.

#### Findings of fact

10. I make the following findings of fact on balance of probabilities.
11. The First Respondent is a charity dedicated to helping people develop their independence, particularly in a working environment. It was founded by Mrs Bensley and her husband in 2018. The Second Respondent is Community Interest Company. It is a subsidiary of the First Respondent.
12. Mrs Bensley previously ran a Community Interest Company. Her evidence was that someone who worked with that company with took a large sum of money from them, which meant that they had to close it down and led to Mrs Bensley being declared bankrupt.
13. The Claimant and Mr Pettigrew own a courier business together. Mr Pettigrew began volunteering for the First Respondent via an unpaid work scheme. From August 2018, the Claimant also started volunteering for the First Respondent. She became the Chair of the First Respondent's Trust Board in 2019. The Claimant and Mr Pettigrew became friendly with Mr and Mrs Bensley.
14. It was common ground that, as a charity, the First Respondent would need Charity Commission approval to make a payment to a Trustee. There was no such restriction in respect of the Second Respondent.
15. Mr Bensley was a Trustee of the First Respondent at all relevant times. Mrs Bensley was the Chief Executive Officer of the First Respondent. Although Mrs Bensley was the Chief Executive Officer, she did not attend Trust Board meetings. Mrs Bensley's evidence was that she did not discuss Trustee business with her husband.
16. Mrs Bensley's evidence was that as CEO of the First Respondent, she took instructions from the Chair and/or Board. She referred on various occasions to unquestioningly taking instructions from the Claimant (in her capacity as Chair of Trustees).
17. The Claimant's evidence was that in that reality, decisions were made by Mr and Mrs Bensley and simply presented to the Board. Her evidence was that when matters were discussed by the Board, the discussions were manipulated by Mr Bensley. I will deal with this difference in evidence in my conclusions below.

18. Mr and Mrs Bensley had plans to set up a trading subsidiary to the First Respondent, which would be set up as a Community Interest Company. Mr and Mrs Bensley asked the Claimant to become a Director of the Community Interest Company, and also to take on the role of senior manager. Mrs Bensley's evidence was that that conversation took place at a meeting in January 2021. The Claimant's evidence was that the conversation took place on 15 February 2021 at the First Respondent's registered address. The Claimant signed a declaration regarding the CIC, in her capacity as putative Director, on 15 February 2021. I find on balance that it is likely that the discussion regarding the Claimant taking on a senior management role occurred at the same time, so I find that that discussion took place on 15 February 2021.
19. The Claimant's evidence is that she was told she would be paid £2,500 per month net for her work with the Second Respondent, with effect from March 2021. The Claimant's evidence was that Mrs Bensley explained to her that the Respondents were waiting for Access to Work funding to come through, which had been delayed. Her evidence was that she told Mrs Bensley that she was happy for payment of her wages to be deferred until the funding had come through, as financially she did not need the money straight away and was in a position to wait for it.
20. Mrs Bensley's evidence was that the Claimant understood that the management role could not be a paid position immediately, but that when the financial position was better then she would require a salary of £2,500 (gross) per calendar month. Mrs Bensley's evidence was that any payment to the Claimant for her work with the Second Respondent would need to be approved by the Board of the First Respondent.
21. The evidence of Mrs Morris was that she was informed by Mrs Bensley in March 2021 that the Claimant would become a PAYE employee in March 2021, and that she would be earning £2,500 per month.
22. Mrs Bensley's evidence was that she was instructed by the Claimant to place her on payroll with effect from 1 April 2021 (although at that stage, on Mrs Bensley's evidence, the Claimant was not to be paid). The Claimant denied giving Mrs Bensley any such instruction.
23. Another Community Interest Company was also set up at the same time as the Second Respondent. Mr Pettigrew was appointed as a Director of that company, and also held a senior management position similar to that held by the Claimant in respect of the Second Respondent. His evidence was that he was (albeit retrospectively) paid from 1 March 2021 onwards for that work.
24. It was suggested in the Respondents' ET3 and written submissions that the Second Respondent was not incorporated until 7 May 2021. There was no evidence before the Tribunal of the Second Respondent's incorporation date, and it was not put to the Claimant that the Second Respondent was not incorporated at the point that she claimed her employment commenced. The Second Respondent's Memorandum of Association was dated 15 February 2021. I am not in a position to make

any findings of fact regarding when the Second Respondent was incorporated.

25. I will deal with my findings regarding what was agreed about the Claimant's pay and start date in my conclusions below. It was not suggested to me that there was any express agreement regarding the Claimant's entitlement to annual leave. It was common ground that she would work 4 days per week.

26. On 9 June 2021 Mrs Bensley sent the Claimant a text message in the following terms:

"Could you also right [sic] my list of what next steps owes you so I can pay you back next week please x"

27. There was a list of sums said to be owing to the Claimant in the bundle. It was described in the index as "C's calculation of monies owed", with the date June 2021, although the document itself was undated. The list in the bundle included invoices for June and July 2021, payment of tax on a Transit van for June, July, August and September, and payment of insurance from May until October. It referred to a loan (from the Claimant to the Second Respondent) to cover the Second Respondent's other April 2021 wages.

28. Regarding the Claimant's pay, it said this:

"Was told would get Wages as from March 21

Didn't receive any April – July (2500ish)

But received from Aug to date THANK YOU"

The majority of the document was typed, but the figure (2500ish) was handwritten.

29. The Claimant's evidence in the course of cross-examination was that she had submitted a list along those lines to Mrs Bensley on more than one occasion, updating it as necessary. I accept the Claimant's evidence in that regard. I find that the version in the bundle, which was the only version in evidence, cannot have been produced before October 2021. It does not assist me in determining what was on the list submitted by the Claimant in June 2021.

30. On 30 June 2021, the Claimant sent a text message to Mrs Bensley in the following terms:

"Forgot to ask earlier are we able to get payslips from March even tho not had it?? Seeing mortgage man on Friday x"

31. Mrs Bensley replied:

"Yes, of course x"

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32. Mrs Bensley's evidence was that at the time, since she reported to the Claimant in her capacity as Chair, she simply followed instructions. Her evidence was that on reflection, she felt she should have challenged that request since the Claimant was not in a paid role.
33. There were a number of payslips in the bundle. The first was dated 1 April 2021, which covered March 2021. It showed a gross payment of £3,353.63 to the Claimant (net £2,375.64). It showed the Claimant working 161 hours (although it was common ground that the Claimant was employed to work from 9am to around 3 or 3.30pm four days per week). It was suggested to the Claimant in cross examination that the payslip was not genuine. The Claimant's evidence was that the payslip was given to her by Mrs Bensley. Her evidence was that in practice she worked much more than her basic hours of 9am – 3pm/3.30pm, in that she often worked later in the evening. Her evidence was that in any event she didn't know where the figures on the payslip came from as it was generated by the Respondent. I accept the Claimant's evidence in that regard.
34. There were then two payslips for 1 May 2021. One contained the same figures as the April 2021 payslip. The second gave the Claimant's hours of work as 96, her gross pay as £2,500.80 and her net pay as £2,005.94.
35. For 1 June 2021 there were again two payslips.
36. For 1 July 2021 there was one payslip, which contained the lower figures.
37. HMRC records showed that the Claimant was paid £2,500.80 gross on the first of every month from 1 May 2021 until 1 March 2022.
38. Mrs Bensley's evidence was that the Claimant told her in August 2021 that the Trust Board had agreed that she could then be paid. Mrs Bensley's evidence was that this instruction was given in the Claimant's capacity as Chair of the Trust Board. Her evidence was that she was surprised by that instruction, in light of the Second Respondent's financial position but she nonetheless put it into action because the Claimant was the Chair of the Trust Board and she had no reason to disbelieve her.
39. The Claimant was first paid for August 2021. She was paid the sum of £2,000 (net) by bank transfer. She continued to be paid in that way, on or around the first day of the following month, until January 2022.
40. On 28 February 2022, the Claimant was dismissed with immediate effect. She was informed that she would be paid 1 week's pay in lieu of notice. The letter further indicated that the Claimant had accrued 4.7 days annual leave and taken 11 days (including bank holidays), so a deduction of 6.3 days would be taken from her final month's pay.
41. In actual fact the Claimant received no payment for February 2022. The rationale for that was set out in a letter dated 31 May 2022, as follows:

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- a. The Claimant was entitled to a net payment of £1,774.48 (as she received no pay on 24 and 28 February 2022 as she was absent due to ill health).
  - b. The Claimant accrued 13.5 days annual leave during her employment, but took 34 days leave (including bank holidays).
  - c. Therefore, when the 20.5 days taken but not accrued was subtracted, her total net pay was -£99.44 (which the Respondent did not seek to recover).
42. Regarding the question of holidays, Mrs Bensley's evidence was that sometimes the Claimant would discuss holidays with her and sometimes she wouldn't, but that all holidays were entered into a shared SharePoint electronic calendar. That calendar was not in evidence before the Tribunal.
43. The Respondents adduced a document which purported to set out the annual leave that the Claimant had taken during her employment. The document was only disclosed after witness statements were exchanged; it was not clear who had prepared it or how. The Claimant had annotated the document showing which dates she agreed with, and which days she did not. She had included some commentary regarding why she disputed the dates that were disputed. On a number of the dates when the Respondent asserted that the Claimant was on annual leave, the Claimant denied this. The Claimant's evidence was that she had kept a diary, which how she was able to be sure about when she was on annual leave. The Claimant's diary was not in evidence (unsurprisingly, given that she had not seen the Respondent's document until relatively late in the proceedings). The Claimant's evidence was that she had taken 15 days annual leave.
44. I accept the Claimant's evidence regarding the times that she was on annual leave, being set as it was against an evidential vacuum on the part of the Respondents (which ought to have retained and disclosed records of the Claimant's annual leave). Therefore, I find that the Claimant took 15 days annual leave during her employment with the Second Respondent.
45. The claimant notified ACAS under the early conciliation process of a potential claim on 7 March 2022 and the ACAS Early Conciliation Certificate was issued on 31 March 2022. The claim was presented on 15 April 2022.

Law

Unauthorised deductions from wages

46. Section 13(1) of the Employment Rights Act 1996 provides that 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. An employee has a right to complain to an Employment Tribunal of an unlawful deduction from wages pursuant to Section 23 of the Employment Rights Act 1996.

47. A claim about an unauthorised deduction from wages must be presented to an Employment Tribunal within 3 months beginning with the date of payment of the wages from which the deduction was made, with an extension for early conciliation if notification was made to ACAS within the primary time limit, unless it was not reasonably practicable to present it within that period and the Tribunal considers it was presented within a reasonable period after that.

#### Holiday pay

48. The Working Time Regulations 1998 provide for minimum periods of annual leave and for payment to be made in lieu of any leave accrued but not taken in the leave year in which the employment ends. The Regulations provide for 5.6 weeks leave per annum. The leave year begins on the start date of the claimant's employment in the first year and, in subsequent years, on the anniversary of the start of the claimant's employment, unless a written relevant agreement between the employee and employer provides for a different leave year. There will be an unauthorised deduction from wages if the employer fails to pay the claimant on termination of employment in lieu of any accrued but untaken leave.
49. A worker is entitled to be paid a week's pay for each week of leave. A week's pay is calculated in accordance with the provisions in sections 221-224 Employment Rights Act 1996, with some modifications. There is no statutory cap on a week's pay for this purpose.

#### Breach of contract

50. The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 provides that the Tribunal can hear claims for damages for breach of contract which arise or are outstanding on termination of employment, seeking:
- a. damages for breach of a contract of employment or any other contract connected with employment;
  - b. the recovery of a sum due under such a contract; or
  - c. the recovery of a sum in pursuance of any enactment relating to the terms or performance of such a contract.
51. A claim of breach of contract must be presented within 3 months beginning with the effective date of termination (subject to any extension because of the effect of early conciliation) unless it was not reasonably practicable to do so, in which case it must be submitted within what the Tribunal considers to be a reasonable period thereafter.
52. The purpose of the 1994 Order is to avoid the situation where an employee is forced to use both a tribunal and a court of law to have all his or her claims determined (*Sarker v South Tees Acute Hospitals NHS Trust* [1997] ICR 673).



Conclusions

53. I deal first with when the Claimant's employment with the Second Respondent started.
54. I find that Mrs Bensley played a much more significant role in the running of the Respondents than she suggested in her evidence. Mrs Bensley and her husband founded the First Respondent. She was experienced in managing charities, having previously run another Community Interest Company. On her own evidence, it was her decision (together with her husband) to engage the Claimant to run the Second Respondent. That was inconsistent with her suggestion that she had no real authority over the running of the Respondents. Furthermore, the suggestion that she would simply defer to the Claimant as Chair of Trustees, even on matters concerning the Claimant's own pay, was in my judgement entirely implausible. I therefore prefer the Claimant's evidence regarding Mrs Bensley's involvement, and I find that she was the guiding hand behind the Respondents.
55. When the Claimant asked to have her payslip from March 2021, Mrs Bensley did not question it or suggest that the Claimant's employment hadn't started by that point – she simply agreed to provide it. The fact that Mrs Bensley provided it so readily was inconsistent with her suggestion that the Claimant's pay would need to be agreed by the Trust Board. It is inherently implausible that Mrs Bensley would have agreed to put the Claimant on the payroll and provide her with payslips if she was not in a paid position at that stage.
56. It was common ground that the Respondents had some cash flow difficulties at the point that the Second Respondent was set up. The Claimant loaned a sum of money to the Second Respondent in order to ensure it could meet its payroll obligations to employees in April 2021. That is consistent with the suggestion that, while the Claimant's employment started from 1 March 2021, her pay would initially be deferred until the Second Respondent's cash flow situation improved.
57. The information the Second Respondent provided to HMRC was also consistent with the suggestion that the Claimant was in paid employment from 1 March 2021. So too was the evidence of Mrs Morris, who in her role as HR Coordinator would have been expected to have had some knowledge of the Claimant's start date.
58. Finally, although his circumstances were clearly different, it is relevant that Mr Pettigrew was paid from 1 March 2021 for the similar role he undertook for the other Community Interest Company.
59. For all of those reasons, I prefer the Claimant's evidence regarding what was agreed about when her employment would start. I find that her employment started on 1 March 2021.

60. Turning then the question of what the Claimant should have been paid, I find that the agreement was that she would be paid £2,500 per month gross by the Second Respondent, for the following reasons:
- a. The Claimant's payslips never reflected a payment of £2,500 net, and there was no evidence that she questioned this at the time. On the contrary, after she started receiving pay, the document she produced showing outstanding sums owed simply said "THANK YOU" when it noted that she had started to receive pay.
  - b. Although there were some discrepancies in the payslips, when the Claimant did start receiving pay, she never received more than £2,000 per month.
  - c. I take judicial notice of the fact that salaries are typically negotiated and paid on a gross basis. The Claimant was not the Second Respondent's only employee. It is inherently implausible that the Second Respondent would have agreed to pay the Claimant a net salary.
61. I therefore find that the agreement between the parties was that the Claimant would receive the gross sum of £2,500 per month with effect from 1 March 2021 onwards, although payment would initially be deferred until the cash flow situation of the Respondents improved.
62. Turning then to the question of annual leave:
- a. The Claimant's employment commenced on 1 March 2021 and terminated on 28 February 2022. She was employed for exactly one year. Her entitlement to annual leave was therefore 5.6 weeks, at four days per week – so 22.4 days.
  - b. The Claimant took 15 days annual leave during that time.
  - c. She was therefore entitled to be paid for the remaining 7.4 days, at her net daily rate of £115.73 per day.
63. It follows also that there was nothing for the Respondent to deduct from the Claimant's February pay in respect of annual leave. It was not suggested that the deduction made from the Claimant's February pay was authorised for any other reason. It follows that the deduction was not authorised.
64. The net sum properly payable to the Claimant for February 2022 was £1,774.48 (taking into account the two days absence).
65. I therefore conclude that:
- a. The Claimant was not paid from March to July 2021. The net wages properly payable to her for that period were £10,029.70 (£2,005.94 x 5). That constitutes an unauthorised deduction from her wages.
  - b. The Claimant was paid correctly from August 2021 to January 2022.
  - c. The Claimant was not paid for February 2022, and the wages properly payable to her for that period were £1,774.48 (net). That constitutes an unauthorised deduction from her wages.

- d. The Claimant was additionally entitled to be paid for 7.4 days accrued but untaken holiday on termination, a total of £856.40 (net)
66. The Respondents sought to persuade me that the period from March to July was out of time for a claim for unauthorised deduction from wages, in that the claim was brought outside the period of three months from the last deduction in the series (allowing for early conciliation).
67. In light of my finding that a further unauthorised deduction was made from the pay due in respect of February 2022, the final deduction in the series did not take place until 1 March 2022 (the date on which she would have been paid for February 2022). That is the date from which time starts to run, and so the claim was brought within time.
68. In any event, the Claimant has also advanced the claim as a breach of contract claim. For the same reasons set out above, the Claimant was contractually entitled to payment of the wages set out above. She was not paid those sums. The claim was, in my judgment, outstanding on termination of her employment. The claim was brought within 3 months of the Claimant's Effective Date of Termination (28 February 2022). For the purposes of a claim of breach of contract, provided it is brought within that time limit the Claimant must be entitled to claim what she would have been able to claim for breach of contract in the civil jurisdiction (consistent with the purpose of the 1994 Order). Such a claim would have allowed her to look back for a period of 6 years. So even if I had found that the period from March to July was out of time for the purposes of a claim for unauthorised deduction from wages, I would in any event have found for the Claimant in respect of the breach of contract claim.

Employment Judge Leith  
Date: 8 February 2023

Reasons sent to the Parties: 22 February 2023

FOR THE TRIBUNAL OFFICE