EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101941/2023

Held at Edinburgh by CVP on 15 June 2023

Employment Judge J Young

Ms Jenna De Swarte	**Claimant In Person**
Fife Housekeeping Ltd t/a Bright & Beautiful	**Respondent Represented by Ms G Schofield, Director**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the respondent has made a deduction from the claimant's wages in contravention of s13 of the Employment Rights Act 1996 and that the respondent shall pay to the claimant (1) the sum of One hundred and ninety pounds (£190) in respect of wages and (2) the sum of Three pounds and ninety nine pence (£3.99) in respect of holiday pay.

E.T. Z4 (WR)

REASONS

Introduction

1. In this case the claimant presented a claim to the Employment Tribunal on 17 March 2023 complaining that she was due wages from the respondent in respect of an unlawful deduction made from her final pay; and holiday pay. The claim form also indicated there was an insurance payment due but by the hearing the claimant was able to advise that that was no longer an issue.

2. The claim form was intimated to the respondent in the usual way but no ET3 response lodged. By e-mails of 14 and 15 June 2023 the respondent advised that it wished to attend the hearing and provided certain documents. Ms Schofield attended the hearing on 15 June 2023 on behalf of the respondent. She explained that there had been an administrative failure to attend to the claim but that the respondent wished to make representation.

3. In these circumstances under Rule 21(3) of the Schedule attached to the Tribunal Rules of Procedure 2013 a respondent is only entitled to participate in any hearing to the extent permitted by the Employment Judge. I allowed participation by Ms Schofield in receiving certain documents and making representation in order to clarify the issues.

4. Documents were also received from the claimant in relation to the claim. Neither party provided an index. Those produced were:-

Documents for the claimant

C1-Statement of Main Terms of Employment of claimant with respondent dated 7 September 2022.

C2-HMRC statement showing taxable income received from the respondent and tax/NI paid over period 5 June 2022 to 5 January 2023.

C3-Handwritten sheets by claimant showing hours worked in months June-December 2023.

C4-Document entitled “List Time Sheet” of respondents showing hours worked May/December 2022 by claimant.

C5-Text exchanges between claimant and respondent over Monday 19 December-Wednesday 21 December 2022.

C6-Letter from claimant to respondent of 17 January 2023.

Documents for the respondent

R1-October 2022 timesheet for claimant.

R2-Document entitled “Annual leave accumulator 2022” for claimant.

R3-June 2022 timesheet for claimant.

R4-December 202022 timesheet for claimant.

R5-Email from respondent to claimant dated 6 November 2022.

R6-Email from respondent to claimant dated 1 October 2022.

R7-Untitled Document for January/December 2022 showing “hours accrued” and “hours taken” by claimant.

R8-Document headed “Annual Leave Accumulator 2022” for claimant.

R9-Letter of 4 January 2023 from respondent to claimant.

R10-Payslips of claimant for months ending 31 May 2022-31 December 2022.

R11-Document entitled “How your negative pilon is calculated”.

R12-Document headed “Training Agreement (if applicable) between respondent and claimant” dated 7 September 2022.

5. At the hearing I heard evidence from the claimant and representation from Ms Schofield and was able to make findings in fact on the issues.

Findings in fact

6. The respondent conduct home cleaning and other housekeeping services in Dunfermline and the surroundings areas. The business is based on a franchise model.

7. The claimant was employed as a housekeeper conducting general cleaning services in various properties. She always worked as part of a team. The respondent provided transport for the housekeepers to travel to client sites but occasionally the claimant would use her own car.

8. She signed a Statement of Main Terms of Employment on 7 September 2022 which contained various terms (C1). While the Statement had commencement of employment as at 20 June 2021 that was a mistake as the claimant commenced employment on 30 May 2022 and was paid from that date (R10). Her employment terminated on 23 December 2022.

9. Her *"minimum hours of work"* were 25 per week with *‘‘actual hours”* being those agreed with her manager. The claimant’s hours varied over the period of employment. Pay was at the rate of £9.50 per hour with *“overtime”* at the rate of £11.00 per hour. (C1 and R10) Her hours included *"travel time”* between cleaning appointments The respondent reserved the right to make

deduction from wages including wages payable on termination of employment in respect of various listed matters which were stated to be *"non-exhaustive".*

10. The holiday year ran from 1 January to 31 December in each year. The *"full time"* entitlement of 28 days paid holiday was to accrue evenly from the commencement of employment and was inclusive of bank holidays or any other nominated days. The Clause on holidays and holiday pay stated:-

"*Part-time staff will accrue holiday on a pro-rata basis. In your first holiday year your entitlement will be proportionate to the amount of time left in the holiday year. Your holiday pay will accrue at one twelfth for each completed month of service. Your holiday pay will be calculated at an average of the previous twelve week's earnings.*

In any holiday year in which you were not employed for a full year you will be entitled to holiday accrued during the part of the year during which you are employed on a pro-rata basis. On termination of employment you will be entitled to pay in lieu of any holiday accrued due but not taken calculated at one twelfth for each completed month of service and the employer will be entitled to repayment in respect of any holiday taken but not accrued. The employer reserves the right to make deduction from monies otherwise owing to you in respect of such repayment."

11. On sickness absence it was specified that irrespective of the length of absence contact should be made a line manager by 7am giving an indication of the length of anticipated absence. If the call was not answered then a voicemail message should be left. It was stated that *"notification by text message, e-mail or via work colleagues is not acceptable".* Where unable to confirm a return to work date contact was to be made with a line manager on a daily basis in order that the appropriate cover could be arranged. If the period of absence was for seven continuous days or less the Clause stated:

"*You must report to your line manager immediately upon return to work and complete a self-certification form (available on request from your line manager)" and* absences exceeding seven continuous days would require a medical certificate. Part of the provisions advised that failure to notify absences or to satisfactorily complete a self-certification form or to provide a medical certificate as specified could result in payment from the Statutory Sick Pay scheme (SSP) being withheld and may result in disciplinary action.

12. In the event notice of termination of employment was to be given by the employee then those who had successfully completed their probationary period would require to give notice of one month. The initial probationary period was "*up to three months"* for new employees and the claimant's work was found to be satisfactory in that period with her employment continuing.

13. Under "*Termination of Employment without giving Notice"* it was stated:-

"*If you give notice of termination, in order to maintain our service levels on commitment to our clients, you are required to work your notice. If you terminate your employment without giving or working the required period of notice you will have an amount equal to any additional cost of covering your duties during the notice period not worked deducted from any termination pay due to you."*

14. The payslips provided by the respondent to the claimant between months ending 31 May-31 December 2022 (R10) show hours worked either on £9.50 per hour or the overtime rate of £11 per hour together with a calculation of holiday pay. The calculations are as follows:-

Period to 31 May 2022 - hours of work 10.41.

Period to 30 June 2022 - hours of work 97.52.

Period to 31 July 2022 - hours of work 82.40.

Period to 31 August 2022 - hours of work 99.85.

Period to 30 September 2022 - hours of work 105.74.

Period to 31 October 2022 - hours of work 77.08.

Period to 30 November 2022 - hours of work 88.7.

Period to 31 December 2022 - hours of work 54.16.

15. The total of hours worked in the period amounts to 594.93 hours. That comprises 551.84 hours at the basic rate and hours of 43.09 hours at the overtime rate. That calculates to gross pay for those hours worked in the period of £5716.46.

16. According to the payslips holiday pay was payable to the claimant in the months of July/August/September/October and December 2022 in the total sum of £565.16.

17. The payslips were in error in calculating taxable gross pay to the month ending 31 August 2022 as £5052.90 rather than £2002.07. That error continued through to the taxable gross pay entered in the payslip to 31 December 2022.

18. That payslip to 31 December 2022 at (R10) contained a deduction for "PILON" of £190. Without that deduction gross pay for the month would have been £674.56 and gross pay to date would have been £6078.93 rather than the erroneous figure of £8088.87 (being an error in the taxable gross pay being entered for (a) the month of December 2022 and (b) the month of August 2022).

19. It was agreed the claimant gave the required notice of termination of her employment on 25 November 2022 to expire 23 December 2022.

20. The claimant worked to Monday 19 December 2022 inclusive but around midnight texted her line manager to say that she was *"not going to make it in tomorrow"* as she was not feeling great and had been *"trying to stop myself from being sick all day and it didn't really work. I'm really sorry to let the team down".*

21. Around 6.45 the following morning her manager responded *"Thanks Jenna".*

22. On Wednesday 21 December 2022 the claimant advised:-

"Hey I still don't feel great so won't be in today. I've been completely out of it all day and my headache still hasn't shifted. I really hate letting people down, I'm so sorry."

23. Later that day at 21:13 hrs the claimant advised Ms Wilson:-

"Sorry, can you please take me out of the calendar for the rest of the week please? I'm not in a good place right now and between being in this week and being in constant pain. I've not been able to get a doctor's appointment this week to speak about increasing my medication before Christmas."

24. The claimant did not return to work until the expiry of her notice period on 23 December 2022.

25. She explained that she had been affected by mental health issues and had been "struggling for a while".

26. The final payslip received by the claimant to end 31 December 2022 comprised wages to 19 December 2022 with a deduction of £190 for *"PILON".* She was then not paid for 20/23 December 2022 and the wages for the period to 19 December 2022 reduced by £190.

27. By letter of 4 January 2022 (R9) the claimant was advised that her last day worked was 19 December 2022 but if the notice period had been completed it should have been 23 December 2022. The letter advised that the absence had implications for the business at a very busy time. Reference was made to the Clause within the Statement of Main Terms of Employment. It was indicated that in the event a notice period was not completed there would be a deduction of any additional cost of covering duties during notice period not worked deducted from the termination pay due. It was stated that the amount deducted was £190 *"to cover those costs incurred"* and that a statement on how your "*negative PILON is calculated"* was attached. It was also stated that the claimant would be paid for any holidays accrued but untaken and that the final payslip would be posted shortly.

28. The calculation of *"negative PILON"* (R11) showed that it was calculated in respect of a *"shortfall on notice required"* The calculation was 4 days x 5 hours per day x £9.50 per hour =£190.

29. Ms Schofield advised that the period up to Christmas was a very busy time for the business and that as the claimant did not show for work it was necessary to "cancel a contract" at £653 pay overtime to a salaried employee to cover at £150 and so a loss to the business of £803 as a consequence. It was narrated that a deduction £803 could have been made but was limited to £190.

30. I was advised that the individual paid overtime was a salaried individual working 30 hours per week but *"did more hours that week"* due to the claimant's absence and would work "*Tuesday, Wednesday during the day and her usual duties at night".*

31. It was also maintained that the claimant had not followed the procedure to entitle her to sick pay as she had not self-certified that illness and there was no medical certificate supplied.

32. So far as holiday pay was concerned the calculation within the *"ready reckoner"* which was utilised by the respondent showed £3.99 was due in respect of holiday pay (R2).

33. By letter of 17 January 2023 the claimant responded to the letter from the respondent of 9 January 2023 (C5) She emphasised that her reason for absence was illness and that she communicated that as required. She understood the Clause in her terms on notice was intended to prevent costs to the company if an employee left without notice or giving notice and then absent for no reason which was not the case in her position.

34. She also failed to see the additional cost incurred as there was no pay to her for the four days that she was off sick and therefore any pay made to other members of staff was a *"transfer of cost and not an additional cost".*

35. She was unclear as to the holiday pay to which she was entitled on the basis that she had not been given details of holidays accrued and taken to be able to make the calculation.

Conclusions

Holiday pay

36. The Working Time Regulations 1998 (as amended) govern the issue of entitlement to leave and compensation related to that entitlement. In terms of Regulation 14 where a worker's employment is terminated during the course of a leave year and on a date in which the termination takes effect the proportion taken of leave to which he/she is entitled is less than the proportion of the leave year which has expired the employer shall make a payment in lieu of outstanding leave. Payment is to be in terms of the Regulations formula unless a "relevant agreement" applies. (Reg 14(3) (a). In this case there is a relevant agreement as defined namely a legally enforceable agreement.(CI) with the appropriate term narrated above (Para 10).

37. In this case the leave year runs between 1 January to 31 December in each year. The Statement of Terms indicates that the *"full time entitlement of 28 days paid holiday per annum will be deemed to accrue evenly from the commencement of your employment each yeah'* and that part-time staff will accrue holiday on a "pro-rata" basis.

38. It would appear that the "full-time" entitlement of 28 days holiday is calculated for those who worked 25 hours per week i.e. 5 days @ 5 hours per day. That comes from the payslips (R10) which calculate payment of holiday pay at the rate of 5 hours x £9.50 =£47.50 (R10).

39. In this case the period of employment of the claimant was between 30 May 2022 and 23 December 2022. The period of employment then covered 30 weeks and at the full-time rate of 25 hours per week would mean that the full holiday entitlement would relate to working of 750 hours (30 weeks x 25 hours = 750).

40. The holiday entitlement over a year was 28 days. In the period of employment in this case a full-time worker would be entitled to 30/52 x 28 days =16.5 days.

41. It is calculated that claimant worked 594.93 hours in the period of employment (R10) and the pro rata calculation of the leave to which she was entitled in the period is 594.93/750 x 16.15 days = 12.81 days.

42. If no holiday pay had been paid to the claimant in the course of the period of employment she would be entitled to 12.81 days x 5 hours x £9.50per hour = £608.47. From the payslips she received in holiday pay (including payment at termination) £565.16 leaving holiday pay due of £43.36. However the agreement indicates that pay in lieu at termination is calculated by reference to accrual of 1/12th for each *"completed month of service"* The claimant had 6 *"completed"* months of service in the period which would affect the calculation to the extent that the respondent's calculation of £3.99 remaining

due by way of holiday pay is accepted. That is the small sum awarded in respect of pay for holidays accrued to date of termination but not taken.

Deduction from wages

43. Section 13(1) of the Employment Rights Act 1996 states that an employer must not make a deduction from the wages of a worker 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 - s.13(1)(a), or

- the worker has previously signified in writing his or her agreement to the deduction - s.13(1)(b).

44. For a deduction to be permitted if authorised by a *"relevant provision of the worker's contract" that* provision requires to be one contained in:-

- one or more written contractual terms of which the employer has given the worker a copy before the deduction is made - s.13(2)(a) or

- one or more contractual terms (whether express or implied and if express whether oral or in writing) whose existence and effect (or combined effect) the employer has notified to the worker in writing before the deduction is made - s.13(2)(b).

45. In this case the claimant has acknowledged a written statement within the Statement of Terms and Conditions regarding termination of employment as narrated above (Para. 13)

46. The particular term in this case has been contained in written contractual terms and the claimant in this case has been given a copy before the deduction was made.

47. Once established that there is a contractual provision or written agreement authorising the type of deduction in question a Tribunal then goes to consider whether the actual deduction is in fact justified. The question that the Tribunal requires to ask is " *was the deduction such as was authorised to be made by virtue of any relevant provision in the worker's contract?".*

48. The relevant provision in this case gives no particular circumstance in which the deduction of any additional cost incurred would apply. The wording makes no distinction between those who simply fail to turn up for work during the notice period and those prevented from doing so by way of illness, death, accident or the like. It is enough that the worker fails to work the entire notice period.

49. In ***Arnold v. Britain & Others*** [2015] AC169SC Lord Neuberger summarised the general principles that applied to the interpretation of express contractual terms as *"when interpreting a written contract the Court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean". That is done by focussing on the meaning of the relevant words…. In their documentary, facto and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the contractual agreement, (Hi) the overall purpose of the clause and the agreement, (iv) the facts and circumstances known or assumed by the parties at the time the document was executed and (v) commercial common sense but (vi) disregarding subjective evidence or any parties' intentions".* It was confirmed in ***Campbell v. British Airways Pic*** EATS0015/17 that these observations apply to the interpretation of pay terms within an employment contract.

50. In an assessment of the interpretation of this clause it is accepted that the claimant was prevented from attending work on 20/23 December 2022 by reason of illness and that was not a sham.

51. The clause in this case is headed "*Termination of Employment without giving notice".* The context then would relate to a desire of the employer not to have sudden departures of employees with the concomitant difficulty in providing continuous cleaning services. It gives some time for a replacement to be found or staff re-organised in the provision of those services. I consider that is also the intention behind the phrase *"or working the required period of notice"* namely that the able employee does not simply walk away during the notice period again leaving the employer in the lurch. I do not think that the ordinary intended meaning is that if sickness or illness, death or injury overtakes an individual then they will be penalised by a deduction.

52. There was no suggestion in this case that the illness of the claimant was a sham. I do not regard the relevant provision as operating where genuine illness overtakes an individual in the notice period.

53. I am fortified in that approach by there being no similar deduction contemplated within the terms by illness/sick absence overtaking a worker in the ordinary course of employment outwith the notice period. I see no distinction in the effect sudden absence by reason of sick absence has on continuity of business service within or outwirh the notice period.

54. Also there is no such deduction in the provision of statutory notice. Sections 86/89 of the Employment Rights Act 1996 cover the position of statutory notice being given by an employee. Those sections narrate that pay is still to be made albeit an employee is incapable of work because of sickness or injury in the notice period (under deduction of any sick pay payable). That background in relation to the statutory position in relevant in considering the meaning of this contractual provision.

55. Separately I consider that there can be implied to this contractual provision a term that it would not operate in the event that a worker is prevented from attending work in the notice period by reason of sickness or injury. I consider such a term satisfies the "*officious bystander test* " namely that the implied

term is so obvious it goes without saying. I consider that if the officious bystander were to be asked if the term meant an employee would not only not be paid for the period in which sick absence occurs but also suffer a deduction of "additional cost" incurred because of that absence the answer would be "of course not" The officious bystander would consider that the clause was intended to counter the difficulty of the able employee leaving the employer in the lurch by simply not turning up for work. That bystander would likely have in mind the recent pandemic and consider the danger of a worker being struck by Covid requiring to attend work and risk infecting others because of a prospective deduction in his/her wages.

56. Also in considering the implied term was obvious the officious bystander would have in mind the statutory position outlined above and that the deduction clause does not apply outwith the notice period.

57. The implied term would in my view meet the test of equity and be informed by the reasonable expectations of the parties. I consider the implied term would give the clause allowing deduction practical application namely that it is directed to workers leaving without providing any notice or upping sticks and leaving during the notice period when able to work.

58. Again separately even if the clause would cover a deduction for illness during the notice period rendering a worker unable to work I consider that there was a lack of evidence in this case to justify the deduction applied being *"an amount equal to any additional cost of covering your duties during the notice period……"*

59. The document (R11) which set out the calculation of *"additional costs"* simply referred to a *"shortfall"* in notice of 4 days. The calculation is based on working 5 hours per day at £9.50 per day for 4 days. There is no attempt to analyse *"additional costs of covering your duties"* due to absence.

60. The representation that overtime of £150 required to be paid to another salaried employee could not be *"additional cost"* as that would require to be

offset against the £190 not paid to the claimant for absence over 20/23 December 2022. That resulted in a saving of £40 rather than additional cost.

61. If a contract had to be cancelled worth £653 because the claimant was absent and scheduled to be on that contract (and there was no evidence produced to make any finding that was the case) then it was unknown why it was necessary to pay overtime to another employee to cover for the claimant if there was no contract.

62. In any event if a contract had to be cancelled that did not meet the definition of *''additional costs to cover your duties".*

63. Even if a contract cancellation rather than a payment to cover duties could be taken into account there would require to be an assessment of any net loss to the respondent and there was none. There was no evidence of the profit margin on such a contract to measure any loss.

64. In those circumstances I consider that there was no authorisation for deduction of £190 from the wages payable to the claimant and that sum remains payable. In line with the level of the claimant's earnings in the period no tax or NI would be due on the amounts awarded.

Employment Judge: **J Young**
Date of Judgment: **27 July 2023**
Entered in register: **28 July 2023**
and copied to parties