Case Number 2500051/18

THE EMPLOYMENT TRIBUNALS

Claimant
Ms C Barrigan

Respondent
EHL UK Resources Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT MIDDLESBROUGH ON 9th March 2018

EMPLOYMENT JUDGE GARNON (sitting alone)

For Claimant: in person
For Respondent: Ms B Vowles Director

JUDGMENT

The Judgment of the Tribunal is that the claim of unlawful deduction of wages is well founded. I order the respondent to pay to the claimant the amount of the deductions in the sum of £957.68 gross of tax and national insurance.

REASONS

1 Introduction and the Relevant Law

1.1. This is a claim of unlawful deduction of wages in respect of three weeks of work for which no payment was made and holiday pay accrued in those three weeks.

1.2. Part II of the Employment Rights Act 1996 (the Act), so far as relevant, provides

13 (1) An employer shall not make a deduction from wages of a worker employed by him

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

23 (1) A worker may present a complaint to an employment tribunal—

(a) that his employer has made a deduction from his wages in contravention of section 13

24 (1) Where a tribunal finds a complaint under section 23 well-founded, it shall make a declaration to that effect and shall order the employer—

(a) in the case of a complaint under section 23(1)(a), to pay to the worker the amount of any deduction made in contravention of section 13,

1.3 Section 27 defines wages as including "holiday pay". Section 230 provides:

(1) In this Act 'employee' means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

(2) In this Act 'contract of employment' means a contract of service…whether expressed or implied, and (if it is express) **whether oral or in writing**.

(3) In this Act 'worker'… means an individual who has entered into or works under (or, where the employment has ceased, worked under)-

(a) a contract of employment; or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or a customer of any profession or business undertaking carried on by the individual;

and any reference to a worker's contract shall be construed accordingly."

1.4. Regulation 14 of the Working Time Regulations 1998 (WTR) says where a worker's employment is terminated during the course of a leave year, for whatever reason, and on the termination date the proportion she has taken of the leave to which she is entitled in the leave year under regulation 13 and regulation 13A differs from the proportion of the leave year which has expired, her employer shall make a payment in lieu of leave in accordance with a formula for calculation. Such a claim can be brought under the WTR but also as a claim under Part 2 of the Act

2 The Facts and my Conclusions

2.1. I heard the evidence of the claimant and, for the respondent two directors Ms Barbara Vowles and Mr Ryan Stainsby In last week of August 2017 the claimant applied for a job for which she which was interviewed by Ms Vowles. She wanted to be a full-time employee and had given notice to end her part time job at House of Fraser . Her last day there was 1st September and on Monday 4th she started at the respondent's premises on a trial period . Ms Vowles was on leave until 12th September.

2.2. The rate of pay been agreed orally as £15,000 per annum. On 29 August claimant attended a training day . She was given hours of work during the times 6 am to 8:45 pm as set out in a rota. The details she has provided show hours worked averaging approximately 40 hours a week over the three weeks commencing the Monday 4th 11th and 18th September and one shift on Monday 25th September. On that basis the rate of pay is only a few pence per hour more than the National

Minimum Wage which wholly defeats an argument put by Mr Stainsby that unless the claimant was qualified to and did deliver training to clients, which she accepts she did not, the respondent would not have agreed to pay her so much .

2.3. I reject the respondent's case the claimant agreed to attend and work purely as a volunteer. She took instruction, in Ms Vowles absence, from a manager called "Mike". The respondent's argument that only a director can allocate work is one which I reject.

2.4. On Ms Vowles return the claimant was given a "Statement of Main Terms of Employment" saying in line one '*Your employment began on 4th September 2017*" It says the first 24 months is a probationary period. It is signed by Ms Vowles and dated 12 September, the day she returned from holiday. When the claimant went through it she found clauses she thought were unduly onerous and decided she did not want to work under those terms. It does not matter if her view was justified . The respondent's case is that the fact she did not take up the employment on the written terms of the contract means her previous work done under the oral contract she agreed with Ms Vowles, does not need to be paid for. I cannot accept that either .

2.5. The alternative proposition put by Mr Stainsby that she spent all this time at the gym simply using its equipment and not doing any work is again one which I reject. I also reject his argument that because the claimant cannot prove by producing a P45 that her employment at House of Fraser had ended ,the respondent cannot be under an obligation to pay her. In my judgment she was an employee under an oral contract from 4th September but, even if she were not, she was a worker as defined in s 230 (3) (b).

2.6. The claimant's schedule of loss simply claims for three weeks pay based on division by 52 and multiplication by 3 of her annual salary of £15,000. If anything this is an under claim because she could have argued she should be paid for the training day and a shift on 25 September. She calculates her compensation for untaken annual leave at £92.30 which is a correct calculation. Added to the three weeks of unpaid wages £865.38 it leads to a total award £957.68

_----------

T M Garnon EMPLOYMENT JUDGE

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 12th MARCH 2018