



EMPLOYMENT TRIBUNALS

Claimant
Ms B Louch

Respondent
Paludis Ltd

Heard at: By Telephone
Before: Employment Judge Davies

On: 12 June 2020

Appearances

For the Claimant: In person
For the Respondent: Mr Ritchie (consultant)

RESERVED JUDGMENT

1. Paludis Ltd is substituted as the correct Respondent to this claim by consent.
2. The claim of breach of contract in respect of accrued overtime is well-founded and succeeds. The Respondent shall pay the Claimant £164.54.
3. The claim of unauthorised deduction from wages in respect of rent payments for the staff house is not well-founded and is dismissed.
4. The claim of unauthorised deduction from wages in respect of broadband payments for the staff house was not brought within the three-month time limit. It was reasonably practicable to do so, so time cannot be extended. This claim is dismissed.

REASONS

INTRODUCTION

- 1.1 These were claims of breach of contract or unauthorised deduction from wages brought by the Claimant, Ms Louch, against her former employer, Paludis Ltd trading as the George Hotel. The hearing was conducted by telephone. The parties did not object. A face to face hearing was not held because it was not practicable, and a video conference could not be held because the Claimant's internet connection is not good enough. However, all the issues could be dealt with by telephone. There was no agreed file of documents. Some had been produced in advance but others were produced during the hearing. We took short breaks so that they could be copied and emailed to everybody, to ensure that everyone could see all the relevant documents. The Claimant represented herself. The Respondent was represented by Mr Ritchie, a consultant, who was with Mr Marsh,

the Respondent's owner. I heard evidence from the Claimant and from Mr Ritchie and Ms Vine for the Respondent.

THE CLAIMS AND ISSUES

2.1 The Claimant brought two claims:

2.1.1 She says that she had worked overtime, which she was contractually entitled to take as time off in lieu at a later date. However, she was told in December 2019 that she could not carry her overtime hours forward into 2020. She could have payment for the hours instead, but she would only be paid 80% of the hours she had worked. She accepted because she did not want to lose her overtime altogether. She left in January 2020. She is claiming £164.54, which is the 20% she was not paid for. This is a breach of contract claim. I have to decide:

2.1.1.1 Did the Respondent breach the Claimant's contract by refusing to allow her to carry forward her overtime hours into 2020?

2.1.1.2 Did the Claimant waive the breach by accepting payment for 80% of the hours worked?

2.1.1.3 If not, what damages is the Claimant entitled to?

2.1.2 The Claimant lived in a staff house. At the outset she was told the rent was £250 per month, which would be deducted from her wages. She agreed and that is what happened. She did not sign a written tenancy agreement until months later. The written agreement said the rent was £129 per month. She signed that but she carried on paying £250 per month. She says she has overpaid rent by £121 per month for 15 months since her employment started. She also paid £6.50 for broadband in the first two months. She says she did not agree to that and is claiming that back too. This is a claim for unauthorised deduction from wages. I have to decide:

2.1.2.1 How much rent was the Claimant contractually required to pay?

2.1.2.2 Were the wages paid to the Claimant less than the wages properly payable each month because the Respondent was deducting too much rent?

2.1.2.3 Were the wages paid to the Claimant less than the wages properly payable in the first two months because the Respondent was deducting £6.50 for broadband from her wages?

2.1.2.4 Was the claim about broadband brought within three months of the deduction? If not, was it reasonably practicable to do so and was it brought within a reasonable period?

THE FACTS

3.1 I make the following findings of fact. The Claimant started working for the Respondent as a waitress in November 2018. Nothing was put in writing at that stage but a verbal contract was agreed. The relevant terms were that the Claimant would be paid an annual salary in monthly instalments. Her rate of pay worked out at something over £8 per hour. She was employed for 40 hours per week, but some weeks she would work more and some weeks she would work less, depending on how busy the hotel was. She had to work overtime. She would not be paid for doing so, but she could take the time off in lieu at a later date. There was no restriction on carrying overtime hours forward from one year to the next.

- 3.2 Before starting her job, the Claimant was told that there was a staff house she could rent a room in. The rent was £250 per month and it would be paid by way of salary sacrifice deducted from her wages. The Claimant moved into the staff house on that basis and £250 was deducted from her wages each month. She did not sign any tenancy agreement at that stage.
- 3.3 For the first two or three months £6.50 was deducted from her wages for broadband in the staff house. She had not agreed to that. She asked a colleague about it. The colleague suggested that £250 per month was very cheap for rent so she should not question this. She took that advice and did not question these broadband deductions until after her employment ended. When I asked her about the time limit for bringing this claim she agreed that it was very late and did not put forward any reasons why time should be extended.
- 3.4 In March 2019 a new General Manager was trying to get the paperwork in order and the Claimant was asked to sign a written contract. That confirmed that her employment started on 28 November 2018. She was contracted to work 40 hours per week and was expected to work such additional hours as might be necessary. Any hours worked extra would be recorded and “accumulated” to compensate for hours lost during quiet periods. Overtime for accrued hours would “not normally be paid” but would be “taken in lieu.” That reflects the terms agreed verbally. The written contract confirmed that the Claimant’s basic salary was £15,700 per annum.
- 3.5 Mr Ritchie thought that if somebody was going to leave their employment and had accrued overtime hours, they would probably be asked to take them as time in lieu before their leaving date.
- 3.6 Around the same time as she signed an employment contract, the Claimant was provided with a written copy of a tenancy agreement to sign. It was said to be an agreement between the Respondent as landlord and the Claimant as employee. It said that rent would be paid by way of monthly salary sacrifice and the amount was stated as £129. The Claimant signed the contract. She asked the General Manager, Ben, why it said the rent was £129 when she had been paying £250. He said it was because it was an old contract. Ben left and Ms Vines became General Manager around the end of April 2019. When Ms Vines became General Manager the Claimant asked her about the rent and Ms Vines did not have an answer. The Claimant carried on paying £250 per month and did not do anything else about it.
- 3.7 Mr Ritchie started working as a consultant for the Respondent one or two days per month helping the new General Manager in early 2019. Later on, Mr Ritchie started working one day per week to manage the hotel alongside Mr Marsh and he still does so. In August 2019 an audit of staff paperwork was carried out. The Claimant was asked to sign various documents, such as a staff induction sheet, and they were backdated to the start of her employment.
- 3.8 Mr Ritchie and Ms Vine both gave evidence that towards the end of 2019 the staff had a lot of overtime accrued and they wanted to do something about it. They discussed this in November. They wanted to get the accrued hours to zero and start the new year afresh. Ms Vine explained that they were quite short staffed and everybody was doing a lot of hours, so they could not really give everybody time

off. There was a discussion that they might be able to “pay it off.” Mr Marsh agreed to offer to pay the staff in lieu of their accrued overtime hours. However, the offer was only to pay 80% of the hours accrued.

- 3.9 Mr Ritchie said that staff were under no obligation to accept the offer. If they did not want to, the time owed would have rolled forward as it had done for many years. The Claimant disagreed. She said that she was not given a choice. She was told that she would not be able to carry any hours forward into 2020, so her choice was either to accept 80% or lose her hours altogether. Mr Ritchie did not discuss the matter directly with the Claimant. He said that Ms Vine consulted the staff. Ms Vine said that she spoke to the staff individually. Her evidence was that she told them, “We’ve reached a decision we can pay 80% and that would bring the balance to zero at the start of the new year.” This was what she said to the Claimant. She told her that they would meet in the middle. They wanted to pay this off and get everybody’s hours down to zero. They could not give everybody the time off. They could not pay in full so it would be 80%. I asked Ms Vine if she said anything about carrying the hours forward and she said that she told the Claimant, “We need to clear it before January. Before the new year.” Later in her evidence she said that it was not compulsory to accept the offer, but she said the issue was not raised. The discussion was, “we want to get it cleared and this is the best way for everybody.”
- 3.10 In the light of that evidence, I prefer the Claimant’s evidence that she was not given a choice to carry her hours forward into 2020. That really seemed to be what Ms Vine had said at the time. The aim was to reduce the hours to zero by January and then move to a system of paying for overtime as it was worked. Ms Vine did not say that staff could choose to accept 80% or roll hours forward. What she said was clearly presented on the basis that they needed to get the hours down to zero for the new year and a decision had been taken to pay 80%. I do not accept that this was a “consultation” or that staff were being given any genuine choice. The Claimant understood from what Ms Vine said that her “choice” was to accept 80% or lose her overtime hours and in reality that is what was being said.
- 3.11 The Claimant took the 80% because she did not want to lose the hours. She told Ms Vine she did not really agree to it but did not want to lose her hours. She was paid £822.69 in her December payslip, which was 80% of her overtime hours.
- 3.12 The staff house was sold at around this time. The Claimant could not afford to pay for accommodation nearby at market rates, so she resigned and left her employment at the end of January 2020.

LEGAL PRINCIPLES

- 4.1 Under s 23 Employment Rights Act 1996, where the amount of wages paid on any occasion to a worker is less than the amount of wages “properly payable” on that occasion, the deficiency is treated as an unauthorised deduction, unless there is a written contract or signed agreement authorising the deduction.
- 4.2 When deciding what wages were “properly payable”, Tribunals must decide on ordinary contract law principles the total amount of wages that was properly payable to the worker on the relevant occasion. If an employer is contractually entitled to reduce a worker’s wages, the wages ‘properly payable’ will be the

reduced wages due e.g. under a varied contract or flexibility clause. If the worker is paid that amount, there is no unauthorised deduction.

- 4.3 Claims of unauthorised deductions from wages must be presented to the Tribunal within three months (plus any Early Conciliation extension) of the date the wages were paid. If there is a series of deductions, it must be within three months of the last relevant payment. Time for bringing a claim can be extended if it was not reasonably practicable to present it in three months and it was presented in a reasonable period after that.
- 4.4 Under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 an employee can bring a claim for breach of contract that arises or is outstanding when the employment ends. However, Article 5 of the Order excludes claims for breach of contractual terms imposing obligations in connection with the provision of living accommodation.
- 4.5 The terms of a contract are the terms agreed, expressly or impliedly, by the parties to the contract. They can be agreed verbally or in writing and they can subsequently be varied verbally or in writing.
- 4.6 If one party to a contract breaches it, the other party may lose their right to claim damages if they waive the breach or affirm the contract. The Tribunal will decide on the facts whether that has happened. It is not simply a question of whether the party has delayed too long. It is a question of whether their conduct shows that they intended to “let bygones be bygones.”

APPLICATION OF THE LAW TO THE FACTS

- 5.1 Applying those principles to the findings of fact, I start with the claim in relation to overtime. No deduction was made from the Claimant’s wages – she did not have a contractual entitlement to be paid for overtime, so the wages properly payable to her did not include payment for overtime. Therefore, this is a breach of contract claim.
- 5.2 I find that the Respondent did breach the Claimant’s contract by refusing to allow her to carry forward her overtime hours into 2020. As explained in my findings of fact, I do not accept that the Claimant was given a choice to carry her overtime hours forward if she did not want to accept the 80% offer. She was essentially told that the hours were to be reduced to zero by the new year and that the decision had been taken to pay 80% instead. She was contractually entitled to carry her overtime hours forward, so this was a breach of contract.
- 5.3 I find that the Claimant did not waive the breach. She accepted the payment, but she expressly said that she did not really agree to it but did not want to lose the hours. She received the 80% payment at the end of December, very shortly afterwards, and she left her employment within a month and promptly raised concerns about this issue. On those facts, the Claimant did not waive the breach or affirm the contract. She took the payment under protest and pursued the remaining 20% within a very short time frame.

- 5.4 The Claimant lost the opportunity to have time off in lieu of her overtime hours before she left her job. The appropriate measure of damages is payment for the hours she had worked but was not permitted to carry forward into 2020. That is £164.54.
- 5.5 That brings me to the claim relating to rent. The Claimant cannot bring that claim as a breach of contract claim because Article 5 of the Extension of Jurisdiction Order excludes such a claim. It relates to a contractual term imposing obligations on the Claimant relating to living accommodation. This can only be a claim for unauthorised deduction from wages.
- 5.6 The starting point is to determine what wages were properly payable to the Claimant. The contractual agreement at the start of her employment was clear and unambiguous. The Claimant would be paid her basic salary less £250 per month by way of salary sacrifice for rent. The wages properly payable were her basic salary less £250 per month and that is what she was paid.
- 5.7 I find that the written agreement signed a few months later did not change anything. It certainly did not “undo” the agreement she had reached when she first started her job and I find that there was no agreement to vary the contract at that stage either to reduce the rent to £129. Nobody was telling the Claimant that the rent was or should be £129. Ben told her that the written agreement simply said £129 because it was an old agreement. The clear implication is that it was out of date and did not affect the amount of the rent. Amy could not tell the Claimant anything. She did not discuss it with anybody else. In those circumstances, there was no agreement that the rent was or should be varied to £129 per month. After April 2019 the Claimant carried on paying £250 per month and nothing more was said.
- 5.8 Therefore, the Claimant was contractually required to pay £250 per month in rent throughout her employment.
- 5.9 The Claimant agreed at the outset that her rent would be paid as a salary sacrifice and deducted from her earnings. She would be paid the balance of her salary each month. The wages properly payable to her each month were therefore her basic salary less rent (and other permitted deductions).
- 5.10 The Claimant was paid that amount. There was therefore no unauthorised deduction in respect of rent.
- 5.11 I did not hear detailed evidence about whether there was any basis for making deductions for broadband. However, the claim about this is very substantially outside the time limit. The Claimant did not argue that it was not reasonably practicable to present it within the time limit. Put simply, she chose not to rock the boat, having been advised that the rent overall was very generous. Time for bringing this claim therefore cannot be extended and it is dismissed.

**Employment Judge Davies
16 June 2020**