



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Ms Y Pitarch

v

Katz (AH) Limited

Heard at: Watford

On: 30 January 2020

Before: Employment Judge Hyams, sitting alone

Representation:

For the claimant:

Mr Adam Adamou, of counsel

For the respondent:

Mr Daniel Brown, of counsel

RESERVED JUDGMENT

1. The claim for £1920 by way of unpaid bonus fails and is dismissed.
2. The claim for unpaid holiday pay of £599.94 fails and is dismissed.
3. The claim for pay in respect of a night shift is successful. The respondent must pay the claimant the sum of £93.96 in that regard.
4. The deduction of £105 for the cost of the mobile telephone that the claimant returned damaged was an unlawful deduction from the claimant's wages, contrary to section 23 of the Employment Rights Act 1996, and the respondent must pay the claimant that sum.

REASONS

The claim

- 1 This is a claim of unlawful deductions from the wages of the claimant. The claim

was made under section 23 of the Employment Rights Act 1996 (“ERA 1996”).
The sums claimed are

- 1.1 £1920 by way of an allegedly unpaid bonus;
- 1.2 £599.94 in respect of accrued allegedly untaken annual leave;
- 1.3 £92.40 for an allegedly unpaid night shift payment; and
- 1.4 £105, which was deducted from the claimant’s final payment of wages on the basis that the claimant had damaged a mobile telephone which she had been given by the respondent to use.

The evidence

- 2 I heard oral evidence from the claimant on her own behalf, and, on behalf of the respondent, from Ms Kofoworola Ibitoye, a director and shareholder of the respondent. I was given a 158-page bundle and read the documents in it to which I was referred. Having heard that oral evidence and read those documents, I made the following findings of fact.

The facts

The claimant’s employment with the respondent

- 3 The claimant was employed by the respondent from 27 November 2017 onwards until the events described below as Deputy Manager of the respondent’s small residential home for children and young adults by the name of Addison House. The salary for that post was £26,000 per year. The home was established in 2013 and has a maximum capacity of four residents. The claimant was employed under the terms of a contract set out in a letter dated 27 November 2017 of which there was a copy in the hearing bundle at pages 38-44, to which I return below. (Any reference to a page below is to a page of that bundle.)
- 4 The residents of Addison House (“the home”) have all suffered trauma and abuse and as a result have emotional and behavioural difficulties. The home is regulated and therefore inspected by Ofsted. Ms Ibitoye was at the time of the claimant’s employment by the respondent the home’s registered manager and also what is known as its responsible individual. Both roles are required by Ofsted, and Ofsted regards it as being important to have the roles held by two separate people.
- 5 Ms Ibitoye was keen for the claimant to become the registered manager of the home. As a result, after some discussion, the claimant agreed to accept the role of “Manager”. The acceptance was recorded by Ms Ibitoye in an email to the claimant of 1 May 2018 of which there was a copy at pages 56-57. The email was in these terms:

“Dear Yolanda,

I write further to the verbal offer that was made to you for the position of Manager at Addison House (SC473460). I am pleased that you have accepted the offer.

The Manager position commences today 1st May 2018 until the completion of your fit person interview with Ofsted to become the Registered Manager. As you know, you will have responsibility for the day to day management of the service in line with the Statement of Purpose, Policies and Procedures and legislative requirements and report directly to the Responsible Individual. As the sitting Registered Manager, I will continue to support you to settle in your role until your registration is complete after which I will take on the role of Responsible Individual.

As Manager, your remuneration will be £29,000 per annum and on successfully attaining the Registered Manager position will increase to £32,000 per annum

1. Allowance for night shift – paid at £93.96 per night to a minimum of 48 weeks per annum totally £4,510.08
2. As Registered Manager, you will be entitled to a performance related bonus of 10% of your annual salary for Outstanding (£3,200) and 6% for Good rating (£1,920).
3. Company mobile phone (international calls excluded)
4. £200 monthly bonus for full occupancy with immediate effect
5. Flexible working – compressed hours over 4 days a week/40 hours per week
6. Annual leave – 23 days including bank holidays
7. Workplace Pension

A revised contract of employment in line with the above headline terms will be provided for your signature. Kindly acknowledge receipt of this correspondence in the intervening period.”

- 6 No revised contract of employment was, however, provided to the claimant for her signature. That meant that her original contract of employment governed the terms of her employment, as varied by the terms at least evidenced by the email at pages 56-57. So far as material, the claimant’s contract of employment provided these things:

6.1 In clause 4.1 this was said: “You will be remunerated for night shifts completed at £92.40 per night shift completed between the hours of 8pm and 8am.”

6.2 In clause 5.1, this was said: “You will work 40 hours per week and at least

one night shift per each calendar month.”

6.3 In clause 4.3, this was said: “We shall be entitled to deduct from your salary or other payments due to you any money which you may owe to the Company at any time.”

7 The claimant then started the process required to be followed to become a registered manager of a home such as Addison House. She had not completed that process when, on 29 and 30 November 2018, there was an inspection of the home by Ofsted. The outcome was that the home was rated “Good”.

8 There was a meeting of the claimant and Ms Ibitoye at the home on 4 December 2018. There were minutes of the meeting (headed “Management Meeting”) at pages 103-107. In box 13, on page 107, this was recorded:

“Bonus – Applicable in March 2019 pay.

Staff bonus – £50 voucher to all staff on 13th Dec. Re Ofsted inspection.”

9 The claimant’s evidence (in paragraph 5 of her witness statement) about the words “Bonus – Applicable in March 2019 pay.” was this:

‘On 4 December 2018, I attended a Management Meeting with Kofo Ibitoye, Head of Care (“Kofo”), in respect of feedback from the Ofsted inspection on 29 November and 30 November 2018. The ratings we received from Ofsted were ‘Good’ across all three areas. Concluding the meeting, I was told all staff would receive a £50 bonus voucher alongside me receiving my bonus, as agreed, in my March 2019 pay (see minutes at page 107 of the Bundle). The amount was not specified at the meeting but according to the email received on 1 May 2018, I believed this to be £1,920.’

10 Ms Ibitoye’s evidence (in paragraph 4.4 of her witness statement) about the reference to a bonus was this:

“On 4 December 2018 I had a management meeting with the Claimant where we discussed a number of different things (page number 103-107). The minutes of the meeting refer to us discussing a bonus at item 13 (page number 107), however this did not relate to the bonus that was linked to the Ofsted rating. This related to the £200 monthly bonus which the Claimant was entitled to if Addison House was fully occupied. This bonus was not conditional upon the Claimant being the Registered Manager, and it is referred to in my email of 1 May 2018 (page number 56-57). However, the occupancy bonus was not paid as Addison House was not at its full occupancy of 4 in December 2018, January 2019 and/or February 2019. This is not contested by the Claimant and the occupancy bonus does not form part of the Claimant’s claim. We also discussed the £50 voucher that all staff were entitled to following the Ofsted inspection; the Claimant received

the £50 voucher before Christmas. There was no discussion regarding the bonus that was linked to the Ofsted rating at the meeting on 4 December 2018 and the Claimant did not raise the issue of this alleged bonus with me during her employment.”

- 11 The parties agreed (and the documentary evidence showed) that the home was not full after May 2018. The claimant was paid at the end of May 2018 a bonus of £200 for that month as a result of the home being full during that month. After that, the claimant received no further bonus of £200 for the home being full during any month.
- 12 During oral evidence the claimant said that Ms Ibitoye had said to her at the meeting of 4 December 2018 that because she (Ms Ibitoye) was very happy about the outcome of the Ofsted inspection, she was going to give the claimant her bonus and the whole of the staff a £50 bonus. In addition, for the first time as far as the respondent was concerned, the claimant said that Ms Ibitoye had asked her whether she wanted her bonus (i.e. not the £50 bonus) to be paid in December 2018 or March 2019, and the claimant had said that she wanted it to be paid in March 2019 because it would be a better time for her since it would help her to pay for her summer holiday, and if she got it in December then she would probably spend it on something else.
- 13 During her oral evidence, Ms Ibitoye said that the reference on page 107 to a bonus being paid in March 2019 was made because she was referring to the claimant’s potential bonus of £200 being unlikely to be payable again before March 2019 and because she was trying to encourage the claimant by reminding her that she could earn more money if she achieved full occupancy of the home.
- 14 The £50 bonus was paid to all of the staff (including the claimant) before Christmas 2018.
- 15 After Christmas 2018, however, the claimant’s work became less satisfactory to Ms Ibitoye. The claimant’s application to become the home’s registered manager stalled, for reasons to which it is not necessary to refer here, and on 30 January 2019 Ms Ibitoye withdrew the application for the claimant to be the home’s registered manager. She wrote about that withdrawal in her letter to the claimant at page 116. It was dated 30 January 2019 and ended:

“Because your application for the subject position is no longer going ahead, you will therefore revert to your contractual position and salary as a Deputy Manager with effect from 1st February 2019.

Should you have any questions or wish to discuss, do not hesitate to contact me.”

- 16 The claimant was not happy about that decision. On 2 February 2019, Ms Ibitoye initiated a restructuring of the home’s operations. On 3 February 2019, the

claimant raised a grievance about what she saw as her “demotion”.

- 17 On 28 February 2019, Ms Ibitoye gave the claimant notice of the termination of her contract of employment. In that notice (at page 138), the claimant was required to take garden leave, i.e. not to attend work during her notice period. The letter included this passage:

“You are entitled to a month’s notice as per your contract of employment. The company has decided to ask you to proceed on Garden Leave from 1st to 31st March 2019 (The Notice Period).

We confirm that your contractual and payroll benefits will be in place until the last day of your employment with Katz Care Services – 31st March 2019, subject to the conditions below:

1. you are not required to carry out any work or responsibility for, or, on behalf of Katz Care Services [sic] and you must spend the full duration of your notice period as above away from Addison House.
 2. As a contractual clause, you must not breach the terms of your contract of employment whilst on garden leave.”
- 18 The claimant’s final pay statement (for March 2019) was at page 144. The pay statements for the preceding months were at pages 145-148. Taken together, they showed that the claimant’s basic salary for the final two months of her employment was the same as it had been in the months, up to and including January 2019. That was £2,416.67, i.e. one twelfth of £29,000.

Annual leave

- 19 The claimant was abroad from 25 to 29 March 2019. There was a leave request form for that period in the bundle at page 108. Somewhat oddly, the form had two dates next to the claimant’s signature: 19.01.19 and 28.01.19. It was not approved by Ms Ibitoye (so she had not dated the form at all). In contrast, there was a leave request form for one day’s leave on 25 January 2019 at page 111, and that request had been signed by Ms Ibitoye as being approved and was stated to have been a “Retrospective request for 1 day AL on 25/01/19”. That leave request (on page 111) was dated 25 January 2019 by both the claimant and Ms Ibitoye.
- 20 Ms Ibitoye’s evidence about that annual leave and those documents was in paragraph 4.6 of her witness statement, which was in these terms:

“The Claimant had 1 January 2019 off as a bank holiday. She also had 25 January 2019 off as holiday (page number 108). On 14 January 2019, the Claimant requested 4 days holiday from 25 to 28 March 2019, which was approved (page number 111).”

21 Those page references were inaccurate, as can be seen from what I say in paragraph 19 above: the leave request for 25 January 2019 was at page 111 and the leave request for the period of time off in March was at page 108. Further, as I say above, the latter was not approved. It was also for the period from 25 to 29 March, and not 25 to 28 March, although it was stated to be for 4 days.

The mobile telephone

22 The respondent (via Ms Ibitoye's PA, Ms Leah Spencer) asked the claimant in the email dated 14 March 2019 at page 140 to return the respondent's mobile telephone by 31 March 2019. The words used were these:

"Good morning Yolanda,

May I please inform you that your company Mobile phone must be returned by the 31st March 2019."

23 On 25 March 2019, Ms Spencer wrote (page 142):

"Good morning Yolanda,

Further to the previous email I sent you regarding the return of your company mobile phone as we have not received it yet I ask that it is returned by Thursday 29th March as this is the day you are paid.

You may post it back and we will reimburse the postage fee.

If it is not received by this date then the cost of the handset will be deducted from your final wages."

24 The next development was that the claimant did not return the mobile telephone on or before 29 March, but instead she did so on 31 March 2019, as recorded by her in her email at page 143.

25 As for what happened then, Ms Ibitoye said this in paragraph 4.12 of her witness statement:

"The Claimant returned the phone on 31 March 2019 (page number 143) and the entire screen was broken. I made enquiries as to how much it would cost to fix the phone, however I was told that it was not worthwhile to repair the phone as the repair would have cost more than the value of the handset (£105). We therefore posted the phone back to the Claimant so that she could use it, however she returned it to us."

The relevant law

26 Section 13 of the ERA 1996 prohibits deductions from an employee's pay 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.”

27 Section 25(4) of the ERA 1996 provides this:

“ Where a tribunal has under section 24 ordered an employer to pay or repay to a worker any amount in respect of a particular deduction or payment falling within section 23(1)(a) to (d), the amount which the employer is entitled to recover (by whatever means) in respect of the matter in relation to which the deduction or payment was originally made or received shall be treated as reduced by that amount.”

28 Mr Adamou submitted (and I accepted) that any documentary ambiguity should be interpreted against the interests of the party who introduced it (the *contra proferentem* principle).

My conclusions and my reasons for them

(1) The bonus claim

A discussion

29 The claim for a bonus was for £1920. That was 6% of the annual salary that the claimant would have received if she had been appointed the registered manager of Addison House, i.e. £32,000. The claimant was at no time paid that salary: she was paid at the rate of £29,000 from 1 May 2018 until 31 March 2019.

30 The claimant never did become the registered manager. As a result, given the terms of the email of 1 May 2018 at pages 56-57 she could have become entitled to a bonus as a result of the “Good” rating achieved in the Ofsted inspection of November 2018 only if there was a separate agreement to that effect between her and the respondent.

31 Such an agreement can have come into being (on the evidence before me) only as a result of what was said at the meeting of 4 December 2018 of which there was Ms Ibitoye's record at pages 103-107.

32 I found Ms Ibitoye's explanation for the reference to a bonus being paid in March 2019, namely that she was referring to the claimant's potential bonus of £200 being unlikely to be payable again before March 2019 and that she was trying to

encourage the claimant by reminding her that she could earn more money if she achieved full occupancy, to be difficult to believe. One reason why it did not make sense was that the home had just received a rating of “Good” from Ofsted, so there was no apparent need to encourage the claimant in the face of bad news or a poor future outlook.

- 33 However, equally, I found it hard to believe that the claimant would have opted for payment of the bonus in March 2019 rather than December 2018. In addition, I found it hard to believe that Ms Ibitoye would have offered that alternative.
- 34 I put it to the parties that Ms Ibitoye might have said that despite the fact that the claimant was not at the time of the inspection the home’s registered manager, she would be paid the bonus of £1920 if she became the home’s registered manager by March 2019. However, both parties said that that was not what had been said by Ms Ibitoye at the meeting of 4 December 2018.
- 35 I said that it was possible that Ms Ibitoye had been mistaken about the claimant’s entitlement to a bonus in respect of the “Good” rating of November 2018, but it was not advanced by either party that that was the case.
- 36 After the hearing, when preparing this judgment, I noticed (see paragraph 15 above) that the letter of 30 January 2019 informing the claimant about the withdrawal of the application for her to become the home’s registered manager referred to the claimant reverting to her “contractual position and salary as a Deputy Manager with effect from 1st February 2019.” However, the claimant’s pay was not subsequently reduced to that which she had been receiving as Deputy Manager. Nevertheless, that did not help me to come to a conclusion about what happened at the meeting of 4 December 2018.
- 37 It was for the claimant to prove her entitlement to the bonus.
- 38 Of all of the possible explanations for the use by Ms Ibitoye of the words “Bonus – Applicable in March 2019 pay”, even though it was difficult to believe, Ms Ibitoye’s own explanation fitted the circumstances best.

My conclusion on the bonus claim

- 39 Given the above factors, I came to the conclusion that the claimant had not proved on the balance of probabilities that she was entitled to the payment of a bonus. I also concluded that if she had been entitled to a bonus, then it would have been to a payment of 6% of £29,000, which would have been £1740. In any event, the claim to a bonus (whether of £1920 or £1740) failed on the facts as I found them to be.

(2) The claim to accrued holiday pay

- 40 As for the claim to accrued holiday pay, I concluded that the claimant had taken

4 days of annual leave in March 2019 and therefore that she had taken her full entitlement in the first quarter of 2019. The fact that the request was not formally approved by Ms Ibitoye was in my view not determinative: in my view, on the balance of probabilities, Ms Ibitoye had approved the time off, and simply failed to complete her part of the request form at page 108. That failure was readily explicable by reference to the restructuring of the respondent's operations in the first part of 2019 and the turbulence caused by the withdrawal of the application for the claimant to be the registered manager of the home.

(3) The claim for the payment of one night shift allowance

41 The parties agreed with me that if the claimant was entitled to a night shift payment, then, given the email at page 56 the material part of which is set out in paragraph 5 above, it was at the rate of £93.96.

42 In this regard, I concluded that the letter of 28 February 2019 (the material part of which is set out in paragraph 17 above) had the effect that the claimant was to be paid all of her contractual entitlements to pay and other benefits until the end of March 2019. Those included the pay which she would have received if she had not been on garden leave, which included the night shift payment that she would have received if she had worked during that month, even though she (necessarily) did not work a night shift that month. If there was any doubt in regard to that entitlement by reason of any ambiguity or lack of clarity then, in the circumstances, it fell to be resolved in favour of the claimant. In any event, in my view the claimant was in the circumstances entitled to one night shift allowance, in the sum of £93.96.

(4) The sum of £105 deducted in respect of the mobile telephone

43 In my judgment, clause 4.3 of the claimant's contract of employment (set out in paragraph 6.3 above) did not entitle the respondent to deduct the cost of the claimant's mobile telephone either because she had not returned it by 29 March 2019 or because, when it was returned, on 31 March 2019, its screen was broken. I reached that conclusion for the following reasons.

43.1 The claimant was entitled by reason of the terms of the email at page 56 read with the letter of 28 February 2019 at page 138 to the use of a mobile telephone during her employment with the respondent after 1 May 2018 up to and including 31 March 2019, so that the failure to return the telephone by 29 March 2019 did not entitle the respondent to any sum of money at all.

43.2 It could not properly be said (i.e. I rejected the contention that) the words "any money which you may owe to the Company at any time" could apply to a failure to return property such as a mobile telephone, or to its return in a damaged state.

43.3 If either a failure to return property to an employer or its return in a damaged state were to be covered by a power to deduct money from an employee's pay, then in my judgment it needed to be stated in terms that that was so. Even then there was the possibility of ambiguity since it might not be clear what deduction was justified.

44 In any event, in the circumstances, in my judgment the deduction of the sum of £105 was an unlawful deduction.

The sum that the respondent must now pay to the claimant

45 Therefore, the respondent unlawfully deducted from the claimant's wages, and therefore owes the claimant, in total £198.96.

Employment Judge Hyams

Date: 31 January 2020

JUDGMENT SENT TO THE PARTIES ON

.....

.....
FOR THE TRIBUNAL OFFICE