EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110420/2021

Hearing heard by Cloud Video Platform (CVP) on 28 September 2021

Employment Judge R Mackay

Ms S Stewart	**Claimant** **Represented by** **Mr L McKay,** **Trainee** **Solicitor**
Gray Ghost Ltd	**Respondent** **Not Present &** **Not Represented**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

None of the claims brought by the Claimant being well founded, they are dismissed.

REASONS

Introduction

1 This is a claim for unpaid wages under section 13 of the Employment Rights Acts 1996 ("**ERA**"); unpaid pension contributions under section 3 of the Employment Tribunals Act 1996 (and the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994); and for payment in respect of holidays accrued but untaken under section 14 of the Working Time Regulations 1998

(**"the Regulations**"). There is a subsidiary claim for a failure to provide a statement of written particulars in accordance with section 1 ERA.

2 The Respondent submitted a defence to the claim to the effect that all payments due to the Claimant had been made.

3 The Claimant was represented by Liam McKay, a trainee solicitor. The Respondent was due to be represented by a chartered accountant, Mr David Houston.

4 The Respondent had applied on 25 August 2021 for a postponement of the Hearing. The reason given was that Mr Houston would be at an airport at the relevant time. The application was refused by an Employment Judge and the refusal was communicated to the parties by letter emailed on 3 September 2021.

5 In response to an email seeking to set up a CVP test, Mr Houston responded by email of 16 September 2021 to the effect that he would be the only person attending the Hearing but would be at an airport and was not 100% sure if he would have access. He stated that he was trying to find a substitute whom he could brief with the background and details but had had no luck at that point.

6 At the time scheduled for the commencement of the Hearing (2pm), Mr Houston sought to log in and is noted as having attempted to do so on 14 occasions. He could be seen but it was apparent that he could not hear what was being said.

7 The Hearing was adjourned in order for the Employment Tribunal Clerk to try to make contact with Mr Houston. He called his landline telephone number and received no answer. He left a voicemail. He sent an email at 14:38 asking for Mr Houston to make contact with him. No response was received. He rang a mobile telephone number set out on the ET3. A Mr Scanlon on behalf of the Respondent answered and provided a mobile number for Mr Houston. The Clerk then rang Mr Houston's mobile at 14:46. There was no answer and he left a voicemail.

8 The Hearing reconvened and on behalf of the Claimant, Mr McKay asked that the Hearing continue. He pointed out that it had been scheduled since 19 July and that earlier applications for postponements had been refused. He pointed to other failures on the part of the Respondent in terms of case management.

9 Having regard to the information available to the Tribunal, the procedural history and the clear prejudice to the Claimant in delaying the process, the Tribunal determined that the case should proceed in the absence of the Respondent.

10 10 Following the conclusion of the Hearing, by email the following day, Mr Houston contacted the Employment Tribunal. He stated that he could see the meeting and could see that attendees were speaking but could not hear anything and had no idea if other parties could hear him. He stated that he looked for a chat option on the portal but was not able to identify one. He had not thought to check his email.

11 He stated that the telephone number used for him was correct but that his office was closed and that the telephone number is answered from home by one of the Respondent's receptionists.

12 An email was also received from Mr Scanlon apologising for the lack of representation. He stated that had known that there would be such issues, he would have attended himself.

13 The Claimant was in attendance at the Hearing and gave evidence on her own behalf. There were no other witnesses. She produced a bundle of documents, most of which were brought to the attention of the Tribunal, and a schedule of loss.

Findings in Fact

14 The Claimant commenced employment with the Respondent on 1 April 2019. She was employed, latterly as Assistant Manager, at the Scarecrow Bar & Grill in Kilsyth. She was initially employed by Dark Angel Ltd. At some point

during the course of her employment, there was a transfer of ownership of the business to Gray Ghost Ltd who became her employer.

15 When she commenced employment, she had no set hours. They varied according to shifts allocated to her and her ability to devote time to the job. She was studying at college at the time.

16 After leaving college at the end of January 2020, the Claimant was offered a supervisor position. The Claimant stated that she envisaged that her employment would become full time but she did not in fact do so and continued to work variable hours depending on the shifts offered to her by the Respondent.

17 The Respondent's General Manager forwarded a draft contract of employment to the Claimant on 4 September 2020. The draft contract was not signed by either party. In it, the Claimant's job title was Assistant Manager. Her pay was said to be £8.50 per hour rising to £9.00 per hour on 15 October 2020. It referred to her commencement of continuous service as being 15 July 2019. The draft was not signed by either party.

18 The draft contract stipulated that the Claimant would work a minimum of 50 hours per week. It also stipulated that she would be paid monthly (sic) for the hours worked in the previous week. The salary clause contained the sentence: "*You will only be paid for the hours that you work*".

19 The reason for issuing the Claimant with a draft contract was that she had requested one for the purposes of evidencing employment status for mortgage lending purposes.

20 Notwithstanding the provision in the draft contract regarding minimum hours, the majority of payslips evidenced the Claimant working fewer than 40 hours and on some occasions substantially fewer.

21 The Claimant was entitled to pension contributions in accordance with the Respondent's minimum statutory duty. The Nest scheme was used. The

Claimant complained to Nest about missing contributions. A letter from Nest relied upon by the Claimant referred to an underpayment of £14.44.

22 During the course of her employment, the Claimant was placed on furlough leave on a number of occasions. Whilst on furlough, the Claimant was paid 80% of average earnings. The Claimant was simply informed of the payment reduction. There was no advance consultation. It was put to the Claimant that in the ET3 it was stated that she had verbally agreed to receive 80% of wages. Her response was "*Not exactly*".

23 The Claimant was on furlough leave for a total of approximately 11 months. It was explained to her that she was being paid 80% of the average of her wages from the commencement of her employment to date.

24 The Claimant's employment ended on 14 May 2021. She resigned with effect from that date.

25 The Claimant did not take holidays in the period from 1 April 2020 until the termination of her employment. This amounts to 31.5 days. She received payment in respect of accrued holidays on termination of employment but challenged the calculation.

26 Prior to her resignation, the Claimant submitted a grievance relating *inter alia* to the calculation of furlough pay – suggesting that her pay ought to be based on the 50 hour set out in the draft contract. Her grievance was rejected by the Respondent.

Claimant's Submissions

27 Mr McKay spoke to the Claimant's schedule of loss. In relation to unlawful deduction from wages, he submitted that the Claimant was, as a matter of contract, entitled to payment for 50 hours per week at the rates of pay stipulated. He submitted that there was nothing in the evidence to suggest that the draft contract was a sham. On that basis, he asked for the balance between the sums actually paid to the Claimant and sums calculated on the basis of 50 hours per week to be awarded from 15 July 2019 onwards.

28 In relation to the period when the Claimant was on furlough leave, he submitted that there had been no agreement to a reduction in pay. For that reason, he submitted that the Claimant should be awarded full pay (based again on 50 hours per week) during the period spent on furlough.

29 In relation to unpaid pension contributions, Mr McKay submitted that there had been a shortfall in payments. The shortfall was calculated by reference to the Claimant's payslips and the sums actually paid as against contributions based on a 50 hour per week role. He initially claimed both the employer and employee contributions but withdrew the claim for the latter on the basis that a failure to deduct employee contributions does not give rise to a financial loss.

30 In relation to holiday pay, Mr McKay submitted that the calculations in the schedule of loss were wrong and that the shortfall was in fact £77.00. It was not clear how that figure had been calculated.

31 Mr McKay went on to submit that if any of the primary claims was successful, there should be an uplift for a failure to provide written particulars of employment. On being questioned by the Employment Judge as to whether the draft contract referred to did not amount to written particulars, he submitted that it had not been provided timeously.

Relevant Law

32 It is unlawful for an employer to make a deduction from a worker's wages unless (a) the deduction is required or authorised by statute or a provision in the worker's contract or (b) the worker has given their prior written consent to the deduction (Section 13 ERA).

33 The relevant definition of wages is contained in Section 27 ERA.

34 Section 13(3) ERA provides:

"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 [of ERA] as a deduction made by the employer from the worker's wages on that occasion".

35 The term "properly payable" was considered in ***New Century Cleaning Co Ltd v Church*** [2000] IRLR 27 at paragraph 62:

"*For wages to be "properly payable" by an employer, he must be rendered liable to pay, either under the contract of employment or in some other way. Section 27 contains some examples of sums which may be payable either under contract or because for some other reason the employer is liable to make payable as an addition or supplement to "wages".*"

36 A claim for underpayment of pension contributions brought under the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 requires there to have been a breach of the Claimant's contract outstanding at the termination of employment.

37 In relation to holiday pay, the Claimant, in broad terms, is entitled to payment in respect of certain accrued but untaken annual leave in accordance with Section 14 of the Working Time Regulations 1998.

Decision

38 The Claimant's claims are all predicated upon her having a contractual entitlement to be paid for 50 hours work per week regardless of the number of hours actually worked. In practice, she worked, and was paid for, substantially fewer hours than 50 during most weeks of her employment. She did not challenge the position until shortly before her employment ended.

39 The draft contract makes provision for the Claimant to be paid only in respect of hours actually worked. That is how the relationship operated in practice. Whilst the Tribunal would not go so far as to say that the draft contract was a sham, it was somewhat concerning that it was produced in the context of the Claimant seeking mortgage approval.

40 Having regard to the pattern of hours worked, and the Claimant's acceptance of the payments received during the course of her employment, the Tribunal

was satisfied that it was not the intention that the Claimant be guaranteed a minimum of 50 hours per week - far less that she would be paid in respect of such hours if she did not work them. Instead, as she stated in her own evidence, her hours of work were dependent on the Respondent offering her shifts each week.

41 There is, therefore, no proper basis on which the Claimant can claim an uplift in wages to reflect a nominal 50 hours per week arising from the terms of the draft contract. Her actual contractual entitlement was to be paid for shifts worked by her.

42 Other than the furlough period, there was otherwise no evidence to suggest that the Claimant was not properly paid for the hours worked by her.

43 So far as the period of furlough is concerned, it is clear that the Respondent did not obtain the Claimant's written (or express verbal) consent to the reduction in pay. The question for the Tribunal was whether the Claimant had nonetheless by her conduct accepted the change in terms and conditions.

44 The Tribunal had regard to the guidance in ***Solectron Scotland Ltd v Roper & Others*** [2004] IRLR 4 at paragraph 30:

> "*If an employer varies contractual terms by, for example, changing the wage or perhaps altering the job duties and the employees go along with that without protest, then in those circumstances it may be possible to infer that they have by their conduct after a period of time accepted the change in terms and conditions. If they reject the change they must either refuse to implement it or make it plain that, by acceding to it, they are doing so without prejudice to their contractual rights*."

45 There was no evidence before the Tribunal that the Claimant had in any way worked under protest. On the contrary, she gave evidence that she felt she was lucky to be paid anything at all. The Tribunal therefore concluded that the Claimant had by her conduct accepted the reduction in wages to 80%.

46 Again, there was nothing before the Tribunal to suggest that the Respondent had not properly calculated the 80% of wages based on the Claimant's prior earnings.

47 The Tribunal reached a similar conclusion in respect of the claim for unpaid pension contributions. On the basis that the Claimant was using a weekly rate of pay based on 50 hours per week, she was making a claim which was not borne out by the actual agreed terms. The only evidence of any shortfall was in the letter from Nest referred to amounting to £14.44. There was no evidence before the Tribunal as to whether that payment had subsequently been paid.

48 In relation to holiday pay, the Tribunal had difficulty in understanding the basis on which a figure of £77 was sought (that having been revised from the figure in the schedule of loss). If, as appears to be the case, the calculation was based on an inflated weekly pay figure the Tribunal was not satisfied that any award was due.

49 Having not found in favour of the Claimant in respect of any of her principal claims, the Tribunal is not permitted to make any award for an uplift for any alleged failure to provide a statement of written particulars of employment. It is noteworthy, however, that the draft contract issued to the Claimant is described as being such a statement and leaving aside the question of whether it amounts to a contract and the validity of the hours of work clause, it broadly complies with the statutory requirements. Although issued late, the Tribunal would not in any event have been able to make an award (see ***Govdata Ltd v Denton*** UK EAT/0237/18).

Employment Judge: **R Mackay**
Date of Judgment: **8 November 2021**
Entered in register: **9 November 2021**
and copied to parties