



EMPLOYMENT TRIBUNALS

Claimant: Miss Zoey Harris

Respondent: J Williamz Limited

Heard at: Central London by video

On: 7 November 2022

Before: Employment Judge K Hunt

Representation

Claimant: Miss Harris – in person

Respondent: Mr Folygon – in person

RESERVED JUDGMENT

1. The Claimant's claim that there were unauthorised deductions from her wages with regard to withholding her final month's salary for the period to 15 July 2022 is well founded and is upheld. The Respondent is ordered to pay to the Claimant the sum of £918 (gross) less such deductions for tax and national insurance contributions as may be due (if any).
2. The Claimant's claim that there were unauthorised deductions from her wages in failing to pay her in lieu of accrued and untaken holidays on the termination of her employment is well founded and is upheld. The Respondent is ordered to pay to the Claimant the sum of £459 (gross) less such deductions for tax and national insurance contributions as may be due (if any).

REASONS

Introduction

1. The Claimant was employed by the Respondent as an Administrative Assistant under the Kickstart Scheme funded through Universal Credit. She was employed for a fixed term of six months from 17 January 2022 to 15 July 2022. The Claimant's employment terminated on 15 July 2022. The claimant claims unlawful deduction of wages in respect of her final month's wages and brings a claim for outstanding holiday pay. The Claimant commenced Acas early conciliation on 22 August 2022 and

raised a grievance on 26 August 2022 to which the Respondent did not reply. The Acas certificate was issued on 6 September 2022 and these proceedings issued on 11 September 2022. In an exchange of correspondence with the Tribunal between 28 October 2022 and 1 November 2022, the Respondent made an application for an extension of time to present a Response.

Claims and issues

Unlawful Deduction from Wages

2. The Claimant is bringing a claim for unlawful deductions from wages under s.13 and s.23 of the Employment Rights Act 1996, claiming for withheld wages of her final month's salary in the sum of £918 and pay in lieu of accrued untaken holiday of 10 days in the sum of £459.
3. The Respondent does not dispute that a deduction was made and that no payment was made in respect of the Claimant's final month's wages and any accrued untaken holiday. The Respondent says that the final month's wages were not paid because her final assignment had not been completed and was of poor quality and that she had been warned of this. In respect of pay in lieu of untaken holidays, the Respondent submits that at times during her employment the Claimant requested time off and this was regarded as the Claimant taking time off as holiday.
4. The issues for the Tribunal to consider were discussed at the outset of the hearing, as follows:
 - 4.1 Did the Respondent make a deduction from wages by its withholding of the Claimant's final month's salary?
 - 4.2 Was any deduction required or authorised by statute or by a written term or relevant provision of the contract of employment or did the Claimant agree in writing to the deduction before it was made?
 - 4.3 If the deduction was authorised, was the deduction made justified or were the wages paid less than the wages that were properly payable?
 - 4.4 If the Respondent made an unauthorised deduction, how much is the Claimant owed?
 - 4.5 How much holiday entitlement had the Claimant accrued but not taken, if any, by the end of her employment?
 - 4.6 If entitled to any accrued untaken holiday, how much is the Claimant owed as pay in lieu of holiday?

Procedure – preliminary issues, documents and evidence heard

Respondent's Application for an extension of time

5. At the outset of the hearing, I first dealt with the Respondent's application for an extension of time to file a response under Rule 20 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the Tribunal Rules). Miss Harris objected to the Respondent's application. I had been provided with email correspondence on file between the Respondent and the Tribunal (copied to the Claimant) dated 29/10/22, 31/10/22 and 1/11/22 by which the written application was made with a draft response in support. Mr Folyan gave evidence in support of the application.
6. Mr Folyan's evidence in explaining why a Response had not been filed in time was that he knew nothing about these proceedings until the morning of Friday 28 October 2022, when he received a call at 10.18 from a company who represent small and micro businesses, offering to represent the Respondent. The same day he received an email from the Claimant to the Tribunal (copying Mr Folyan) requesting a default judgment as the Respondent had not filed a response to the claim. Mr Folyan tried unsuccessfully to call the Tribunal that day and on the Saturday and Monday. He also replied by email to the Tribunal in response to the Claimant's email on Friday 28 October 2022, advising as above that the Respondent was unaware of the claim and had received no notice or letter from the Tribunal. Following the exchange of correspondence with the Tribunal referred to above, the Respondent submitted a Response/ET3 on 1 November 2022, having been sent copies of the ET1, notice of claim, ET3 form and notice of hearing that day. In his evidence Mr Folyan explained that he works from home and mail is sent to the company's registered office and is forwarded to him by email but that he did not receive any letters concerning the tribunal claim.
7. Miss Harris was given an opportunity to cross examine Mr Folyan and put to him that there were 3 separate occasions when the Respondent was informed of a claim, namely by her and by acas and when HMRC attempted to contact the Respondent about the claim for unpaid wages. Mr Folyan stated he had no knowledge of the claim until 28 October 2022 and that HMRC spoke to the Respondent's accountant and nothing was said about a tribunal claim. He stated that he had replied immediately to the Tribunal when he got a letter from the Legal Officer and there was no reason why he would not have responded at the right time.
8. I considered all of the evidence including the email correspondence, evidence of Mr Folyan and the draft response. In deciding whether to grant or refuse an extension under r.20 of Tribunal Rules and taking account of the over-riding objective to deal with matters fairly and justly, I considered all relevant factors including the respondent's explanation of why the extension was required, the balance of prejudice between the Claimant and the Respondent if the application was accepted or refused and whether there was some merit in the Respondent's response. I found Mr Folyan's explanation to be candid and that once he received an email he had acted promptly in his efforts to engage with the Tribunal and that as soon as he received a copy of the ET1 he responded the same day; in weighing the balance of prejudice I considered that the Claimant had received a copy of the draft response and had an opportunity to consider this and had included it in the Bundle of papers she prepared for this hearing and that there was an arguable case set out in the response to be

heard on the evidence, though I was not determining the merits at this stage, and on balance considered that the Respondent would suffer greater prejudice if the application was refused than the Claimant would suffer if it was granted.

9. My decision delivered orally at the hearing was to allow the Respondent's application for an extension of time and the Response was accepted.

Documents and Evidence

10. There was a small bundle of documents of 44 pages prepared by the Claimant and filed with the Tribunal copied to the Respondent on 4 November 2022. Mr Folyan had also provided a copy of the contract of employment to the Tribunal prior to the hearing. After dealing with the preliminary issue and in discussion with the parties, having clarified the issues in the claim as above, it was agreed that there would be an adjournment to enable Mr Folyan to send to the Tribunal, copied to the Claimant, additional documents (emails and texts) relevant to the issues that he wished to rely on and also to allow for reading time of the Claimant's witness statement and documents referred to in the Bundle. Mr Folyan sent additional documents: via email 1 - texts dated between 4/7/22 and 9/8/22, via email 2 - an email exchange dated 22/8/22 and via email 3 - an email exchange dated 1/7/22 to be included in the Bundle. In making his submissions, Mr Folyan sent a further email chain (email 4) with emails dated between 12 July 2022 and 11 August 2022.
11. I heard evidence from the Claimant for herself and Mr Folyan for the Respondent. There was a written statement from the Claimant and Mr Folyan relied on the details of the response set out in section 7 of the ET3 as his witness statement. I read the documents in the Bundle that I was referred to and the additional documents submitted by Mr Folyan.

Findings of Fact

12. I ask the parties to note that I have only made findings of fact where those are required for the proper determination of the issues in this claim. I have therefore not made findings in every area where that is not necessary for the proper determination of the complaint before me.
13. The Claimant was employed by the Respondent as an Administrative Assistant under the Kickstart Scheme funded through Universal Credit. She was employed for a fixed term of six months from 17 January 2022 to 15 July 2022. The Claimant worked the hours of 10am to 3pm Monday to Friday inclusive of a 20 minute break. On starting she was paid £8.36 per hour payable monthly on 17th of the month at a rate of 100 hours at £8.36 per hour. This hourly rate increased in line with the national minimum wage increase in April 2022, after the Claimant had cause to query her wages in May 2022, at which point her wages were increased to £9.18 per hour and an adjustment made in her June wages to pay any arrears. At the time of leaving her monthly wages were £918 at a rate of 100 hours at £9.18 per hour.

14. With respect to holidays, the Claimant's contract includes a Holidays clause which states: *"Your holiday year begins on 17th January 2022 and ends on 17th July 2022 during which you will receive a paid holiday entitlement of 10 days which is inclusive of any public holidays which you may choose to request"* and that on termination *"any annual leave accrued but not taken will be paid for"*; the clause also states that *"The Company operates a holiday booking procedure and all requests for holiday should be made using this procedure"*. A further clause on Public Holidays states that as part of her holiday entitlement she is entitled to three public holidays on 15 April (Good Friday), 18 April (Easter Monday) and 2 May (Bank Holiday) (page 22 of the Bundle).

15. Mr Folygon (the owner of the business and Claimant's manager) put to the Claimant in cross examination that she asked for days off and in his view that these were taken as holiday. The Claimant noted that sickness was treated separately under the contract and accepted that she recalled asking to leave early for medical appointments on occasion but that the procedure for holidays was in the contract and this was not a request for holiday, this was a medical appointment. The Claimant accepted that she took some days off for sickness leave and the Respondent in its response asserted that she called in sick over 10 times during her employment. In submissions, Mr Folygon acknowledged the Respondent was aware that the Claimant had health issues and had made allowances for this. The Claimant accepted in her evidence that although she did not book any holiday, she was granted bank holidays listed in the contract. In cross examination, Mr Folygon agreed in his evidence that if she had not taken holiday, he would have paid her holiday in her final salary payment but asserted that because there were periods when he had been looking for her and she did not work, he took that as her taking holiday.

16. There was no documentary evidence or record before me of holidays requested or taken and on balance, I accept the Claimant's evidence that she did not request nor take time off as holiday other than the three public holidays granted in the contract, during her period of employment and I find that the days off that Mr Folygon in his evidence said he regarded as holiday, were days of sickness absence and/or requests to leave early for medical appointments.

17. By way of background, the Respondent alleges that the Claimant's work throughout her employment was lacking in quality and that she failed to complete tasks or failed to complete them in a timely fashion. In her evidence the Claimant accepted that the Respondent had complained at times about the quality of her work or that it had not been done and that she had apologised at the time and said she would improve.

18. The contract includes a Deductions clause which states: *"You agree that deductions from your pay will be made for the following costs incurred by the Company in relation to your employment. The Company expressly reserves the right to make these deductions:"* and lists a number of bullet points including *"in relation to deductions authorised by any separate agreement into which the Company has entered with you"* (page 25 of the Bundle).

19. With respect to the withholding of her final month's salary, the Respondent contends in its response and Mr Folyan in his evidence relied on a separate agreement by way of a warning given to the Claimant by email. The Respondent asserts that the Claimant was warned and agreed that unless she completed the final assignment given to her on time and of good quality, the Respondent would outsource this to someone to complete and her salary would be withheld.
20. On 1 July 2022, the Claimant and Mr Folyan exchanged emails (email 3 added to Bundle) and Mr Folyan raised whether, given the time available before she left, she would be able to assist with completing a database project for the Respondent. On or around 4 July 2022 Mr Folyan met with the Claimant and she was given an assignment of inputting data from business cards onto the Respondent's database and was asked if she would be able to do 50 cards a day in order to complete the task before she left, which she agreed on 4 July saying "*I can do 50 names a day Mr Folyan until the day I leave*" with Mr Folyan responding that he would get the cards to her that day or the following day at the latest (email 1 re text messages dated 4 July above). In his evidence Mr Folyan referred to 600 business cards of which 35 were unreturned. The Claimant referred to 500 business cards that she had to input.
21. At this point the Claimant was mid-way through her final month of employment and had 10 working days to complete the assignment before the end of her employment, which at the rate agreed with Mr Folyan required the completion of 500 business cards to be added to the database and this accords with the Claimant's evidence of the task set. I accept the Claimant's evidence on this. The Claimant said in her evidence that she attempted to do 50 cards a day but that it was too difficult for her to complete before her employment ended. However, she said that she attempted to complete it outside of her contractual hours and after she had left the Respondent's employment. Work carried out after her employment ended was evidenced on an excerpt from a document edit history of the database (page 35 of the Bundle).
22. The Claimant in her witness statement acknowledged that she was made aware that she would not be paid her final salary payment until submission of the final assignment by virtue of an email dated 12 July 2022. Mr Folyan had referred to this in an email dated 12 July 2022 to Ms Daniell, HR manager of Caresse Recruitment, and copied to the Claimant. The recruitment agency were involved in setting up and managing the Kickstart placement and in his message Mr Folyan stated to Ms Danielle that he had met with the Claimant and warned her that "*unless she finishes the work, her salary will be withheld and she did promise to complete the task*" (page 34 of the Bundle).
23. In a separate email on 12 July to the Claimant (email 4 added to Bundle), Mr Folyan asked how far she had got with completing the assignment and noting that her last day was 15 July, stated that if she had not finished the work by then: "*you will have to complete the task by next week and return the cards and I will remit your salary.*" The Claimant in her evidence said that she understood this to mean that her wages may be withheld temporarily until she completed the task but not permanently.

I accept the Claimant's evidence on this, which is reflected in the email sent to her.

24. The Claimant's employment ended on 15 July 2022. The work was not submitted by the Claimant and in her evidence she accepted that her communication with the Respondent should have been better. The Claimant's final salary was due on 17 July 2022. The Claimant did not receive a final pay slip or wages for the final month that she worked for the Respondent.
25. The Claimant in cross examining Mr Folyan asked why the Respondent reported her earnings to universal credit as having been paid, when they were withheld. Mr Folyan in his evidence said the payslips and reporting were prepared by the accountant who normally processes everything before the 16/17th pay date and this was prepared based on the expectation that that Claimant was going to submit the work by 17 July 2022. In his further response as to why universal credit were not informed once he had no intention to pay final wages, he said they were not informed because the Respondent had informed the recruitment company.
26. On 26 July 2022 Mr Folyan messaged the Claimant saying that he had not heard from her and asking about the assignment and the cards (email 1 – text dated 26 July).
27. The Claimant and Mr Folyan met on 9 August 2022 and the Claimant apologised for the delay in completing the work and handed over the business cards and sent the assignment by email. The Claimant said in her witness statement that she left this meeting believing that she would receive her final wages as the Respondent had said it would take 2 or 3 days to check and process. In cross examination Mr Folyan put to the Claimant when asking if she had completed 50 cards a day, that at the meeting on 9 August 2022, by way of explanation she said she had been working at nights. The Claimant explained that she had not been working but said that she had because she feared that issues with her health, which was the reason she had struggled to complete the task, would not be taken as a true excuse.
28. On 22 August 2022 the Claimant emailed Mr Folyan asking when she would receive her wages for July and in reply Mr Folyan sent an email (copied to Caresse Recruitment) stating "*i have discussed with Caress Recruitment that you did not complete the task given to you and I am not satisfied with the quality of work done and we now have to employ someone else to do it properly. Thats the basis on which the wages for that period is not being paid to you*" (page 36 of the Bundle). The Claimant stated in her witness statement that she was unaware of the other reasons the Respondent put forward in its response in these proceedings, as further reasons for not paying her, which she had not been made aware of until reading the response. In his submissions, Mr Folyan said the Claimant was constantly warned that the quality of her work was not up to standard and about completing tasks, and that he had previously reported this to the recruitment company, who offered to apply disciplinary measures but he said he was willing to monitor her in good faith.

29. On 26 August 2022, the Claimant sent an email to Mr Folyan which she describes as a grievance (page 37 of the Bundle) informing him that due to the withholding of her final pay, she intended to take the matter to an employment tribunal unless she received a reply within 7 days and that she was also owed pay for untaken holidays/leave. In his evidence, Mr Folyan said that he did not reply because he did not believe that the Claimant would in good conscience go to the tribunal because in his view the Claimant never truly did any work and in six months achieved nothing. He explained that he spoke to Ms Daniell who he said advised him to ignore it, as she did not believe the Claimant would take it to an employment tribunal. The Claimant reiterated that she had followed the grievance procedure in her contract. Although now described as a grievance, I find the email was not clearly stated as such and being sent after the end of her employment I make no further finding on this.

Law

30. Under **Section 13(1) of the Employment Rights Act 1996 (ERA 1996)** a worker has the right not to suffer unauthorised deductions from wages 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 or the worker has previously signified in writing his agreement or consent to the making of the deduction.

31. **ERA 1991 s.13 (3)** states:

“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 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.”

32. In deciding whether wages are properly payable the Tribunal has jurisdiction to resolve any issue necessary to do so including the meaning of the contract: **Delaney v Staples (t/as De Montfort Recruitment) 1991 ICR 331,CA** and in the combined appeals of **Agarwal v Cardiff University and Tyne & Wear Passenger Transport Executive v Anderson [2018] EWCA Civ 2084, [2019] IRLR 657** the Court of Appeal affirmed that the employment tribunal can, if necessary, construe and interpret the claimant's contract of employment including identifying any applicable implied terms in determining whether there had been an unlawful deduction from wages.

33. An employee has a right to complain to an Employment Tribunal of an unlawful deduction from wages pursuant to **Section 23 of the ERA 1996**.

34. Where a Tribunal makes a declaration that there has been an unauthorised deduction from wages, it may order the employer to pay to the worker, the amount deducted, and such amount as the Tribunal considers appropriate in all the circumstances to compensate the worker for any financial loss sustained by him which is attributable to the unlawful deduction: section **24(2) ERA 1996**.

35. **The Working Time Regulations 1998** provide for minimum periods of annual leave and for payment to be made in lieu of any leave accrued but

not taken in the leave year in which the employment ends. The Regulations provide for 5.6 weeks leave per annum. The leave year begins on the start date of the claimant's employment in the first year and, in subsequent years, on the anniversary of the start of the claimant's employment, unless a written relevant agreement between the employee and employer provides for a different leave year. There will be an unauthorised deduction from wages if the employer fails to pay the claimant on termination of employment in lieu of any accrued but untaken leave.

Conclusions

Did the Respondent make a deduction from wages by its withholding of the Claimant's final month's salary?

36. With respect to wages the Respondent accepts that it withheld the Claimant's final salary payment of £918 due on 17 July 2022, this is not disputed. The Respondent contends that it withheld the Claimant's final month's salary due to the Claimant's failure to complete a final assignment which it considered was of poor quality.

Was any deduction required or authorised by statute or by a written term or relevant provision of the contract of employment or did the Claimant agree in writing to the deduction before it was made?

37. I found that there was a Deductions clause in the Claimant's contract of employment authorising deductions in specific circumstances including where any deduction is authorised by a separate agreement. Throughout, in the response and in his evidence and in submissions Mr Folygon confirmed that the Respondent, in withholding the Claimant's final salary, relied on a warning given to the Claimant by email that unless she completed the final assignment given to her, her salary would be withheld, which he contended was agreed by the Claimant.
38. The email that I was referred to by way of such warning was dated 12 July 2022 and was sent to Ms Daniell of Caresse Recruitment and copied to the Claimant, as found above. This referred to a meeting with the Claimant at which the task was set and agreed, which meeting I found had taken place on or around 4 July 2022. I found that the Claimant had agreed to complete the task at the rate of 50 cards a day and attempted to do so.
39. In terms of the agreement reached with the Claimant in relation to any withholding of her final salary, I found that the Claimant's understanding was that her final salary may be temporarily withheld until she completed the task rather than permanently withheld. I conclude that the Claimant's understanding of the agreement is supported by evidence and my findings above, namely the Respondent's further email of 12 July 2022 that if she had not finished the work by her last day of employment she would have to do so the following week and return the business cards and he would remit her salary; by the Claimant's continuing to work to complete the task after her employment ended in anticipation of receiving her final salary on completion, by the Respondent's email of 26 July 2022 seeking an update

on progress and the subsequent meeting with the Claimant on 9 August to handover the cards, with the work being submitted by email on or after that meeting.

40. On the balance of probabilities, I conclude that the separate agreement reached and as found by the Tribunal based on the evidence, which was relied on by the Respondent, was an agreement whereby the Respondent was authorised by a written term or relevant provision of the employment contract as set out in my findings above, to temporarily withhold the Claimant's wages on 17 July 2022 pending completion of the task, which timeframe for completion the Respondent varied by its email of 12 July 2022 to after her employment ended, at which point the temporarily withheld wages would be properly payable.

If the deduction was authorised, was the deduction made justified or were the wages paid less than the wages that were properly payable?

41. I find that the wages paid were less than the wages properly payable and was unauthorised. Based on my findings, my conclusions are that the Claimant was set a task mid-way through her final month of employment to upload 500 business cards to the Respondent's database at a rate of 50 cards a day over the last 10 working days of her employment. The Claimant was unable to complete the task by the end of her employment and based on the varied agreement found as above, having continued to work to complete and submit the task on or after 9 August 2022, the Claimant's final salary was properly payable. I conclude that the task set as found on the evidence was to upload 500 cards and the Respondent's evidence that of 600 cards some 35 were not returned and the task was not completed is not found on the evidence and was not justifiable grounds to withhold the Claimant's final salary payment.
42. In terms of the alleged poor quality of the work as a reason for withholding the Claimant's wages, there was no evidence before the Tribunal to support the Respondent's contention in this regard. Mr Folyan in submissions acknowledged that the Respondent had not formally addressed any issues of quality of work with the Claimant during her employment despite the recruitment agency offering this, which was not pursued by him at the time.
43. Further the contemporaneous evidence before the Tribunal as outlined in my findings and conclusions above did not support the contention that there was an agreement authorising a deduction on the basis that salary may be withheld due to poor quality of work. The evidence in this regard was raised in the email of 22 August 2022, which post-dated the agreement with the Claimant regarding the work set and the timeframe for completion and post-dated the submission of the work and the deduction. I conclude on balance that this did not form part of a separate agreement authorising a deduction from wages.

If the Respondent made an unauthorised deduction, how much is the Claimant owed?

44. The Claimant was paid a monthly salary based on working hours of 10.00 to 15.00 Monday to Friday, at a rate of £9.18 per hour, according to

her pay slip at the time of termination of her employment her monthly salary was £918. The Claimant is owed £918.00.

How much holiday entitlement had the Claimant accrued but not taken, if any, by the end of her employment?

45. The Claimant was entitled to 10 days holiday under her contract for the period of her six month employment.
46. I found that the Claimant had not booked any of her contractual allowance of 10 days holidays and was owed 10 days untaken holiday on termination of her employment.
47. The Claimant was also entitled to the 3 public holidays set out in her contract during that period, which she accepted were granted. I conclude that the public holidays granted and taken fall outside the 10 days' holiday entitlement under the contract, which otherwise would be less than the statutory entitlement under the Working Times Regulations 1998 of 5.6 weeks, which pro rata for 6 months amounts to 2.8 weeks or 14 days inclusive of bank holidays.

If entitled to any accrued untaken holiday, how much is the Claimant owed as pay in lieu of holiday?

48. The Claimant is owed pay in lieu of 10 days' accrued untaken holiday at a rate of 5 hours per day at £9.18 per hour which is £45.90 per day for 10 days, totalling £45.90 x 10 = £459.

Employment Judge K Hunt

Date: 29 November 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
.29/11/2022

FOR EMPLOYMENT TRIBUNALS