EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101704/2022

Held in Glasgow on 16 June 2022

Employment Judge Russell Bradley

Miss Starr Hunter	**Claimant** **Represented by:** **Ms L Dreyer-Larsen - Lay Representative /Family Member**
Dreadnought Petrol Station MFG plc	**Respondent** **Represented by:** **D Ponpandian - Franchise Owner of Respondent**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the employment Tribunal is: -

1. To declare that the claimant's claim that the respondent has made a deduction from her wages in respect of salary due to her in contravention of section 13 of the Employment Rights Act 1996 is well founded;

2. To order the respondent to pay to the claimant the sum of **THREE HNDRED AND THIRTY SIX POUNDS (£336.00)** in respect of that deduction; and

3. To find that the claim in terms of section 38 of the Employment Act 2002 succeeds; the respondent is ordered to pay the claimant the sum of **ONE HUNDRED AND FOURTEEN POUNDS AND THIRTY TWO PENCE (£114.32).**

REASONS

Introduction

1. In an ET1 presented on 31 March 2022 the claimant made various claims. In an ET3 lodged on 3 May with additional material they were resisted.

2. The claimant was not present. She was represented by Ms Dreyer-Larsen, a (lay) family member. The respondent is a franchise business owned and operated by Mr Dhinesh Ponpandian. It is not (yet) a limited company. He gave evidence.

3. The claimant's employment was short. While there was a minor dispute as to her effective date of termination, at its longest it lasted two months and two days (2 January to 4 March 2022).

4. In the discussion before hearing evidence it became clear that the claimant maintained two claims. First, of an unlawful deduction from wages of £336.00. This sum was allegedly withheld so as to cover training costs. Without any documentation vouching her claim for the total number of hours worked by her, the claimant accepted the respondent's numbers, being 67 hours in January and 51 hours in February. The respondent did not dispute that it had deducted the sum of £336.00. That amount corresponds with the claimant's understanding of the calculation of the amount withheld; she believed that it represented 40 hours at her pay rate of £8.40 per hour. The second claim was in respect of an alleged failure by the respondent to provide a statement of terms and conditions of employment conform to section 1 of the Employment Rights Act 1996. In short the respondent accepted that it had not done so. The claimant accepted that any compensation due was dependent on the success of her other claim.

5. Neither party had prepared a hearing bundle or lodged any paperwork specifically for the hearing. I note at paragraph 7 below the material to which reference was made in the evidence.

The issues

6. The issues for determination were:-

   a. was the deduction of £336.00 made by the respondent from the claimant's salary either authorised to be made by virtue of a relevant provision of the contract, or one to which the claimant had previously signified in writing her agreement or consent?

   b. If not, to what remedies is she entitled?

   c. If there was an unlawful deduction and the claimant is entitled to an order for payment of £336.00 is she also entitled to an amount equal to two weeks' pay or an amount equal to four weeks' pay in terms of section 38 of the Employment Act 2002?

The evidence

7. I heard evidence from Mr Ponpandian. He spoke to most of the papers attached to the ET3. They were; a three page document which incorporated the claimant's claim and the respondent's answers; a single page typed letter dated 8 April 2022 from Mr Ponpandian *"to whom it may concern"* signed by him and countersigned by David Mathieson, a manager; a report bearing to show two payments to the claimant on 15 February totalling £562.80; and three pages bearing to show What'sApp exchanges between the claimant and Mr Ponpandian in the period 31 January to 9 March 2022.

Findings in fact

8. From the tribunal paperwork, the discussion before the start of evidence and from the evidence itself I found the following facts admitted or proved.

9. The claimant is Starr Hunter.

10. The respondent is Dreadnought Petrol Station mfg (motor fuel group). Mr Ponpandian is a sole trader. He trades as Dreadnought Petrol Station mfg. He has done so since about October 2013. It operates as a franchise business. It operates petrol stations. One is in Callander. It has traded there

since about March 2020. The other is in Kincardine. It has 14 employees in total. 5 were employed in Callander. They all report to Mr Ponpandian. One of them was the claimant.

11. The respondent employed the claimant as a petrol station attendant. Her employment began on Sunday 2 January 2022. Prior to 2 January Mr Ponpandian interviewed the claimant for the job. During the interview he agreed a rate of pay of £8.40 per hour, higher than was customary (the national minimum wage). He did so because of the favourable impression which the claimant presented. During the interview Mr Ponpandian also explained the respondent's policy of deducting a payment equivalent of 40 hours pay (called a *"training deduction")* should she leave the respondent's employment in the first three months. The respondent's template statement of terms and conditions of employment for its employees reflects that policy. The respondent pays its staff monthly, on the fifteenth. Ordinarily, Mr Ponpandian requires to collate the necessary information and send it to his accountant by the tenth of each month for payment to be made on time.

12. Mr Ponpandian became a father to a new child in December 2021. By about 28 January 2022 he was very unwell with COVID-19. He is asthmatic. The virus was particularly difficult for him. He was not present on site at work for about three weeks. He returned by about 18 February. There was thus an adverse impact on his ability to attend to a number of issues to do with the respondent's business. They included the provision to the claimant of a statement of her terms and conditions of employment.

13. On 31 January Mr Ponpandian messaged the claimant. In it he sought details (8 points) so as to be able to set her up on the respondent's payroll system. One of them was her national insurance number (NI number). In two replies shortly afterwards the claimant said that she had lost it. By 2.37pm later that day she had provided all of the other information sought. Later that day in various exchanges Mr Ponpandian provided some assistance and information to the claimant to help locate her NI number. By about 5.21pm she let him know that she had ordered it but it could take 2-3 weeks. In those exchanges the claimant asked if she would be paid on 15 January. She was not. In

January the claimant worked 67 hours. She was due to be paid for them at £8.40 per hour.

14. On 15 February Mr Ponpandian asked the claimant if she had got her NI number. By about 3.30pm that day the claimant had provided it. At about that time she asked if she would get a payslip. Mr Ponpandian replied that day to say she would receive e-payslips by What'sApp, but would not receive one for February as her NI number had not been provided before the month's payrun. Instead, he explained that wages due to be paid to her that day would be shown on the payslip for the following month. She asked how much she would be paid that day, 15 February. Two payments were made that day; the first was for £442.20. After a discussion between them, the respondent paid a further £120.60.

15. On 25 February the claimant raised with Mr Ponpandian an issue about a blocked toilet. He replied that day to say that contractors would look at it. In February the claimant worked 51 hours.

16. On Friday 4 March (5.59pm) the claimant messaged Mr Ponpandian saying *"I quit not coming in this weekend."* He replied immediately to say, *"You're sacked - you can't quit anymore."*

17. There were various exchanges between them on 8 and 9 March. In his email at 3.05pm on 9 March Mr Ponpandian said that the claimant had worked 51 hours in February, *"there will be a deduction of first 40 hours as you had to leave within the first 3 months as discussed during the interview. Any hours worked on March will be paid as usual on following payday* At 3.47pm the claimant said, *"I did NOT have a contact [sic] so it was no agreed that I would be paying that back."*

18. Sometime thereafter the respondent provided a payslip to the claimant. In the claimant's opinion, it did not accurately reflect the total hours that she had worked. It showed the deduction of £336.00 said to represent training costs.

19. Mr Ponpandian was aware at the relevant time (2 January 2022) of the obligation of an employer to issue to a worker a statement conform to section

1 of the Employment Rights Act 1996. He knew that the law had changed in April 2020 as a result of which the statement required to be issued at the start of the contract. The respondent had not done so as a result of a combination of factors which impacted on Mr Ponpandian, who in effect ran the respondent's business. Those factors included the impact of a newborn child at home and COVID-19.

Comment on the evidence

20. The evidence on the date of termination of the contract was unclear. The claimant maintained it was 4 March, which was broadly supported by the messages. The respondent maintained it ended on 28 February. Its pled position was that she had resigned but in her notice period she had *"initiated conflict* in the workplace and was removed. That was not supported by any evidence beyond that of Mr Ponpandian. In the context of the issues, neither the date, method or cause of the termination were relevant. It was unfortunate but again not crucial that the one payslip which was given to the claimant was not produced.

Submissions

21. Both parties made short oral submissions. On the claim for the unlawful deduction, Ms Dreyer-Larsen argued that there was nothing which permitted the deduction in terms of the relevant statutory provision and thus the deduction of £336.00 from the claimant's pay was unlawful. On the claim for an amount for the failure to provide a section 1 statement the factors in favour of 4 weeks' pay were (i) the claimant's role was not full time and (ii) she had to borrow money from her family while she was employed by the respondent because she had not received her full salary.

22. In answer, Mr Ponpandian quite properly accepted that the deduction was not authorised by a relevant provision of the contract. He argued however that a combination of his verbal discussion (at the interview) and the What'sApp messages were sufficient to show that the claimant had previously signified in writing her agreement or consent to it On the question of an amount for the admitted failure to issue a section 1 statement he said it should be 2 weeks'

pay. While he recognised the statutory right which as far as he knew had changed relatively recently (April 2020) he ordinarily complies with it. He uses a template contract. It requires an amount of detail. And while he had sufficient of that detail by the end of January, a combination of personal circumstances meant that he had not issued a contract. The default was not intentional.

The law

23. Section 13 (1) and (2) of the Employment Rights 1996 provide that:- "ft) An *employer shall not make a deduction from wages of a worker employed by him 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 (2) In this section "relevant provision" in relation to a worker's contract, means a provision of the contract comprised— (a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or (b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion. "*

24. Section 13 subsections (5) to (7) of the 1996 Act provide that:- *"(5) For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect. (6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified. (7) This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting "wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer. "*

25. Section 38(3) and (4) of the Employment Act 2002 provides *"If in the case of proceedings to which this section applies — (a) the employment tribunal makes an award to the worker in respect of the claim to which the proceedings relate, and (b) when the proceedings were begun the employer was in breach of his duty to the worker under section 1(1) or 4(1) of the Employment Rights Act 1996 (in the case of a claim by an worker) under section 41B or 41C of that Act, the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it Just and equitable in all the circumstances, increase the award by the higher amount instead. (4) In subsections (2) and (3) — (a) references to the minimum amount are to an amount equal to two weeks [1]pay, and (b) references to the higher amount are to an amount equal to four weeks' pay."*

Discussion and decision

26. While the ET1 form disputed the respondent's calculation of the number of hours worked by the claimant, Ms Dreyer-Larsen helpfully accepted that she was not in a position to prove the ET1 version (170 hours). That being so, the claimant could not prove what was originally claimed in it, £865.20. At the outset of the hearing, Ms Dreyer-Larsen accepted that the alleged unlawful deduction was of £336.00. There was thus no dispute as to the sum in issue between the parties. The dispute lay in whether the respondent was entitled to deduct that sum from the wages which in the normal course of events should have been paid. In my view, the claimant's claim about that deduction succeeds. The respondent accepted that it could not show that the claimant had a relevant provision in her contract which authorised the deduction. Mr Ponpandian argued that a combination of his verbal discussion (at the interview) and the What'sApp messages were sufficient to show that the claimant had previously signified in writing her agreement or consent to it. I cannot accept that argument. The interview discussion was by its very nature not in writing. The What'sApp messages do no more really than cast back to the interview. They do not indicate the claimant's written consent. If anything she objected.

27. On the claim of the failure to provide a section 1 statement, in my view it is just and equitable to award 2 weeks' pay. I consider that it would not be just or equitable to increase that amount. In my view the failure was not deliberate or careless. I accepted Mr Ponpandian's evidence that he uses a template for employment contracts. I accepted his evidence as to the reason for it not having been used in these circumstances. I accepted his explanation that ordinarily his employees receive a section 1 statement based on his template. Finally, I did not accept the claimant's reasons were sufficient to increase an award from 2 weeks' pay. I agreed with the parties that I would use the information that I had in order to calculate 2 weeks' pay.

28. Assuming the accuracy of the respondent's information on the number of hours worked in two months (118) it is reasonable to assume that in one year (52 weeks) the claimant would have worked 708 hours. The division of hours by those weeks gives an average of 13.61 hours per week. At the rate of £8.40 per week produces an award for 2 weeks of £114.32. This sum is reflected in the judgement.

Postscript

29. On 20 June Mr Ponpandian emailed to the tribunal to ask that all further correspondence for the respondent be sent to a new address. I have included that new address where it is designed above.

Employment Judge: Russell Bradley
Date of Judgment: 29 June 2022
Entered in register: 30 June 2022
and copied to parties