



EMPLOYMENT TRIBUNALS

Claimant: Miss L. Fenton-Williams

Respondent: Mr Gary Heathcote and Mrs Gloria Heathcote
t/a McGregors

Heard at: Birmingham

On: 01 October 2018

Before: Regional Employment Judge Fiona Monk

Representation

Claimant: In person

Respondent: In person

JUDGMENT

1. The name of the Respondent is amended to Mr Gary Heathcote and Mrs Gloria Heathcote t/a McGregors.
2. The Claimant has suffered an unauthorised deduction from her pay and the Respondents are ordered to pay to her the sum of £490.00.
3. The Respondents have failed to pay to the Claimant six days holiday pay and are ordered to pay the sum of £315.00 gross.
4. The Respondents failed to provide the Claimant with wage slips. No award is made.
5. The Respondents failed to provide the Claimant with a statement of terms and conditions. No additional award is made.
6. The Respondents are therefore ordered to pay the total sum of £805.00 gross to the Claimant. The Claimant may be liable for tax and National Insurance on the sum.

REASONS

1. Oral reasons were given on the day and written reasons were requested by the Respondents at the Hearing. These are the reasons for the decision above.

2. By a claim form lodged on the 08 March 2018, the Claimant, Ms Lesley Fenton-Williams brought claims against her former employer Mr and Mrs. Heathcote, trading as McGregors for unpaid wages, breach of contract, failure to provide itemised pay statements and a failure to pay holiday pay. I heard evidence from Ms. Fenton-Williams and from both Mr and Mrs Heathcote. There were no written witness statements. There was very little by way of documentary evidence to assist me so the factual findings I make are based on my assessment of the witnesses before me and their credibility. I accept that both parties did their best to provide me with their honest evidence and I have reminded myself that the burden of proof is on the Claimant in relation to establishing the facts upon which her claim is based.
3. The only documents that were before me, in addition to the ET1 and ET3, were a couple of copies of pay records that the Respondents had sent in; they recorded pay details for the week ending 01 July 2017. The respondents had extracted these from the records they inherited on the business's computer. In addition, during the hearing, Mrs. Heathcote, resourcefully, obtained some photographs, sent to her mobile, of the wall calendar which was kept up at the premises. That recorded holiday taken by staff and helped clarify the amount of leave the claimant had taken during the calendar year 2017. The Tribunal staff arranged for copies of those photographs to be provided to the Claimant and to me and the Claimant was able to give evidence about what they showed.
4. The parties agreed at the outset that the name of the Respondent should be amended to Mr Gary Heathcote and Mrs Gloria Heathcote trading as McGregors as they are in partnership running business.

Issues

5. The Claimant's case was that the Respondents had taken over the business, a sandwich shop, in which she had previously been a partner on 03 July 2017. She remained in employment until 12 January 2018. It was agreed that she had had deductions (of 50p per hour) made from her wage of 7.50 ph., purportedly to cover tax and National Insurance liabilities but she asserted that they were unauthorised deductions. It was agreed that she had received no itemised pay statements during her employment. Secondly, she claimed that she was owed holiday pay of six days for holiday which she had taken but for which she had not been paid. This case turned on the oral evidence of both parties.

Findings

6. The Claimant worked in partnership with, her then life-partner, Mr Andrew Mallard, and had run the sandwich shop known as McGregors for around nine years. They were in discussions about handing over the business to Mr and Mrs Heathcote from around February 2017. This was initiated because the Claimant's relationship with Mr Mallard had broken down and he was keen to exit the business. Mrs. Gloria

Heathcote worked for the business as an employee for the claimant and Mr Mallard until she and her husband took over.

7. Whilst in partnership the Claimant's evidence was that she worked for the business but was salaried. The records produced by the Respondents confirmed that she was paid £7.50 per hour for 24 hours a week, taking home a gross salary of £780.00 or £620.00 per month net approximately. The Claimant said that she in fact worked considerably more hours than that in the business but confirmed that was her salary. She also confirmed that during the period of her partnership and whilst working for the business, she was not provided with a written contract of employment.
8. On the 03 July, Mr and Mrs. Heathcote took over, signed the lease and started running the business. I accept their evidence that the final monies in relation to the purchase were not transferred until December as they had problems with the bank loan, but they agreed that they signed the lease and took over the running of the business from the 03 July. I find that was the date of the transfer to them. Mrs. Gloria Heathcote having worked alongside Ms Fenton-Williams prior to this was under the impression that the business was a profitable one. That did not prove to be the case and there is obviously a considerable degree of resentment between the Respondents and the Claimant about that and what happened subsequent to the business transferring. Their relationship had clearly broken down even before tribunal proceedings were commenced.
9. I accept the evidence from Ms. Fenton-Williams that she had discussions with Mrs. Heathcote and negotiated different working arrangements so that she stayed on in the business. I accept that it was agreed that she would work for them 9 to 4, five days per week and not at weekends, which amounted to 35 hours per week. Indeed, it was accepted by all parties that was in fact the hours that she worked until January when she left. However, the Respondents say that her contractual hours were only 20 because they say that is what she was working before they took over the business and they could not vary that because of the TUPE regulations. They say that they paid her for the hours she worked above that as overtime. Without pay-slips or any written records of payment to assist, on balance I prefer the claimant's evidence on this point and conclude that there was an agreed variation to her hours on the transfer of the business to 35 pw.
10. It was not disputed that the claimant was paid £7.50 per hour but that Mr and Mrs Heathcote told her that they would deduct £0.50p per hour in lieu of payment for tax and National Insurance. They were not sure what their liability would be and so £0.50p per hour was deducted from the Claimant's pay but was not paid over to HMRC. No pay-slips were given to the Claimant from July through to January. The Claimant has calculated and it is not disputed that the deductions for that period amount to £490.00.
11. With respect to holiday entitlement, the Respondents have produced an old contract of a previous employee of the business. That showed

that the contractual entitlement was to 28 days per year including public holidays and the holiday year ran from January to December. Ms. Fenton-Williams agreed that that was the basis on which she understood her holiday entitlement to work. We established through Ms. Fenton-Williams's recollection and also the wall-calendar that Mrs Heathcote was able to obtain pictures of, that in the period of 2017, the Claimant had taken the following holiday: five days in February, five days in April although one of those was Good Friday and is not recorded as holiday on the calendar possibly because the business was shut, four days in July, four in August and five in October/November and six in December, which amounted to 29 days holiday or 28 if Good Friday was not included. The claimant explained that she had not received her full holiday pay for those periods – it appeared that the Respondent had chosen to pay her at what they considered to be her 'contractual hours' (i.e. what she was paid for before the transfer) of 20 hours per week. The evidence on this was somewhat confusing and unfortunately the Respondent has not produced any evidence of what was actually paid, payments were made cash-in-hand so there is no record in the Claimant's bank account, no pay slips and we have no written records to assist.

12. The Claimant has maintained throughout that she has had six days holiday that she took in December for which she was never paid. Her evidence was that Mrs. Heathcote had agreed that this would be paid after her last week's pay, but despite several requests for and promises of payment it was never received. That appears to me to be the best evidence I have about holiday pay and six days holiday pay for holiday amounts to £315.00 gross. The respondents have not produced any evidence to contradict that relying rather on an argument that the claimant was only entitled to be paid holiday pay at her previous salary of 20 hours per week.

Conclusions

13. I find therefore on the evidence before me that when the Respondents took over the business a change in the claimant's hours of work was agreed and she was employed to work 35 hours per week from 3 July 2017 at an agreed pay of £7.50 ph. Further I find she was entitled to 28 days holiday in the year 2017 but received pay for only 22 of those days at the relevant weekly pay rate. There was no written authority to deduct payments of 50ph, no statutory authority as they were not actually deductions for tax and NI and were not being paid over to the relevant authorities. No pay slips were provided and no statement of terms and conditions was given.
14. I therefore declare that the following: -
 - i. The Respondents failed to provide the Claimant with itemised wage slips contrary to Section 8 of the Employment Rights Act 1996 (the ERA).
 - ii. The Respondents made an unauthorised deduction from the Claimant's pay of £490.00 being the amount they deducted during her employment without the authority required by s 13 (1) of the ERA. The

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Respondents are ordered to pay the Claimant the sum of £490.00 gross.

iii. The Respondents failed to pay the Claimant holiday pay to which she was entitled and are ordered to pay her six days pay at £315.00 gross.

iv. I make no award for the failure to provide wage slips under s12 of the ERA as the Claimant has above been awarded the deductions that were unnotified.

v. The Respondent has failed to provide the Claimant with a statement of particulars of employment as required by s1 of the ERA, but I make no additional award under s38 of the Employment Act 2002. In normal circumstances, failure must lead to such an order, but I consider that there are exceptional circumstances under Section 38(5) because the claimant was previously responsible for the business and had given herself no such statement. It would be unjust to make such an award and penalise the Respondents for, in effect, her own failure.

Therefore, the total award ordered to be paid by the Respondents to the Claimant is £805.00. The claimant may well be liable for tax and national insurance on that amount as the calculations are gross and she has not paid tax and NI during the time she was employed by the Respondents.

Regional Employment Judge Monk

05 October 2018