EMPLOYMENT TRIBUNALS

Claimant: Miss Christine Ngo Ndjogndo

Respondent: AfroHairCandy Ltd

Heard at: London South (CVP) **On:** 10 August and 7 October 2022

Before: Employment Judge Hart

Appearances

For the claimant: In person

For the respondent: Mr Kawoya, solicitor

RESERVED JUDGMENT

The Judgment of the Tribunal is that:

1. The claimant was a worker employed on a fixed hour open-ended contract.

2. The claim for unlawful deductions of wages (overtime) is dismissed, because the extra hours worked were voluntary.

3. The claim for unlawful deduction of wages (underpayment of wages on termination of contract) partially succeeds. The respondent is ordered to pay the claimant 3 days' and 4 hours' back pay, amounting to **£249.25 net.**

4. The claim for accrued holiday pay succeeds, and the respondent is ordered to pay the claimant 5 days' accrued holiday, amounting to **£348.95 net.**

5. The Tribunal has no jurisdiction to consider the respondent's counter-claim for breach of contract and / or set-off.

REASONS

INTRODUCTION

1. This is a claim for unlawful deduction of wages arising out of the failure to pay overtime, outstanding wages and accrued holiday pay on termination of the contract on 30 August 2021. The reason given by the respondent for non-payment of overtime was that it was voluntary and unauthorised and the reason given for the non-payment of wages and holiday pay was that this was due to authorised deductions for backdated tax and NI, the claimant being initially responsible for her own tax and NI because she was employed on a zero hour contract.

THE HEARING AND PRELIMINARY ISSUES

2. The hearing was conducted by CVP over two days. Ms Ndjogndo, the claimant, was representing herself. Ms Carine Whyte, the respondent, was represented by Mr Kawoya.

3. There was no agreed hearing bundle. The parties confirmed that they were relying on the following documents:

   3.1 A bundle provided by the respondent comprising of 39 pages.
   3.2 An email provided by the claimant with 18 attachments. The claimant confirmed that she was only relying on the following attachments (the others being duplicates):
      a. ‘Evidence bundle’ of 29 pages.
      b. ‘Evidence bundle compressed’ comprising of 212 pages, mainly WhatsApp messages.
      c. ‘AfroHairCandy TIMESHEET FINAL’ comprising of 5 pages, setting out in tabular form the days and hours of work. The respondent alleged during the hearing that this document was ‘fabricated’ because it was created after the event. The Tribunal does not accept that this document was fabricated. At no point did the claimant suggest that it was contemporaneous; it is equivalent to a schedule of loss and sets out the basis for the claimant’s claim for unlawful deduction of wages.

      The claimant’s bundles were not paginated.
   3.3 A bundle provided by the respondent for the resumed hearing comprising of 44 pages, including a statement from Ms Whyte.

   Due to the large number of documents, the Tribunal informed the parties that only those documents that were referred to in evidence or submissions would be considered.

4 The Tribunal heard evidence from two witnesses, first Ms Ndjogndo on behalf of the claimant and then Ms Whyte on behalf of the respondent. On conclusion of the claimant’s case the hearing was adjourned part-heard due to insufficient time.

The respondent was directed to provide a witness statement to stand as Ms Whyte's evidence in chief. At the beginning of the resumed hearing, the claimant was asked if she wished to adduce any further evidence in response to anything raised in Ms Whyte's statement or the additional hearing bundle adduced by the respondent. The claimant confirmed that she did not. At the conclusion of the respondent's case the parties both made oral closing submissions. Judgment was reserved.

Preliminary Issue: Jurisdiction (time limits)

5 The Tribunal determined as a preliminary issue that the claim had been submitted in time. The normal time limit for submitting a claim for unlawful deduction of wages under the Employment Rights Act 1996 (ERA 1996) and / or holiday pay under the Working Time Regulations 1998 (WTR 1998) is within 3 months of the date that payment was due. Sections 207B ERA 1996 and 30B WTR 1998 extend this time limit where the parties have entered into ACAS Early Conciliation. The limitation clock stops during the Early Conciliation period beginning with Day A and ending with Day B, and therefore the time between Day A and Day B is not to be counted. The claimant's contract was terminated on the 30 August 2021, and therefore the primary normal limitation period expired on 29 November 2021. ACAS Early Conciliation was commenced on 5 September 2021 (Day A) and certification was issued on 11 October 2021 (Day B). This added 36 days to the limitation period. The original claim form was submitted on 8 November 2021. It was initially rejected by the Tribunal due to a defect in the Respondent's name. The claim form with the correct name was re-submitted on 29 December 2021. This was within the additional 36-day period, and therefore the claim is time.

Preliminary Issue: Second Response Form

6 The Tribunal raised with Mr Kawoya, the respondent's representative, that the bundle adduced by the respondent contained a response form ('second response form') that was different from that on the Tribunal file ('first response form'). Mr Kawoya, claimed that the second response form had been served on the Tribunal but was unable to identify when this occurred. He confirmed that no application to amend had been made and sought to argue that it was merely a typed version of the handwritten first response form. The Tribunal informed Mr Kawoya that there were significant differences between the two forms: box 6.1 (Response) in the second response form had been expanded and box 7.3 (Employer's Contract Claim) in the second response form had been completed and contained two counter-claims: the first for £398 outstanding tax and NI paid by the respondent to the HMRC and the second for £17,000 losses arising out of the alleged deletion of company data by the claimant on termination of her contract. Therefore the second response form was obviously different from the first response form. Mr Kawoya informed the Tribunal that he did not have a copy of the first response form since he had only been instructed in July 2022. The Tribunal provided Mr Kawoya with a copy, and informed the respondent that if it wished to rely on the contents of the second response form it would need to make an application to amend, otherwise the Tribunal would proceed on the basis of the first response form. The Tribunal also informed the respondent that in any event it had no jurisdiction to consider the counter-claim in the absence of

a breach of contract claim made by the claimant. The Respondent did not apply to amend the first response form.

Issues

7 The issues to be determined were agreed to be as follows:

Unlawful deduction of wages

7.1 The parties agreed the claimant was a worker.
7.2 Was the claimant employed on a zero hour contract?
7.3 Was the claimant entitled to be paid for the hours that she worked overtime?
7.4 Was the claimant owed wages on termination of her contract on 30 August 2021?
7.5 Was the respondent entitled to deduct backdated tax and NI paid to the HMRC?
7.6 Should any award to the claimant be reduced to take into account sums owed by the claimant in backdated tax and NI paid to the HMRC?

Holiday pay

7.7 The parties agreed that the claimant was entitled to 5 days' accrued holiday on termination of the contract.
7.8 Was this sum not paid due to the respondent being entitled to deduct backdated tax and NI paid to the HMRC?
7.9 Should any award to the claimant be reduced to take into account sums owed by the claimant in backdated tax and NI paid to the HMRC?

FACTUAL FINDINGS

8 The Tribunal has only made findings of fact in relation to those matters relevant to the issues to be determined. Where there were facts in dispute the Tribunal has made findings on the balance of probabilities.

9 Ms Carine Whyte was the Director of AfroHairCandy Ltd, a business specialising in hair products, which she established in 2019 and managed with her husband, Mr Marvin Whyte. She had a shop in the Whitgift Centre in Croydon (the shop), along with two pop up stores. In addition to the claimant, she employed a number of sales assistants that she referred to as 'casual workers'.

10 On 9 June 2021 the claimant attended an interview with Ms Whyte, to be employed as a Marketing Executive. At the interview Ms Whyte informed the claimant that she did not pay her staff PAYE and that the claimant would need to file her own taxes as a casual worker. She offered to put the claimant on payroll if she preferred. The implications of this are that Ms Whyte considered the claimant to be self-employed, however the Tribunal accepts the claimant's evidence that she was not aware of this at this point.

11 On 10 June 2021, Ms Whyte sent a text to the claimant informing her that she was to be paid '£10 ph for the first 4-6 weeks while you're training then £11.50 there after'.

12 On 15 June 2021 Ms Whyte sent a text to the claimant stating that her hours of work would be 'at present' '10-6, 1 hr break, 4 days weekly'. The Tribunal notes that the text did not specify which days of the week the claimant was to work.

13 The claimant was provided with a contract headed 'Zero hour contract', it is unsigned but the claimant accepted that this had been sent to her by email. The relevant terms of the contract included:

1. STATUS OF THIS AGREEMENT: 'This contract governs your engagement by AfroHairCandy Ltd as a casual worker from Wednesday 16th June 2021. This is not an employment contract and does not confer any employment rights on you (other than those to which workers are entitled). In particular, it does not create any obligation on AfroHairCandy Ltd to provide work to you and by entering into this contract you confirm your understanding that AfroHairCandy Ltd makes no promise or guarantee of a minimal level of work to you and you will work on a flexible, 'as required' basis. It is the intention of both you and the Company that there be no mutuality of obligation between the parties at any time when you are not performing an assignment.'
2. COMPANY'S DISCRETION AS TO WORK OFFERED: 'It is entirely at AfroHairCandy Ltd discretion whether to offer you work and it is under no obligation to provide work to you at any time'.
3. NO PRESUMPTION OF CONTINUITY: 'Each offer of work by AfroHairCandy Ltd which you accept shall be treated as an entirely separate and severable engagement (an assignment)….'
4. ARRANGEMENTS FOR WORK: 'If AfroHairCandy Ltd wants to offer you any work it will contact you by telephone comment by e-mail, and / or text……'
5. WORK: 'AfroHairCandy Ltd may offer you work from time to time as a Marketing Executive. The precise description and nature of your work may be varied with each assignment and you may be required to carry out other duties as necessary to meet business needs. You will be informed of the requirements at the start of each assignment.' The clause then states that the Marketing Executive was to manage marketing department staff and provides a list of job duties.
7. HOURS OF WORK: 'Your hours of work will vary depending on the operational requirements of AfroHairCandy Ltd. You will be informed of the required hours for each assignment….'
8. PAY: 'You will be paid for the hours that you work. AfroHairCandy Ltd current training rate of pay for your role is £10 an hour (gross). Your rate thereafter will be £11.50 an hour. You will be paid monthly in arrears at the end of each month into your bank account for the hours worked in the previous month. AfroHairCandy Ltd will make all necessary deductions from your salary as required by law and shall be entitled to deduct from your pay or other payments due to you any money which you may owe to the company at any time.'
9. HOLIDAYS: This clause provides that the holiday year runs from 1 January to 31 December and that at the end of each assignment AfroHairCandy Ltd will pay statutory holiday pay in lieu of any accrued but untaken holiday for the holiday year in which the assignment ends.

14 The claimant's employment commenced on 16 June 2021. From the outset she was paid £11.50 ph. The pay period ran from 20th to 21st of the month. The claimant was paid gross and did not receive any payslips during her employment.

15 The claimant initially worked 4 days a week. The claimant's hours were increased to 5 days a week from 19 July 2021. The respondent had originally disputed that the claimant's hours had increased but Ms Whyte stated in evidence that she had 'agreed to 5 days and that you [the claimant] was paid for it'.

16 Ms Whyte maintained a rota which set out the claimant's days and hours of work. The days varied but the hours of work were always 10am to 6pm. The rota recorded:

16.1 From 16 June to 12 July 2021, the claimant's shifts were 4 days a week, Wednesday to Saturday the first week and then Monday to Thursday or Tuesday to Friday.
16.2 For the week commencing 12 July 2021, the claimant's shifts were 3 days: Monday 13, Tuesday 14 and Friday 16 July 2021.
16.3 For the week commencing 19 July 2021, the claimant's shifts were 4 days: Monday 19, Tuesday 20, Wednesday 21 and Thursday 22 July 2021.
16.4 From 26 July to 30 August 2021, the claimant's shifts were 5 days a week, usually Monday to Friday or Tuesday to Saturday.

The Tribunal notes that the rota did not include the following days that the claimant claims she worked at home: 20 June (4 hours), 25 June (7 hours), 4 July (7 hours), 17 July (7 hours) and 23 July 2021 (5 hours). These are not the only days the claimant worked at home, but the only days that she is claiming she should have been paid for. The respondent claims that working at home was not permitted.

17 In relation to the days that the claimant stated she worked at home, the Tribunal notes the following:

17.1 Sunday 20 June 2021 was additional to the 4-day working week in place at the time and therefore was overtime. Further, at 11:02, the claimant sent to Ms Whyte the following WhatsApp message: '… I did tell you I believe in this business hence I came on board and one this I told Mabinty (another member of staff) is that I have a keen interest in the beauty and cosmetics business since I was working on a business plan the past 3 years so this is my area hence you see me, on a Sunday working on this because believe in every one in this business and AfroHairCandy'. This message suggests that the claimant was working on a Sunday because she was interested in the work not because she had been asked to work that day.
17.2 Friday 25 June and Sunday 7 July 2021 were additional to the 4-day working week and therefore were overtime. The claimant referred Ms Whyte to the WhatsApp messages sent on 7 July 2021 as evidence that she was working. Ms Whyte responded that they are evidence of conversations and not work and that in any event this time was not authorised.

17.3 Saturday 17 July was part of the 4-day working week and therefore not overtime. On Wednesday 14 July 2021 at 13:25 the claimant sent a WhatsApp message to Ms Whyte stating 'I will be make my way now but I'll have to leave at 6 as it's my sister's bday today so I might as well carry on working from home till 7-8pm. I'll be in from tomorrow, Friday and Saturday'. To which Ms Whyte responded at 13:25 'It's ok dear don't feel you have to'. The Tribunal considers that this response was in relation to the claimant stating that she would be working from home until 7-8pm (ie working overtime), and notes that the claimant's Timesheet records her as finishing work at 6pm on that day. According to the Timesheet, the claimant worked at home on Thursday but is not claiming payment for this work. The claimant attended the shop on Friday. On Saturday 17 July 2021 at 10:17 the claimant wrote to Ms Whyte stating 'I won't see you today as I'm not well. I went straight to bed yesterday after work but I didn't have a good night at all but I'm working all day from home….' And at 10:18 she wrote ' Along with the girls, I'll write the newsletter for it to be sent today'. Ms Whyte did not respond to these messages, but was involved in the group chat commenting on the work that the claimant did.

17.4 Friday 23 July was part of the 5-day working week which had commenced on 19 July 2021. At 06:50 Ms Whyte had messaged the claimant stating that Rhianna was to 'take the day today to work on marketing', the claimant responded at 08:27 stating 'no problem'. At 10:13 the claimant messaged Rhianna to inform her she was working on marketing and at 10:19 that she was working from home. The Tribunal notes that managing marketing staff was one of the claimant's duties under her contract.

18 In addition to days working at home for which she was not paid, the claimant claimed that throughout her employment with the respondent she worked a large amount of overtime for which she was not paid. According to her timesheet she worked 61 hours extra hours before 10am or after 6pm. The respondent denied that the claimant worked extra hours, stating that the claimant stayed at work because she did not wish to go home and / or that the extra hours worked were to make up for time taken off work at other times during the week. The respondent also claimed that any extra hours worked were unauthorised.

19 On 26 July 2021, the claimant requested by WhatsApp that she be put on payroll since she was looking for accommodation and needed proof of employment. Ms Whyte agreed to this request at 18:50 stating, 'Hi Christine, I can add you tk to payroll with no problem, I'll ask the accountant to do to this evening if you send me your dob, national insurance and full address.' The claimant also requested that her contract be updated to reflect the days / hours of work. Ms Whyte refused this request stating that it was a zero hour contract but offered to write a letter confirming hours of work and rate of pay, and that she could provide pay slips confirming what the claimant was being paid.

20 On 20 August 2021, the claimant provided her NI number, address and date of birth. Ms Whyte responded at 22:11 that she will forward the information to the accountant but that it 'may be too late for this month but next month will be done'. The claimant responded at 22:14 that 'It's alright, I planned to self assess for taxes for the previous months'.

21 On 23 August 2021 the claimant and Ms Whyte had a meeting regarding the claimant's employment status. It was during this meeting that Ms Whyte suggested that the claimant was self-employed and therefore responsible for her own tax and NI. Ms Whyte in evidence stated that it was the claimant who asserted she was self-employed not Ms Whyte. The Tribunal finds that it was more likely that Ms Whyte referred to the claimant as self-employed since this is consistent with her position that she did not put her staff onto the payroll and was not responsible for tax and NI. The claimant was understandably confused as to why Ms Whyte was suggesting that she was self-employed when she had already agreed to put her on the payroll, so she requested a further meeting.

22 The further meeting took place on the 24 August 2021, during which the claimant made it clear that (a) that she had never agreed to be self-employed and that the zero hour contract did not refer to her as being self-employed, and (b) if she was to be treated as self-employed then she should be paid for all the hours she had worked, not just the agreed hours of 10-6pm, initially for 4 then for 5 days per week. The claimant stated she would draft her own contract and backdate it. Following the meeting the claimant sent a WhatsApp message to Ms Whyte at 20:57 stating 'I'll draft the self-employed contract by Sunday and backdate it'. Ms Whyte responded at 21:04 that her accountant had advised her to resend the zero hour contract adding a self-assessment clause. In the lengthy exchange that followed Ms Whyte stated at 21:15 that 'It's a zero hr contract, put in place to protect companies from hefty fees when we do not yet have capacity to take on staff with too much commitment'.

23 The Tribunal notes that during the WhatsApp exchange Ms Whyte did not dispute that the claimant had worked extra hours, in particular:

23.1 At 21:37 Ms Whyte wrote that she had 'assumed you had put in the extra effort for the collective good that will then pay off equally with growth and an economic equilibrium. I have had jobs 9-5 yet get to work at 7am and leave at 11pm to get the tasks of the day done, at no extra pay, but because there's an end goal. So I guess I was naively assuming the same since you said nothing. If you had done so from the start, I would have ensured time was managed better.'

23.2 At 21:46 Ms Whyte wrote 'in any case, please set, work out the hours and minutes extra you've done since the beginning and let me know how many they equate to.' The claimant did not provide Ms Whyte with this breakdown during her employment.

23.3 At 22:50 Ms Whyte wrote 'now that things have been made clear, moving forward for the duration, if you should stay for a minute longer than the comment agreed hours it should be cleared with me first'. And at 22:59 wrote 'Pls do not feel pressured to answer messages out of your working times. If there's anything urgent I will call, but if not, it can always wait. I will text when I think of things, but a response has never been an expectation.'

24 The relationship between Ms Whyte and the claimant deteriorated and on 30 August 2021 at 2pm the claimant resigned. The nature of the deterioration in the relationship is not material for the purposes of determining the claims before the Tribunal.

25 On 31 August 2021, the claimant enquired about outstanding pay and payslips. Ms Whyte responded that the claimant would not be paid until she returned a notebook that she no longer possessed. In fact the claimant was paid £1691.05 into her bank account on 2 September 2021.

26 In September the claimant was provided with backdated payslips for June to August 2021. The gross amounts for the pay periods 16-20 June, 21 June to 20-July and 21 July to 20 August 2021 equated to the payments made to the claimant's bank account on 1 July, 30 July and 2 September 2021 respectively, minus deductions for purchase of products (which the claimant did not dispute). The payslips calculated for each pay period what should have been deducted as tax and NI, applying a tax code 'BR'. None of the payslips provided for holiday pay.

27 The payslip for the final pay period 21 August to 20 September 2021 records that the claimant was due £402.50 gross for 35 hours. From this was deducted £80.40 for tax and £720.55 'overpayment' resulting in a net payment of -£398.45. Ms Whyte stated that the 'overpayment' represented the tax and NI for the previous pay periods that the respondent had paid to the HMRC, following placement of the claimant on PAYE. The Tribunal notes that the previous failure to pay tax and NI had arisen due to a lack of clarity over the claimant's employment status and who was responsible for payment; there was never any suggestion that it would not be paid at all.

28 In evidence the claimant queried the accuracy of the payslips since the hours of work did not equate to her records. She also stated that the wrong tax code was applied and that when she contacted the HMRC it did not have a record of her being employed by the respondent.

29 On the 3 October 2021 the respondent were provided with a 'Notice to employer of employee's tax code (or amended code) and previous pay and tax' which recorded that the claimant's tax code was changed to '1257L'.

LEGAL PROVISIONS

Employment Status and Contract

30 Section 230 of the ERA 1996 provides that:

(1) an employee is 'an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment'.

…

(3) a worker is 'an individual who has entered into or works under (or, where the employment has ceased, worked under):

(a) a contract of employment, or

(b) any other contract, whether express or implied and (if express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual'.

Therefore an employee is a worker but not all workers are employees. Workers are to be distinguished from independent contractors in business on their own account.

31 Section 27A(1) of the ERA 1996 defines a zero hour contract as:

'… a contract of employment or other worker's contract under which –
(a) the undertaking to do or perform work or service is an undertaking to do so conditionally on the employer making work or services available to the worker, and
(b) there is no certainty that any such work or services will be made available to the worker'.

Therefore, a key element of a zero hour contract is that there is no entitlement to a minimum amount of work, in contrast to an agreement to work a fixed number of hours. Further it is clear from this definition that both employees and workers can be employed on a zero hour contract.

32 When considering what contract a claimant is employed on Tribunals have been advised to consider the true nature of the relationship and not just the intentions of the parties or the wording of any written contract: **AutoClenz Ltd v Belcher** [2011] UKSC 41; **Uber BV & Others v Aslam & Others** [2021] ICR 657, SC. This is in recognition of the differential bargaining power of the parties. These are cases considering employment status but the principle is equally applicable to cases where a Tribunal is being asked to interpret the type of contract that a person is employed on.

33 The terms of an employment contract may be expressly agreed, either orally or in writing. Alternatively they may be implied because, for example, they are obvious, necessary to give 'business efficacy' to the employment relationship or by conduct of the parties. A term may only be implied if there is no express term. Implied terms include an obligation on an employer to pay an agreed wage and an obligation on the employee to be 'ready and willing to work' for that wage.

Unlawful Deduction of Wages

34 The prohibition on unlawful deductions of wages is set out in section 13 of the ERA 1996 which provides that:

'(1) 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.

(3) 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 as a deduction made by the employer from the worker's wages on that occasion.’

35 The right is subject to limitations. First what salary is ‘properly payable’ is that which a worker is legally entitled to under their contract or otherwise: **New Century Cleaning Co v Church** [2000] IRLR 27. This is relevant to the overtime claim since a worker is only entitled to be paid for overtime worked if there is an express or implied term of the contract providing for such payment. There is no general implied right to be paid for overtime worked voluntarily.

36 Secondly, under section 13(1)(a) a deduction is permitted if it is required or authorised to be made ‘by virtue to a statutory provision or a relevant provision of the worker’s contract’. This permits an employer to deduct tax and NI since this is required or authorised by virtue of a statutory provision. It also permits a deduction authorised by a contractual term, where that term is in writing and has been provided to the worker prior to the deduction in question. The term relied upon must be precisely drafted and un-ambiguous. Any ambiguity should be construed against the employer.

37 Thirdly, section 14 provides a number of exceptions to the right not to have an unlawful deduction of wages. In particular section 14(1) permits a deduction where the purpose is the reimbursement of the employer in respect of ‘overpayment’ of wages, made ‘for any reason’ by the employer to the worker. There is no limit to the amount that can be recovered or the period of time within which any recovery can be made. In addition, section 14(3) permits deductions ‘…. in pursuance of a requirement imposed on the employer by a statutory provision to deduct and pay over to a public authority amounts determined by that authority as being due to it if the deduction is made in accordance with the relevant determination of that authority’. ‘Determination’ has been given a wide interpretation and a letter from the Inland Revenue requesting back payment of tax and NI is sufficient, since this is a direction given to an employer by a public authority: **Patel v Marquette Partners** (UK) Ltd [2009] I.C.R. 569.

38 An employer can only bring a counter-claim where the employee had brought a contractual claim, which the claimant has not done in these proceedings. The Tribunal has no jurisdiction to consider a counter-claim in relation to a claim for unlawful deduction of wages under the ERA 1996. The same applies to the doctrine of set-off. The provisions on unlawful deduction of wages do not permit an employer to bring a claim for damages against the worker against wages otherwise due: **Asif v Key People Ltd** EAT/0264/07 (7 March 2008, unreported).

Holiday Pay

39 Under regulations 13 and 13A of the WTR 1998 workers are entitled to 5.6 weeks' annual leave in any leave year. Regulation 14(2) provides that where a worker's employment is terminated during the course of a leave year the worker is entitled to pay in lieu. Under regulation 30(1)(b) read in conjunction with regulation 30(5), where a Tribunal finds that an employer has failed to pay a worker in accordance with regulation 14(2), the Tribunal shall order the employer to pay to the worker the amount which it finds due to her. There is no provision permitting an employer or the Tribunal to deduct from any payment other sums due by the employee to the employer. This is to be contrasted with regulation 14(4) which does permit an employer to recover excess holiday, but only where such deduction is provided for by a 'relevant agreement'.

DISCUSSION AND CONCLUSIONS

Nature of the Contract

40 Both parties accepted that the claimant was a 'worker' and not an independent contractor carrying out a business on her own account. That is plainly correct. It is not necessary for the Tribunal to go further and determine whether the claimant was an employee since she can bring claims for unlawful deduction of wages and non-payment of accrued holiday pay as a worker.

41 The Tribunal finds that the claimant was employed on a fixed hour not zero hour contract. The written zero hour contract does not reflect the agreement that the parties entered into regarding claimant's hours of work. The contract stated that the claimant was a casual (zero hour) worker (clause 1), that there was no guarantee of a minimum level of work (clause 1), and that the respondent was under no obligation to provide work (clause 2). Further, that the claimant was to work on a flexible, as required basis (clause 1), and that her hours of work would vary (clause 7) . However, there was nothing 'casual' or zero hour about the actual agreement between the parties that the claimant be employed to work 10am – 6pm, initially for 4 days a week (later changed to 5 days a week). Such an agreement gives rise to an obligation on the respondent to provide work and on the claimant to do the work. Nor could this agreement be considered to be a specific assignment. It was an open-ended commitment, there was no suggestion that it was for a specific period of time or that there would be periods that the claimant would not be required to work and would not be paid (clause 1 and 3). Nor did the zero hour contract reflect the true relationship between the

parties since the actual hours that the claimant worked was consistent with the agreed hours.

Unlawful Deduction of Wages

42 The claimant has claimed unlawful deduction of wages in relation to unpaid wages and overtime. The following reasons for underpayment of wages have emerged from the evidence in this case:

42.1 Non-payment for overtime
42.2 Non-payment for contractual hours worked at home
42.3 Mistakes in payments
42.4 Deduction of back dated tax and NI from the final payment.

Non-payment for Overtime

43 The Tribunal finds that the claimant worked the extra hours set out in her timesheet. Her claim is supported by almost 200 pages of WhatsApp messages, which show that there were frequent and lengthy work-related exchanges between the claimant and Ms Whyte before 10am and after 6pm, and on the extra days worked at home. Further, contrary to the respondent's case, the 24 August 2021 WhatsApp exchange demonstrates that Ms Whyte was fully aware at the time that the claimant was working additional hours since she thought it was done 'for the collective good'. There is no suggestion in this exchange that Ms Whyte thought the claimant was working to make up for time taken off or because of the claimant's home circumstances. The exchange concluded with Ms Whyte asking the claimant to let her know how many extra hours she had worked.

44 The respondent argued that any overtime worked was 'unauthorised' and relied on clause 7 of the contract that the claimant would be informed of the required hours of work for each assignment, and that the claimant had been informed that her hours of work were 10am to 6pm 4 days per week. The claimant relied on clause 8 of the contract that stated that she would be paid for the hours that she worked. The claimant submitted that since Ms Whyte had refused to provide her with a contract specifying her hours of work, the respondent were bound by this provision and therefore she should be paid for all the hours that she worked.

45 The Tribunal has found that the zero hour contract did not reflect the contractual agreement between the parties and that the claimant was employed on a fixed hour contract. The fixed hour contract specified the normal hours of work but did not include any provision as to payment for additional hours worked. The claimant claimed in evidence that the additional work had always been orally agreed with Ms Whyte. However when pressed she was unable to provide specific details of any such agreement, in particular what was agreed. The respondent denied that any overtime had been authorised. In the absence of any clear agreement that overtime would be paid, the Tribunal concludes that there was no express term to this effect.

46 The Tribunal considered whether there was an implied agreement that overtime worked would be paid. The Tribunal considers that the mere fact that Ms Whyte was aware of the extra hours that the claimant was working is not sufficient to

infer agreement that the hours would be paid. The Tribunal notes the claimant's WhatsApp dated 20 June 2021 which suggested that the Claimant was working on a Sunday because she was committed to the business (not because she had been required to work an extra day). The Tribunal also notes Ms Whyte's WhatsApp dated 14 July 2021 stating that the claimant did not have to work overtime that evening, and her comments during the 24 August 2021 WhatsApp exchange that she thought the hours were done voluntarily. Finally, and more significantly, the Tribunal takes into account that the claimant did not request payment for any overtime until 24 August 2021 and that this request was made in the context of the dispute as to whether or not she was self-employed, not that Ms Whyte had expressly or impliedly agreed to pay for overtime. Therefore the Tribunal does not find that there was an implied agreement that the claimant would be paid for overtime.

47 The Tribunal also considered whether Ms Whyte was bound by the WhatsApp message made on 24 August 2021 requesting that the claimant work out the extra hours and minutes worked and let her know how many they equate to. This is what led to the claimant compiling her timesheets and her belief that Ms Whyte had agreed to pay for those hours. However the Tribunal finds that the WhatsApp message is too uncertain to amount to a contractual agreement to pay for the extra hours that the claimant identified. It is merely a request for information. The claimant did not provide this information before she resigned so there was no opportunity for the claimant and Ms Whyte to reach any agreement over compensation, whether by payment or additional time off.

48 There is no doubt that the claimant worked above and beyond for the respondent and that the respondent benefitted from this work. However in the absence of any express or implied request or requirement for the claimant to work the extra hours, the Tribunal finds that overtime was work done on a voluntary basis, and the claimant is not entitled to payment for these hours.

Non-payment for contractual days worked at home

49 The Tribunal has found that the work done on the 17 and 25 July 2021 was not overtime but part of the agreed normal working hours. The 17 July was the fourth day of the agreed 4-day week and 25 July was the fifth day of the agreed 5-day week.

50 Since the claimant was employed on a fixed hour contract, in the absence of any express term to the contrary, the respondent is under an obligation to pay for the agreed hours, as long as the claimant is ready and willing to work (there being no suggestion that she was unable to work the agreed hours). The respondent argued that the claimant was not permitted to work from home, and therefore was not entitled to payment. However the express agreement between the parties does not specify a place of work it merely states that the claimant ' … will be informed of the relevant place of work for each assignment' (clause 6). The respondent has adduced no evidence that the claimant was informed that the shop was her sole place of work or that she was informed that she was not permitted to work from home and would have pay deducted if she did. On the other hand there is evidence that Ms Whyte implicitly consented to the claimant

working from home, since Ms Whyte was aware that the claimant was working from home and did not object.

51 The Tribunal notes that the claimant only worked 5 hours on the 25 July 2021, but considers that these hours were made up by working extra hours the next week. Even if the claimant had not made up these hours, the fixed hour nature of the contract would have still entitled her to be paid.

52 Therefore in all the circumstances the Tribunal has concluded that the claimant is entitled to be paid for the two days that she worked at home.

Mistakes in payments

53 The Tribunal notes:

53.1 The payslip for the pay period 16 to 20 June 2021 records that the claimant worked 28 hours (4 days per week). This reflects the contractual agreement and is correct.

53.2 The payslip for the pay period 21 June to 20 July 2021 records that the claimant worked 112 hours (which equates to 16 days, 4 days per week). The contractual hours for a 4-day week over this time period should have been 126 hours (18 days). One of the missing days can be explained by the fact that the claimant worked at home on the 17 July 2021. The other missing day is unexplained. The Tribunal considers that the error may have arisen because the claimant was paid 4 x 4 weeks and not a full calendar month. The Tribunal determines that the claimant is entitled to an additional day for this pay period.

53.3 The payslip for the pay period 21 July to 20 August 2021 records that the claimant worked 154 hours (22 days). The Tribunal has found that the contractual hours for this pay period was 5 days per week, so the claimant should have been paid for 161 hours (23 days). The missing day is accounted for by the fact the claimant worked from home on 23 July 2021.

53.4 The payslip for the pay period 21 August to 20 September 2021 records that the claimant worked 35 hours (5 days). The claimant's timesheet records that she worked 5 days and 4 hours (since she resigned at 2pm on 30 August 2021. Ms Whyte stated in evidence that when the claimant resigned she had worked 5½ days, 23-27 August and then 30 August 2021. The Tribunal determines that the claimant is owed 4 hours for work done on the 30 August 2021 prior to her resignation.

54 Therefore the Tribunal finds that the claimant is entitled to be paid 1 day and 4 hours arising from mistakes in the calculation of her hours.

Whether the respondent was entitled to withhold payment for the 35 hours?

55 It is not in dispute that the respondent did not pay the claimant £322.10 net for the outstanding 5 days wages (35 hours) on termination of her contract. The reason for the non-payment was because the respondent deducted an

'overpayment' of £720.55 representing backdated tax and NI paid to the HMRC for the previous pay periods, resulting in a net payment of -£398.45.

56 The Tribunal accepts that it was permissible for the respondent to deduct the NI and tax 'over payment' from the pay owed, under sections 13(1) and 14 of the ERA 1996. The deduction was permitted since it was required or authorised by virtue of a statutory provision, and / or was a determination of amounts owed to the HMRC. Alternatively it was an 'overpayment', since it represented the amount owed to the HMRC in back dated tax and NI. The claimant queried whether there was in fact such a determination and / or payment, since she stated in evidence that when she contacted the HMRC on leaving her employment it had no record of her employment at AfroHairCandy Ltd. The Tribunal notes that the respondent adduced no evidence of the HMRC's demand for backdated pay and NI, or that the sum was paid. However the Tribunal considers it unlikely that the respondent would have produced payslips identifying the sums owed by the claimant in backdated pay and NI, had it not received a request for payment of this sum from the HMRC and had paid this sum. Further, the respondent did adduce the HMRC 'Notice to employer of employee's tax code (or amended code) and previous pay and tax' dated 3 October 2021, containing the claimant's name and NI number. This confirmed that the HMRC had been informed by that date that the claimant was their employee.

57 The respondent separately argued that it was permitted to make this deduction under clause 8 of the claimant's contract. In the Tribunal's view, this clause would not have been sufficiently precise to permit the deduction for backdated tax and NI, in the absence of any such demand from the HMRC.

<u>Wrong tax code</u>

58 The claimant stated that the wrong tax code was used, and that more tax and NI had been deducted than should have been. The Tribunal notes that the 'BR' (basic rate) tax code was used, and that this is a tax code applied by the HMRC on a temporary basis, pending further information. It meant that the claimant's salary was taxed at 20% without taking into account the tax-free personal allowance. The Tribunal further notes that on the 3 October 2021 the respondent was notified that the claimant's tax code was changed to '1257L'. This is the tax code usually applied to employees and takes into account the tax-free personal allowance. The claimant's pay for a 35 hour week was £402.50 gross, therefore according to the estimate provided by the government tax calculator using the 1257L tax code, deductions for tax and NI should have been £53.42 per week, providing a weekly rate of pay of £349.08 net and an hourly rate of £9.97 net. If code 1257L had been used to determine the claimant's tax and NI, then the amount of 'overpayment' would have been an estimated £449.82 (calculated as £1.53 per hour x 294 hours worked from 16 June 2021 to 20 August 2021 according to the payslips), not £720.55. This would have still resulted in the claimant receiving zero pay since the amount due in the final pay period would have been £349.08 net, less than the 'overpayment' of £449.82 owed to the respondent in tax and NI. However this would have resulted in an estimated net payment of -£100.74 not -£398.45.

<u>Whether the respondent should pay to the claimant the outstanding 3 days and 4 hours</u>

59 The Tribunal has determined that the claimant is owed 3 days' and 4 hours' unpaid wages, 2 days for normal hours spent working at home, 1 day unexplained that appears to have been due to the claimant being paid for 4 weeks rather than a calendar month and 4 hours on the last day of employment. This amounts to 25 hours in unpaid wages. The gross sum is £287.50 (£11.50 x 25 hours) and the net sum (using the tax code 1257L) is £249.25 net (£9.97 x 25).

60 The Tribunal has considered whether the amount that the claimant owed in tax and NI should be deducted from this sum. Since the Tribunal had no jurisdiction to consider the respondent's contractual counter-claim this could only be done if permitted to set-off such a sum. The Tribunal concludes that in the absence of any statutory provision permitting such a deduction to be made that the claimant should receive the full amount.

61 The Tribunal therefore awards the claimant the sum of **£249.25 net** in unpaid wages, representing 3 days and 4 hours.

<u>Holiday Pay</u>

62 The respondent did not dispute that the claimant was entitled to 35 hours (5 days) holiday pay accrued at the date of termination. The respondent claimed that the holiday was not paid due to deductions for backdated tax and NI. This is not supported by the payslips, none of which provided for any holiday entitlement. The Tribunal considers that the accountant's letter dated 12 June 2022, does not assist the respondent since it only sets out the amount of holiday owed, it does not support the respondent's case that the reason it was not paid was due to overpayment.

63 In any evet, there is no provision under the WTR 1998 for an employer to make a deduction from any sum awarded for accrued holiday, due to any overpayment of wages, statutory authority or for any other reason. In the absence of a statutory provision, the claimant is entitled to this sum. The claimant is therefore entitled to **£348.95 net** (£9.97 x 25) outstanding holiday pay.

Employment Judge Hart

Date: 25 November 2022

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