

THE INDUSTRIAL TRIBUNALS

CASE REF: 18140/20

CLAIMANT: Georgia Hamilton

RESPONDENTS: Babylife Ltd

JUDGMENT

The unanimous judgment of the tribunal is that the claimant's claims for unauthorised deduction from wages, breach of contract and failure to supply a written statement of particulars of employment are not well founded and are dismissed.

CONSTITUTION OF TRIBUNAL

Employment Judge: Employment Judge Bell

Members: Mr I Atcheson
Ms G Clarke

APPEARANCES:

The claimant was in attendance and was not represented.

The respondent was represented by Ms Suzanne Jennings.

1. The claimant in her claim complained she had suffered an unauthorised deduction from wages and breach of contract arising from a failure by the respondent to pay her furlough pay following the closure of non-essential business and lockdown in March 2020 based on basic weekly hours of 18 hours each week and that she had not received an employment contract.
2. The respondent resisted the claim and contended the claimant was employed to work flexibly with no fixed weekly hours in place and that payment had been made for all hours worked.
3. The claim, response, sworn oral testimony from the claimant and from Ms Jennings and agreed bundle of documentation submitted prior to hearing were taken into consideration.

ISSUES

4. The issues for determination by the tribunal were:-
 - a. Has the claimant suffered an unlawful deduction from wages/ has the

respondent in breach of contract failed to pay the claimant wages due?

That is,

- i. What wages were properly due to the claimant?
 - Was the claimant contracted to work minimum guaranteed hours per week?
- ii. Has the claimant been paid less than what was properly due?

If so,

- b. Was the respondent when the claim was presented in breach of the duty to provide written particulars of employment?

RELEVANT LAW

5. Article 45 of The Employment Rights (Northern Ireland) Order 1996 [ERO] provides a worker the right not to suffer an unauthorised deduction from wages and for a deficiency in the total amount of wages paid against that properly payable to be treated as a deduction.
6. Under Article 33 ERO where an employee begins employment with an employer, the employer shall give to the employee a written statement of particulars of employment as provided therein.
7. Under Article 27 of The Employment (Northern Ireland) Order 2003, in proceedings before an industrial tribunal in respect of specified jurisdictions which include unauthorised deductions and payments, if the tribunal makes an award to the employee in respect of the claim, and when the proceedings were begun the employer was in breach of his duty to the employee under Article 33 ERO, the tribunal shall increase the award by the minimum amount equal to two week's pay to be paid by the employer to the employee and may, if it considers it just and equitable in all the circumstances, award the higher amount equal to four week's pay instead. The tribunal's duty does not apply if there are exceptional circumstances which would make an award or increase unjust or inequitable.

FINDINGS OF FACT

8. The respondent was a new business getting ready to launch and open its shop. The claimant responded to a sign on the respondent's shop door for a flexible working sales assistant. No set hours were specified. At interview the claimant expressed that she wished to leave her current job and so would require 16 hours work per week. Ms Jennings in the course of the interview enquired as to the claimant's required notice period in her current job. The claimant was advised she would be paid monthly.
9. The claimant commenced working for the respondent on 3 February 2020 initially helping to set up for the shop opening on 12 February 2020. The claimant thereafter worked variable days and hours as were agreed week to week between the

claimant and respondent. The claimant worked in February, week 1, 12.5 hours; week 2, 29 hours; week 3, 21.5 hours; week 4, 16 hours; and in March, week 1, 16 hours; week 2, 17 hours; week 3, 16.5 hours; and week 4, 11 hours.

10. On opening in February 2020 the respondent, through its accountant, applied for registration of its PAYE payroll scheme on HMRC's real time information system. HMRC registered the respondent for PAYE online but the activation code required for online access and submission of PAYE records was not received in time for the respondent's February payroll. The respondent's accountant on receipt of HMRC's activation code submitted the respondent's February and March monthly payrolls together on 24 March 2020.
11. Following the UK lockdown announcement on 23 March 2020 and subsequent Northern Ireland Regulations brought in on 28 March 2020 in response to the Covid-19 pandemic, the respondent temporarily closed its shop.
12. In the month of April 2020 the respondent provided the claimant with a total of 18 hours work to be done from home in relation to its website on a laptop provided to her for that purpose. The respondent advised the claimant there would be no more available hours thereafter until the shop reopened and it would make an application for a furlough grant.
13. On 20 April 2020 the respondent advised the claimant that its furlough application had been rejected but it would appeal. The respondent also informed the claimant of its accountant's advice that she could seek to be put on furlough through her previous employer for whom she was still working in February 2020, but the claimant did not wish to do so.
14. On 27 May 2020 the respondent advised the claimant there was still no response from HMRC and its accountant had made numerous phone call requests without reply. On 28 May 2020 the claimant texted the respondent, *'No worries fingers crossed if it picks up and you need a hand any days just let me know'*.
15. On 10 June 2020 the claimant contacted the respondent to ask about the shop re-opening.
16. Ultimately HMRC rejected the respondent's appeal for furlough support because its records on 19 March 2020 did not show employees on the payroll albeit relevant records were submitted on 24 March 2020. The respondent on 11 June 2020 by telephone advised the claimant of the rejection, told her she would definitely not receive furlough, the shop was only open by appointment and no hours available to offer her and that she should look for other work. The claimant offered that if there were two appointment requests at the same time she would be happy to work hours no matter how little and sought written confirmation as to why she would not receive furlough pay. The respondent wrote to the claimant on 15 June 2020 explaining why furlough support had not been received.
17. On 26 June 2020 the claimant turned down an offer of 7-10 hours work for the respondent because she had applied for universal credit explaining casual hours did not suit her situation as a single parent and she could not work for less than 16 hours per week.

18. The respondent advised the claimant by telephone on 30 June 2020 that it could not offer her 16 hours and would issue her P45 and the respondent provided the claimant the following day with a letter dated 30 June 2020 confirming its regret at having to make the claimant's position redundant due to current business circumstances.
19. The claimant presented her claim to the office of the tribunals on 23 July 2020.

CONCLUSIONS

20. It was in dispute whether at the interview stage minimum guaranteed hours were agreed to be given to the claimant. The tribunal find more probable Ms Jennings's evidence that rather than agree to provide minimum hours each week that she explained to the claimant they would hope to be in a position to offer the claimant the hours she sought but that as it was a new business, available hours would be as and when required and advised the claimant she should keep her other job whilst they were starting up and they would review matters in a few months' time when the business had traded and see what hours were available then. The tribunal accept Ms Jennings' later enquiry as to the claimant's notice period was intended to gauge future availability were the business to be a success on the opening of its shop and greater assistance required, rather than confirmation of an agreement having been reached upon guaranteed minimum hours.
21. The tribunal find as a fact the claimant was engaged on a flexible contract without guaranteed minimum hours and without contractual entitlement to wages in a week in which work was not provided.
22. The respondent, albeit not obliged to so for employees on a flexible contract, endeavoured to seek furlough support in relation to the claimant. It is unfortunate that determination of the respondent's eligibility was made on a snapshot of actual RTI payroll data held by HMRC on 19 March 2020 which the respondent did not meet arising from circumstances outside of its control and without allowance made for it being a new business. The claimant's upset and disappointment at being in a financially worse position than she might otherwise have been are understandable in circumstances where on the face of it she was employed at the relevant time so as to have potentially been within furlough support. It is unfortunate the respondent's online payroll submission could not take place earlier and likewise that the claimant did not feel able to seek furlough support through her previous employer. The respondent however on failing to secure furlough support for the claimant had no underlying contractual obligation to pay a guaranteed weekly wage to her. As such no breach of contract or unauthorised deduction from wages has occurred and in the absence thereof an increased award for failure to supply a written statement of particulars of employment is not applicable. The claimant's claims are not well founded and are accordingly dismissed.

Employment Judge:

Date and place of hearing: 23 August 2021, Belfast.

This judgment was entered in the register and issued to the parties on: