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EMPLOYMENT TRIBUNALS

Claimant: Mr D. Rogers

Respondent: United Services (Chingford) Club Limited

Heard at: East London Hearing Centre (by CVP)

On: 7 October 2020

Before: Employment Judge Massarella

Representation
Claimant: Ms M. Aisha (pupil barrister)
Respondent: Mr N. Henry (legal consultant)

RESERVED JUDGMENT

The judgment of the Tribunal is that: -

1. The Respondent made unauthorised deductions from the Claimant's wages in the amount of £868.51. That is the gross amount, which the Respondent must pay, subject to any appropriate deductions for tax and national insurance.

REASONS

This has been a remote hearing, which has not been objected to by the parties. The form of remote hearing was V (CVP). A face to face hearing was not held because it was not practicable and all the issues could be determined in a remote hearing.

Background

1. By a claim form presented on 26 June 2020, after an ACAS early conciliation period between 15 and 22 April 2020, the Claimant complained of unauthorised deduction from wages.

The hearing

2. I had an agreed bundle, running to some 100 pages. I heard evidence from the Claimant, and from Mr Phillip Eskelsen, on behalf of the Respondent.
3. I apologise to the parties for the delay in sending out this judgment. This was caused by increased pressure on judicial resources, and the competing demands of other cases.

The claims

4. The Claimant contends that he was not paid for the period 23 February to 2 April 2020; and that he was underpaid from 1 April to 30 April 2020, because he was not paid 80% of his normal pay, while furloughed.
5. Ms Aisha (Counsel for the Claimant) confirmed at the beginning of the hearing that there was no claim in respect of holiday pay; that was reflected in the updated schedule.

Findings of fact

6. The Respondent is a non-profit making member's social club, run by committee, whose members at the material time include Mr Tony Webster (President); Mr Phillip Eskelsen (vice chairman of the committee, and entertainments manager. From around May 2020, he became the HR manager of the club); Ms Pauline Whitbread (Secretary); and Mr Alan Clark (Security Manager, who subsequently stood down). All committee members are volunteers, with an honorarium paid to the Treasurer and the Secretary of £2000 per annum.
7. The Claimant was employed as an assistant bar steward at the club. His employment commenced on 3 April 2019. He had a written contract of employment, which provided that he would be paid monthly on the fifteenth of each month, by bank transfer at the rate of £10.50 gross per hour. That was the rate of pay at which he was paid when working shifts on Mondays and Wednesdays. In addition, he worked as bar staff on Sundays, when his gross hourly pay was £8.50; that rate was increased, with effect from 1 April 2020, to £8.72.
8. The Claimant's standard weekly shift pattern was two 6-hour shifts as Assistant Steward; and four hours as bar staff.

The Claimant's grievance

9. On 10 September 2019, the Claimant lodged a grievance with the Respondent secretary, Ms June Barrington. His complaints included the following: that bar staff were no longer permitted to stay at the end of their shift for social time beyond thirty minutes of closing time; that he was spoken to in a threatening manner by Mr Tom Whitbread; that the committee had declared the bar staff's contracts 'null and void due to contract stating our retirement age was wrong'; that he was denied holiday for October which had previously been granted. He characterised these matters as bullying and harassment and 'personal agendas and vendettas'.

10. On 13 January 2020, the Claimant was invited to a meeting the following day to discuss an incident which occurred on 11 January 2020. The Claimant alleged that the committee member, Mr Alan Clark, approached him at the bar and advised him to 'stop pissing people off... You have pissed the committee off, they are all out to get you... Drop the grievance'. The Claimant alleged that Mr Clark pushed him against the wall, pushed a glass into his neck and twisted it. He alleged that Mr Clark said 'I don't mind doing the time to kill you. I will have a van waiting for you outside, I don't even have to be here.' The situation was defused by other members of staff.
11. By letter dated 15 January 2020, the President of the club, Mr Webster, wrote to the Claimant about the incident on 11 January 2020, 'reinstating' him pending the outcome of the investigation and inviting him to return to work. I find that the language of reinstatement strongly suggests that the Claimant had been suspended in relation to this incident, albeit for a short period.
12. An investigation of sorts took place into the incident, although the Respondent appears to have been unable to reach a firm conclusion as to what had happened, despite the existence of CCTV. In oral evidence before me, Mr Eskelsen stated that there were 'two different sides to the story' and that both the protagonists were 'given a probationary period'. He denied that Mr Clark was barred from the club, but accepted that he decided to stay away from the club.
13. By letter dated 30 March 2020, Mr Eskelsen wrote to the Claimant with the outcome of the grievance. Surprisingly, given that this was a grievance by the Claimant, Mr Eskelsen wrote to the Claimant informing him that no formal disciplinary action would be taken against the Claimant in relation to the incident with Mr Clark, although he stated that the Claimant's actions were 'tantamount to an act of gross misconduct'. It is unclear how he reached that conclusion.

The incident on 23 February 2020

14. On 23 February 2020, the Claimant discovered that live bullets had been left on his doorstep. He believed that they had been left by Mr Clark, in an attempt to intimidate him. He reported it to the police, who clearly took the matter very seriously.

The events of 24 February 2020

15. The Claimant sent a WhatsApp message to Ms Mima Minihane, the bar manager, at 10:50 on the morning of 24 February 2020: 'Sorry Mima can't work this evening'. He received a response from her, commenting that it was late notice.
16. Later the same day, the Claimant went to the club with his mother to inform them that there had been a threat to his life, which he had reported to the police. He said that the police had told him not to leave his house. He declined to give details of the incident, saying that he had been advised not to do so by the police. He had a conversation with Mr Eskelsen and Ms Whitbread. Mr Eskelsen recorded what he told the Claimant in a subsequent letter:

'I explained we had a duty of care to you, all members and staff, and we had to do a risk assessment on the club because of the situation. After a while you decided to call your mother came [sic] to the club and we all spoke about the situation. In the conversation your mother agreed she would give me the CAD number the next day so I could talk to the police about it. I informed her she will need to get a letter confirming all this and she agreed.'

17. The decision to conduct a risk assessment was pursuant to advice from the Respondent's HR advisers at the time.

18. On 27 February 2020, the Claimant and his mother came into the club and informed Mr Eskelsen that threats had now made against the whole family. The file note concludes:

'I then had to suggest that if the threat is against the whole family, David needs to get a letter from the police saying he cannot leave home so cannot attend work and has a duty of care to all staff members the whole family must stay away. What would happen if someone came in with a gun shouting where is he or all [sic] and opened fire. I then said I hate doing this but must protect everyone.'

19. It is clear from this note that Mr Eskelsen instructed the Claimant not to attend work from that date onwards, not only because of the risk to him, but because of the potential risk to others.

20. Mr Eskelsen's evidence on the question of the risk assessment was somewhat incoherent. He first stated that he had done a risk assessment, which would normally be in writing, but accepted that there was no evidence of one. As for what that risk assessment consisted of he stated that 'we looked at how we could get him back in, but if there was a risk of someone coming in to attack him, there was no way we could protect him.' I am not satisfied that there is any evidence that a meaningful risk assessment was conducted by Mr Eskelsen, or that any measures were put in place by the Respondent to ensure the Claimant could return to work safely.

21. Mr Eskelsen's final position was that 'it was clear [the Claimant and his family] should not come into the club until such time he can prove he is no longer under this threat'. It is unclear how Mr Eskelsen expected the Claimant to prove a negative of this sort. What is clear, however, is that he was adamant that the Claimant must not attend the club.

22. On 28 February 2020 the Claimant's mother duly provided Mr Eskelsen with the CAD number, but was unable to provide any further information. She suggested that he contact the police directly, which he did. Later Mr Eskelsen texted the Claimant's mother again and told her that officers he had spoken to were unable to give him further information, but had told him that he would receive a call from one of the two police constables dealing with the matter, PC Hart or PC Fuller. He thanked her for her help

23. On 13 March 2020, the Claimant messaged Mr Eskelsen, saying that he had not been paid his correct wages, and making the point that it was not his choice not to be at work, while Mr Eskelsen conducted his risk assessment. Mr Eskelsen replied:

'I did say we would need proof of the police saying you cannot attend work due to your life threat. As far as I know there has been no paperwork put in so the club needs to treat this as AWOL. I did ask if you can prove the police telling you to stay at home re the threat to life with mum [sic] understandably you said no due to confidentiality. Mum gave the police CAD number. I find as I said I would, but they would not confirm anything on 28th Feb and told me I would be contacted by two different PCs i.e. PC Hart and PC Fuller. I did ask you in the meeting I deal with those as well [sic]. Neither has contacted me to date.'

24. On 17 March 2020 Mr Eskelsen wrote to the police asking them to confirm that the Claimant had been instructed by the police not to attend work. In that email, Mr Eskelsen wrote:

'I told him I had a duty of care to him and all staff and members. He would not be allowed in the club from today. He accepted this saying about time someone cared.'

25. This again confirms that the Claimant was told that he would not be permitted to attend work. As for the pay issue he said this:

'we are not paying David as you have not provided any paperwork to say he's housebound so he is not sick and gets no payment which he is now questioning. Please confirm the police have told Mr David Rogers from refraining from work as of his alleged reports. I'm concerned if there is a life threat neither of your officers have contacted me again, PC Hart or PC Fuller. I am not paying Mr Rogers as he has no evidence of a death threat. He comes to the club and drinks and goes to local pubs.'

26. On 19 March 2020 Mr Eskelsen received an email from a police administration assistant, stating that the information he was asking for was regarded as 'third-party information', and suggesting that he contact the police station where the PCs were based.

27. Mr Eskelsen wrote to PC Laura Hart on 20 March 2020, chasing information and observing that 'I can't believe the police are not treating this as serious, or am I being misinformed'?

28. It is plain from an email dated 25 March 2020 from PC Fuller to Mr Eskelsen that they had spoken on the telephone earlier that day. PC Fuller apologised for the time it had taken to respond to Mr Eskelsen. It would appear from the email that PC Fuller was asking Mr Eskelsen for evidence which might be relevant to the alleged incident on 11 January 2020. Whether in this conversation, or in another conversation, Mr Eskelsen accepted in oral evidence that, although the police would not go into details, they did confirm to him 'that a death threat had been made'.

29. On 1 April 2020, the Claimant wrote to police stating that he had not received any updates since the incident on 23 February 2020, other than having been informed that the matter was now 'with the firearms officer and awaiting forensics'. He explained his difficulty with his employer in relation to pay, and asked for confirmation in writing that the incident had indeed taken place, and that live ammunition had been left on his doorstep.

30. On 2 April 2020, the police wrote to the Claimant, confirming that PC Fuller had spoken with Mr Eskelsen regarding the incident. He confirmed that bullets had been found outside his home, and had been examined for fingerprints, of which there were none. He was also informed that, although the incident was currently closed, pending any further information, the Claimant remained 'a police priority with officers attending address on blue lights'.
31. PC Fuller chased Mr Eskelsen on 5 April 2020. On the same day Mr Eskelsen replied that he been unwell, but that he did have some photographs which he would send through.
32. On 6 April 2020 the Claimant wrote to Mr Eskelsen and the committee asking for an explanation as to the decision to withhold his salary.
33. On 18 April 2020 Mr Eskelsen wrote to the Claimant enclosing a letter inviting him to accept furlough.
34. There were further interactions between Mr Eskelsen and the police in April including an email on 22 April 2020, in which he wrote:

'all we have ever wanted was a letter from yourself as we were told you were the acting officer so as we could file it to pay David. We have never received anything in writing but had to do a risk assessment for the club. David has been placed on AWOL since 24 February 2020 due to no letter or confirmation from the police. As I am sure you will understand we could not allow David in the club if he is under what I would call house arrest due to the threat but would need this in writing to pay him.... All I am asking is a letter to say if the facts are true the police told him not to come to work and stay indoors.'

35. PC Fuller contacted Mr Eskelsen again on 28 April 2020, saying that he had tried to contact him several times. In that email he wrote:

'I would just like to make it clear we had not told David he cannot work or placed him under any restrictions. He has been advised not to return to the club but this is just advice only. We are doing everything we can to help David in relation to the matter he has reported. I note that one investigation that was running by PC Hart has been closed with no further action. The only matter that we are still looking into is this incident with the pint glass at the club which we have discussed previously David has given me permission to speak to you about'.

36. By email dated 4 May 2020, Mr Eskelsen wrote to the Claimant, setting out a salary calculation. By letter dated 5 May 2020, the Claimant was informed that he was reinstated to the payroll with effect from 2 April 2020, but put on furlough.

Termination of employment

37. The Claimant's employment terminated on 10 July 2020. By letter dated 10 July 2020, he was dismissed by reason of being absent without leave from 24 February 2020, until he was placed on furlough on 2 April 2020. He was paid one month's notice plus any adjustments for outstanding holiday pay.

The relevant law

38. Part 2, Ss.13 to 27B of the Employment Rights Act 1996 Act ('ERA') set out the statutory basis for a claim of unauthorised deduction from wages.
39. There is no issue that the Claimant was not a worker employed by the Respondent at the material time and thus entitled to the protection of the 1996 Act.
40. An employer shall not make a deduction from wages of a worker employed by him, which are properly payable to the worker, unless the deduction is required or authorised to be made: by virtue of a statutory provision; 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. Any agreement or consent, authorising the deduction from wages to be made, must be entered into before the event giving rise to the deduction.
41. A worker's right not to suffer an unauthorised deduction does not apply to a deduction from a worker's wages made by the employer where the purpose of the deduction is the reimbursement of the employer in respect of an overpayment of wages.
42. 'Wages' for the purposes of Part II ERA is widely defined. It includes any fee, bonus, commission, holiday pay or other emolument referable to employment, and to statutory sick pay.

Submissions

43. For the Claimant, Ms Aisha argued that the Claimant had been advised by the police not to attend work. Further, Mr Eskelsen told the Claimant that a risk assessment was going to be undertaken, and in the meantime he must not attend work. Mr Eskelsen never contacted the Claimant to inform him that the risk assessment had been concluded and that he should attend work again. Indeed, Ms Aisha submitted, there was no evidence that a risk assessment had been conducted. Certainly, none had been provided for this hearing. The Claimant absence was not unauthorised; he was absent on instruction from his employer. None of the exceptions in the statutory provisions apply, and the Claimant is entitled to the sums claimed in his schedule of loss.
44. For the Respondent, Mr Henry argued that the Respondent was entitled to withhold pay from the Claimant because he was absent without leave: he was not on holiday; he was not on sick leave; and he had not been suspended. Accordingly, wages were 'not properly payable' to him, because he did not attend work, in circumstances where his absence was not authorised.

Conclusions

45. Mr Eskelsen twice instructed the Claimant not to attend work. He gave that instruction because he was concerned not only for the safety of the Claimant, but also for the safety of others. He did not revoke that instruction during the material period. That in itself, in my judgment, leads inevitably to the conclusion that the Claimant is entitled to his pay in relation to the period when he was following that instruction.

46. Mr Eskelsen indicated to the Claimant that he was going to conduct a risk assessment. I accept Ms Aisha's submission that there is no evidence that he did so. In any event, Mr Eskelsen's oral evidence was that there were no steps which could be taken to remove the risk. Given that Mr Eskelsen's own position was that the Claimant's attendance at work was contingent on the risk assessment, then absent such an assessment, for that reason also the Claimant could not attend work, through no fault of his own.
47. In my judgment, it was wholly unreasonable of Mr Eskelsen to put the onus on the Claimant to prove that it was safe for him to attend work: the onus was on the Respondent to provide a safe place of work for him to return to. On Mr Eskelsen's own admission, it did not consider it could do so. Indeed, I have found that no meaningful risk assessment had been conducted. Had the Respondent indicated to the Claimant that it had put in place measures which meant that it was safe for him to return to work, I find, on the balance of probabilities, that he would have done so. I note, in particular, that he did return to work to attend training in June.
48. Insofar as it was submitted that the Claimant's absence from work was justified by his failure to provide proof that he had been instructed by the police not to attend work, I reject that submission. The Claimant cooperated in providing the CAD number. Mr Eskelsen began to liaise directly with the police. In the course of those discussions, they confirmed to him that there had been a threat to the Claimant's life; further, that they had not instructed the Claimant not to attend work, but had only 'advised' him not to do so. In any event, I have concluded that this is something of a red herring. Whatever the police told/advised the Claimant to do, Mr Eskelsen had instructed him not to attend work.
49. For the avoidance of doubt, I regarded Mr Eskelsen's evidence that he had been told that the Claimant had been 'placed under house arrest' as fanciful. I think it far more likely that that was his own mischaracterisation of the information which he had been given.
50. The only submission advanced by Mr Henry as to how wages might lawfully be withheld, by reference to the statutory provisions, was that they were not 'properly payable'. He agreed that that submission was dependent on a finding that the Claimant was absent without authorisation. I have concluded that he was not; he was absent on the express instruction of Mr Eskelsen. I accept Ms Aisha's submission that none of the other statutory exemptions apply (none were relied on by the Respondent).
51. Accordingly, I conclude that the Respondent made unauthorised deductions from the Claimant's wages.

Remedy

52. The amounts claimed were clarified by way of an updated schedule of loss, lodged with the Tribunal on 7 October 2020. The Respondent was given permission to lodge a counter-schedule by 8 October 2020, but did not do so.

53. I accept the calculation advanced by the Claimant, which is attached as an appendix to this judgment, and the Respondent is ordered to pay compensation accordingly.

Employment Judge Massarella

7 January 2021

APPENDIX: CALCULATION OF COMPENSATION

The Claimant's weekly contractual pay is £160 for 16 hours of work per week, the breakdown is as follows:

Monday rate of pay £10.50 an hour for 6 hours = £63

Wednesday rate of pay £10.50 an hour for 6 hours = £63

Sunday rate of pay £8.50 an hour for 4 hours = £34

Weekly gross pay = £160

Calculation for pay during February and March:

$£10.50 \times 12 + £8.50 \times 4 = £160 \times 4 = £640$

From 1 April 2020 the Claimant's rate of pay for Sunday was increased to £8.72 and as of 2 April 2020 the Claimant was placed on Furlough Scheme and was entitled to receive 80% of his salary.

Weekly gross pay = £160.88 after 80% deduction = £128.70

Calculation for pay during April and May:

$£10.50 \times 12 + £8.72 \times 4 = £160.88$ apply the 80% deduction = £128.70

$£128.70 \times 4 = £514.80$

Given that there is an overlap between rates of pay for the period 16 March 2020 – 15 April 2020 please see the breakdown of calculations below:

16 March 2020 – 1 April 2020 = $£160 \times 2 + £126$ (Monday 30 March at $£10.50 \times 6 +$ Wednesday 1 April at $£10.50 \times 6$) = £286

2 April 2020 – 15 April 2020 = £128.70 + (Sunday 5 April at £8.72 x 4 + Monday 13 April at £10.50 x 6 + Wednesday 15 April at £10.50 x 6 = £160.88 at 80%) £128.70 = £257.40

Total for this period = £286 + £257.40 = £543.40

Period of Work	Payments Received	Payments Due	Balance
24 February 2020 – 15 March 2020	£233.20	£480	£246.80
16 March 2020 – 15 April 2020	£12.21	£543.40	£531.19
16 April 2020 – 15 May 2020	£424.28	£514.80	£90.52
Total Claimed			£868.51