



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss W I Cheang

**Respondent:** New Summer Palace Limited

**HELD AT:** Liverpool

**ON:** 12 February 2018

**BEFORE:** Employment Judge Barker

## REPRESENTATION:

**Claimant:** In person, assisted by Ms Z Cooper, interpreter

In person, assisted by Ms E Smith, interpreter

**Respondent:**

## JUDGMENT

The decision of the Tribunal is that the claimant's claims for unpaid wages succeed.

**The respondent is to pay the sum of £169 to the claimant**, comprised of the following:

1. Wages owed for the first week of the claimant's employment with the respondent from 30 May 2015 to 6 June 2015. The claimant is owed unpaid wages for that week of £104, that being the National Minimum Wage of £6.50 per hour for 16 hours.
2. Wages owed but unpaid to the claimant for two bank holidays worked, being 1 May 2017 and 29 May 2017. The claimant is awarded £30 per day at the rate of the National Minimum Wage in force at the time of £7.50 per hour for four hours worked per day, and is therefore owed £60; and
3. Wages of £120 for her final week at work for the respondent, 3 July to 9 July 2017.
4. The claimant accepts that the respondent made a payment to her of £115 on Wednesday 12 July which partly discharged the debt owed to her. The total sum owed by the respondent to the claimant is £284, which leaves an outstanding sum of £169 owing to the claimant, which is payable immediately.

# REASONS

1. The parties had attended a previous hearing on 22 November 2017. At that hearing, case management orders were made and the matter was listed to take place before “*an Employment Judge sitting with lay members*”. It was explained to the parties at the start of the hearing on 12 February 2018 that this was a clerical error and that due to the nature of the claims being brought by the claimant, that is for unpaid wages, the matter could be dealt with by an Employment Judge sitting alone. The parties were given the opportunity to comment on this issue and both parties were happy to proceed on the basis of the matter being heard by a judge sitting alone.

2. The respondent drew to the judge’s attention the fact that the claimant had not complied with the fifth case management order set down on 22 November 2017, that being that each party must deliver to the other a copy of any document on which they intend to rely. Mrs Tsui told the Tribunal that they had delivered their documents to the claimant but that she had not sent any documents to them. Miss Cheang was given an opportunity to comment on this, and it became apparent that the reason for her non-compliance with that case management order was that she did not have any documents to disclose, and indeed she did not seek to rely on any documents at this hearing.

3. Both parties were ably assisted during the hearing by Cantonese interpreters, Ms Cooper and Ms Smith. At the start of the hearing, given that both sides were unrepresented, the claimant and Mr Tsui were sworn in after the interpreters. Mr Tsui is, the Tribunal understands, the Managing Director of the respondent. Evidence was then taken from Miss Cheang and Mr Tsui by way of questions from the judge, with each party having the opportunity to cross-examine the other thereafter. Mrs Tsui and Miss Tsui, who are Mr Tsui’s wife (and manager of the respondent) and the daughter of Mr Tsui respectively, were given their opportunity to contribute evidence where necessary once the primary case for both sides had been heard.

4. The Tribunal was asked by Miss Cheang to decide claims of unpaid wages. Very little documentation was before the Tribunal to assist in these decisions and evidence was largely in the form of oral evidence given by way of answers to questions from the judge. The respondent and the claimant had brought the claimant’s payslips, but the claimant did not seek to rely on these and they were found to be unreliable evidence, for reasons set out below. The respondent, when asked, confirmed that they had no further payment records. The claimant’s P45 and P60 were offered to the Tribunal, but they did not assist with the issues in this case as they only show total pay to a particular end date and not weekly sums paid. The findings of fact in this case and the decisions by the Tribunal are therefore made largely on the oral evidence given at the hearing and the credibility and consistency of the witnesses’ testimony.

5. There were a number of issues in dispute between the parties, relating to alleged threats made, abusive text messages and so on. These were not matters that were before the Tribunal to decide, and evidence was heard in relation to these

issues only so far as it might have been relevant to the issues that were before the Tribunal to decide.

**Issues for the Tribunal to decide**

6. Miss Cheang brings claims for unpaid wages. She told the Tribunal that she was not paid for the week 30 May to 6 June 2015 or 3 July 2017 to 9 July 2017. She also claims that she worked but was not paid for two bank holidays in May 2017, being 1 May 2017 and 29 May 2017.

7. Towards the end of the hearing, the claimant raised, for the first time in these proceedings, the fact that she had not been paid holiday pay during the restaurant's shut down in May 2017. It was not possible to deal with this issue in the time allocated to hear the issues that were in her claim form, particularly due to the limited availability of the interpreters. Should the claimant wish this issue to be determined by a Tribunal, it is possible for her to make a further application in this regard.

8. Mr and Mrs Tsui told the Tribunal that the way the claim was presented by the claimant was unfair because Mr Leung had asked for £240.20 on the previous occasion on 22 November 2017, and at this hearing Miss Cheang was asking for £235.

9. Mrs Tsui also noted that Miss Cheang was asking for more than the National Minimum Wage in 2015. She was claiming £115 for 16 hours worked in May/June 2015, when the National Minimum Wage rates in force at the time meant that she was entitled to £104.

10. In relation to these points I find that there is no prejudice to the respondent by the claimant's claim being presented in this manner. The legal principles and the issues for the Tribunal to decide have not changed, and the changes to the sums claimed are minimal.

11. Miss Cheang's claim form clearly states that the amount that she believes to be owed to her is £235. This is based on £60 per day for the two Bank holidays, a weekly wage of £120 in 2017 and a weekly wage of £115 in 2015. Mr Leung accepted that he had asked for a slightly different figure at the previous hearing. However, I find that there is no disadvantage to the respondent in the fact that the sums differed by £5.20 on that occasion. Mr Leung is not a professional representative and did not have Miss Cheang at the previous hearing to assist him. Mr Leung told the Tribunal that the handwritten note of the sums owed was written by him and not Miss Cheang.

12. Secondly, in relation to the issue of the weekly wage in 2015, I find below on the balance of probabilities that the claimant was paid at the National Minimum Wage at that time, as she was in 2017. The National Minimum Wage at that time was £6.50 per hour and therefore for a 16 hour working week at £6.50 per hour her weekly wage would have been £104. However, I find that there is no prejudice to the respondent by the claimant's claim being incorrect in this regard. I find that it would have been clear to the respondent that the claimant's claim was for the minimum wage that would have been in force at the time the hours were worked.

**Findings of Fact:**

**Payment of wages for the claimant's first and last weeks at work**

13. The claimant's case was that she began work for the respondent on 30 May 2015 and worked 16 hours in her first week which ran from 30 May 2015 to 6 June 2015. She says, however, that at the end of that first week she was not paid. The claimant's payslip purports to show that she was paid for that week, but her evidence to the Tribunal was that she was not and that she understood that she would have to work a week "in hand" for the respondent.

14. The claimant resigned on 9 July 2017. There was a dispute of facts between the parties as to whether the claimant did any work for the respondent the following Tuesday, 11 July 2017, but in any event it is common ground between the parties that the claimant did not stay long on the premises on Tuesday 11 July and certainly did not work a full shift. However, it was the claimant's expectation that at the end of her employment she would be paid for the week in hand from May/June 2015 and also her final week's wages from 3 to 9 July 2017 which she would ordinarily have been paid at the end of her shift on Sunday 9 July 2017.

15. The claimant's evidence to the Tribunal was that she had rowed with Mr Tsui at work on 9 July 2017 and that she had not received her wages at the end of the shift.

16. Mr Tsui accepted that he and Miss Cheang had had a disagreement on Sunday 9 July 2017. However, the respondent's case is that the claimant was paid in full for all sums that she was owed. Mr Tsui told the Tribunal that Miss Cheang was handed her usual wages in cash at the end of her shift on 9 July 2017.

17. Mr Tsui also said that they paid Miss Cheang for the week she worked in May 2015 and that they paid her £115 at that time. The Tribunal notes that, at times, the respondent's evidence was contradictory. Mrs Tsui gave evidence to the Tribunal that the National Minimum Wage at the time in May 2015 was £6.50 per hour and so the claimant would not have been entitled to more than that for the 16 hours worked. 16 hours work at the National Minimum Wage rate in force in May 2015 would have been £104.

18. I find that, on the balance of probabilities, the claimant was owed £104 for the first week worked in May/June 2015, because she would have been entitled to the National Minimum Wage rate in force at the time for 16 hours worked. I find that she was entitled to £120 for her final week of work in 2017, as this was the National Minimum Wage rate in force at the time for 16 hours worked. I find that she was not paid for either of those weeks worked.

**Payment for hours worked on two bank holidays in May 2017**

19. Ms Cheang's evidence was that she had worked both bank holidays in May 2017, those being 1 May 2017 and 29 May 2017. The claimant told the Tribunal that her expectation was that she would be paid £60 per day, being her usual hourly wage multiplied by eight hours. Miss Cheang told the Tribunal that she believed that by law, workers in the UK are entitled to "double time" for working on a bank holiday. This is not the case, and payment for bank holidays is to be at the worker's usual

rate of pay or such other rate as agreed between the parties, provided that it does not fall below the minimum rate set by the National Minimum Wage Regulations.

20. The respondent alleges that the claimant did not work either of the bank holidays in May 2017. Miss Tsui gave evidence to that effect and both Mr Tsui and Mrs Tsui said that they staffed the takeaway with their two daughters on bank holidays. Mr Tsui also said that when people did work bank holidays, he gave them an extra day off in the week in lieu instead of extra payment.

21. Miss Cheang disagreed with this and told the Tribunal that she had taken no time off in lieu in the week following 1 May 2017 because the restaurant had been closed, and that she had not been paid for the whole of the period of its closure, which was 2 May to 18 May 2017. She also told the Tribunal that she never took a day off after working a bank holiday, because she only worked part-time in any event.

22. Mrs Tsui told the Tribunal that the takeaway was not open for 8 hours on a bank holiday, and that she had brought a leaflet to the Tribunal to show this. The Tribunal accepts her evidence in this regard. The Tribunal finds that reference to “8 hours” pay being owed to Miss Cheang for each of the bank holidays was due to a mistaken belief that she was owed double pay for those days. I find that Miss Cheang worked for 4 hours on each of those days in May 2017.

23. The claimant told the Tribunal that she did not get paid after the first bank holiday because Mr Tsui closed the restaurant for approximately two weeks because of a trip to Hong Kong and that at the end of May she did not receive payment for the second bank holiday because Mr Tsui had told her that he was unable to pay her at that time, because he had other debts he needed to pay off first.

24. On the balance of probabilities, I find that Miss Cheang was entitled to payment at her usual hourly rate of £7.50 per hour for both bank holidays worked in May 2017, and that she worked for four hours each day. She is therefore entitled to be paid £30 per day, which is £60 in total. She was not paid these sums at the time.

### **Events of 11 May and 12 May 2017**

25. As stated above, Mr Tsui told the Tribunal that he had paid Miss Cheang in full as usual on 9 July at the end of her shift, that she had not worked either of the bank holidays in May and that she had been paid in full for her first week worked in May/June 2015.

26. The Tribunal notes that Mr Tsui’s evidence, when taken together, was that at Sunday 9 July 2017 the claimant had been paid in full all monies that she was owed by him and that no further monies were owing to her.

27. Nevertheless, when Miss Cheang’s boyfriend, Mr Leung, telephoned Mr Tsui on Tuesday 11 May 2017 to discuss the money owed to Miss Cheang, her evidence was that Mr Tsui told him that they could agree to split the difference and that he would pay £175 and that they should come to the respondent’s premises the next day to collect it.

28. Mr Tsui agreed that he had had this conversation with Mr Leung on 11 May, and agreed that he had invited them to come to see him on 12 May. He also agreed that he had offered to pay Miss Cheang £175.

29. When asked by the Tribunal why he had offered to pay £175 to Miss Cheang when he claimed not to owe her any wages, he told the Tribunal that it was a gratuity or a gift, because she had been a good worker.

30. On the balance of probabilities, I find Mr Tsui's evidence in this regard to be unreliable. He accepted that he and Miss Cheang had a disagreement on 9 July and Miss Tsui told the Tribunal that she had made a comment to Miss Cheang about her being silly to be leaving work because of a row over money. It is not credible that an employer would pay an employee a gratuity of such an amount in these circumstances.

31. I therefore find that he offered to pay Miss Cheang £175 not as a gift, but because he accepted that he owed her money. I find that he will have recalled that Miss Cheang had not been paid for the previous week's work and that contrary to what he told Mr Leung on the telephone, that he had no intention of paying her £175. I find that he only ever intended to pay her a sum for the work she had done that previous week.

32. When they visited the respondent's premises on Wednesday 12 May 2017, they were handed a wad of bank notes by Mr Tsui, which they took from him.

33. Miss Cheang's evidence was that they had both felt intimidated during the visit to the respondent's premises on Wednesday 12 July, because Mr Tsui had made reference to his wife's brother being a senior member of the "Triad" gang. They therefore did not count the money until after they had left the premises. When they did count the money, they found it was only £115.

34. Miss Cheang's evidence to the Tribunal was that when Mr Tsui was asked about this, he said that Mr Leung must have stolen the rest of the money, as he had handed over £175.

35. Miss Cheang said that, on behalf of Mr Leung, she wanted to "clear his name" because Mr Tsui had told numerous members of the local Chinese community that Mr Leung had stolen the money and they were concerned as to the effect that this would have on his reputation and his ability to find work.

36. I find that there is no credibility to the allegation that Mr Leung stole any of the money that was handed over on Wednesday 12 July 2017. He and Miss Cheang were clearly distressed by the allegations of theft and their possible consequences, and I find that those allegations have no credibility whatsoever. I find instead that Mr Tsui handed over £115 on 12 July.

### **The claimant's payslips**

37. The claimant's payslips were before the Tribunal in evidence. Miss Cheang brought her copies with her and the respondents provided their copies. Miss Cheang's evidence was that these payslips were unreliable and that the payslips were produced often several at a time and after a gap of several weeks. It is noted

that the payslips are identical save for the dates. Every payslip shows the claimant as having been paid the National Minimum Wage for 16 hours a week. The Tribunal noted that the claimant was said to have been paid for 16 hours per week throughout the period in May when it was accepted by both parties that the restaurant was closed. Mr Tsui told the Tribunal that this was because had paid her even though the restaurant was closed by way of “holiday pay” although her payslip does not record payments made during this period as holiday pay.

38. Miss Tsui told the Tribunal that the claimant had taken a lot of holidays and that this had “messed up” the holiday pay. Again, the payslips seen by the Tribunal did not record that any holidays had been taken by the claimant.

39. Furthermore, there were no records to show the amount of cash and the frequency with which cash had actually been paid over to Miss Cheang. Mr Tsui was asked whether there were any other records of payment or of hours worked by the staff, and Mr Tsui told the Tribunal that he only had the payslips. It would have been helpful for the Tribunal to see the records that the respondent keeps for HMRC PAYE and National Insurance purposes, but when asked, Mr Tsui told the Tribunal that he only had the payslips.

40. On the balance of probabilities and having weighed up all the evidence before me and having carefully considered the witness evidence given by all witnesses, I find that the payslips produced by the respondent are not a reliable record of the amounts of money paid to the claimant or the hours worked by her.

### **The Law**

41. The Employment Rights Act 1996 section 13 gives employees the right not to suffer unauthorised deductions from their wages. In the event that an employee does suffer unauthorised deductions made by their employer, they are entitled to ask the Tribunal to determine the amount of that unlawful deduction and the Tribunal may order repayment of those sums deducted by the employer.

### **Application of the law to the facts found**

42. I find that the claimant worked 16 hours “in hand” in May and June 2015, and was entitled to be paid for this work at the National Minimum Wage rate in force at the time, which was £6.50 per hour. She is entitled to be paid £104 for this work and was not paid this money either at the time or at the end of her employment on 9 July 2017. This is an unlawful deduction from her wages contrary to s13 of the Employment Rights Act 1996.

43. I find that the claimant worked 4 hours per day on 1 May and 29 May 2017 and is entitled to be paid for this work at the National Minimum Wage rate in force at the time, which was £7.50 per hour. She is entitled to be paid £60 for this work and she was not paid this money either at the time or at the end of her employment on 9 July 2017. This is an unlawful deduction from her wages contrary to s13 of the Employment Rights Act 1996.

44. I find that the claimant worked 16 hours between 3 July and 9 July 2017 and is entitled to be paid for this work at the National Minimum Wage rate in force at the time, which was £7.50 per hour. She is entitled to be paid £120 for this work and

she was not paid this money at the time. This is an unlawful deduction from her wages contrary to s13 of the Employment Rights Act 1996.

45. Finally, the claimant was paid £115 in partial repayment of the sums owed to her by the respondents on 12 July 2017. She is therefore entitled to the remaining sums owed to her, which amount to £169. This is to be paid by the respondent within 14 days of the date of this judgment being sent to the parties.

Employment Judge Barker

14 February 2018