



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: S/4113363/2018

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Held in Edinburgh on 31 October 2018

Employment Judge: David Hoey (sitting alone)

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Ms A Rutkowska

Claimant
In Person

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Chez Jules Hanover Street Limited

Respondent
Mr Levicky (Director)

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Respondent is ordered to pay the Claimant the following sums:

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1. £217.95 in respect of 5 days' accrued holidays due to the Claimant;
 2. £7250 as a result of the Respondent's failure to comply with the National Minimum Wage Regulations 2015 and
 3. An increase to the foregoing award by the additional sum of £523.08 (representing
- 40 2 week's pay).

REASONS

1. This claim called as a final Hearing. The Claimant attended the hearing herself. The Respondent was represented by Mr Levicky (Director). The Tribunal was assisted by an interpreter Ms Pitryzk.
2. The Tribunal asked Ms Pitryzk to speak with the Claimant and ensure that the parties spoke the same language (and that there were no issues of regional dialect or misinterpretation). Ms Pitryzk confirmed that both parties spoke Polish and there were no concerns as to misinterpretation.
3. The Tribunal began by setting out the position in respect of the interpreter so both parties understood the position. The interpreter was present to ensure that everybody understood what was happening and everyone could participate fully in the proceedings. Responses were to be kept short and any issues as to understanding were to be raised immediately. Regular breaks would be taken. Everyone understood and Ms Pitryzk took the oath. At regular intervals the Tribunal asked the parties to confirm that they had understood what was being said.
4. The hearing began by identifying what the key issues in the case were. The Claimant explained that she had raised a claim for holiday pay and non-payment of wages. It became clear following detailed discussions with the parties that the Tribunal required to determine the following issues:
 1. What was the Claimant's outstanding accrued holiday pay entitlement at the point her employment ended?
 2. If the Claimant was due holidays, what sum should be ordered?
 3. How many hours was the Claimant required to work each week by virtue of her contract of employment with the Respondent – was it 36 hours or 40 hours?
 4. Was the Claimant paid a sum at or above the applicable national minimum wage in respect of each hour she worked with effect from 1 September 2015?

5. If the Claimant received a sum less than the applicable national minimum wage, what was the shortfall that was due to the Claimant?

5 5. The Claimant gave evidence as did her daughter, Ms Rutkowska and a former colleague, Ms Mrowczynsk. The Claimant had brought another witness but she would only have been able to speak to the time when the Claimant finished work, which was not in dispute and so she was not called. The Respondent led the following witnesses: Mr Levicky (director), Mr Lawrence (director), Ms Fleming (bookkeeper) and Ms Pinnisko (manager).

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6. The Claimant initially sought payment in respect of untaken holidays for each year of her employment. She accepted, however, that she had never been prevented from taking leave during her employment and had instead chosen not to take her holiday entitlement during those years. She had taken leave on occasion but wanted payment in respect of the outstanding balance for each year. The Tribunal explained that Scots law only allowed her to seek payment in respect of leave that had accrued upon her final year of employment (given she accepted she had chosen not to take such leave and the Respondent had encouraged her to take leave during previous holiday years). It was agreed to focus on her accrued holiday entitlement as at the date of termination in respect of her final year of employment.

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7. The Claimant had brought a number of documents as had the Respondent. It was not necessary to refer to these documents given the issues in dispute had significantly reduced such that the only real issue of dispute became the time the Claimant was required to commence work each morning. There were no documents that set out what the working hours were. The other issues had been agreed. There were some text communications that were referred to during evidence. These were on the relevant mobile phones in question which were viewed. The messages were not disputed.

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Findings in fact

8. The Tribunal makes the following findings in fact from the evidence that was presented during the course of the hearing.
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9. The Respondent runs a restaurant.
10. The Claimant was employed to carry out a number of tasks for the Respondent, including cleaning and kitchen duties.
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11. She began her employment on 27 June 2013 and her employment ended on 27 June 2018.
12. Since 2015 the Claimant was paid a gross annual salary of £13,600 which resulted in her being paid £1133.33 gross a month.
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13. The pay reference period for the Claimant is a calendar month.
14. A week's pay for the Claimant was £1133.33 (monthly salary) x 12 divided by 52 which gives £261.54.
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15. At no stage during the Claimant's employment did she receive a written statement of particulars or any contractual document setting out her terms and conditions (such as her hours of work).
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16. When the Claimant first began her work for the Respondent she worked around 2 hours a week (with 2 hours in another restaurant).
17. She needed to increase her income and met with Mr Levicky at the end of August 2015 (with the Claimant's daughter in attendance to help her mum understand what was being said). The Claimant said that she had to look for another job as she needed to increase her income. Mr Levicky said that he wanted to retain the Claimant within the business and he would speak to his business partner, Mr Lawrence, and create a role for her. The Respondent wanted to keep the Claimant within the business as she was a valued employee. She remained a valued employee throughout her employment.
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18. A few days later (at the end of August 2015) Mr Levicky met the Claimant and her daughter again. Mr Levicky explained that a role would be created for her involving kitchen and cleaning duties. He told her that her hours would be Tuesday and Sunday 7am to 1pm and Wednesday, Thursday, Friday and Saturday 7am until 2pm. That resulted in the Claimant being required to work 40 hours each week.
19. The Claimant began to work these hours with effect from 1 September 2015 and continued to work these hours until the end of her employment on 27 June 2018.
20. The Claimant would regularly attend the Respondent's premises earlier than her start time (which was her choice) but she would commence work at 7am on her working days and work the above shift times for the period from 1 September 2015 to the end of her employment on 27 June 2018.
21. No written statement of particulars were issued nor were there any other documents issued to confirm this change to the Claimant's contract which took effect immediately on 1 September 2015.
22. The Respondent closed the restaurant for refurbishment in September 2017. All staff, including the Claimant, had been advised that the closure period should be taken as holidays. This had been communicated to the Claimant prior to the closure period.
23. The restaurant duly closed and the Claimant took 11 days holidays in respect of the closure period 5 of which were carried forward from the previous holiday year. She used 6 days of the current (and in this case her final) holiday year for this break.
24. The Claimant had asked about becoming an hourly paid employee instead of being salaried around April 2018. This was being considered by the Respondent.
25. On or around 10 May 2018 a text was sent to the Claimant by Mr Lawrence (Director) stating that "We have agreed to pay you an hourly rate of £7.83 an hour but for a 36 hour week". Those discussions did not reach the stage of being implemented. Her payments did not change.

26. The Claimant was absent by reason of illness during the month of May 2018.

27. Rather than pay the Claimant statutory sick pay, the Respondent decided, as a goodwill gesture, to pay the Claimant her full salary for the month of May and did so. The Claimant did not take that time as holiday.

28. The Claimant decided to leave her employment and asked that 2 weeks of her notice period be taken as holidays. That was agreed and the Claimant took 2 weeks as holidays during her notice period.

29. The Claimant was entitled to 28 days holidays each year.

30. The Respondent's holiday year runs from 1 September each year.

31. In her final year of her employment the Claimant was entitled to 28 days' holiday for a full year of employment. As her employment ended on 27 June she was due 23 days for that partial year.

32. The Claimant had taken 18 days holiday in her final year of employment. She had 5 days outstanding. The Respondent had encouraged the Claimant to take her holiday entitlement during her employment but she chose not do so.

33. The Claimant raised a grievance about the fact she believed she had been underpaid in respect of the national minimum wage since 2015. No mention was made of unpaid holidays. This letter was sent on 29 May 2018.

34. The Respondent replied by letter dated 17 July 2018 denying that there had been an underpayment. That letter also noted that the Claimant had received her salary when she had been absent by reason of sickness. No appeal was offered in that letter.

Law

35. There are a number of statutory measures that the Tribunal must take into account in determining the claims that have been raised.

Holiday entitlement

36. Entitlement to holidays is found within the Working Time Regulations 1998 and are
5 as follows.

37. Regulation 13 - Entitlement to annual leave

(1) Subject to paragraph (5), a worker is entitled to four weeks' annual leave in each leave
10 year.

(9) Leave to which a worker is entitled under this regulation may be taken in instalments,
but—

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- (a) it may only be taken in the leave year in respect of which it is due, and
 - (b) it may not be replaced by a payment in lieu except where the worker's employment is terminated.

38. Regulation 13A - Entitlement to additional annual leave

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(1) Subject to regulation 26A and paragraphs (3) and (5), a worker is entitled in each leave year to a period of additional leave determined in accordance with paragraph (2).

(2) The period of additional leave to which a worker is entitled under paragraph (1) is—

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- (e) in any leave year beginning on or after 1st April 2009, 1.6 weeks.

(3) The aggregate entitlement provided for in paragraph (2) and regulation 13(1) is subject to a maximum of 28 days.

30 (4) A worker's leave year begins for the purposes of this regulation on the same date as the worker's leave year begins for the purposes of regulation 13.

(5) Where the date on which a worker's employment begins is later than the date on which his first leave year begins, the additional leave to which he is entitled in that leave year is a proportion of the period applicable under paragraph (2) equal to the proportion of that leave year remaining on the date on which his employment begins.

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(6) Leave to which a worker is entitled under this regulation may be taken in instalments, but it may not be replaced by a payment in lieu except where—

- (a) the worker's employment is terminated; or
- 10 (b) the leave is an entitlement that arises under paragraph (2)(a), (b) or (c); or
- (c) the leave is an entitlement to 0.8 weeks that arises under paragraph (2)(d) in respect of that part of the leave year which would have elapsed before 1st April 2009.

15 (7) A relevant agreement may provide for any leave to which a worker is entitled under this regulation to be carried forward into the leave year immediately following the leave year in respect of which it is due.

39. **Regulation 14** deals with compensation related to entitlement to leave and states:

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(1) This regulation applies where—

- (a) a worker's employment is terminated during the course of his leave year, and
- 25 (b) on the date on which the termination takes effect (“the termination date”), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13 and regulation 13A differs from the proportion of the leave year which has expired.

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(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).

(3) The payment due under paragraph (2) shall be—

(a) such sum as may be provided for the purposes of this regulation in a relevant agreement, or

5 (b) where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula—

$$(A \times B) - C$$

10 where—

A is the period of leave to which the worker is entitled under regulation 13 and regulation 13A;

B is the proportion of the worker's leave year which expired before the termination date, and

15 C is the period of leave taken by the worker between the start of the leave year and the termination date.

40. **Regulation 16** deals with payment in respect of periods of leave

20 (1) A worker is entitled to be paid in respect of any period of annual leave to which he is entitled under regulation 13 and regulation 13A, at the rate of a week's pay in respect of each week of leave.

(2) Sections 221 to 224 of the 1996 Act shall apply for the purpose of determining the
25 amount of a week's pay for the purposes of this regulation, subject to the modifications set out in paragraph (3).

(3) The provisions referred to in paragraph (2) shall apply—

30 (a) as if references to the employee were references to the worker;

(b) as if references to the employee's contract of employment were references to the worker's contract;

- (c) as if the calculation date were the first day of the period of leave in question;
and
- (d) as if the references to [sections 227 and 228](#) did not apply.

5 (4) A right to payment under paragraph (1) does not affect any right of a worker to remuneration under his contract (“contractual remuneration”) (and paragraph (1) does not confer a right under that contract)].

10 (5) Any contractual remuneration paid to a worker in respect of a period of leave goes towards discharging any liability of the employer to make payments under this regulation in respect of that period; and, conversely, any payment of remuneration under this regulation in respect of a period goes towards discharging any liability of the employer to pay contractual remuneration in respect of that period.

15 41. **Section 221** of the Employment Rights Act 1996 (to which reference is made above) sets out how a week’s pay is calculated for the Claimant (whose hours were fixed as was the payment):

20 (1) This section and sections 222 and 223 apply where there are normal working hours for the employee when employed under the contract of employment in force on the calculation date.

25 (2) Subject to section 222, if the employee's remuneration for employment in normal working hours (whether by the hour or week or other period) does not vary with the amount of work done in the period, the amount of a week's pay is the amount which is payable by the employer under the contract of employment in force on the calculation date if the employee works throughout his normal working hours in a week.

30 (3) Subject to section 222, if the employee's remuneration for employment in normal working hours (whether by the hour or week or other period) does vary with the amount of work done in the period, the amount of a week's pay is the amount of remuneration for the number of normal working hours in a week calculated at the average hourly rate of remuneration payable by the employer to the employee in respect of the period of twelve weeks ending—

- (a) where the calculation date is the last day of a week, with that week, and

(b) otherwise, with the last complete week before the calculation date.

(4) In this section references to remuneration varying with the amount of work done includes remuneration which may include any commission or similar payment which varies in amount.

5 (5) This section is subject to sections 227 and 228.

National Minimum Wage Act 2008

10 42. This introduces the entitlement to be paid a minimum hourly rate for each hour worked. **Section 1** states that:

(1) A person who qualifies for the national minimum wage shall be remunerated by his employer in respect of his work in any pay reference period at a rate which is not less than the national minimum wage.

15 (2) A person qualifies for the national minimum wage if he is an individual who—

(a) is a worker;

(b) is working, or ordinarily works, in the United Kingdom under his contract; and

(c) has ceased to be of compulsory school age.

20 (3) The national minimum wage shall be such single hourly rate as the Secretary of State may from time to time prescribe.

(4) For the purposes of this Act a “pay reference period” is such period as the Secretary of State may prescribe for the purpose.

(5) Subsections (1) to (4) above are subject to the following provisions of this Act.

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43. **Section 2** deals with the determination of hourly rate of remuneration:

(1) The Secretary of State may by regulations make provision for determining what is the hourly rate at which a person is to be regarded for the purposes of this Act as remunerated by his employer in respect of his work in any pay reference period.

5 (2) The regulations may make provision for determining the hourly rate in cases where—

(a) the remuneration, to the extent that it is at a periodic rate, is at a single rate;

(b) the remuneration is, in whole or in part, at different rates applicable at different times or in different circumstances;

10 (c) the remuneration is, in whole or in part, otherwise than at a periodic rate or rates;

(d) the remuneration consists, in whole or in part, of benefits in kind.

(3) The regulations may make provision with respect to—

15 (a) circumstances in which, times at which, or the time for which, a person is to be treated as, or as not, working, and the extent to which a person is to be so treated;

(b) the treatment of periods of paid or unpaid absence from, or lack of, work and of remuneration in respect of such periods.

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(4) The provision that may be made by virtue of paragraph (a) of subsection (3) above includes provision for or in connection with—

(a) treating a person as, or as not, working for a maximum or minimum time, or for a proportion of the time, in any period;

25 (b) determining any matter to which that paragraph relates by reference to the terms of an agreement.

(5) The regulations may make provision with respect to—

- (a) what is to be treated as, or as not, forming part of a person's remuneration, and the extent to which it is to be so treated;
- (b) the valuation of benefits in kind;
- 5 (c) the treatment of deductions from earnings;
- (d) the treatment of any charges or expenses which a person is required to bear.

(6) The regulations may make provision with respect to—

- 10 (a) the attribution to a period, or the apportionment between two or more periods, of the whole or any part of any remuneration or work, whether or not the remuneration is received or the work is done within the period or periods in question;
- (b) the aggregation of the whole or any part of the remuneration for different
15 periods;
- (c) the time at which remuneration is to be treated as received or accruing.

(7) Subsections (2) to (6) above are without prejudice to the generality of subsection (1) above.

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44. **Section 17** deals with what happens if the worker is not paid the right rate:

- (1) If a worker who qualifies for the national minimum wage is remunerated for any pay reference period by his employer at a rate which is less than the national minimum wage,
25 the worker shall at any time (“the time of determination”) be taken to be entitled under his contract to be paid, as additional remuneration in respect of that period, [whichever is the higher of—

- (a) the amount described in subsection (2) below, and
- (b) the amount described in subsection (4) below.

(2) The amount referred to in subsection (1)(a) above is the difference between—

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- (a) the relevant remuneration received by the worker for the pay reference period; and
 - (b) the relevant remuneration which the worker would have received for that period had he been remunerated by the employer at a rate equal to the national minimum wage.

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(3) In subsection (2) above, “relevant remuneration” means remuneration which falls to be brought into account for the purposes of regulations under section 2 above.

(4) The amount referred to in subsection (1)(b) above is the amount determined by the
15 formula—

$$(A / R1) \times R2$$

where—

A is the amount described in subsection (2) above,

R1 is the rate of national minimum wage which was payable in respect of the
20 worker during the pay reference period, and

R2 is the rate of national minimum wage which would have been payable in respect of the worker during that period had the rate payable in respect of him during that period been determined by reference to regulations under section 1 and 3 above in force at the time of determination.

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(5) Subsection (1) above ceases to apply to a worker in relation to any pay reference period when he is at any time paid the additional remuneration for that period to which he is at that time entitled under that subsection.

5 (6) Where any additional remuneration is paid to the worker under this section in relation to the pay reference period but subsection (1) above has not ceased to apply in relation to him, the amounts described in subsections (2) and (4) above shall be regarded as reduced by the amount of that remuneration.

10 45. This means that where a worker is not paid the minimum wage rate in earlier years, in calculating compensation, the rate applicable as at the date of calculation is used. The above legislation was brought into practice by the National Minimum Wage Regulations 2015. **Regulation 4** states that “The single hourly rate of the national minimum wage for the purposes of section 1(3) of the Act (“the national living wage rate”) is £7.83 which is the applicable rate today.

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46. **Regulation 4B** provides assistance as to how the rate is calculated stating:

20 “The hourly rate of the national minimum wage at which a worker is entitled to be remunerated as respects work, in a pay reference period, is the rate which applies to the worker on the first day of that period.”

47. **Regulation 6** sets out what the pay reference period is:

25 A “pay reference period” is a month, or in the case of a worker who is paid wages by reference to a period shorter than a month, that period.

48. **Regulation 7** explains how the calculation is carried out:

30 A worker is to be treated as remunerated by the employer in a pay reference period at the hourly rate determined by the calculation—

R/H

where—

“R” is the remuneration in the pay reference period determined in accordance with Part 4;

5 “H” is the hours of work in the pay reference period determined in accordance with Part 5.

49. **Regulation 8** further explains that:

10 The remuneration in the pay reference period is the payments from the employer to the worker as respects the pay reference period, determined in accordance with Chapter 1, less reductions determined in accordance with Chapter 2.

50. **Regulation 9** continues:

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(1) The following payments and amounts, except as provided in regulation 10, are to be treated as payments by the employer to the worker as respects the pay reference period—

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(a) payments paid by the employer to the worker in the pay reference period (other than payments required to be included in an earlier pay reference period in accordance with sub-paragraphs (b) or (c));

(b) payments paid by the employer to the worker in the following pay reference period as respects the pay reference period (whether as respects work or not);

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(c) payments paid by the employer to the worker later than the following pay reference period where the requirements in paragraph (2) are met;

(d) where a worker's contract terminates then as respects the worker's final pay reference period, payments paid by the employer to the worker in the period of a month beginning with the day after that on which the contract was terminated;

(e) amounts determined in accordance with regulation 16 (amount for provision of living accommodation) where—

(i) the employer has provided the worker with living accommodation during the pay reference period, and

5 (ii) as respects that provision of living accommodation, the employer is not entitled to make a deduction from the worker's wages or to receive a payment from the worker.

(2) The requirements are that as respects the work in the pay reference period—

10 (a) the worker is under an obligation to complete a record of the amount of work done,

(b) the worker is not entitled to payment until the completed record has been given to the employer,

15 (c) the worker has failed to give the record to the employer before the fourth working day before the end of that following pay reference period, and

(d) the payment is paid in either the pay reference period in which the record is given to the employer or the pay reference period after that.

51. The process is explained in **Regulation 17**:

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In regulation 7 (calculation to determine whether the national minimum wage has been paid), the hours of work in the pay reference period are the hours worked or treated as worked by the worker in the pay reference period as determined—

(a) for salaried hours work, in accordance with Chapter 2;

25 (b) for time work, in accordance with Chapter 3;

(c) for output work, in accordance with Chapter 4;

(d) for unmeasured work, in accordance with Chapter 5

52. In this case as the Claimant was paid a salary and worked the same number of hours, she was a salaried hours worker. **Regulations 21 -23** explain the process:

5 21 The meaning of salaried hours work

(1) “Salaried hours work” is work which is done under a worker's contract and which meets the conditions in paragraphs (2) to (5) of this regulation.

(2) The first condition is that the worker is entitled under their contract to be paid an annual salary or an annual salary and performance bonus.

10 (3) The second condition is that the worker is entitled under their contract to be paid that salary or salary and performance bonus in respect of a number of hours in a year, whether those hours are specified in or ascertained in accordance with their contract (“the basic hours”).

15 (4) The third condition is that the worker is not entitled under their contract to a payment in respect of the basic hours other than an annual salary or an annual salary and performance bonus.

(5) The fourth condition is that the worker is entitled under their contract to be paid, where practicable and regardless of the number of hours actually worked in a particular week or month—

20 (a) in equal weekly or monthly instalments, or

(b) in monthly instalments that vary but have the result that the worker is entitled to be paid an equal amount in each quarter.

(6) Circumstances where it may not be practicable to pay a worker by equal instalments, or by an equal amount in each quarter, include where—

25 (a) a performance bonus is awarded;

(b) the annual salary is varied;

(c) a payment is made in respect of hours in addition to basic hours; or

(d) the employment starts or terminates during a week or month with the result that the worker is paid a proportionate amount of their annual salary for that week or month.

(7) Work may be salaried hours work whether or not—

- 5 (a) all the basic hours are working hours;
- (b) the worker works hours in excess of the basic hours (whether the worker is entitled to be paid for those additional hours or not);
- (c) the annual salary may be reduced due to an absence from work.

10 (8) A “performance bonus” is a payment paid to a worker on merit attributable to the quality or amount of work done in the course of more than one pay reference period.

53. 22 Determining hours of salaried hours work in a pay reference period

15 (1) The hours of salaried hours work in a pay reference period are to be calculated in accordance with the following paragraphs.

(2) Where the pay reference period is a week, the hours of salaried hours work in that period are the basic hours divided by 52.

(3) Where the pay reference period is a month, the hours of salaried hours work in that period are the basic hours divided by 12.

20 (4) Where the pay reference period is any other period, the hours of salaried hours work in that period are the basic hours divided by the figure obtained by dividing 365 by the number of days in the pay reference period.

(5) The basic hours are to be ascertained in accordance with the worker's contract on the first day of the pay reference period in question unless paragraphs (6) or (7) apply.

25 (6) The hours of salaried hours work in a pay reference period are to be ascertained in accordance with regulations 24 to 28 if the worker—

- (a) during or before the payment reference period, works additional hours in excess of the basic hours in the calculation year, and
- (b) is not entitled to be paid more than annual salary and a performance bonus for those additional hours.

5 (7) The hours of salaried hours work in a pay reference period are to be determined in accordance with regulation 29 if the employment terminates before the end of the calculation year or the contract is varied before the end of the calculation year so that it is no longer a contract for salaried hours work.

10 54. 23 Absences from work to be reduced from the salaried hours work in a pay reference period

(1) The hours a worker is absent from work are to be subtracted from the hours of salaried hours work in a pay reference period if all of the following conditions are met—

- 15 (a) the employer is entitled under the worker's contract to reduce the annual salary due to the absence;
- (b) the employer pays the worker less than the normal proportion of annual salary in the pay reference period as a result of the absence.

20 (2) The hours during which a worker takes industrial action are to be subtracted from the hours of salaried hours work in a pay reference period if an annual salary was payable for those hours, or would have been payable but for the industrial action

25 55. Regulation 23 therefore states that where a worker is absent from work for a month (and does not in fact work) if she is in fact paid her salary for that month (even if there is no entitlement to be paid salary), the normal number of hours of work are to be included in the calculation together with the salary that is paid (even although no hours were worked) and the salary payment that was made is taken into account.

Breach of contract claims

56. The claim for pay has been brought as a breach of contract claim, as the Claimant argues that she was due sums under her contract which were not paid to her. This was a sum which was outstanding as at the date of termination. The Tribunal's power to consider a breach of contract claim is found at **Regulation 4** of the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 which states that:

“Proceedings may be brought before an employment tribunal in respect of a claim of an employer for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if—

- (a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in Scotland would under the law for the time being in force have jurisdiction to hear and determine;
- (b) the claim is not one to which article 5 applies;
- (c) the claim arises or is outstanding on the termination of the employment of the employee against whom it is made; and
- (d) proceedings in respect of a claim of that employee have been brought before an employment tribunal by virtue of this Order.

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57. Under section (1)(a) reference is made to Section 131(2) of the 1978 Act which is now the Employment Tribunals Act 1996, section 3(2) which says that

(1) The appropriate Minister may by order provide that proceedings in respect of—

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- (a) any claim to which this section applies, or
- (b) any claim to which this section applies and which is of a description specified in the order,

may, subject to such exceptions (if any) as may be so specified, be brought before an employment tribunal.

(2) Subject to subsection (3), this section applies to—

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- (a) a claim for damages for breach of a contract of employment or other contract connected with employment,
 - (b) a claim for a sum due under such a contract, and
 - (c) a claim for the recovery of a sum in pursuance of any enactment relating to the terms or performance of such a contract,

10 if the claim is such that a court in England and Wales or Scotland would under the law for the time being in force have jurisdiction to hear and determine an action in respect of the claim.

15 58. In this claim, the Claimant seeks wages that were due to her. The alleged failure to pay her the sum she says was contractually due falls within the jurisdiction of the Employment Tribunal as a result of the foregoing provision.

Failure to provide an up to date written statement of particulars

20 59. Another relevant piece of legislation is the Employment Act 2002 which provides the Tribunal with the power to adjust awards made where the employer failed to issue an up to date written statement of particulars. Section 38 of the Employment Act 2002 states that:

25 (1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule 5.

(2) If in the case of proceedings to which this section applies—

(a) the employment tribunal finds in favour of the employee, but makes no award to him in respect of the claim to which the proceedings relate, and

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(b) when the proceedings were begun the employer was in breach of his duty to the employee under section 1(1) or 4(1) of the Employment Rights Act 1996 (c 18) (duty to give a written statement of initial employment particulars or of particulars of change) [or under section 41B or 41C of that Act (duty to give a written statement in relation to rights not to work on Sunday)],

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the tribunal must, subject to subsection (5), make an award of the minimum amount 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 instead.

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(3) If in the case of proceedings to which this section applies—

(a) the employment tribunal makes an award to the employee in respect of the claim to which the proceedings relate, and

(b) when the proceedings were begun the employer was in breach of his duty to the employee under section 1(1) or 4(1) of the Employment Rights Act 1996 or under section 41B or 41C of that Act,

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the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.

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(4) In subsections (2) and (3)—

(a) references to the minimum amount are to an amount equal to two weeks' pay, and

(b) references to the higher amount are to an amount equal to four weeks' pay.

(5) The duty under subsection (2) or (3) does not apply if there are exceptional circumstances which would make an award or increase under that subsection unjust or inequitable.

(6) The amount of a week's pay of an employee shall—

5 (a) be calculated for the purposes of this section in accordance with Chapter 2 of Part 14 of the Employment Rights Act 1996 (c 18), and

(b) not exceed the amount for the time being specified in section 227 of that Act (maximum amount of week's pay).

10 (7) For the purposes of Chapter 2 of Part 14 of the Employment Rights Act 1996 as applied by subsection (6), the calculation date shall be taken to be—

(a) if the employee was employed by the employer on the date the proceedings were begun, that date, and

15 (b) if he was not, the effective date of termination as defined by section 97 of that Act.

60. Schedule 5 makes reference to The Employment Tribunal Extension of Jurisdiction (Scotland) Order 1994 which means that if the Tribunal finds in favour of the
20 Claimant it should consider whether or not to increase any compensation awarded by the above sums.

Submissions

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61. The Claimant accepted that she had not been prevented from taking holidays during her employment with the Respondent. She had instead chosen not to take all the holidays which she was due. She accepted she had taken 2 weeks' holidays (12 days since she works 6 days a week) during her notice period and 6 days from this

year's holiday entitlement during the closure period. In total she had therefore taken 18 days. The Claimant accepted she was due 23 days (given she left during the holiday year) and so she was due to be paid 5 days holiday. The Respondent agreed with this. The parties had not calculated what 5 days meant in monetary terms.

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62. In relation to unpaid wages, the Claimant maintained that she was required to work 40 days a week and had done so since September 2015. She had only been paid for 36 hours a week. She had been paid the same annual salary which resulted in an underpayment because of the national minimum wage. She sought an order requiring the Respondent to pay her such sums due.

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63. The Respondent argued that the Claimant was not required to work 40 hours a week as she had been told she would need to work 36 hours. She may well have been present at the restaurant earlier than when her shift was contractually due to begin but that was not because she was contractually required to begin work earlier. The Respondent explained there was flexibility as to hours but that her contractual position was 36 hours a week. The Respondent accepted that for the year of 2015/2016 the Claimant had not received the national minimum wage even if she was required only to work 36 hours but it was argued that subsequent years met the minimum wage requirements.

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64. Mr Levicky argued that it would be unfair if the company could not be given credit for the full salary that was paid to the Claimant during the month of May when the Claimant was sick (and not entitled to pay).

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65. The parties had not calculated precisely what was due and submitted that it was for the Tribunal to carry out the relevant calculations.

Observations on the evidence

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66. The Tribunal found that each of the witnesses gave their evidence candidly and to the best of their abilities.

67. During the course of the hearing it became clear that the issue in dispute in this case in relation to the claim for underpayment of wages was the start time of the Claimant that was required of her in terms of her contract of employment. This was not an easy issue to determine since the Claimant and her daughter both vividly recollected the discussion with Mr Levicky that her start time for each of her shifts was to be 7am. Mr Levicky's recollection of the meeting was less clear, which was unsurprising given how long ago the meeting was. However, he recalled having spoken to his business partner Mr Lawrence, and both individuals believed that the Claimant was told her start time was 7.30am. No other person was able to say for certain what the Claimant's contractual start time was.

68. Had a written statement of particulars been issued the matter would have been much clearer since the parties would know precisely what the Claimant's normal hours of work were. In the absence of this the Tribunal requires to decide what was agreed, on the balance of probabilities, ie from the evidence what is more likely than not to have been the position? A contract of employment is the fluid relationship that exists between the parties and the terms of the contract can often be agreed between the parties verbally or sometimes even by custom and practice (and parties' actions). This is not an easy dispute to resolve given the conflict in evidence but having considered the evidence advanced before the Tribunal, the Tribunal concluded that the Claimant's position was to be preferred and she was required to (and did) start work at 7am each morning of her shift.

69. The Claimant and her daughter had clear recollections as to her start time. Mr Levicky candidly accepted that the Claimant may well have been at work earlier than her start time (on some occasions considerably earlier than when she was due to commence her work). His position was that she chose to do so voluntarily. There were no documents that supported either party's position and the Tribunal had to choose between the oral evidence that it heard. There was a text message which assisted which is referred to below.

70. Mr Lawrence was not present during the discussion with the Claimant and while he believed that the Claimant's start time was 7.30am he was unable to confirm this was what was actually communicated to the Claimant. The text message that

Mr Lawrence sent did say the revised hourly rate would be applicable “but” for a 36 hour week. The Claimant maintained this indicated that the Respondent knew she was then required to work more than 36 hours. Mr Lawrence said this was simply underlining she would not be paid for any more hours.

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71. The Tribunal prefers the submissions of the Claimant on this issue. The evidence of the Claimant and her daughter was clear in respect of what was stated at the original meeting when her hours were confirmed. While Mr Lawrence believed that she was already working 36 hours, it is not clear why he would need to clarify that payment would only be for 36 hours.

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72. The Claimant’s clear evidence was that she commenced work by 7am each morning and she did this from 1 September 2015. The Tribunal accepted that evidence as accurately setting out what happened and finds the text message supportive of this position.

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73. The Tribunal has sympathy with the Respondent given this was a very busy restaurant and it was not possible to be absolutely clear as to the start and finish times of all staff. The Respondent submitted that there was flexibility as to working hours throughout their operation. Nevertheless for the purposes of this claim, the Tribunal requires to determine when the Claimant’s contract of employment required her to commence work. It has done so from the evidence presented.

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Discussion and reasons

Holiday pay – the amount

74. By the conclusion of the hearing, the parties had agreed that the Claimant was due 5 days’ holiday. The Claimant was paid £1133.33 a month. Calculation of a day’s pay for the Claimant is not in fact straightforward. This is because the Working Time Regulations refer to holidays in blocks of weeks (with the minimum being 5.6 weeks) but stating that this would be no more than 28 days. For a worker working 6 days a

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week, 5.6 weeks would be 5.6×6 which would be 33.6 days but the Regulations cap the entitlement at 28 days.

5 75. Calculating a day's pay was considered in **Yarrow v Edwards Chartered Accountants** 2007 All ER (D) 118 in which the Employment Appeal Tribunal stated that a day's pay is calculated by reference to days worked rather than calendar days.

10 76. As the Claimant worked 6 days a week, her annual working year amounted to 6×52 which is 312. A day's pay for the Claimant is therefore 1 divided by 312 x her annual salary, ie 1 divided by $\frac{1}{312} \times £13,600$ which gives a day's pay for the Claimant as £43.59. She is due to be paid 5 days (which both parties agreed was due) which amounts to £217.95.

Unpaid wages

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77. In relation to unpaid wages, the Tribunal concluded that the Claimant was working 40 hours a week which began on 1 September 2015. She was paid £1133.33 gross a month from this date. This resulted in an hourly rate of **£6.54** ($\frac{£1133.33 \text{ (month)}}{12} \div 52$ (giving her weekly rate) $\div 40$ (giving the hourly rate)).

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78. The national minimum wage hourly rate in respect of the Claimant for 2015 was £6.70, £7.20 in 2016, £7.50 in 2017 and £7.83 in 2018. Thus for every hour worked by the Claimant from the change in rate in 2015 (when the rate was £6.70) to the end of her employment, she was underpaid.

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79. The Respondent accepted that the sum they paid the Claimant was less than the national minimum wage rate in 2018 even if the Claimant had only been required to work 36 hours. They had proposed to change her employment from salaried to become hourly paid, and proposed the minimum wage rate. This had not been implemented by the time the Claimant left their employment.

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80. Section 17 of the National Minimum Wage Act 1998 provides the calculation in respect of underpayment that spans years with different rates. A worker is entitled to be paid the higher of the amount that ought to be have been paid for each hour of

work at the then application minimum wage rate (section 17(2)) and an amount calculated as follows: the amount that would have been paid (as per the preceding clause) divided by the rate of national minimum wage payable during the pay reference period multiplied by the rate applicable as at the date of determination. In other words the hours for which any underpayment existed, should be compensated by referring to the current minimum wage rate.

81. The national minimum wage rate up to October 2015 was £6.50.
82. The national minimum wage rate from October 2015 was £6.70.
83. The national minimum wage rate from April 2016 was £7.20.
84. The national minimum wage rate from April 2017 was £7.50.
85. The national minimum wage rate from April 2018 was £7.83.
86. The sums due to the Claimant are therefore as follows.
87. The Claimant worked 40 hours a week. For each hour that she worked she was paid £6.54 (her monthly pay £1133.33 x 12 divided by 52 divided by 40). That was her rate of pay until her employment ended on 27 June 2018.
88. She was therefore paid the minimum wage for each hour she worked for the period up to October 2015.
89. From 1 October 2015 the minimum wage increased to £6.70 and continued at this rate until 1 April 2016. That amounts to 26 weeks. She received the sum of 26 x £6.54 x 40 which amounts to £6,801.60. She ought to have been paid £6,968. The alternative calculation is £6968 divided by £6.70 x £7.83 which amounts to £8143.20. There was therefore an underpayment of £8143.20 less £6,801.60 which amounts to an underpayment of £1341.60.
90. From 1 April 2016 to 1 April 2017 there were 52 weeks. She received the sum of 52 x £6.54 x 40 which is £13,603.20. She ought to have been paid 52 x £7.20 x 40 which is £14,976. The alternative calculation is £14976 divided by £7.20 x £7.83

which amounts to £16,286.40. There was therefore an underpayment of £16,286.40 less £13,603.20 which is £2,680.20.

5 91. From 1 April 2017 to 1 April 2018 there were 52 weeks. She received the sum of 52 x £6.54 x 40 which is £13,603.20. She ought to have been paid 52 x £7.50 x 40 which is £15,600. The alternative calculation is £15,600 divided by £7.50 x £7.83 which amounts to £16,286.40. There was therefore an underpayment of £16,286.40 less £13,603.20 which is £2683.20.

10 92. From 1 April 2018 to 27 June there are 12.5 weeks. She received the sum of 12.5 x £6.54 x 40 which is £3270. She ought to have been paid 12.5 x £7.83 x 40 which is £3915. There is no need for the alternative calculation since the rate used is this year's rate. There was therefore an underpayment of £3915 less £3270 which is £645.

15 93. The total underpayment is therefore £1341.60 plus £2580.20 plus £2683.20 plus £645 which is £7250.

20 94. The Respondent argued that the *ex gratia* sum paid to the Claimant should be taken into account. It was argued that the Claimant was paid an extra sum of £900 during May (since it was argued the Claimant was only entitled to statutory sick pay but the Respondent decided to pay her full salary, the difference being £900).

25 95. The National Minimum Wage Regulations 2015 deal with this issue. Regulation 23 (which is reproduced above) states that the calculation is altered where the employer pays the worker less than the normal proportion of salary in a pay reference period where the worker is absent by reason of sickness.

30 96. In this case the Respondent paid the worker her full salary during the pay reference period and expressly accepted that they were paying her the usual monthly salary payment. They wanted to "do the right thing" recognising that she was a good worker. The law requires the sum paid to the Claimant by the Respondent to be taken into account in the calculation in the normal way, even although the Claimant did not work that month.

Failure to provide a written statement

97. Finally the Tribunal is required to consider section 38 of the Employment Act 2002 which states that where an employer fails to issue written statement of particulars the Tribunal must increase any award by 2 weeks' pay (and potentially increase this to 4 weeks' pay) unless there are exceptional circumstances that make the increase unjust or inequitable.

98. The Tribunal has decided to increase the award by 2 week's pay in this case. Had the Respondent issued these particulars, the key issue in this case, the Claimant's hours of work, could have been avoided. It is not just or equitable to increase this further.

99. A week's pay for the Claimant was £1133.33 (monthly salary) x 12 divided by 52 which gives £261.54. 2 week's pay is therefore £523.08.

In summary

100. The Respondent is therefore ordered to pay the Claimant the following sums:

1. £217.95 in respect of 5 days' holidays due to the Claimant;
2. £7250 as a result of the Respondent's failure to comply with the National Minimum Wage Regulations 2015 and
3. an increase to the foregoing award of £523.08 (representing 2 week's pay).

101. The award is expressed in gross figures. The parties should ensure that the appropriate tax is deducted from the sums due.

Employment Judge: Hoey
Judgment Date: 13/11/2018
Entered into the Register: 15/11/2018
And Copied to Parties