



THE EMPLOYMENT TRIBUNALS

Claimant
Ms S Robson

Respondent
Durham Bed Centre Sunderland Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT NORTH SHIELDS
EMPLOYMENT JUDGE GARNON (sitting alone)

On 1 February 2019

Appearances : Claimant- in person Respondent – no attendance

REMEDY JUDGMENT FOLLOWING A JUDGMENT ON LIABILITY ONLY **(made under Rule 21 of the Employment Tribunal Rules of Procedure 2013)**

The Judgment of the Tribunal is:

- (a) on the claim of unlawful deduction of wages (described in the liability judgment as unpaid wages) I order the respondent to repay to the claimant **£ 3544.92**
- (b) on the claim for compensation for untaken annual leave (described in the liability judgment as unpaid holiday pay) I award compensation of **£736.80** .
- (c) I make an additional award under s 38 of the Employment Act 2002 (the 2002 Act) of **£1842**.

The total payable under this judgment is £6123.72.

REASONS

1. A judgment of 3 December 2018 by Employment Judge Johnson under rule 21 of the Employment Tribunal Rules of Procedure 2013 in default of a response held the claims succeeded. He ordered this hearing so the claims could be quantified and an additional award under s 38 of the 2002 Act considered.

2. This is one of three virtually identical claims. Mr S Burdus presented a claim on 19 September 2018 for unpaid wages, including commission, and compensation for untaken annual leave. It was served on 11 October and listed for hearing on 7 December . A response was due by 8 November and one was received on that day. The name of the “contact” filing the response was Mr John Marshall. He had not been involved on behalf of the respondent at the outset of the case and the claimant confirmed he did not work there when she did .

3. On 7 December, Mr Burdus appeared before Employment Judge Buchanan. I see from the file he presented a considerable amount of evidence and called a witness Mr Benjamin Hodgson who also had a claim. The respondent did not attend. Employment Judge Buchanan reached his judgment that all claims succeeded and he quantified loss under each head of claim. A written judgment was sent to the parties on 7 December. The documents on the file show a considerable amount of evidence to the effect an agreement pay commission was reached between employees and the company, the owner of which is named as a Mr Armour.

4. On 13 December a notice of appeal against that decision was received at the Employment Tribunal. It was returned the following day to the respondent with a letter saying any appeal should be sent to the Employment Appeal Tribunal and providing the necessary address.

5. The claim by Mr Hodgson, also presented on 19 September was served on 12 October with a notice of hearing for 10 December. No response was received by the due date of 9 November. On 13 November Employment Judge Buchanan issued a judgment under rule 21 on liability only and the hearing listed for 10 December became a hearing to determine remedy. It was conducted by Employment Judge Shepherd who issued a judgment for failure to pay commission, basic wages and accrued holiday pay. That judgment was sent to the respondent on 11 December.

6. The claimant in this case presented her claim on 26 September. The name of the respondent she gives differs slightly from the other two claims in that in the word "Sunderland" is omitted in them. There is a company named Durham Bed Centre Ltd and another Durham Bed Centre Sunderland Ltd. The claimant was rightly told by ACAS to name the company shown on her payslips, copies of which she showed me today, and it is the latter company.

7. This claim was duly served on 26 October, a response was due on 23 November and the case was listed for hearing on 27 December 2018. **No response was received.** Accordingly on 3 December, Employment Judge Johnson gave judgment under rule 21 and converted the listed hearing to a remedy hearing. On 11 December an email was received from Mr Marshall on behalf of the respondent simply saying "*May we ask for the above case to be adjourned to a later date as the owner is off due to ill-health*". My only involvement with any of these cases was to refuse that application because there was no evidence to support the bare assertion the "owner" (whoever that was) was ill, or any explanation as to why no-one else at the respondent could deal with the case. Refusal of the postponement was notified to the parties on 12 December.

8. On 19 December an email was received from the respondent. It is not possible to discern the name of the sender but the email includes :

" A response form was sent back to yourselves dated 14 November 2018.

I have very limited knowledge of this case but I have been asked to take over the case

No commissions has ever been agreed with any employee where Mrs Robinson has stated that she is owed £1000 which was agreed with former area manager Stan McKeith who was dismissed from the company for theft is a close friend of Mrs Robinson was the person who had employed Mrs Robinson. "

9. The claimant's name is Robson not Robinson. The e-mail gives particulars of the paid holidays she had taken. Rule 71 says an application for reconsideration shall be presented in writing and copied to the claimant within 14 days of the written record of the original decision being sent to the parties. No such application was received and the respondent would have had to apply for an extension of time for making it, explain why one was not made in time and provide a draft response. The respondent was still entitled to be heard on remedy.

10. On the morning of 17 December the claimant telephoned the tribunal to say she was unable to attend due to a sudden attack of sickness and diarrhoea. I instructed the tribunal clerk to attempt to contact the respondent to say the case may be postponed for that reason. There was a difference between the circumstances and those in which I refused to postpone at the respondent's request. Illness came upon the claimant suddenly and nobody but her could give the evidence required to enable me to determine remedy. The Tribunal **did not succeed** in contacting the respondent. By the time fixed for the hearing, the respondent had not attended. So I postponed it

11. In lengthy notes to the Order I made which was sent to the parties on 28 December I explained the only ground for a reconsideration is whether one is necessary in the interests of justice. If there was evidence to show a response was sent within time, reconsideration may be appropriate. I warned the respondent it would not simply be accepted a document has been "lost in the post" particularly where the mode of communication recently adopted by the respondent had been email. There has been no further contact from the respondent. Notice of this hearing was sent on 11 January 2019. **The respondent did not attend today.**

12. The law relating to unlawful deduction of wages is in Part 2 of the Employment Rights Act 1996 (the Act) and that relating to compensation for untaken annual leave in the Working Time Regulations 1998 (WTR). Section 13 of the Act includes:

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

Section 27 defines wages as including commission .

13. Regulation 14 of WTR says:

(1) This regulation applies where -

(a) a worker's employment is terminated during the course of his leave year, and

(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.

(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 -

(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 -

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

where -

A is the period of leave to which the worker is entitled under regulation 13(1);

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

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

The leave year in the absence of a relevant agreement (defined as being an agreement in writing of which there was none) commences on the anniversary of the start date . The annual leave to which the claimant is entitled is 4 weeks under Reg 13 and 1.6 weeks under Reg 13 A

14. Section 38 of the 2002 Act applies to these claims and includes:

(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, 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.

(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—

(a) be calculated for the purposes of this section in accordance with Chapter 2 of Part 14 of the Employment Rights Act

Section 1 of the Act requires an employer to give to every employee a statement of terms and conditions of employment and ss (4) specifies it must include the rate or method of calculating remuneration. The claimant was not given one despite asking

15. The claimant started work for the respondent on 14 February 2018 as a manager of a shop which sold beds. She is 57 years old and her basic weekly pay was £348 gross which is about £1 per hour above the National Minimum Wage (NMW). Mr Burdus and Mr Hodgson were salesmen paid only £7.83 per hour which was NMW. It is ludicrous to suggest any manager or salesman would work for that alone. Their case and the claimant's case is they was promised 1% commission on all sales. I

find the claimant was. She has no record of her sales because she was told to leave without notice. She knows the gross weekly sales were £12000-15000 over a six day week of which she worked 5 days . Taking the mid point of £13500 dividing by 6 multiplying by 5 produces a figure of £11250. She was due 1% of that for each of the 22 weeks she worked = **£2475**

16 The second aspect of her claim of unlawful deduction of wages is the respondent made deductions **purportedly** for tax, national insurance (NI) and a workplace pension from her pay but did not pay the money to the relevant persons (save for tax and NI for 4 weeks and pension for 1 week) . The tax and NI totalled £ 46.38 per week of which 18 are unlawful deductions = **£834.84** and the pension was £ 11.16 per week of which 21 are unlawful deductions= **£234.36**. The total of the emboldened figures in this and the last paragraph is **£3544.20**

17. She had taken some paid holiday. She had accrued an entitlement of 5.6 weeks divided by 365 days of the year and multiplied by the 155 days which had elapsed by the termination date of 19 July 2018. Her accrued entitlement was 2.4 weeks and as she worked a 5 day week that is 12 days . The respondent's email I mentioned at paragraph 8 above says she took 15 days but the claimants evidence was clear she took only 4 days .She is owed 8 days or 1.6 weeks. For the weeks she worked her pay should have been £ 348 + £112.5 commission = £460.50 and it is on that figure her holiday pay and the s38 increase must be calculated. £ 460.5 x 1.6 = **£736.80**

18. She was never given a statement compliant with s1 of the Act .Neither this case nor the other two would have had any room for argument on commission had one been given . The higher amount is entirely appropriate in such circumstances. Her week's pay including the commission , £460.50 x 4 = **£1842**.

T M Garnon EMPLOYMENT JUDGE
JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 1st FEBRUARY 2019



THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number(s): **2503186/2018**

Name of case(s): **Mrs S Robson** v **Durham Bed Centre Sunderland Ltd**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: **13 February 2019**

"the calculation day" is: **14 February 2019**

"the stipulated rate of interest" is: **8%**

MISS K FEATHERSTONE
For the Employment Tribunal Office

INTEREST ON TRIBUNAL AWARDS

GUIDANCE NOTE

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

2. The Employment Tribunals (Interest) Order 1990 provides for interest to be paid on employment tribunal awards (excluding sums representing costs or expenses) if they remain wholly or partly unpaid more than 14 days after the date on which the Tribunal's judgment is recorded as having been sent to the parties, which is known as "the relevant decision day".

3. The date from which interest starts to accrue is the day immediately following the relevant decision day and is called "the calculation day". The dates of both the relevant decision day and the calculation day that apply in your case are recorded on the Notice attached to the judgment. If you have received a judgment and subsequently request reasons (see 'The Judgment' booklet) the date of the relevant judgment day will remain unchanged.

4. "Interest" means simple interest accruing from day to day on such part of the sum of money awarded by the tribunal for the time being remaining unpaid. Interest does not accrue on deductions such as Tax and/or National Insurance Contributions that are to be paid to the appropriate authorities. Neither does interest accrue on any sums which the Secretary of State has claimed in a recoupment notice (see 'The Judgment' booklet).

5. Where the sum awarded is varied upon a review of the judgment by the Employment Tribunal or upon appeal to the Employment Appeal Tribunal or a higher appellate court, then interest will accrue in the same way (from "the calculation day"), but on the award as varied by the higher court and not on the sum originally awarded by the Tribunal.

6. 'The Judgment' booklet explains how employment tribunal awards are enforced. The interest element of an award is enforced in the same way.