



# THE EMPLOYMENT TRIBUNALS

**Claimant:** Mr G Warley

**Respondent:** Metro Lodgings Limited

**Heard at:** North Shields                      **On:** 29 August 2018

**Before:** Employment Judge Morris (sitting alone)

***Representation:***

**Claimant:** In person

**Respondent:** Neither present nor represented

## REASONS

### Procedural issue

1 The respondent was neither present nor represented at the hearing at the due time of 10:00am. Other hearings had engaged the Tribunal from then until 1:00pm, during which time the claimant simply had to wait. At 1:00pm the respondent was still neither present nor represented and no message had been received on its behalf; for example, that there were any transport difficulties.

2 It was apparent from the file that the previous afternoon three requests had been made on behalf of the respondent that today's hearing be adjourned: the first by e-mail timed at 15:40; when that was refused, the second by e-mail timed at 16:52; and when that was refused, the third by e-mail timed at 18:39. That application was refused first thing this morning. In summary, it was explained on behalf of the respondent that its director was out of the country at the moment and the matter was being dealt with by Ms Kirkpatrick who was the only person who had knowledge of it. She had been on long-term sick leave for a year but was due to travel from Northern Ireland where she lives to attend the hearing. It had only been found out on 28 August 2018, however, that Ms Kirkpatrick was unable to attend the hearing for medical reasons. It was explained that she was the respondent's sole and essential witness and it was not possible "to arrange for another person to appear for or represent the respondent at such short notice". A number of medical related documents, including letters, medical certificates and a list of medication, were attached to the first of the applications. A letter from a doctor with the Ardmore Medical Practice dated 22 December 2017 recorded the ill-health of Ms Kirkpatrick Stagg from being admitted to hospital on 7 August 2017 and again on 7 September 2017 when she underwent cardiac stenting, and that she was not physically well enough either to work or attend court appearances. Indeed, in light of her

“severe heart failure” she could be “medically unfit for many months”. A further letter from the same Doctor dated 5 March 2018 confirmed, amongst other things, that Mrs Kirkpatrick Stagg was medically unfit to attend tribunals. A letter from a nurse specialist with Southern Health and Social Care Trust dated 17 July 2018 recorded, amongst other things, that Ms Kirkpatrick Stagg remained under review of the Trust heart failure service, the pumping strength of her heart remains below normal, she requires frequent rests, and expressed the opinion that she was unable to give evidence or meet with her legal representatives to give instructions.

3 All three applications had been refused on the bases that the application had been too late and that the respondent is a limited company and someone from or on behalf of the respondent must attend the hearing on its behalf at which the request for an adjournment could be made directly to the Employment Judge.

4 I took all of the above into account and noted the following, for example: Ms Kirkpatrick Stagg had been quite seriously unwell since August 2017; in December of that year a medical opinion had been expressed that she could be medically unfit for many months; in March 2018 it had been said that she was medically unfit to attend tribunals and this was, in essence, repeated on 17 July 2018. Additionally, the terminology of that last letter (in which the word “remains” is used) might suggest that Ms Kirkpatrick Stagg had suffered continued ill-health rather than having suffered a relapse in recent days or weeks.

5 In the above circumstances I considered it to be surprising, first, that Ms Kirkpatrick Stagg was, as had been submitted on behalf of the respondent, the only person who had knowledge of this matter and it had been intended that she would be the respondent’s sole witness, secondly, that given the content of the submitted documents, including the letter of 17 July 2018, an application for a postponement had only been made at 15.40 the day before the hearing and, thirdly, that the respondent appeared to have decided not to take up the opportunity referred to in the refusals of the applications for someone on its behalf to attend the hearing before me to make the application for the adjournment.

6 In the circumstances, I considered it appropriate and in accordance with the overriding objective to proceed with the hearing in the absence of the respondent. I explained to the claimant, and he confirmed that he understood, that the absence of the respondent did not mean that he would automatically succeed in his complaint and that the burden of proof remained on him to satisfy me that it was well-founded.

#### Representation and evidence

7 The claimant appeared in person and gave oral evidence during the course of which he referred to various documents. As indicated above, the respondent was neither present nor represented.

8 I also brought into my consideration the response (ET3) that had been submitted on behalf of the respondent and relevant correspondence on the case file.

#### The claimant’s complaint

9 The claimant had presented a single complaint to the Tribunal. Pursuant to section 23 of the Employment Rights Act 1996 (“the Act”) he asserted that the respondent had made an unauthorised deduction from his wages contrary to section 13 of the Act. Additionally, he referred to the respondent not having provided him with a contract of employment.

The respondent's response

10 The response submitted on behalf of the respondent (ET3) makes a number of assertions in respect of the claimant including as follows:

- 10.1 he had failed to attend meetings and designated shifts or to respond to communications with the effect that he had, "by his own actions terminated his employment with the Respondent";
- 10.2 "All monies due to the Claimant for hours worked have been paid to him";
- 10.3 "The Claimant was been provided with a written statement of his terms and conditions of employment".

The above assertions are not, however, particularised and, crucially, no evidence in support of them or submissions in respect of them were before me.

The issues

11 At the commencement of the Hearing, I briefly summarised the issues in this case, which the claimant confirmed he understood. Those issues are as follows:

*Wages*

- 11.1 Was the claimant a worker engaged by the respondent?
- 11.2 Had the respondent made a deduction from his wages in that it had paid him less than the amount due on any given occasion, which includes a failure to make any payment at all? The respondent asserted conduct.
- 11.3 Was the deduction (or deductions) authorised by a statutory provision, a relevant written contractual provision or agreed to in writing by the claimant before the event giving rise to the deduction; or was it an exempt deduction?
- 11.4 If the above questions are answered in the affirmative, has the claimant sustained financial loss which is attributable to the making of the deduction?
- 11.5 If, having considered the above issues the claimant succeeds in his claim, what if any amount is it appropriate in all the circumstances to order the respondent to pay?

*Statement of employment particulars*

- 11.6 Had the Employment Tribunal found in favour of the claimant?
- 11.7 Was the claimant an employee of the respondent? Correspondence from the respondent referred to him as being such.
- 11.8 Had the respondent given the claimant a written statement of particulars of employment?
- 11.9 If not, are there exceptional circumstances that would make it unjust or inequitable to make an award to the claimant; and if not should that award be the minimum amount equal to two weeks' pay or the higher amount equal to four weeks' pay?

Consideration and findings of fact

12 Having taken into consideration the content of the claim and response forms and the applications for postponement and all other relevant evidence before the Tribunal,

documentary and oral (during the course of which I asked the claimant several questions that he answered clearly and consistently) in the context of the relevant statutory and case law (notwithstanding the fact that, in the pursuit of conciseness, every aspect of the evidence or law might not be specifically mentioned below), I record the following facts as found by me on the balance of probabilities.

- 12.1 The respondent operates one or more hotels. The claimant was employed by the respondent. That is not disputed by the respondent and there are references in correspondence to it being his “employer” and in the response form to his “employment”. The claimant had been employed by the respondent as a receptionist at Metro Inns, Newcastle upon Tyne since January 2014.
- 12.2 The claimant had raised a grievance against his line manager, Sue Middleton, at the beginning of June 2018. When he next went into work he was told that he was suspended while his grievance was investigated and that he had been written to to this effect saying that he had been suspended and was not allowed to be in work. He then received a letter on 21 June 2018, which was dated 11 June 2018, and although that letter confirmed receipt of the grievance from the claimant concerning his line manager, Sue Middleton, it said nothing about him being suspended.
- 12.3 The claimant pursued this with the author of the letter, Jackie Kirkpatrick, who informed him that the letter of 11 June was the first letter. There was a second letter to follow. That letter, which the claimant did receive, is dated 26 June 2018. It was critical of the claimant in regard to his attitude and attendance at work but concluded that an interview would be arranged to pursue his grievance and he would be informed of the date, time and place as soon as possible. The claimant did not receive any such information from the respondent.
- 12.4 The claimant contacted the respondent, however, to draw attention to the fact that he had not been paid for the time that he had worked since 21 April 2018 and that he needed to receive his pay as he had to pay his own bills. No response was received from the respondent.
- 12.5 A copy of the claimant’s timesheet shows that from 21 April to 20 May 2018 he had earned gross income of £1,028.57, which should have been paid to him at the end of May. He did not receive that payment. The claimant produced his bank statements that showed that nothing had been received from the respondent in relation to the period in question. In addition the claimant stated that he had worked some shifts after 20 May 2018 for which he should have been but had not been paid, but he was not able to produce any evidence of non-payment and decided not to pursue it.
- 12.6 The submitted bank statements also revealed that the claimant had suffered certain bank charges as a result of not having received the wage that was due to him from the respondent. Those charges include two Unpaid Transactions of £8.00 each on 29 June and 31 July 2018, which had also then led to the claimant being pushed into unarranged overdraft that had led to a further charge of £72.00 being levied on 31 July 2018. The claimant stated, and I had no reason to disbelieve him, that other charges had arisen due to the non-payment of the wages in question and

the late payment of other wages but he did not seek to pursue recoupment in respect of those charges.

- 12.7 In addition to bank charges set out above the claimant had had other charges levied in relation to his credit card: these being, on 14 June 2018, a late payment charge of £12.00 and an over limit charge of £12.00 and then, on 6 August 2018, interest of £195.76.
- 12.8 A separate matter was that the respondent had failed to give the claimant a written contract of employment or statement of the particulars of his employment. The claimant had brought this up with the respondent multiple times but he had been told that as he had an oral contract he did not need anything in writing and his further requests had then been ignored.

### Submissions

13 After the evidence had been concluded, I enquired of the claimant whether he wished to make any further submissions but he was content that he had Satisfactorily explained his claim while giving evidence and did not wish to make any further submissions.

### The law

14 The principal statutory provisions that are relevant to the issues in this case are as follows:

#### **Employment Rights Act 1996**

##### ***“13 Right not to suffer unauthorised deductions.***

- (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*
  - (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.*
- (2) In this section “relevant provision”, in relation to a worker’s contract, means a provision of the contract comprised—*
- (a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or*
  - (b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.*
- (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.*

**23 Complaints to employment tribunals.**

- (1) A worker may present a complaint to an employment tribunal -
  - (a) that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)),

**24 Determination of complaints.**

- (1) Where a tribunal finds a complaint under section 23 well-founded, it shall make a declaration to that effect and shall order the employer—
  - (a) in the case of a complaint under section 23(1)(a), to pay to the worker the amount of any deduction made in contravention of section 13,
  - (b) ..... etc.
- (2) Where a tribunal makes a declaration under subsection (1), it may order the employer to pay to the worker (in addition to any amount ordered to be paid under that subsection) such amount as the tribunal considers appropriate in all the circumstances to compensate the worker for any financial loss sustained by him which is attributable to the matter complained of.”

**“1 Statement of initial employment particulars.**

- (1) Where an employee begins employment with an employer, the employer shall give to the employee a written statement of particulars of employment.”

**Employment Act 2002**

**“38 Failure to give statement of employment particulars etc.**

- (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
  - (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 (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),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.
- (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,

*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.”*

Application of the facts and the law to determine the issues

15 Set out above are the salient facts relevant to and upon which I based my Judgment. I considered those facts and submissions in the light of the relevant law and the case precedents in this area of law.

16 The claimant gave clear and consistent evidence, which was corroborated to an extent by the, albeit limited, documentation that he was able to put before me. In particular, he answered each of the questions I raised with him without hesitation. He was a credible witness and, while noting, for obvious reasons, that he was not subject to cross-examination, I accept his evidence.

17 In short, the claimant has discharged the burden of proof upon him to satisfy me as to the following key aspects of his complaint:

17.1 The claimant was an employee of the respondent.

17.2 The claimant had undertaken work for the respondent during the course of his employment, including from 21 April to 20 May 2018 and, from that work, he had earned gross income of £1,028.57, which should have been paid to him at the end of May but the respondent did not pay that wage to him.

17.3 As a consequence of not receiving that wage, certain bank charges had been imposed upon the claimant including two Unpaid Transactions of £8.00 each on 29 June and 31 July 2018; further, those charges had also then led to the claimant going into an unarranged overdraft and that had led to an additional charge of £72.00 being levied upon him on 31 July 2018.

17.4 In addition to bank charges the claimant had had other charges levied in relation to his use of his credit card at this time: namely, on 14 June 2018, a late payment charge of £12.00 and an over-limit charge of £12.00, and then, on 6 August 2018, interest of £195.76.

18 In light of the above findings, in accordance with section 24(1) of the 1996 Act I declare the claimant's complaint under section 23 of that Act that the respondent made a deduction from his wages in contravention of section 13 of that Act to be well-founded. In that respect, in accordance with section 24(1)(a) of that Act the respondent is ordered to pay to the claimant the amount of that unauthorised deduction in the sum of £1,028.57.

- 19 Pursuant to section 24(2) of the 1996 Act the respondent is also ordered to pay to the claimant the sum of £307.76 to compensate him for certain of the financial losses that he sustained, which are attributable to the non-payment of his wages.
- 20 The respondent had failed to comply with its duty under section 1 of the 1996 Act to provide to the claimant a written statement of the particulars of his employment. I accept the evidence of the claimant that he had raised this with the respondent many times and that he had been ignored. In the circumstances I consider it just and equitable to make an award to the claimant under section 38 of the Employment Act 2002.
- 21 Given the nature of the respondent's business and the fact that the claimant repeatedly requested that he be provided with a written statement I consider it just and equitable to award the higher amount of four weeks' pay. The claimant's normal working week comprised 32 hours in respect of which he received the minimum wage of (at his age) £7.38, producing an award of £236.16, which the respondent is ordered to pay to the claimant.

**EMPLOYMENT JUDGE MORRIS**

**JUDGMENT SIGNED BY EMPLOYMENT  
JUDGE ON 12 OCTOBER 2018**

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