



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4103651/19

Held in Inverness on 5 July 2019

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Employment Judge J M Hendry

Miss O Nikonorova

**Claimant
In Person**

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**Kirsten Schabeck & Rick Shabeck
t/a The Mission Cafe**

**Respondent
Represented by:
Mrs K Schabeck**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Claimant's application for a finding that she has suffered an unlawful deduction from her wages succeeds and the respondent shall pay to the claimant the sum of Five Hundred and Fifteen Pounds and Seventy-Six pence (£515.76)

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E.T. Z4 (WR)

REASONS

- 5 1. The claimant in her ET1 sought a finding that the respondents had made unlawful deductions from her wages by failing to pay her in full the accrued holiday pay she was entitled to at the correct rate of pay. The respondents' position was that the full entitlement had been paid and the rate of pay correctly calculated.
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2. The issue for the Employment Tribunal came down to what was the correct method by which the claimant's "weeks' pay" should be calculated for the purposes of her accrued holiday entitlement. There was no other dispute between the parties. The hours the claimant had worked, the dates on which she had worked, the payments that had been made and so forth were all
- 15 agreed.
3. The Tribunal had the benefit of productions lodged by the respondents. The first document in that bundle set out the basis on which they had made their calculations after taking advice on the matter. The claimant lodged a
- 20 separate document with a counter calculation (C1).
4. The factual position was as noted straightforward. The claimant had worked as a casual worker with The Mission Café from 19 September 2017. Her last
- 25 working week ended on 20 January 2018. Thereafter the claimant went on unpaid maternity leave in September. She was due to return on 22 February. She was then absent from work through illness until her employment terminated by agreement on 22 January 2019. Her hourly rate was £8.50. She did not in essence return to work after leaving on maternity leave.
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5. The claimant resigned from her employment which ended on 22 February 2019.

6. The claimant was entitled to 5.6 weeks holiday in the period 16 September 2017 to 15 September 2018 during which she took two weeks leave. The claimant accrued 2.5 weeks between the 16 September 2018 and 22 January 2019.

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7. It was agreed that the claimant accrued 8.1 weeks of holiday during the period of her employment and that she had taken two weeks leave which left 6.1 weeks. The respondents calculated that the holiday pay should be paid at the rate of £104.76 per week using the time period 15 January 2018 to 13 April 2018. This period was a period during which the claimant was on maternity leave or unwell. The respondents paid two separate sums £143.62 and £534.27 towards accrued holiday leave.

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15 **Decision**

8. It was unfortunate in this case that the employers had taken advice and tried their best to calculate the holiday pay correctly. Indeed, they made reference at the hearing to the guidance published by the Government for the use of employers. The dispute between the parties comes down to the correct calculation for a week's pay to be used in calculating holiday entitlement.

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9. The respondent's position was that holiday pay or more accurately the final calculation of holiday pay would be based on the 12 weeks from 15 January. This took into account statutory sick pay and maternity allowance as a detailed calculation was provided (R2).

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10. I regret to say that I have concluded that the respondents were in error in calculating the pay the way they did. The practical dispute is whether or not the statutory maternity pay and sick pay should be taken into account in calculation and the calculation made for the 12 week period from 15 January. In my view these benefits should not be taken into account when making the calculation nor is the calculation period correct.

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11. Matters governed by s.221 onwards of the Employment Rights Act. It is important to recall the wording of the statute. Section 221 refers to a normal weeks' pay and various methods are given for calculation. Section 222 states:

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“222 Remuneration varying according to time of work.

(1) *This section applies if the employee is required under the contract of employment in force on the calculation date to work during normal working hours on days of the week, or at times of the day, which differ from week to week or over a longer period so that the remuneration payable for, or apportionable to, any week varies according to the incidence of those days or times.*

(2) *The amount of a week's pay is the amount of remuneration for the average number of weekly normal working hours at the average hourly rate of remuneration.*

(3) *For the purposes of subsection (2)—*

(a) *the average number of weekly hours is calculated by dividing by twelve the total number of the employee's normal working hours during the relevant period of twelve weeks, and*

(b) *the average hourly rate of remuneration is the average hourly rate of remuneration payable by the employer to the employee in respect of the relevant period of twelve weeks.*

(4) *In subsection (3) “the relevant period of twelve weeks” means 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.”*

12. The calculation has to be made on the basis of weeks actually worked and this means the employer here had to go back to the period before the claimant went on maternity leave to find 12 'normal weeks' or was absent though sickness. The 12 week period used to find average remuneration (a weeks' pay) for this purpose must be the period prior to the claimant taking maternity leave or being absent on sick leave. Although I can find no direct authority in relation to maternity leave it was held in the case of ***Stevens v. Nash Bakery Ltd*** ET Case No. 2700353/09 that an employer could not count a period of absence during which the employee was getting statutory sick pay when calculating holiday pay in accordance with s.223(1). The same principle must

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5 apply to maternity leave in my view. Someone on maternity leave is not in receipt of their 'normal pay' during this period. She was not carrying out her normal work during this period and accordingly for the purpose of carrying out the 12 week calculation an earlier period, when she was actually carrying out her normal work, has to be used. The claimant's calculations are correct. The respondents accepted that if the principle underpinning it was correct namely the earlier 12 week period should be used then the arithmetic was not in dispute. The claimant averaged £195.68 per week in the 12 week period to 30 January 2018. The total accrued holiday pay accrued amounted to 10 £1193.65 to which £143.62 and later £534.27 was paid leaving £515.76. In these circumstances the claimant is due the sum of £515.76 and a Judgment for this sum is accordingly made.

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Employment Judge:**James Hendry****Date of Judgment:****06 August 2019****Date Sent to parties:****08 August 2019**

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