



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

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**Case No: 4110191/2019**

**Held in Edinburgh on 30 October 2018**

**Employment Judge: M Sutherland (sitting alone)**

10 **Marc Fraser**

**Claimant**  
**In person**

**Genes J & T (t/a Happy Days)**

**Respondent**  
**Represented by:**  
**Ms V Wilson**

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### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

20 The judgment of the Tribunal is that the Respondent made an unlawful deduction from wages and the Respondent is ordered to pay the Claimant the sum of £502.62 (gross) from which income tax and national insurance fall to be deducted.

### **REASONS**

25 **Introduction**

1. The Claimant presented a complaint of unlawful deduction from wages in respect of a failure to pay wages, holiday pay and notice pay.
- 30 2. The Claimant appeared on his own behalf. The Respondent was represented by Ms Wilson.

3. The Claimant lodged a set of productions and gave evidence on his own behalf.

5 4. The Respondent lodged a set of productions and Ms Wilson gave evidence on behalf of the Respondent.

#### Findings of Fact

5. The tribunal makes the following findings of fact –

10 6. The Claimant was employed by the Respondent from 28 January 2019 until 10 June 2019. The Claimant was employed by them as a chef.

15 7. In terms of his contract the Claimant agreed to work from 7am until 2pm Monday to Friday. He was entitled to a 30 minute unpaid break. His total hours a week were 32.5 hours. His rate of pay was £8.75 per hour.

8. The Claimant was paid monthly in arrears on the last working day of the month.

20 9. In terms of his contract the Respondent is entitled to make a deduction in respect of an overpayment of wages.

10. The Claimant worked 28 hours in January but was paid in respect of 26 hours.

25 11. The Claimant worked 97.5 hours in February but was paid in respect of 130 hours of work.

30 12. The Claimant worked 136.5 hours in March but was paid in respect of 105.31 hours (32.5 hours were deducted in respect of his 5 day sickness absence in February).

35 13. The Claimant had been flexing his start and finish times. Towards the end of March 2019 the Respondent reminded the Claimant that his hours of work were 7am to 2pm and he was not entitled to temporarily flex those hours. They advised him that they were amenable to a permanent change to his

hours but this would require to be discussed and agreed. As a goodwill gesture they agreed to pay 4.05 hours in respect of the deductions to be made. The Respondent did not make payment in respect of the 4.05 hours.

5 14. The Claimant worked 143 hours in April but was paid in respect of 138.25 hours. The Claimant had failed to work to his shift end by 4.75 hours. The Respondent deducted 4.75 hours in respect of his failure to work until his shift end.

10 15. The Claimant worked 149.5 hours in May and was paid in respect of 129.08 hours. The Claimant had failed to work to his shift end by 6.5 hours. The Respondent deducted 20.42 hours in respect of his failure to work until his shift end.

15 16. On 3 June 2019 the Respondent issued notice of termination to the Claimant acknowledging that he was entitled to 1 week's notice. The Claimant's last working day was 31 May 2019. The Claimant was absent on holiday from 3 until 7 June 2019 but did not receive any pay in respect of that holiday.

20 17. The Claimant was also absent on holiday on 3 other days in March, April and May 2019 and received pay in respect of those holidays.

18. The Claimant received £96.68 in respect of outstanding holiday pay.

### Observations

25 19. The tribunal makes the following observations on the evidence –

20. The Claimant asserted that he was unclear whether rest breaks were paid or unpaid but he sought payment in respect of them. The Claimant also asserted that he signed the contract which the Respondent ordinarily issues at the end  
30 of the probationary period. That contract expressly provides that rest breaks are unpaid.

21. The evidence provided by the Respondent was that the Claimant's failure to work until his shift end amounted to 11.25 hours in total. The total amount of

the deduction made in respect of the failure to work to the shift end was 25.17 hours. Accordingly the amount of the deduction exceeded the amount of the failure by 13.92 hours.

### **Relevant law**

5 22. Section 13 of the Employment Rights Act 1996 ('ERA 1996') provides that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised by statute, or by a provision in the workers contract advised in writing, or by the worker's prior written consent. Certain deductions are excluded from protection by virtue of  
10 s14 or s23(5) of the ERA.

23. A worker means an individual who has entered into or works under a contract of employment, or any other contract whereby the individual undertakes to perform personally any work for another party who is not a client or customer of any profession or business undertaking carried on by the individual (s230  
15 ERA).

24. Under Section 13(3) there is a deduction from wages where the total amount of any wages paid on any occasion by an employer is less than the total  
20 amount of the wages properly payable by him to the worker on that occasion.

25. Under Section 27(1) of the ERA "wages" means any sums payable to the worker in connection with their employment.

25 26. A complaint for unlawful deduction from wages must be made within 3 months beginning with the due date for payment (Section 23 ERA 1996). If it is not reasonably practicable to do so, a complaint may be brought within such further reasonable period.

30 27. Under Regulations 13 and 13A of the Working Time Regulations 1998 a worker is entitled to 5.6 weeks annual leave in each leave year. Where a worker's employment is terminated during a leave year the worker is entitled to a proportion of that leave and a payment in lieu in respect of any leave not taken. (Less than half a day's leave is rounded up to half day's leave and if

more is rounded up to a whole day.) The holiday year begins on the date when employment begins unless a relevant agreement provides otherwise. A worker is entitled to leave paid at the rate of a week's pay calculated under the Employment Rights Act 1996.

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### Discussion and decision

28. The total amount of any wages payable was less than the total amount of the wages properly payable by the Respondent to the Claimant in the following occasions: -

<b>Date</b>	<b>Amount Payable</b>	<b>Amount Paid</b>	<b>Deduction</b>
31 January 2019	28 hours x £8.75	26 hours x £8.75	£17.50
29 March 2019	136.5 hours – 32.5 hours sickness absence = 104 hours x £8.75	105.31 hours x £8.75	£0
30 April 2019	143 hours – 4.75 hours re failure to work to shift end + 4.05 hours agreed not to deduct = 142.3 hours x £8.75	138.25 hours x £8.75	£35.44
31 May 2019	149.5 hours – 6.5 hours re failure to work to shift end = 143 x £8.75	149.5 hours – 20.42 hours re failure to work to shift end = 129.08 x £8.75	£121.80
<b>Total</b>			<b>£174.74</b>

29. The Claimant worked for 19 weeks and accordingly accrued 10.5 days holiday (19/52 x 5.6 weeks x 5 days). He took and was paid for 3 days holiday. He also took 5 day's holiday during his notice period which was unpaid. He is therefore due payment in respect of 7.5 days holiday. His daily rate of pay is £56.88. Accordingly he was entitled to holiday pay in sum of £426.56. He received a payment to account of £98.68. He is therefore due to be paid £327.88 in respect of holiday pay.

30. The Respondent has therefore made an unlawful deductions from wages in sum of £502.62 in total (£174.74 + £327.88).

**Date of Judgment: 06 November 2019**  
**Employment Judge: Michelle Sutherland**  
**Entered Into the Register: 12 November 2019**  
**And Copied to Parties**