EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103065/2019

Held in Glasgow on 5 June 2019

Employment Judge I McPherson

Miss Kylie Fullerton	**Claimant** **In Person**
Redding & Westquarter Unity Club	**Respondents** **Represented by:** **Ms Tracy Fyfe -** **Bar Manager**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:

(1) having heard oral submissions from the claimant, and the representative appearing for the respondents, at this Final Hearing, the Tribunal allows the respondents' representative to participate in the Hearing, to the extent of challenging the amount of holiday pay due but unpaid to the claimant, but not liability for unpaid holiday pay, the respondents having failed to lodge an ET3 response, and their late response having previously been rejected by the Tribunal; and

(2) having thereafter heard evidence from the claimant in person, and the respondents' representative, and having considered the productions lodged with the Tribunal, the Tribunal finds that there was an unlawful deduction from wages by the respondents, by their failure to pay holiday pay accrued, but untaken by the claimant at the effective date of termination of her employment, and, accordingly, the Tribunal orders the respondents to pay to

the claimant the sum of **THREE HUNDRED AND SEVENTY POUNDS, SEVENTY FIVE PENCE (£370.75).**

REASONS

Introduction

1. This case called before me on the afternoon of Wednesday, 5 June 2019, at 2.00pm, for a Final Hearing, further to Notice of Claim and Notice of Final Hearing issued by the Tribunal to both parties on 26 March 2019.

2. Following ACAS Early Conciliation between 13 February and 13 March 2019, the claimant, who is representing herself, presented an ET1 claim form to the Employment Tribunal, on 20 March 2019, complaining that the respondents owed her holiday pay, which she had calculated in the sum of £552, following the end of her employment with the respondents, as a bar person, stated to have ended on 30 December 2018.

3. The claim was accepted by the Tribunal administration on 26 March 2019, and a copy of the claim was served on the respondents, at their place of business, in Falkirk, requiring them to lodge an ET3 response form at the Glasgow Employment Tribunal office by 23 April 2019 at the latest.

4. In that Notice of Claim, it was explained to the respondents that if their response was not received by that date, and no extension of time had been agreed by an Employment Judge before that date, then they would not be entitled to defend the claim and, where no response was received or accepted, an Employment Judge might issue a judgment against them without a Hearing and they would only be allowed to participate in any Hearing to the extent permitted by an Employment Judge.

5. Further, that Notice of Claim and Notice of Final Hearing, sent to both parties by the Tribunal on 26 March 2019, stated that the claim would be heard by an Employment Judge sitting alone, and that one hour had been allocated to hear the evidence and decide the claim, including any preliminary issues.

6. No ET3 response was lodged by, or on behalf of, the respondents, by the due date of 23 April 2019. In those circumstances, following referral to Employment Judge Jane Garvie, by letter from the Tribunal to both parties, dated 2 May 2019, the claimant was advised that no acceptable response to her claim had been received, and it was therefore possible to issue a judgment without the need for a Hearing.

7. However, Employment Judge Garvie considered that there was insufficient information to issue a judgment at that stage and therefore she required the claimant to provide further information, within 14 days, to allow a judgment to be issued, and to clarify whether it was £552 for holiday pay, and how much was claimed for any unpaid wages.

8. While a reply was invited from the claimant, within 14 days, no such response was received from her by the due date of 16 May 2019. In those circumstances, following referral to Employment Judge Peter O'Donnell, and by letter of 28 May 2019 sent to both parties, the claimant was advised that as no response to the Tribunal's letter of 2 May 2019 had been received, Employment Judge O'Donnell had directed that the claimant write to the Tribunal to clarify her position as, without the information requested, a judgment could not be issued and the case would proceed to the listed Final Hearing on 5 June 2019.

9. That letter was sent following the Tribunal's receipt, on 16 May 2019, of an ET3 response form submitted by Tracy Fyfe, which, following referral to Employment Judge Robert Gall, and as detailed in a letter from the Tribunal to the claimant, and copied to the respondents, on 21 May 2019, was rejected under **Rule 18 of the Employment Tribunals Rules of Procedure 2013.**

10. It was rejected because the response had not been presented within the statutory limit, and Ms Fyfe had made no application for an extension of time and, as a result, the ET3 response could not be accepted by the Tribunal. Parties were advised that the claim would proceed as undefended and that the respondents would only be able to participate in any Hearing to the extent permitted by an Employment Judge.

11. However, that same letter of 21 May 2019, advised the respondents that they had the right to apply for a reconsideration of Employment Judge Gall's decision to reject the response and, if they wanted to make such an application, they must do so in writing within 14 days of the date of that letter, and they must explain why they believed the decision not to accept their response was wrong or rectify any identified defect.

12. The respondents were also advised that they should state whether they requested a Hearing to consider their application, and that they must copy their application to the claimant and confirm to the Tribunal that they had done so.

13. Thereafter, by email of 29 May 2019 to the Tribunal only, but not copied to the claimant, Tracy Fyfe, acting on behalf of the respondents, wrote in the following terms:

> "***Hi. I would like to appeal the rejection response for the 16th of May. I had moved house and I put ma applications in on the 16th of May. I do apologise for it being on that date. But I would like to defend ma response plz."***

14. Following referral to Employment Judge Rory McPherson, and as detailed in the Tribunal's letter to the respondents, of 31 May 2019, copied to the claimant for her information, the respondents were advised that Employment Judge Rory McPherson had directed that the Final Hearing on 5 June 2019 would proceed and they may be entitled to participate in that Hearing to the extent permitted by the Employment Judge, but he also stated that their response was refused as "***out of time, not compliant with Rule 30 of the Employment Tribunal Rules of Procedure 2013".***

15. I pause to note, and record here, that **Rule 30** provides, at **Rule 30 (2),** that where a party applies for any case management order, they shall notify the other parties that any objections to the application should be sent to the Tribunal as soon as possible, and, at **Rule 92** (correspondence with the Tribunal: copying to other parties), it is provided that where a party sends a communication to the Tribunal (except an application under **Rule 32** for a

Witness Order), that party shall send a copy to all other parties, and state that it has been done (by use of "cc" or otherwise), although the Tribunal may order a departure from that rule where it considers it is in the interests of justice to do so.

16. Further, it is noted and recorded that, while Employment Judge Gall had rejected the response, in terms of **Rule 18**, for it having been presented late, the respondents made no application for reconsideration of that rejection, in terms of **Rule 19**, nor did they make an application, in terms of **Rule 20**, for an extension of time for presenting a response.

17. Finally, by email to the Tribunal, sent on 29 May 2019, but not copied to the respondents, the claimant stated that, in regard to her Hearing on 5 June 2019, she believed:

> ***"I am entitled to 70 hours 13 minutes holidays going by the gov website which works out at £552.15 with the minimum wage at £7.50."***

18. Following referral of the claimant's email of 29 May 2019 to Employment Judge Sally Cowen, by letter to the claimant, and copied to Ms Fyfe for the respondents, on 31 May 2019, parties were advised that Employment Judge Cowen had directed that the case proceed to Final Hearing on 5 June 2019, and that the respondents may attend and only participate to the extent permitted by the Employment Judge.

Respondents' application to participate in this Final Hearing

19. When the case called before me, shortly after 2.00pm, on Wednesday, 5 June 2019, the claimant was in attendance, unrepresented, and without any witnesses, although accompanied by a Ms C Hutchison, a friend, for moral support, but not as a witness.

20. The respondents were also in attendance, represented by Ms Tracy Fyfe, who had submitted the late, rejected ET3 response, and emailed the Tribunal on 29 May 2019, seeking to "***appeal the rejection response***", but her email was

not treated as an application for reconsideration by Employment Judge Rory McPherson.

21. At this Final Hearing, Ms Fyfe explained that she was acting as the respondents' representative, although she was accompanied by two committee members, a Mr Peter Ure, and a Mr William Marshall, and she advised that they were to be present as observers, but not as witnesses on behalf of the respondents, where she would be acting as both their representative, if allowed to do so, and as a witness. Ms Fyfe further advised that the respondents should have been represented by the club's Treasurer, but he was away on holiday on a cruise in Russia.

22. In the event, I required to clarify certain matters with both the claimant, and Ms Fyfe, prior to considering further procedure at this Final Hearing, so I did so, with the claimant, and Ms Fyfe only present, and their supporters/observers, remained in the respective waiting rooms. When, after clarification, and determination of further procedure, I then took sworn evidence from each of the claimant, and Ms Fyfe, I asked them a series of structured and focused questions, to take their evidence in chief, and they were then each briefly cross examined by the other.

23. While, in the Notice of Final Hearing, issued on 26 March 2019, both parties were clearly advised, as is standard practice, that they should ensure that any relevant witnesses attend the Hearing and that they bring copies of any relevant documents, being four sets in total, the claimant brought only one set of her payslips, and Ms Fyfe brought no documents, on behalf of the respondents.

24. After discussion, and clarification, it was agreed by Ms Fyfe that the copy payslips produced by the claimant were those emailed by Ms Fyfe to ACAS, and then forwarded onto the claimant from ACAS and, as such, it was agreed that the payslips produced are the payslips issued in respect of the claimant's employment by the respondents. In the course of discussion, it also emerged, as regards the date of the claimant's employment, that the claimant had received a P45 from the respondents and, as this was only available on the

claimant's mobile phone, she forwarded it to the Tribunal office, where it was then printed off, and copies provided to me, and both parties, for use at this Hearing.

25. As regards seeking to clarify parties' respective positions, and the extent to which the respondents might be allowed to participate in this Final Hearing, I referred to the fact that the respondents, through Ms Fyfe, had submitted an ET3 response, defending the claim, but, because it had been rejected, and returned to Ms Fyfe, the claimant had not seen it.

26. However, I felt, in the interests of fairness, and in the interests of full transparency of the respondents' stated position, it was appropriate for the clerk to the Tribunal to copy that ET3 response, so that it was available to both the claimant, myself as the presiding Judge, and Ms Fyfe for the respondents.

27. That ET3 response form, lodged on 16 May 2019, agreed that there had been ACAS early conciliation between the parties, as per the details given by the claimant in her ET1 claim form, and it further agreed, as per her ET1 claim form, that the dates of employment given by the claimant were correct, and that the employment was not continuing. In this respect, the claimant, at section 5.1 of her ET1 claim form, had stated that her employment with the respondents had started on 19 March 2018, but it was no longer continuing, and that it had ended on 30 December 2018.

28. The ET3 response neither confirmed, nor denied, that the claimant's job title was barperson, and, likewise, it neither confirmed, nor denied, the information provided by the claimant, in her ET1 claim form, about her earnings, being employed on the basis of 16 hours per week, for which she received weekly wages of £125.

29. At section 6.1 of the ET3 response form, where the respondents indicated that they were defending the claim, the following narrative was given setting out the facts on which they relied to defend the claim, as follows: -

> ***"We have Kylie's wage slips of the full time that she has been there and she has never missed a payment as benefit she was receiving meant she needed 16 hours per week. Her p45 does show this. There was error on her final payment as it was holiday period it was based on pro rata for the account to be back after the xmas holiday. She has received her pay even when she has been off either for holidays or time off."***

30. That defence was a reply to the claimant's details of claim, at section 8.2 of her ET1 claim form where, so far as relevant for present purposes, she had stated as follows: -

> ***"I worked my last shift on 26th December, I was due to work again on Saturday 29th, I received a message from the bar manager on Friday 28th advising me not to attend for my shift on 29th as the committee were going to work the shift and all bar staff hours were going to be reduced in the New Year. On 30th December the bar manager visited my home to tell me… that my employment had been terminated. I subsequently sent a letter to the club committee asking for a meeting to discuss the above. This meeting took place on 16th January, my stepdad accompanied me to the meeting…. the committee agreed to send a letter of apology, I have however not received any communication from them.***
>
> ***I then requested my P45 (I had previously requested it on 2nd January but had not received it) and any holiday pay due to me via a text message to the bar manager Tracy Fyfe. When I did not receive my holiday pay I lodged a complaint with ACAS. My employer offered £260… I declined the offer…. despite my employment being terminated on 30th December when I received my wage slips and P45, it states that I was employed and paid up to 8th January. I received no payment from my employer since I worked my last shift on 26th December."***

Clarifications sought by the Tribunal

31. I sought to clarify with the claimant the sum that she was seeking from the respondents, given the differing figures in her ET1 claim form, at section 9.2, and her email of 29 May 2019, at £552.15. In her ET1, the claimant had stated that ***"£552 which is the holiday pay due to me according to the holiday calculator on the government website."***

32. The claimant confirmed that while she had used the government website, she did not have a copy of the calculation on which her claim form was based, and similarly, as regards the figure of £552.15, shown in her email of 29 May 2019, claiming 70 hours, 13 minutes, at £7.50 per hour, again the claimant stated that she had used the government website calculator, but she did not have a copy of the calculation that she used then to produce to the Tribunal.

33. The claimant stated that she was paid her wages in cash, and received them as per the copy payslips which she had produced, from 16 April 2018 to 14 January 2019, but that she had only received those payslips, via ACAS, after her Tribunal claim was brought, and she did not get payslips when she was employed by the respondents. Further, she stated, she did not take any holidays, and she did not get any holiday pay.

34. She clarified that while she had received her wages due, she had not been paid any holiday pay, and that is what she was seeking from this Tribunal. While, in her email of 29 May 2019, she had multiplied the holiday entitlement by £7.50 per hour, she stated that that was in error, as the wage slips show that her hourly rate was £7.83, and accordingly she was seeking her holiday entitlement based on the correct hourly rate, and not at £7.50 per hour.

35. When I asked the claimant about her dates of employment, stated in her ET1 as having started on 19 March 2018, and ended on 30 December 2018, she stated that she had no documents to produce, such as a contract of employment issued by the respondents, vouching her start date, but she adhered to the dates given in her ET1 claim form.

36. When I noted, from the ET3 response, that the respondents agreed with those dates, Ms Fyfe stated that the ET3 response form was wrong and that the claimant's employment had started on 13 April 2018, which she knew because, on 12 April 2018, the claimant had sent her national insurance number, to go to the respondents' accountants for the payroll. She further stated that the claimant's last shift of work was on 26 December 2018, and that was the end date of her employment and that she had been told, on 29 December 2018, that she would be getting no more shifts.

37. In response to that clarification from Ms Fyfe, the claimant accepted that 26 December 2018 was her last day worked, and Ms Fyfe stated that she accepted that the claimant's holiday entitlement should be based on the hourly rate of £7.83, but she did not accept the claimant's calculation, and she submitted that the claimant was only entitled to two weeks' holiday pay, which she quantified at £250.54, on the basis of £125.28 per week, for two weeks, being £7.83 per hour x 16 hours per week. Further, added Ms Fyfe, her evidence would be that the claimant had been off for a week in June 2018, and two weeks in August 2018.

38. In reply, the claimant then advised that she had received a P45 from the respondents, by email, and it showed her leaving date as 8 January 2019, but Ms Fyfe, speaking for the respondents, stated that her leaving date was not 8 January 2019, as her last working day was 26 December 2018. She accepted, as a true copy, the P45 provided by the claimant, it having been issued to her by Ms Fyfe, on behalf of the club.

39. In the circumstances, I stated that it appeared that there was a dispute as regards the start and end dates of employment, and the quantum, or amount, of holiday pay still due and owing to the claimant from the respondents, and that I would require to make a judicial determination on that matter, in the event that parties were unable to agree matters between themselves, and thus avoid the case needing to progress to such a Final Hearing.

40. Ms Fyfe stated that the last few payslips provided to the claimant were done on a pro rata, predetermined basis, on the basis of predicted shifts over the

festive period, as the accountant's offices were closed, and that she had no pay, or holiday records for the claimant, kept at the club, to produce at this Final Hearing, as everything is done through the club's accountants for producing payslips.

41. By this stage, having heard from both the claimant, and Ms Fyfe for the respondents, I advised them of the terms of the Tribunal's overriding objective, under **Rule 2 of the Employment Tribunal Rules of Procedure 2013,** which provides that the Tribunal is to deal with cases fairly and justly, and that dealing with a case fairly and justly includes, so far as practicable:

    (a) ensuring that the parties are all on the same footing;

    (b) dealing with cases in ways which are proportionate to the complexity and importance of issues;

    (c) avoiding unnecessary formality and seeking flexibility of the proceedings;

    (d) avoiding delay, so far as compatible with proper consideration of the issues; and

    (e) saving expense.

42. Further, **Rule 2** also provides that the Tribunal shall seek to give effect to the overriding objective when exercising any power given to it by the rules, and parties shall assist the Tribunal to further the overriding objective and, in particular, parties shall cooperate generally with each other and the Tribunal.

43. When I asked Ms Fyfe why she had not sent a copy of her 29 May 2019 email to the Tribunal, seeking to "***appeal***" the rejection response, she stated that there was "***bad blood***" between her and the claimant, which the claimant disputed, and the claimant advised that she simply wanted matters sorted out at this Hearing, while Ms Fyfe stated that the respondents wanted to defend the claim, and to be allowed to participate.

44. Ms Fyfe assumed that the club's accountant had the claimant's holiday records, and explained that she just sent information to the accountant, for

payroll, and nothing else, and that, when she took a holiday in March 2019, her own payslip did not show it as holiday taken. Further, added Ms Fyfe, the sum sued for by the claimant is too high, as she submitted that the claimant is only due £250.54.

45. As neither party was legally represented, and both advised me they had no knowledge of Tribunal practice or procedure, or the relevant law, I advised both of them that, consistent with my **Rule 2** duty to deal with the case fairly and justly, I could inform them in general paraphrased terms, of the applicable legal test for what is known as a **Rule 20** application, for an extension of time to lodge a late ET3 response, and then invite their comments, by way of addressing the factors identified in the Employment Appeal Tribunal case law, including the explanation or lack of explanation for the delay in presenting a response to the claim, the merits of the respondents' defence, the balance of prejudice each party would suffer should an extension of time be granted or refused, and why they invited me to grant or, as the case may be, refuse any application by the respondents for an extension of time to present their ET3 response defending the claim.

46. Specifically, I read to them part of the judgment of Mrs Justice Simler DBE President of the Employment Appeal Tribunal, in **Grant v Asda [2017] UKEAT/0231/16/BA, [2017] ICR D17**, which refers to earlier judicial guidance given in **Kwiksave Stores Ltd v Swain [1997] ICR 49**, from Mr Justice Mummery.

47. When I asked the claimant, and Ms Fyfe, whether they had anything further to say, on the matter, neither did, and, having heard from both of them, I decided that I would allow the respondents to participate in this Final Hearing to dispute the quantum of holiday pay only, but not liability, on the basis that Ms Fyfe accepted that the claimant was due at least two weeks' holiday pay. The only issue before the Tribunal was therefore the appropriate quantum or amount of holiday pay due and resting to the claimant from the respondents.

Findings in Fact

48. On the basis of the sworn evidence heard from the claimant, and Ms Fyfe for the respondents, and the copy payslips, and P45, provided to the Tribunal, the Tribunal has found the following essential facts established:

(1) The respondents are a social club, who operate a bar, open on Friday, Saturday, and Sunday, with paid bar staff, but the bar is run by their committee volunteers during the week.

(2) The claimant, who is aged 30, was formerly employed by the respondents as a bar person, normally working 16 hours per week, over two days. She is now in other employment as a hairdresser.

(3) At this Final Hearing, notwithstanding the dates given by the claimant in her ET1 claim form, she accepted that her employment with the respondents started on 13 April 2018, and ended on 26 December 2018.

(4) Further, parties were jointly agreed, at this Final Hearing, and notwithstanding the fact that the respondents had issued the claimant with a P45 dated 15 January 2019, showing her leaving date as 8 January 2019, with total pay to date of £4917.24, that the end date was 26 December 2018. A copy of that P45 was produced to the Tribunal by the claimant.

(5) It was a further matter of agreement, at this Final Hearing, that the claimant was never issued with any formal contract of employment by the respondents, nor with any statutory written particulars of employment by the respondents, and, while after her employment ended, and she brought these Tribunal proceedings against the respondents, after ACAS early conciliation, she only received, via ACAS, a copy of her payslips from the respondents.

(6) Copy payslips were produced for every week in the period from 16 April 2018 (week 2) to 14 January 2019 (week 41). For each of those weeks, except week 41 which shows a zero payment, the claimant is shown as having received a cash payment from the respondents.

(7) Except for weeks 6 and 7 (being 14 and 21 May 2018), which show that she was paid for 18 hours per week, producing £140.94, for each of the other weeks showing wages paid, the payment shows payment for a basic 16 hours at £7.83 per hour, giving £125.28 gross, with no deductions for PAYE tax or national insurance, producing normal weekly net pay of £125.28. Further, on each payslip, there is an entry showing: "***Holidays: Taken 0.00. Remaining: 0.00."***

(8) A copy of these payslips for the claimant (shown as employee number 15) were produced to the Tribunal, by the claimant, and it was agreed, at this Final Hearing between the parties, that these were true copies of the payslips provided to her by the respondents.

(9) On the basis of the evidence heard at this Final Hearing, there was a dispute between the parties as to whether or not the claimant did in fact receive payments in cash for her wages for a week in June 2018, and two further weeks in August 2018, but it was agreed that she had not received any payment for the wages shown in the payslip dated 7 January 2019. The claimant does not complain that she was owed any outstanding wages, and her ET1 claim form seeks no order for payment of any arrears of pay owed to her.

(10) The Tribunal was advised that the payslips were prepared weekly by the respondents' accountant, identified as a Mr Graeme Laird, of Ian McFarlane & Co, Accountants, Falkirk, based on information from the respondents' bar manager, and the accountant prepared the payslips, which were distributed by the respondents' bar manager to bar staff, along with their weekly wages in cash.

(11) No pay records, or holiday records, were produced to this Tribunal by the respondents, nor any payroll related documents from the club's accountants. In particular, the respondents did not produce any documents signed by the claimant showing her receipt of the cash payments shown on the various payslips produced to the Tribunal.

(12) The claimant denied receipt of any holiday pay from the respondents, and the payslips produced show no separate payments in respect of any holiday pay.

(13) In her evidence to the Tribunal, the claimant accepted that she had been off on holiday (to Bulgaria) for one week in June 2018, but otherwise she had not been on holiday, nor had she received any holiday pay from the respondents. In August 2018, she had not been working, as she had been hospitalised following an operation. She had not claimed, nor been paid, any sick pay for that period.

(14) Insofar as the respondents' payslips showed no holidays taken by the claimant, she accepted in evidence that is incorrect in respect of the one week's holiday (16 hours) taken by her in June 2018.

Tribunal's Assessment of the Evidence

49. In considering the evidence led before the Tribunal, I had to carefully assess the whole evidence heard from the claimant on her own behalf, and Ms Fyfe on behalf of the respondents, and to consider the copy payslips, and copy P45, produced to the Tribunal, which evidence and my assessment are now set out in the following sub-paragraphs:

(1) <u>Ms Kylie Fullerton: Claimant</u>

(a) The claimant appeared as a straight talking, determined young woman, who was still clearly aggrieved at the fact that the respondents have not paid to her outstanding holiday pay that she believes is still owed to her.

(b) While in her ET1 claim form, the claimant had claimed £552 holiday pay owed, and stated her weekly earnings were £125 per week, it was clear from the evidence produced at this Final Hearing that her weekly wages were in fact £125.28 per week gross, and net, based on a standard basic 16 hour per week at £7.83 per hour.

(c) As such, it is not clear why, in her email to the Tribunal, on 29 May 2019, the claimant sought payment for hours due at £7.50 per hour, as that had never been her hourly rate.

(d) I found the claimant to be a confused and confusing witness. In giving her evidence in chief, in reply to focused questions from me as the presiding Employment Judge, she initially stated that she did not take any holidays during the period of her employment with the respondents, and that she did not get any holiday pay from the respondents, and that she only got her weekly wages in cash.

(e) She then stated she was off for two weeks in August 2018, but not paid, and she only got paid wages for two of the four weeks in August 2018, and not the four weeks shown on her payslips. While she was not clear on exact dates, she spoke of having had an operation on 14 August 2018, so she was probably off work in the third and fourth weeks of that month.

(f) The claimant insisted she had received no holiday pay from the respondents, and while she acknowledged receipt of a P45 from the respondents, she stated that the leaving date shown of 8 January 2019 is not right, as her last shift working at the club was 26 December 2018, and she frankly conceded: ***"I have not got a clue why it says 8 January."***

(g) She refused Ms Fyfe's offer of £250 in settlement, as she insisted she was entitled to her full holiday pay due, and she had received her last payment of wages for weeks 38 and 39 (24 and 31 December 2018) but not for week 40 (7 January 2019).

(h) Under cross examination by Ms Fyfe for the respondents, the claimant agreed that she had taken a week off (around 11 June 2018), for a holiday, and that she had not worked that week. She explained that she was on holiday in Bulgaria, as agreed with the respondents as her employer, but she did not get paid holiday pay for that week.

(i) When asked about 19 August 2018, and the two weeks following, the claimant agreed with Ms Fyfe that she had been off work, on the sick, following a gall bladder operation on 14 August 2018. She stated that she was not away on holiday, and not able to work, and that the respondents knew she was in hospital. Further, the claimant stated that she did not apply to the respondents for any sick pay, as she did not know if she could do that.

(j) When, as presiding Employment Judge, I was examining in chief the respondents' representative, Ms Fyfe, as their only witness, she stated that the claimant got paid her wages for her week's holiday in June 2018, and the two weeks off in August 2018, but the claimant interjected to challenge that statement, but the claimant did not choose to cross examine Ms Fyfe on her evidence to the Tribunal.

(k) The claimant stated that she was due the sum of holiday pay shown in her email of 29 May 2019 to the Tribunal, namely £552.15, being similar to the sum of £552 shown in her ET1 claim form. She further stated that she had used the Gov.UK website holiday pay calculator, but she did not produce a copy of her calculation provided at the time of her ET1 claim form, or email to the Tribunal, that she was relying upon.

(l) Her email of 29 May 2019 refers to "***70 hours, 13 minutes***", but, in any event, the calculation provided by her on that date was wrong, as she multiplied the hours owed by £7.50, rather than her hourly rate of £7.83. I pause here to note and observe that, in any event, even using the £7.50 per hour rate, the claimant's calculation in that email of 29 May 2019 is not arithmetically correct, as 70 hours, 13 minutes, calculated at £7.50 per hour, produces a total sum of £526.62.

(m) Using the Gov.UK calculator, and the start and end dates of 19 March and 30 December 2018, (as in the claimant's ET1) it shows

a statutory holiday pay entitlement of 70 hours and 28 minutes, so I am not sure where the claimant got her 70 hours and 13 minutes.

(2) Ms Tracy Fyfe: Respondents' Bar Manager

(a) Ms Fyfe, aged 48, appeared as both the club's representative, and their only witness. She advised that she has been the bar manager there for some five years, and, as such, she was the claimant's line manager, and she worked 28 hours per week at the social club. She was here, at this Final Hearing, representing the club, notwithstanding two members of the club's committee attended the Tribunal along with her as observers.

(b) The Tribunal is obliged to her for doing her best to represent the club's interests, and challenge, by her oral evidence, the amount of holiday pay being sought by the claimant, but the Tribunal was disappointed that the office bearers of the club, who presumably have oversight and management of its affairs, left it to her as an employee to speak on their behalf.

(c) Further, given the terms of Ms Fyfe's own testimony to the Tribunal, it appears that the lack of employment contracts, or statutory written particulars of employment, is not unique to the claimant's situation, but applies to other staff, including Ms Fyfe herself, notwithstanding she advised the Tribunal she has been employed there for five years.

(d) While Ms Fyfe had submitted an ET3 response on behalf of the club, seeking to defend the claim, she was late in doing so, and accordingly it was rejected by the Tribunal. She explained the delay was being on account of her moving house but, if the club's management committee had perhaps played a more proactive and transparent role in dealing with the claim, then the ET3 might well have been lodged in time.

(e) It would also have assisted the Tribunal if the ET3 response instead of referring to "***there was an error in the final payment***", had fully explained the position, and clarified what holiday pay (if any) they agreed the claimant was entitled to, because the statement "***she received her pay even when she has been off either on holiday or time off"*** suggested that the claimant was paid every week, whether or not she worked. In their ET3 response, and at this Final Hearing, there was a lack of transparency by the respondents in detailing what sums she was paid, and when, and what for.

(f) No information was given to confirm, or deny, the claimant's stated hours at 16 hours per week (albeit this was accepted, at this Final Hearing, and it is vouched by the copy payslips produced to this Tribunal), nor to confirm, or dispute, the information given by the claimant about her wages, although, as emerged at this Final Hearing, her wages stated in the ET1 claim form by the claimant, at £125, were wrongly stated, when in fact they were £125.28.

(g) As no documents whatsoever were lodged by Ms Fyfe, on behalf of the respondents, either with the ET3 response, or in the course of this Final Hearing, the only documentation before the Tribunal is that lodged by the claimant, as an ex-employee, with nothing from the respondents as her former employer, or their accountants who managed the payroll.

(h) Further, it was confusing, as evidence emerged at this Final Hearing, that Ms Fyfe, in completing the ET3 response, agreed with the claimant's dates of employment as per her ET1 claim form yet, at this Final Hearing, she challenged those very dates that she agreed with. It was only after clarification of this matter, at the start of this Final Hearing, with both the claimant, and Ms Fyfe, that there was joint agreement on the start and end dates of employment.

(i) On the end date, the picture before the Tribunal was however clouded and confused by the fact that the respondents had issued

the claimant with a P45 showing her leaving date as 8 January 2019. It was agreed by both the claimant, and Ms Fyfe acting for the respondents, that that date was not the effective date of termination of the claimant's employment with the respondents, and in that respect, the P45 leaving date is wrongly stated.

(j) While Ms Fyfe was insistent that the claimant was due, and only due, £250.54 (being two weeks at £125.28 per week), as unpaid holiday pay, she produced no documentary evidence from the respondent club to show the claimant's holiday records, or absence records, or pay records, to substantiate her oral evidence that the claimant had taken holidays, and that she had been paid her holiday pay due proportionate to the length of her employment with the respondents.

(k) Indeed, while she spoke of payments being made in cash, there was no mention by Ms Fyfe of employees being required to sign any receipt to prove payment had been received. The payment arrangements adopted in the club appear most loose and care free, with no apparent control mechanisms in place, other than cash being left in an envelope, for a named employee, which could be uplifted by the employee, if not handed over by the bar manager, or club Treasurer.

(l) Further, Ms Fyfe referred to the club accountant having documentation, but she did not have it here at this Final Hearing. Indeed, no evidence was led by the club from its accountant, in circumstances where the Notice of Final Hearing is crystal clear that it is the responsibility of both parties to bring to the Tribunal witnesses and documents which they consider relevant to the case.

(m) Only Ms Fyfe was led on behalf of the respondents, but with no documents produced, albeit she agreed that the copy pay slips, and P45, produced by the claimant, were true copies. The club's

accountant was not led at all to speak to the employer's payroll records that he was administering on their behalf.

(n) Ms Fyfe agreed that the claimant did not get paid wages for the 7 January 2019 payslip, and so her P45 issued by the accountant is wrong as to the total paid to the claimant during her employment with the respondents, at least in regard to that week's payment, if not more generally as regards three weeks, one in June, and two in August 2018, where there was dispute at this Final Hearing, as to whether or not, in fact, the claimant had received her wages, let alone her holiday pay.

(o) At this Final Hearing, Ms Fyfe asserted that the claimant had been off for a week in June 2018, and two weeks in August 2018, but with no specification as to exact dates of any holidays taken. It was of note that in her evidence to the Tribunal, Ms Fyfe insisted the claimant got paid for these three weeks, one in June, and two in August 2018, and Ms Fyfe spoke of herself taking a holiday in March 2019, and her own payslip from the respondent not showing that week's holidays as having been taken.

(p) I found Ms Fyfe to be an honest witness, doing her best to represent the club's interests, by putting points to the claimant, in cross examination, but the fact is that, at the end of the day, I had a factual dispute, where the employer, whom the Tribunal would ordinarily expect to have produced contemporary records to show matters relating to an employee's attendance at work (or non-attendance whether on account of leave, sickness absence, or otherwise), and what payments had been made, when, and for what, but nothing was produced by the respondents at all.

Reserved Judgment

50. At the close of their evidence, I briefly adjourned, for a short period, of around 10 minutes, to allow both parties to speak to their respective supporters/observers, before I invited them to make any final closing

submissions, in addition to their oral evidence to the Tribunal. When we resumed, after that brief adjournment, neither the claimant, nor Ms Fyfe, for the respondents, chose to make any closing submissions.

51. This was not unexpected as, with an unrepresented party litigant, and a lay representative acting for the respondents, I had no expectation that I would be addressed by them on the relevant law, and, in any event, I had explained to them that it is my duty, as the presiding Employment Judge, to consider the relevant law, and apply it to the facts as I have found them to be.

52. In those circumstances, I advised both parties that I was reserving judgment, and written Judgment, with Reasons, would be issued as soon as possible.

Relevant Law

53. The relevant law on unlawful deduction from wages, and failure to pay holiday pay, is to be found in **Part II of the Employment Rights Act 1996**, dealing with the protection of wages, and the **Working Time Regulations 1998,** dealing with rights and obligations concerning working time, including entitlement to annual leave, and compensation / payments related to that entitlement.

54. Under **Regulation 30**, an employee may bring a complaint to the Tribunal that the employer has failed to pay the whole or any part of any amount due by way of payment respect of statutory annual leave, or payment in lieu of accrued but untaken leave upon termination of employment.

55. Failure to make payment under the regulations can be enforced by way of a claim for unauthorised deduction from wages, as per the judgment of the House of Lords in **Revenue and Customs Commissions v Stringer [2009] ICR 985**, on the basis that the payments fall within the definition of wages under **Section 27 of the Employment Rights Act 1006.**

56. The general rule is that an employee is not entitled to be paid unless he or she is ready and willing to work. However, most employment contracts make some provision, express or implied, for sick pay and holiday pay and, if such provision exists, the relevant particulars should be included in the statutory

written statement of employment particulars issued to employees. In the present case, there are no written particulars of employment issued by the respondents to the claimant.

57. Under the **Working Time Regulations 1998**, an employee has the right to be paid the minimum holiday entitlement conferred by those regulations, and to receive a payment in lieu of unused annual leave on the termination of their employment. In the absence of a relevant agreement, and none was referred to by either party in this case, payment in lieu on termination is determined by reference to a statutory formula set out in **Regulation 14(3)(b).**

Discussion and Deliberation

58. In considering the evidence in this case, I have come to the view that, based on Ms Fyfe's statement to the Tribunal that the claimant is due £250.56, being two weeks' holiday pay, the question arising is whether or not the claimant has met the burden of proof on her to establish that the respondents' liability is at a higher amount.

59. In the present case, for her normal 16 hours per week employment, the claimant's weekly pay was £125.28. That is a matter of joint agreement.

60. Holiday pay should be paid for the time when annual leave is taken, and an employer cannot include an amount of holiday pay in the hourly rate, known as ***"rolled-up holiday pay".*** In the present case, there was no evidence before the Tribunal that the hourly rate of £7.83 included rolled-up holiday pay.

61. There was no evidence led before the Tribunal about the respondents' holiday or leave year. As such, I have taken the leave year as being that starting on the claimant's date of commencement of employment.

62. The claimant accepted that she had a week off in June 2018 when she was away on holiday in Bulgaria. The respondents have not produced any records of the holidays taken by the claimant, so on that basis, I accept that the claimant is due her proportionate allocation of holiday pay, less the 16 hours taken and paid to her for that week's annual leave in June 2018.

63. The payslips produced by the claimant show a payment for all four weeks in June 2018, although none is marked as being holiday pay. Her ET1 claim form does not complain of any unpaid wages, so I am prepared to accept that she received that cash payment of £125.28 on all 4 weeks, including whichever of those 4 weeks was her holiday week.

64. Using the Gov.UK holiday entitlement calculator, based on 16 hours per week, for someone working 2 days per week, starting and leaving part way through a leave year, and using 13 April 2018 as the employment stat date, and 26 December 2018, as the employment end date, those dates being jointly agreed by both parties at this Final Hearing, that computes as a statutory entitlement of **63 hours and 21 minutes** holiday.

65. Subtracting 16 hours from that entitlement, for her week's holiday taken in June 2018, produces a balance outstanding of **47 hours and 21 minutes**, which as a fraction computes as **47.35 hours**, multiplied at **£7.83 per hour**, which produces the sum of **£370.75**, which is the amount of unpaid holiday pay that I have ordered the respondents to pay to the claimant, that being the holiday entitlement accrued but untaken as at date of termination of employment.

Closing Remarks

66. In the clarifications to the Tribunal, at the start of this Final Hearing, Ms Fyfe, acting for the respondents, stated that she had been employed at the club for five years, and she had still not got a contract of employment, and that her role, as bar manager, was to give information weekly to the club's accountant, and the accountant processed the payslips, which were then emailed to the club, and distributed (or not as the claimant's evidence was) to employees, who were then paid in cash.

67. Albeit the respondents are clearly a small employer, employers regardless of size have legal responsibilities in respect of the employment of staff, and it is not clear on the evidence led before me at this Final Hearing that the respondents are complying with their legal responsibilities as an employer. I respectfully suggest to them that they should seek independent, professional

assistance, to advise them on their existing employment practices and procedures, and draw to their attention that free guidance is available online through the Gov.UK website.

68. The fact that the claimant, and it would appear, Ms Fyfe, as bar manager, have never been issued with written contracts of employment, or statutory written particulars of employment, is a matter of particular concern, given the legal obligation on an employer to do so.

69. The respondents will also wish to bear in mind that if an employee complains to a Tribunal, and a Tribunal upholds their complaint, the Tribunal has power, in terms of **Section 38 of the Employment Act 2002**, to make a minimum additional award of two weeks' gross pay, or a maximum award of four weeks' gross pay, in addition to any compensation awarded to a successful claimant in Tribunal proceedings, and that includes the situation where there has been a failure by an employer to fulfil its legal obligations under **Section 1 of the Employment Rights Act 1996** to issue statutory written particulars of employment.

70. Further, arising from Ms Fyfe's evidence in this case, and confirmed by evidence by both the claimant, and Ms Fyfe, and the copy pay slips for the claimant produced to this Tribunal, it would appear that the respondents, on the payslips provided to employees, are not recording holidays taken, and balance remaining.

71. Again, I respectfully suggest to the respondents that they will wish to review their pay practices and procedures, and ensure that accurate holiday, and pay records, are kept for all staff employed by the club.

72. Finally, given both the claimant, and Ms Fyfe, agreed that the claimant did not receive the final week's wages shown on her payslip of 7 January 2019, the sum shown on that final payslip, and replicated through onto the P45 (which, it was jointly agreed at this Final Hearing has the wrong leaving date), I also suggest that the club, through its accountants, may wish to contact HMRC to advise of relevant changes.

73. Further, the claimant would be well advised to make a similar approach to HMRC on her own behalf.

Employment Judge: Ian McPherson

Date of Judgement: 25 June 2019

Entered in Register,

Copied to Parties: 01 July 2019