



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case no: 4100326/2020 (A)**

**Held via telephone conference call on 14 August 2020**

**Employment Judge: W A Meiklejohn**

**Mr W Tabakh**

**Claimant  
Represented by:  
Ms L Campbell  
Solicitor**

**Giza Catering Ltd**

**Respondent  
No appearance and  
no representation**

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

The Judgment of the Employment Tribunal is that the claimant's claims of breach of contract and unlawful deduction of wages succeed, and the respondent is ordered to pay to the claimant the following sums –

- (a) **FOUR HUNDRED AND TWENTY POUNDS AND SEVENTY-THREE PENCE (£420.73)** in respect of damages for breach of contract;
- (b) **TWO THOUSAND NINE HUNDRED AND FORTY-FIVE POUNDS AND TWENTY-FIVE PENCE (£2945.25)** in respect of unlawful deduction of wages;  
and
- (c) **ONE THOUSAND SIX HUNDRED AND EIGHTY-TWO POUNDS AND NINETY-TWO PENCE (£1682.92)** in respect of failure to give a written statement of initial employment particulars.

### **REASONS**

1. This case came before me for a final hearing conducted by telephone on 14 August 2020. Ms Campbell represented the claimant. The respondent had not submitted an ET3 response form and did not participate.

## Claims

2. The claimant alleged that the respondent had failed to pay him for the work he had performed and that this was a breach of contract. The claimant also alleged that the respondent had failed to provide him with a written statement of particulars of employment.

## Applicable law

3. The right of a worker not to suffer unauthorised deductions from wages is set out in section 13(1) of the Employment Rights Act 1996 (“ERA”) –

*“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.”*

4. The right of an employee to minimum notice of dismissal is set out in section 86(1) ERA-

*“The notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more –*

*is not less than one week’s notice if his period of continuous employment is less than two years....”*

5. The circumstances in which an employee is dismissed include those set out in section 95(1)(c) ERA –

*“For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2), only if) –*

*....(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer’s conduct.”*

6. The right of an employee to receive a written statement of particulars of employment is set out in section 1(1) ERA –

*“Where an employee begins employment with an employer, the employer shall give to the employee a written statement of particulars of employment.”*

7. A consequence of an employer failing to comply with section 1(1) ERA is found in section 38(3) of the Employment Act 2002 (“EA”) –

*“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.”*

8. The list of proceedings to which section 38 EA applies is found in Schedule 5 EA and includes unlawful deduction of wages and breach of contract. The “*minimum amount*” is two weeks’ pay and the “*higher amount*” is four weeks’ pay. Section 38(5) EA provides that the duty of the Tribunal to increase the award under section 38(3) EA “*does not apply if there are exceptional circumstances which would make an award or increase....unjust or inequitable*”.

### **Procedural history**

9. The claimant’s ET1 claim form was submitted on 20 January 2020. The date of receipt by ACAS of the claimant’s early conciliation notification was 6 December 2019. The date of issue by ACAS of the claimant’s early conciliation certificate was 21 December 2019.
10. The respondent did not submit an ET3 response form.

11. A preliminary hearing for the purpose of case management took place on 16 July 2020 (before Employment Judge Kemp). In the Note dated 22 July 2020 issued following that hearing it was recorded that the claim was undefended and that there should be a final hearing on remedy. The claimant was ordered to submit a schedule of loss, which he duly did.

### **Evidence**

12. I heard evidence from the claimant.

### **Findings in fact**

13. The claimant was employed by the respondent as a waiter at the Giza restaurant in Dundee from 22 July 2019 until 9 September 2019, a period of 7 weeks. It was anticipated that the claimant would work around 40 hours per week and it was agreed that he would be paid £7.70 per hour.
14. The claimant's actual hours of work varied from week to week. The claimant kept a record of the hours he worked and this was attached to his schedule of loss. This showed that he worked 116 hours in July 2019, 207.5 hours in August 2019 and 59 hours in September 2019. His total of hours worked for the respondent was accordingly 382.5, an average of 54.64 hours per week.
15. The claimant was not paid for these hours worked. The claimant submitted bank statements covering the period of his employment with the respondent which disclosed no payments from the respondent into his bank account. The claimant regarded this as a material breach of contract by the respondent and, because of this, he resigned on 9 September 2019.
16. The gross amount of wages the claimant should have received from the respondent for the period between 22 July and 9 September 2019 was £2945.25. This would have been subject to the deduction of income tax and National Insurance contributions. The claimant's average weekly gross pay was £420.73 (54.64 hours multiplied by £7.70 per hour).
17. The claimant did not receive a written statement of particulars of employment from the respondent. He had not received such a statement when he submitted his ET1 claim form on 20 January 2020.

**Discussion and disposal**

18. I found the claimant to be a credible witness. I accepted that he had worked for the respondent for a period of 7 weeks for the number of hours detailed in his schedule of loss (382.5), for which he had been entitled to be paid at the rate of £7.70 per hour. He had not been paid. The claimant had accordingly suffered an unlawful deduction of wages in the gross amount of £2945.25.
19. The claimant was entitled to treat the respondent's failure to pay the wages to which he was entitled as conduct amounting to a material breach of contract and to terminate his contract of employment without notice. In terms of section 95(1)(c) ERA the claimant had been dismissed by the respondent as at 9 September 2019. As an employee with 7 weeks' service, he had been entitled to one week's notice of termination of employment. He was accordingly entitled to be compensated for one week's loss of earnings in the gross amount of £420.73.
20. The respondent had been in breach of the duty under section 1(1) ERA to provide the claimant with a written statement of particulars of employment when the ET1 was submitted. As the Tribunal was making an award to the claimant, section 38(3) EA was engaged. The respondent had failed to comply with the section 1(1) duty entirely. I was satisfied that an award of the higher amount – in this case 4 weeks' pay at the rate of £420.73 per week, a total of £1682.92 – was appropriate. There were no exceptional circumstances which would make such an award unjust or inequitable.
21. The said gross sums of £2945.25 and £420.73 should be paid by the respondent to the claimant under deduction of the appropriate amounts in respect of income tax and National Insurance contributions.

**Employment Judge:**  
**Date of Judgment:**  
**Date sent to parties:**

**Alexander Meiklejohn**  
**17 August 2020**  
**17 August 2020**