# EMPLOYMENT TRIBUNAL

**Claimant:**

**(1) REBECCA JOHNSON**

**(2) THOMAS FORREST**

**Respondent:**

**PUB SOLUTIONS (SOUTH WEST) LTD**

**Heard at:** **Southampton, by Cloud Video Platform**

**On: 2 September 2020**

**Before:** **Employment Judge Dawson**

**Representation**
Claimants: In person
Respondent: Ms Owen, counsel

# REASONS

**JUDGMENT** having been sent to the parties and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

## Introduction

1. By a claim form presented on 4 February 2019, the claimants brought a number of claims. However, the only claims which survive for determination today are of failure to pay the national minimum wage which has been treated by both parties is being bought as a deduction from wages claim pursuant to section 23 Employment Rights Act 1996 and a claim for holiday pay. Both claimants make identical claims.

2. The respondent had, throughout their period of engagement, treated the claimants as self-employed contractors. Thus there is no contract of employment, only a management agreement between the respondent and each of the claimants, pursuant to which the claimants were to manage a pub known as the Winchester Public House in Taunton. The claimants were paid various sums in respect of their engagement which, in weekly cash settlement sheets, were described as commission but in a spreadsheet provided after proceedings were commenced were described as management fees.

3. Perhaps because the respondent was treating the claimants as self-employed, the respondent has no records of the hours worked by the claimants, whether for the purposes of ensuring compliance with the National Minimum wage Act or for any other purpose.

4. On 5 December 2019, Employment Judge Matthews held that the claimants were employees and workers for the period of their engagement.

**Issues**

5. It is not in dispute that the claimants were not paid sums equivalent to the national minimum wage in respect of the hours that they worked. However there is a dispute as to the number of hours which the claimants worked. That is the primary issue which I must determine. There is also a factual issue as to how much the claimants were actually paid during the period when they were employed by the respondent.

6. The claimants have provided, both in their witness statements and in a schedule of loss, a breakdown of the number of hours that they say they worked. In a helpful list of issues provided by the respondent, the respondent has set out its challenges to those claims.

7. Thus the majority of the issues for me to resolve ones of fact. However there is a legal issue arising out of section 13(3) Employment Rights Act 1996. The respondent argues that I must interpret the words “wages properly payable” to mean that if the claimants were on the pub premises doing what they considered to be work, but it was not reasonable for them to be doing so because the work was not needed or could be done by one person rather than two, I should find that wages were not properly payable to the claimants. Thus some of the cross examination of the claimants was spent on the question of whether it was necessary for there to be two members of staff on site at any particular point.

8. In respect of the claim for holiday pay, whilst the respondent accepts that the claimants are entitled to holiday pay in respect of accrued but undertaken leave at the date of their resignation, the amount depends upon the number of hours which I find they worked. The respondent has provided a calculation being the number of hours I find worked per week multiplied by (21/52 x 5.6).

9. In respect of the remedy aspect of the hearing, there was no dispute as to the calculations once I had made determinations of fact.

**Conduct of the hearing**

10. Ms Johnson did most of the representation of both herself and Mr Forrest. Mr Forrest was content with that although I did ask him at appropriate intervals whether he had anything else he wished to add.

11. In terms of the cross examination of the witnesses, the respondent's counsel proposed that she would not put the same questions to Mr Forrest as she had to Ms Johnson in order to save time. Whilst unnecessary duplication is welcome, I was concerned that Mr Forrest was a claimant in his own right and may wish to give different answers to the ones given by Ms Johnson. In those circumstances I proposed, and all parties agreed, that was Johnson would give evidence first and be cross-examined. When it came to Mr Forrest's evidence I would ask him whether he wished to say anything about the answers which had already been given by Ms Johnson. The respondent could then cross-examine him as it considered appropriate.

12. A timetable was agreed for the conduct of the case to enable the case to finish within the allotted time and all parties stuck to that timetable. I was grateful for their cooperation.

13. At the end of the submissions, counsel for the respondent referred me to the case of *Driver v Air India* 2011 IRLR 992 in response to matters which I had raised during her submissions. I asked the claimants whether they wanted time to read and consider that authority and make further submissions after lunch but they did not wish to do so.

**The law**

14. The Employment Rights Act 1996 contains the following relevant sections

> **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.
>
> …
>
> (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.

(4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker 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)),

**27.— Meaning of "wages" etc.**

(1) In this Part *"wages"* , in relation to a worker, means any sums payable to the worker in connection with his employment, including—

(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise,

(b) statutory sick pay under Part XI of the Social Security Contributions and Benefits Act 1992,

(c) statutory maternity pay under Part XII of that Act,

(ca) [statutory paternity pay][2] under Part 12ZA of that Act,

(cb) statutory adoption pay under Part 12ZB of that Act,

(cc) statutory shared parental pay under Part 12ZC of that Act,

(d) a guarantee payment (under section 28 of this Act),

(e) any payment for time off under Part VI of this Act or section 169 of the Trade Union and Labour Relations (Consolidation) Act 1992 (payment for time off for carrying out trade union duties etc.),

(f) remuneration on suspension on medical grounds under section 64 of this Act and remuneration on suspension on maternity grounds under section 68 of this Act,

(fa) remuneration on ending the supply of an agency worker on maternity grounds under section 68C of this Act,

(g) any sum payable in pursuance of an order for reinstatement or re-engagement under section 113 of this Act,

(h) any sum payable in pursuance of an order for the continuation of a

contract of employment under section 130 of this Act or section 164 of the Trade Union and Labour Relations (Consolidation) Act 1992, and

(j) remuneration under a protective award under section 189 of that Act,

but excluding any payments within subsection (2).

(2) Those payments are—

(a) any payment by way of an advance under an agreement for a loan or by way of an advance of wages (but without prejudice to the application of section 13 to any deduction made from the worker's wages in respect of any such advance),

(b) any payment in respect of expenses incurred by the worker in carrying out his employment,

(c) any payment by way of a pension, allowance or gratuity in connection with the worker's retirement or as compensation for loss of office,

(d) any payment referable to the worker's redundancy, and

(e) any payment to the worker otherwise than in his capacity as a worker.

15. Under section 24(2) of the Act, where a Tribunal makes a declaration that there has been an unlawful deduction from wages it may order the employer to pay such amount as a 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.

16. The National Minimum Wage Act 1998 provides as follows

**17.— Non-compliance: worker entitled to additional remuneration.**

(1) If a worker who qualifies for the national minimum wage is remunerated for any pay reference period by his employer at a rate which is less than the national minimum wage, the worker shall at any time ("the time of determination") be taken to be entitled under this contract to be paid, as additional remuneration in respect of that period, whichever is the higher of—

(a) the amount described in subsection (2) below, and

(b) the amount described in subsection (4) below.

(2) The amount referred to in subsection (1)(a) above is the difference between—

(a) the relevant remuneration received by the worker for the pay

reference period; and

(b) the relevant remuneration which the worker would have received for that period had he been remunerated by the employer at a rate equal to the national minimum wage.

(3) In subsection (2) above, *"relevant remuneration"* means remuneration which falls to be brought into account for the purposes of regulations under section 2 above.

(4) The amount referred to in subsection (1)(b) above is the amount determined by the formula—

( A ) / ( R1 ) ×R2

where—

A is the amount described in subsection (2) above,

R1 is the rate of national minimum wage which was payable in respect of the worker during the pay reference period, and

R2 is the rate of national minimum wage which would have been payable in respect of the worker during that period had the rate payable in respect of him during that period been determined by reference to regulations under section 1 and 3 above in force at the time of determination.

(5) Subsection (1) above ceases to apply to a worker in relation to any pay reference period when he is at any time paid the additional remuneration for that period to which he is at that time entitled under that subsection.

(6) Where any additional remuneration is paid to the worker under this section in relation to the pay reference period but subsection (1) above has not ceased to apply in relation to him, the amounts described in subsections (2) and (4) above shall be regarded as reduced by the amount of that remuneration.

17. Section 28 National Minimum Wage Act 1998 provides

**28 Reversal of burden of proof**

(1) Where in any civil proceedings any question arises as to whether an individual qualifies or qualified at any time for the national minimum wage, it shall be presumed that the individual qualifies or, as the case may be, qualified at that time for the national minimum wage unless the contrary is established.

18. **I** have also considered Driver v. Air India ltd [2011] IRLR 992 and in particular paragraphs 128 to 130

**Findings of Fact**

19. The claimants were employed by the respondent between 16 July 2018 and 10th December 2018

20. As I have indicated there was no contract of employment but only a Management Agreement. There was a separate Management Agreement with each claimant. The terms of that agreement include that "the company hereby grants the licensee permission to operate and administer the public house… and to carry on the business there of a licensed victualler and general caterer".

21. Pursuant to the Management Agreements the claimant were required, amongst other things, to keep the premises, fixtures and fittings, furniture and goods in a clean and tidy condition. The licensee (being one of the claimants) could retain 15% of the net weekly sales with the balance being paid to the company.

22. At subparagraph (d) of the 2nd Schedule to the agreement it is provided that, "you the Manager will be responsible for all members of staff whose rights are covered by Tupee at the commencement of this agreement." (sic)

23. The respondent has kept no records of the claimants' working hours. Neither have the claimants. Except in certain limited respects there is no contemporaneous evidence and the evidence which does exist does not really cast any light on the number of hours worked.

24. I am, therefore, in making my findings of fact, largely reliant upon the evidence given by the claimants themselves; but that evidence has been challenged by the respondent which makes various substantial points about the likely accuracy of the evidence.

25. The claimants accept that the first time they performed any calculation of the hours which they had worked was when they completed their schedule of loss after proceedings had been issued. Whilst I have formed the view that the claimants are being honest in the evidence they give, it is now generally accepted that the recollection of even honest witnesses changes over time and in the light of the arguments they advance within a case. Thus whilst I have no doubt that the claimants have been frank with the tribunal in what they say, I do not consider that, of itself, means that all that they have said is right. I must still exercise judgement in reaching my findings of fact on the balance of probabilities.

26. I find that, generally speaking, the pub which the claimants managed was a quiet pub and I accept the submission of the respondent that, on average, takings were equivalent to 8 pints per hour being pulled. However, within the time over which that average was calculated there would have been busier periods and quieter periods.

27. I accept that between 26 July 2018 and 1 September 2018 the pub operated between the hours of 12 p.m. and 11 p.m. from Sunday to Thursday and 12 p.m. to 1 a.m. on Friday and Saturday - a total of 81 hours per week. I also accept that from 1st September to 9 December 2018 the Sunday hours were

altered so that the pub closed at 6 p.m.. Thus it was open for a total of 77 hours per week.

28. Although the respondent asserts that it received 4 complaints during that period that the pub was not open when it should be, I am not satisfied on the evidence that those complaints were right. I have not been provided with any contemporaneous notes of the complaints or the dates of those complaints. I do not know what hours the complaining person thought the pub should be open at.

29. I accept the claimants' evidence that whilst the pub was open, both of them were present and on site. Various explanations were given for that, including the size of the bar and the need for there to be 2 people on site for health and safety reasons. The respondent argues that was unnecessary and that bigger pubs are taking more money and are operational with only one member of staff. However the respondent's witness also accepted that two other managers who had operated the claimants pub, being Lee and Wayne, had people to assist them in running it. I find that both claimants were doing activities which could properly be described as running and operating the pub while it was open, even if it was only waiting for customers who wanted to served.

30. I also accept that the claimants took no holidays during that period. I gained the impression, and find, that the claimants considered that they were running the business together, they were attempting to "make a go of it" in challenging circumstances. Subject to the findings I make below, I find that the claimants did most jobs in the pub together, whether unnecessarily or not. I do not find that either one of them would have taken a substantial break from the pub without the other, at least not in the initial period of operation up to December 2018. The evidence of Ms Johnson was compelling in this respect when she said, having been challenged on her evidence that she took no weekends off, no holidays and took no breaks; "that's why we resigned exhausted, that's why we wanted to reduce Sunday opening."

31. The claimants asserted that during the period that they were on the premises they took no breaks, whether for lunch or otherwise. However in her cross examination Ms Johnson modified her evidence in this respect to say that lunch was eaten in the kitchen while it was operational or in a store room or at the bar if the pub was quiet.

32. I think it unlikely that neither claimant took any break for lunch or otherwise for the whole time in which the pub was operational, particularly as 2 of them were present. I accept that looking back now, they genuinely believe they did not take breaks, but I think it more likely than not that they did. I think it likely that each claimant would have taken 30 minutes break per day equating to 3.5 hours per week.

33. In addition during the period between 16 July and 13 October 2018, the claimants assert that outside of opening hours they each did one hour per day cleaning amounting to 7 hours per week. In her evidence Ms Johnson maintained forcefully that would be an under-estimate because of the need to spend an hour each evening sorting out the bar after the pub closed and a

couple of hours each morning hoovering, mopping etc. It was asserted by the respondent that cleaning could have been done during operational hours, but even Ms Ing, for the respondent, accepted in cross examination that mopping and hoovering could not be done while the pub was open. There would inevitably be some cleaning which could not be done while the pub was operational and a need to set up and pack down the pub outside of opening hours. On the other hand, I consider it likely that the claimants did more cleaning during pub opening hours than they now recollect; they would have used the quiet spells to do what they could. Nevertheless it is likely that there would be around 1 hours cleaning to be done after the pub had closed and before it opened in the morning and therefore I consider it reasonable for the claimants to claim 7 hours per week each in that respect.

34. I reject the argument of the respondents that I should find that no cleaning was done because of the site visit sheets to which I have been referred. The site visit on 29 August 2018 shows that the cleanliness of the Bar was regarded as clean and tidiness is regarded as "very tidy"(page 61). The inspection on 19th September 2018 (page 83) shows the bar as "good" in terms of both cleanliness and tidiness. The site visit of 4 October 2018 shows things as "okay" in terms of cleanliness and "good" in terms of tidiness.

35. After 15 October 2018 the claimants claim nothing in respect of cleaning. They say that the fall in seasonal trade meant that much of the cleaning was able to be done during opening hours. I am willing to accept that evidence.

36. In addition for the period between 16 July 2018 and 30 October 2018 the claimants assert that they spent 4 hours a week each on other matters including the delivery of drinks, the purchasing of dry/food stock (which required travelling to the cash-and-carry), supervising the collection of money from the gambling machines by a company called Alan Davies (2 hours per week) line cleaning and weekly admin. After the kitchen had closed, on 13 October 2018, it was only necessary to make monthly trips to the local cash-and-carry and for the period after 9 December 2018 only one hour is claimed for these additional tasks.

37. Again, whilst I have no doubt that the claimants have been as honest as they can be looking back, I have considerable doubt whether, for all of those activities both claimants were engaged all of the time and I also have some doubt as to how accurate the claimant's recollection can be as the amount of time spent. It is likely that some time was spent working on those matters during pub opening times given how quiet the pub was.

38. Acknowledging that I am engaging in a very imprecise science, I find that it is likely that each claimant spent, on average, one hour per week on those matters and I make that finding in respect of the entire period that the claimants were engaged.

39. In addition the claimant's claim that each spent 3 hours when a stock take was carried out and there were 3 stock takes during their time at the Winchester Arms. They said the stock takes started at 9 a.m. and the stock taker would be present until past 12 noon.

40. I have no reason to disbelieve the claimants that the stock takes started at 9 a.m. and continued after 12 noon. I also accept the claimants' evidence that they both were present during the stock take. I find that they were both doing work during that period (in the sense that they were both engaged in supervising the stock take). I do not find that it was necessary for both of them to be present. In my judgment only one person needed to be present during the stock take and it was reasonable for one person to be there. I will return to the consequences of this finding when I set out my conclusions.

41. The claimants also claim sums in respect of a period when builders were on site. They each claim 10 hours work for earlier opening to allow the builders in and supervise them. I think it unlikely that both claimants were present to open early for the workmen and a close analysis of the claimant's witness statement shows that is not what they are asserting. Page 5 of Ms Johnson's witness statement states that at least one of them was on site during the time when the work was taking place. She asserts that the workmen arrived at 8 a.m. each morning adding at least 20 hours to the working week during that period. The difficulty with this claim is that there really is very little detail as to when the workmen arrived or when they left. Whilst I am satisfied that workmen were on site, the lack of evidence in relation to this claim means that I cannot be sufficiently satisfied as to any sums which should be awarded to the claimants in this respect.

42. That leaves the question of how much the claimants were paid.

43. As I have set out above, on a weekly basis the claimants were paid an amount described as commission or a management fee.

44. There is evidence of all of the commission which was paid, for every week up to the week commencing 1 November 2018 (pages 100 to 117). The parties have agreed how much that was. However sheets are missing for the weeks commencing 18th November, 25th November and 2 December 2018. Each party blames the other for that failure.

45. The evidence of Mrs Ing was that for those 3 weeks a sum of £3000 was banked and when that is divided by 3 and certain sums are deducted, the "wet take" should be regarded as being £833 per week- which would give rise to a commission of £104 per week (see page 118). That evidence was adduced in answer to my questions after she had been cross examined, but after I had asked my questions I gave Ms Johnson the opportunity to ask more questions and she did not challenge it. The claimants have put forward no counter evidence. In those circumstances, I accept that the claimants received the sum of £104 for each of those weeks and, therefore, that they were paid a total of £6372.73 in respect of the hours worked at the pub.

**Conclusions**

46. I have found that during the hours when the pub was open both claimants were on site and were doing activities which could properly be described as work.

47. The assertion by the respondents that the work of one claimant was unnecessary has very little evidential basis beyond a bald assertion that the pub was quiet and, therefore, one person could have done the work. Without significantly more evidence I do not know how I could engage in an assessment of whether the respondent's case is accurate or not. I have been provided with no evidence as to comparable pubs and the number of staff they engage. It is not clear to me that one member of staff would be able to supervise the whole of the bar area in this pub, particularly given that it had an outside area and a function room. It is likely that if meals were ordered somebody would need to be in the kitchen preparing the meal while somebody would be at the bar.

48. At this point I must consider the effect of section 28 National Minimum Wage Act 1998. Counsel for the respondent accepts that where I am satisfied that a person was working I must presume that they qualified for the national minimum wage unless the contrary is established. I am satisfied that both claimants were working during the period when the pub was operational (subject the breaks which I found they would have taken). I am not satisfied that one person alone could have run the pub. It has not been established that they are not entitled to the national minimum wage in respect of those hours.

49. I find that both claimants are entitled to be paid the national minimum wage for the time when the pub was operational, subject to the need to deduct 3.5 hours per claimant per week for breaks I find they would have taken.

50. I also find that each claimant is entitled to be paid for 7 additional hours per week in respect of cleaning up to 15 October 2018.

51. I also find that each claimant is entitled to pay for one hour per week doing other activities for the period up to them leaving.

52. Having found that both claimants were present during stock takes but that it was not necessary for them both to be there, since one person could easily have supervised the stock take, the submission for the respondent that I must consider what wages were properly payable to the claimants comes into clear focus. Counsel for the respondent was unable to cite any authority directly on point but did refer me to *Driver v. Air India Ltd* [2011] IRLR 992. It addresses the question of whether overtime should be paid in respect of work done in the context of extra work being done unilaterally by an employee and whether that work was at the express or implied request of the employer.

53. I consider that it is reasonable for a manager of a pub to be present during a stock take as part of their job and, therefore, that their presence is at the implied request of the employer. The more difficult question is whether it can be said that the presence of both managers was at the implied request of their employer.

54. There is no contract of employment setting out the manager's job description in this case, perhaps for obvious reasons. Having found that both employees were engaged in the activities of their employer when supervising the stock take, I find that it is necessary for them to be paid for that work. If that work was unnecessary that may be a management issue, i.e. the claimants might be told

that they should not both be present, but it seems to me that is not a reason to say that wages were not properly payable to them for the hours spent supervising the stock take.

55. Thus I find that the claimants should both be paid for the time spent doing the stock take, which is 3 hours each for 3 stock takes.

56. Because of the paucity of the evidence, I am not able to find that the claimants are entitled to be paid for any time spent supervising the builders in the sense that I am unable to quantify the amount of time they would have spent doing so.

57. The sums due to the claimants must be calculated in accordance with section 17 National Minimum Wage Act.

58. Given that the claimants took no holiday during the period they were at work they are entitled to be paid for the holiday which would have accrued during that period but which was not taken.

59. Given that the claimant had not been provided with a contract of employment at the date proceedings commenced, I must award either 2 weeks' or 4 weeks' pay pursuant to section 38 Employment Act 2002. The claimant were given a contract at the start of their employment with the respondents, however given that the respondent had wrongly characterised the relationship as being one of self-employment, the wrong contract was given. I do not consider this was a case where an employer has deliberately behaved badly towards its employees and, in my judgment, the appropriate award is one of 2 weeks' pay.

60. Following the delivery of the oral judgment set out above Ms Owen, to whose submissions and industry I pay tribute, calculated the sums due to the claimants. Those figures were then discussed and agreed by the all parties as follows.

**Minimum Wage Claim**

Hours Worked

61. Opening hours:

| | |
|---|---|
| 7 weeks at (81 – 3.5) hours - 77.5 hours x 7 = | 542.5 hours |
| 14 weeks at (77 – 3.5) hours- 73.5 hours x 14= | 1029 hours |

62. Cleaning:

| | |
|---|---|
| 16.07.18 – 13.10.18 – 13 weeks at 7 hour per week= | 91 hours |

63. Additional:

| | |
|---|---|
| 21 weeks at 1 hour per week= | 21 hours |

64. Stock take:

| | |
|---|---|
| 9 hours each= | 9 hours |
| **65. Sub-total per claimant** | **1692.5 hours** |

Calculation as per s17 National Minimum Wage Act

66. Amount each claimant received = £6372.73/2= £3186.37

67. Amount each claimant should have earned = 1692.50 x £7.83 = £13252.28

68. Difference = £10,065.91.

69. (10,065.91/£7.83) x £8.72 = £11, 210.06

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**Holiday Entitlement**

70. Average hours per week based on a total of 1692.5 hours over 21 weeks =80.60 hours per week

71. The calculation for accrued holiday is 80.60 x (21/52 x5.6) = 182.28 hours

72. 182.28 hours x £7.83= £1427.25

**S38 employment Act 2002**

73. Hours worked at date of termination- 73.5.

74. 2 weeks pay awarded.

*75.* 2 x 73.5 x £7.83 = £1151.01

Employment Judge Dawson

Dated: 18 September 2020

Reasons sent to Parties: 28 September 2020

FOR THE TRIBUNAL OFFICE