



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Sean Jenkins

**Respondent:** Hunt Hospitality Recruitment Limited

**Heard at:** London South Employment Tribunal (by CVP)

**On:** 4 December 2020

**Before:** Employment Judge Rahman sitting alone

**Representation**

Claimant: In person

Respondent: Represented by Ms K Zakrewska (legal consultant)

## JUDGMENT

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### **Introduction**

1. This was a remote hearing conducted by CVP.
2. The Claimant's complaint that there was an unauthorised deduction from his wages is well founded. The Respondent unlawfully deducted the sum of £2,353.84.
3. The Claimant's claim for holiday pay is successful and he is entitled to a sum of £84.63 representing 3 days' of holiday pay. This is calculated net of tax.
4. The Tribunal makes a declaration that the Claimant was not provided with a written statement of his terms pursuant to section 1 of the Employment Rights Act 1996 but considers no compensation was payable as the Claimant had been made aware of the terms of his employment and therefore suffered no detriment.

### **Claims and Issues**

5. By claim form presented on 9 December 2019 the Claimant has brought claims for

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an unauthorised deductions from his wages. The claim relates to non-payment of his final wages and accrued but untaken annual leave entitlement (i.e. holiday pay). An application to amend the claim form was subsequently made to include constructive unfair dismissal, injury to feelings and a claim for failing to provide a section 1 ERA written statement. This application was considered by the Tribunal at a hearing on 17 September 2020. The Tribunal allowed the amendment so the Claimant could bring a claim for failing to provide a section 1 ERA written statement but refused the remaining amendments.

6. At the outset of this hearing the issues were agreed at the outset and confirmed as follows:
  - a. Who is the correct Respondent. Although this was identified as agreed in the last order it was clear there were three different options for the Respondent, namely -
    - i. The ACAS certificate identified Hunt Hospitality Recruitment Limited as the Respondent
    - ii. The payslips both parties relied upon identified Alexander Lucey as the Claimant's employer
    - iii. The Claim Form identified Alexander Hunt as the Respondent.

At this hearing each party was asked for their position as to who was the correct respondent. The Claimant sought to recover against Hunt Hospitality Limited who he identified as his employer. Ms Zakrewska took instructions and confirmed it was agreed that the correct respondent and employer of the Claimant was Hunt Hospitality Recruitment Limited and the Tribunal therefore directed that the correct Respondent be named accordingly.

- b. Did the Respondent make unauthorised deductions from the Claimant's wages. Were the deductions required or authorised by virtue of a relevant provision of the Claimant's contract or had the Claimant previously signified in writing his agreement or consent to the making of deductions. The Respondent relied on clauses in an employment contract dated 10 October 2018 that the Claimant states he had never been given or seen before these proceedings.
- c. If the Tribunal makes a declaration the Claimant suffered unauthorised deductions from his wages is it appropriate to compensate him for any financial loss which he has sustained that is attributable to the matter complained of.
- d. The Claimant claims for 10 days' holiday pay. The Respondent asserts there was no holiday entitlement outstanding.
- e. Did the Respondent fail to provide the Claimant with a statement of terms of his employment.

**Procedure**

7. The Tribunal heard evidence from the Claimant and Mr Hunt on behalf of the Respondent.
8. At the start of the hearing there were additional witnesses that attended to support

the case of the Respondent – namely Paul Wilkinson, Jack Conway, Amy Geogham and George Alderman.

9. The Tribunal was informed that Dan Walsh, who had provided an unsigned statement that was contained in the bundle, was unable to attend although he had been able to attend earlier in the morning and it had been thought the hearing would be heard in the morning. In the circumstances, neither party sought to postpone the hearing so that Mr Walsh could not attend. This was a reasonable position for each party to take, given the narrow remit that Mr Walsh's evidence was likely to cover, given the content of the draft statement.
10. The other four witnesses were character references for the Respondent whose evidence was not challenged by the Claimant. In the circumstances their evidence was accepted without challenge and there was no need for any of the witnesses, save for Mr Hunt, to provide oral evidence.
11. There was a Tribunal bundle of some 305 pages that was prepared by the Respondent. The Tribunal also had the benefit of the Tribunal file. At the hearing the following additional documents were provided: witness statements from the parties and from the witnesses identified above. Each party had the opportunity to consider the same before the hearing resumed.
12. The hearing was conducted by CVP. Breaks were offered during the hearing. In particular there was a significant break after evidence and submissions to consider updating papers. This was after each party confirmed what documents were missing and arrangements were made for any outstanding documents to be provided to each party.

### **Fact-Finding**

13. The Claimant worked as a recruitment consultant for the Respondent from 20 July 2018 until summer of 2019. The Respondent is Hunt Hospitality Recruitment Company which also traded as Alexander Lucey. Alexander Hunt is a director who worked at the Respondent company for 9 years.
14. There was a dispute as when the Claimant stopped working for the Respondent. The Claimant's case is that he worked until 1 August 2019; the Respondent's case is that he did not work after 19 July 2019.
15. The claim for unauthorised deductions was brought on 9 December 2019.
16. The case on the part of the Respondent is that they are authorised to make the deductions of the salary as a) the Claimant did not work after 19 July 2019 until 1 August 2019 and b) as they say it was a performance related salary and he poorly performed and therefore he was not owed additional monies. They deny a holiday entitlement saying he took all his holidays before he left and they further oppose a remedy under section 1 ERA.

### **Law**

17. Section 13(1) of the Employment Rights Act 1996 enshrines the right not to suffer an

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unauthorised deduction from wages; section 23 gives a worker a right of complaint to the Employment Tribunal. Section 230(3) sets out the definition of a 'worker' which includes a person who works under an employment contract.

18. A claim for holiday pay can be brought as a breach of contract claim, a complaint of unauthorised deduction of wages under the ERA (WA) or a complaint under the Working Time Regulations 1998 (WTR). Under the Regulations workers are entitled to 5.6 weeks' paid leave per year (pro rata for part-time employees). In this case this appears not to be disputed: the issue is a factual issue of whether the Claimant took up all his holiday entitlement when he left the Respondent.
19. Section 1 of the ERA 1996 sets out the minimum information that an employer must give an employee in relation to their working terms and conditions.

**Conclusions**

20. The Tribunal has considered all the material provided for the hearing and listened carefully to the evidence of the Claimant and Mr Hunt.
21. The Tribunal makes the following findings of fact.
22. There has clearly been an unhappy breakdown in relations between Mr Hunt and Mr Jenkins who at one point enjoyed a good relationship. The tension was tangible during the hearing.
23. For the purposes of this hearing the Tribunal had to consider at the outset whether the Claimant was an employee of the Respondent. It was clear he was. The Respondent did not challenge this and in fact provided a contract at p. 33 of the bundle that set out the Claimant was an employee; moreover he provided payslips that are set out in the bundle.
24. It is a curious feature that there is a stark dispute of fact as to certain matters such as:
  - (i) Was there a contract signed between the parties as set out at page 33. There is an electronic signature on each page of that contract that purports to be that of the Claimant, yet the Claimant denies having seen the contract before these proceedings.
  - (ii) Was there an agreement between the parties at an appraisal meeting in July 2019 that the Claimant's salary was performance-related so that loss of earnings was deducted from the Claimant's monthly wage: the form at page 102 appears to evidence this but the Claimant denies the last three bullet points (which include the apparent agreement) that are set out at p.106 were in fact ever raised at that meeting.
  - (iii) Whether the Claimant worked from July 19<sup>th</sup> to August 1<sup>st</sup> 2019.
  - (iv) Holiday pay – whether the Claimant had taken up his holiday entitlement at the time of his departure.

25. The Tribunal considered the character witness evidence that was provided in support of the Respondent and weighed that in the balance.
26. However having heard from the Claimant and Mr Hunt and considering all the material before it, the Tribunal on balance preferred the evidence of Mr Jenkins where there was a dispute of fact. On each of the matters set out at (24) above the Tribunal preferred the evidence of the Claimant as being more reliable. The reasons for that assessment are set out below.
27. In terms of the contract – if there had been a contract as the Respondent contends, it begs the question as to why there was reference to a further contract to be signed in correspondence when the Claimant provided his resignation. Both the Claimant and Mr Hunt agreed this referred to a contract that would be retrospective – yet why would there need to be one if there was already was one in existence from October 2018.
28. Even if it was to be a contract setting out new terms, the Tribunal is still not satisfied on the evidence it heard that the Claimant knew of the contract – this was, according to the Respondent, a contract that had been electronically signed and uploaded to Dropbox – yet there was no electronic evidence of passage to or from the Claimant as could be quite easily evidenced if indeed the Claimant did know of this. There were no email trails of acceptance as one may expect.
29. In respect of the alleged agreement as to deductions of losses from the Claimant's salary it is notable that there is no evidence of such an agreement in the employment contract on which the Respondent seeks to rely. This is a crucial element – it governs whether the Claimant has a basic salary or his salary is wholly reliant of his performance. It is not credible that such a term would not have been in the contract of employment if it was something that had been agreed; or set out in writing as an agreement between the parties. The Tribunal is therefore not satisfied that there was any such agreement that the Claimant's salary was performance-related.
30. The Tribunal heard from the Claimant as to the dates he states he worked in July and August 2019. The dates are specific and are not an inordinate or exaggerated length of time. The Claimant's evidence had a ring of truth and was preferred to that of Mr Hunt.
31. The Respondent's assertion that the Claimant had used up all his holiday pay was undermined by the letter at page 125 which attaches a blank holiday form and refers to a clarification of the holiday accrued. However the Tribunal notes that the Claimant originally sought 3 days of holiday pay (as set out at page 111) and finds that this is the accurate entitlement.
32. The Tribunal is satisfied that the Claimant was not provided with terms and conditions of his employment but that he was substantially aware of those terms; he is therefore not entitled to compensation for a breach of the duty to provide a statement under section 1 of the ERA.
33. For all the reasons above the Respondent was not permitted to make a deduction from the Claimant's salary and the following order is made.

**Order**

The Respondent is ordered to pay the Claimant

- (1) £2,353.84 for unauthorised deductions from wages under section 13 of the Employment Rights Act 1996. This is a gross sum. The Claimant is to account for any deductions for tax or national insurance.
- (2) A sum of £84.63 for 3 days of holiday pay; this is net of tax.

**EMPLOYMENT JUDGE RAHMAN  
4 December 2020**