



# EMPLOYMENT TRIBUNALS

## Claimant

Mr A Kaley

v

## Respondent

Anglo Industrial Holdings Ltd

**Heard at:** Watford

**On:** 4 January 2021

**Before:** Employment Judge Anderson

## Appearances

**For the Claimant:** In Person

**For the Respondent:** Mr H Griffiths - Director

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by Cloud Video Platform (V). A face to face hearing was not held because it was not practicable during the current pandemic and all issues could be determined in a remote hearing.

## JUDGMENT

The judgment of the Tribunal is that:

1. The Claimant's claim for holiday pay and unpaid wages is dismissed.
2. The employer's contract claim is dismissed

## REASONS

### Claims

1. The Claimant claimed unpaid wages and breach of contract for holiday pay and sick pay. He also claimed an award for failure to provide a statement of terms and conditions. He claimed that holiday pay, which was paid at his standard weekly rate for his contracted hours, should have included an element for overtime, which he regularly worked. He claimed that he should have been paid his full wage for a week of sickness absence from 19 April 2019 to 25 April 2019.

2. The Respondent denied all the above claims, referring to company policy that only statutory sick pay was paid in respect of sickness absence, as evidenced by the standard employment contract, denying that the Claimant had worked regular overtime or that there was an agreement that any such payments would be included in holiday pay, and further noting that the Claimant had been provided with a document setting out key terms and conditions of his employment.
3. The Respondent brought a counter claim by way of a letter dated 7 July 2020 claiming overpayment in relation to a sickness absence in August 2018.

**Preliminary Issues:**

4. The claim was brought against Mr Harvey Griffiths personally. He was the owner of the business that employed the Claimant, Elder Sheet Metal. Elder Sheet Metal was taken over by Anglo Industrial Holdings Ltd after the Claimant's employment ended. By an order dated 1 May 2020, Anglo Industrial Holdings Ltd replaced Harvey Griffiths as the Respondent to these proceedings.

**Issues:**

The issues to be decided were as follows:

5. Did the payment of the Claimant's full weekly wage in respect of a sickness absence in August 2018 constitute a departure from the standard terms and conditions of employment, or a change in the contract terms, that the Claimant could rely on during further sickness absences?
6. Was the overtime carried out by the Claimant sufficiently regular and paid over a sufficient period to constitute part of his normal weekly remuneration.

**Documents:**

7. The parties provided separate bundles of documents. The Claimant provided a witness statement. The Respondent provided signed witness statements from two employees but did not call the witnesses.

**Findings of Fact:**

8. The Claimant was employed by Elder Sheet Metal from 2 October 2017 to 30 April 2019 as a welder.
9. On commencing employment, the Claimant was provided with a document entitled 'Draft Key Terms of Employment' dated 1 October 2017. Clause 12 of that document sets out that a contract of employment will follow on formal offer. No contract of employment was provided to the Claimant during his employment with Elder Sheet Metal.

10. The Respondent's standard employment contract, a blank copy of which was provided to the tribunal, sets out at clause 7 that statutory sick pay is payable for absences of four or more days, also that any absence paid at the full rate will be at the absolute discretion of the Managing Director and is not a contractual entitlement.
11. In August 2018 the Claimant was absent on sick leave for one week. He was paid his full weekly wage for that week. The payment was the result of an oversight by the Respondent.
12. The Claimant worked irregular overtime. Over the 20 months of his employment he received overtime payments in respect of ten of those months. He received no overtime payment for the months January to April 2019.
13. The Claimant was absent on sick leave for the period 19 April 2019 to 25 April 2019 and received statutory sick pay for that period.

#### **Law**

14. Section 13(1) of the Employment Rights Act 1996 (ERA) provides that an employer shall not make a deduction from wages of a worker employed by him unless 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 the worker has previously signified in writing his agreement or consent to the making of the deduction. An employee has a right to complain to an Employment Tribunal of an unauthorised deduction from wages pursuant to Section 23 ERA. The definition of "wages" in section 27 ERA includes holiday pay.
15. In *Dudley Metropolitan Borough Council v Willetts and others* [2017] IRLR 870 the EAT held that voluntary overtime pay, out-of-hours standby payments and call-out payments should be included in pay for the four weeks' leave under regulation 13 of the Working Time Regulations 1998 if they are sufficiently regular to amount to normal remuneration. This was so even though there was no obligation for workers to accept the offer of overtime.
16. If an employee is not provided with written particulars of employment an award of two or four weeks' pay must be made under s38 Employment Act 2002, where the tribunal finds in his favour on the substantive claim.

#### **Conclusion**

17. Holiday Pay – On the Claimant's admission overtime was paid in half of the months he was employed, and no overtime was paid during the period January to April 2019. An overtime payment was received in May (for work carried out in April). I find that the overtime payments received by the Claimant were not sufficiently regular or paid over a sufficient period to

constitute part of the Claimant's normal weekly remuneration, for the purposes of calculating holiday pay. The claim for holiday pay is dismissed.

18. Sick Pay - I find that the payment made to the Claimant in August 2018 for the week in which he was on sickness absence was made in error by the Respondent. It was not intended to set a precedent for future sickness absences and nor did it. The claim for unpaid wages for the week 19 April 2019 to 25 April 2019 is dismissed.
19. Statement of terms and conditions– as the Claimant's claim has failed no award can be made under s38 Employment Act 2002.
20. The Respondent stated in the hearing and provided a letter in evidence that he noted the error in January 2019 and told the Claimant that the relevant amount would be deducted from his pay for January. He did not do so nor did he return to the matter during the remainder of the Claimant's employment or in calculating his final pay. I therefore find that the Respondent made the decision not to pursue that overpayment. The Respondent's counterclaim is dismissed.

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Employment Judge Anderson

Date: 16 January 2020

Sent to the parties on: 11 February 2021

For the Tribunal Office