



## EMPLOYMENT TRIBUNALS

**Claimant**  
Mr Garry Sexton

v

**Respondent**  
Thomas Square Limited

### Judgment

**Heard at:** Southampton (CVP)

**On:** 12 January 2021

**Before:** Employment Judge Rayner

#### Appearances

**For the Claimant:** In person

**For the Respondent:** Did not attend

1. This was a remote hearing with the claimant attending by video link. It was held in public with the Judge sitting in open court in accordance with the Employment Tribunal Rules. It was conducted in that manner because the parties consented and a face to face hearing was not possible in light of the restrictions imposed by the Health Protection (Coronavirus, Restrictions) (England) (Amendment) (No. 2) Regulations 2020.
2. The respondent has made an unlawful deduction from the claimant's wages, by non-payment of wages, of **£3060.00**.
3. The respondent has wrongfully dismissed the claimant without notice.
4. The respondent had made an unlawful deduction from wages in respect of 60.9 hours unpaid holiday pay of **£548.00**.
5. The respondent will therefore pay the claimant the total sum of **£3914** calculated as follows:

Unlawful deduction from wages	<b>£3060.00</b>
1 weeks' notice pay	<b>£306.00</b>
60.9 hours unpaid holiday pay	<b>£548.00</b>
<b><u>Total payable to the claimant by the respondent</u></b>	<b><u>£3914</u></b>

## REASONS

1. By a claim dated 13 July 2020 the claimant brought the claim for loss of earnings by way of an unlawful deduction from wages; a claim in respect of holiday pay accrued but not paid on termination. Also as an unlawful deduction from wages and a claim in respect of notice pay.
2. The claim was filed on the respondent but no response was received therefore on 23 September 2020, a letter was sent to the respondent in accordance with rule 21 of the employment tribunal (Constitution and Rules of Procedure) Regulations 2013 stating that, no response having been received judgement might now be entered and that whilst the respondent was entitled to receive notice of hearing, they would only be able to take part in any hearing extent allowed by the judge.
3. In this case a hearing to determine both liability and remedy was listed on 12 January 2021 at 10 am. Notice of hearing was sent to both parties.
4. The hearing took place on 12 January 2021 and judgement was given for the claimant. The judgement was sent to the parties on 27 January 2021.
5. Following the judgement being sent out the employment tribunal received a request for written reasons of the judgement from somebody called Sophie would, on 6 February 2021. The individual did not identify who she was or whether she was making an application on behalf of the claimant or the respondent or some other person. There was no record of her on the court file and therefore the employment tribunal administrators asked her for clarification.
6. On 11 February 2021 she replied stating that she was the personal assistant of Mr Parker, who is the respondent, and was applying for written reasons on his behalf.

### The hearing

7. Prior to hearing the claimant produced a bundle of relevant documents and a witness statement which he filed with the court.
8. Mr Sexton attended at the hearing and gave sworn evidence on his own behalf.
9. I made the following findings of fact
10. Mr Sexton started work for the respondent on 20 January 2020 as a chef.

11. On frequent occasions the claimant was not paid on time and despite making a number of requests during the course of his employment for payslips and a contract of employment, he was not provided with either.
12. The claimant worked on average 34 hours a week and was paid at a rate of £9 an hour.
13. In March 2020 at the start of the coronavirus pandemic, all restaurants including the one at which the claimant worked were required by law to close to the public. The claimant was told that the respondent was planning to set up a takeaway business in order to keep things running, and was also told that the respondent might be making applications for furlough pay in respect of some of his employees.
14. The claimant understood that he would be expected to continue working as needed in the takeaway side of the business and also understood that he may well be furloughed and receive furlough pay.
15. In fact, the claimant was not told anything further about furlough pay and was not in fact put on furlough.
16. The respondent did set up a takeaway business and Mr Sexton did do some work in respect of that business.
17. The claimant then had some holiday to take and left the Isle of Wight to visit his family. During this period of time the landlord of his rented accommodation agreed that he would not charge Mr Sexton rent.
18. When Mr Sexton returned from his holiday, he found that the accommodation was no longer available to him. He therefore sought alternative accommodation. He kept his employer informed and was told at that point that there were no shifts available for him in the takeaway business, and that there was no furlough being applied for on his behalf.
19. By the 20 April 2020, the position was that although the claimant remained employed by the respondent, he had not been placed on furlough because the respondent had not put him forward for furlough scheme and he had not been allocated any shifts to work in the takeaway business that the respondent was running instead of the restaurant.
20. At no time was the claimant dismissed by the respondent.
21. The claimant was concerned about money as he had not been paid and he was unsure what his situation was regarding his employment.
22. He therefore contacted his employer and his employers' representative on several occasions to try to find out what the respondent intended to do about

his employment and about paying him. He remained available for work, but no work was allocated to him.

23. The claimant made it clear to the employer and the employers representative, that if he was being dismissed, then he expected to receive his unpaid wages, his holiday pay and his notice pay .
24. His employer and his employers' representative replied to the claimant but did not make the position clear. None of the documents I have seen indicate that the respondent did in fact terminate the claimant's employment. What the respondent did do was tell the claimant that there was no money.
25. The claimant continued to try to obtain the money he considered he was owed and reminded the respondent that whilst he remained employed he was entitled to be paid.
26. Eventually the claimant considered that he was entitled to treat himself as having been dismissed because the respondent had failed to pay his wages and had failed to pay his holiday pay and had failed to allocate in any work.
27. The claimant has not received notice pay holiday pay or payment in respect of his last months of employment.
28. There has been no variation of the claimant's contract and he is therefore entitled to receive payment the period that he was employed.
29. From the evidence I have heard and from the documents I have been referred to I have determined that the claimant remained employed for a period of 10 weeks until 29 May 2020.
30. I find that in the absence of a written contract, he was entitled to the statutory minimum of one weeks- notice and that he is therefore entitled to one weeks notice pay.
31. The claimant told me and I accept that during the course of his employment he had never been paid for any holiday. During the course of his employment I have calculated that he was entitled to 16.9 hours holiday paid at £9 per hour. This was the figure the claimant had set out in his ET1.
32. The claimant had not been paid for a period of 10 weeks. There was no agreement between him and the employer for the respondent to cease paying him and therefore the respondent has made an unlawful deduction from his wages in respect of that pay.

**The relevant legal principles in this case are as follows**

33. Section 13 of the Employment Rights Act 1996 provides that 'An employer shall not make a deduction from wages of a worker employed by him.' this prohibition

does not include deductions authorised by statute or contract, or where the worker has previously agreed in writing to the making of the deduction — S.13(1)(a) and (b).

34. If what was paid by the employer to the worker on the relevant occasion was less than the amount properly payable (applying common law and contractual principles), then there has been a deduction for the purposes of S.13S. 13(3) specifically provides that wages which are properly payable but not paid are to be treated as a deduction. There is no valid distinction to be drawn between a deduction from a sum due and non-payment of that sum.
35. I must therefore decide on the ordinary principles of common law and contract, the total amount of wages that was properly payable to the worker on the relevant occasion. Of course, if an employer is contractually entitled to reduce a worker's wages — either because there has been an agreed variation of contract or because there is a flexibility clause giving the employer the right to do so — the wages 'properly payable' will be the reduced wages due under the varied contract or under the flexibility clause (and provided that this is the amount the worker receives, there will have been no unlawful deduction from wages).

### **36. Holiday pay**

37. The Working Time Regulations 1998 provide that all workers, including young workers, are entitled to *four weeks' basic paid annual leave* in each leave year — Regs 13(1) and 16(1).
38. The right to payment in respect of that leave is dealt with in Reg 16 Which provides that a worker has the right to be paid during the minimum holiday entitlement conferred by Regs 13 and 13A — Reg 16, and receive a payment in lieu of unused annual leave on the termination of his or her employment — Reg 14.

### **39. Conclusions**

40. I conclude that by failing to pay the claimant his proper wages during a period when no work was allocated and by failing to pay the claimant whilst the claimant was absent on holiday, that the respondent has made unlawful deductions from the claimant's wages.
41. There was no agreement between the parties which allowed the respondent to cease paying the claimant and no agreement or statutory provision which allowed the respondent to make the deductions.
42. I conclude that the claimant was either dismissed or was entitled to treat himself as being dismissed following the non-payment of wages, the non-payment of holiday pay and a failure by the respondent to indicate when or if the claimant would be paid.

43. In the absence of a contract of employment and in the absence of wages slips, I conclude that the claimant was entitled to be paid one weeks notice pay in lieu of notice, and that he is entitled to be paid at the rate of £9 per hour for the periods of time that he was on leave and for untaken leave at termination of his contract.

44. I therefore conclude that the claimant is entitled to be paid by the respondent. The amounts set out in his claim form and as itemised beginning of judgement.

**Employment Judge Rayner**

Southampton

Date: 22 February 2021

Sent to the parties: 25 February 2021

FOR THE TRIBUNAL OFFICE