



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4106897/2020

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Held via Cloud Video Platform (CVP) on 21 January 2021

Employment Judge Beyzade Beyzade (sitting alone)

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Mr Paul Grant

**Claimant
In Person**

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CHS Transport Solutions Ltd

**Respondent
Represented by:
Mr C Gallagher -
Director**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The judgment of the Tribunal is that:

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1.1. the complaint of unauthorised deduction from wages in respect of holiday pay between 1st January 2020 and 24th September 2020 is well founded and the Respondent is ordered to pay the Claimant the sum of **THREE HUNDRED AND FORTY-EIGHT POUNDS AND EIGHTY PENCE [£348.80]** from which tax and national insurance requires to be deducted, provided that the Respondent intimates any such deductions in writing to the Claimant and remits the sum deducted to Her Majesty's Revenue and Customs.

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1.2. the complaint of unauthorised deduction of statutory sick pay from wages, said in terms of the ET1, to have been made in respect of the period between 16.09.2020 and 24.09.2020 is not well founded and is dismissed.

REASONS**Introduction**

2. The Claimant presented a complaint of unlawful deduction from wages (holiday pay and statutory sick pay) which the Respondent denied.
- 5 3. A final hearing was held on 21st January 2021. This was a hearing held by CVP video hearing pursuant to Rule 46. I was satisfied that the parties were content to proceed with a CVP hearing, that it was just and equitable in all the circumstances, and that the participants in hearing were able to see and hear the proceedings.
- 10 4. The parties did not file a Bundle of Documents. The Tribunal had in its possession a copy of the Tribunal file which included the Claim Form, Claimant's P45, a number of the Claimant's payslips between January – September 2020, correspondence from the Headteacher of the Claimant's son's school of 16th September 2020, standard directions made on 04th November 2020, a copy of an email from the Respondent dated 11th January 2021 in relation to the Claimant's holiday pay claim, and other correspondences between the Tribunal and the parties.
- 15 5. Mr. Gallagher was asked why the Respondent failed to present a Response (ET3) to the Claimant's claim. Mr. Gallagher referred to the email sent to the Employment Tribunal dated 11th January 2021 and stated that he found out about the Tribunal Hearing on 7th January 2021. In relation to the letter that was sent to the Respondent providing Notice of Claim and the hearing details dated 04th November 2020, he stated that he had not received this. He stated that he contacted Mr. Chris Franks at ACAS who confirmed to him that a claim had been lodged at the Employment Tribunal and he supplied Mr. Gallagher with a copy of the Claim Form on 11th January 2021.
- 20 6. Mr. Gallagher confirmed that he was a Director of the Respondent company and that he was duly authorised to represent the Respondent.
- 25 7. Having discussed the matter with the parties, the Tribunal was satisfied that no ET3 had been filed (and no application had been made to extend the
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relevant time limit for filing an ET3) and therefore Rule 21(3) was applicable in that “*The respondent...shall only be entitled to participate in any hearing to the extent permitted by the judge.*” After the Claimant gave evidence, Mr. Gallagher was to be afforded an opportunity to give evidence and to make submissions in accordance with this Rule. The Tribunal applied its overriding objective (Rule 2).

8. At the outset of the hearing the parties were advised that the Tribunal would investigate and record the following issues as falling to be determined, both parties being in agreement with these:

- (i) Is the Claimant owed any holiday pay in respect of the period 1.1.2020 – 24.09.2020 and if so how much is payable to the Claimant?
- (ii) Should the Claimant be entitled to payment of statutory sick pay between 16.09.2020 and 24.09.2020 (8 days) during which period the Claimant states he was required to self-isolate?

9. The Claimant gave evidence at the hearing on his own behalf and Mr. Gallagher, Director gave evidence on behalf of the Respondent.

10. Both parties made closing submissions on their own behalf.

Findings of Fact

11. On the documents and oral evidence presented the Tribunal makes the following essential findings of fact restricted to those necessary to determine the list of issues -

12. The Claimant was employed by the Respondent from 23rd October 2019 until 16th September 2020 as a driver.

13. The Claimant was not provided with a Statement of Terms of Employment by the Respondent. However, the Claimant was paid £8.72 per hour (in September 2020). The Claimant’s working hours varied according to the needs of the business, although his working hours were divided up consistently over five days (Monday-Friday). The Claimant did not have a

lunchbreak (neither paid nor unpaid). The Claimant was paid on a weekly basis.

14. When the Claimant first started working for the Respondent on 23rd April 2019 on average, he worked 32 hours per work. This continued until 10th April 2020 when his working hours were varied to 25.6 hours per week. On 4th September 2020, the Claimant's weekly working hours were cut to 24 hours per week, and therefore his working hours were further reduced to 20 hours per week by agreement.
15. The Claimant worked up to and including 16th September 2020 at a reduced working week of 20 hours per week.
16. The Claimant took 10 days holiday in June 2020. The Claimant was paid in respect of these.
17. The Claimant did not receive payment in relation to any bank holidays. There were six bank holidays between 1st January 2020 and 16th September 2020.
18. The Claimant resigned and gave the Respondent approximately two weeks' notice of termination of his employment. He stated that he was only required to provide one week's notice.
19. At the date of termination, the Claimant had not used or been paid any of his annual leave entitlement in respect of the period 1st January 2020 – 16th September 2020, other than 10 days in June 2020. Neither the Respondent nor the Claimant produced any annual leave records.
20. On 16th September 2020, the Claimant was at work and he was driving home from Perth. At approximately 3pm, the Claimant received an email from his son's school headteacher advising him that his son was identified by the Test and Protect Team as having been in close contact with a person with Coronavirus and must self-isolate for 14 days. The Claimant telephoned Mr. Gallagher on 16th September 2020 and advised him that his son had to self-isolate for 14 days and he had only just found out about this. His employment came to an end on 16th September 2020 by agreement following this call and he did not work after this date.

21. It was Mr. Gallagher's practice to pay all employees who resigned until the end of the working week (in respect of which they worked part of the week). As recorded on the Claimant's final payslip, the Claimant received his full pay up to and including 18th September 2020 (the termination date on the Claimant's P45).

Observations

22. On the documents and oral evidence presented the Tribunal makes the following essential observations on the evidence restricted to those necessary to determine the list of issues –

23. The Claimant had no Contract of Employment, so he was not aware of the details relating to his annual leave entitlement.

24. In the absence of a Contract of Employment, the provisions of the Working Time Regulations 1998 applied in respect of the Claimant's annual leave arrangements. The Claimant was not aware of this. There was no evidence that the Respondent provided details of the Claimant's annual leave details to him during his employment.

25. When the Claimant was asked to clarify how he arrived at the figure of £322.00 in respect of annual leave payment that was owed to him, he stated that this was what ACAS told him. There was no evidence in relation to how the Respondent calculated the Claimant's annual leave entitlement and the Respondent's annual leave records had not been provided to the Tribunal (despite the fact the Respondent confirmed it had an accountant preparing annual leave records on its behalf, the Tribunal's standard directions of 04th November 2020 and providing a short adjournment at the final hearing to enable the Respondent to make enquiries).

26. The Claimant's annual leave entitlement in respect of the period 1st January 2020 – 16th September 2020 should be based on 37 working weeks during this period. Neither party provided records of specific dates or hours worked or any annual leave accrued, or annual leave taken between the said dates. In the absence of this information, and based on the best evidence the

Tribunal had, the Tribunal determined the Claimant's annual leave entitlement on the balance of probabilities based on an entitlement of 5.6 weeks per year calculated up to his leaving date on 16th September 2020.

27. The Claimant referred to an email notification he received from his son's school on 16th September 2020, although I noted that this email did not require the Claimant himself to self-isolate.
28. Whereas on the Claim Form the Claimant stated he was told to self-isolate by 'track and trace NHS' on 16th September 2020, in his oral evidence the Claimant stated he received the NHS call on 17th September 2020. The Claimant did not provide a copy of any text message or email from NHS Track and Trace (or Test and Protect in Scotland), and he did not produce a copy of the call records he referred to (despite the Claimant stating he had received a text and email, the Tribunal's standard directions dated 04th November 2020 and providing a short adjournment during the hearing to enable him to do so). On the balance of probabilities, the Tribunal was not satisfied that either that the Claimant received a call from the NHS or that the Claimant telephoned the Respondent to claim statutory sick pay on 16th or 17th September 2020. The Respondent's oral evidence was consistent with its email of 11th January 2021, the final payslip which showed the Claimant was paid full pay up to 18th September 2020 and the fact that there were no sickness records, or self-certification by the Claimant, or any other supporting evidence to show the Claimant was told to self-isolate or that he informed the Respondent that he was told to self-isolate.
29. Additionally the Claimant's employment ended on 16th September 2020. This was the date of the telephone call between him and Mr. Gallagher. The Claimant did not attend work after this date. During this phone call it was confirmed the Claimant's employment would end that day. In any event this was consistent with the parties' conduct. I noted the Claimant was paid up to 18th September 2020 and he did not receive any payment thereafter, which explained why the P45 termination date was 18th September 2020.

Relevant law

30. To those facts, the Tribunal applied the law –
31. Section 13 of the Employment Rights Act 1996 ('ERA 1996') provides that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised by statute, or by a provision in the workers contract advised in writing, or by the worker's prior written consent. Certain deductions are excluded from protection by virtue of s14 or s23(5) of the ERA.
32. A worker means an individual who has entered into or works under a contract of employment, or any other contract whereby the individual undertakes to perform personally any work for another party who is not a client or customer of any profession or business undertaking carried on by the individual (s230 15 ERA).
33. Under Section 13(3) there is a deduction from wages where the total amount of any wages paid on any occasion by an employer is less than the total amount of the wages properly payable by him to the worker on that occasion.
34. Under Section 27(1) of the ERA "wages" means any sums payable to the worker in connection with their employment including holiday pay.
35. A complaint for unlawful deduction from wages must be made within 3 months beginning with the due date for payment (Section 23 ERA 1996). If it is not reasonably practicable to do so, a complaint may be brought within such further reasonable period.
36. Under Regulations 13 and 13A of the Working Time Regulations 1998 a worker is entitled to 5.6 weeks annual leave in each leave year. Where a worker's employment is terminated during a leave year the worker is entitled to a proportion of that leave and a payment in lieu in respect of any leave not taken. Less than half a day's leave is rounded up to half day's leave and if more is rounded up to a whole day. The holiday year begins on the date when employment begins unless a relevant agreement provides otherwise. A

worker is entitled to leave paid at the rate of a week's pay calculated under the Employment Rights Act 1996.

37. In addition to sums covered by section 27(1)(a), statutory sick pay is also counted as wages by virtue of section 27(1)(b).

5 38. The *Statutory Sick Pay (General) Regulations 1982* ("SSP Regulations") sets out the circumstances in which statutory sick pay is payable and in Regulation 2 it lists persons deemed incapable of work.

39. The SSP Regulations were amended after the unprecedented restrictions imposed by the UK Government following the Coronavirus pandemic in March 10 2020 by *The Statutory Sick Pay (General) (Coronavirus Amendment) Regulations 2020* to include under Regulation 2 persons who were isolating from others in such a manner as to prevent infection or contamination with Coronavirus, in accordance with guidance published by Public Health England, NHS National Services Scotland or Public Health Wales with effect 15 from 12th March 2020.

40. A Schedule was inserted into the SSP Regulations by virtue of *The Statutory Sick Pay (Coronavirus) (Suspension of Waiting Days and General Amendment) Regulations 2020* providing a list of the circumstances in which SSP is payable where a person is isolating due to Coronavirus.

20 41. There were 5 further amendments (that were brought into force before September 2020) to the SSP Regulations by virtue of the following Regulations which the Tribunal took into account, to the extent that they were relevant:

25 (i) *The Statutory Sick Pay (General) (Coronavirus Amendment) (No. 2) Regulations 2020 (effective 17th March 2020);*

(ii) *The Statutory Sick Pay (General) (Coronavirus Amendment) (No. 3) Regulations 2020 (effective 16th April 2020);*

(iii) *The Statutory Sick Pay (General) (Coronavirus Amendment) (No. 4) Regulations 2020 (effective 28th May 2020);*

(iv) *The Statutory Sick Pay (General) (Coronavirus Amendment) (No. 5) Regulations 2020 (effective 5th August 2020): and*

(v) *The Statutory Sick Pay (General) (Coronavirus Amendment) (No. 6) Regulations 2020 (effective 26th August 2020).*

- 5 42. The consolidated version of Schedule 1 of the amended SSP Regulations provides that a person who has been advised by a relevant notification that he has had contact with a person who at the time of the contact was infected with Coronavirus and is staying at home until the date specified in a relevant notification is eligible to receive a statutory sick pay payment.
- 10 43. A "*relevant notification*" is defined as a notification which emanates from DHSC, Scottish Health Service or "*any other person employed or engaged by a Government Department or other public authority in communicable disease surveillance.*"
- 15 44. The guidance from NHS National Services Scotland states that if a person (or their child or household or extended household) has symptoms of Coronavirus, has tested positive for Coronavirus, has been advised by an NHS Scotland contact tracer or a Test and Protect message that they were a close contact of someone with Coronavirus, living in a household with someone who has tested positive for Coronavirus, or has received or is awaiting a Coronavirus test result, they must self-isolate. Household members without symptoms must self-isolate for 10 days from when the first household member developed symptoms or tested positive.
- 20 45. The ACAS Guidance on Sick Pay for Self-Isolation During Coronavirus (which is broadly consistent with the NHS guidance) refers to employees and workers' entitlement to statutory sick pay from the first day they are absent from work in certain circumstances with effect from 13th March 2020 and provides useful guidance for employers and employees, including but not limited to how evidential requirements may be addressed (last updated 14th December 2020). The ACAS Guidance also focuses on those who are told to self-isolate by NHS Test and Trace (or Test and Protect) or those who test positive.
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Discussion and decision

46. On the basis of the findings made the Tribunal disposes of the issues identified at the outset of the hearing as follows –

5 47. The Claimant submits that he was due £322.00 in respect of his annual leave payments that were payable between 1st January 2020 and 24th September 2020. The Claimant received payment of 10 days' annual leave in respect of holiday dates he had booked in June 2020. The Claimant therefore states he is owed £322.00 (he was unable to show his calculations in respect of this sum). The Claimant did not receive payment of this sum.

10 48. The Claimant worked for 37 weeks and accordingly accrued 20 days (rounded up to from 19.92 days) holiday ($37/52 \times 5.6 \text{ weeks} \times 5 \text{ days}$). He took and was paid for 10 days holiday. He is therefore due payment in respect of 10 days holiday. His daily rate of pay is £34.88 ($£8.72 \times [20/5]$). Accordingly he was entitled to holiday pay in sum of £348.80. He has not received a payment to
15 account in respect of this. He is therefore due to be paid £348.80 in respect of holiday pay.

49. The Respondent has therefore made an unlawful deduction of wages in respect of non-payment of the Claimant's accrued annual leave in the sum of £348.80 in total.

20 50. In relation to the Claimant's statutory sick pay claim, there was no evidence that either the Claimant or the Claimant's son developed any Coronavirus symptoms or were officially notified to self-isolate (by way of a 'relevant notification' in accordance with the SSP Regulations [as amended]). Furthermore, and in any event, the Respondent was not notified of a relevant
25 notification received by the Claimant and therefore could not reasonably be expected to pay statutory sick pay to the Claimant. On the evidence the only notification referred to in the Claimant's evidence which was the notification from the Claimant's son's school (which I have found the Respondent was not forwarded to the Respondent). As stated above, I note that the Claimant was
30 in receipt of full pay up to the end of the week ending 18th September 2020.

51. On the above basis I hold that the Claimant has failed to establish, in fact and in law, the occurrence of an unauthorised deduction from his wages during the period complained of in respect of his statutory sick pay claim and, accordingly, that the claim falls to be dismissed.

5 52. Standing the above disposal it is not necessary for me to reach a determination of the Claimant's entitlement under the SSP Regulations to claim statutory sick pay even if (contrary to my finding) there were evidence that he forwarded to the Respondent a copy of the notification received from his son's school. I accordingly do not do so. I observe, however, that a school
10 is not referred to in the definition of 'relevant notification' in the SSP Regulations and a school is clearly not engaged by the Government to provide communicable disease surveillance. Additionally, the Claimant was not told to self-isolate in the email notification from the school.

15 53. In the circumstances, the Claimant would not qualify for statutory sick pay under the SSP Regulations (the provisions of which have been amended by numerous times up to September 2020) and there are no provisions within the SSP Regulations entitling the Claimant to qualify for statutory sick pay even if the Tribunal had found that the Respondent were forwarded a copy of the notification received from his son's school (which is contrary to my
20 findings). Therefore, given the circumstances, I would have in any event found that the Claimant was not entitled to statutory sick pay pursuant to the SSP Regulations (as amended) and thereby did not suffer an unlawful deduction of wages by virtue of non-payment of statutory sick pay.

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Employment Judge: Beyzade Beyzade

Date of Judgment: 18th February 2021

Entered into Register: 25th February 2021

30 Copied to Parties