



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101990/2020

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Held via Cloud Video Platform (CVP) on 25 January 2021

Employment Judge Beyzade Beyzade (sitting alone)

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Miss Nicole Lavery

**Claimant
In Person**

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Supreme Recruitment Agency Ltd

**Respondent
No appearance and
Not represented**

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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 23rd April 2019 and 15th February 2020 is well founded and the Respondent is ordered to pay the Claimant the sum of **EIGHT HUNDRED AND SIXTY-TWO POUNDS AND SEVENTY-THREE PENCE [£862.73]** 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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REASONS

Introduction

2. The Claimant presented a complaint of unlawful deduction from wages (holiday pay) which the Respondent denied.

3. A final hearing was held on 25th January 2021. This was a hearing held by CVP video hearing pursuant to Rule 46. Employment Judge O'Donnell stated at a Preliminary Hearing on 19th November 2019 that he was satisfied that the parties were content to proceed with a CVP hearing and that it was just and equitable in all the circumstances. The Tribunal were satisfied that the Claimant were able to see and hear the proceedings.
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 ET1 Claim Form, ET3 Response Form, orders made on 19th November 2020, a copy of an email from the Respondent in relation to holiday pay, and other correspondences between the Tribunal and the parties.
5. On 19th November 2019 Employment Judge O'Donnell at a Preliminary Hearing given several directions including at paragraph six where he directed the Claimant to provide a calculation of her holiday pay setting out the matters to be included in subparagraphs a. to f. of that order. Within 14 days of being provided with the same, the Respondent was to set out its calculation in writing. The parties were sent a further Direction from myself on Friday 22nd January 2021 requiring compliance with Employment Judge O'Donnell's order dated 19th November 2020 by return. The Tribunal questioned why the Claimant did not comply with the Order. The Claimant stated that she was to provide information about how much she was owed, and she was not sure what this amount was, but she had subsequently received an email confirming the amount from the Respondent. The Tribunal was satisfied that the Claimant could deal with any matters contained in paragraph six of the said Order fairly and justly in evidence and submissions and that this was in accordance with the overriding objective (Rule 2).
6. After the Tribunal had sought to arrange a CVP test with the parties, on 22nd January 2020 at 10.03am India Boyer of the Respondent sent an email to the Tribunal stating, "*Sorry for slow response I will not be able to make Monday call my health is not good just now I have spoken with my accountant to see*

if she is able to do on my behalf I will e mail as soon as she gets back to me thanks Yasmin kayes.” Employment Judge O’Donnell having considered the correspondence directed by email sent at 2.16pm that the Respondent could if they wished apply for a postponement on medical grounds with a supporting GP letter (soul and conscience letter), which would need to be made urgently. No application or other correspondence was received by the Tribunal from the Respondent thereafter. The Tribunal has been seeking to contact the Respondent by email and telephone thereafter on 22nd and 25th January 2021. This included an email sent to the Respondent by the Tribunal at 4.56pm on 22nd January 2021 advising that the Respondent would receive a call on 25th January 2021 at 09.20am to carry out a CVP test and that if this were not practicable, the Respondent was reminded that it must log-into the hearing in readiness to start promptly at 10.00am, which was the listed start time for the hearing. As the Respondent did not log-into the CVP hearing at 10.00am, the Tribunal did not start the hearing until 10.22am to allow the Respondent a further opportunity to attend.

7. The Tribunal determined that it was appropriate and reasonable to proceed with the final hearing in the Respondent’s absence because the Respondent was notified about the date, time and format of the hearing in paragraph 21 of Employment Judge O’Donnell’s order sent to the parties 10th December 2020, the Respondent emailed the Tribunal on 22nd January 2021 indicating they were aware of the listed hearing, the Respondent did not apply for a postponement or supply the medical evidence as directed by Employment Judge O’Donnell on 22nd January 2021, and additionally, the Tribunal Clerk made every reasonable effort to make contact with and facilitate the Respondent’s attendance. The Tribunal considered its overriding objective (Rule 2), and it was in the interests of justice to proceed without further delay.
8. At the outset of the hearing the Claimant was advised that the Tribunal proposed to investigate and record the following issues as falling to be determined, the Claimant being in agreement with these:

8.1 Was the Claimant owed any payment in lieu of untaken holidays when her employment with the Respondent ended on 15th February 2020, and if so, in what amount?

5 9. The Claimant gave evidence at the hearing on her own behalf and the Respondent were not present or represented.

10. The Claimant made closing submissions on her behalf.

Findings of Fact

10 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 April 2019 until 15th February 2020 as a Catering Assistant. The Claimant's duties included cooking, cleaning, and serving in the Respondent's burger van (which was built into the ground) located at 730 Great Western Road, Glasgow, G12 0UE.

15 13. The Claimant was not provided with a Statement of Terms of Employment by the Respondent. However, the Claimant was paid £8.21 per hour. Her working hours were usually between 9am – 6pm, although both her daily and weekly working hours varied according to the amount of work that was available. The Claimant did not have a lunchbreak (neither paid nor unpaid) and she frequently worked alone. The Claimant was paid on a weekly basis.

14. The Claimant would normally start work at 9am. She would finish work between 3pm and 6pm depending on the amount of work.

25 15. When the Claimant first started working for the Respondent on 23rd April 2019 on average, she worked 40 hours per week. This continued until the end of summer, and up to the end of September 2019. The burger van was busy with customers during this period. At the end of September 2020, the Claimant's weekly working hours were cut to between 16-20 hours per week.

16. The Claimant worked from 1st October 2019 until 4th December 2019 for 16 hours per week (9.29 weeks) and from 5th December 2019 until 15th February

2020 (9.29 weeks) for 20 hours per week (except during the 2-week Christmas period during which the Claimant accepted she did not work).

17. The business was closed during the Christmas period including on 24-26th
5 December 2019. Additionally, the Claimant stated that the business may have been open on 1st and 2nd January 2020, but she did not work on those days. The Claimant did not receive payment in respect of any bank holidays.
18. The Claimant resigned and gave the Respondent approximately one week's notice of termination of her employment.
- 10 19. At the date of termination, the Claimant had not used or been paid any of her annual leave entitlement.

Observations

20. On the documents and oral evidence presented the Tribunal makes the following essential observations on the evidence restricted to those necessary
15 to determine the list of issues –
21. The Claimant had no Contract of Employment, so she was not aware of the details relating to her annual leave entitlement.
22. In the absence of a Contract of Employment, the provisions of the Working
20 Time Regulations 1998 applied in respect of the Claimant's annual leave arrangements. The Claimant was not aware of this and when she asked the Respondent about her entitlement she was not provided with any information.
23. When the Claimant was asked to clarify how she arrived at the figure of
25 £524.85 in respect of annual leave payment that was owed to her, she stated that this was the Respondent's calculation, and she was not sure. The Claimant's own figure in terms of what was owed to her was £665.00 which she calculated on the basis of a 4.4 weeks' pay annual leave entitlement, £1814.12/12 which is £151.20. The Claimant multiplied this by 4.4 and this resulted in £665.30 owed. She used the Government's website and annual leave calculator to work this out. There is no evidence on the Tribunal file in

relation to how the Respondent calculated its figure and the Respondent's annual leave records have not been provided.

24. The Claimant's annual leave entitlement in respect of the period 23rd April 2019-30th September 2019 should be based on 40 hours, which was the Claimant's average working week during this period. However, between 1st October 2019 – 15th September 2020, neither party provided any specific dates or hours worked or any annual leave records. In the absence of this information, and based on the best evidence the Tribunal had, the Tribunal determined that on the balance of probabilities the Claimant worked during 50% of the time from 1st October 2019 for 16 hours per week and the remaining 50% for 20 hours per week (except during the 2-week Christmas period during which the Claimant accepted she did not work).

Relevant law

25. To those facts, the Tribunal applied the law –
26. 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.
27. 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).
28. 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.
29. Under Section 27(1) of the ERA "wages" means any sums payable to the worker in connection with their employment including holiday pay.

30. 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.
31. 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.

15 Discussion and decision

32. On the basis of the findings made the Tribunal disposes of the issues identified at the outset of the hearing as follows –
33. The Claimant submits that she was due £865.57 in respect of her annual leave payments. The Claimant received the sum of £340.72 amount in relation to this in March 2020. The Claimant therefore states she is owed £524.85. The Claimant did not receive payment of this sum.
34. The Claimant worked for 40.58 weeks (the Claimant did not work for 2 weeks over Christmas, so this has been deducted, i.e., 42.58 weeks – 2 weeks) and accordingly accrued 146.582908 hours holiday (40 hours for the first 22 weeks and 16 hours thereafter for 9.29 weeks, and a further 20 hours for the remaining 9.29 weeks, totalling 1214.44 hours) [1214.44 hours x 12.07% (i.e. [5.6 weeks/46.4] x 100)] x £8.21) between the period 23rd April 2019 – 15th February 2020. The Claimant did not take nor was she paid for any of her holidays up to her last day of work on 15th February 2020. She is therefore due payment in respect of 146.582908 hours holiday. Her hourly rate is £8.21.

Accordingly, she was entitled to holiday pay in the sum of £1203.45. The Claimant received a payment on account of £340.72 after her employment ended. She is therefore due to be paid £862.73 in respect of holiday pay. The Claimant did not consent to the said deduction from her wages.

- 5 35. The Respondent has therefore made an unlawful deduction of wages in the sum of £862.73 in total.

10 Employment Judge: Beyzade Beyzade
Date of Judgment: 5th February 2021
Entered in Register: 17th February 2021
Copied to Parties