



# EMPLOYMENT TRIBUNALS

**Claimant**

Mr A Jakowlew

-v-

**Respondent**

Mr Pawel Kedziak t/a Baking Point

**Heard at:** by Cloud Video Platform (“CVP”) **On:** 6 April 2021

**Before:** Employment Judge Evans (sitting alone)

**Representation**

For the Claimant: in person

For the Respondent: in person

Interpreter (Polish language): Ms Magdalena Ions

## JUDGMENT

1. By consent, the name of the Respondent is amended to Mr Pawel Kedziak t/a Baking Point.
2. The Respondent made unauthorised deductions from the Claimant’s wages of £300 and is ordered to pay the Claimant that amount.
3. The Respondent failed to pay the Claimant the amount due to him in respect of accrued but untaken holiday pay under regulation 14 of the Working Time Regulations 1998 on the termination of his employment. The amount due to the Claimant was £128.88 and the Respondent is ordered to pay the Claimant that amount.

## REASONS

**Preamble**

1. This has been a remote hearing to which neither party objected. The form of remote hearing was video by CVP. A face-to-face hearing was not held because all issues could be determined in a remote hearing.
2. The Claimant was employed by the Respondent for a number of weeks in 2020. Following the termination of his employment, and a period of early conciliation running from 25 June 2020 to 10 July 2020, the Claimant presented a claim form on 17 July 2020. In that claim form at section 8 the Claimant ticked the boxes indicating that he wished to pursue complaints of unfair dismissal, arrears of pay and “other payments”.

**Case No: 1803871/2020 (V)**

In box 8.1 the Claimant complained about the circumstances in which his employment had terminated and referred to unpaid wages. At box 9.2 he said that he should be paid for “2 weeks of my work plus 4 holidays days”.

3. The Respondent's response was received on 19 August 2020. It said that the Claimant had been paid for the days that he had worked.
4. The Claimant's claim of unfair dismissal was struck out by a judgment dated 25 September 2020 on the basis that he had completed less than two years' continuous employment when his employment had terminated. This judgment followed a preliminary hearing for case management purposes on the same date.
5. On 31 December 2020 an amended notice of hearing was sent to the parties in which they were also directed to ensure that witness statements and a bundle were sent to the Tribunal a week before the final hearing. This was meant to take place on 6 January 2021 but the hearing on that date was postponed because the Claimant had not received the amended notice of hearing. On 6 January 2021 the parties were ordered to send each other and the Tribunal copies of any documents that were relevant to the claims and witness statements.
6. At the hearing on 6 April 2021 I had the following documents before me:
  - 6.1. From the Claimant, handwritten witness statements from Mr K Jakowlew (the Claimant's father), Mr P Marchelewski, and Mr M Topczynski;
  - 6.2. From the Respondent, typed witness statements from Mr P Marechelwski, Mr A Pielok and Mr E Ruszkowski;
  - 6.3. From the Respondent, an email of 4 February 2021 with the following attachments: a document in English and Polish signed by a number of employees indicating that they had been paid up to 15 May 2020 (“the 15 May pay confirmation document”), a similar document for the period to 22 May 2020 (“the 22 May pay confirmation document”), a similar document for the period to 29 May 2020 (“the 29 May pay confirmation document”), a document signed by Mr Topczynski dated 18 April 2020 and a copy of a photo ID card for Mr P Marchelewski.
7. I checked with the parties that these were all the documents that they wished me to take into account and they confirmed that they were. Neither the Claimant nor the Respondent had understood that they needed to provide a witness statement with the consequence that neither had done so. I therefore asked them questions in order to establish their evidence in chief.
8. During the course of the hearing I heard oral evidence from the Claimant, Mr K Jakowlew, Mr M Topczynski, the Respondent, Mr Pielok, and Mr Ruszkowski. Apart from the Respondent, they all gave their evidence in Polish through an interpreter and I was satisfied that there was no problem with the interpreting. The Respondent speaks English fluently and I was satisfied that he understood what was being said to him.
9. The hearing had been listed for three hours. It took some time to identify the issues and the evidence progressed slowly because of the need to have it translated. Consequently, although neither party made submissions beyond inviting me to find in their favour on the basis of the evidence heard, there was insufficient time for me to reach a decision on the day and I reserved my judgment.

**The discussion at the beginning of the hearing and the issues**

10. There was a discussion at the beginning of the hearing. The Claimant explained his claim as follows:

**Case No: 1803871/2020 (V)**

- 10.1. He had been employed by the Respondent from the beginning of March to the end of April. He did not know the exact dates;
  - 10.2. His weekly pay (paid cash in hand) was £350 for 50 hours' work;
  - 10.3. The Respondent had failed to pay him for two weeks and so owed him £700 in unpaid wages;
  - 10.4. The Respondent had also failed to pay him any holiday pay.
11. The Respondent's response to this was that:
- 11.1. He had employed the Claimant for three weeks from Monday 11 to Friday 29<sup>th</sup> May 2021;
  - 11.2. The Claimant's weekly pay was £300 paid cash in hand for a 30 hour week;
  - 11.3. He had paid the Claimant correctly for each week of pay;
  - 11.4. He accepted that he had not paid the Claimant any holiday pay that was due to him.
12. It is therefore necessary for me to determine:
- 12.1. Between what dates the Claimant was employed;
  - 12.2. What his weekly pay was;
  - 12.3. Whether the Respondent paid him correctly or whether he made unauthorised deductions from his wages;
  - 12.4. The amount that is due to the Claimant in respect of accrued but untaken holiday pay.
13. There was also a discussion of the correct identity of the employer at the beginning of the hearing. The Claimant had described it as "Pawel Kendziak" in box 2.1 of the claim form with "Baking Point" then given as the number or name in the address section. It was agreed that the correct name of the Respondent was "Pawel Kedziak trading as Baking Point" and the Respondent's name was amended by agreement to reflect that.

**The Law**

14. Section 13 of the Employment Rights Act 1996 ("the ERA") provides that an employer may not make a deduction from the "wages" of a worker unless the deduction is required or authorised by virtue of a statutory provision or a relevant provision of the worker's contract or the worker has previously signified in writing their agreement or consent to the making of the deduction.
15. Where a Tribunal finds a complaint under section 23 well-founded it shall make a declaration to that effect and order the employer to pay the worker the amount of any deductions made in contravention of section 13. It may also in addition order the employer to pay to the worker such amount as the Tribunal considers appropriate in all the circumstances to compensation the worker for any financial loss sustained by them which is attributable to the matter complained of (section 24 of the ERA).
16. Regulation 14 of the Working Time Regulations 1998 ("the WTR") gives a worker whose employment is terminated during the course of a leave year a right to a payment in lieu of accrued but untaken leave calculated in accordance with regulation 14(3). A claim for a failure to pay the amount due under regulation 14 may be brought under regulation 30.

**The evidence and findings of fact**

16. I am bound to be selective in my references to the evidence when explaining the reasons for my decision. However, I wish to emphasise that I considered all the evidence in the round when making my findings and reaching my conclusions.

17. There is a remarkable absence of documentation in this case. There are none of the documents that one would normally expect to have at one's disposal to decide factual matters such as the dates on which employment began and ended, rates of pay etc. The Respondent was unable to provide a contract of employment, payslips, internal records showing how much had been paid and when, or a P45. The Respondent's explanation for this was that there was no documentation because the Claimant had not produced certain documents relating to his previous employment. However this is not a satisfactory explanation: whilst a P45 or other documentation might have been necessary to sort out the deductions which fell to be made from the Claimant's wages, they do not explain why no documentation whatsoever which was specific to him was produced (the various pay confirmation documents were signed by all employees present on particular pay days, suggestive in itself of a cash in hand culture: if employees are given payslips and paid by bank transfer there is no need to make them sign weekly to confirm that they have been paid).
18. Much therefore depends on the evidence of the various witnesses. I make the following observations and findings in relation to this.
19. The Claimant's evidence about when he was employed has been inconsistent and vague. In the claim form he said that he had been employed from 22 April 2020 to 12 June 2020. In his oral evidence he initially said that he had been employed from the end of March to the beginning of April. Then he said from the beginning of March to the end of April. The reality was that he did not remember – indeed, when I first asked him about this he said "I cannot stipulate what dates". However there is no doubt that he was employed and I find his inconsistent evidence simply reflected an inability to remember. The Claimant's evidence about what he was paid had also been inconsistent: he said £350 per week in his oral evidence but £360 net (£380 gross) in the claim form. Equally, he was vague about which two weeks had not been paid. However, when I asked him a number of questions about this he was in the end reasonably clear that he had not been paid for the first week and the last week of his employment. Overall, I find that the Claimant's inconsistencies of recollection reflect a poor recollection of events rather than dishonesty.
20. I find that the evidence of Mr K Jakowlew and Mr M Topczynski in relation to the dates of the Claimant's employment is of no real assistance: both accepted in cross examination that they could not remember when his employment had begun and ended. The Claimant accepted that he had prepared their written statements (because "they do not speak English"). They were very short and the interpreter translated each statement back to the witness at the beginning of their evidence and each witness confirmed the accuracy of their statement. However, overall, I attach little weight to their statements or their oral evidence, because I find it unlikely that the Claimant took proper instructions from them when preparing them (subject to one exception) and, contrary to what their statements said it was clear that they had no real recollection of when the Claimant's employment had begun and ended. The exception is in respect of the statement contained in Mr K Jakowlew's statement that "[the Claimant] did not receive remuneration for work because Mr Kendziak state that he would pay his salary for poor children". I attach some weight to that element of Mr K Jakowlew's evidence because when it was translated back to him he was very emphatic that that had been said and that Mr P Marchelewski had also been present.
21. Turning to the Respondent's evidence, the evidence of the Respondent himself had been internally consistent in relation to the dates of employment. He said in the response that the Claimant had been employed from 11 May 2020 for three weeks and that was his oral evidence at the hearing also. In terms of pay, he was slightly less consistent: he referred to net pay of £261.60 in the response but said that the Claimant was handed £300 each week in cash in his oral evidence. When asked "do you remember that situation that my father was talking about when you say you will give my remuneration to poor children" he said "no I don't remember that". He was

consistent between the claim form and his oral evidence in relation to the Claimant's weekly hours, which he said were 30.

22. Mr Pielok, who is a manager of the Respondent, also said that the Claimant had been paid £300 cash in hand each week. He said "no I can't remember" when asked about the conversation which had been put to Mr Kedziak about the Claimant's remuneration being given to poor children. When asked about how employees were paid, he said that if they provided the correct documentation at the beginning of their employment they worked a week in hand (i.e. they would be paid at the end of week two for the work performed in week one) but that if (like the Claimant) they were unable to provide the correct documentation at the beginning they were paid at the end of week one for week one. He did not know why this distinction was made; nor could he provide any logical explanation for it (especially since this arrangement seems to give employees an incentive *not* to provide the documentation required by the Respondent).
23. Mr E Ruszkowski said in his oral evidence that the claimant was paid £300 a week in cash for a 30 hour week. So far as his evidence confirming that the Claimant had been paid was concerned, it was clear that he depended to a considerable extent on the pay confirmation documents: no employee would sign one of those unless they had indeed been paid.

### **Conclusions**

24. Overall, the evidence is unsatisfactory and none of the witnesses emerge with their credibility fully intact. In particular, that of the Claimant is damaged by the inconsistency of some of his recollections, that of the Respondent is damaged by his failure to provide a satisfactory explanation for the strange lack of documentation, and that of the Claimant's witnesses is damaged by their admissions that they could not in fact remember the dates that they had stated so plainly in their statements.
25. I should also comment briefly on the surprising fact that both the Claimant and the Respondent produced a witness statement from Mr P Marchelewski. The statements were very different. However Mr P Marchelewski did not attend to give evidence and I was unable to form any view on why the statements were so different. Accordingly I did not take the two different statements into account as a matter damaging either party's credibility.
26. Overall, doing my best with the evidence at my disposal, my findings and conclusions are as follows:
  - 26.1. The Claimant was employed for four weeks, with his employment ending on 29 May 2020, but was only paid for three weeks. I so find because:
    - 26.1.1. He was insistent that he had been underpaid and communicated a sense of genuine grievance; given the short-lived nature of his employment he would have been unlikely to have been mistaken about this and I find that he was not lying;
    - 26.1.2. Further and separately, I accept that there was a conversation in which the Respondent referred to giving the Claimant's wages to poor children. The way that this evidence was advanced had a ring of truth to it and it was notable that the Respondent and Mr Pielok simply said that they could not remember whether such a comment had been made. Such a comment is not one, I find, that they would simply "not remember". It is the kind of comment, I find, that they would have been able to either positively remember or positively deny having been made. The fact that they said they could "not remember" points towards the comment having been made;

- 26.1.3. Further and separately, if the Claimant's employment had lasted only three weeks, I would have expected the Respondent to produce a pay confirmation document for the week before 9 May and the week after 29 May. These would have been good evidence one way or the other for the Claimant's employment having lasted for just three weeks. Yet no such evidence was provided.
- 26.2. I find that what happened was that he was never paid for his first week of employment. I am satisfied that he was paid for the following weeks (because this is what the 15, 22 and 29 May pay confirmation documents strongly suggest and the Claimant accepted that he had signed each of them). I so find because the Claimant said that he had not been paid for the first week and Mr Pielok accepted that some employees were made to work a week in hand and yet could not explain logically the distinction based on documentation between those employees who were and those who were not. (I have considered whether the fact that the first week was not paid gave rise to any limitation point: in short it did not, not least because the claim could equally well have been considered as a breach of contract claim in respect of which limitation ran from the date employment ended.)
- 26.3. I find that the Claimant was paid £300 per week. I so find because this was a matter in respect of which all the Respondent's witnesses gave consistent and straight forward oral evidence. I therefore preferred it to that of the Claimant which, taken in the round, was less consistent over time.
27. Consequently, the Respondent made an unauthorised deduction of £300 from the Claimant's wages and I order that the Respondent pay the Claimant that amount.
28. Turning to the question of holiday pay, I find in accordance with the Claimant's evidence that he took no holiday during his employment (a fact not disputed by the Respondent). Consequently the calculation under Regulation 14 of the WTR is  $5.6 \times 28/365 = 0.429$  week's pay. £300 (the weekly pay of the Claimant) multiplied by 0.429 gives £128.88. I therefore order the Respondent to pay the Claimant this amount in respect of accrued but untaken holiday pay.

Employment Judge Evans

Date: 20 April 2021