



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr T Adamson

**Respondent:** James' Places (North West) Limited

**HELD AT:** Manchester

**ON:** 27 January 2021

**BEFORE:** Employment Judge Batten  
(sitting alone)

**REPRESENTATION:**

**Claimant:** Mr R Adamson, Solicitor

**Respondent:** Ms J Briggs, HR Manager

**JUDGMENT** having been sent to the parties on 22 February 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

## REASONS

### Introduction

1. By a claim form presented on 28 October 2020, the claimant pursued complaints about notice pay, unpaid wages and holiday pay due at the termination of his employment. The claimant also contended that he had never had a contract of employment. On 3 December 2020, the respondent provided a response denying that the claimant was owed any money.
2. The claim was listed for 1 hour but the hearing took almost 4 hours due to the amount of evidence and the need to consider the position of the claimant's earnings on a zero-hours contract with variable shifts, working in the hospitality industry prior to furlough.

### Evidence

3. The Tribunal was provided with a bundle of documents of 131 pages, prepared by the respondent, to which the claimant had added certain

documents which the respondent had inadvertently omitted. The claimant also provided a supplementary bundle of 4 further documents evidencing communications between the parties about the claim and about disclosure of documents.

4. As this was a short-track case, there had been no direction for witness statements and the parties had not therefore prepared witness statements. The Tribunal therefore heard oral evidence from the claimant and from Ms Briggs, the respondent's HR manager. Both witnesses answered questions from the Tribunal and were cross examined by the other party's representative.

### **Issues**

5. At the beginning of the hearing, the Tribunal discussed with the parties the issues to be determined in this case, which are as follows:
  - 5.1 Did the respondent make unauthorised deductions from the claimant's wages?
  - 5.2 Was the claimant entitled to payment for any accrued untaken holiday entitlement at the termination of his employment?
  - 5.3 Was the claimant entitled to further pay for the 4 weeks' period of notice he gave?
  - 5.4 If any of the above complaints succeed, was the claimant supplied with particulars of his employment in accordance with section 1 of the Employment Rights Act 1996 ("ERA")?

### **Findings of fact**

6. Having considered all the evidence, the Tribunal made the following findings of fact. Where a conflict of evidence arose, the Tribunal resolved the same on the balance of probabilities, in accordance with the following findings.
7. The claimant was employed by the respondent from 3 November 2019 as a barman. He was given a contract of employment at the outset which he read carefully and signed. The Tribunal found on the balance of probabilities that the claimant was given a copy of the document he signed but that he did not for whatever reason retain it. The claimant did not ask for a copy of his contract from the respondent until after his employment had ended. In the circumstances and having regard to the contract in the bundle, the Tribunal considered that the claimant had been issued with a statement of terms and conditions in compliance with section 1 of ERA.
8. The claimant worked shifts over 5 variable days per week, which included Fridays and Saturdays. The shifts were of variable lengths but the parties agreed that the claimant's average working week, in the period prior to furlough, was 33.75 hours worked per week. The figure of 33.75 had been calculated by the independent payroll company used by the respondent, by taking the claimant's average weekly pay under furlough, at 80% of his usual

earnings, grossing that figure up to 100% and then dividing it by the claimant's hourly rate of pay of £8.72 per hour to produce a figure of hours worked and paid of 33.75 hours per week, from which the claimant's furlough pay at 80% was derived.

9. On 21 March 2020, the claimant was furloughed as a result of the COVID pandemic. The respondent gave notice to its staff to say that it would pay them at 80% of their average earnings during furlough. The claimant thereafter received the sum of £942.08 gross per four weeks' pay period. The claimant did not raise any objection to furlough nor to the level of pay nor to the payments made by the respondent.
10. On 21 May 2020, the respondent emailed all staff to give them 2 weeks' notice that they were required to take a week's holiday from 4-12 June 2020, being 5 days' holiday entitlement. The claimant was subsequently paid at his full rate of pay for this holiday period, rather than at the furlough rate of 80%.
11. On 3 July 2020, the claimant gave 4 weeks' notice to the respondent to leave his employment, to the effect that his last working day would be 31 July 2020. The claimant was not working at the time; he was on furlough. The claimant had secured a better paid job, to start at the beginning of August 2020.
12. On 8 July 2020, the respondent replied to the claimant saying it did not require any notice and he was welcome to start his new job as soon as he liked. On 9 July 2020, the claimant said he might not actually be starting until mid-August 2020. Later, the claimant realised that he had been paid for a week's notice only. He then queried his pay.
13. The respondent then said that the claimant was only required to give 1 week's notice under the contract of employment, and so it would only be paying him for one week in lieu of notice. The respondent declared that the claimant's employment ended on 3 July 2020.
14. The respondent had paid the claimant 1 week's notice pay at the 80% furlough rate. The Tribunal was told that the shortfall between the 80% furlough rate and full pay for the week's notice was paid prior to these proceedings.

### **The applicable law**

#### *Unauthorised deductions from wages*

15. A worker is entitled to be paid for work done under his or her contract of employment. ERA, Part II, governs the payment of wages and provides that a failure to pay wages owing constitutes an unauthorised deduction from wages.
16. Wages are defined in section 27 ERA. Section 27(1) (a) provides that:

*"wages includes any fee, bonus, commission, holiday pay or other emolument referable to his employment whether payable under his contract or otherwise".*

Hence, the non-payment of holiday pay can be an unauthorised deduction from wages.

17. ERA, section 13, governs circumstances in which an employer can make deductions from an employee's wages. Section 13 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 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.”*

*Holiday pay*

18. The Working Time Regulations 1998 (“WTR”), Regulations 13 and 13A, provide that every worker is entitled to a minimum of 5.6 weeks' paid holiday entitlement in each holiday year. An employer can give advance notice to employees to take holiday, and the amount of notice required is at least twice as many days in advance of the earliest date of the holiday.
19. Regulations 14(1) and (2) of the WTR provide that a worker is entitled to payment in lieu of accrued unused holiday entitlement when his employment terminates during the leave year. This arises where, at the termination date, the proportion of statutory annual leave a worker has taken under regulations 13 and 13A WTR is less than the proportion of the leave year that has expired.

*Notice pay*

20. ERA section 86 provides that minimum periods of notice shall be given by employer and employee. One week is the statutory minimum notice required of an employee. This does not preclude a party giving longer notice to terminate the employment contract.
21. Notice, once given by a party, can only be varied or shortened by agreement between the parties. An employer may decide not to require an employee to work their notice period, but it has to pay them in lieu of the notice given unless there is an agreement for short notice or an agreement to vary the notice given. If an employer unilaterally cuts short a notice period upon an employee's resignation, it must make a payment in lieu where the contract allows for such.

*Particulars of employment*

22. Section 38 of the Employment Act 2002 provides that if a claimant succeeds with certain claims before the Tribunal, such as a claim for unauthorised deductions or holiday pay or notice pay, the Tribunal must consider whether the respondent was in breach of its duties under sections 1 and/or 4 of the ERA, namely whether the respondent gave the claimant a written statement of

initial employment particulars or a statement of particulars of change, in accordance with sections 1 and/or 4 of the ERA.

23. If the respondent has failed to comply with those duties, the Tribunal can make certain additional awards in relation to any failure by the respondent.

## Conclusions

### Notice Pay

24. The claimant's contract of employment says that employees have to give a week's notice. It does not say anywhere that, if the employee gives more than a week's notice, they will only be entitled to receive a week's pay, and the contract does not make any provision about giving more or less notice.
25. Once notice is given, the claimant's contract provides that a payment in lieu of notice can be made. However, in this case, the respondent purported to cut short the notice period unilaterally. A variation of the notice period in such manner requires the agreement of the claimant to shorter notice. The claimant gave four weeks' notice. The Tribunal did not find there was any agreement to vary or cut short that notice, in fact the emails presented to the Tribunal show there was no such agreement. In those circumstances, the claimant is entitled to be paid for the 4 weeks' notice given. He has been paid for 1 week, leaving 3 weeks' pay owing. The Tribunal was told by the respondent that the claimant's rate of pay was £1,177.60 gross per 4 weeks' pay period, so 3 weeks' pay gross is **£883.20** which is outstanding and owing.

### Holiday Pay

26. The contract of employment which the claimant signed says that the respondent's annual leave year is 1 January to 31 December. The respondent had argued that the leave year was varied to 1 April to 31 March, but there was no evidence produced to the Tribunal that such a variation had been put into effect, for example by notice to the claimant of that variation nor evidence that such a variation had been agreed. Ms Briggs, the respondent's HR manager, was unable to help the Tribunal on this matter because she had not been working for the respondent at the time that such a variation was said to have been put into effect.
27. Taking the claimant's average working week of 33.75 hours, his statutory minimum annual holiday entitlement of 5.6 weeks would be 189 working hours per annum. The claimant's employment came to an end on 3 July 2020, which is just slightly over 6 months of the annual leave year and so he had accrued 94.5 hours of holiday entitlement pro-rata the length of his employment during the leave year.
28. The claimant told the Tribunal that he had taken at least 4 days of holiday during the leave year since 1 January 2020. The Tribunal has also found that the respondent gave valid notice under the WTR for a further five days of holiday in June 2020. Therefore, the claimant had taken 9 days of holiday,

which is 60.75 hours of holiday. In the circumstances, the claimant is entitled to payment for 33.75 hours of accrued unused holiday entitlement at termination of his employment. This gives a figure of £294.30 gross holiday pay. However, the Tribunal was told that, after ACAS early conciliation, the payroll company appointed by the respondent decided, for some reason which neither party was able to explain, that the claimant was owed pay for 7 hours of holiday entitlement, and a payment of £61.04 gross was made to the claimant and appears on his final payslip. The Tribunal considered that this payment reduces the amount of holiday pay owing to **£233.26** gross.

29. The Tribunal noted that other sums appear on the claimant's payslips as 'holiday pay'. The Tribunal found that the 'holiday pay' shown on the payslips was not understood by the parties' witnesses who were unable to explain such. There was a complete absence of evidence as to the calculations or reasoning behind such payment(s) nor was the respondent able to identify to which holidays/holiday hours they related. Likewise, the respondent's witness was unable to explain why 7 hours' holiday entitlement was paid as part of the claimant's final pay nor its calculation basis. The Tribunal therefore concluded, on a balance of probabilities, that holiday pay was provided to the claimant during the last 6 months of his employment because it related to the holidays he has taken.

Particulars of employment

30. The Tribunal has found as a fact that the claimant was issued with a statement of terms and conditions in compliance with section 1 of ERA at the outset of his employment. A signed copy of the document appears in the bundle and was not disputed by the claimant. This claim therefore fails.

**Summary**

31. In light of the above conclusions, the Tribunal awarded the claimant a total of £1,116.46 gross, which shall be subject to deductions for tax and National Insurance, and which comprises: the balance of the claimant's notice in the sum of £883.20; and for outstanding accrue holiday pay the sum of £233.26 gross.

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Employment Judge Batten  
Date: 7 May 2021

REASONS SENT TO THE PARTIES ON

11 May 2021

FOR THE TRIBUNAL OFFICE

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