



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

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**Case No: 4107007/2020 (V)**

**Held via Cloud Video Platform (CVP) on 27 January 2021**

**Employment Judge Murphy (sitting alone)**

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**Mr J Henderson**

**Claimant  
In Person**

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**Eros Retail Ltd**

**Respondent  
No appearance  
and no  
Representation**

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### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

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1. The Respondent has made an unauthorised deduction from wages contrary to section 13 of the Employment Rights Act 1996 and the Respondent is ordered to pay to the Claimant the sum of £127.32 in respect of underpaid holiday pay for annual leave taken from 31 August to 6 September 2020.

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2. The sum awarded in item 1 is expressed gross of tax and national insurance. It is for the Respondent to make any deductions lawfully required to account to HMRC for any tax and national insurance due on the sums, if applicable.

### **REASONS**

**E.T. Z4 (WR)**

**Introduction**

1. The Claimant brought a claim for unauthorised deductions from his wages following receipt of gross holiday pay in the sum of £130.80 for a week of annual leave taken between 31 August and 6 September 2020. The  
5 Claimant considered the Respondent's approach to the calculation of his holiday pay was incorrect and that it ought to have been calculated based on his average working hours across the appropriate reference period.
2. A Notice of this claim and hearing was sent to the Respondent on 11 November 2020. The Respondent did not enter a response to the claim  
10 and did not participate in the hearing.

**Issue**

3. Did the Respondent unlawfully deduct a sum from the Claimant's wages by undercalculating his holiday pay in relation to the week commencing  
15 31 August 2020?

**Findings in Fact**

4. The tribunal made the following findings in fact.
5. The Claimant was employed by the Respondent as a Retail Assistant from 30 March until 22 November 2020. He was issued with a Statement of Main Terms of Employment ("the Statement") which he signed on 15  
20 October 2020. The Claimant earned £8.72 per hour and routinely worked 30 hours per week, occasionally working more or fewer hours.
6. The Statement indicated the Respondent's holiday year ran from 1 April to 31 March and that holiday pay would be based "on average earnings over the previous 12 weeks".
- 25 7. Throughout the period of his employment, the Claimant took just one week's annual leave in the week commencing 31 August 2020. Notwithstanding the terms of the Statement, the Respondent calculated the Claimant's holiday pay as £130.80, apparently based on an assumed

15-hour week. The Claimant raised his concerns with the Respondent, but the Respondent declined to reconsider the calculation.

8. The Respondent issued pay slips to the Claimant for the period of his employment post-dating 12 July 2020. For the prior period, the Claimant was not furnished with pay slips. He broadly worked 30 hours per week in the period before 12 July, occasionally working more or fewer hours. Details of net weekly income received from the Respondent were produced to the tribunal for this period. Pay slips were produced for the period from 12 July to 30 August 2020.
9. In the 15-week period to 12 July 2020, the Claimant's average net income was £251.40.
10. In the 8-week period from 12 July to 30 August 2020, the Claimant's average gross weekly pay was £240.62 and his average net weekly pay was £225.37.

### 15 **Relevant Law**

11. Under the Working Time Regulations 1998 ("WTR"), workers are entitled to 5.6 weeks' annual leave. If there are no normal working hours, a week's pay is calculated, under the Employment Rights Act 1996 ("ERA") as modified by the WTR, as the average weekly remuneration (including commission and bonuses) over the previous 52 complete weeks or, if the employee has been employed for a lesser period, over the period of complete weeks for which they have been employed (ERA section 224; WTR, R16(3) (e); and SI 2018/1378 R10).
12. Under section 234 (1) where an employee is entitled to overtime pay when employed for more than a fixed number of hours in a week, there are for the purposes of ERA normal working hours in his case. A failure to pay, in whole or in part, statutory holiday pay due to a worker can be enforced by way of a claim for unauthorised deductions from wages under section 13 of the Employment Rights Act 1996.

### 30 **Discussion and Decision**

13. The Claimant's contract stated he would be required to work a minimum of 4 hours per week but would require to work those hours "required to carry out your duties to the satisfaction of the company as necessitated by the needs of the business". In practice the Claimant's hours of work varied but in only three weeks between 1 April and 30 August did they fall below 30 hours. Hours beyond the minimum four per week specified in his contract were not, as a matter of practice, treated as overtime. Giving the words 'normal working hours' their natural meaning, and having regard to section 234, the Tribunal is satisfied that the Claimant did not have 'normal hours of work' for the purposes of ERA and consequently a week's pay falls to be calculated in accordance with section 224 of the Act as modified by Regulation 16 of WTR.
14. Average (gross) pay requires to be calculated over the period of complete weeks of employment preceding the holiday on 31 August 2020. Given the lack of availability of pay slips detailing gross pay figures for pay in the period to 12 July 2020, the tribunal has taken a 'broad brush' approach to assessing the gross pay in this period, based on the weekly net pay received by the Claimant and his evidence regarding his hourly rate and hours worked.
15. In the 15-week period to 12 July 2020, the Claimant's average net income was £251.40. His average gross weekly pay is assessed as £267.45 over these 15 weeks. In the 8-week period from 12 July to 30 August 2020, the Claimant's average gross weekly pay was £240.62. Therefore, in the 23 complete weeks of employment immediately preceding the Claimant's holiday on 31 August, his average gross weekly pay was £258.12.
16. The Respondent paid the Claimant £130.80 gross for his week's holiday, giving a shortfall in payment of £127.32 (gross).

17. The Respondent has made an unauthorised deduction from the Claimant's wages and is ordered to pay to the Claimant £127.32 (gross).

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<b>Employment Judge</b>	<b>Lesley Murphy</b>
<b>Date of Judgment</b>	<b>24<sup>th</sup> of February 2021</b>
<b>Date sent to parties</b>	<b>24<sup>th</sup> of February 2021</b>

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