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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4100173/2020

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Final Hearing held remotely on 6 April 2021

Employment Judge: R Sorrell

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Miss B McDonald

**Claimant
In Person**

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Mr Kashif Chaudry

**Respondent
In Person**

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FINAL HEARING

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Judgment of the Tribunal is that:-

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- (i) The claim for holiday pay is well founded and upheld and the Respondent is ordered to pay to the Claimant the sum of £893.05 (Eight Hundred and Ninety Three Pounds and Five Pence)
- (ii) A declaration is made to the effect that the claim for failure to provide written itemised pay slips after 6 April 2019 is well founded and upheld.

REASONS

Introduction

E.T. Z4 (WR)

1 The Claimant lodged a claim for holiday pay and failure to provide her with
itemised pay slips on 14 January 2020. In the ET1 the Claimant also stated
that she did not receive her P45 upon termination of her employment.

2 The burden of proof is on the Claimant and the standard of proof is on the
5 balance of probabilities.

3 This Hearing was scheduled to determine the claim. It took place remotely
given the implications of the COVID-19 pandemic. It was a virtual hearing held
by way of the Cloud Video Platform.

4 As both parties were party litigants, I explained the purpose and procedure
10 for the Hearing and that I was required to adhere to the Overriding Objective
of dealing with cases justly and fairly and to ensure that parties were on an
equal footing.

5 A joint bundle of productions had been lodged by the Respondent prior to the
Hearing and the Claimant confirmed that the Respondent had provided her
15 with a copy of it. At the outset of the Hearing the productions were checked
with parties and paginated where necessary. The importance of referring to
the relevant documents when giving their evidence was explained to parties.

6 The Claimant and Respondent both gave evidence.

Findings in Fact

20 The following facts are found to be proven or admitted;

7 The Claimant's date of birth is 19 July 2000.

8 The Respondent's business was a restaurant and take-away out-let. It was
established in 2010 and between 5-10 staff worked there depending upon
requirements. It ceased trading on 12 July 2020.

25 9 Mr Chaudry was the owner of the Respondent business and had overall
operational management of it. This involved the recruitment and management
of staff, dealing with pay, records, the ordering of supplies and environmental

matters. His sister-in-law, Sajida Chaudry was also involved in the management of staff shifts.

10 The Claimant commenced employment with the Respondent as a Customer
Assistant in the week beginning 9 July 2018. (Doc J) This involved waiting
5 and serving on customers.

11 At the same time the Claimant was doing a full-time course at college in child-
care.

12 The Claimant was not provided with a contract of employment or written
particulars of her employment by the Respondent.

10 13 The Claimant's hours of employment varied between 15-30 hours per week.
(Doc V) At the start of her employment, she was paid the minimum wage of
£5.90 per hour which increased to £6.15 per hour in April 2019.

14 The Claimant was paid her wages weekly in arrears and in cash by Mr
Chaudry. (Doc J) Mr Chaudry kept a weekly record of staff hours worked in a
15 diary and this record was checked with the Claimant before she was paid to
ensure that her wages corresponded with the hours she had worked.

15 The Claimant took unpaid leave during her employment with the Respondent.
She took her last period of unpaid leave from 25 September 2019 until 9
October 2019. (Doc V p.21)

20 16 The Claimant asked Mr Chaudry about holiday pay each time she requested
leave and was told that she had no entitlement to holiday pay.

17 Throughout the duration of the Claimant's employment with the Respondent,
she did not receive any holiday pay for the leave she took. This amounted to
a series of unauthorised deductions from her wages. There were no gaps of
25 three months between any two deductions. (Doc I – p.1)

18 On 30 September 2019 the Claimant tendered her resignation. (Doc M - p.1)
The Claimant's final wages were paid to her on 7 October 2019. (Doc S – p.1)

19 During her employment with the Respondent, the Claimant did not receive
pay slips at or before the time at which payment of her wages was made to
her. Some of the pay slips lodged for the Hearing recorded less hours than
the Claimant worked and she was paid for. (Docs A, B & V)

5 20 The Claimant did not receive her P45 upon or after the termination of her
employment.

Respondent's Submissions

10 21 The Respondent submitted that he ran the business for 10 years and never
had a problem with anyone else. He was in charge of all the documentation
for the business. Everything was kept up to date and submitted when
required. The payslips, P60 and P45 were all there. The evidence shows that
everything was documented, provided in time and paid. He never refused the
15 Claimant time off and there were no issues at all. The Claimant had access
to both him and his sister-in-law if the Claimant had any genuine issues to
raise. He always said to staff to raise any issues with them and his diary
records show that she did not do so at the time. There was nothing to stop
her from raising these issues with either of them, so it doesn't make sense
that she only did so after she left.

20 22 In her resignation text of 30 September 2019, the Claimant thanked him for
the work opportunity. She did not say she was aggrieved in any way and there
was no mention of holiday pay or wage slips. If there was an issue, why did
she not say so then? The Claimant did not seek the Respondent's PAYE
25 submissions to HMRC until October 2020. He treated everyone fairly and had
many staff. The Claimant was paid everything she was due. There was no
post box at the Respondent premises to be able to receive the recorded
delivery letter that the Claimant sent to him on 11 November 2019. He was
dumbfounded when the Claimant made this claim and submits that it has been
30 concocted.

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Claimant's Submissions

23 The Claimant submitted that she would like to have her holiday pay, her
payslips and P45 that she requested. She tried her best to speak to the
Manager, Mr Chaudry but she was ignored and nothing was given to her, so
she had no choice but to take it further. All her concerns were raised by her
5 in person and there is not any other evidence of that. Mr Chaudry has lied and
said she has received her holiday pay, payslips and P45. He also did not reply
to ACAS. That is why she lodged a Tribunal claim.

Relevant Law

10 Holiday Pay

24 Section 27(1) of the Employment Rights Act 1996 (“ERA” 1996) defines
“wages” as “any sums payable to the worker in connection with his
employment”. Holiday pay is listed as a specific payment that is to be counted
as wages under Section 27(1)(a) of the “ERA” 1996.

15 25 The Working Time Regulations 1998 SI 1998/1833 (“WTR”) provide workers
with a guaranteed statutory right to paid holiday. Under Regulations 13 and
13A, workers are entitled to 5.6 weeks paid holiday in each leave year
beginning on or after 1 April 2009. Where there is no relevant agreement
which applies between the worker and employer, the leave year begins on the
20 date on which that employment begins and each subsequent anniversary of
that date. Regulation 16(1) provides that a worker is entitled to be paid at the
rate of a week’s pay in respect of each week of annual leave to which he/she
is entitled.

26 The House of Lords decision in **Revenue and Customs Commissioners v**
25 **Stringer 2009 ICR 985, HL** establishes that unpaid holiday pay due under
Regulations 16 (1) or 14 (2) of the Working Time Regulations can be

recovered by means of a claim for unlawful deductions from wages under Section 23 of the “ERA” 1996 in accordance with its time limit provisions.

Unauthorised Deductions from Wages

5 27 The law relating to unauthorised deductions from wages is contained in Section 13 of the Employment Rights Act 1996 (the ‘ERA’).

28 This states: “An employer shall not make a deduction from wages of a worker employed by him unless:-

(i) The deduction is required or authorised to be made by virtue of a
10 statutory provision or a relevant provision of the worker’s contract [Section 13(1)(a)]; or

(ii) The worker has previously signified in writing his agreement or consent to the making of the deduction [Section 13(1)(b)].”

29 Section 13 (2) states: “In this section “relevant provision,” in relation to a
15 worker’s contract, means a provision of the contract comprised –

(i) In one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question or, [Section 13(2)(a)]

(ii) In one or more terms of the contract (whether express or implied and,
20 if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion [Section 13(2)(b)].”

30 Section 13 (3) states that: “Where the total amount of wages paid on any
25 occasion by an employer to a worker employed by him is less than the total

amount of wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion."

5 31 Section 23 (1) (a) states that: "A worker may present a complaint that his employer has made a deduction from his wages in contravention of Section 13." Section 23 (3) states that: "Where such a complaint involves a series of deductions, the references in Section 23 (2) to the deduction or payment are to the last deduction in the series."

10 32 It was held in **Bear Scotland Ltd v Fulton and anor 2015 ICR 221 EAT** that if there is a gap of more than three months between any two deductions in the chain, the series of deductions is broken.

33 In accordance with the Employment Rights Regulations 2018 SI 2018/1378 (which amend Sections 221-224 of the "ERA" 1996), holiday pay is
15 calculated by reference to the 52 weeks of pay prior to the calculation date (the first date of leave taken). Where there are no such weeks to take into account, it is the amount that fairly represents a week's pay having regard to the factors specified in Section 228 (3) of the "ERA" 1996 which include any remuneration received by the worker in respect of the employment.

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Itemised Pay Slips

34 With effect from 6 April 2019 Sections 8,9,11 and 12 of the "ERA" 1996 provide all workers with a right to be given a written itemised pay statement at or before the time at which any payment of wages or salary is made and a
25 right to enforce that in the employment tribunal. From the same date

employers are required to itemise pay slips to show the number of hours paid for where a worker is paid on the basis of an hourly rate. An itemised pay statement must also contain the gross amount of the wages or salary, the amounts of any variable or fixed deductions from that gross amount and the purposes for which they are made, the net amount of wages or salary payable and where different parts of the net amount are paid in different ways, the amount and method of each part-payment. There is no qualifying period for the right to an itemised pay statement.

35 Under Section 11 (1) of the “ERA” 1996, a worker who has not been provided with an itemised pay statement has the right to refer the matter to an employment tribunal. A reference must be made within three months of the termination of the employment, or if not reasonably practicable to present the claim within that time, within such further time as the tribunal considers reasonable.

15 36 If the tribunal finds that a worker has not received a pay statement, or that it does not contain the particulars required, Section 12 (3) of the “ERA” 1996 provides it must make a declaration to that effect. Section 12 (4) further provides that where a tribunal finds that any unnotified deductions have been made during the 13 weeks immediately preceding the claim, it may also make a monetary award to the worker.

Issues to be Determined by the Tribunal

25 37 The Tribunal identified the following issues required to be determined:-

- (i) Is the Claimant entitled to any holiday pay?
 - (ii) If so, has the deduction from the Claimant's wages by the employer required or authorised to be made in accordance with a relevant provision of her contract?
 - 5 (iii) If not, has the Claimant previously signified in writing her agreement to the deduction?
 - (iv) If not, has the Respondent made unauthorised deductions from the Claimant's wages?
 - (v) If so, how much is the Claimant to be awarded?
- 10 38 Did the Claimant receive pay slips at or before the time at which payment of her wages was made to her after 6 April 2019?
- 39 Did the Claimant receive her P45 upon termination of her employment?

Conclusions

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Holiday Pay

40 Having carefully considered all of the evidence in the round, I preferred the Claimant's evidence to the Respondent's evidence in that although she was correctly paid for the hours she worked, she did not receive holiday pay from
20 the Respondent throughout the duration of her employment and it was not an authorised deduction. This is because overall I found the Claimant was a credible witness who gave consistent and reliable evidence which was corroborated by the documentary evidence. In contrast, I did not find the Respondent to be a credible witness and I considered his evidence was
25 largely unreliable.

41 It was not in dispute that the Claimant took leave during her employment with the Respondent. The Respondent has lodged a record of the leave requested and taken by the Claimant which was unchallenged. (Doc I) However, the

Claimant's evidence was that each time she requested leave she asked Mr Chaudry about her holiday pay to which he would respond that she was not entitled to it. In contrast, the Respondent gave evidence that he calculated the staff's holiday pay each week on the basis of the hours worked and in support of that, he lodged a sample of his weekly diary records showing the staff hours worked each day and a table at the bottom setting out the number of staff hours worked the previous week and paid for, as well as the amount of leave accrued, taken and paid. (Doc H)

42 Having examined the sample of the Respondent's weekly diary records in
10 respect of the Claimant's wages and leave, I considered, as put to the Respondent by the Claimant in cross examination, that it was more than likely this table was not present in the diary when the Claimant would check her weekly hours with the Respondent before payment. (Docs H, A & B) This is because having examined the Claimant's pay slips lodged by the
15 Respondent, I was satisfied that the information in the table regarding holiday pay was not reflected in the relevant pay slips and in fact there was no evidence in these pay slips of holiday pay being paid at all.

43 In this regard I did not accept Mr Chaudry's evidence in chief as true that there was no requirement to itemise the holiday pay in the pay slips as it is already
20 there and just dealt with in a different way, or indeed the email sent to Mr Chaudry from his Accountant, Mr Din dated 30 March 2021 which stated: "I am also confirming that all hours worked or holiday hours were shown as normal pay" (Doc Q – p.1) because there was no evidence to show holiday hours had been paid in any way.

25 44 In reaching this view, I have noted the following:

45 The diary entry for 22-28 October 2018 states that the Claimant was paid at the end of that week for 15 hours plus £29.50 holiday pay for the week 15 - 21 October 2018 and therefore received a total of £118.00. (Doc H - p.10) Yet, the pay slip dated 27 October 2018 shows that the Claimant was paid
30 £88.50 for 15 hours work at £5.90 per hour and there is no record of holiday pay. (Doc A – p.5)

46 The diary entry for 18 - 24 March 2019 states that the Claimant was paid at the end of that week for 10 hours work plus 10 hours holiday pay for the week 11-17 March 2019 and therefore received a total of £118.00. (Doc H – p.2)
5 However, the pay slip dated 23 March 2019 shows that the Claimant was paid £59.00 for 10 hours work at £5.90 per hour and there is no record of holiday pay. (Doc A – p.23)

47 The diary entry for 15 - 21 April 2019 states that the Claimant was paid at the end of that week for 15 hours plus £59.90 holiday pay for the week 8 - 14 April 2019 and therefore received a total of £197.50. (Doc H - p.5) However, 15
10 hours work at the increased minimum wage rate of £6.15 amounts to £92.25 and together with the holiday pay of £59.90 totals £152.15 and not £197.50. The holiday pay recorded has also been calculated at the minimum wage rate for the previous year of £5.90. Furthermore, the pay slip dated 20 April 2019 shows that the Claimant was paid £92.25 for 15 hours work at £6.15 per hour
15 and there is no record of holiday pay. (Doc B – p.1)

48 The diary entry for 12-14 July 2019 states that the Claimant was paid at the end of that week for 15 hours plus 15 hours holiday pay for the week 1 – 7 July 2019 and therefore received a total of £184.50. (Doc H - p.8) However, the pay slip dated 13 July 2019 shows that the Claimant was paid £92.25 for
20 15 hours work at £6.15 per hour and there is no record of holiday pay. (Doc B – p.13)

49 For these reasons I found that the Claimant was not paid holiday pay during her employment with the Respondent.

25 Compensation

50 The Claimant's holiday pay entitlement has been calculated at the rate of a week's pay in respect of each week of annual leave she is entitled to on the basis of the evidence before me. As there is no evidence of the Claimant's hours of work prior to 7 October 2018 and her first leave date was 25 October
30 2018 (the calculation date), in accordance with Section 228 (3) of the "ERA"

1996, her average weekly pay has been calculated from the hours she worked between 7 October 2018 and 22 September 2019. (Docs U & Doc V)

51 The Claimant worked 461 hours over a 24 week period at the rate of £5.90
per hour = 2,719.90. She worked a further 595 hours over a 26 week period
5 at the rate of £6.15 per hour = 3,659.25. $2,719.90 + 3,659.25 = 6,379.15$
which divided by the 50 week period = £127.58 as her average weekly pay.

52 For the period 9 July 2018 – 8 July 2019 the Claimant was entitled to holiday
pay = £714.44 (127.58×5.6 weeks) For the period 9 July 2019 – 9 October
2019 she was entitled to holiday pay = £178.61 (5.6 weeks divided by 12
10 months = 0.466×3 months = 1.399×127.58) The total amount of holiday pay
due to the Claimant is therefore £893.05 ($714.44 + 178.61$)

Failure to Provide Itemised Payslips

53 The Claimant gave evidence that during her employment she did request
15 her pay slips from Mr Chaudry who said he would provide them to her but
that he never did and the first time she saw them was when these were
produced for the Hearing.

54 The Respondent's evidence was that he provided the Claimant with her pay
slips at the same time she was paid. In support of his evidence, Mr Chaudry
20 referred to an email dated 3 September 2018 from his Accountant, Mr Din
that noted pay slips were attached (Doc K – p.1) and a further email from
him dated 30 March 2021 which attached the "RTI" (Real Time Information)
submissions made to HMRC on 11 October 2019. (Doc Q - p.1-6)

55 Having considered this evidence, I preferred the evidence of the Claimant to
25 the Respondent and found that the Claimant was not provided with her pay
slips before or at the time of the payment of her wages. In reaching this view
I took account of my overall findings of credibility in respect to the Claimant

and Respondent and that while I accepted the email from Mr Din to Mr Chaudry of 3 September 2018 expressly referred to attached payslips, I was not satisfied that this was evidence to show that the pay slips had in fact been issued to the Claimant at or before the time of payment of her wages as required after 6 April 2019.

56 Furthermore, I found the Claimant's evidence credible that some of the pay slips lodged recorded less hours of work than she was paid for and that she would have raised this with the Respondent if she had received them when she was paid. In doing so, I have noted the following:

10 57 The pay slip dated 27 October 2018 for hours worked between 15 – 21 October 2018 shows that the Claimant was paid £88.50 for 15 hours work at £5.90 per hour (Doc A – p.5), yet the text message exchange between the Claimant and Sajida Chaudry on 14 October 2018 confirms that the Claimant worked 17 hours for that week. (Doc V – p.2)

15 58 The pay slip dated 16 March 2019 for hours worked between 4 – 10 March 2019 shows that the Claimant was paid £59.00 for 10 hours work at £5.90 per hour (Doc A – p.22), yet the text message exchange between the Claimant and Sajida Chaudry on 4 March 2019 confirms that the Claimant worked 20 hours for that week. (Doc V – p.11)

20 59 The pay slip dated 23 March 2019 for hours worked between 11-17 March 2019 shows that the Claimant was paid £59.00 for 10 hours work at £5.90 per hour (Doc A - p.23), yet the text message exchange between the Claimant and Sajida Chaudry on 10 March 2019 confirms that the Claimant worked 16 hours for that week. (Doc V – p.13)

25 60 In view of my finding that since 6 April 2019 the Claimant was not provided with written itemised pay slips at or before the time she was paid as required, a declaration has been made to that effect. However, on the basis that the Claimant suffered no unnotified deductions during the 13 weeks immediately preceding her claim, other than her holiday pay entitlement which the Respondent is ordered to pay, no further monetary award is made.

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- 61 In terms of the Claimant's P45, the Claimant gave evidence that she requested it from the Respondent when she started her new employment. This is supported by the text message evidence which shows the Claimant asking Mr Chaudry for it on 21 October 2019. (Doc S – p.2) However, her
5 evidence was that she never received a response to her text message and the first time she saw her P45 was when it was produced by the Respondent for the Hearing. The Respondent gave evidence that he requested the Claimant's P45 from his Accountant on 8 October 2019 which he received on 11 October 2019, which is supported by the email evidence. (Doc F – p.4 -5)
10 However, his evidence was that he then gave the Claimant her P45 on 13 October 2019 which is clearly not the case when there is evidence to show she was still requesting it from him on 21 October 2019. As such, I am satisfied that the Claimant did not receive her P45 upon termination of her employment with the Respondent.
- 15 62 For all these reasons the claims for holiday pay and failure to provide written itemised pay slips are well founded and upheld.

20 Employment Judge: Rosie Sorrell
Date of Judgment: 23 April 2021
Entered in register: 01 May 2021
and copied to parties