



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr D Bowen

**Respondent:** Llangennech Community Council

**Heard at:** By video

**On:** 30 April 2021

**Before:** Employment Judge Webb

## **Representation**

Claimant: In person

Respondent: Mr Paul O'Callaghan (Counsel)

**JUDGMENT** having been sent to the parties on 04 May 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. The Claimant, Mr Bowen has been employed by the Respondent, Llangennech Community Council, as an Assistant Caretaker/Supervisor since April 2018. The matters before me arose as a result of Covid-19 pandemic, and the closure of the facilities offered by the Community Council as a result of the public health emergency.

## **Claims and Issues**

2. The Claimant has brought a claim against the Respondent for unlawful deduction of wages.
3. In deciding this claim the issues I need to address are as follows:
  - i. Were the wages paid to the Claimant from 24 March 2020 to 29 December 2020 less than the wages he should have been paid?
  - ii. If yes, was any deduction required or authorised by statute or by a written term of the contract??
  - iii. If authorised by the contract, did the Claimant have a copy of the contract or written notice of the contract term before the deduction was made?

- iv. Did the Claimant agree in writing to the deduction before it was made?
  - v. If there was an unlawful deduction, how much is the Claimant owed?
4. The Claimant has also brought a claim for the failure to provide particulars of employment.
5. In deciding this claim the issues I need to address are as follows:
- i. If the unlawful deduction of wages claim succeeds, was the Respondent in breach of its duty to give the Claimant a written statement of employment particulars or of a change to those particulars, when these proceedings were begun?
  - ii. Are there exceptional circumstances that would make it unjust or inequitable to make the minimum award of two weeks' pay under section 38 of the Employment Act 2002? If not, the Tribunal must award two weeks' pay and may award four weeks' pay.
  - iii. Would it be just and equitable to award four weeks' pay?

### **The Hearing**

6. The Claimant represented himself and gave evidence. The Respondent was represented by Mr O'Callaghan, who called evidence from Mr Wyn Evans, Chair of the Llangennech Community Council.
7. In making my decision I also considered the documents from an agreed 149-page bundle of documents which the parties introduced in evidence.

### **Preliminary Matters**

8. Mr Bowen had raised the possibility of amending his claim by email on 15 April 2021. At the start of the hearing Mr Bowen made an application to amend his claim to include a holiday pay claim covering the period from the start of his employment to the end of his leave year 2019-2020, his leave year running from April to April. He stated that he had not been aware of his ability to have made such a claim at the same time as his unlawful deduction from wages claim.
9. In response Mr O'Callaghan for the Respondent submitted that the amendment of the claim had come as a surprise to the Respondent. The ET1 was clear that the only issue was the average pay being paid during furlough and it was too late to raise this claim now.
10. I refused the application to amend the claim.
11. In my view the holiday pay claim engaged a different set of factual circumstances to the claims before me. I considered in particular that Mr Bowen had referred to caselaw that dealt with holiday pay matters in

his ET1, but had not set out that that a holiday pay claim was being made, nor were the factual details of such a claim on the face of the ET1.

12. The time limit for presenting a holiday pay claim is 3 months following the date that annual leave was not permitted, the date payment should have been made, or the date a deduction is taken. The amendment related to a claim for the period April 2018 to April 2020 and would be out of time. I considered Mr Bowen's reason for not submitting the claim earlier but found that it was reasonably practicable for him to have submitted the claim earlier.
13. The application to amend was made late in proceedings; the Respondent did not have any opportunity to deal with the holiday pay claim in the response or subsequently. Having considered these and all relevant factors I concluded that the balance of injustice and hardship required me to refuse the application to amend the claim.

### **Findings of Fact**

14. The relevant facts are as follows. Where I have had to resolve any conflict of evidence, I indicate how I have done so at the material point. References to page numbers are to the agreed bundle of documents.
15. Mr Bowen was employed by Llangennech Community Council as an Assistant Caretaker/Supervisor from April 2018. Mr Bowen in his evidence said that during his interview process he discussed the prospect of overtime, and the ability to work overtime was one of the reason for him taking on the job.
16. I find the terms of the contract with regard to pay and overtime are set out in those documents at pages 1-4 of the bundle. These set out that Mr Bowen was to be paid for 13 hours a week and that overtime would be available from time to time to cover holidays, sickness and any other reason. Mr Bowen in his evidence accepted that overtime was not guaranteed to him. I find that the circumstances in which overtime was envisaged under the contract meant that it was to be discretionary.
17. While I accept the prospect of overtime may have been part of Mr Bowen's reasons for taking the position, I find that guaranteed overtime was not part of the contract under which Mr Bowen was employed.
18. The full particulars of Mr Bowen's employment were contained not just in those documents at page 1-4 of the bundle, but also in the National Joint Council – National Agreement on Pay and Conditions of Service. This document was not before me.
19. In his evidence Mr Bowen said that he had not been able to access the document as the website on which it was held required a password, and he had not yet been provided with a paper copy. I accept Mr Bowen's evidence on these matters, Mr Evans in his evidence confirmed that it was an oversight on his part that a copy had not been provided in response to emails and I accept that Mr Bowen has made efforts to discover his full terms and conditions of his employment in order to assist his claim.

20. I find that Mr Bowen did undertake significant overtime during his employment. Both Mr Bowen and Mr Evans in evidence confirmed this was the case and both also agreed that the overtime was due to long period of sickness of the main caretaker. Mr Evans in his evidence told me that prior to this sickness, the amount of overtime had been less. Mr Evans also told me that the amount of overtime had raised the wages bill by such a large extent that it had been necessary to justify the increased amount to an auditor. I accept what Mr Evans says about this as Chair of the Community Council he would have had direct knowledge of its financial position.
21. In March 2020, because of the Covid-19 regulations, the facilities of Llangennech Community Council closed. Mr Bowen was told that he would no longer be required to attend work but would continue to be paid as set out in this contract at 13 hours per week. Mr Bowen accepted that during the time he was not required to attend work he was paid for 13 hours per week. I find that Mr Bowen has been paid for 13 hours per week from 24 March 2020 to 29 December 2020.
22. Mr Bowen's evidence was that had he been furloughed under the UK Government Job Retention Scheme, its terms would have meant he would have been paid at least 80% of his normal wages and that his normal wages would have included his overtime time payments. I accept his evidence on this.
23. Mr Bowen's evidence was that the Respondent could have taken advantage of that scheme, however he did not identify that the Council had any obligation to take advantage of the scheme. I find on the basis of Mr Evans' evidence, the minutes of the council meetings of 12 October 2020 (page 21 of part b of the bundle) and the subsequent email to Mr Bowen dated 16 October 2020 (page 22 of part b of the bundle), that the respondent decided that it was not able to take advantage of the Job Retention Scheme.
24. As he has not been required to attend work for the Respondent, Mr Bowen has found additional employment as a hospital porter in the NHS assisting with the response to the Covid-19 pandemic.

## Law

25. The right not to suffer unlawful deductions is found in section 13 of the Employment Rights Act 1996:

*"13.— Right not to suffer unauthorised deductions.*

*(1) An employer shall not make a deduction from wages of a worker employed by him unless—*

*(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or*

*(b) the worker has previously signified in writing his agreement or consent to the making of the deduction...*

26. In his submissions Mr Bowen, said that he felt it would have been fair for him to have been put on the furlough scheme and been paid at least 80% of his normal wages, topped up to 100%. Others employed by the Council were being paid 100% of what they were usually being paid, but because he had not now been paid for any overtime he was losing out more.
27. Mr O'Callaghan for the Respondent asked me to examine the terms of the contract. He submitted that Mr Bowen had agreed that there was no promise of guarantee of overtime, Mr Bowen knew he was entitled to be paid for 13 hours per week and accepted that he had been paid for 13 hours per week. The additional overtime Mr Bowen had carried out did not change the terms of the contract through custom and practice because the Council's practice of offering Mr Bowen overtime was not reasonable, notorious and certain. Mr O'Callaghan also submitted that in the alternative, as Mr Bowen had worked in another roll there had been no loss.
28. There is a duty on employers under section 1(1) of the Employment Rights Act 1996 to provide employees with particulars of their employment. Under section 38 of the Employment Act 2002, where the Tribunal finds in favour of a worker, and the employer is in breach of their duty under section 1(1) of the 1996 Act, the Tribunal must make an award of two weeks pay unless there are exceptional circumstances that make such an award unjust. The Tribunal may award up to 4 weeks pay if it is considered to be just and equitable.
29. In his submission to Mr Bowen said that he did not accept that the contract of employment complied with section 1(1) of the Employment Rights Act 1996, because not all the information had been provided to him, even though it had been requested by him recently.
30. For the Respondent Mr O'Callaghan emphasised that section 38 of the Employment Act 2002 is not a stand-alone claim, and to succeed the Claimant would need to succeed on his unpaid wages claim. He submitted that in any event the Respondent was compliant with the duty to provide particulars. Mr Bowen was provided with a document that confirmed the name of his employer, the date his employment began and the scale of remuneration. Mr O'Callaghan accepted that details of Mr Bowen's holiday entitlement were not on the face of those documents but were available in a separate document that was referred to in the document Mr Bowen was provided with.

## **Conclusions**

31. I have considered the facts as I have set out above and the submissions of the parties in reaching my conclusions on the issues before me.
32. *Were the wages paid to the Claimant from 24 March 2020 to 29 December 2020 less than the wages he should have been paid?*

33. Although there was significant overtime, I conclude the circumstances in which it arose could not be described as reasonable, notorious and certain and did not change the terms of the contract that Mr Bowen agreed to when he began his employment.
34. I conclude that there is no general right to be furloughed under the UK Government Job Retention Scheme and there is no obligation on any employer to furlough employees. I further conclude that there was no term of the contract between Mr Bowen and the Respondent that would entitle him to be paid at least 80% of his normal wages while he was not required to attend work.
35. I conclude that Mr Bowen was entitled to be paid for 13 hours per week under the terms of his contract, was paid for 13 hours and that the wages paid to him from 24 March 2020 to 29 December 2020 were not less than he should have been paid.
36. As the claimant was not paid less than he should have been there was no unlawful deduction from his wages, I do not need to consider any further issues in relation to this claim.
37. *If the unlawful deduction of wages claim succeeds, was the Respondent in breach of its duty to give the Claimant a written statement of employment particulars or of a change to those particulars, when these proceedings were begun?*
38. As I have not found in favour of the claimant in his unlawful deduction of wages claim, I conclude I am unable to make any award for a failure to provide particulars of employment.

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Employment Judge Webb

Date: 14 June 2021

REASONS SENT TO THE PARTIES ON 15 June 2021

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FOR THE TRIBUNAL OFFICE Mr N Roche