



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4105532/2020

Held by CVP on 21 June 2021

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Employment Judge McFatridge

Ms Catriona Day

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**Claimant
In person**

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Hairy Taverns Ltd

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**Respondent
Represented by:
Mr O'Hare,
Director**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is the respondent shall pay to the claimant the sum
30 of One Hundred and Nine Pounds (£109) being the balance of notice pay due to
the claimant.

REASONS

1. The claimant submitted a claim to the Tribunal in which she claimed that
35 she was due notice pay following the termination of her employment. The
respondent denied the claim. The final hearing took place over CVP on
21 June 2021. The claimant gave evidence on her own behalf. Mr O'Hare
was invited to give evidence but did not do so. The parties made
E.T. Z4 (WR)

submissions. In advance of the hearing the claimant had lodged a number of text messages which she had exchanged with the respondent's manager. The respondent had lodged copies of the claimant's final three pay slips. On the basis of the evidence and the productions I found the following essential facts to be proved or agreed.

Findings in fact

2. The claimant commenced employment with the respondent in or about February 2020. The respondent operates a public house in Dundee. The claimant was employed by them on the basis that she worked 35 hours per week. She was paid at the rate of £8.72 per hour giving her a normal weekly wage of £305.20 gross. At some point Mr O'Hare offered the claimant a pay rise to £9 per hour. The claimant indicated that this would not be of assistance to her since it would affect her benefits. An arrangement was made whereby the claimant would continue to be paid at the rate of £8.72 per hour but that Mr O'Hare would voluntarily pay her a cash amount of around £9 per week. So far as her contract of employment was concerned she was entitled to be paid 35 hours per week at the rate of £8.72 per hour.
3. The claimant worked to a weekly rota. On Monday 7 September 2020 the claimant was not at work. The claimant arrived for work at 10:00 am on Tuesday 8 September to open the bar. She was told by Mr O'Hare's daughter who was the manager that she was being dismissed. She was not required to work for the rest of the week.
4. As noted above, the claimant normally received the sum of £305.20 gross for a 35 hour week. This equated to £271 per week net. She was paid every Friday. She was paid on 4 September 2020 as normal. In the week ending 11 September she was paid her accrued holiday pay of £973.59 together with payment for 22 and a half hours' work at the rate of £8.72 per hour giving total pay for £196.20. The claimant did not work any part of that week since she was dismissed on the Tuesday morning before starting work.

Matters arising from the evidence

5. I found the claimant's evidence somewhat difficult to follow. The position as stated in her ET1 was that she had been dismissed on 9 September which was a Wednesday. This contrasted with the respondent's position which was that she had been dismissed on 7 September which was a Monday. During evidence the claimant was quite clear that it was the Tuesday morning that she had been dismissed. That was the 8 September. The claimant initially said that she had received around £200 the following Friday but then accepted that the wage slip lodged by the respondent was correct and this showed that she had been paid around £857.06 net including her accrued holiday pay. The claimant accepted that she had been paid the 22 and a half hours' pay but said that she understood from the respondent's manager that the respondent had agreed to pay her up to the end of the week "as a goodwill gesture". It was her position that she had gone to ACAS and ACAS had then told her she was due a week's pay in lieu of notice given that she had been dismissed without notice.

Discussion and decision

6. I first of all had to determine whether it was appropriate for the tribunal to deal with the case at all given the claimant's assertion that she had an agreement with the respondent that she would be paid part of her wages cash in hand in order to avoid reducing her benefits. On the basis of the limited information available to me I felt that I could not conclude either that the contract itself was illegal given that I had no real information as to whether any such cash in hand payments were made and what they represented or that the claimant had participated in the illegality to the extent that it would be appropriate, given the case law, that the claimant's participation in the illegality was such as to make it inappropriate for the claimant to be able to avail herself of recourse to the tribunal in order to enforce the contract. I therefore decided it was appropriate to deal with the case.
7. It was clear to me from the evidence that the claimant had been summarily dismissed on Tuesday 8 September. Given that she was not permitted to

work her notice she was entitled to one week's pay in lieu of notice. The two questions I had to decide were firstly how much the claimant was entitled to be paid in respect of a week's pay in lieu of notice and secondly whether the sum of £196.20 which the claimant had been paid in her final pay packet was a payment (or part payment) in lieu of notice as the respondent contested or whether it was a "goodwill gesture" over and above her entitlement to pay in lieu of notice as the claimant suggested.

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8. With regard to the amount of a week's pay I noted that both parties agreed in the ET1 and ET3 that the claimant was paid £305 per week gross and £271 per week net. The claimant's evidence was that she normally worked a 35 hour week. The respondent's position was that the final figure had been calculated by their accountant and was based on the fact that the claimant had not been rota-d to work on Friday the 11 September and that the respondent had paid her the amount which she would have earned in the week 4-11 September had she not been dismissed.

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9. The claimant is entitled to notice pay in terms of section 86 of the Employment Rights Act 1996. Given her length of service she was entitled to one week's notice or one week's pay in lieu of notice. A week's pay is defined in Chapter 11 of the Employment Rights Act 1996. I considered that in this case the claimant's normal working hours were 35 hours per week. This was on the basis of the claimant's evidence and the respondent's acceptance of the position in the ET3. I should say that even if I am wrong in this and the hours varied it appeared clear from the claimant's evidence that averaging her earnings out over the previous 12 weeks as one would be required to do if she did not have "normal working hours" would give the same figure. It therefore appears clear to me that the claimant's normal week's pay was £305.20 gross. Accordingly, this is the amount of payment in lieu of notice which the claimant ought to have received.

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10. The claimant's final pay slip showed that she received a sum of £196.20. I considered that this was quite clearly intended to be a payment in lieu of notice. There was nothing to suggest that there was any agreement between the parties that the claimant would receive a higher amount or a "goodwill gesture" on top of her entitlement. It was appeared to me that

the respondent had instructed their accountants to pay the claimant what was due rather than to pay her some additional amount.

- 5 11. It was clear to me that the respondent's accountants had fallen into error by deciding that the claimant was only entitled to be paid for the hours she was rota-d to work for the rest of that week. As noted above the claimant had been paid £305.20 per week during her employment.
- 10 12. The claimant was due to be paid £305.20 gross as pay in lieu of notice. She was paid £196.20 gross. She is therefore still due the sum of £109. Accordingly, I have made an order for this amount to be paid to the claimant. The amount is a gross amount. It will be open to the respondent to deduct from this sum any sums due to be paid to HMRC in respect of PAYE Income Tax and Employee's National Insurance Contributions provided the respondent provides the claimant with an itemised pay slip showing the amount of such deductions, that the respondent immediately
15 account for any sums so deducted to HMRC in the usual way and that if asked by the claimant the respondent provides the claimant with proof that these deductions have been remitted to HMRC in the usual way.

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25 **Employment Judge:** **I McFatridge**
Date of Judgment: **23 June 2021**
Date sent to parties: **23 June 2021**