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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No's: 4107889/2020 & 4107890/2020

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Held in Glasgow by Cloud Video Platform (CVP) on 2 March 2021

Employment Judge B. Beyzade

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Miss Lauren Faircloth

**First Claimant
In Person**

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Mr Jack Sutton

**Second Claimant
In Person**

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DW Construction & Joinery Ltd

**Respondent
Represented by
Duncan Wardrup,
Director**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The Judgment of the Tribunal is that:

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- 1.1. the complaint of unauthorised deduction from wages in respect of unpaid wages as at the week ending 30 October 2020 is well founded and the Respondent is ordered to pay the First Claimant the sum of **ONE HUNDRED AND THIRTY-ONE POUNDS AND TWENTY-FIVE PENCE [£131.25]** from which tax and national insurance requires to be deducted, provided that the Respondent intimates any such

deductions in writing to the First Claimant and remits the sum deducted to Her Majesty's Revenue and Customs.

5 1.2. the complaint of unauthorised deduction from wages in respect of holiday pay between 13 January 2020 and 30 October 2020 is well founded and the Respondent is ordered to pay the First Claimant the sum of **TWO HUNDRED AND TWENTY-SIX POUNDS AND EIGHTY PENCE [£226.80]** from which tax and national insurance requires to be deducted, provided that the Respondent intimates any such deductions in writing to the First Claimant and remits the sum deducted to Her Majesty's Revenue and Customs.

10 1.3. the complaint of unauthorised deduction from wages in respect of unpaid wages during week ending 30 October 2020 is well founded and the Respondent is ordered to pay the Second Claimant the sum of **THREE HUNDRED AND THIRTY-SIX POUNDS [£336.00]** from which tax and national insurance requires to be deducted, provided that the Respondent intimates any such deductions in writing to the Second Claimant and remits the sum deducted to Her Majesty's Revenue and Customs.

15 1.4. the complaint of unauthorised deduction from wages in respect of holiday pay between 1 January 2020 and 30 October 2020 is well founded and the Respondent is ordered to pay the Second Claimant the sum of **TWO HUNDRED AND FIVE POUNDS AND EIGHTY PENCE [£205.80]** from which tax and national insurance requires to be deducted, provided that the Respondent intimates any such deductions in writing to the Second Claimant and remits the sum deducted to Her Majesty's Revenue and Customs.

REASONS

Introduction

1. On 17 December 2020, the Claimants presented a complaint of unlawful deduction from wages (arrears of pay and holiday pay) in relation to which the Respondent entered a Response on 20 January 2021.
2. A final hearing was held on 2 March 2021. This was a hearing held by CVP video hearing pursuant to Rule 46. I was satisfied that the parties were content to proceed with a CVP hearing, the parties did not raise any objections, that it was just and equitable in all the circumstances, and that the participants in the hearing were able to see and hear the proceedings.
3. The parties did not file a Bundle of Productions. The Tribunal had in its possession a copy of the Tribunal file which included the ET1 Claim Form, Notice of Hearing/standard directions (including in relation to directions for a possible list to which the Claimants objected and disputed the Respondent's counterclaim), wage slips (First Claimant 24.01.2020 – 06.11.2020 and Second Claimant 10.01.2020-06.11.2020), two letters in relation to the Claimants' redundancies dated 01.10.2020, a letter from Richardson & Co. relating to annual leave calculations dated 13.11.2020, Email from the Respondent dated 16.11.2020 attaching a copy of an invoice and other correspondences between the Tribunal and the parties.
4. At the outset of the hearing the parties were advised that the Tribunal would investigate and record the following issues as falling to be determined, the parties being in agreement with these:
 - (i) In relation to the First Claimant's arrears of pay claim, is the First Claimant entitled to unpaid salary, and if so in what amount?
 - (ii) Is the First Claimant entitled to payment in lieu of untaken holidays, and if so, in what amount?

- (iii) In relation to the Second Claimant's arrears of pay claim, is the Second Claimant entitled to unpaid salary, and if so in what amount?
- (iv) Is the Second Claimant entitled to payment in lieu of untaken holidays, and if so, in what amount?

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5. Both Claimants confirmed that their respective claims for arrears of pay and payment in lieu of untaken holiday were brought pursuant to section 13 of the Employment Rights Act 1996. Following the Claimants' confirmation of this and in light of the content of their Claim Form, the Respondent was not entitled
10 to make a contract claim (i.e. a contractual counterclaim). The Tribunal therefore did not investigate or determine the Respondent's contract claim.

6. The Claimants gave evidence at the hearing on their own behalf and Mr. Duncan Wardrup, Director gave evidence on behalf of the Respondent.

15 7. The parties made closing submissions at the end of the proceedings.

Findings of Fact

8. On the documents and oral evidence presented the Tribunal makes the following essential findings of fact restricted to those necessary to determine
20 the list of issues -

First Claimant

9. The First Claimant was employed by the Respondent from 13 January 2020 until 30 October 2020 as an Admin/AutoCAD Operator. The First Claimant
25 was employed by the Respondent, DW Construction & Joinery Ltd, a private limited company with its registered office at Hilltop, The Glen, Dumfries, Dumfries and Galloway, DG2 8PU.

10. The First Claimant was not provided with a Statement of Terms of Employment by the Respondent. However, the First Claimant was paid
30 £10.50 per hour. Her working hours were initially agreed at 30 hours per week.

The First Claimant was not paid in respect of any lunch break. The First Claimant was paid weekly.

11. The First Claimant would normally attend work 4 days per week and her normal working day would last for 7.5 hours.
- 5 12. When the First Claimant initially started working for the Respondent in January 2020 on average, she worked 30 hours per week. The First Claimant's weekly pay based on 30 hours worked per week was therefore £315.00 before tax and national deductions were made.
- 10 13. During the First Claimant's last working week she worked 30 hours.
14. The First Claimant received a pay slip relating to pay date 06 November 2020 stating she was due £315.00 (described as lieu hours) but £131.25 was deducted from the First Claimant's pay under the heading "Holiday Hrs".
- 15 15. At the date of termination, the First Claimant had in fact used and been paid in respect of 112.5 hours of her annual leave entitlement. The First Claimant had accrued further annual leave entitlement of 21.6 hours. She did not take the said 21.6 hours of her annual leave entitlement and she was not paid in lieu of this.
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Second Claimant

16. The Second Claimant was employed by the Respondent from 1 January 2020 until 30 October 2020 as Bench Joiner. The Second Claimant was employed by the Respondent, DW Construction & Joinery Ltd.
- 25 17. The Second Claimant was not provided with a Statement of Terms of Employment by the Respondent. However, the Second Claimant was paid £14.00 per hour. His working hours were initially agreed at 42.5 hours per week. The Second Claimant was not paid in respect of any lunch break. The Second Claimant was paid weekly.

18. The Second Claimant would normally attend work 5 days per week and his normal working day would last for 8.5 hours.
19. The Second Claimant on average worked 42.5 hours per week, excluding his lunch break. The Second Claimant's weekly pay based on 42.5 hours worked per week was therefore £595.00 before tax and national deductions were made.
20. During the Second Claimant's last working week he worked 42.5 hours.
21. The Second Claimant received a pay slip relating to pay date 06 November 2020 indicating that he was due £595.00 (described as lieu hours) although £336.00 was deducted from the Second Claimant's pay under the heading "Holiday Hrs".
22. According to the letter from Richardson & Co. dated 13 November 2020 at the date of termination, the Second Claimant had in fact used and been paid in respect of 166 hours of his annual leave entitlement.
23. Additionally the Second Claimant did not work on 1 January 2020 or on 2 January 2020, both days being public holidays in Scotland.
24. At the date of termination, the Second Claimant had accrued further annual leave entitlement of 14.7 hours. He did not take the said 14.7 hours of his annual leave entitlement and he was not paid in lieu of this.

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Observations

25. On the documents and oral evidence presented the Tribunal makes the following essential observations on the evidence restricted to those necessary to determine the list of issues –
26. Neither the First Claimant nor the Second Claimant had a Contract of Employment, and they were not made aware of the details relating to their

annual leave entitlements by the Respondent. There was no written agreement between the parties setting out any furlough arrangements.

27. I did not accept the Respondent's assertion that in accordance with the Construction Industry Joint Council ("CIJC") rules its employees should be entitled to 22 days' holiday. The Tribunal was not provided with any evidence of these rules and in any event the rules were not incorporated in the Claimants' Contracts of Employment.

28. In the absence of a Contract of Employment, the provisions of the *Working Time Regulations 1998* applied in respect of the Claimants' annual leave arrangements. The Claimants were not aware of this. However the Claimants understood that their holiday entitlement was 28 days including bank holidays in respect of a full leave year (the Claimants were not entitled to a full leave year - the First Claimant's employment started on 13 January 2020; the Second Claimant's employment started on 1 January 2020 and both Claimants' employments terminated on 30 October 2020) and that this entitlement did not change when the Claimants were purportedly on furlough leave.

First Claimant

29. The First Claimant explained that she had only taken 112.5 hours of her annual leave entitlement. She stated she was therefore owed 21.75 hours. The First Claimant's calculation and methodology of her holiday entitlement was not clear, although this is unsurprising as the First Claimant did not have a Contract of Employment and her pay slips did not contain full and accurate information in respect of her annual leave.

30. The First Claimant's annual leave entitlement in respect of the period 13 January 2020-30 October 2020 should be based on her pro rata entitlement of 134.1 hours holiday (based on her agreed average 30 hours working week and 7.5 hours per day). Her annual leave entitlement was not reduced by agreement. Neither party provided any specific or accurate dates or hours worked or any annual leave records. In the absence of this information, and

based on the best evidence the Tribunal had, the Tribunal determined that on the balance of probabilities the First Claimant was entitled to receive pro rata annual leave entitlement (based on 7.5 hours working days) as she did not take 21.6 hours leave during the dates in question.

5 31. Although the First Claimant stated she believed she did not take 21.75 hours annual leave, I was not satisfied on the balance of probabilities that the First Claimant was owed this amount in relation to the period worked and the First Claimant provided insufficient evidence to show the amount claimed were owed. The evidence relating to the days and hours she worked were
10 manifestly inadequate. In any event the calculations provided were not correct.

32. As the First Claimant was clearly owed 21.6 hours of accrued annual leave, it was difficult to decipher on what basis the Respondent sought to deduct £131.25 from her pay. The Respondent did not provide any records in respect
15 of the First Claimant's annual leave entitlement. I was not satisfied on the balance of probabilities that the Respondent was entitled to deduct the said sum or any other amount from the First Claimant's pay. The First Claimant's pay recorded on her 06 November 2020 pay slip should have been £315.00 in respect of her last working week (without the said deduction).

20 *Second Claimant*

33. The Second Claimant advised that he took 166 hours of his annual leave entitlement. He further advised that he was therefore owed 32.05 hours. Not only was the Second Claimant's calculation and methodology of his holiday entitlement not clear (again this is unsurprising as the Second Claimant did
25 not have a Contract of Employment and his pay slips did not contain full and accurate information in respect of his annual leave) but also the information he provided to the Tribunal was inconsistent.

34. The Second Claimant's annual leave entitlement in respect of the period 1 January 2020-30 October 2020 should be based on his pro rata entitlement
30 of 197.7 hours holiday (on the basis of his agreed average 42.5 hours working

week and 8.5 hours per day). His annual leave entitlement was not reduced by agreement. Neither party provided any specific or accurate dates or hours worked or any annual leave records. In the absence of this information, and based on the best evidence the Tribunal had, the Tribunal determined that on the balance of probabilities the Second Claimant was entitled to receive his pro rata annual leave entitlement (based on 8.5 hours working days) as he did not take 14.7 hours leave during the dates in question.

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35. Although the Second Claimant stated that he believed he did not take 32.05 hours annual leave entitlement that he had, I was not satisfied on the balance of probabilities that the Second Claimant was owed this amount in relation to the period worked and the Second Claimant provided insufficient evidence to show the amount he claimed were owed. He could not recall what days and hours he worked with any meaningful accuracy. In any event the calculations provided were not correct.

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15 36. The Second Claimant stated in his evidence that he worked during all bank holidays. He later accepted that he did not work on Christmas Day, New Year's Eve or New Year's Day. When asked if he worked on 2 January 2020 (public holiday in Scotland) the Second Claimant stated that according to his pay slip he did not take annual leave on that date. This information could not be confirmed as the Second Claimant did not produce his pay slip to the Tribunal covering the dates 1 and 2 January 2020 (the first pay slip provided was dated 10 January 2020). On the balance of probabilities, I preferred Mr. Wardrup's evidence that the Second Claimant did not work and was paid in respect of 1 and 2 January 2020 which was clear and consistent.

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25 37. As the Second Claimant was due 14.7 hours of accrued annual leave, it was difficult to decipher on what basis the Respondent sought to deduct £336.00 from his pay. The Respondent did not provide any records in respect of the Second Claimant's annual leave entitlement. I was not satisfied on the balance of probabilities that the Respondent was entitled to deduct the said sum or any other amount from the Second Claimant's pay and there was no evidence of any agreement for the said deduction to be made. The Second

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Claimant's pay recorded on his 06 November 2020 pay slip should have been £595.00 in respect of his last working week (without deduction).

Relevant law

38. To those facts, the Tribunal applied the law –

5 39. Section 13 of the Employment Rights Act 1996 ('ERA 1996') provides that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised by statute, or by a provision in the workers contract advised in writing, or by the worker's prior written consent. Certain deductions are excluded from protection by virtue of s14 or
10 s23(5) of the ERA.

40. A worker means an individual who has entered into or works under a contract of employment, or any other contract whereby the individual undertakes to perform personally any work for another party who is not a client or customer of any profession or business undertaking carried on by the individual (s230
15 15 ERA).

41. Under Section 13(3) there is a deduction from wages where the total amount of any wages paid on any occasion by an employer is less than the total amount of the wages properly payable by him to the worker on that occasion.

42. Under Section 27(1) of the ERA "wages" means any sums payable to the
20 worker in connection with their employment including unpaid wages and holiday pay.

43. A complaint for unlawful deduction from wages must be made within 3 months beginning with the due date for payment (Section 23 ERA 1996). If it is not reasonably practicable to do so, a complaint may be brought within such
25 further reasonable period.

44. Under Regulations 13 and 13A of the Working Time Regulations 1998 a worker is entitled to 5.6 weeks annual leave in each leave year. Where a worker's employment is terminated during a leave year the worker is entitled to a proportion of that leave and a payment in lieu in respect of any leave not

taken. Less than half a day's leave is rounded up to half day's leave and if more is rounded up to a whole day. The holiday year begins on the date when employment begins unless a relevant agreement provides otherwise. A worker is entitled to leave paid at the rate of a week's pay calculated under the Employment Rights Act 1996.

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45. Under the *Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994* ("the Order"), a Respondent employer is entitled to make a contract claim (i.e. a contractual counterclaim) against a Claimant if, and only if, that Claimant has included a contract claim in his or her ET1 claim form which has been served on that Respondent. It is not permitted to make such a contractual counterclaim in response to an ET1 which does not include a contract claim. A Claimant is only to be treated as including a contract claim in his or her ET1 claim form if the claim:

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- must necessarily have been brought under the Order, i.e., it can only be brought as a breach of contract claim and not alternatively as a statutory claim, or
- has unequivocally been brought as a breach of contract claim under the Order

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46. By way of example, if a Claimant presents a claim for arrears of pay the Respondent will not be entitled to present a contractual counterclaim because the Claimant's claim will not necessarily have been brought unequivocally pursuant to the Order.

Discussion and decision

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47. On the basis of the findings made the Tribunal disposes of the issues identified at the outset of the hearing as follows –

First Claimant

48. The First Claimant submits that she was due £228.00 in respect of her annual leave payments (total entitlement 134.25 hours). The First Claimant received holiday pay in respect of 112.5 hours. The First Claimant therefore states she

is owed £228.38 in respect of 21.75 hours. The First Claimant states she did not receive payment of this sum.

49. The First Claimant accordingly accrued 134.1 hours holiday (30 hours working week) [total hours worked x 12.07% (i.e. [5.6 weeks/46.4] x 100)] x £10.50
5 between the period 13 January 2020 – 30 October 2020. The First Claimant did not take nor was she paid for any of her holidays up to her last day of work on 30 October 2020 (except in respect of 112.5 hours). She is therefore due payment in respect of 21.6 hours holiday. Her hourly rate is £10.50. Accordingly, she was entitled to holiday pay in the sum of £226.80 (gross).
10 The First Claimant did not receive a payment on account of her holiday pay that fell due after her employment ended. She is therefore due to be paid £226.80 (gross) in respect of holiday pay. The First Claimant did not consent to the said deduction from her wages.

50. In relation to her October 2020 pay (payslip dated 06 November 2020), the
15 First Claimant is due £131.25 (gross) this being based on the amount of basic pay shown on her pay slip of £315.00 and the amount deducted of £131.25 owing to the Respondent's mistaken belief that the First Claimant had taken holiday entitlement more than her annual leave allowance. She is therefore due to be paid £131.25 (gross) in respect of unpaid wages. The First Claimant
20 did not consent to the said deduction from her wages. Compensation under section 24(2) of the ERA 1996 was not claimed.

Second Claimant

51. The Second Claimant submits that he was due £448.70 in respect of his
25 annual leave payments (total entitlement 198.05 hours). The Second Claimant received holiday pay in respect of 166 hours. The Second Claimant therefore states he is owed £448.70 in respect of 32.05 hours. The Second Claimant states he did not receive payment of this sum.

52. The Second Claimant accordingly accrued 197.7 hours holiday (42.5 hours working week) [total hours worked x 12.07% (i.e. [5.6 weeks/46.4] x 100)] x

£14.00) between the period 1 January 2020 – 30 October 2020. The Second Claimant did not take nor was he paid for any of his holidays up to his last day of work on 30 October 2020 [except in respect of 166 hours confirmed in the letter from the accountant dated 13 November 2020 and an additional 17 hours (1 and 2 January 2020)]. He is therefore due payment in respect of 14.7 hours holiday. His hourly rate is £14.00. Accordingly, he was entitled to holiday pay in the sum of £205.80 (gross). The Second Claimant did not receive a payment on account of his holiday pay owed after his employment ended. He is therefore due to be paid £205.80 (gross) in respect of holiday pay. The Second Claimant did not consent to the said deduction from his wages.

53. In relation to his October 2020 pay (payslip dated 06 November 2020), the Second Claimant is due £336.00 (gross) this being the difference between the amount of basic pay shown on his pay slip of £595.00 and the amount deducted of £336.00 due to the Respondent's erroneous calculation that the Second Claimant had taken holiday entitlement in excess of his annual leave allowance. He is therefore owed £336.00 (gross) in respect of unpaid wages. The Second Claimant did not consent to the said deduction from his wages. Compensation under section 24(2) of the ERA 1996 was not claimed.

54. In relation to both Claimants' claims the Respondent submitted that the Claimants were entitled to 22 days annual leave. As indicated previously, there was no evidence in relation to the CIJC rules nor that the same were incorporated in the Claimants' terms of employment

55. The Respondent's contract claim was not considered by the Tribunal. This was not a matter that was before the Tribunal. The Tribunal was satisfied that the Claimants brought their claims under the Tribunal's statutory jurisdiction. Therefore the Tribunal was unable to consider any employer contract claim.

Conclusion – First and Second Claimant

56. The Respondent has therefore made an unlawful deduction of wages in the First Claimant's claim in the sum of £358.05 in total, from which statutory deductions including tax and national insurance will need to be deducted.

5 57. The Respondent has therefore made an unlawful deduction of wages in the Second Claimant's claim in the sum of £541.80 in total, from which statutory deductions including tax and national insurance will need to be deducted.

10 *I confirm that this is my judgment in the case of Miss Lauren Faircloth and Mr Jack Sutton -v- DW Construction & Joinery Ltd 4107889/2020 & 4107890/2020 and that I have signed the order by electronic signature.*

Employment Judge: B Beyzade

Date of Judgement: 30 March 2021

15 Entered in register: 29 April 2021

and copied to parties