



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Kamel Lardjani

**Respondent:** Elior UK Plc

**Heard at:** Watford (by CVP)

**On:** 1 March 2021 and 6 May 2021

**Before:** EJ Price

## Representation

**Claimant:** In person

**Respondent:** Mr C Hill, Counsel

# JUDGMENT

1. The claim for unlawful deduction of wages is dismissed.
2. The claim for breach of contract is dismissed.
3. The claim for holiday pay is dismissed, upon withdrawal.

# REASONS

## Introduction and issues

1. The claim is for breach of contract and/or unlawful deduction from wages arising out of whether or not any overtime was due to the Claimant upon the termination of his employment. There was an additional claim for holiday pay.
2. The Claimant's claim is that he was due payment for overtime he worked during the period March to April 2019. The Respondent accepts that the Claimant worked overtime, but considers that they have paid him all monies owing for any additional work he undertook. The do not agree with the number of hours he asserts he worked or the rate of pay which he claims was agreed.

## Holiday pay

3. At the outset of the hearing the Claimant applied to amend his ET1 to include a claim for holiday pay. He had raised this issue in his complaints to his employer about not being paid his wages. He explained that he thought this was all included in his claim as it was all part of a claim for unpaid wages, hence he didn't mention this discreetly in his claim form.
4. This application was objected to by the Respondent who contended that they had thought that the issue regarding the Claimant's holiday pay had been resolved, that it was not formulated clearly and had no prospects of succeeding.
5. I allowed the amendment on the basis that the Claimant had referred to holiday pay owing in his pre-tribunal correspondence with the Respondent and thus the dispute was one the Respondent was aware of. Further the Respondent's evidence had been prepared to include testimony on this issue and therefore there was limited, if any, prejudice to the Respondent in allowing the same.
6. However, through the course of cross examination the Claimant accepted that he had misunderstood how his holiday pay was calculated and what was owing to him. He also agreed when questioned that he was not owed any outstanding holiday pay at the end of his employment. He subsequently withdrew this claim. The Respondent applied for the claim to be dismissed, the Claimant did not object to this.

#### **Unlawful deduction from wages/breach of contract**

7. In his ET1 the Claimant had stated that he was due 267 hours of overtime. On the 20 October 2020 the Claimant was directed him to provide clarification of the amounts he claimed. He complied with this order by emailing the Tribunal on the 23 November 2019 setting out the amount due as £6574.27.
8. At the outset of the hearing the Claimant clarified the amounts he was claiming as follows:

272 hours of overtime consisting of:

240 hours at a rate of £25.46 (which was double his ordinary hourly rate)  
= £6110.40; and

32 hours at £12.78 (his ordinary hourly rate) = £408.96

60 hours working at night at a rate of £25.46 (which was double his ordinary hourly rate) = £1527.60.

A total of £8046.96.

#### **Procedure, documents, and evidence heard**

9. This was a remote hearing which had not been objected to by the parties. The form of remote hearing was video. A face-to-face hearing was not held because

it was not practicable and no-one requested the same and all issues could be determined in a remote hearing.

10. I had sight of 16 pdf files provided by the Claimant and an 85-page bundle of documents. Ms Nicola Makarek, the Respondent's HR manager and Mr George Symons, the Respondent's operations manager provided witness statements and gave oral evidence. There was no witness statement provided by the Claimant, but the Respondent agreed that he could adopt the description of his claim set out in his ET1 as his evidence in chief. The Claimant gave oral evidence.

### **Findings of Fact**

11. The Tribunal made the following findings of fact, on the balance of probabilities, after giving careful consideration to the documentary and oral evidence provided to it and the submissions made by the Claimant and the Respondent's representative.
12. It was not disputed that the Respondent is contracted to provide in house catering services for Tesco in their stores. The Claimant worked in the Borehamwood branch as a cook manager. He started working there on 8 November 2018 and was dismissed by way of redundancy at the end of April 2019. There was some dispute as to whether his last day of employment was 28 April 2019. The Claimant had stated in his ET1 claim form that the 31 April 2019 was the last day of his employment. However, he accepted in evidence that his role came to an end on 28 April 2019 and that was in fact the last day of his employment. The redundancy was due to Tesco changing the contract it had with the Respondent which resulted in a number of stores no longer using the Respondent's services.
13. The Claimant initially worked on a contract which was for 15.5 hours per week. This was replaced on 8 March 2019 with a contract which included a term requiring him to work 37.5 hours per week for which he was to be paid £25,000 per year. This was paid to him on a monthly basis.
14. Borehamwood was classified by the Respondent as a medium size store. Mr Symons gave evidence that usually in a store the size of Borehamwood there would be chef manager, a chef, 3 general assistants and a night chef. It was not disputed that Claimant worked with a women called Hanna. Nor is it disputed that sometime in March 2019 Hanna left for a period of annual leave and after this did not return to work and that subsequently the Claimant worked on his own for a period.
15. It was agreed that although the Claimant was only contracted to work 15.5 hours per week up until the 8 March 2019 he in fact worked more than this and therefore by March he was owed back pay. The Claimant brought up this issue with his manager and on 17 March 2019 Mr Symons met with the Claimant in

store in Borehamwood and input the hours of work that were unpaid into the Respondent's digital records.

16. The Respondent did not have any sort of clocking in system. Therefore Mr Symons relied on the Claimant's account of the number of overtime hours he had worked, namely 203 hours. The Claimant was subsequently paid an additional 203 hours to make up for this with his March 2019 salary.
17. In April Mr Symons again input the Claimant's overtime hours into the Respondent's system and again this was based on the information the Claimant gave him in relation to how many hours he had worked.
18. Throughout his employment the Claimant made a handwritten note of the hours he worked. In March 2019 the Claimant recorded having worked 213.5 hours and in April 2019 253 hours. His evidence to the Tribunal was that this was an accurate record of the hours he worked.
19. It was agreed that the Claimant and Mr Symons had a discussion around this time about the fact the Claimant was working on his own. There was no dispute that Mr Symons offered to get agency staff to assist the Claimant. However, the Claimant felt this would be unhelpful as he did not have time to train up someone who did not know how to do the job. It was also agreed that the Claimant and Mr Symons reached an oral agreement around the same time that the Claimant would be paid some additional money for some of the work he was doing.
20. The Claimant was subsequently made redundant, and his employment came to an end on the 28 April 2019.
21. On the 23 May 2019 the Claimant wrote to the Respondent stating that he had received his final pay slip which recorded a payment for 157.50 hours in the sum of £1,779.57. He went on to say he had in fact worked 240 hours overtime between 8 March 2019 and 27 April 2019. And that it was agreed between himself and Mr Symons that these hours would be paid at £25.46 per hour and that he had yet to be paid for this.
22. On 30 May 2019, Mr Birks a payroll administrator for the Respondent confirmed in writing that the Claimant was paid 203 hours at the standard rate for overtime in March 2019 and 157.50 hours at the standard rate and 14.5 hours at a rate of time and a half for overtime in May 2019.
23. On the 31 May 2019 Mr Symons wrote to the Claimant by email. In this he explained that 240 hours of overtime was due, but 360.5 hours had been paid and there was a 120 hour 'variance'. This figure included the 203 hours paid for overtime in March 2019. The email went on to explain that the 'variance' as Mr Symons called it was due to the 'rate of pay being increased as per the agreement between you and I working alone'.
24. From this I understand that Mr Symons was explaining that the overtime is being paid at 1.5 times the normal rate, as 120.5 hours is just over half of 240

hours. He went on to say that the *'decision around if the conversation of either double time or time and a half will have t fall outside my remit'* (sic).

25. Ms Makarek continued to look into the issue raised by the Claimant and on the 26 June 2019, Mr Symons emailed her stating *'I believe the overtime payments are correct as both Karmel and I inputted them on to the system together when I was onsite to correct the previous month. The exception to this is the April overtime input as I done this remotely, the input was based on the information Kamel gave me when I requested it from him'* (sic). It went to say *'the 14.5 hours at time and half are the overtime hours that was agreed as an inflated rate to cover absents of another colleague. I believe the conversation and subsequent agreement was based on and hourly rate that translated in to time/half as opposed to an agreement of double time. I can also confidently state that I did not agree to the whole working week at an inflated rate but the hours in which the colleague was absent'*.

26. On 10 June, Mr Lowe emailed Ms Makarek setting out what the Respondent had recorded as having paid the Claimant. I set out these figures in a table for the sake of clarity:

Month	Basic salary amount	Overtime amount	Rate	Hours
December 18	955.21	416.08	basic	52
January 19	538.89	416.08	basic	52
February 19	538.89	160.03	basic	20
March 19	1715.62	2595.58	basic	203
April 19	1893.95	Nil		
May 19	Nil	2014.82	basic	157.50
		278.10	1.5	14.5

27. On 26 June 2019 Ms Makarek wrote to the Claimant explaining the Respondent's position was that they believed they had paid all the hours owing.

28. On 28 June 2019 the Claimant wrote to Ms Makarek asserting that the 203 hours of overtime paid in March was due from the period 8 November 2018 to end of February 2019. He also stated that the 14.5 hours of overtime was for his night shift. And that the *'agreement I had with George was that I would be paid time and a half when Hanna was on holiday. Hanna was on holiday for 2.5 weeks (200 hours). She then returned to work- for half a day. The 72 hours of work I did by myself as a result of Hanna quitting her job'*. And that consequently he was still missing a total of 272 hours of overtime paid at time and a half.

29. The final piece of correspondence on the matter prior to this claim being lodged was when the Claimant wrote again to Ms Makarek on 1 July 2019 again expressing that the payment in March was for earlier overtime and that he had been underpaid.

## Conclusions

30. On the 17 March 2019 Mr Symons inputted the Claimant's overtime hours up to that point into the Respondent's payroll system. This amounted to 203 hours. He was subsequently paid for these 203 hours as recorded on the Claimant's March 2019 payslip. The Claimant accepted in his oral evidence that as of the 17 March 2019 he had been what was owing to him and all his back dated pay was owing. This accords with his correspondence to the Respondent dated 28 June 2019 when he said that the 203 hours were for overtime worked in an earlier a period of time.
31. As to the remaining period where there was a dispute, there were two primary issues. The first was the number of hours worked. The second was the rate at which it should be paid.
32. Between 18 March 2019 and the 27 April 2019 there was 5 weeks and 6 days. The Claimant was due to work 37.5 hours per week. The number of contracted hours he was to work in this period was 221 hours<sup>1</sup>.
33. Helpfully the Claimant kept a written note of the hours he worked at the time of his employment. Given this record was made at the time the Claimant was undertaking the work and is therefore a contemporaneous record, it is on the balance of probabilities more likely that his recollection of the hours he worked at that stage was better than his recollection some 2 years later when he gave evidence before the Tribunal. According to his own record the Claimant worked 378.5 hours from 17.3 to the end of his employment on 27 April 2019.
34. I find that he was contracted to do 221 hours work in this time (allowing for the fact he did not work on 28 April 2019). Subtracting the contractual hours of 221 from the 378.5 of hours worked, a figure of 157.50 hours is produced. In terms of day time work the Claimant agreed in his evidence before the Tribunal that this was the amount of outstanding overtime due to him, save that he understood that for the final week he would be paid 37.5 hours, not 33.
35. Overtime was paid for a total of 157.50 hours at single rate and 14.5 hours at 1.5 times his ordinary rate of pay to the Claimant in arrears in May 2019. This meant a total of 172 hours of overtime was paid to the Claimant in May. This figure is confirmed by both the email from Mr Lowe dated 10 June 2019 and also is reflected in the May payslip the Claimant received.
36. Whilst I have no doubt that the Claimant was trying his hardest to assist the Tribunal in terms of his recollection during his evidence, his account was very inconsistent in terms of the overtime hours he claimed to have worked. In correspondence with the Respondent in March 2019 he claimed to be owed for 240 hours, in June 2019 he stated that the figure was 272 hours. Then before the Tribunal he claimed that there was an additional 60 hours owing to him for

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<sup>1</sup> In his final week of employment he worked 86% of his contracted week, which was 33 hours (rounded up to the nearest full hour).

night time work. In his evidence he said he had worked for 11 days and nights straight a matter he had not mentioned in any of his earlier very detailed correspondence.

37. I accepted Mr Symons' evidence that he inputted the figures that the Claimant gave him for his overtime into the system. This figure is very close to the one recorded by the Claimant in his own contemporaneous notes. On 27 March he recorded he had worked '5.5 night shift' on 27 March. He then noted a further 5.5 hours with 'N.S' written beside them. The Claimant suggested that his own record of the hours he worked was incorrect to the extent that it did not include 11 days of night shifts. I do not accept this evidence, as I find that his handwritten record of hours worked by the Claimant at the time of his employment was, on the balance of probabilities, likely to be more accurate than his recollection some two years later as it was taken contemporaneously. Therefore I do not find that pay for 60 hours of night time shift work was owing to the Claimant, I find that 11 hours of night shift work was undertaken.
38. The final issue is the rate of pay that was agreed for overtime. The Claimant's evidence about the agreement he had with Mr Symons to pay a higher rate was very unclear. He could not recall when the agreement was made, nor could he recall what exactly was said about the rate of pay, he gave no clear evidence as to which of the hours he worked it would apply to.
39. I found Mr Symon's to be a candid witness and I accepted his evidence that at no point did he agree to pay the Claimant double his hourly rate as this was not something he had the authority to do. I also accepted his evidence that he did 'offer 1.5 times' for some work and that this was an 'exception' '*when he worked alone because of a colleague's absence*'. This agreement was also recorded in his email of 26 June 2019 which described this as '*an inflated rate to cover absents (sic) of another colleague*'. Although this appears to some extent to contradict the contents of the 31 May 2019 sent by Mr Symons. In this email Mr Symons confirmed there was an agreement to pay the Claimant more due to him having to work alone and then suggests that the 'variance' in the pay to date, was due to an agreement to pay 1.5 times the ordinary rate of pay. I find that Mr Symon's unclear explanation in this email is in fact wrong and that part of the pay he was referring to was the 203 hours of overtime paid in March which was due for work undertaken in the period 8 November 2018 to end of February 2019. The fact that the March payment was for hours worked prior to this date was agreed by both the Claimant and the Respondent in their submissions before the Tribunal.
40. Neither Mr Symons nor the Claimant were therefore clear as to the detail of what had been agreed. The Claimant was unable to recall when the Respondent's other employee at the Borehamwood store, Hanna, left the Respondent's employment and was unable to recall the detail of which days or hours he worked by himself, or the detail of what had been agreed or when it was agreed. Further, there was no other evidence as to which hours the Claimant worked by himself.

41. On the balance of probabilities, I find that this agreement to pay 1.5 the hourly rate was limited to the 14.5 hours which was paid at a time and a half. Mr Lowe's email of 10 June 2019 confirmed that the 14.5 hours broke down into two periods, one of 5 hours and another at 9.5 hours. I accept My Symon's evidence that the information he inputted into the Respondent's pay records about the hours the Claimant had worked had come from the Claimant himself. As I have already concluded there was no other record being kept by the Respondent of hours worked. Therefore, the Claimant was paid for the number of hours of overtime that he worked, at the correct rate and there was no underpayment.

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Employment Judge **Price**

Date: 10/6/2021

JUDGMENT SENT TO THE PARTIES ON

28/6/2021

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FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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