



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4112044/2019 & 4102196/2020 (V)

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Held via Cloud Video Platform on 1 & 2 September 2020

Employment Judge M Sangster

10 **Mr C Allan**

**Claimant
In Person**

15 **Clyde Coast Tourism Limited**

**Respondent
Represented by
Ms Stevenson -
Director**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that:

- The respondent made an unauthorised deduction from the claimant's wages and is ordered to pay the claimant the sum of £1,928.63.
- 25 • The respondent failed to pay the claimant's full holiday entitlement and is ordered to pay the claimant the sum of £798.81; and
- The claimant was dismissed in breach of contract in respect of notice and the respondent is ordered to pay damages to the claimant in the sum of £425.00.

REASONS

30 **Introduction**

1. This was a final hearing which took place remotely. This was not 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 due to the Covid-19 pandemic and all issues could be determined in a remote hearing. The documents that

I was referred to were compiled into a bundle of 39 pages, the contents of which I have recorded.

2. The claimant presented complaints of unlawful deductions from wages, failure to pay holiday pay and wrongful dismissal. The respondent denied that
5 sums were unlawfully deducted from the claimant's wages, or that he was legally/contractually entitled to any further sums. They asserted that all sums due to the claimant had been paid to him. The respondent intimated an employer's contract claim within their ET3. This was accepted on 16 April 2020. Both claims were heard, together, by the Tribunal.
- 10 3. The claimant gave evidence on his own behalf. The respondent led evidence from Catriona Stevenson (**CS**), Director, Helmut Waterott (**HW**), Director and Kimberley Stevens (**KS**), Operations Specialist. The claimant and respondent separately intimated to the Tribunal and each other, in advance of the Hearing, the documents upon which they intended to rely. These were
15 collated into an agreed bundle at the outset of the hearing.

Issues to be Determined

4. Was the claimant entitled to additional payments from the respondent in respect either of the following:
 - a. Payment for time worked;
 - 20 b. Notice pay; and/or
 - c. Holiday pay.
5. If so, what sums were due to the claimant?
6. Was there an unauthorised deduction from the claimant's wages, or was the respondent entitled to make a deduction from wages otherwise due to the
25 claimant?
7. Is the respondent entitled to damages for breach of contract from the claimant?

Findings in Fact

8. The Tribunal found the following facts, relevant to the issues to be determined, to be admitted or proven.
9. The respondent provides scheduled and private tours/excursions in Scotland.
5 There are two directors of the company – CS and HW. The company employs one person on a permanent basis, with around 7 additional individuals engaged during the summer months on fixed term contracts. During those months CS and HW also conduct tours themselves, with KS taking over the administration of the business on a day to day basis.
- 10 10. The respondent arranges accommodation for their Tour Driver Guides to stay in during the tours. Guests on the tours normally book their own accommodation, once they know the itinerary of the tour. On occasion it can transpire that guides and guests are staying in the same accommodation. Rarely, the respondent will book accommodation for guests also, on an
15 exceptional basis.
11. The claimant commenced employment with the respondent on 13 May 2019. He was employed as a Tour Driver Guide for a fixed term to 7 November 2019. He received an employment contract which detailed that he would be
20 paid £10.50 per hour, with the expectation that he work at least 40 hours per week. He was paid for monthly in arrears, based on a 40 hour week, plus overtime. The contract stated that any sums which the claimant owed to the respondent could be deducted from his pay or other payments due to him and that, if the claimant worked under 40 hours in any week, this would be deducted from his pay at the end of his contract.
- 25 12. The contract of employment confirmed that the first 6 months of the claimant's employment was a probationary period, during which his employment could be terminated by either party giving one week's written notice. It also stated, that the respondent '*may end [the claimant's] employment without letting any notice period run its course by making a payment equivalent to the basic
30 salary that would have been due during the unexpired notice period.*'

13. The contract of employment confirmed that the holiday year ran from 13 May to 12 May annually and that the claimant's entitlement was to 117 hours holiday per annum. He was informed at the outset of his employment however that holidays would be paid in lieu at the end of the fixed term. Summer is the respondent's main season, so it is not possible for staff to take holidays in this period.
14. The contract of employment stated that the claimant's '*work unit base is 14 Crawford Street, Greenock, PA15 1LJ or any other workplace(s) within Scotland that we ask you to work from.*' The majority of the respondent's tours ran from the port at Greenock. Some tours did however commence in Edinburgh (where the claimant lived) or in other locations. The claimant was provided with a vehicle by the respondent which he used to conduct his duties. He did not require to return that vehicle to Greenock each night. Instead he kept it at his home. If he had a tour commencing in Edinburgh, he would be paid from 15 minutes before the tour was due to start and end 30 minutes after the tour finished, to allow for cleaning and refuelling the vehicle. Where a tour started in Glasgow, Greenock or some other location, his shift was deemed to have commenced 1 hour after he left home. This was determined on the basis that this would have, otherwise, been his daily commute to Greenock. That commute was not however always required as he kept the company vehicle at home and generally the tours he conducted commenced in other locations, principally Edinburgh.
15. The claimant was informed of the arrangements in relation to deemed start/finish times during his interview for the role, by email on 30 May 2019, during a team meeting on 8 July 2019 and in a meeting he had with KS and another member of staff on 1 August 2019.
16. Notwithstanding this, when submitting his timesheets, he claimed for the point when he left his home each day, to the time he returned, plus 30 minutes for cleaning and refuelling the vehicle.
17. On 19 August 2019, the claimant was assigned to a 4 day tour to Skye. During his journey to Skye, he was sent an email by KS with details of where he

would be staying that evening. On arrival, he realised that he was staying in an Airbnb, two bedroom, property with one of the female guests and her 15 year old son. No host was present at the property. There was a shared living area and lockable bathroom. He telephoned KS to query why he was sharing the property with the guests, indicating that he was uncomfortable doing so and requesting that alternative accommodation be booked for him. KS indicated that she would not have authority to book further accommodation for him, but that she would ask CS to call him to discuss matters.

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18. KS then contacted CS via a group chat set up on WhatsApp, which all individuals working for the respondent were members of. She stated, at 17:52, '*@CatrionaStevenson hes found it but may be issue sleeping arrangements, may be better to give him a wee call?*'.

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19. CS then called the claimant at 17:52. CS explained to the claimant that there were two bedrooms in the property and the intention was that the female guest and her son shared one room and he stayed in the other. The female guest and her son had asked to sign up to the tour relatively late, and the only way they could be accommodated on the tour was if, on the first night, they shared the accommodation which had originally just been booked for the Tour Driver Guide, as they were not able to secure any alternative accommodation for that night. CS explained that the female guest and her son were happy with the arrangement. The claimant maintained however that he was not comfortable with this. He stated that he would not stay in the property with them and requested that alternative accommodation be booked for him. CS stated that if he was not willing to stay that would be the end of his contract with the respondent. He could either continue with the tour, or bring the vehicle back to Greenock immediately. CS was agitated and swearing during the call and the claimant asked her to calm down.

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20. Following the telephone call the claimant took the guest and her son to Portree to have dinner. The claimant also, separately, had dinner.

21. At 18:13, CS posted on the group chat on WhatsApp *'I just told him to fuck himself' 'We will make our way up to Skye'*. Followed by *'This is an absolute joke'* at 18:16.
22. At 18:17 CS stated on the group WhatsApp *'@Chris We will organise someone to swap with you tonight.'*
23. At 18:18 stated on the group WhatsApp *'If you want to work for someone else please, that is fine. Helmut stayed with guests last time on Skye, I did it last week at a hostel and Ross has had to share a room on Skye.'* *'Our guests come first...and accommodation is thin on the ground there as it is.'*
24. At 18:19 stated on the group WhatsApp *'£125 a night for you today and clearly not acceptable for you. So we will have to make a plan, but 100% we cannot get you another place.'*
25. The claimant did not respond to any of the posts on the group WhatsApp.
26. At 19:25 the claimant received a call from HW. The claimant was in the vehicle on his own at the time, waiting to pick up the female guest and her son, following their dinner, to take them back to the accommodation. HW repeatedly swore at the claimant and was angry from the outset of the call. HW told the claimant that he worked for him and needed to follow instructions. He told the claimant he was sacked and that he should return the vehicle the following day. He told the claimant that he would not be paid and that he wouldn't receive another penny from the respondent. He stated that the claimant could go to Acas but it would be pointless.
27. No further discussions took place between the claimant and CS or HW.
28. KS was then informed by CS that the claimant was returning to Edinburgh and she should make arrangements to collect the company vehicle from him the following day, and deal with arrangements for the termination of his employment at the same time.

29. After the call, the claimant picked up the female guest and her son from where they had been having dinner and took them back to the accommodation. He told them that he had been sacked and another guide would be there the following day to continue their tour. He then left to commence his journey home. He slept in the vehicle at the roadside on his way home. When he awoke, he had a message from KS, indicating that she would collect the vehicle from him in Edinburgh at around 14:30 that day. He met her as arranged at 14:30 and handed over the vehicle and all company property. KS also discussed with the claimant his final pay and obtained receipts etc from him to allow this to be processed. She informed him that his P45 would be sent to him.
30. The claimant's employment accordingly terminated on 19 August 2019. At which point he worked for the respondent for 14 weeks and one day. During his employment he received an average of £525.53 per week (gross) based on an average working week of 50.05 hours. The total number of paid hours he worked each month, were as follows:

Month	Core Hours	Overtime	Total
May	140.25	-	140.45
June	173.30	60.3	233.60
July	173.30	12.25	164.25
August	169.5	-	169.50
Total hours			707.80

31. The claimant did not take any holidays during the period of his employment with the respondent.
32. The respondent arranged for an alternative tour guide to attend, with a different vehicle, the following day. The cost of this was £500. HW then

travelled to Skye to take over the third and final day of the tour, cancelling a tour he was due lead from Greenock to enable him to do so, at a cost of £400.

33. On/around 31 August 2019, the claimant received a payslip, dated 31 August 2019, detailing final, gross, payments as follows:

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- a. Salary - £1,820
 - b. Overtime - £128.63
 - c. Accrued holidays - £848.61

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34. Following deductions for tax, national insurance contributions, pension and an outstanding expenses float, the net sum detailed on the payslip, to be paid to the claimant, was £1,965.63. The respondent did not however make any further payment to the claimant, whether in respect of the sums indicated on the payslip or otherwise.

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35. On 9 September 2019, the claimant wrote to the respondent asking why he had been dismissed for querying his sleeping arrangements indicating that, in addition to the sums detailed on the payslip, he was due the following sums:

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- a. A further £193.37 for additional hours worked in June 2019 (additional travelling time to/from his home claimed but not paid by the respondent);
 - b. A further £370.12 for additional hours worked in July 2019 (additional travelling time to/from his home claimed but not paid by the respondent);
 - c. £606.38 in respect of a week's notice pay; and
 - d. A further £148.89 in respect of holiday pay (The claimant claimed his total holiday pay entitlement was to £997.50, for 95 hours' accrued holiday).

Relevant Law

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36. Wrongful dismissal is a claim for breach of contract – specifically for failure to provide the proper notice provided for by statute or the contract (if more). An employer does not however have to give notice if the employee is in fundamental breach of contract. This is a breach of contract that goes to the

heart of the contract so that the employer should not be bound by its obligations under the contract (including the requirement for notice).

37. Section 13 of the Employment Rights Act 1996 provides that an employer shall not make a deduction from a worker's wages unless:

5 a. The deduction is required or authorised by statute or a provision in the worker's contract; or

b. The worker has given their prior written consent to the deduction.

38. A deduction occurs where the total wages paid on any occasion by an employer to a worker is less than the net amount of the wages properly payable on that occasion. Wages are properly payable where a worker has a contractual or legal entitlement to them (*New Century Cleaning Co Limited v Church [2000] IRLR 27*).

15 39. The Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 gives the Tribunal jurisdiction to consider breach of contract claims where the claim '*arises or is outstanding on the termination of the employee's employment*' (Regulation 3). It also provides that an employer may counterclaim against the employee where that claim '*arises or is outstanding on the termination of the employment of the employee against whom it is made*' (Regulation 4).

20 **Submissions**

40. Each party made closing submissions, briefly summarising the evidence they had led.

Discussion & Decision

41. The Tribunal considered each head of claim in turn.

25 *Arrears of Pay*

42. The claimant did not receive his final salary payment of £1,820.00 plus £128.63, totalling £1,928.63 (gross). He has a contractual and legal right to

this payment. It was unlawfully deducted from his wages and is due to him by the respondent.

43. The claimant was paid in accordance with the respondent's stated arrangements re deemed start/finish times. He claimed that he was entitled to additional payments to cover all time spent working for the respondent, from the moment he left his house, to the time he returned, plus a further 30 minutes for cleaning and refuelling the vehicle. Whilst such time would be working time for the purposes of the Working Time Regulations 1998, those Regulations do not contain any entitlement to payment for all working time. Rights to minimum payments for time spent working are set out in the National Minimum Wage Act, but there is no suggestion that there is any claim under that Act in the circumstances of this case: the claimant was paid above the applicable minimum wage rates, regardless of whether he was paid for all time spent working, or in accordance with the respondent's arrangements re deemed start/finish times. In the circumstances, it was open to the respondent to specify that the claimant would be paid from 15 minutes before pick up until the drop off time for collections from Edinburgh, or after one hour's travel (which would have been less than his commuting time to Greenock). The claimant has not established any contractual or legal right to any additional sums.

Notice Pay

44. The claimant's employment terminated on 19 August 2019. He was informed he was sacked and asked to return his company vehicle. He was not given one week's written notice of the termination of his employment and was not paid for any notice period. Whether he is entitled to payment for his notice period depends upon whether he was in fundamental breach of his contract of employment with the respondent i.e. had he committed an act of gross misconduct?
45. The Tribunal find that the claimant was not in fundamental breach of contract. He had merely questioned his accommodation arrangements, indicated that he was uncomfortable with what was proposed and asked for alternative

arrangements to be made. He did not however state that he was not going to continue with the tour, or that he would not continue with his duties. Simply that he was not comfortable with the accommodation which the respondent had arranged for him. This did not amount to a fundamental breach of contract.

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46. As a result of the conversation between CS and the claimant, the respondent took the decision that the claimant should not continue with the tour, his duties and his employment. This was clear from the WhatsApp messages posted immediately after the initial call between CS and the claimant, when he was informed that the respondent would make their way to Skye and he would be replaced on the tour, and thereafter from the terms of the conversation between the claimant and HW, when HW informed him that he was sacked.

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47. The claimant did not receive one week's written notice of the termination of his employment and has received no payments in lieu of his notice period, in breach of the terms of his contract of employment. He is entitled to damages for breach of contract equivalent to the sum he would have received if the contract had been terminated in accordance with its terms, namely one week's wages. Given his average weekly hours (50.05) and hourly rate (£10.50) this amounts to £525.53 gross/£425.00 net.

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48. The Tribunal did not accept the claimant's assertion that he was entitled to damages for breach of contract equivalent to the sums he would have earned during the remainder of the fixed term i.e. to 7 November 2019, given that the contract stated it could be terminated on one week's notice. His only entitlement is to damages for breach of contract equivalent to the sum he would have received if the contract had been lawfully terminated in accordance with its terms, as indicated above.

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Holiday Pay

49. The claimant was entitled to 5.6 weeks' holiday per year. The Tribunal did not accept that the claimant had taken any holidays during his employment. No evidence of this was produced to the Tribunal, whether by way of holiday records or payslips detailing holiday pay. The Tribunal accepted as credible

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the claimant's position that he was informed at the outset that he would not be able to take any holidays during his fixed term contract, due to the fact that he was employed to cover a particularly busy period for the respondent. This latter fact also being supported by the respondent's evidence.

- 5 50. The claimant's pro-rata holiday entitlement, from 13 May 2019 to the termination of his employment, was 1.52 weeks' holiday pay, which equates to £798.81 (gross).

Employer's Contract Claim

- 10 51. The Tribunal was not persuaded that the respondent was entitled to make any deductions from any sums due to the claimant as a result of the terms of his contract (which stated that the respondent could deduct any money that maybe owed to them from pay or other payments due to the claimant), or that the employer's contract claim, for damages for loss incurred by the respondent in respect of alleged breach of contract by the claimant, should
15 succeed. The Tribunal find, for the reasons stated, that the claimant had not committed gross misconduct and was not in fundamental breach of contract.

20 Employment Judge: M Sangster
Date of Judgment: 20 September 2020
Entered in register 24 September 2020
and copied to parties