**CASE NO: 2603410/2020**

# EMPLOYMENT TRIBUNALS

**Claimant:** **Mrs A Belshaw**

**Respondents:** **1) YRJ Bridgford Limited**

**2) Mr B Xu**

## At a Preliminary Hearing by Cloud Video Platform

**Heard at:** **Leicester**

**On:** **26 April 2021**

**Before:** **Employment Judge Ahmed (sitting alone)**

**Representation**
**Claimant:** **Mr P Belshaw (Claimant's husband)**
**Respondent:** **Miss C L Williams of Counsel**

# JUDGMENT

The Judgment of the Tribunal is that the Respondent is ordered to pay to the Claimant:

1. £480.96 in respect of arrears of wages.

2. £393.15 in respect of unpaid holiday pay

3. £630.00 pursuant to section 38 Employment Act 2002 for failure to comply with the provisions of section 1 of the Employments Rights Act 1996
**[Total £1504.11].**

# REASONS

1. In these proceedings the Claimant brings complaints of sexual harassment and

an unlawful deduction of wages and unpaid holiday pay (the latter being referred to hereinafter as "money claims").

2. The complaints of sexual harassment are listed for a hearing in February 2022.

3. The money claims have been listed to be dealt at an earlier hearing as they will not affect the issues at the hearing dealing with the sexual harassment complaint. Although this was described as a 'preliminary hearing' in the notice of hearing it is in fact a final hearing for the money claims.

4. The Claimant's money claims are for:

4.1 £772.20 being unpaid employer's pension contributions;

4.2 A claim for non-payment of wages during the first four weeks of furlough as set out at paragraph (8) (xiv)(a) of the preliminary hearing on 8 December 2020.

4.3 A claim for holiday pay for accrued but untaken annual leave.

5. The first part of the claim can be dealt with fairly simply. The Claimant alleges that the Respondent has failed to enrol her in the NEST pension scheme and seeks contributions for the sum of £772.20 over a period of 52 weeks.

6. Section 27 of the Employment Rights Act 1996 ("ERA 1996"), so far as is relevant, states:

> (1) In this Part "wages", in relation to a worker, means any sums payable to the worker in connection with his employment, including—
>
> (a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise….,
>
> but excluding any payments within subsection (2).
>
> (2) Those payments are—
>
> [(a) - (b) not relevant]
>
> (c) any payment by way of a pension, allowance or gratuity in connection with the worker's retirement or as compensation for loss of office,

7. Pension payments are therefore not defined as 'wages' and so the Tribunal has no jurisdiction to deal with this part of the claim. The Tribunal has no jurisdiction to deal with any failure to enrol an employee into the NEST pension scheme either.

8. The Claimant has produced a table setting out the deductions of wages for the first four weeks of furlough. I prefer the calculation given by the Respondent which is that furlough pay would be 80% of the basic pay of £2,070.78 which is £1,656.62. The Claimant was only furloughed for 9 days in March which would mean the sum due is £480.96. Any payments beyond March are not part of the pleaded case and there has been no application to amend. The ET1 was presented on 15 September

2020 with ACAS early conciliation not having begun until 31 July 2020 and the early conciliation certificate was issued on 17 August 2020.

9. The Respondent contends that this part of the claim has been brought out of time.

10. Section 23 of ERA 1996 states:

"(1) A worker may present a complaint to an employment tribunal

(a) that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)),

(2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—

(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made….

(4) Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable."

11. Thus the Claimant has 3 months from the date of the deduction to bring a claim unless the Claimant shows that it was "not reasonably practicable" to do so. This is the only claim for wages so there is no question of there being any series of deductions.

12. The date of payment (and thus the date of deduction) is not clear. The furlough portals did not open until 20 April and so it could not have been paid or payable before then. There is no certainty or agreement as to when this part of the claim was due for payment. I am satisfied it remained an ongoing deduction until at least early conciliation began because of the absence of any defined payment date. The Respondent says that there was a payroll error and so was not included in the April pay. That suggests it must have decided to pay it in the next run which would mean payment was expected to be made in May and this would bring the claim in time. The claim is in time and the Respondent has made an unlawful deduction of wages of £480.96.

13. The complaint as to holiday pay has been unnecessarily complicated because much of it is historical going back to previous leave years and because of the way in which it is administered by the Respondent.

14. The general principle under domestic law is that if annual leave is not used in any leave year it is lost – it is very much a case of 'use it or lose it'. There is no contractual provision in this case for it to be carried over into the next leave year.

15. There do not appear to have been any written agreement as to annual leave as to when it begins or how much the entitlement is. I therefore take the Claimant's annual entitlement to be 5.6 weeks (28 days) being the statutory minimum. The Claimant left part way through the leave year. Her employment ended on 14

August 2020. I calculate her leave year to begin on 1 April 2020. Her annual entitlement to the date of termination was therefore 10.5 days. She did not work in the month of August at all. The Claimant's contractual hours were 35 per week. She worked 5 days a week. Her annual leave entitlement as at the date of leaving was therefore 10.5 days. The daily rate of pay was £72.00. She is therefore entitled to holiday pay of £756.00. However, it is clear the she has received part-payments towards her holiday pay of £65.49 in May, £149.76 in June and £147.60 in July making a total of £362.85. The balance of her holiday pay is therefore £393.15.

16. The Respondent did not provide the Claimant with the written particulars required by section 1 ERA 1996. An award under section 38 Employment Act 2002 is therefore appropriate. Although not pleaded and claimed, it is appropriate to make such an award as it does not need 'pleading'.

17. I consider that a 'lower' award in this case (of two weeks' pay) is appropriate as opposed to the higher award of 4 weeks. The Respondent is a very small employer and was not aware of their legal obligations at the time. This is not a case of a refusal to supply particulars but simply an oversight or ignorance. The Claimant's weekly pay was £315.00. The award under this provision is therefore £630.00.

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Employment Judge Ahmed

Date: 9 August 2021

JUDGMENT SENT TO THE PARTIES ON

10 August 2021

FOR THE TRIBUNAL OFFICE

***Covid-19 statement:***
***This was a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video. It was not practicable to hold a face-to-face hearing because of the Covid-19 pandemic.***

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