EMPLOYMENT TRIBUNALS

Claimant: Richard Huamani Capcha

Respondent: Sharma's Food Ltd

Heard at: Watford (by cvp) **On:** 05 August 2021

Before: Employment Judge Housego

Representation

Claimant: Maya Thomas-Davis, of United Voices of the World

Respondent: Ankur Kumar, Director

JUDGMENT

1. The Respondent made unlawful deductions from the wages of the Claimant, in part by not paying money due under the contract and partly by paying less than the National Minimum Wage.

2. For that reason the Respondent is ordered to pay to the Claimant the sum of £3,093.30 (£2,201.72 + £891.58).

3. The Respondent is ordered to pay to the Claimant the sum of £229.29 in respect of holiday accrued but not taken at the end of the employment.

4. The Respondent failed to provide a contract of employment to the Claimant in breach of S1 of the Employment Rights Act 1996 and is ordered to pay to the Claimant the sum of £977.06.

5. The Respondent did not afford the Claimant weekly rest breaks as required by the Working Time Regulations 1988 and is ordered to pay to the Claimant the sum of £2,500.

6. The total the Respondent is ordered to pay to the Claimant is £6,799.65.

REASONS

1. An extempore judgment was given, and so written reasons are not required. However, there is a lot of arithmetic in the judgment and so I said that I would set out a summary of my judgment. I invited the parties to draw my attention to any arithmetic error, and if there was one I would reconsider the judgment of my own volition in order to correct it.

2. It was accepted by the Respondent that the Claimant was an employee throughout.

3. It was accepted by the Claimant that his pay was at NMW level throughout, and that was £8.21 an hour.

4. It was accepted by the Respondent that the Claimant worked 7 days a week, throughout.

5. It was accepted by the Respondent that the Claimant had taken no holiday, and so worked every day between 25 September 2019 and 23 March 2020 save Christmas day.

6. The Respondent did not challenge the claim that the Claimant was entitlement to 16.5 days' pay for holiday entitlement not taken.

7. The Claimant accepted that part payment for that liability was made, of £922.25.

8. All payslips have now been provided.

9. There is dispute over hours worked:
   9.1. The Respondent says 49 hours a week.
   9.2. The Claimant says 9½ hours a day, which is 66.5 hours a week.

10. I find that the Claimant opened the store at 6:30 am. I preferred his evidence to that of Respondent which was contradictory and inconsistent on this point.

11. The Respondent says that he recorded the Claimant's working time at the beginning but then not. No record is produced. I had only oral evidence.

12. The Claimant agrees he had an unpaid ½ hour daily break.

13. The Respondent says that the Claimant's work ended at 3pm, sometimes earlier and certainly so on Sundays.

14. The Respondent says there was an element of the Claimant learning from his accountant and the franchise consultant at the end of his work and so not the time spent at work was working hours.

15. The Claimant says he worked all the time. He says that he would work past 4pm and even to 5pm frequently.

16. The Claimant accepts that after the Respondent stopped being so helpful about business learning he started to leave earlier – at 3pm or soon after.

17. I find there is some element of truth in the Respondent's suggestion, because the Claimant said that he started to leave early when the Respondent stopped helping him learn from the others and from Respondent himself. It is credible and plausible that trade on Sunday afternoon was slack and that the Claimant went home earlier on Sundays than on other days.

18. Taking all these things into account and reassessing it I decide that my preliminary indication, given before the lunch break so that submissions could be made about it, is as accurate as I can get: 8½ hours work a day (6:30am to 3:30pm, with a ½ hour unpaid break).

19. That means the daily rate was 8.5 x £8.21 = £69.79.

20. And that the weekly rate was 8.5 x £8.21 = £69.79 x 7 = £488.53 a week.

21. The monthly rate will be that sum x 52 = 25,403.56 divided by 12 = £2,116.96 pcm.

22. Turning to the heads of claim, first pay.

23. First the period between 25 September 2019 - 23 March 2020 (when the Claimant was furloughed). It is impossible to be arithmetically accurate, but I take it that it the fixed figure of £1700 a month paid from November 2019 was the pay for this work, even for September and October which was before the fixed monthly amount was agreed. There was no evidence about what was actually paid to consider this erroneous.

24. The payslips show extra payments said to be reimbursement of expenses, but which the Respondent says was for extra work in maintenance such as for cooling cabinets - I exclude that from assessment.

25. Payment of £1700 a month is £20,400 a year so £392.31 a week.

26. He should have got £488.53 weekly, as set out above, had he received the NMW. The difference – the shortfall - is £96.22 weekly.

27. There are 26 weeks between 25 September 2019 and 23 March 2020.

28. 26 x 96.22 = £2,501.72. But in December 2019 there was a bonus of £1,000 and in March 2020 the payment (made on 01 April 2020) was of only £1,000, so there is £700 shortfall that month. Netting these 2 there is £300 to be deducted, and so the money paid is **£2,201.72** below the level of the NMW.

29. For the furlough period 23 March to end April the Claimant was entitled to 80% of his pay. The first question is what should his pay have been?

30. For want of a better figure I decide on 48 hours a week, the maximum a working week can be without the express consent of the employee. 48 x £8.21 = £394.08. There are 6 weeks to the end of April. That is £2,364.48. The Claimant is entitled to 80% of that which is £1891.58.

31. In that period £1,000 only was paid (the payment of £1,000 on 01 April being attributed to pay for the period 1-23 March 2019). The Claimant was furloughed so is entitled to that pay whether or not the Respondent recovered it. Accordingly, the figure awarded is **£891.58.**

32. For holiday pay, 16.5 days at £69.79 = £1,151.54. The Respondent paid £922.25. I award the difference, which is **£229.29.**

33. The claim that no contract of employment was received succeeds. I do not accept Respondent's evidence about this, which was not credible. I award 2 weeks' pay. This was an omission not a commission: a failure of administration not a refusal to do so. At £488.53 a week that is **£977.06.**

34. The Respondent accepted that the Claimant did not get weekly rest breaks for the 6 months he worked for him. The award of compensation is totally discretionary. There is no case law guidance. I consider that consistency with the Vento bands and with personal injury claims is important.

35. I note that:

    35.1. The Claimant was willing to undertake this work.
    35.2. They were friends, and shared accommodation.
    35.3. Although there was an employer/employee relationship there was not a power imbalance because the Claimant wanted something out of doing this arrangement and so it was not exploitative.
    35.4. There was no adverse effect on C's health.
    35.5. The Claimant stopped working such long hours when he wanted to do so – there is nothing to suggest that the Claimant could not have asked for and insisted on breaks had he wished.

36. I also note that to work 7 days a week for 6 months with only Christmas day off is simply unacceptable, and Ms Thomas-Davis description of this as an egregious breach is warranted.

37. The award is entirely discretionary, and bearing mind all the factors I decide that the figure of **£2,500** is appropriate, and so award.

38. The figures are **£2,201.72**, **£891.58, £229.29, £977.06** and **£2500.00** and total **£6,799.65**.

39. At the conclusion of the ex tempore decision, I indicated that if there was any error in arithmetic it should be indicated to me, and I would reconsider the judgment of my own volition. Subsequent to the hearing, Ms Thomas-Davis sent in a recalculation, in tabular form, breaking down the period into smaller sections and setting out the amounts paid, and the deductions, and recalculating the awards. She also reworked the furlough period. The end result was about £1,000 more. I made it clear that I was not given the information necessary to do an accountancy exercise, and so would assess the amount underpaid on the basis that I would assess the number of hours worked, apply the minimum wage to it and deduct the amount paid at £1700 a month other than were this was not the case (as above). The award is the difference between the two.

40. My invitation was to correct arithmetic errors, not to revisit the method used. There is an error in principle in the request, for it uses 8½ hours a day, 7 days a week during the furlough period. I did not consider this the appropriate way to assess loss of earnings in that period, and used a 48 hour week (at 80% of NMW) as the basis of assessment.

41. For these reasons I decline to reconsider the decision of my own motion: it is not suggested that my arithmetic is erroneous.

Employment Judge Housego

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Date 05 August 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON

25/8/2021

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FOR THE TRIBUNAL OFFICE