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## EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4108365/2021

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Hearing Held in Glasgow (by CVP) on 26 May 2021 and 4 June 2021

Employment Judge B. Beyzade

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**Mrs Lidia Karasinska-Kurpiel**

**Claimant  
In person**

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**Halcyon Hygiene Ltd**

**Respondent  
Represented by:  
Ms. Grace Sorha,  
General Manager**

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### JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The judgment of the Tribunal is that:

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1.1. the claimant's complaint of unauthorised deduction from wages in respect of overtime pay in October 2020 is well founded and the respondent is ordered to pay the claimant the sum of **EIGHTY-THREE POUNDS AND TWENTY-FIVE PENCE [£83.25]** from which tax and national insurance requires to be deducted, provided that the respondent intimates any such deductions in writing to the claimant and remits the sum deducted to Her Majesty's Revenue and Customs.

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1.2. The claimant's claim in respect of non-payment of company sick pay by the respondent to the claimant does not succeed and is dismissed.

- 1.3. The claimant's claim in respect of non-payment of statutory sick pay by the respondent to the claimant does not succeed and is dismissed.

## REASONS

5 **Introduction**

1. The claimant presented a complaint of unlawful deduction from wages (overtime pay and sick pay) and the respondent did not enter a response.
2. A final hearing was held on 26 May 2021 and 4 June 2021. Both hearings were held by Cloud Video Platform (CVP) video hearing pursuant to Rule 46.  
10 I was satisfied that the parties were content to proceed with a (CVP) hearing, that it was just and equitable in all the circumstances, and that the respondent and the interpreter in the hearing were able to see and hear the proceedings and that the claimant (who joined the hearing by telephone) could hear me.
3. The Tribunal file was sent to me in advance of the hearing containing a copy  
15 of the claim form, directions sent to the claimant, an email dated 04 May 2021 from the claimant, and notices of hearing. In the email dated 04 May 2021 the claimant withdrew her claim for interest and provided further details relating to her overtime pay claim.
4. At the outset of the hearing the parties were advised that the Tribunal would  
20 investigate and record the following issues as falling to be determined, the parties being in agreement with these:
- (i) Whether the claimant is entitled to be paid overtime pay in respect of work done for the respondent in September and October 2020, and if so, in what amount?
- 25 (ii) Is the claimant entitled to any sick pay in relation to the period between December 2020 and 11 March 2021, and if so, on what basis and in what amount?

5. During the hearing on 26 May 2021, the claimant was assisted by a Polish interpreter, Ms. Ada Lebiezinka. The hearing which was due to commence on 26 May 2021 at 2.30pm did not start until approximately 2.47pm. Both the claimant and the claimant's interpreter experienced issues connecting to the hearing. At approximately 3.58pm the claimant's interpreter was disconnected from the hearing and she was not able to reconnect, despite allowing until 4.10pm for her to reconnect to the hearing. The claimant was asked whether she was content to proceed or whether she sought a postponement. The claimant invited the Tribunal to postpone the hearing as she advised that she was not able to continue to present her case without an interpreter. The respondent confirmed that they did not object to a postponement. The Tribunal agreed to the postponement application in the circumstances. It was underlined to the parties that a fresh date would be set down and a continuation hearing was listed on 4 June 2021 at 2.30pm. Throughout the hearing on 4 June 2021 the claimant was assisted by a Polish interpreter, Mr. Piotr Jankiewicz.
6. The claimant gave evidence at the hearing on her own behalf and Ms. Grace Sorha, General Manager gave evidence on behalf of the respondent
7. Both parties made closing submissions.

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### **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 the list of issues -
9. The claimant was employed by the respondent from 25 September 2020 as a Part Time Supervisor. The claimant's duties included working as a cleaner (in a supervisor role) in a toy store. The claimant was also asked to perform additional work not related to cleaning in September and October 2020.

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10. The claimant was provided with a Statement of Terms of Employment by the respondent dated 25 September 2020. The claimant was paid £9.25 per hour. Her working hours were usually between 7am – 9am, although she was asked to work overtime in addition to this. The claimant did not have any scheduled breaks. The claimant was paid on a weekly basis.
11. The claimant would normally start work at 7am. She would finish work by 9am.
12. When the claimant first started working for the respondent on 25 September 2020, she was contracted to work 6 hours per work. She normally worked on Mondays, Wednesdays, and Fridays when she commenced her employment, however, her normal days of work were later changed to Mondays, Wednesdays, and Thursdays.
13. Clause 11 of the claimant's Statement of Terms of Employment stated: *"Additional time must be authorised by H.O."*
14. The claimant's Statement of Terms of Employment also stated under the heading 'absence': *"If you are unable to attend work you must notify your Supervisor or Head Office 2 hours before your start time. Failure to do so will be considered gross negligence. A medical certificate must be presented on the third day of absence. Statutory sick pay applies."*
15. In October 2020, the claimant was asked to assist with tearing out some pages from a catalogue. This work was not part of her normal duties. The claimant worked approximately 24 hours of overtime in total on 05, 09, 21, 22 and 23 October 2020. The additional hours of work she carried out was authorised by the claimant's line manager (who was known to the claimant as 'Greg'). The claimant duly submitted timesheet in respects of her hours worked to her line manager and the respondent's payroll team.
16. Although the claimant was paid in respect of 14.5 hours of work, she had not received any payment from the respondent for any remaining hours of overtime work she carried out in October 2020. According to the timesheet

she submitted the claimant was owed 9 hours' overtime pay in the amount of £83.25.

5 17. On or around 17 December 2020 the claimant started a period of sickness absence. The claimant notified her line manager that she was unwell on her first day of sickness and she submitted a medical certificate to both her line manager and to the respondent's payroll team. The medical certificate stated that the claimant was unfit to work for approximately 2 months and that she was suffering from depression. The claimant's sickness absence is continuing, and the claimant sent further medical certificates thereafter to the  
10 respondent, the latest of which stated that the claimant would not be fit for work until 30 June 2021.

18. The claimant did not receive any sick pay from the respondent since she went on sick leave on 17 December 2020 and there have been no communications from the respondent in relation to her sick pay.

15 **Observations**

19. 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 –

20 20. The claimant had a Statement of Terms of Employment, so she was aware of the details relating to her overtime and sick pay entitlement.

21. According to her Statement of Terms of Employment, the claimant was entitled to Statutory Sick Pay. The claimant did not receive any sick pay and  
25 when she sent emails to the respondent about her sick pay entitlement she was not provided with any information or responses.

22. Ms. Sorha stated in her evidence that although the claimant submitted a medical certificate in December 2020 and she sent further medical certificates thereafter, the claimant was not entitled to Statutory Sick  
30 Pay as her earnings did not meet the required minimum average weekly earnings of £120.00 per week. She asked me to interpret the

5 contractual provision referred to above relating to absence as being  
subject to the requirement for employees to meet the Statutory Sick  
Pay conditions as stated on the .gov.uk website including the  
requirement for minimum weekly earnings of £120.00. She stated that  
there is no discretionary or company sick pay payable and that  
employees were not paid Statutory Sick Pay where they did not meet  
the statutory conditions. Although it was most unsatisfactory that the  
respondent failed to advise the claimant why the claimant was not paid  
any sick pay, this explanation provided by Ms. Sorha at the hearing  
10 was not disputed.

15 23. The claimant claimed 9.5 hours' overtime pay. This was claimed at her  
hourly rate of £9.25. I had no hesitation in accepting the claimant's  
evidence that her claim were authorised by her line manager and that  
she submitted timesheets to payroll at the relevant time in relation to  
her claim. It was accepted by Ms. Sorha that the overtime claimed was  
authorised by the claimant's line manager and she stated that she  
would like to receive a copy of the relevant timesheets. Ms. Sorha  
accepted that the claimant had worked the overtime claimed and  
stated that as soon as the claimant produced copies of the relevant  
timesheets to her, the claimant would be paid any outstanding  
20 overtime pay. According to the timesheets she submitted the claimant  
was owed 9 hours' overtime pay in the amount of £83.25.

### Relevant law

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

25 25. 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  
30 s23(5) of the ERA.

26. 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  
5 15 ERA).
27. 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.
28. Under Section 27(1) of the ERA "wages" means any sums payable to the  
10 worker in connection with their employment including any fee, bonus, commission, holiday pay or other emolument referable to employment and to statutory sick pay.
29. A complaint for unlawful deduction from wages must be made within 3 months  
15 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 further reasonable period.
30. The right to Statutory Sick Pay was introduced in 1983 and entitles qualifying  
20 employees to a minimum level of pay from their employer during sickness absence. It is paid at a flat rate and for a maximum of 28 weeks. The Statutory Sick Pay rate was £95.85 per week from 6 April 2020 pursuant to the *Social Security Benefits (Up-rating) Order 2020 SI 2020/234 regulation 9*. For the 2021 – 2022 tax year, weekly Statutory Sick Pay is now £96.35 per week under regulation 9 of the *Social Security Benefits (Up-rating) Order 2021*.
31. Under the *Social Security Contributions and Benefits Act 1992* (SSCBA 1992)  
25 ss 151 and 155, an employer is liable to pay Statutory Sick Pay to any qualifying employee who is unfit for work. For these purposes 'employer' essentially means a person liable to pay the employer's share of Class 1 National Insurance contributions or would be but for the employee's age or level of earnings.

32. If the employee's 'normal weekly earnings' are below the lower earnings limit for National Insurance contributions, that employee cannot claim Statutory Sick Pay (this is confirmed in the SSCBA 1992 Schedule 11 paragraph 2(c)). With effect from 6 April 2020, the lower earnings limit is £120 per week: see  
5 SSCBA 1992 s 5(1) and SI 2020/299. From 6 April 2021 the threshold to qualify remains an average weekly earnings of £120.00.

### **Discussion and decision**

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

10 34. The claimant submits that she was due £222.00 gross in respect of her overtime payments. The claimant received the sum of £134.12 in relation to this in or around October 2020. The claimant therefore stated that she was owed £87.88. The claimant did not receive payment of this sum.

15 35. The claimant stated that this was based on the fact that she worked 24 hours overtime. It was not disputed that the claimant's overtime claim was approved by her line manager in accordance with clause 11 of her Statement of Terms of Employment and that a timesheet was duly submitted by her to the  
20 respondent. The claimant was paid in respect of 14.5 hours overtime pay. She stated that she was due payment in respect of 9.5 hours overtime pay.

25 36. The respondent stated that it agreed to pay the claimant the outstanding overtime pay subject to receiving a copy of her timesheets. During the hearing, the claimant forwarded a copy of her timesheets to Ms. Sorha, following which Ms. Sorha confirmed that the respondent would be happy to process the claim for overtime pay in the sum of £83.25 based on 9 hours' pay. The claimant agreed that according to the timesheets she submitted she was owed 9 hours' overtime pay in the amount of £83.25. The claimant's  
30 hourly rate was £9.25. The claimant is therefore due to be paid the sum of £83.25 by the respondent in respect of unpaid overtime pay, subject to any required deductions for tax and national insurance contributions.



37. As noted above, the sole issue for determination in relation to the claimant's sick pay claim is what was properly payable to the claimant in the period 17 December 2020 to 11 March 2021 (date of claimant's claim) when she was off work sick. Did the contract give her a right to be paid normally during this period, bearing in mind that there must be a legal entitlement to the sum due if the payment is to fall within the definition of wages in section 27(1) ERA 1996? Or was her entitlement simply to Statutory Sick Pay - in which case there had been no unauthorised deduction?
38. There was an express term dealing with sick pay in the claimant's employment contract which is set out above. This referred to the applicability of Statutory Sick Pay.
39. Apart from this, after the claimant submitted her various medical certificates to the respondent, the topic had never been discussed between the parties. The respondent failed to reply to the claimant's correspondences. The question was therefore whether there was an implied term obliging the employer to pay the claimant her normal rate of pay throughout sickness absence.
40. Although neither party referred me to any authorities on this issue, it is well established that there is no general implied right to contractual sick pay and no presumption in favour of such a term. Instead the Tribunal must have regard to all the facts and circumstances of the employment relationship when interpreting the parties' agreement.
41. Having reviewed the evidence I decided that there was no such implied term. Firstly, there was clearly no evidence of any culture or practice in this company of paying sick pay over and above Statutory Sick Pay to salaried employees or otherwise. Quite the reverse, no other employee received discretionary or company sick pay.

42. Secondly, I was not persuaded that the conduct of the parties supported such a term. As my findings of fact make clear, no payment was made by the respondent to the claimant in respect of her period of sickness absence.

5 43. Thirdly the contract worked perfectly well without an obligation to pay sick pay, particularly as Statutory Sick Pay was payable during periods of sickness absence subject to meeting the statutory criteria. Accordingly an implied term was not needed to make sense of the agreement and it seemed to me that if I were to imply such a term I would effectively be writing the parties' contract  
10 for them – not least when it came to determining the length of the obligation to pay. I could see no justification for doing so and therefore decided that the facts and circumstances of the employment relationship pointed against the implication of such a term. Furthermore, there was an express term in the contract of employment that set out the position relating to sick pay, namely  
15 the applicability of Statutory Sick Pay.

44. The Statement of Terms of Employment states that "*statutory sick pay applies.*" Although, this is not set out expressly in the contract, it seems to me that it is proper in all the circumstances to imply a term that this was subject  
20 to the statutory criteria being satisfied by the claimant. The respondent stated that it only paid Statutory Sick Pay to employees where they met the statutory criteria. It did not pay employees Statutory Sick Pay unless their average weekly earnings amounted to £120.00 per week or more. This was a statutory threshold which was prescribed by law. The claimant did not dispute this or  
25 provide any evidence to suggest that the respondent paid Statutory Sick Pay where the statutory criteria was not met. In the circumstances having regard to all the facts and circumstances of the employment relationship when interpreting the contract of employment, it was an implied term that the claimant had to meet the minimum earnings threshold currently set at an  
30 average of £120.00 per week. The claimant clearly did not meet these minimum earnings criteria (her average earnings were £83.25 per week) and as a result she was not entitled to Statutory Sick Pay. Accordingly, there had been no unlawful deduction from wages by the respondent in relation to the claimant's claim for sick pay during the period of claim.

45. The respondent has therefore made an unlawful deduction of wages in the sum of £83.25 in total in respect of the claimant's overtime pay claim. The respondent has made no unlawful deduction of wages in respect of the claimant's company and statutory sick pay claim, which are dismissed.

5 *I confirm that this is my judgment in the case of 4108365.2021 Mrs L Karasinska-Kurpiel v Halcyon Hygiene Ltd and that I have signed the order by electronic signature.*

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**B.Beyzade**  
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**Employment Judge**

**02 July 2021**  
\_\_\_\_\_  
**Date of Judgment**

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**Date sent to parties**

**12 July 2021**  
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**Employment Judge: B Beyzade**  
**Date of Judgment: 2 July 2021**  
**Entered in register: 12 July 2021**  
**and copied to parties**