



EMPLOYMENT TRIBUNALS

Claimant: Mr D White

Respondent: Adams Leisure Limited

Heard at: East London Hearing Centre (by Cloud Video Platform)

On: 22 October 2021

Before: Employment Judge Russell

Representation

Claimant: Ms N Thompson (Partner)

Respondent: Mr A Afzalmia (Company Representative)

JUDGMENT

1. It is in the interests of justice to reconsider the Judgment sent to the parties on 19 May 2021.
2. The Judgment will be varied as follows:
 - (1) The Respondent has made an unauthorised deduction from the Claimant's wages. The Respondent must pay the Claimant £211.51 in respect of unpaid tips.
 - (2) The Respondent did not make an unauthorised deduction from the Claimant's wages in respect of sick pay.
 - (3) The Claimant was dismissed in breach of contract as he was not given his full four weeks' notice. The Respondent is ordered to pay damages to the Claimant in the sum of £75.38.
 - (4) The Claimant was unfairly dismissed. The Respondent shall pay to the Claimant a basic award in the sum of £753.85 (two years' completed service). There is no compensatory award as the Claimant mitigated his losses.
 - (5) The Respondent has failed to pay the Claimant's holiday entitlement. At the date of termination, the Claimant had accrued 19 days' holiday (8/12 x

28) of which he had taken 13 days. The Respondent shall pay the Claimant the sum of £311.31 (6 days' holiday less £140.97 already paid).

(6) The total award to be paid by the Respondent to the Claimant is therefore £1,352.05.

REASONS

1. By a claim form presented to the Tribunal on 16 October 2019, the Claimant brought complaints of unfair dismissal, breach of contract, for holiday pay and other payments. The Respondent failed to enter a Response.

2. The matter came before me on 10 May 2021. Ms Thompson appeared on behalf of the Claimant on that occasion as she does today. The Respondent did not attend. The Claimant gave evidence on oath which I accepted as truthful and reliable. He confirmed that he had been employed by the Respondent from 6 March 2017 until 2 September 2019. He said that he was contractually entitled to four weeks' notice but, as notice was given to him on or around 10 August 2019, he had been paid for only three weeks. The Claimant's evidence was that he had been absent due to sickness from 20 March 2019 until 7 April 2019 but had only been paid in respect of two weeks, with a further week of Statutory Sick Pay due to him.

3. The Claimant's holiday year runs from 1 January to 31 December, eight months of the year had elapsed and he was entitled to 28 days as a salaried employee. Pro rata at the effective date of termination, that is 18.66 days rounded to 19 days at a daily rate of £75.38. Credit must be given for 13 days' taken as shown on the Respondent's records and with for a balancing payment of £140.97 made on termination.

4. The Claimant said that he had received tips during his employment and relied upon payslips from January 2019 until July 2019. On each payslip he was paid tips. However, on 9 August 2019 payslip there is no payment for any tips. The Claimant's evidence (confirmed on oath today) was that he was told by the Head Chef that his tips would be withheld to cover damage to a microwave. Averaging the Claimant's tips over the year came to £211.51 per month.

5. The Claimant said that he had worked for more hours than he was contracted to and that there had been a failure to pay National Minimum Wage. However, he provided no evidence with regard to those additional hours worked and accordingly I made no award on that heading.

6. Having sent the Judgment to the parties, the Respondent contacted the Employment Tribunal to indicate that it had not received the Notice of Hearing for 10 May 2021 and had been deprived of the opportunity to make representations. The Notice had been sent to a former employee, a Ms Finch, who had left the Respondent quite some time before and was not seen by any officer of the Respondent.

7. In light of the explanation provided by the Respondent, I directed that it may be appropriate to reconsider the Judgment in the interests of justice and I listed today's hearing. I noted that as the Respondent had failed to present a Response, the Claimant was entitled to Judgment in his favour and the Respondent's submissions would be limited to the amount due by way of remedy.

8. Mr Afzalmia resubmitted on behalf of the Respondent documents that had previously been submitted and which I had taken into account at the last hearing. These included a copy of the Claimant's contract of employment as an hourly paid kitchen assistant; there was no copy of an employment contract covering his subsequent salaried employment. There were also print-outs from the Respondent's Selima system of clock-in and clock-out times, 13 days of paid holiday in the relevant period (2 May to 5 May, 22 May to 25 May, 19 August to 25 August 2019) and a further spreadsheet showing clock-in, clock-out times and the total number of hours worked daily.

9. I heard submissions from Ms Thompson today on behalf of the Claimant. On behalf of the Respondent, I heard from Mr Afzalmia.

10. The Respondent accepts that the Claimant is entitled to the basic award. He calculates it as £751.78. I conclude that that is a calculation error, the correct sum is £753.85.

11. Dealing with the other matters, firstly unpaid sick pay. On balance, I accept Mr Afzalmia's submissions today. The Claimant had a period of 19 days' sickness absence. Under the Statutory Sick Pay Scheme, the first four days of absence are not paid. For those reasons, I am satisfied that the Claimant was correctly paid for two weeks of sickness absence only. The Judgment is varied to remove the sum of £92.05 for the third week.

12. As for notice pay, Mr Afzalmia did not dispute that the Claimant would be entitled to four weeks' notice even in the absence of a copy of his revised contract of employment. Mr Afzalmia fairly conceded that the Respondent had no records with regard to notice pay and the most he could say was it was highly unlikely that they would not have paid in full. On this point, I prefer the evidence of the Claimant and I find that the Claimant was only given three weeks' notice (10 August to 2 September 2019). He was underpaid his notice by one week. The Judgment for £75.38 notice pay is confirmed.

13. Turning to the question of tips, Mr Afzalmia submitted that tips are not a contractual entitlement and that the Head Chef retains a discretion to remove an employee from the tronc system in the event of underperformance, lateness and the like. The Claimant's evidence was that at the conclusion of his employment, the Head Chef told him that his tips were being withheld to cover the cost of a broken microwave. Mr Afzalmia said that this would not have happened as it was not the Respondent's policy to make that deduction. There was no evidence from the Head Chef.

14. On balance and having regard to the payslips throughout 2019, I am satisfied that the Claimant was paid an amount of money each month in respect of tips up to and including the termination of employment. Section 27 of the Employment Rights Act defines wages as "**any fee, bonus, commission, holiday pay or other emolument referable to his employment whether payable under his contract or otherwise**". It is not necessary for the

Claimant to establish that tips were a contractual entitlement. I am satisfied that tips earned in the course of employment are therefore wages for the purposes of the Act.

15. No payment for tips was made in the final month. I do not accept Mr Afzalmia's speculation that it may have been due to the Claimant's performance. There is no evidence of under-performance and I prefer the evidence of the Claimant, namely that he was told by the Head Chef that the tips were being withheld due to damage to the microwave. There was no written agreement or contractual term entitling the Respondent to make such a deduction. The Claimant is entitled to the sum of £211.51.

16. Turning finally to holiday entitlement, the Respondent has calculated holiday entitlement as being 15.87 days to the date of termination as Mr Afzalmia submits that holiday accrued differently when the Claimant was hourly paid. He says that the Claimant had booked 14 days leave and so was entitled to payment in lieu for 1.87 days only. By contrast, the Claimant says that he is entitled to pro rata accrual for the holiday year to termination and that the Respondent's system shows only 13 days' in fact taken.

17. As stated above, there is no revised contract for when the Claimant became a salaried employee or clear date. However, even when hourly paid, the holiday year ran from 1 January to 31 December and the entitlement was to 5.6 weeks paid holiday (28 days). The Respondent's record-keeping is not reliable and there is no evidence to support its case that holiday accrued differently under the new contract or that the position was different when the Claimant was paid hourly. The payslips in the bundle show that the Claimant was being paid a monthly salary from at least as early as January 2019. At the date of termination, the Claimant had accrued 8 months' holiday, giving a pro rata period of 18.66 days. This is rounded up to 19 days. The Claimant took 13 days' holiday as recorded by the Respondent's system. He was entitled to be paid for 6 days' accrued but untaken holiday. Credit must be given for the £147.97 paid on termination.

18. For all of these reasons, the Judgment is varied simply to the extent that the sick pay award is removed. All other sums remain due and owing as before. The total sum which must be paid to the Claimant is **£1,352.05**

Employment Judge Russell
Dated: 20 December 2021