



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4104172/2020 (A)

Held in Glasgow by CVP on 8 and 9 December 2021

Employment Judge: Rory McPherson

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Patricia Flynn

**Claimant
In Person**

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Mikeylenn Ltd

**Respondent
Represented by
G Kelly and M Lennon
Directors**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that;

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1. the respondent made unauthorised deduction of wages from the claimant's wages in the sum of **Six Hundred and Thirty Two Pounds and Sixty Four Pence (£632.17)**, being 11 weeks' pay at the contractual rate of £57.47; and

2. the claimant was dismissed in breach of contract in respect of notice, and the respondent is ordered to pay damages in the sum of **One Hundred and Seventy Two Pounds and Forty One Pence (£172.41)**, being 3 weeks' notice contractual notice pay £57.47; and

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3. the claimant was dismissed by reason of redundancy and is entitled to a redundancy payment of **One Thousand One Hundred and Seventy Six**

E.T. Z4 (WR)

Pounds and Eighty Eight Pence Pounds (£1,176.88) calculated on average of paid wages 52 weeks prior to termination (£261.53 x 4.5 having regard to the claimant's age), the claimant having a period of 3 continuous years of service.

- 5 4. The respondent has failed to pay the claimant's accrued (16 March to 25 May) holiday entitlement and is ordered to pay the claimant the sum of **Sixty Three Pounds and Twenty Two Pence (£63.22)**.
5. As the Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 do not apply, these sums are payable
10 immediately by the respondent.

REASONS

Preliminary Matters

1. Oral reasons were given at the hearing, and having issued oral judgment as
15 set out above, the claimant subsequently requested written Judgment.
2. This claim was one of 3 separate claims heard together. No request for written reasons was made by the other claimants.
3. Both the claimant and respondent appeared without representation.
4. The claimant prepared an informal bundle following directions given at
20 reconsideration hearing held by video on Thursday 28 October 2021 sent to the parties on Friday 1 November 2021. That informal bundle was supplemented by additional documents, including Isolation Note, which is referred to below. In advance of the hearing, the claimant had provided calculations which included reliance on HMRC based information which is
25 referred to below in respect of which calculations had been assisted by advice agencies. The claimant had sought outstanding pay, including notice pay, holiday pay, and redundancy pay together with what was described as

furlough pay. The claimant did not argue that the termination was not due to redundancy.

5. The claimant gave evidence, as did Mr. Kelly as a director of the respondent company.

Findings in Fact

1. On **Monday 1 August 2016**, the claimant commenced her continuous period of employment at King Arms public house in Fenwick, carrying out various roles culminating in the role of bar staff from around November 2016.
2. The claimant worked 7 core agreed contractual hours, referred to as “basic hours,” although she commonly worked additional hours. The claimant was paid at the same rate for basic and additional hours.
3. On or around **Saturday 29 February 2020**, the claimant commenced a period of previously agreed holiday leave to Monday 16 March 2020 (the agreed holiday period), utilising the remainder of her then outstanding accrued annual leave. The claimant was paid by her then employer (as of 29 February 2020) for that agreed holiday period.
4. In the 52 weeks prior to the expiry of the agreed holiday period, the claimant was paid on average £261.53, reflecting both the basic and additional pay received. The claimant’s basic contractual entitlement to pay was £57.47. Holiday pay was calculated on contracted hours and additional hours worked.
5. On or about **Monday 2 March 2020**, the respondent company, established for this purpose, took over the public house operation. Consequently, the claimant’s continuous period of employment and related liabilities were transferred to the respondent company.

6. On the claimant's return from the agreed holiday period by **Monday 16 March 2020**, she was provided with an Isolation Note (the March 2020 Isolation Note) which told her she must stay off work by official advice. The Isolation Note was a new concept introduced in response to the emerging Covid 19 pandemic and operated as equivalent to a GP-provided Fit Note. The March 2020 Isolation Note, which was due to expire **Sunday 22 March 2020**, was provided to the respondent.
7. On **Monday 23 March 2020**, the Government announced a national lockdown arising from the onset of the Coronavirus pandemic. Consequently, the respondent's public house was unable to operate, and the claimant was unable to attend her next scheduled workday.
8. That week the UK Government created the Coronavirus Job Retention Scheme ("CJRS"), a new concept within UK employment law (which has become known as the Furlough Scheme) in consequence of the Covid 19 Pandemic.
9. As they were unable to operate the public house, the respondent company sought unsuccessfully to secure the benefit of the Furlough Scheme to pay the claimant, including appealing a decision rejecting their application to be eligible under the Furlough Scheme. The application had been rejected as the respondent, which had commenced operation of the public house on Monday 2 March 2020, was not registered prior to that date, for an earlier effective cut-off date for HMRC's Real Time Information process (at which date the Furlough Scheme did not exist).
10. As part of the process including the appeal, and in anticipation that their application would be approved to operate the Furlough Scheme, the respondent company had understood that it was required to maintain a formal record of payments which would have ordinarily been made (if operational) although it did not, in fact, make such payments. An unintended effect of that process was to create an HMRC record which erroneously suggested that payments had been made by the respondent company following the claimant's return from her agreed holiday period.

11. Following upon the claimant's return from her agreed holiday period, the respondent company did not pay the claimant. The reason for that non-payment was not the TUPE transfer of the claimant. It was the onset of the pandemic.
- 5 12. On **Monday 25 May 2020**, due to the ongoing absence of requirement for the work carried by the claimant, the respondent terminated the claimant's employment due to the continuing impact lockdown.
13. The respondent had remained unable to secure its eligibility to operate within the Furlough Scheme. The respondent was unable to operate the public
10 house from the period from a few weeks after the TUPE transfer to the date of redundancy.

Relevant Law: Contract/TUPE

14. In terms of **Reg 4 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE 2006)**, a new employer, the
15 respondent in this case, inherits all the accrued rights and liabilities connected with the contract of employment of the transferred employee. Thus, contractual terms and conditions with the previous employer automatically become the terms and conditions with that new employer, including continuing to pay basic contractual pay to an employee for the
20 basic contractual hours. TUPE 2006 does not, however, require an employer to make additional payments where additional hours are not worked.

Relevant Law: Furlough

15. Since the innovation of Furlough, there have been different versions. However, for present purposes, Version 1 (Furlough) operated from Sunday
25 1 March to Tuesday 30 June 2020 would have been applicable. An employer's application for Furlough is required to be approved by, in effect HM Treasury. In the absence of such approval, the scheme did not operate, and the Government would not pay an employer the 80% of salary (subject to a cap of £2,500 per month) in consequence of the employer's employees
30 being prohibited from working. The Furlough Scheme did not create a

general obligation for an employer whose application was not accepted to make any payments to an employee who could not work.

Redundancy

- 5 16. It was a matter of agreement that the termination of employment was by reason of redundancy. The dismissal, in any event, met the requirements of s139 (1) of the Employment Rights Act 1996, being a dismissal wholly or mainly attributable to the diminished requirement of the business.
- 10 17. In terms of section 223 (1) (2) of the Employment Rights Act 1996, no account is taken in the calculation for redundancy pay of a period preceding the redundancy date, during which no payments have been made.

Conclusions

18. The claimant's continuous period of employment and related liabilities were transferred to the respondent company by reason of TUPE 2006 on **Monday 2 March 2020** to the respondent company, established for this purpose.
- 15 19. The claimant's entitlement to redundancy is calculated reflecting the paid period preceding the redundancy date. That calculation does not include, in terms of section 223 (1) (2) of the Employment Rights Act 1996, the period from the end of the agreed holiday period to the date of redundancy, during which no payments were made and for which a separate award for breach of contract is made. As such the HMRC records erroneously created for that period in anticipation of the respondent successful appeal against Furlough Scheme rejection are disregarded. No payment was made by the respondent company in that period.
- 20 20. The respondent company did not pay the claimant the sums she was contractually entitled to following upon the conclusion of her agreed holiday period, being 11 weeks' pay at a contractual rate of £57.47.
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21. The respondent company dismissed the claimant in breach of contract in respect of her entitlement to 3 weeks contractual notice pay having regard to her cumulative length of service.
22. The respondent dismissed the claimant by reason of redundancy and is entitled to a redundancy payment, calculated on an average of paid wages 52 weeks prior to termination (£261.53 x 4.5 having regard to the claimant's age) having regard to the claimant having a period of 3 continuous years of service. No account is taken of the period beyond the agreed holiday period during which the claimant was not paid.
23. The respondent failed to pay, at dismissal, the claimant's accrued holiday entitlement following her return after the agreed period of holiday. The calculation of holiday pay entitlement in judgment dated 13 December 2021 issued 14 December 2021 in error referred to the period as from 6 March, that is corrected above to 16 March in terms of Rule 69 of the 2013 Rules and accordingly, on reconsideration in terms of Rule 70 of the 2013 Rules, the calculation of accrued unpaid holiday pay is varied to **£63.22** accordingly.
24. The claimant is entitled to the sums set out above

20 Employment Judge: Rory McPherson
Date of Judgment: 07 January 2022
Entered in register: 10 January 2022
and copied to parties