



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr S Vitale

**Respondent:** Enoteca (UK) Ltd

**Heard at:** London Central via CVP

**On:** 6 January 2022

**Before:** Employment Judge Wisby (Sitting Alone)

## Representation

Claimant: In person

Respondent: Mr Malloy (litigation assistant)

# JUDGMENT

1. The Tribunal declares that the Respondent made unauthorised deductions from wages in the following respects:
  - 1.1. £1384.62 (gross) in respect of notice pay; and
  - 1.2. £1507.42 (gross) in respect of holiday pay.
2. The Respondent is ordered to pay the sums set out in 1.1 and 1.2 above to the Claimant.
3. The Respondent is ordered to pay the Claimant £229.38 in respect of the statutory redundancy payment that the Claimant was entitled to.

# REASONS

## Preliminary Matters

4. Written reasons for the Judgment issued on 6 January 2022 at the end of

the 2-hour final merits hearing were requested by the Claimant on 6 January 2022.

### **Evidence and documents before the Tribunal**

5. The Tribunal was presented with:
  - 5.1. a bundle of documents amounting to 126 pages;
  - 5.2. witness statements from: the Claimant, Mr Paice, Mr Grant and Ms Mastrantonio. Mr Grant and Ms Mastrantonio did not attend the hearing.
6. The parties provided a list of agreed issues and facts (set out at paragraph 8 below). The Tribunal asked both parties to confirm that they agreed with the matters set out in this document. Both parties confirmed that they did. The Claimant stated he was not pursuing any other legal complaints and that he agreed with the calculations set out in the agreed list.
7. The Respondent provided a written skeleton argument.

### **8. AGREED SET OF FACTS and ISSUES**

*The Claimant and Respondent are in agreement of the following facts:*

1. *The Claimant's employment with the Respondent began on 1 April 2017.*
2. *During his employment, the Claimant benefitted from a Tronc scheme, whereby gratuities received in the Respondent's restaurants were paid into an account managed by the Respondent's accountant and then distributed between employees.*
3. *On or around July 2019, the Respondent agreed with the Claimant that henceforth they would receive £48,000 per year, made up of £24,000 as a basic salary and £24,000 of gratuity made via Tronc payments.*
4. *On 19 March 2020, the Respondent placed the Claimant on furlough, due to the COVID-19 pandemic.*
5. *The UK Government's Coronavirus Job Retention Scheme (furlough scheme) excluded Tronc payments in any calculations for an employee's past earnings.*
6. *The Claimant signed an updated contract on 18 April 2020.*
7. *The Claimant's holiday year began on 1 April and ended on 31 March each year. The Claimant's holiday entitlement was of 28 days inclusive of public / bank holidays.*
8. *A benefit of the Claimant's contract was that he continued to receive Tronc payments when taking annual leave.*
9. *The Claimant returned to working with the Respondent on flexi-furlough in September 2020.*
10. *On 15 October 2020, the Claimant was informed that he was at risk of redundancy.*
11. *On 22 October 2020 and 27 October 2020, the Respondent conducted consultations with the Claimant offering alternatives to redundancy. The Claimant did not pursue these offers.*
12. *On 29 October 2020, the Respondent informed the Claimant that he was to be made redundant.*

13. *The Claimant's statutory notice period was three weeks.*
14. *On the basis of his basic salary of £24,000 per year and a weekly pay of £461.54, the Claimant received payment in lieu of three weeks' notice for the amount of £1,384.62.*
15. *The Claimant's redundancy pay is calculated by multiplying his gross weekly pay by a multiplier of three.*
16. *On the basis of his basic salary of £24,000 per year and a weekly pay of £461.54, the Claimant received total redundancy pay for the amount of £1,384.62.*
17. *The Claimant also received a sum of £301.48 to top his furlough pay up to 100% for 16.33 days holiday that had been taken during his period of furlough*

**AGREED LIST OF ISSUES**

**Notice Pay**

18. *Should the Claimant's weekly pay have been calculated on the basis of his £24,000 per year basic salary and his £24,000 per year Tronc payments for the purpose of notice pay?*
19. *If so, the Claimant and the Respondent agree that the Claimant is owed an additional £1384.62 for notice pay.*

*Calculation*

*Weekly pay*

$$£48,000 \div 52 \text{ weeks} = £923.08$$

$$\text{Three weeks' notice pay } £923.08 \times 3 \text{ weeks} = £2769.24$$

$$\text{Notice pay owed less notice pay received } £2,769.24 - £1,384.62 = £1,384.62$$

**Redundancy Pay**

20. *Should the Claimant's weekly pay have been calculated on the basis of his £24,000 per year basic salary and his £24,000 per year Tronc payments for the purpose of statutory redundancy pay?*
21. *If so, the Claimant and the Respondent agree that the Claimant is owed an additional £229.38 for redundancy pay.*

*Calculation*

*Weekly pay*

$$£48,000 \div 52 \text{ weeks} = £923.08$$

$$2020 \text{ statutory redundancy weekly pay cap} = £538.00$$

*Redundancy pay*

$$£538.00 \times 3 \text{ weeks} = £1,614.00$$

$$\text{Redundancy pay owed less redundancy pay received } £1,614.00 - £1,384.62 = £229.38$$

**Holiday Pay**

22. *Should the Claimant's holiday pay have been calculated on the basis of his £24,000 per year basic salary and his £24,000 per year Tronc payments?*
23. *If so, the Claimant and the Respondent agree that the Claimant is owed an additional £1,507.42 holiday pay.*

*Calculation*

*Daily pay*

$$£48,000 \div 260 = £184.62$$

$$\text{Holidays pay owed for 16.33 days accrued } £184.62 \times 16.33 = £3,014.84$$

*Holiday pay owed less holiday pay received*

$$\text{Holiday pay received during furlough at 80\%} = £1,205.94 \text{ Holiday top up pay received} = £301.48$$

$$£3,014.84 - £1,205.94 - £301.48 = £1,507.42$$

9. The issues were therefore had the Claimant's Statutory Redundancy Payment (SRP), notice pay and holiday pay been calculated correctly.
10. There was no dispute over the number of week's notice due, the formula for the SRP or the number of days annual leave to be considered for holiday pay purposes. The dispute related purely to whether the agreed additional monthly 'tronc' amount should be included in the week's pay calculations for these purposes.
11. The parties agreed that the Claimant had normal working hours and his pay did not vary with the amount of work done, nor the time of work.
12. Due to the parties agreeing the facts set out above, neither party wished to cross examine the other side's witnesses.

## **The Law**

13. Section 13 of the Employment Rights Act 1996 ("ERA") prevents an employer from making deductions from a worker's wages unless the deduction is: a. required or authorised by law or by a provision in the worker's contract; or b. The worker has agreed to the deduction in writing in advance of it being made.
14. The Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 gives Employment Tribunals the power to consider claims for breach of contract up to a value of £25,000. To succeed in a claim for breach of contract an employee must show, on the balance of probabilities, that his employer has breached an express or implied term of his contract of employment.
15. Claims for holiday pay can be brought as complaints of unlawful deduction from wages, as complaints of breach of contract or under the Working Time Regulations 1998 ("WTR").
16. Section 88 of the ERA applies to employees with normal working hours. It provides that such employees are entitled to be paid not less than an average hourly rate for hours during their statutory notice period where, amongst other things, they are ready and willing to work but no work is provided.
17. A week's pay for the purposes of calculating a SRP and notice pay under section 88 of the ERA is calculated in accordance with the provisions in sections 221 to 224 of the ERA. The calculation depends upon whether the

employee has normal working hours or not.

18. The Employment Rights Act 1996 (Coronavirus, Calculation of a Week's Pay) Regulations 2020 (SI 2020/814) came into force on 31 July 2020, these Regulations set out how a week's pay is calculated for an employee who has been furloughed.
19. Under the WTR, workers are entitled to be paid during statutory annual leave at a rate of a week's pay for each week of leave. There is no cap on the amount of a week's pay for these purposes.

### **Findings of Fact**

20. The Tribunal accepted the agreed facts presented by the parties. Additionally, the Tribunal found that the new contract the Claimant signed on 18 April 2020 did not change the agreement in respect of the Claimant's pay, being that as a minimum he would receive £48,000 per year, made up of £24,000 as a basic salary and £24,000 via the Tronc payment system.
21. When working normally the Claimant's annual total pay was therefore a minimum of £48,000 per annum. This level of pay was not impacted by annual leave.

### **Discussion and Conclusions**

22. The Respondent referred to the Governments' furlough scheme, the rules in respect of how furlough grant should be calculated and the National Minimum Wage (NMW) Regulations. The position under the NMW regulations is that tronc payments cannot be considered when calculating whether the NMW has been paid. On this basis it was submitted that the £2000 per month (gross) that the Respondent had agreed would be paid to the Claimant on top of the basic wage could not count towards the week's pay calculations for notice pay, holiday pay and the SRP.
23. It was admitted by the Respondent, that a benefit of the Claimant's contract was that he would continue to receive the 'tronc' payment amount whilst taking annual leave. This was said to be a benefit for salaried employees only, not hourly staff.
24. The Tribunal does not accept that: (i) the way the furlough grant that could be claimed by employers was calculated; and (ii) the case law regarding the calculation of the NMW, means that the additional £2000 per month (gross) that was guaranteed to this Claimant by the Respondent is not relevant to the specific calculations to be considered today. The calculations for statutory notice pay, SRP and holiday pay have their own legal framework. The Respondent agreed with the Claimant minimum payments that would be made to him when he was working normal hours and during annual leave. On that basis the Tribunal has concluded that the SRP was calculated incorrectly, there was a breach of contract in respect of notice pay and an unauthorised deduction from wages in respect of holiday pay. The relevant calculations for today's hearing should have been carried out using the figure of £48,000 p.a. not £24,000 p.a. and the Tribunal awards the Claimant the shortfall amounts,

as agreed by the parties in their calculations.

25. The Tribunal acknowledged that the Respondent tried to support employees by topping up furlough pay.

Employment Judge Wisby

12.1.2022

REASONS SENT TO THE PARTIES ON

12/01/2022

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FOR THE TRIBUNAL OFFICE