



EMPLOYMENT TRIBUNALS

Claimant: Mr D Slifkin

Respondent: GH Sheldon Wholesale Baker Limited

Heard at: Manchester (via CVP)

On: 1 November 2021 and
18 November 2021 (in
chambers)

Before: Employment Judge Ainscough
(sitting alone)

REPRESENTATION:

Claimant: In person

Respondent: Sarah Sheldon (Director/Solicitor)

JUDGMENT

The judgment of the Tribunal is that:

1. The claim for unlawful deduction from wages, contrary to section 13 of the Employment Rights Act 1996, is successful. The respondent is ordered to pay the claimant the gross amount of **£572.80**
2. The claim for breach of contract is successful and the respondent is ordered to pay the claimant **£800**.
3. The claim for unpaid holiday pay contrary to regulation 14 of the Working Time Regulations 1998 is successful. The respondent is ordered to pay the claimant **£1120**.
4. An additional award is also made in accordance with section 38 of the Employment Act 2002 because the claimant brought a claim for unlawful deduction from wages and a failure to pay accrued holiday pay on termination of employment. The respondent failed to provide the claimant with a statement of employment particulars. The respondent is ordered to pay the claimant **£3200**.

REASONS

Introduction

1. The claimant worked as a Transport Manager for the respondent, a wholesale bakery, from 10 May 2021 until 6 August 2021. The claimant has brought claims for unlawful deduction from wages, failure to pay correct holiday pay on termination and breach of contract.
2. The respondent asserted that the claimant had in fact received an overpayment of wages and as a result had been sacked for gross misconduct. The respondent contended that as a result the claimant was not entitled to his notice pay and had been paid correctly for his accrued annual leave.

The Issues

3. The issues to be determined were as follows:
 - (1) Whether the claimant was entitled to payment of his daily rate for hours worked on a Saturday and Sunday.
 - (2) If so, whether there had been an unlawful deduction from wages contrary to section 13 of the Employment Rights Act 1996.
 - (3) Whether the claimant was entitled to a week's notice pay.
 - (4) The claimant's holiday pay entitlement on termination of his employment in accordance with regulation 14 of the Working Time Regulations 1998.

Evidence

4. The parties produced a 91 page bundle which consisted of documents provided by the claimant and documents provided by the respondent. In addition, the bundle also included a witness statement from the claimant, a witness statement from Sarah Sheldon, a director of the company, and a witness statement from Ken Mackintosh, the HR Manager for the respondent.
5. I heard evidence from the claimant and from Sarah Sheldon.

Relevant Findings of Fact

Interview

6. The claimant was interviewed by Sarah Sheldon and was told at interview that the respondent operated a business that was open seven days per week 24 hours per day. The claimant was told that the respondent business already had one Transport Manager called Peter Oxton and there was a need to recruit a second Transport Manager.
7. Following interview, the claimant was offered the role of Transport Manager. The claimant was told that he would work Monday to Friday from 8.00am to 4.00pm

and receive a daily rate of £160. It was agreed that the claimant would be paid a week in hand i.e. he would work one week and then receive pay at the end of that week. The offer of the role was made to the claimant verbally and he accepted the role verbally. The claimant was not provided with a contract of employment prior to commencement of employment.

Start of Employment

8. The claimant began employment on 10 May 2021 and was subject to an employee induction by Ken Mackintosh, the HR Manager. During the induction the claimant was taken through the employee handbook.

9. The employee handbook provides for flexibility in roles performed with the respondent and informs employees that the company can amend the role and duties at any time.

10. An employee must clock in and clock out of the site via a hand biometric scan which involves placing a hand on top of a scanner before entry or exit is allowed. Employees are also informed that CCTV is in use on the site and that they will be recorded whilst on site.

11. The handbook states that the respondent can change the employee's terms and conditions. Employees are also informed of the respondent's right to deduct any overpayment of wages.

12. The handbook sets out that any additional hours will be paid at the basic rate and additional pay will only be provided for such hours if it provided for in individual terms and conditions.

13. Employees are provided with annual leave in accordance with the Working Time Regulations 1998. The handbook sets out the disciplinary procedure. Instances of gross misconduct can lead to summary dismissal.

14. Employees are entitled to varying lengths of notice periods depending on the level of role they perform.

15. The handbook does not provide for a pro rata daily rate in the event that less than a full day is worked or provide details of the appropriate rate of pay when required to work beyond the normal working hours.

16. On starting his employment, the claimant discovered that Peter Oxton worked set days from Sunday to Thursday and queried with Sarah Sheldon as to who would cover transport issues on a Saturday. The claimant was informed by Sarah Sheldon that it was up to the claimant and Peter Oxton to work out a seven day cover whilst ensuring that they each had adequate days off.

17. From 15 May 2021 the claimant worked on a Saturday to cover the transport duties on this day. The claimant was paid a full day rate for each Saturday that he worked.

Clock in and clock out system

18. From 10 May 2021 to 25 June 2021 the claimant clocked in and out each time he attended at the respondent's site.

19. At the beginning of June 2021, the claimant advised Ken Mackintosh and another director, Neil Fairhurst, that he was uncomfortable using the hand biometric system because of the risk of transfer of germs during the pandemic. The claimant complained that he was constantly suffering from a cold and was uncomfortable using the system.

20. On 25 June 2021 the claimant stopped using the hand biometric system.

Peter Oxton's departure

21. On 1 June 2021 Peter Oxton left the respondent's employment. On 2 June 2021 the claimant met with Sarah Sheldon and Neil Fairhurst to discuss the situation. The claimant was informed that a replacement would be recruited. The claimant asked the managers not to do this until he had got on top of the job.

22. From the first week in June 2021 until the claimant left his employment he worked seven days per week.

23. Each time the claimant worked a Saturday and Sunday he was asked to complete a timesheet confirming his attendance. The timesheet contained columns for the employee number, the name of the employee, a column to indicate whether they were in or out of work, the start time and finish time, a signature column and a column that said "hours worked".

24. From 26 June 2021 until Sunday 1 August 2021 the claimant completed the timesheet by ticking the column to show he was in work but did not complete the hours that he started and finished. The claimant's name was directly under the title "manager" and then there was a gap to the names of other employees. Each employee completed the hours that they worked.

25. Despite the claimant working each Saturday from 15 May 2021 and each Saturday and Sunday from 1 June 2021, the hand biometric scan had no record of the claimant entering the respondent's site at the weekend except for the weekends of 5 and 6 June and 12 and 13 June, where an entry time was recorded but no exit time was recorded.

26. The respondent viewed the CCTV footage and whilst the CCTV footage was not available to the Tribunal it is accepted, because it was not disputed by the claimant, that the claimant worked the following hours on the following weekends:

Saturday 26 June	3 hours 32 minutes
Sunday 27 June	57 minutes
Saturday 3 July	3 hours 24 minutes
Sunday 4 July	2 hours 25 minutes

Saturday 10 July	3 hours 1 minute
Sunday 11 July	2 hours 24 minutes
Saturday 17 July	3 hours 45 minutes
Sunday 18 July	2 hours 35 minutes
Saturday 24 July	3 hours 1 minute
Sunday 25 July	2 hours 42 minutes
Saturday 31 July	3 hours 25 minutes
Sunday 1 August	3 hours 1 minute

27. On each of those days, the claimant claimed his daily rate of £160.

Pay dispute

28. Following the weekend of 31 July and 1 August 2021 a member of the respondent's office staff approached Sarah Sheldon about an alleged discrepancy between the hours worked by the claimant and his claim for wages. It was alleged that because the claimant had not worked a full day, he should not be entitled to a full daily rate.

29. Therefore, on 5 August 2021 Sarah Sheldon emailed the claimant and alleged that he had been overpaid. It was asserted that this error had occurred because there had been no timings recorded for the claimant, and he was asked to ensure clock in and clock out when on site. The claimant was asked to confirm the hours worked from 26 June 2021 – 1 August 2021.

30. On the same day the claimant responded to Sarah Sheldon's email and said that he had stopped clocking in and out because of his concerns about the transfer of germs. The claimant offered to start using the clock in and clock out system but informed Sarah Sheldon that he would stop if the cold returned.

31. The claimant asserted that he was coming in on the weekends to make sure drivers were briefed and had worked on average four hours per day. The claimant also asserted that he did not think it unreasonable that he received a full day's pay for hours worked on a weekend because his job had altered since Peter Oxton had left the business. The claimant informed Sarah Sheldon that is this could not be agreed there needed to be a further discussion between the claimant and the respondent.

32. On 6 August 2021 Sarah Sheldon responded stating:

"The pay every employee receives is as per the clocking system and therefore you will be paid for the hours worked as shown on your clock and report. There are no exceptions to this."

33. Approximately seven minutes later the claimant sent an email to Sarah Sheldon stating that he did not agree and would resign. The claimant indicated he would give notice of one week starting on 6 August 2021.

34. Immediately on receipt of the claimant's email the directors met to discuss the situation and determined that the claimant had fraudulently claimed hours and was guilty of gross misconduct and should be summarily dismissed. Approximately ten minutes after the claimant had indicated he would resign, Neil Fairhurst told the claimant to collect his belongings and to leave.

35. On 13 August 2021 the claimant received a payslip that recorded he was owed holiday pay of £947.20. The payslip also recorded a deduction of £400 and the claimant only received gross pay of £547.20.

36. The respondent has produced a different payslip for the date of 13 August 2021. This payslip shows that the claimant was entitled to basic pay for 4.5 days which equated to £720 and was also entitled to holiday pay of £947.20. The payslip records a deduction of £1,120 which equates to seven days of the daily rate. The payslip records gross taxable pay of £547.20.

37. Whilst the two payslips are different, the gross taxable pay paid to the claimant is the same.

38. The respondent admitted that a deduction of seven days of the daily rate had been taken from the money outstanding to the claimant on the termination of his employment based on their findings from the CCTV evidence. It was the view of the respondent that because the claimant had only worked a number of hours on each Saturday and Sunday, he was only entitled to half a day rate for each of the weekend days worked. This equated, in the respondent's view, to an overpayment of seven days.

39. The respondent also asserted in evidence that the holiday pay calculation was based on the claimant's five day working week, and in light of the duration of his service he was entitled to 5.92 days of accrued holiday on termination of employment.

40. The claimant expected payment of basic pay of £1276.20 from 31 July 2021 – 6 August 2021. The claimant also expected payment of notice pay at a daily rate of £160 which equated to £800. Finally, the claimant expected payment of accrued holiday of 7.5 days at a daily rate of £160 which equated to £1200.

Relevant Legal Principles

Rights during notice period

41. Section 86(1) of the Employment Rights Act 1996 provides:

“The minimum notice period to be given by an employer to terminate the contract of a person continuously employed for one month or more as:

- (a) Not less than one week's notice if his period of continuous employment is less than two years.”**

42. Section 86(2) of the Employment Rights Act 1996 provides that an employee who has been continuously employed for one month or more must give not less than one week's notice to terminate the contract of employment.

Unlawful deduction from wages

43. The unlawful deduction from wages claim was brought under Part II of the Employment Rights Act 1996. Section 13 confers the right not to suffer unauthorised deductions unless:

- “(a) The deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision in the worker’s contract; or**
- (b) The worker has previously signified in writing his agreement or consent to the making of the deduction.”**

44. A relevant provision in the worker’s contract is defined by section 13(2) as:

- “(a) One or more written contractual terms of which the employer has given the worker a copy of on an occasion prior to the employer making the deduction in question; or**
- (b) In one or more terms of the contract (whether express or implied) and, if express, whether oral or in writing, the existence and effect, or combined effect, of which in relation to the worker the employer has notified the worker in writing on such an occasion.”**

45. A deduction is defined by section 13(3) as follows:

“Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this part as a deduction made by the employer from the worker’s wages on that occasion.”

46. Section 27 defines wages as:

- “(a) Any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise.”**

Holiday Pay

47. Regulation 14 of the Working Time Regulations 1998 provides:

- (1) This regulation applies where –**
 - (a) A worker’s employment is terminated during the course of this leave year; and**
 - (b) On the date on which the termination takes effect (the termination date) the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13 and regulation 13A differs from the proportion of the leave year which has expired.**
- (2) Where the proportion of the leave taken by the worker is less than a proportion of the leave year which has expired, his employer shall pay him a payment in lieu of leave in accordance with paragraph 3.”**

Submissions

Respondent's Submissions

48. The respondent submitted that it disagreed with the claimant's case and it was very clear from the payslips that he had been paid for everything that he worked. The respondent asserted it was entitled to deduct the seven days' pay because the claimant should not have been paid a full day at weekends.

49. The respondent accepted that there was no contract of employment but that the claimant was well aware of the rates and the hours. It was submitted that the claimant and the respondent spoke on a daily basis and the claimant knew he was getting away with a nice bonus which was not paid to other staff.

50. The respondent contended that the claimant had attempted to abuse the system when the office was under strain and that it was unreasonable.

Claimant's Submissions

51. The claimant submitted that he had been open-minded and was happy to work Monday to Friday but was coerced and pressured into doing seven days per week. The claimant asserted that he resigned when he was questioned about working the weekends despite being open and honest and because his family life was being affected.

52. The claimant submitted that he wanted the wages that he was entitled to.

Discussion and Conclusions

Whether the claimant was allowed to payment of his daily rate for hours worked on a Saturday and Sunday

53. In evidence, it was agreed between the parties that there was no contract of employment. The employee handbook is not a replacement for the contract of employment but rather a generic document explaining the policies and procedures of the respondent. The handbook specifically makes reference to separate terms and conditions for employees. It is therefore anticipated that there will be a separate contract of employment for each employee.

54. It was also agreed between the parties that the claimant was recruited as a Transport Manager to work Monday to Friday between the hours of 8.00am and 4.00pm.

55. The claimant was told by Sarah Sheldon that he needed to arrange cover with Peter Oxtan over the weekend and it was something that she would leave for them to sort out. It is therefore clear that the respondent required the presence of a Transport Manager on a Saturday and Sunday on site.

56. The employee handbook makes no reference to the pro rata of a daily rate for those employees who worked less than a full day. The respondent admitted that even if the claimant had a contract of employment it too would not deal with the issue of pro rata.

57. The respondent also admitted that if the claimant worked longer than eight hours Monday - Friday he would not be entitled to additional pay over his daily rate unless he worked substantially more than eight hours. It was the respondent's position that if they did not apply the pro rata principle to those on a daily rate, they would go out of business.

58. It was the claimant's case that having worked in the transport industry for a number of years and from running his own business that he would never ask an employee to work additional days without some form of additional compensation. It was the claimant's expectation that because he was working beyond Monday to Friday, that he would be adequately compensated for working a seven day week.

59. The claimant took the view that although he only worked a number of hours on a Saturday and Sunday, he was entitled to a full day rate. The claimant said that this was what he would normally receive should he work a weekend in other employment.

60. I find that prior to the claimant's employment the respondent operated a pro rata policy to those who were remunerated with a daily rate and worked less than eight hours.

61. However, this policy was never conveyed to the claimant verbally, in a contract or via the employee handbook. The claimant had an expectation that if he worked, he would receive a daily rate of £160 per day. Whilst the claimant did not work eight hours on a Saturday or a Sunday, he did work on each day, and in the absence of any other agreement, verbally or in writing, was entitled to his daily rate of £160.

62. The claimant had received this daily rate from 15 May 2021 and the payment from 15 May 2021 until 26 June 2021 does not appear to be disputed by the respondent. The respondent has deducted seven days pay for the weekends worked between 26 June 2021 – 1 August 2021.

63. The deduction made by the respondent of £1,120 was unlawful because it was not an overpayment.

64. On termination of employment the claimant was entitled to £1120 in unpaid wages for the period 31 July 2021 – 6 August 2021. In his final payslip the claimant received £547.20 gross salary. Therefore, the claimant is entitled to £572.80 gross salary.

Breach of Contract

65. On 6 August 2021 the claimant gave notice of one week in accordance with the employee handbook, on the assumption that he was at managerial level, but also in accordance with section 86 of the Employment Rights Act 1996. The respondent chose to summarily dismiss the claimant and denied him the payment of his notice pay. The claimant was entitled to claim a daily rate for each weekend day worked and therefore the respondent was not entitled to summarily dismiss him without notice.

66. The claimant is therefore entitled to notice pay of £800.

Holiday Pay

67. The respondent has calculated, as a result of the claimant's length of service from 10 May 2021 to 6 August 2021, that he is entitled to 5.92 days' holiday. This calculation is based on the claimant working 5 days per week.

68. Regulation 14 of the Working Time Regulations 1998 provides a formula to establish how much accrued leave should be paid to a worker on termination of employment midway through the annual leave year.

69. The claimant was entitled to 28 days' annual leave each year in accordance with the Working Time Regulations 1998. The claimant started his employment on 10 May 2021 and therefore 25% of the leave year had expired on termination of his employment. The claimant had not taken any leave prior to the termination of his employment and therefore using the formula in regulation 14 of (a x b) – c, were:

- “(a) Is there a period of leave to which the worker is entitled
- (b) Is the proportion of the worker's leave year which expired before the termination date
- (c) Is the period of leave taken by the worker between the start of the leave year and the termination date”

$$(28 \times 25\%) - 0 = 7.$$

70. Therefore, the claimant had accrued seven days' annual leave by the time of the termination of his employment and was entitled to £1,120 in accrued holiday pay.

Failure to provide statement of employment particulars

71. Section 38 of the Employment Act 2002 provides that where a claim is brought for unlawful deduction from wages and a failure to pay accrued annual leave on termination of employment, the Employment Tribunal **shall** make an award if, in addition, the employee has not been provided with a statement of particulars of employment.

72. In this case, there was no contract of employment, and that was admitted by the respondent. Section 38 provides that awards can vary between a minimum of two weeks' pay to a maximum of four weeks' pay. It is at the discretion of the Tribunal as to what award is made.

73. In light of my findings and that there has been an admission by the respondent that there was never a contract of employment and there was no attempt to provide the claimant with a contract of employment, I have determined that the claimant is entitled to an additional four weeks' pay for the respondent's failure to provide a written statement of employment particulars. The claimant is therefore entitled to an additional £3200.

Employment Judge Ainscough
Date: 31 January 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON
1 February 2022

FOR THE TRIBUNAL OFFICE

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NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: **2410160/2021**

Name of case: **Mr D Slifkin** v **GH Sheldon Wholesale Baker Limited**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant judgment day" is: 1 February 2022

"the calculation day" is: 2 February 2022

"the stipulated rate of interest" is: **8%**

Mr S Artingstall
For the Employment Tribunal Office

INTEREST ON TRIBUNAL AWARDS

GUIDANCE NOTE

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

2. The Employment Tribunals (Interest) Order 1990 provides for interest to be paid on employment tribunal awards (excluding sums representing costs or expenses) if they remain wholly or partly unpaid more than 14 days after the date on which the Tribunal's judgment is recorded as having been sent to the parties, which is known as "the relevant decision day".
3. The date from which interest starts to accrue is the day immediately following the relevant decision day and is called "the calculation day". The dates of both the relevant decision day and the calculation day that apply in your case are recorded on the Notice attached to the judgment. If you have received a judgment and subsequently request reasons (see 'The Judgment' booklet) the date of the relevant judgment day will remain unchanged.
4. "Interest" means simple interest accruing from day to day on such part of the sum of money awarded by the tribunal for the time being remaining unpaid. Interest does not accrue on deductions such as Tax and/or National Insurance Contributions that are to be paid to the appropriate authorities. Neither does interest accrue on any sums which the Secretary of State has claimed in a recoupment notice (see 'The Judgment' booklet).
5. Where the sum awarded is varied upon a review of the judgment by the Employment Tribunal or upon appeal to the Employment Appeal Tribunal or a higher appellate court, then interest will accrue in the same way (from "the calculation day"), but on the award as varied by the higher court and not on the sum originally awarded by the Tribunal.
6. 'The Judgment' booklet explains how employment tribunal awards are enforced. The interest element of an award is enforced in the same way.