



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100408/2017

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Held in Glasgow on 4 October 2019

Employment Judge L Doherty

10 **M**

**Claimant
In Person**

F

**Respondent
Represented by:
Mr W Lane *
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that;

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(1) the claim of unauthorised deduction of wages under section 13 of the Employment Rights Act 1996 (ERA) is not well founded and is dismissed;

(2) the claim in lieu of leave accrued but not paid on termination of employment under regulation 14 (2) of the Working Time Regulations 1998 (the Regulations) succeeds and the respondent is ordered to pay the claimant the sum of £275.47

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REASONS

1. This claim has a long procedural history which includes the issue of a privacy orders. For the purposes of this judgment, the relevant parties and witnesses will be identified as follows:

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a. The claimant (M);

b. The respondent (F);

c. The respondent's son (S)

E.T. Z4 (WR)

- d. The claimant's witness (CW1); and
 - e. The respondent's witness (H).
2. The claimant appeared in person, and the respondents were represented by Mr Lane, solicitor. The purpose of this hearing is to determine the claimants' claim of unauthorised deduction of wages under section 13 of the Employment Rights Act 1996 (ERA) and his claim of failure to make a payment in lieu of leave which had accrued, had not been taken upon termination of his employment, in terms of regulation 14 (2) of the Working Time Regulations 1998 (the Regulations).
 3. The claimant's claims of unfair dismissal and breach of contract have been struck out under Rule 37 (1) (b) and (e) of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 (the Rules).
 4. It is agreed that the claimant's employment commenced on 10 November 2012 and terminated on 8 January 2017.
 5. It was not in dispute that the respondent deducted £260 from the claimant's final wage paid in January 2017.
 6. The Tribunal heard evidence from the claimant and one witness on his behalf (CW1). The respondent gave evidence and led evidence from one witness (H). A joint bundle of documents was produced.
 7. Evidence in chief was taken by way of witness statements which were taken as read, by the agreement of the parties.

Findings in fact

8. From the information and evidence before it the Tribunal made the following Findings in Fact.
9. S has a number of disabilities. F is S's primary carer. The claimant was employed by F to provide care and support for S.
10. The claimant commenced his employment with F on 10 November 2012. The claimant not issued with a written contract of employment.

11. The claimant worked a shift pattern over six days per week. The claimant provided care services for S, including from time to time respite care. On occasion this respite care involved the claimant taking S away overnight. In August 2016 the claimant took S for overnight respite care to visit the Military Tattoo in Edinburgh.
12. The claimant's gross rate of pay was £15 per hour, and his basic hours of work were 33.5 per week. The claimant was paid monthly, on a calendar month basis. The claimant's wage slips are produced in the bundle from 29 January 2016 to 27 January 2017 (pages 89 to 95).
13. The claimant's monthly pay depended on the hours he worked and was paid for above his basic hours. In the month ending 25th November 2016, the claimant earned £1753.76 net; in the month ending 28 October 2016 - £1569.68 net; in the month ending 30 December 2016 - £16442 net; and the month ending 27 January 2017 - £1578.64.
14. The payslips which the claimant received contained a section for '*holidays taken*', and '*holidays remaining*', however holidays taken or remaining were not marked up on his wage slips.
15. There was no written agreement in place between the claimant and respondent agreeing the annual leave year.
16. H, S's father on occasion had care of S on a residential basis. Broadly S stays with H each year for a total of around 6 weeks each year, split over three two week stays around Easter, at some point in the summer, and at Christmas.
17. In 2006, S stayed with H for around two weeks around the beginning of April 2016 to reflect the spring holiday period with Glasgow schools. S also stayed with H for two weeks of August 2016, and from around Christmas Eve, to some point after the new year holidays.
18. When H has care of S neither the claimant or CW1, who was also employed by the respondent to support S, had any caring responsibility for S.

19. The leave arrangement in place between the respondent the claimant was that the respondent gave the claimant annual leave during the period when H had care of S. In the event the claimant wished to take holiday leave over and above the period when H had care of S, then he had to perform work, sometimes of a general domestic nature, in order of to make up the hours of leave which he took.
20. The claimant took annual leave from Saturday the 19 to Tuesday the 29th November, which was a period of 9 days in order to go on holiday to the USA. The respondent told him that he had to work the hours necessary to cover this leave period before he went on holiday, and the claimant did that.
21. At some point in November 2016 just prior to his going on holiday, the claimant stopped carrying out his work looking after S. The claimant's employment was terminated with effect from 8 January 2017.
22. The claimant 's employment came to an end on the 8th of January. He was however paid up until the end of January 2017 in the amount of £1,578.64. The claimant's wage slip of 27th January 2017 is produced at page 95 of the Bundle. The respondent deducted £260 from the claimant's final wage in January to reflect monies which the respondent considered were due by the claimant arising from a fine of £30, and two insurance excesses of £75 which the respondent had paid some time previously.

Note on Evidence

23. The Tribunal heard from the claimant; CW1; the respondent; and H. The Tribunal formed the impression that the claimant and respondent felt considerable animosity towards each other, and it formed the impression that to a degree this coloured the evidence which they both gave.
24. It was apparent that there were a number of conflicts in the position of the claimant and respondent on number of matters, however not all these were material to the Tribunal's consideration, and therefore it was unnecessary for the Tribunal to deal with all the conflicts which arose. The Tribunal's determination of the material conflicts is dealt with below.

25. The Tribunal heard from CW1 on behalf of the claimant. A considerable amount of the evidence in his witness statement was irrelevant, however he gave evidence about the holiday arrangements in place. CW1 had been employed by the respondent in the same capacity as the claimant. He said
5 that he was told by the respondent that he would only get three weeks holiday, to be taken when S was in the care of H, and that if he was to have other time off out with those dates, he would have to pay the hours back by carrying out work, which could generally be described as domestic tasks.
26. The Tribunal took into account that CW1 was also originally a claimant in this
10 case, and that it was not unlikely that he was to a degree partisan. It did not accept, given H evidence about the amount of time he had the care of S when neither the claimant or CW1 had any caring responsibilities for S, that CW1 only had three weeks leave each year; it did however find convincing his evidence about the need to work time in lieu in order to take time off beyond
15 the time when S was cared for by H. This it appeared to the Tribunal, was consistent with other evidence before it, including the respondent's evidence.
27. The Tribunal also heard evidence from H, in support of the respondent. H impressed the tribunal as a credible and in the main a reliable witness, other than to the degree that he did not have an accurate recollection of the exact
20 periods during which he looked after S. He could broadly confirm when he undertook caring responsibilities for S, and the Tribunal drew no adverse inference from the fact that he could not recall the exact dates, or the exact periods when he had looked after S. The Tribunal attached weight to the fact that H appeared to be detached from the conflict which otherwise engaged
25 the claimant and the respondent and to a degree CW1, and the fact that he had this degree of distance from their disputes added to the credibility to his evidence.
28. It was H's evidence that he looked after S for around six weeks per year, in three tranches each of around two weeks. This occurred around Easter, the
30 summer period, and Christmas, albeit he could not give precise dates or be precise about the exact amount of time he looked after S. The Tribunal

accepted that neither the claimant or CW1 had any caring responsibilities for S while S was in H's care.

29. For the purposes of this claim the principle conflict which the Tribunal had to resolve was whether the claimant required to work time of lieu in respect of holiday leave he took between 9th and 29th November 2016.

30. It was the claimant's evidence, supported by CW1, that he had to 'bank hours', in order to take holidays. It was his position that he and CW1 were only given 21 days holiday per year, as opposed to 5.6 weeks holiday which they were entitled to. The claimant's evidence, again supported by CW1, was that if he or CW1 wished to take holidays beyond the three weeks which he was allowed, then he had to bank hours, by doing other tasks for the respondent, such as decorating, painting, general cleaning of the house and gardening and driving duties.

31. The claimant said that he had 'banked' or worked the hours he needed to go on holiday to the USA in November 2016. His evidence was that the respondent had told him that he had to bank the hours for the holiday before he went, as he was not entitled to them.

32. The respondent denied this.

33. The respondent said in her witness statement that the claimant was given 5.6 weeks holiday per year, and she operated a holiday year which ran from 1 January to 31 December.

34. In cross examination the respondent said that she kept a note of the holidays taken on the back of a calendar, and then completed timesheets, which she submitted to Glasgow City Council in respect of the hours worked by the claimant. A copy of a calendar is produced in the bundle (pages 100 to 125). The respondent explained the fact that there was no indication of what holidays were taken, or what holidays were remaining for the claimant in his payslips, by saying that she had not engaged her accountant to provide this service, which she considered would only be provided by a large employer.

35. The respondent later in her evidence seemed to be unaware of the contents of her witness statement at paragraph 20, to the effect that the claimant's holiday entitlement was to the statutory amount of 5.6 weeks.
36. In her evidence the respondent denied that the claimant and CW1 were only given 21 days holiday per year. She said they were given 6 weeks a year and that the claimant and CW1 had their holidays when S was in H's care. The respondent said she paid for sickness and paternity leave over and above that holiday leave.
37. On balance, the Tribunal considered that the claimant's evidence as to 21 days leave was an exaggeration of the position, taking into account the evidence of H, which the tribunal found credible, to the effect that he had care of S for a period of around six weeks.
38. However, Tribunal did find credible the claimant's evidence to the effect that when he went on holiday abroad, from 19 to 29 November, he had, as he said, worked in lieu or 'banked hours', in respect of this leave.
39. F strenuously denied that there was a system whereby hours were 'banked' for leave, however the tribunal was persuaded that the claimant and CWTs evidence was credible to the effect that they were only able to take holiday leave during the time when S was in the care of H. It appeared to the Tribunal on its analysis of the evidence, that there was no significant dispute about the fact that this was the case, and that the claimant was given his annual leave during the period when S was in the care of H. The claimant, CW1, the respondent, and H (who confirmed the claimant had no caring responsibilities for S when he was in H's care) all gave evidence which supported that conclusion.
40. On balance the Tribunal was persuaded that there was a system of banking hours, whereby the claimant worked or banked hours, which he could use as time in lieu in order to take time off, out with the periods when S was in the care of H. That system being in place is consistent with the respondent's evidence to the effect that she paid sick leave over and above holiday leave which was given to the claimant in the period when S was in the care of H.

41. Mr Lane submitted the Tribunal should draw an adverse inference from the fact that there is no mention of banked hours in the ET1 which was submitted on behalf of the claimant and CW1.
42. On this point both the claimant and CW1 explained the lack of reference to the need to work banked hours in the ET1 was being due the fact that they were unrepresented.
43. The ET1 is not full in its terms; no details of the holiday pay claim at all are included, and the Tribunal found the claimant and CWTs explanation of this omission credible and did not draw any adverse inference from it.
- io 44. Mr Lane also submitted that the Tribunal should reject the claimant's evidence about the requirement to work 'banked hours' in order to take leave as incredible, having regard to the history of this claim and the findings made in the course of these proceedings about the claimant's conduct.
45. The Tribunal takes into account that there has been a finding earlier in this case to the effect that the claimant has behaved scandalously and unreasonably in the conduct of these proceedings. The fact however that an earlier Tribunal reached adverse conclusions about the claimant's conduct is an insufficient basis for this Tribunal to conclude that his evidence on the material points before it is to be rejected as incredible. Rather it is the function of this Tribunal to assess all the evidence before it in order to make findings in fact. Neither the claimant nor the respondent was an impressive witness; both exhibited considerable hostility to each other and on occasion responded to questions in an aggressive, and sometimes evasive manner.
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46. The most persuasive factor which the Tribunal took into account in reaching its conclusion that the claimant had to work time in lieu in order to go on holiday if he wished to take leave, out with the leave that he was given when S was looked after by H, was that it was inherently plausible that that would be the case. The respondents position was that the claimant was given all the leave he was entitled to during the weeks when S was looked after by H, and therefore on balance it was likely that if the claimant wished to take leave
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over and above that, the respondent would require him to work time in lieu in order to take that leave.

47. The Tribunal also had to consider whether the claimant had 'pre banked', as he said, the hours of work necessary to cover his holiday leave in November 2016. The claimant said he was told by the respondent that he had to bank the holidays before he went away in November as he was not entitled to leave. The respondent denied this.

48. On balance the Tribunal was satisfied that the claimant had worked the hours necessary to cover his leave before he went on holiday in November 2016. In reaching this conclusion again the tribunal take into account that it was inherently plausible that the respondent would require this of the claimant, in circumstances where she considered he had been given all the leave he was entitled to when S was cared for by H, and the period of leave in November not did not fall within the time that H had care of S.

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Submissions

Claimant's submissions

49. The claimant referred to the length of time which this case had taken to reach this stage. He submitted that the Tribunal should conclude that the respondent had illegally made a deduction from his wages and had done so out of spite because he had brought a claim. He referred to the fact that the respondent issued wage slips which had no indication of holiday leave, had written holidays on the back of an old calendar, and had not maintained any computerised records. He submitted the respondent had illegally made deductions from wages. He also submitted that holiday leave was due.

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Respondent's submissions

50. Mr Lang for the respondents dealt firstly with the claim for holiday pay and referred the tribunal to of the 1998 Regulations. He accepted the claimant was entitled to 28 days /5.6 weeks leave per annum.

51. Mr Lane accepted there was no relevant agreement in place in terms of Regulation 13 (3) (a) that applying the regulations 13 (3) (b) (ii) the claimants leave year commenced on 10 November, which was the anniversary of the claimant's start date.
- 5 52. That then engaged regulation 14 and the formula $A \times B - C$.
53. Mr Lane submitted that A should be 28 days, B the ratio of $59 / 365$, (i.e. 59 days being the period from 10 November 2016 to 8 January 2017), and C was 9 days, which was the claimant's holiday leave which he had taken from 19 to 29 November.
- 10 54. Mr Lane submitted that the only factual issue which was relevant and in dispute, was whether there was a system of toil, or banking holidays. He submitted that the respondent's evidence should be preferred to that of the claimant and his witness. The tribunal should have regard to the earlier findings of scandalous behaviour of the claimant in reaching its conclusions on credibility.
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55. In relation to illegal deductions, Mr Lang referred to the terms of section 13 of the ERA. The respondent accepted that £260 had been deducted from the claimant's final wage slip. The claimant's employment however had been terminated on 8 January, and he was paid until the end of January, and therefore there was deduction from sums properly due.
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56. Lastly, Mr Lang submitted that the claimant's wage was £367.29 per month, as opposed to £410.12, identified in the claimant's schedule of loss. This figure was arrived at by considering the claimant's last four wage slips which gave average pay of £1591.75 per month which brings out an average of
- 25 £267.29 per week.

Consideration

Section 13 Claim

57. The Tribunal firstly considered the complaint of unauthorised deduction of wages. Section 13 of the ERA provides the right not to suffer unauthorised deduction of wages. Section 13 provides:

5 “(1) *An employer shall not make a deduction from wages of a worker employed by him unless —*

(a) *the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker’s contract, or*

(b) *the worker has previously signified in writing his agreement or*
ii) *consent to the making of the deduction.*

....

15 (3) *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. ”*

58. There is no suggestion that the claimant had given any authorisation or written consent to the deduction of £260 being made from his final salary in January
20 2017.

59. The issue for the tribunal is whether there were deductions from wages which were *properly payable*, in terms of section 13 (3) i.e. was the claimant paid less in January than the total amount of wages properly payable to him.

60. It is agreed that the claimant’s employment was terminated on 8 January.
25 The Tribunal was satisfied that the claimant was paid up until the end of January. There was no challenge to this, and the fact that that is the case is supported by the production of his payslip with a process date of 27 January 2017, at page 95 of the bundle.

61. The claimant was paid wages up to end of January of £1,576.64 when in fact he was only employed until the 8th of January and was therefore only due to be paid up until that date. The monies which he received in January beyond the pay he was due under up until 8th January, were not wages which were properly payable to him in terms of Regulation 13 (3). The deduction of £260 from the full amount of January's salary therefore this did not represent a deduction from 'wages properly payable' to the claimant and on that basis, this claim is not well founded, and is dismissed.

Holiday pay claim

62. Regulation 13 (3) of the 1998 Regulations provides;

A worker's leave year, for the purpose of this regulations, begins -

(a) *on such date during the calendar year as may be provided for;*
or

(b) *where there are no provisions, a relevant agreement which*
apply:

(i) *if the worker's employment began on or before 1 October 1998, on that date and each subsequent anniversary of that date; or*

(it) *if the worker's employment begins after 1 January 1998, on a date of which their employment begins and each subsequent anniversary of that date. "*

63. It is not in dispute that the claimant's annual leave entitlement under regulation 13A of the regulations was 5.6 weeks per year.

64. Regulation 14 provides

(1) *This regulation applies where -*

(a) *the worker's employment is terminated during the course of his leave year; and*

(b) on the date on which the termination takes effect (the termination date') the proportion he has taken of leave to which he is entitled in leave year under regulation 13 and regulation 13A differs from the proportion of the leave year which has expired.

(2) If a proportion of the leave year taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3) of the payment due under paragraph (2) shall be-

(b) where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula

$$(A \times B) - C$$

where

A is the period of leave to which the worker is entitled under regulation 13 and 13A.

B is the proportion of the workers leave year which has expired before the termination date, and

C is the period of leave taken by the worker between the start of the leave year and the termination date.

65. For the reasons given above, the Tribunal was satisfied that the claimant took leave for a period of 9 days from Saturday 19th to Tuesday 29 November, but that he had worked in lieu of the time taken. The claimant therefore had not taken paid leave during the period between 10th November 2016 and 8th January

not taken paid leave during the period between 10th November 2016 and 8th January

66. It follows under regulation 13.2, there being no relevant agreement in place, the claimant's annual leave year is to be calculated from the anniversary of the date upon which he commenced employment, as submitted by Mr Lane.

67. The claimant's annual leave year therefore began on 10 November 2016. The period from 10th November 2016 to 8th January 2107 is 59 day. Applying the formula in regulation 14 (3) (b), the claimant's annual leave entitlement is therefore calculated as follows;

$$(28 \times 59 / 365) - 0 = 4.5 \text{ days.}$$

68. The Tribunal then has to determine the claimants weekly pay. The claimant made no submissions in support of the figure in his schedule of loss. The Tribunal was unable to make a determination of the claimants pay for a period of 12 weeks before the termination of the claimant's employment, and therefore in the absence of a contrary approach being advanced by the claimant as to how a week's pay should be assessed, the Tribunal adopted the approach relied upon by Mr Lane. That approach relied on totalling the claimant's wages over the last 4 months of his employment (i.e. £ 1573.76 +£ 1569.68 +£1578.64 + £ 1644.20 =£6,366.28). That amount was then divided by 4 (months) which brings out a monthly average of £1,591 .57. That figure is then multiplied by 12 which gives an annual average of £19,098.84. Lastly that figure is divided by 52 to give an average weekly figure of £367.29 net.

69. The claimant accepted that he worked 6 days a week and therefore his average daily wage was £367.29 divided by 6 = £61.21. That multiplied by 4.5 days equals £275.47 which is the amount the Tribunal shall award in respect of leave accrued but not taken at the termination of employment.

5 Employment Judge: Laura Doherty
Date of Judgment: 10 October 2019
Entered in register: 18 October 2019
and copied to parties

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