



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs A Kobernik

**Respondent:** Eden Polish Kitchen Cheltenham Ltd

**Heard at:** Bristol (remotely by CVP)      **On:** 18 March 2022

**Before:** Employment Judge Leverton

**Representation**

**Claimant:** Assisted by Mr Radoslaw Jakubowski (friend)

**Respondent:** No appearance or representation

## JUDGMENT

The claim for unlawful deduction from wages under Part II Employment Rights Act 1996 is well-founded and the Tribunal grants a declaration to that effect. The Tribunal orders the Respondent to pay the Claimant the sum of **£1,052.04** in respect of that claim. This is the net figure after deductions for tax and national insurance.

The claim for payment under regulation 14 Working Time Regulations 1998 for annual leave untaken at the Claimant's termination date is well-founded and the Tribunal grants a declaration to that effect. The Tribunal awards the Claimant compensation amounting to **£1,034.43** in respect of that claim. This is the net figure after deductions for tax and national insurance.

The Tribunal awards the Claimant **£1,440** under section 38 of the Employment Act 2002 for the Respondent's failure to provide a written statement of employment particulars.

## REASONS

### Claims and issues

1. By a claim form presented on 20 February 2021, the claimant brought two claims:
  - a. unpaid wages under Part II of the Employment Rights Act 1996 (ERA) (unauthorised deductions from wages), and
  - b. holiday pay for annual leave accrued but not taken on termination of employment under regulation 14 of the Working Time Regulations 1998 (SI 1998/1833) (WTR).
2. The Respondent did not submit a response to the claim and did not attend the hearing.
3. The issues to be decided at the substantive hearing were set out in a record of a preliminary hearing that took place before Employment Judge Leith on 6 January 2022. In summary, they were whether the Respondent failed to pay the Claimant for annual leave that she had accrued but not taken when her employment ended; and whether the Respondent made unauthorised deductions from the Claimant's wages between November 2020 and February 2021. The record of the preliminary hearing sets out various issues relevant to each of those questions which I do not repeat here.

#### **Evidence and procedure**

4. The substantive hearing was conducted remotely. It started 50 minutes late because the Claimant and her friend Mr Jakubowski, who was assisting her, initially did not join. After several attempts, the clerk succeeded in contacting them. It transpired that the notice of hearing and video link had been sent to Mr Jakubowski, who had not forwarded them to the Claimant. Both the Claimant and Mr Jakubowski confirmed that they were available and wished to proceed.
5. The Claimant had sent an email to the Tribunal on 3 February 2022 setting out what payments the Respondent had made and what sums she alleged were still outstanding. She also provided copies of payslips for the period November 2020 to February 2021, and bank statements for the period 28 October 2020 to 12 February 2021.
6. The Claimant gave evidence at the hearing through a Polish interpreter, Mrs Poroslo. At the conclusion of the hearing, I delivered judgment and gave oral reasons for my decision, and the Claimant requested full written reasons.

#### **Findings of fact**

7. The Claimant was employed by the Respondent as a waitress from 6 July 2020 until 2 February 2021. Her gross pay was £1,560 per month, or £360 per week.
8. The Respondent issued payslips to the Claimant for the period 30 November 2020 to 28 February 2021 showing the amount that was properly payable to her by way of wages and statutory sick pay. The total amount

owing was £2,052.04 (net). A detailed breakdown of this sum is set out under 'Discussion and conclusions – unpaid wages' below.

9. The payments that the Claimant actually received were made at random intervals and in varying amounts, making it difficult to ascertain to which month or other period they related. During the relevant period, the Claimant's bank statements show that she received three payments from the Respondent: £100 on 3 December 2020, £300 on 8 December 2020, and £1,000 on 5 February 2021. The Claimant's evidence, which I accept, was that the two payments in December 2020 related to work carried out in October 2020. Only the third payment of £1,000 related to the period of her claim, 30 November 2020 – 28 February 2021. The Claimant received no payments from the Respondent after 12 February 2021, the final date covered by the bank statements that she provided. She confirmed to the Tribunal that she did not seek to recover any consequential losses such as bank charges or interest on loans, just her outstanding wages.
10. The Claimant had never been given a written statement of the terms of her employment. She had been promised one but it was never provided. The absence of a written contract or statement meant that she was unsure of the terms and conditions relating to holidays, such as the dates of the Respondent's leave year, her statutory or contractual annual leave entitlement, and whether she had any right to carry over additional statutory leave or contractual leave from one leave year to the next. She had taken no annual leave while employed by the Respondent.
11. The figure stated on the Claimant's final payslip was £1,178.64 (gross) and £1,034.43 (net) for 16.37 days' unused holidays. The Claimant did not know exactly how this figure had been calculated but she accepted that it was the sum due to her. The provision of the payslip indicates that the Respondent would not dispute the correctness of the stated amount. I therefore proceed on the basis that £1,034.43 (net) is the correct figure for the Claimant's unused leave on termination. The Claimant did not receive that payment.

### Legal framework

12. Section 13 ERA provides, in so far as material:

*'(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 consent to the making of the deduction.'*

13. Section 27 ERA provides:

*'(1) In this Part "wages", in relation to a worker, means any sums payable to the worker in connection with his employment, including –*

*(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise,*

*(b) statutory sick pay under Part XI of the Social Security Contributions and Benefits Act 1992...’.*

14. Section 23 ERA provides: *‘(1) A worker may present a complaint to an employment tribunal – (a) that his employer has made a deduction from his wages in contravention of section 13...’.*

15. Section 24 ERA deals with remedies:

*‘(1) Where a tribunal finds a complaint under section 23 well-founded, it shall make a declaration to that effect and shall order the employer –*

*(a) in the case of a complaint under section 23(1)(a), to pay to the worker the amount of any deduction made in contravention of section 13...’*

16. Under regulation 13(1) WTR, a worker is entitled to four weeks' annual leave in each leave year. Regulation 13A confers an entitlement to a period of additional leave of 1.6 weeks. The worker's aggregate entitlement under both these provisions is subject to a maximum of 28 days.

17. Regulation 14 WTR deals with payment for untaken leave on termination of employment:

*‘(1) Paragraphs (1) to (4) of this regulation apply where –*

*(a) a 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 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 leave 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).*

*(3) The payment due under paragraph (2) shall be –*

*(a) such sum as may be provided for for the purposes of this regulation in a relevant agreement, or*

*(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 × B) – C*

*where –*

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

*B is the proportion of the worker's leave year which 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.'*

18. Section 38 of the Employment Act 2002 provides:

*'(3) If in the case of proceedings to which this section applies –*

*(a) the employment tribunal makes an award to the worker in respect of the claim to which the proceedings relate, and*

*(b) when the proceedings were begun the employer was in breach of his duty to the worker under section 1(1)... of the Employment Rights Act 1996 [duty to provide a written statement of particulars of employment]... ,*

*the tribunal must... increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.*

*(4) In subsections (2) and (3) –*

*(a) references to the minimum amount are to an amount equal to two weeks' pay, and*

*(b) references to the higher amount are to an amount equal to four weeks' pay.'*

## Discussion and conclusions

### *Unpaid wages*

19. The amount of wages and statutory sick pay properly payable to the Claimant for the last four months of her employment was set out in her payslips:

<b>Date of payslip</b>	<b>Amount due</b>
30 November 2020	£1,285.24 (net wages, including furlough pay)
31 December 2020	£345.06 (statutory sick pay)
31 January 2021	£402.57 (statutory sick pay)
28 February 2021	£19.17 (statutory sick pay)
<i>Total</i>	£2,052.04

20. The Respondent paid the Claimant £1,000 on 5 February 2021. That was the only payment referable to the period 30 November 2020 – 28 February

2021. There was therefore a shortfall of £1,052.04 (net), which was an unauthorised deduction from the Claimant's wages.

*Holiday pay*

21. The Claimant also claimed 16.37 days' pay for holidays untaken at her termination date. She was entitled to payment in lieu of her unused annual leave under regulation 14 WTR and had not received any such payment. The sum properly payable is as stated on the Claimant's final payslip, £1,178.64 (gross), or £1,034.43 (net).

*Failure to provide written statement of employment particulars*

22. The Respondent did not provide the Claimant with a written statement of employment particulars. I must therefore make an award under section 38 of the Employment Act 2002. The Claimant had been promised a written statement, and the Respondent's failure to provide one gave rise to difficulty in establishing the terms of her employment, including her holiday entitlement and the dates on which her wages were properly due. In view of the Respondent's cavalier attitude towards the Claimant's employment rights and the uncertainty created for the Claimant by the absence of a written contract, I consider it just and equitable to award the higher amount of four weeks' pay at a weekly rate of £360, giving a total figure of £1,440.

**Employment Judge Leverton**

Date: 4 April 2022

Judgment sent to parties: 14 April 2022

FOR THE TRIBUNAL OFFICE