



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Timothy Trott

**Respondent:** United Anodisers Ltd

**Heard on:** 21 April 2022 by Cloud Video Platform

**Before:** Employment Judge Saward (sitting alone)

## **Representation**

Claimant: In person

Respondent: Mr Peter Watts, Managing Director (United Anodisers Ltd)

# RESERVED JUDGMENT

1. The name of the respondent is amended by consent to United Anodisers Ltd.
2. The claim of £15,000 damages for breach of contract is dismissed on withdrawal.
3. The respondent made an unauthorised deduction from the claimant's wages of £900 for repayment of an advance. The respondent is ordered to pay to the claimant the sum of £900.00 in respect of the amount unlawfully deducted.
4. The complaint of unauthorised deductions from wages under section 13 Employment Rights Act 1996 is otherwise not well-founded and is dismissed.
5. The claim for holiday pay was premature. The Tribunal does not have jurisdiction to consider the claimant's claim for 5 days' pay in lieu of accrued but untaken holiday at termination. This claim is dismissed.

# REASONS

## **Name of the respondent**

1. The claimant names the respondent company as 'United Anodisers'. The full name is 'United Anodisers Ltd' as appears in the filed response. No

issue is taken by the respondent on this point who consented at the start of the Hearing to a correction by the addition of the word 'Ltd'. With the agreement of the parties an amendment shall be made to that effect.

**Claims and Issues**

2. The claimant submitted a claim against the respondent on 24 September 2020 for holiday pay and an unauthorised deduction from wages in respect of backpay, overtime pay and unpaid bonus. The claimant also sought damages in the sum of £15,000 for a claimed breach of the implied term of trust and confidence. This breach of contract claim was subsequently withdrawn by the claimant at the start of the Hearing. Early conciliation began 27 August 2020 and ended on 16 September 2020.
3. In the response of 31 August 2021, the claim is resisted on the grounds that:
  - 3.1 The claimant's pay increase took effect following completion of his 3-month probationary period and he was paid in full within the restrictions of the furlough scheme.
  - 3.2 The company bonus scheme is discretionary and the claimant was paid appropriately in line with the scheme rules.
  - 3.3 Payment for 'excess' overtime is discretionary. The claimant had not always been paid overtime. Prior to furlough, he was paid overtime in 2 of the 6 months worked. He worked overtime in 5 of the 6 months. No other managers were paid overtime through 2019, 2020 or 2021.
  - 3.4 The respondent offered to pay the claimant 10 hours overtime in March 2020 as a gesture of goodwill. Those sums were paid in the claimant's salary in September 2021.
  - 3.5 The claimant was not required to take enforced holiday. The claimant requested to use some of his remaining holiday during his notice period. He was required to take holiday during furlough along with all other employees benefitting from the furlough scheme.
4. At the start of the Hearing the claimant clarified that there are essentially four strands to his claim. Firstly, he seeks overtime pay for the months of January and February 2020 in the sum of £900 due to be paid in April 2020. Secondly, a bonus payment calculated at £5,500 payable in April 2020. Thirdly, non-payment of increased salary of £1,200 payable in April 2020. Fourthly, 5 days of holiday pay for days worked in June 2020.
5. The parties disagree on:
  - 5.1 The wages to which the claimant was entitled.
  - 5.2 Whether the claimant was entitled to overtime pay.
  - 5.3 Whether the claimant was entitled to receive a bonus under the company bonus scheme. If so, how much should be paid.

- 5.4 Whether the claimant has been paid the correct amount in lieu of untaken holiday.
6. The issues to be decided were discussed and identified as follows:

Jurisdiction of the Tribunal

- 6.1 Given the date the claim form was presented, whether the Tribunal has jurisdiction to consider the claims.

Unauthorised deductions

- 6.2 Was the claim presented in time?
- 6.3 What was the claimant entitled to be paid as wages? Was he entitled to receive a bonus? Was he entitled to overtime pay?
- 6.4 Were the wages paid to the claimant less than the wages he should have been paid?
- 6.5 Was any deduction required or authorised by statute or by a written term of the claimant's contract?
- 6.6 Did the claimant agree in writing to a deduction before it was made?
- 6.7 Did the claimant suffer financial loss by not being paid wages on time, and if so, how much?
- 6.8 How much is the claimant owed, if anything?

Holiday pay

- 6.9 Subject to the Tribunal having jurisdiction, did the respondent fail to pay the claimant for annual leave the claimant had accrued but not taken when his employment ended?

**Procedure, documents and evidence heard**

7. The electronic file of documents before the Tribunal consisted of witness statements, emails and around 21 accompanying document folders.
8. All four witnesses who completed witness statements gave sworn evidence at the Hearing. The Tribunal heard from Mr Trott, the claimant. Three witnesses appeared for the respondent: Mr Watts (Managing Director), Ms Nurse (Finance Manager) and Ms Bottomley (Accountants Assistant and HR).

**Findings of fact**

9. The correct name of the respondent is United Anodisers Ltd.
10. It is undisputed that the claimant had the status of an employee. The claimant was employed by the respondent as a 'Technical/Quality Manager' based at its Uxbridge factory site between 16 September 2019 and 30 September 2020.

11. The claimant had a written statement of terms and conditions of employment within his offer of employment letter dated 27 August 2019. The offer of employment was subject to the terms and conditions set out therein and contained in the Schedule of Contractual Terms and Conditions. The Schedule was not supplied to the claimant at the time of issue of the letter. No copy of the Schedule has been produced.
12. The offer letter included terms relating to remuneration, bonus, hours of work, place of work, holidays and other benefits (i.e., company pension).
13. Under the terms, the claimant's initial starting salary was £32,000 per annum payable at monthly intervals on or about the last Friday of each month. Following satisfactory performance, the claimant's salary would increase to £35,000 after three months. The offer of employment and accompanying terms was accepted by the claimant in an email sent on 28 August 2019 in which the claimant requested that "the increase in salary be delayed until April 2020." The respondent agreed. It is common ground that the claimant became contractually entitled to the pay rise after 3 months service but he was not paid the higher rate of pay in January, February or March 2020 because of the claimant's request for deferral.
14. When national lockdown occurred due to the global coronavirus pandemic, the claimant was placed on furlough in April 2020 until June 2020 and part-time 'flexible furlough' from July 2020 until his departure at end of September 2020.
15. Under the Government's furlough scheme the claimant was paid 80% of his basic pay at the rate paid in February 2020. As the claimant had requested deferral of his pay rise until April 2020, his February 2020 pay remained at the lower starting rate. Holiday pay was calculated and paid at the increased rate of £134.62 per day gross.
16. According to the claimant's written account, he agreed that his £3,000 pay rise would be paid as two bonus payments of £1,500 at the end of April 2020. In oral submissions the claimant stated that he had agreed with the respondent that one sum of £1,500 would be paid after 6 months and the second amount (for the period January to June 2020) would be paid in July 2020. This does not tally with the written contract and no written variation has been brought to the Tribunal's attention.
17. Pursuant to the claimant's contract his increased salary was £35,000 per annum. This equated to an additional £250 per month gross pay. The claimant's payslip for end August 2020 shows that the claimant was paid £750 for 3 units of £250. This equates to the sums due to the claimant for his pay rise for January to March 2020.
18. The claimant accepts that the £750 represented backpay but disputes that it covered all sums due. I find that those sums represented the claimant's outstanding pay for the first three months of 2020. Those monies were not

paid to the claimant in his April 2020 pay because the respondent believed that only furlough could be paid. The backpay was not paid to the claimant in July 2020 when he came off full furlough because the respondent had requested the claimant to advise when he wanted the monies to be paid.

19. The claimant accepts that he received some pay at the higher rate and £750 of backpay. He claims a shortfall of £1,200. However, this overlooks two factors. Firstly, his pay rise of £3,000 was not payable as a lump sum. It was an increase in salary payable over the course of a year and by the time of his departure, he had not worked a full year at the higher rate of pay. Secondly, his furlough pay over the 3 months from April to June 2020 could not be paid at the higher rate when he had not yet received the pay rise.
20. The claimant emailed the respondent's HR person on 27 August 2020 to confirm that he had asked the Managing Director to issue him with 1 months' notice to finish on 30 September 2020. This email was taken by the respondent as the claimant giving one months' notice as set out in the response of 1 September 2020.
21. At the point of termination of employment on 30 September 2020, the claimant had been employed for 9 complete months on a salary of £35,000 per annum, less his time on furlough. His higher monthly rate of pay was paid for those months when he was not on furlough. The claimant had not worked a full year at the higher rate of pay which was payable pro rata.

### Overtime

22. The written terms provide that the claimant's "*normal working hours will be 40 hours a week, Monday to Thursday 8.00 to 17.00 and Friday 8.00 to 15.00..... You will be expected to work a reasonable amount of overtime which is not normally payable for this position....*"
23. Mr Watts, the Managing Director, was evasive over how the respondent interpreted the word 'normally' and the circumstances in which overtime might be paid. Whilst he contended that no other managers had requested or been paid overtime over the previous 5 years at least, the claimant had been paid overtime on 29 October 2019 and 20 December 2019. An email from Mr Watts to the claimant on 29 November 2019 also refers to 25 hours of overtime which would be paid "today or Monday".
24. The claimant was paid 41.75 units of outstanding overtime amounting to £1053.79 gross in his August 2020 pay and 10 units of £252.40 gross in his final salary pay in September 2020. Notwithstanding the latter payment being made after the claim was brought, the claimant contends that he agreed with Mr Watts that he would be paid £900 for overtime worked in January and February 2020 to be paid end April 2020. The claimant then asked for the £900 to be paid earlier in March 2020 and it was paid into his account on 10 March 2020. The payment details give the letters 'ADV RE O/T HRS', most likely meaning 'advance regarding overtime hours'.

25. The sum of £900 was deducted from the claimant's wages on 28 August 2020. It is this deduction to which the claimant objects. The same sum had previously been deducted from the claimant's payslip on 29 May 2020, but refunded to his bank account the same day.
26. It is the evidence of Mr Watts that the £900 was in fact a repayable advance to assist the claimant with a court fee. This is more plausible than the claimant's evidence because the bank transfer and payslips are consistent in describing an 'advance'. I find that the claimant received the sum of £900 as an advance which was to be re-paid. However, there is no previous written agreement before the Tribunal wherein the claimant agreed or consented to the advance being deducted from future wages.

#### Bonus pay

27. Mr Watts asserts that no employee of the respondent is entitled to a bonus within their first year of employment. As an exception, a discretionary payment was made to the claimant in recognition of his good work with an adjustment to reflect that he had not yet worked a full year.
28. The position taken by Mr Watts does not accord with the claimant's written terms of employment which state: "You will be eligible for the companies EBITDA bonus scheme". There is no qualifying period of service nor does it say that a bonus *may* be paid. Therefore, the claimant was eligible for a bonus under the scheme.
29. The claimant received £1773.08 gross as EBITDA bonus as itemised in his payslip of 31 July 2020. The figure of £5,500 now claimed reflects the additional amount the claimant believes he should have been paid based upon what the General Manager said he had received.
30. The respondent acknowledges that a higher bonus was awarded to the General Manager who was the claimant's superior with responsibility for the whole site.
31. There are no written terms and conditions for the EBITDA scheme or details made available for employees. Mr Watts solely decides how much bonus is paid and when. He decides the amount as a percentage of the employee's salary taking into account their performance and company profits but those calculations are never shared with employees. In 2019 the figure varied between £300 to £10,000.

#### Holiday pay

32. Within the written terms of employment, the claimant had an annual holiday entitlement of 25 days plus statutory bank holidays. Any holidays not taken in the current holiday year could not be carried over into another year and would be forfeited. In the event of termination of the contract by either party, payment will only be made in lieu of holiday entitlement that has been

accrued and has not been taken and *'will be calculated using the Working Time Directive calculation which is: number of days holiday (excluding bank holidays) divided by 52 weeks x by the number of weeks service up to the point of termination.'*

33. The respondent required all employees to take one weeks' annual leave in June 2020 whilst employees were being paid furlough. Neither party could recall the precise week but the claimant's payslip of 26 June 2020 confirms payment of £673.08 gross for 5 days holiday pay over the preceding month. The premises were shut down during that week.
34. Some staff were made redundant after 2 months including the Uxbridge General Manager who was the claimant's senior manager. This left the claimant as the sole person looking after the site.
35. During the one week of closure, the claimant continued to go into his place of work with the prior agreement of Mr Watts. The length of time varied and there are no records of the duration of his attendance as no clocking-in provision existed. The claimant was a key holder and had offered to check on the premises which contained a large number of chemicals. It was undisputed that the claimant had walked over 3 miles each way into work for this purpose.
36. There is no evidence that the Environment Agency required the claimant's attendance personally. Nevertheless, Mr Watts had "no specific recollection" of the details discussed with the claimant whose recall of the meeting and agreement over his attendance during the week of shut down was clear and detailed. That being so, I give greater weight to the claimant's evidence over the arrangements for him to attend the site during the week of shut down.
37. The claim was presented on 24 September 2020 whilst the claimant remained an employee. On that date, the claimant was yet to receive his final salary which was paid on 30 September 2020, the effective date of termination. There is no dispute that the claimant was entitled to pay in lieu of accrued but untaken holiday for part of the 2020 holiday year up until his employment terminated. Indeed, his final pay included 11.5 days holiday pay. This figure does not include holiday pay for the 5 days of shut down in June 2020 when the claimant had continued to work.

## **The Law**

### Unauthorised deductions

38. The right of an employee not to suffer an unauthorised deduction from wages is contained in section 13(1) of the Employment Rights Act 1996 ('ERA'):

“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.”

- 39. A ‘deduction’ is a complete or partial failure to pay what was properly payable on a particular occasion. The definition of ‘wages’ in section 27(1) ERA means any sum payable to the worker in connection with his employment including any fee, bonus, commission, holiday pay or other emolument referable to his employment. This is subject to certain exclusions.
- 40. Specifically excluded from the definition of wages is any payment by way of an advance under an agreement for a loan or by way of an advance of wages (section 27(2)). This means that a worker cannot seek recovery of such payments by bringing an unlawful deduction from wages claim under section 13. However, section 13 will still apply to any deduction an employer may make from a worker’s wages to recover any such advance.
- 41. Section 23(1) ERA gives a worker the right to complain to an Employment Tribunal of an unauthorised deduction from wages. There is no qualifying period of employment before a person is entitled to bring such a claim.
- 42. Under section 23(2)(a) the time limit is 3 months beginning with the date of payment of the wages from which the deduction was made, with an extension for early conciliation as provided by section 207B ERA. Where a complaint is brought under section 23 ERA in respect of a series of deductions or payments, the 3-month time limit starts to run from the date of the last deduction or payment in the series (section 23(3)(a)).
- 43. Whether there is entitlement to overtime and a bonus depend upon the proper construction of the contract. Contractual terms relating to bonuses should be interpreted in line with the meaning they would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
- 44. If the claimant has suffered consequential financial loss because of the failure to pay on time, an award for this can be made under section 24(2) ERA.
- 45. In response to the outbreak of COVID-19, the Government announced The Coronavirus Job Retention Scheme (‘CJRS’) which enabled employers to claim back 80% of the wages (up to £2,500 per month) of employees who had been ‘furloughed’ (i.e. put on a leave of absence) in response to the pandemic. The CJRS had legislative backing by the Coronavirus Act 2020. The CJRS began 1 March 2020 and ended on 30 September 2021.



46. To qualify for furlough, individuals originally had to be employed on 28 February 2020 but the eligibility date was extended to employees on the PAYE payroll on 19 March 2020. For salaried employees the employee's actual salary before tax as at 19 March 2020 was used to calculate the 80% figure. Employers could choose to pay the wages of furloughed employees in full while only claiming up to 80% of the cost but there was no obligation under the scheme to do so.
47. Whilst on furlough, employees remained in employment but could not be asked to undertake work for or on behalf of their employer up until the end of June 2020. Only when 'flexible furlough' was introduced on 1 July 2020 could furlough workers return to part-time work.

#### Holiday pay

48. There will be an unauthorised deduction from wages if an employer fails to pay the claimant on termination of employment in lieu of any accrued but untaken leave entitlement. The employment must have terminated in order for a claim to arise.
49. Payment for the basic four weeks' leave guaranteed by the Working Time Directive should correspond to a worker's 'normal remuneration'. Where a furloughed worker who is receiving only 80 per cent of their normal wages takes annual leave, the employer will have to top up their holiday pay in order to meet this requirement.
50. The Government's guidance published on 17 April 2020 entitled 'Check if your employer can use the Coronavirus Job Retention Scheme', confirmed that workers continue to accrue annual leave while they are on furlough. The guidance also suggests that an employer can require workers to take holiday during a period of furlough. However, employers are also cautioned to 'consider whether any restrictions the worker is under, such as the need to socially distance or self-isolate, would prevent the worker from resting, relaxing and enjoying leisure time, which is the fundamental purpose of holiday'.
51. As guidance only, the document does not create legally enforceable rights or determine the legal tests that have to be applied.
52. The Working Time Regulations give workers a statutory right to 5.6 weeks' paid holiday per year and a right to payment in lieu for any outstanding holiday entitlement on termination. The right to pay in lieu only applies to the statutory annual entitlement of 5.6 weeks, and only to untaken leave outstanding from the worker's final leave year. Contractual provisions may be more generous.

#### **Conclusions**

53. In terms of unpaid wages, the claimant relies upon the protection for wages provisions within section 13 ERA. Contractually, the claimant was entitled

to a pay increase from £32,000 to £35,000 after 3 months service i.e., from 19 December 2020. However, there was an agreed variation in the terms of the contract, instigated at the claimant's request, so that the increase would not take effect until April 2020. There was no entitlement to a £3,000 lump sum payable in two parts. The £3,000 pay increase was payable per annum i.e., over the course of a 12-month period of employment. This equated to £250 per month gross.

54. It was unfortunate for the claimant that the unexpected impact of COVID-19 meant that he was placed on furlough so that his pay from April 2020 was under the CJRS and thus calculated on his basic pay applicable as at 19 March 2020, which would be the sum shown on his February payslip. When the claimant was on furlough there was no entitlement for his furlough pay (April to June (inclusive)) to be at the higher rate of pay.
55. Once the claimant came off full furlough in July 2020 he was paid at the higher contractual rate. The outstanding backpay of £250 per month gross for January to March 2020 was paid to the claimant in August 2020. As backpay owed to the claimant, I see no reason why this could not have been paid in April 2020, as contractually agreed. Nonetheless, the claimant has produced no evidence of financial loss in consequence of the delay.
56. If the claimant is right and there were other sums due in April 2020, his claim was presented outside the 3-month time limit in any event and it was reasonably practicable for him to bring a claim within time. Thus, the Tribunal would have no jurisdiction in respect of such sums.
57. Although the contractual terms stated that overtime would not 'normally' be paid this did not discount the possibility that there would be occasions when overtime would be paid. As a matter of fact, overtime was paid to the claimant on several occasions. However, there is no substantive evidence of a shortfall in overtime payments and an amount of £900 in particular.
58. I have found find that the claimant received £900 as an advance of wages. By its very nature an advance is a payment made earlier than the date when the monies are due and which would be deducted at a future date. Much of the evidence heard on this matter related to verbal discussions between the claimant and respondent's Managing Director. Ultimately, the advance could only be deducted from the claimant's wages when it was taken in August 2020 if there was his prior written agreement or consent. In the absence of such written agreement or consent, the £900 was unlawfully deducted from the claimant's wages regardless of whether those monies are lawfully owed to the respondent.
59. The claimant was contractually entitled to be paid a bonus and he did receive one on 31 July 2020. The amount paid to another member of staff who was senior to the claimant and with greater responsibility and influence over profitability, does not provide comparable circumstances. Moreover,

the calculation was discretionary. No basis of claim is made out for an unlawful deduction of wages in this regard.

60. There was a contractual entitlement to annual leave and express entitlement to be paid in lieu of accrued but untaken leave on termination.
61. The respondent was content for the claimant to attend and check on the Uxbridge site throughout the week of shutdown in June 2020. Attending the workplace would be contrary to the aims of annual leave and giving the employee a break from work. Had, the respondent not wished the claimant to attend work and take holiday instead then the claimant's offer should have been declined. As it was, it would be a breach of the terms of furlough for an employee to undertake any work whilst on furlough.
62. Nevertheless, I find that the claimant had not taken annual leave for the 5 days of shut down in June 2020 for which he received holiday pay at the end of that month. Therefore, when the claimant left his employment on 30 September 2020, he had accrued 5 days annual leave for which he had not been paid. However, the claim was premature. The cause of action only arose once his employment terminated without payment in lieu of all untaken holiday. The Tribunal has no jurisdiction to deal with the claim for holiday pay which only arose after the claim was made.

Employment Judge Saward

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Date: 23 May 2022

JUDGMENT & REASONS SENT TO THE PARTIES ON

27 May 2022

FOR THE TRIBUNAL OFFICE