



THE EMPLOYMENT TRIBUNAL

Claimants: Mr Botros

Respondent: Pasha Margate Limited

Heard at: London South Employment Tribunal (video hearing)

On: 24 June 2022

Before: Employment Judge Robinson

Representation

Claimants: In person

Respondent: Did not attend

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The name of the Respondent is amended to Pasha Margate Limited.
2. The Claimant's claim that the Respondent made unauthorised deductions from wages by failing to pay the claimant's wages is well-founded. The Respondent is ordered to pay the Claimant the net sum of £298.21.
3. The Claimant's claim for breach of contract for failure to pay fuel expenses is not well-founded and is dismissed.
4. The Claimant's claim for accrued but untaken annual leave on termination of employment is well-founded. The Respondent is ordered to pay the claimant the net sum of £1,038.51.
5. The Claimant's claim in relation to pay slips not being provided is not well-founded and is dismissed.

REASONS

1. The Claimant worked for the Respondent as a waiter/delivery driver for just over 7 months; from 10 August 2020 until 18 March 2021. He mainly

worked in the bar area of the Pasha restaurant until the November lockdown. From that point onwards, he mainly worked as a food delivery driver.

2. Early conciliation started on 23 April 2021 and ended on 27 April 2021. The claim form was presented on 9 May 2021. The response form was received on 9 June 2021.
3. Due to issues with the parties' correct addresses, the original hearing date of 21 April 2022 was adjourned because the Respondent had not received notice of the hearing, nor had the Claimant received the response form.
4. The claim is about unauthorised deductions from wages, unpaid fuel expenses, holiday pay and failure to provide payslips. The Respondent's defence is that all sums and payslips due to the Claimant have been provided.
5. This matter was listed for a three hour hearing from 10am until 1pm. I heard oral evidence from the claimant in support of himself. The respondent did not attend. The Tribunal made repeated attempts to contact the Respondent to see if they intended to join the hearing. No response was received so I decided to proceed in their absence and the hearing began at 10.30am.
6. I have carefully considered the Respondent's documentary evidence, the Claimant's documentary and oral evidence, and listened to the closing submissions of the Claimant.

Issues

7. The Claimant agreed the list of issues below. The Respondent's view on this list is unknown because they did not attend the hearing nor respond to the 21 April 2022 Case Management Order.
8. The list of issues in this matter was as follows:
 - a. Unauthorised deductions
 - i. Were the wages paid to the Claimant less than the wages he should have been paid?
 - ii. If so, how much is the Claimant owed?
 - b. Breach of Contract
 - i. Was the Respondent required to reimburse the Claimant for monies spent on petrol to carry out deliveries on behalf of the Respondent?
 - ii. If so, how much should the Claimant be awarded as damages?

- c. Holiday Pay (Working Time Regulations 1998)
 - i. Did the Respondent fail to pay the Claimant for annual leave the Claimant had accrued but not taken when his employment ended?
 - ii. How much should the Claimant be awarded?
- d. Pay Slips
 - i. Did the Respondent fail to provide the Claimant with payslips for February 2021 and March 2021?
 - ii. If so, what is the appropriate remedy?

Procedure, documents and evidence heard

9. The claimant submitted the following documents as evidence:
 - a. A schedule of loss
 - b. Screenshots of the shifts he had worked
 - c. Bank statements for the period of his employment
 - d. Receipts for his fuel expenses
10. The Respondent submitted the following as evidence:
 - a. Bank statements showing payments made to the Claimant
 - b. Copies of the Claimant's pay slips
 - c. Letters purporting to show the Respondent's good character
11. The claimant gave witness evidence on behalf of himself.

Fact findings

12. The Tribunal has made the following findings of fact on the balance of probabilities having heard the evidence and considered the documents. These findings of fact are limited to those that are relevant to the four issues ((i)-(iv)) and necessary to explain the decision reached.

(i) Unauthorised deduction from wages – unpaid wages

13. The aim of the Tribunal in this section of fact-finding was to determine the total amount that the Claimant *was* paid during his employment and the total amount that he *should* have been paid.
14. The Tribunal accepts the claimant's evidence that he worked as an employee on a rate of £8.72 per hour. That is confirmed by the rate shown on the pay slips provided by the Respondent.

15. Although the claim form stated 50 hours per week, it is clear from the contract of employment and the pay slips that the contracted hours were 40 hours per week.
16. The contractual rate of pay was therefore £8.72 x 40 = £348.80 per week. That amounts to an annual salary of £18,137.60 which is equivalent to £1,511.47 per month. However, the pay slips use the figure of £1,511.44, so that amount will be used for the purposes of consistency in the calculations below.
17. In relation to his first two months (August and September 2020), the Claimant accepted that the hours worked, the pay slip provided, and the pay received were accurate and that this was not in dispute, nor part of his claim.
18. For the period of October 2020 to March 2021, the claimant gave evidence of the following which (except where mentioned below) align with the bank statements and pay slips provided by the Respondent:
 - a. October 2020 pay period
 - i. Claimant received £1831.31 according to his bank statement
 - ii. Respondent paid out £1831.31 according to his bank statement
 - iii. September's pay slip was for £1,331.31. The Claimant accepted he was given a cash advance of £500.
 - b. November 2020 pay period - Claimant received £810
 - c. December 2020 pay period
 - i. Claimant received £1700 (the Tribunal accepts the Claimant's evidence that he was paid an extra £59.50 as reimbursement for the Respondent's expenses which the Claimant incurred – for knife-sharpening and medicine)
 - ii. Respondent paid out £1759.50 according to his bank statement
 - d. January 2021 pay period - Claimant received £700
 - e. February 2021 pay period - Claimant received £2,044
 - f. March 2021 pay period - Claimant received £1,270
19. The Tribunal finds that the total received by the Claimant for October 2020 to March 2021 inclusive was therefore £7,024.
20. The Claimant gave evidence, which the Tribunal accepts, that he was working throughout the period of his employment. Although the hours did

fluctuate due to the pandemic. For example, he worked around 40 hours per week in the bar during October and November 2020, but was later only working around 20 hours per week as a food delivery driver following the November Covid-19 lockdown onwards until his employment ended in March 2021.

21. Although there was no formal clocking-in or clocking-out system at the Respondent's restaurant, the Claimant provided his own written record of his shifts throughout the period of his employment.
22. Without accepting the precise details of this record of shifts worked, the Tribunal accepts that the Claimant was actually working from November 2020 to March 2021 when the Respondent was claiming the Claimant was furloughed.
23. The November 2020 to February 2021 pay slips are all for the same net amount (£1,159.09). This is 80% of the Claimant's monthly salary of £1,511.47 which is the amount provided under the Coronavirus Job Retention Scheme (the furlough scheme).
24. However, as noted above, the Tribunal finds that the bank statements produced, by both the Claimant and the Respondent, provide that the payments received by the Claimant *exceed* the amounts it says on his pay slip. That reinforces the Tribunal's finding that the Respondent was claiming furlough money for the Claimant whilst simultaneously employing him (and paying him a series of smaller payments) for work as a delivery driver.
25. As far as the Claimant is concerned, the Tribunal finds that he was not, in reality, on furlough. He was still working.

(ii) Breach of contract – petrol expenses

26. The Claimant was not able to provide any evidence that the Respondent had agreed to cover fuel costs when the Claimant's job moved to that of delivery driver in November 2020.
27. The Tribunal therefore finds that there was no such agreement.

(iii) Unauthorised deduction from wages – holiday pay

28. The Tribunal accepts that the signed contract provided by the Claimant is the contract of employment governing the relationship between the parties. It provides for 28 days holiday per year in addition to public holidays.
29. The Tribunal accepts the Claimant's evidence that he did not take any annual leave during his time working for the Respondent.
30. The contract provides that the employment began on 10 August 2020. The parties both accepted in their written evidence that it ended on 18 March 2021. This amounts to 220 days of employment, or 60.3% (220/365ths) of a year.

(iv) Failure to provide pay slips

31. The Tribunal does not accept the Claimant's evidence that he was not provided with his February and March 2021 pay slips. Copies of the pay slips have been provided to the Tribunal as part of the Respondent's evidence and show the same furlough pay and tax and NI contributions as in previous months. The Tribunal finds on the balance of probabilities that the pay slips were provided to the Claimant.

Law

32. Section 13(1) of the Employment Rights Act 1996 ("ERA") provides that:

"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."

33. In relation to holiday pay, the Working Time Regulations 1998 provide employees with 5.6 weeks annual leave as follows:

"13(1) Subject to paragraph (5), a worker is entitled to four weeks' annual leave in each leave year.

(3) A worker's leave year, for the purposes of this regulation, begins—

...

(b) where there are no provisions of a relevant agreement which apply—

...

(ii) if the worker's employment begins after 1st October 1998, on the date on which that employment begins and each subsequent anniversary of that date.

...

(5) Where the date on which a worker's employment begins is later than the date on which (by virtue of a relevant agreement) his first leave year begins, the leave to which he is entitled in that leave year is a proportion of the period applicable under paragraph (1)4 equal to the proportion of that leave year remaining on the date on which his employment begins.

13A(1) Subject to regulation 26A and paragraphs (3) and (5), a worker is entitled in each leave year to a period of additional leave determined in accordance with paragraph (2).

(2) The period of additional leave to which a worker is entitled under paragraph (1) is—

...

(e) in any leave year beginning on or after 1st April 2009, 1.6 weeks.

...

(4) A worker's leave year begins for the purposes of this regulation on the same date as the worker's leave year begins for the purposes of regulation 13.

(5) Where the date on which a worker's employment begins is later than the date on which his first leave year begins, the additional leave to which he is entitled in that leave year is a proportion of the period applicable under paragraph (2) equal to the proportion of that leave year remaining on the date on which his employment begins."

34. Under section 8 of the ERA an employee has the right to be given by their employer, "*at or before the time at which any payment of salary or wages is made to him, a written itemised pay statement*". This statement should include particulars of any variable and fixed deductions, and the purposes for which they are made. Under section 11 of the ERA, where an employer does not give an employee a statement as required by section 8, an employee may make a reference to an employment tribunal to determine what particulars ought to have been included.

Conclusions

(i) Unauthorised deduction from wages – unpaid wages

35. The Tribunal concludes that the claimant is entitled to his normal rate of pay during the period during which the Respondent was claiming furlough pay yet requiring the Claimant to still work. Although the Claimant was claiming for varying amounts of hours in addition to his furlough period, the Tribunal treats the Claimant as if he was not furloughed because he was working during the entire period.
36. The Tribunal also concludes that, based on the taxable pay in the tax year 2020/21, it is likely that the Claimant would have remained below the income tax threshold for the personal allowance. Therefore had he been paid his full wage throughout his employment, it would have been at the same net rate as he had received for the month of September 2020 (£1,331.31).
37. For the pay periods in dispute (October 2020 – February 2021 inclusive), the Claimant should have been paid his normal salary, given that he was working: $5 \times £1,331.31 \text{ net} = £6,656.55$. For the half month he worked in March 2021, he should have been paid £665.66. This amounts to £7,322.21 net, which is what the Claimant *should* have received.

38. What he actually received for that period, as confirmed by both parties' bank statements is £7,024.
39. The Respondent therefore made an unauthorised deduction from wages of £298.21, which is the net sum awarded.

(ii) Breach of contract – petrol expenses

40. In the absence of any evidence, the Tribunal concludes that there was no agreement for the Respondent to cover petrol costs. The Claimant's breach of contract claim fails and is dismissed.

(iii) Unauthorised deduction from wages – holiday pay

41. The Tribunal concludes that because the claimant was employed for 60.3% of the year, he is entitled to 60.3% of the contractual 28 days of leave = 16.9 days.
42. The Claimant's net day rate is calculated by multiplying his net monthly pay (£1,331.31) by 12 and then dividing it by 52 and then by 5 = £61.45.
43. The Claimant is therefore entitled to 16.9 days of holiday at a rate of £61.45 per day. That amounts to £1,038.51, which is the net sum awarded.

(iv) Failure to provide pay slips

44. The Claimant's claim in relation to the provision of pay slips is not well-founded and is dismissed.

Employment Judge Robinson

Date 6 July 2022