



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs B Newbery

**Respondent:** London Rd Restaurants Ltd

**Heard at:** Bristol (remotely by VHS)      **On:** 1 July 2022

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

## Representation

**Claimant:** No appearance or representation

**Respondent:** Mr M Forfar, Director

# RESERVED JUDGMENT

The claims for notice pay, holiday pay and unauthorised deductions from wages are not well-founded and are dismissed.

# REASONS

## Claims and background

1. By a claim form presented on 10 January 2021, the Claimant brought the following claims:
  - a. damages for failure to pay notice under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 (SI 1994/1623) (the 'Extension of Jurisdiction Order');
  - b. holiday pay for statutory annual leave accrued but not taken on termination of employment under regulation 14 of the Working Time Regulations 1998 (SI 1998/1833) ('WTR'); and
  - c. unpaid wages under Part II of the Employment Rights Act 1996 ('ERA') (unauthorised deductions from wages).

2. The Claimant alleges that she was due a total termination payment of £1,561.64 comprising notice pay, holiday pay and unpaid wages but was paid only £574.33 in her final payslip, leaving a shortfall of £987.31. An unfair dismissal claim was included in the claim form but was not pursued, the Claimant having completed less than two years' continuous service.
3. The claim form incorrectly named Mr Michael Forfar, the present Respondent's sole director, as the respondent when the Claimant was in fact employed by his company, London Rd Restaurants Ltd. Mr Forfar did not enter a response, and on 24 May 2021 the tribunal issued a default judgment in favour of the Claimant awarding the total sum of £1,612.95. This was more than the Claimant sought to recover and appears to be based on a misreading of the sums set out in her claim form. The Claimant then commenced enforcement proceedings against Mr Forfar, who paid the sum awarded in the default judgment.
4. At a hearing on 31 March 2022, an application by Mr Forfar to present a response out of time was granted. The default judgment of 24 May 2021 was reconsidered and revoked, and the name of the Respondent was amended to London Rd Restaurants Ltd. The present claim is brought against that Respondent.

### **Evidence and procedure**

5. The Respondent was represented at the hearing by Mr Forfar, who gave oral evidence. The Claimant did not attend the hearing. The tribunal staff made repeated attempts to contact her on her mobile number but there was no response, and I decided to proceed in her absence.
6. The Claimant's ET1 claim form gives a breakdown of the sums claimed. There were no witness statements and there was no agreed bundle of documents. The Respondent provided a copy of the Claimant's terms and conditions, emails and documents relating to the payments alleged to be due, and a copy of the Claimant's final payslip.

### **Findings of fact**

7. I find the following facts on the balance of probabilities, based on the evidence I heard and the documents before me. Additional findings of fact relevant to the calculation of the sums claimed are included below under 'Discussion and conclusions'.
8. The Claimant was employed in the Respondent's restaurant as a front-of-house staff member from 8 August 2019 until 17 November 2020. There is no need for me to consider the circumstances in which her employment was terminated because her length of service precludes a claim for unfair dismissal, and there is no suggestion that the Claimant was guilty of gross misconduct such as to disentitle her from the right to notice pay.
9. The Claimant was employed under a zero-hours contract. She usually worked between 10 and 30 hours per week and was paid at an hourly rate of £9. Her holiday year began on 1 April each year and her holiday entitlement was calculated according to the number of hours she worked.

She was fully furloughed from the start of the COVID-19 lockdown in March 2020 until September 2020, when the restaurant reopened and she went on to flexible furlough. During periods of furlough, she received 80 per cent of her normal pay. She had no entitlement to contractual notice of termination over and above the minimum notice period set out in the ERA.

10. I accept Mr Forfar's evidence that all employees were given notice that they should take holidays during furlough in line with the Government guidance in effect at the time. In her claim form, the Claimant denied that she had received any such instruction, but she was not present to give evidence and Mr Forfar's recollection seemed to me to be both credible and reliable.
11. As noted above, the Claimant brought enforcement proceedings against Mr Forfar in reliance on a default judgment that was subsequently revoked. I accept Mr Forfar's evidence that, having received an enforcement notice, he paid out £1,884.74 from his personal bank account, comprising the sum of £1,612.95 awarded to the Claimant plus fees and interest. Mr Forfar made this payment in order to satisfy the Claimant's entitlement to outstanding sums due in connection with her employment.

## Legal framework

### *Notice pay*

12. Section 86 ERA provides: '*(1) The notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more (a) is not less than one week's notice if his period of continuous employment is less than two years.*'
13. Under the Employment Rights Act 1996 (Coronavirus, Calculation of a Week's Pay) Regulations 2020 (SI 2020/814), statutory notice pay must be based on the employee's normal remuneration rather than the reduced furlough rate of pay.
14. The Extension of Jurisdiction Order allows employment tribunals to hear some contractual claims brought by employees, including claims for damages in respect of unpaid notice pay, provided '*the claim arises or is outstanding on the termination of the employee's employment*' – Article 3.

### *Holiday pay*

15. 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.
16. Regulation 13(3) WTR provides (in so far as material): '*A worker's leave year, for the purposes of this regulation, begins (a) on such date during the calendar year as may be provided for in a relevant agreement...*'
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 –

$(A \times B) - C$

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. Regulation 16 WTR provides for statutory holiday pay to be calculated according to the 'week's pay' formula in sections 221 to 224 ERA. For workers without normal working hours, pay and remuneration are averaged over a period of 52 weeks.

19. Government guidance, 'Holiday entitlement and pay during coronavirus (COVID-19)', states that employees continue to accrue holiday entitlement during furlough; that the employer can require them to take annual leave during furlough by giving notice; and that holiday pay should be calculated in the usual way and may therefore be higher than furlough pay, in which case the employer should make up the difference.

### *Unpaid wages*

20. 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.'*

#### *Law of agency*

21. Bowstead & Reynolds on Agency (22nd edition) suggests a definition of the common law concept of agency:

*'Agency is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly manifests assent that the other should act on his behalf so as to affect his legal relations with third parties, and the other of whom similarly manifests assent so to act or so acts pursuant to the manifestation... In respect of the acts to which the principal so assents, the agent is said to have authority to act; and this authority constitutes a power to affect the principal's legal relations with third parties.'*

#### **Discussion and conclusions**

##### *The claim*

22. The Claimant's final payslip gives a total gross figure payable of £576.13 (£574.33 net). £392.26 of that gross figure is attributed on the payslip to 'furlough 80%' and £183.87 to 'holiday pay'. The payslip does not show the hours worked, the hourly rate of pay or the number of days' holiday that the Claimant had accrued.

23. The Claimant alleges in her claim form that she was due the following sums on termination, based on her average weekly earnings of £263.83 during the previous 12 weeks:

- a. £361.81 furlough pay for the period 5–17 November 2020, calculated at a rate of £30.15 per day;
- b. £263.83 notice pay for one week's unpaid statutory notice; and
- c. £936 in lieu of 13 days' unused holidays. This is based on a three-day working week, so that 5.6 weeks' leave equates to 16.8 days off work each year. The Claimant says she was paid for only 2.5 days' leave in her final payslip and that she had taken one day's paid leave in August 2020. She says that she was therefore entitled to payment for 13 days' untaken leave, based on an eight-hour day and an hourly rate of £9.

24. The Claimant concludes that she was due a total termination payment of £1,561.64 but was paid only £574.33 in her final payslip, leaving a shortfall of £987.31.

25. For the reasons set out below, I have concluded that the shortfall was less than the Claimant alleges, and in any event that all sums outstanding at her

termination date have been paid by Mr Forfar acting as the Respondent's agent.

*Furlough pay and notice pay*

26. The Claimant was entitled to a week's statutory notice under section 86 ERA. Mr Forfar says that her notice pay was included in the figure of £392.26 shown on her final payslip. He says that her termination date was 17 November 2020 but she was paid up until 24 November 2020, effectively giving her a week's notice in addition to her furlough payment for 1–17 November. She was on flexible furlough throughout that month and did not work any hours.
27. I accept Mr Forfar's evidence on these points, which is confirmed by a spreadsheet from the Respondent's accountant headed 'Brianna Newbery pay review May 2022'. The spreadsheet shows that the payment of £392.26 shown on the payslip is based on 54.48 hours paid at the furlough rate of £7.20 per hour (i.e. 80 per cent of the Claimant's normal hourly rate of £9). I am satisfied on the available evidence that this payment covers the period 1–24 November 2020 and comprises furlough pay and a week's statutory notice.
28. Mr Forfar accepts that the week's notice should have been paid at the Claimant's normal rate of £9 per hour by virtue of the Employment Rights Act 1996 (Coronavirus, Calculation of a Week's Pay) Regulations 2020. The Respondent's accountant calculates the shortfall in notice pay as **£22.88**, and I conclude that this additional sum was payable at the Claimant's termination date.

*Holiday pay*

29. The Claimant calculates her entitlement to payment in lieu of statutory leave on the basis that she was entitled to a full year's leave and had taken only one day's leave during furlough. On the basis of Mr Forfar's oral evidence, I am satisfied that her leave year began on 1 April; that there was no entitlement to carry over any leave from the previous leave year; and that she had used up several days' leave entitlement during furlough, for which she had already been paid. This explains why she received less holiday pay on termination than she had been expecting.
30. I accept the figures given in the accountant's pay review spreadsheet, 'Brianna Newbery pay review May 2022'. This shows that for the period April – November 2020 the Claimant had accrued 29.59 hours of annual leave during furlough, and 56.32 hours of annual leave in respect of hours worked, giving a total of 85.91 hours accrued at her termination date. She had taken 23.02 hours of annual leave during furlough and eight hours' leave during an ordinary period of work, giving a total of 31.02 hours' annual leave taken. She was therefore entitled to payment for 55 hours' untaken leave under regulation 14 WTR, i.e. £9 x 55 = £495. She received only £183.87 for holidays in her final payslip, a shortfall of **£311.13**.
31. The Respondent accepts that the Claimant is also entitled to a 20 per cent top-up in respect of the 23.02 hours of annual leave taken during furlough

that were paid at only 80 per cent of her normal earnings. The calculation is  $£1.80 \times 23.02 = \mathbf{£41.44}$ .

*Total shortfall*

32. I conclude that the total shortfall from the Claimant's final pay packet was **£375.45**, the sum of the figures set out above in bold. The figure given for the shortfall in the spreadsheet provided by the Respondent's accountant is £374.44. I attribute this slight discrepancy to the rounding-up or rounding-down of some of the figures.

*Payment by Mr Forfar as agent*

33. Mr Forfar has already paid the Claimant substantially more than £375.45. That payment was made in satisfaction of the default tribunal judgment that was subsequently revoked.

34. The present claim is brought not against Mr Forfar, but against the company of which he is the sole director. The Claimant named the wrong respondent in her claim form: she was employed by the company that is the Respondent to this claim, not by Mr Forfar.

35. Nevertheless, when Mr Forfar made the payment to the Claimant following receipt of the default judgment and the enforcement notice, I am satisfied that he did so as an agent of his company. The company could only act through its sole director, Mr Forfar, and the purpose of the payment was to satisfy the Claimant's entitlement to outstanding sums due in connection with her employment contract. Mr Forfar was acting on the company's behalf and with its authority; he was acting so as to affect the company's relations with the Claimant; and the payment was made in satisfaction of the company's potential liability to her, with the intention of extinguishing her outstanding claims against the Respondent and drawing the matter to a close. In that light, I conclude there are no sums still owing to the Claimant. Through the agency of Mr Forfar, the Respondent has already paid her substantially more than she is due.

36. It follows that the claims are not well-founded and are dismissed.

**Employment Judge Leverton**

Date: 25 July 2022

JUDGMENT & REASONS SENT TO THE PARTIES ON  
28 July 2022 by Miss J Hopes

FOR THE TRIBUNAL OFFICE