



## EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102618/2022

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Held in Glasgow on 29 August 2022

Employment Judge M Robison

Mr L Klapil

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Claimant  
In Person  
[Interpreter - Ms  
P Velickova]

Pegasus Express Limited

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Respondent  
Represented by:  
Mr G Millar -  
Solicitor

### JUDGMENT OF THE EMPLOYMENT TRIBUNAL

20 The judgment of the Employment Tribunal is that the claimant's claims for arrears of pay, for unpaid sick pay and for unpaid holiday pay are not well-founded and are dismissed.

### REASONS

1. The claimant lodged a claim in the Employment Tribunal on 10 May 2022 claiming arrears of pay, unpaid holiday pay and sick pay. The respondent resists the claims.
2. At this final hearing, the Tribunal heard evidence from the claimant through an interpreter (Ms P Velickova) and then from Ms Murphy, finance director for the respondent.
3. The respondent had lodged a volume of documents, which are referred to in this judgment by R and the page number. It was not until the claimant had commenced his evidence that I appreciated that he had brought with him documents which he intended to rely on. I arranged for these to be copied and for a copy to be passed to Mr Millar. These are referred in this judgment by the letter C and the page number.

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**Findings in fact**

4. The Tribunal finds the following facts proved, admitted or agreed based on the evidence heard and the documents referred to.
5. The claimant was employed by the respondent as an HGV Driver, from 4 May 2021, having previously been engaged through an agency, until his resignation on 29 January 2022.
6. On the day of the commencement of his employment, the claimant completed and signed a “starter form” (R25). This stated that his basic hours were 50 hours per week, his basic rate was £12.00 per hour and his overtime rate was £12.00 per hour.
7. He was issued with a contract of employment (R26 – 33). This stated, at paragraph 5, that his salary was £28,600 per year. That however was an error, based on an hourly rate of £11, as opposed to £12 which was agreed. This paragraph states that he was to complete daily time sheets recording working hours, to be submitted to the depot manager each day.
8. Under paragraph 6, headed “hours of work and rules”, it is stated that:
- i) Given the nature of our work, we require to be able to deliver a flexible service to meet the demands of our customers. That does not always fit into a particular pattern of work and as a driver you are required to work to the shift patterns as outlined by your depot manager...
  - ii) Given the nature of our work, you may be required to work such additional hours as may be necessary for the proper performance of your duties.
  - iii) Your normal hours of work will be 50 hours per week worked over the shift pattern mentioned in 6.1. You are responsible for ensuring that you comply with rest breaks and daily limits on working time, in terms of the Road Transport (Working Time) Regulations 2005. If you are uncertain of your obligations in terms of these Regulations, then please contact your line manager. By signing this contract, you

acknowledge that in certain weeks you may be required to work in excess of 48 hours, up to a maximum of 60 hours in any one week.

- iv) This is a salaried position and therefore no overtime is payable.
- v) You are required at all times to comply with our rules, policies and procedures in force from time to time including those contained in the Staff Handbook, a copy of which is available from Payroll Dept, Glasgow or your Depot Manager.

9. Paragraph 7 was titled "holidays" and states as follows:

- i) You are entitled to 5.6 weeks' (28 days) holiday during each holiday year. This includes the usual public holidays in Scotland and England. If you are required to work on one of those public holidays you will receive a day off in lieu.
- ii) You will be paid your normal basic remuneration during such holidays. The Company's holiday year runs between January and December. If your employment starts or finishes part way through the holiday year, your holiday entitlement during that year shall be calculated on a pro-rata basis.
- iii) In order to ensure that we are able to cover the operational requirements of the business, you will be notified at the start of each holiday year when you are expected to take your holiday....
- iv) You cannot carry untaken holiday entitlement forward from one holiday year to the following holiday year.
- v) We shall not pay you in lieu of untaken holiday except on termination of employment. If you have taken more holiday than your accrued entitlement at the date your employment terminates, we shall be entitled to deduct from any payments due to you one day's pay for each excess day.

10. Paragraph 8 is headed "incapacity" and includes the following at 8.5: "If you are absent from work due to incapacity we shall pay you Statutory Sick Pay

(SSP) provided that you satisfy the relevant requirements. Your qualifying days for SSP purposes are Monday to Friday”.

11. By letter dated 4 May 2021, confirming the claimant’s appointment, the claimant was advised that, “Your basic salary will be £28,600 per year and it will be paid directly into your bank account on 27th of each month. You will be paid for the whole month (1-31) along with any adjustments for overtime, additional work and annual leave until the monthly payroll cut-off date. Your normal working hours will be agreed with your Line Manager”. As stated above this annual figure was an error.
12. That letter included two copies of the contract of employment (the claimant being asked to sign one and return to HR), job description, annual leave dates, annual leave Q and A, request to amend leave form, policy document; with a request to present certain documentation, including drivers licence. The claimant did not return a signed copy because of the error in the salary figure.
13. That letter states that “You will be entitled to 5.6 weeks (28 days) holidays including usual public holidays (January to December). As you will be starting during our annual leave year, your entitlement from commencement to 31st December 2021 will be 19 days including public holidays.....”
14. That letter was accompanied by a memo advising the claimant that copies of their policies and procedures (listed) had been provided and that he should familiarise himself with them. The claimant confirmed receipt by signing an employee declaration on 7 May 2021 (R 38).
15. During the course of his employment, the claimant completed time sheets (which were not lodged). The claimant also set out his hours of work in handwriting (which were lodged (C1 – C18)).
16. The claimant’s hours at work were also recorded on a tachograph card which was personal to him. A computerised print out was lodged (R40 – R60). This shows the split of driving time, other working time and rest and break times.
17. The claimant was in fact paid a gross annual salary of £31,300 per year. This is based on a calculation of 50 hours per week at £12 per hour for 52 weeks

and a monthly figure of £2,600. The claimant was paid a gross monthly salary of £2,600 at a minimum. He was paid this salary even if he did not work 50 in any one week. Where he worked over 50 hours, he was paid overtime for additional hours. He was paid for those overtime hours at the same rate as his basic rate, namely £12 per hour.

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18. The claimant was required to take a break of 45 minutes each day, which was unpaid.

19. The claimant took annual leave for seven days from 22 July until 30 July 2021. Payment is represented on his pay slip for 27 August 2021 (C7) as a payment of £927.55 (representing payment of average pay, including overtime) for holidays, with a deduction (adjustment) of £840 representing payment at basic rate for the relevant period.

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20. The claimant was absent on sick leave (with a broken finger) for three weeks from 1 August to 23 August 2021. Payment is represented on his payslip for 28 August 2021 (C7) as a deduction for absence of £1,800 from his salary. The claimant was paid statutory sick pay totalling £231.24. This represents 15 days absence on sick leave, the first three days being unpaid, so that the claimant received 12 days at a daily rate of £19.27 per day (that is based on statutory sick pay rates pertaining at that time of £96.35 per week).

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20 21. On 17 December 2021 the claimant was required to sleep in his truck overnight (C14). He was paid a £25 overnight allowance (R68).

22. The claimant took five public holidays during the period from May to December 2021. The claimant was also on annual leave from 24 December until 4 January (C16). The total days for the period from May to 4 January was 18 days consisting of 7 days annual leave, 5 days public holiday and 6 days at Christmas/New Year.

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23. On 10 January 2022 the claimant had a positive covid test and was absent on sick leave until 17 January 2022. The respondent paid the claimant statutory sick pay for the whole period, because the absence was covid related. This is reflected in his pay slip of 27 January 2022, with SSP for three days totalling

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£57.81 and supplementary sick pay for the remaining four days totalling £77.08 (R68).

24. The claimant resigned and his last day of employment was 29 January 2022.

5 25. The claimant's payslip for January 2022 reflects a salary of £2,600 plus overtime. From that is deducted £840 reflecting the covid related absence, which was replaced by SSP. The sum of £360 was also deducted, representing three days' pay. This payslip included overtime only until 16 January 2022.

10 26. Outstanding overtime worked to 29 January 2022 was paid in February, reflected in the payslip dated 25 February 2022 (R69). There was an adjustment made adding £120, given the deduction in January reflected three days, whereas the claimant worked on 29 January and therefore only two days from the January salary was entitled to be deducted.

15 27. The claimant was not entitled, in accordance with his contract, to carry forward leave to the next holiday year, which ran from January to December.

28. The claimant was however paid £403.75 holiday pay on the termination of his employment (R68). This represents two days of annual leave accumulated to 29 January and one day of annual leave, carried forward from the previous year, paid at average pay (R68).

## 20 **Relevant law**

29. Section 13 of the Employment Rights Act 1996 (ERA) states that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is authorised by a statutory provision or a relevant provision of the worker's contract or he has the worker's consent.

25 30. Section 23(1) ERA states that a worker may present a complaint to an employment tribunal that his employer has made a deduction from his wages in contravention of Section 13.

31. The law relating to holiday pay is contained in the Working Time Regulations 1998. Regulation 13 provides that a worker is entitled to four weeks' annual

leave in each leave year. Regulation 13A provides that a worker is entitled an additional 1.6 weeks' leave (that is 28 days in total).

32. Regulations 13(3) states that a worker's leave year begins on such date as is provided for in a relevant agreement.

5 33. Regulation 13(5) states that where the worker starts after the date their first leave year began, "the leave to which he is entitled in that leave year is a proportion of the [28 days] equal to the proportion of that leave year remaining on the date on which his employment begins".

10 34. By reason of regulation 13(9) leave may only be taken in the year in respect of which it is due and may not be replaced by a payment in lieu except where the worker's employment terminated.

35. Equivalent provisions relating to the additional 1.6 weeks leave are set out in regulation 13A.

15 36. Regulation 14 relates to where a worker's employment is terminated during the course of his leave year, and regulation 14(2) states that "where the proportion of the 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 in accordance with paragraph (3)".

20 37. Any unpaid holiday pay can be claimed as an unlawful deduction from wages under section 13 ERA.

### **Submissions for the respondent**

25 38. Mr Millar had prepared written submissions, but made oral submissions on the basis of the evidence heard at the hearing. He submitted that it had become apparent that there was a fundamental misunderstanding on the part of the claimant as to what he was entitled to. However, he accepted in cross examination that he was never entitled to more than £12 per hour.

39. Mr Millar submitted that, as confirmed by the pay slips lodged, regardless of how many hours he worked, he would be paid for at least 50 hours per week. This was confirmed in the contract of employment and on the starter form. If

he was required to work more than 50 hours, he would be paid overtime for the hours he worked, but still at the same basic rate of pay, namely £12 per hour.

- 5 40. The claimant's evidence, referring to his experience of working for other companies, was that if he worked more than 50 hours he would be entitled to an overtime rate which was higher than his basic rate. This is based on what he believes should have happened, rather than what he signed up for.
- 10 41. The onus is on the claimant to prove that the respondent has deducted sums from the wages which were properly payable, and he has lodged handwritten records to substantiate his claim. However the unchallenged evidence of the respondent's finance director was based on the information provided to payroll, which was based on the hours which had been agreed between the claimant and his line manager. Where agreement was not reached, then they could revert to the tachograph to check the position.
- 15 42. Although time sheets were not lodged the tachograph records were and these demonstrate that the claimant was always paid for a minimum of 50 hours per week even when he worked less; and that he was always paid for every overtime hour worked.
- 20 43. With regard to holiday pay, the claimant accepted that he had received the contract of employment but that he had not signed or returned it because he felt that the salary was wrong. However it can be seen from the contract that any holiday pay was to be used in the holiday year; and the covering letter attached to the contract shows that the claimant had 19 days between 4 May and 31 December 2021; the claimant took and was paid for all leave due in  
25 that year.
- 30 44. With regard to the claim for breach of contract, the claimant conceded in evidence that there was no agreement to increase the hourly rate. Thus there was no unlawful deduction, no underpayment and no breach of contract. Given the details had previously been supplied to the claimant which had they been considered would have made it clear there was no valid challenge, the respondent reserves the right to claim expenses.



**Submissions for the claimant**

45. Mr Klapil said in submissions that he started working with Pegasus after he had worked for them through an agency and because it suited him to work for a small company which was only 10 minutes drive from where he lives.
- 5 46. His usual route was from Cleland to Inverness via Glasgow. With 45 minutes break each day, he could not do this route in the number of hours he was scheduled to work. There is provision that lorry drivers are to work a maximum of 60 hours per week or 12 hours per day maximum; and while this could be exceeded a little if he drove this route and took 45 minute break he would not  
10 have been able to make the return trip and fit into 13 hours. He saw Michael the director at least three times in Inverness and he pointed out that he was working more than 13 hours. He saw him cleaning the truck and helping the forklift drivers during the break. They therefore reached an oral agreement that if he was to manage to do it all then they would not be deducting the 45  
15 minutes from his hours each day.
47. Further, if the lorry driver was driving a night shift the provisions say that a driver can only work 10 hours per day and that he can only exceed that with agreement. He was driving more than ten hours but he was not consulted about it. This was just one of the concerns he had about the way that he was  
20 treated by the company. Because of the way he was treated he had given his notice twice before and it was only on the third time that he actually left.
48. With regard to the overtime payment, he asked Micheal for £13.50 per hour in October. This was because Michael had said that the law required them to deduct 45 minutes for rest breaks, and given he was working during that break  
25 that meant he was working for £11 per hour and not £12 per hour.
49. The claimant said that he had regularly worked over 50 hours per week and even sometimes over 60 hours per week. This was because he could not complete the routes he was given in the time frame. On occasions the transport manager had required to go and collect him in his car, but this would  
30 not be recorded in the tachograph. He had also required to travel to Aberdeen on 17 December 2021 but could only get as far as Perth when he had to take

a break, but there was no facilities for food or sleep and he required to stay overnight without his agreement.

50. He therefore complains about their moral conduct and the way that the respondent treated its employees despite the loyalty he showed.

5 **Tribunal decision**

51. This is a claim for arrears of pay, for unpaid sick pay and for unpaid holiday pay. These claims are pursued under section 13 of the Employment Rights Act 1996. This states that an employer cannot make a deduction unless that is permitted by a relevant employment law provision, or by the terms of the contract of employment, or with the agreement of the worker.

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**Arrears of pay – overtime**

52. The claimant expressed concern in regard to the rate of payment of overtime. He was of the view that the overtime rate should be higher than the basic rate of pay. He said that this was his experience with previous employers, and he ridiculed the suggestion that overtime should be paid at the same rate as basic pay.

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53. The arrangement for payment in this case is, it has to be said, rather unusual. The claimant was paid what is described as a “salary” and that salary is calculated on the basis that the claimant would work at least 50 hours per week. If he worked less than 50 hours per week, then the claimant would still receive his full salary. To that extent, this is a standard. However, the agreement reached is that where the claimant worked more than 50 hours per week, he would be paid for each of those additional hours. This was described as “overtime” but it was paid at the same basic rate of pay.

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54. The claimant sought to make something of there being a limit of 60 hours per week which lorry drivers should be working; but it was not clear what point was being made. In so far as the claimant did work over 60 hours in any one week, it is apparent that he was paid for those hours at the “overtime” rate of £12 per hour.

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55. What is clear however is that the claimant agreed to this arrangement; and that he agreed to a basic rate of £12 per hour and that he agreed to an “overtime” rate of £12 per hour. That is reflected in all the paperwork lodged in this case. Although there was an error in the calculation of the annual salary, all other paperwork makes it clear that the agreed rate was £12 and that was the rate which was paid. No sums therefore can be due in respect of the rate of pay for the overtime and I did not understand the claimant in the end to pursue such a claim.

#### **Arrears of pay – general**

10 56. There is thus no doubt that the claimant agreed to be paid £12 an hour. Although the claimant claimed to have had a discussion about an increase to £13.50 per hour, he accepted in evidence that an agreement to that effect had never been reached. There can be no claim then for breach of contract in that regard.

15 57. The claimant also complained about the fact that he required to take an unpaid break of 45 minutes each shift, during which he suggested that at least on occasions he had to work. He suggested that there had been a discussion about this being paid. However, again he accepted, as is clear from documentary evidence submitted by him, that 45 minutes was to be deducted each day representing this unpaid break.

20 58. The claimant has in this case provided handwritten notes setting out the hours which he says that he worked during the whole of his employment. Taking each month in turn, he claims that these show an underpayment of gross wages for the hours he recorded that he had worked. As was pointed out during the hearing, in several of the months referenced, the claimant’s gross wage was actually higher than the number of hours he said that he had worked. This indicates at least that the basis of his calculations is unclear and that they have not apparently taken all factors into account.

25 59. Ms Murphy gave evidence regarding the number of hours worked. She explained that the claimant would complete time sheets and these would be agreed with the claimant’s line manager. In the event of any disagreement,

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the tachograph records could be checked. The electronic print outs were lodged with the Tribunal which Ms Murphy confirmed accorded with the hours, including overtime hours, which the claimant had worked and had submitted on his time sheets, which had been agreed by his manager.

5 60. These time sheets would then be submitted to payroll for calculation, and calculated for the month as at 27<sup>th</sup> of each month. The payslips show that the claimant received his salary (for up to 50 hours each week) and payment for the number of overtime hours submitted. The claimant made no complaint about the sums which he was paid during the course of his employment.

10 61. It should be noted that although the claimant was given time during the lunch-break to consider any questions which he might have for Ms Murphy, he took the view that as she was a qualified accountant he was not in a position to ask questions. The evidence of Ms Murphy was therefore unchallenged. I accept, given the evidence I heard that the hours had been calculated based on time sheets submitted and agreed, that the claimant has been paid for all  
15 the hours that he worked at the agreed rates.

62. The claimant said on more than one occasion during his evidence that he did not understand his pay slips or how his pay was calculated. Mr Millar said that he should have taken the time to consider the detailed breakdown of  
20 information which had been supplied to him and that would have made it clear. It must be said however that the way that payments are calculated are relatively complex, and it is understandable that a claimant (especially one whose first language is not English) might struggle to understand exactly how his pay was calculated (particularly in regard for example to holiday pay).

25 **Arrears of pay – sick pay**

63. The claimant apparently claims underpayment of sick pay. The contract makes clear that the claimant is not entitled to contractual sick pay. The claimant was entitled, by contract and by statute, to statutory sick pay (SSP). At the time, statutory sick pay was £96.35 per week, which is a daily rate of  
30 £19.27.

64. The statutory right for employees to sick pay is set out in the Social Security Contributions and Benefits Act 1992 and related regulations. SSP is payable for qualifying days during a period of incapacity for work, but not for the first three qualifying days, known as “waiting days”.
- 5 65. In this case the claimant was absent in August on sick leave for three weeks, that is 15 days, and was paid for 12 days (deducting the waiting days).
66. The claimant was also absent from work in January 2022 having tested positive for covid. Regulations were enacted during the pandemic which suspended the waiting days (The SSP (Coronavirus) (Suspension of Waiting  
10 Days and General Amendment) Regulations 2020). The claimant received SSP for each of the days that he was absent for covid related reasons. No sums are therefore due in respect of SSP.
67. The claimant mentioned in evidence a payment of £500 which is understood to be a protection payment for those absent self-isolating with covid. This it is  
15 understood was paid by Government to those who may be eligible, and is not a payment which can be sought from an employer.

### **Payment for annual leave**

68. The claimant claims that he has not been paid for accrued annual leave.
69. The claimant was entitled, by contract as well as by statute, to 28 days annual  
20 leave per year. Here it is clear from the documents that the leave year ran from January to December.
70. The claimant was advised that he was entitled to 19 days between the commencement of his employment in May and December. This was to include public holidays.
- 25 71. The evidence relating to how many days holiday the claimant had taken in 2021 was unclear. Ms Murphy initially responded that the claimant had taken and been paid for the 19 days which the claimant was due. When reflecting on the days taken, she counted 15, which would be 7 days holidays, 5 days public holidays and three days between Christmas and New Year. She also

said however that employees were given leave on Christmas Eve and on 3 and 4 January.

72. I conclude the following from the evidence: the claimant took seven days holiday in August. He was paid for those seven days at average pay, including overtime (not basic pay, which was then deducted). The claimant also was paid for five days of public holidays, which was a bank holiday in May and Christmas Day and Boxing Day, as well as New Year's Day and the second of January. Accepting Ms Murphy's evidence that the claimant also had an additional three days holiday at Christmas and New Year, namely 24 December and 3 and 4 January, I concluded that the claimant had received a total of 16 days during 2021, with an extra two days into 2022.

73. Although the claimant's contract states that he was not entitled to carry forward any holidays from the previous year, it is apparent that this was permitted in this case. It is apparent that the claimant was on leave for New Year's Day and the second of January (which are public holidays) but also for 3 and 4 January.

74. Further, on termination the claimant was paid for 3 days holidays. I calculate that the claimant would have been entitled to two days holiday accumulated to 29 January. It appears then that one day outstanding from 2021 was carried forward into 2022, and I so find.

75. The claimant therefore either took or was paid for all of the annual leave due to him on the termination of his employment, paid on the basis of average pay.

76. Although I raised the matter of carry forward into the year in which the contract was terminated during submissions, given that it is apparent that the claimant was in fact paid for leave carried forward, this did not arise in this case.

### Treatment at work

77. The claimant during his evidence but more particularly during submissions complained about the way that he was treated at work. I explained to him that the Tribunal could not take account of what he said in submissions if he had not included this in his evidence. However, it was apparent that the further information which he gave during submissions was not in any event relevant to the claims which he was making. He appeared to suggest that this was a “moral” claim. One matter that the claimant did raise in evidence related to the circumstances which led him to require to stay overnight on his truck on 17 December 2021. I did note however that the claimant was paid an overnight allowance in respect of that incident. In any event, as Mr Millar pointed out, no valid legal claim was however before the Tribunal (and it was not apparent that there was one). There can be no additional claim for compensation in respect of the way that he claims that he was treated by the company.

### Conclusion

78. Given these findings, there can be no valid claim for unlawful deduction from wages in this case. To the extent that there was also a valid claim for breach of contract being pursued (to which Mr Millar referred) there was no evidence to support such a claim either. All claims are therefore dismissed.

Employment Judge: Muriel Robison  
Date of Judgment: 31 August 2022  
Entered in register: 14 September 2022  
and copied to parties

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