



# EMPLOYMENT TRIBUNALS

BETWEEN

**Claimant:** Mr R Whitmore

and

**Respondent:** Hi-Speed  
Services Limited

**HELD AT** Birmingham

**ON** 13 September 2022

**EMPLOYMENT JUDGE** Choudry

## Representation:

**For the claimant:** No appearance

**For the respondents:** No Response Entered

## JUDGMENT

The claimant's claim for unlawful deduction of wages and holiday pay partially succeeds. The respondent is order to pay the claimant the sum of £388.77 (gross).

## REASONS

### Background

1. By a claim form received on 11 March 2020 the claimant brought a claim for holiday pay, unlawful deduction of wages and outstanding pay.
2. The respondent did not file a Response. As such, the respondent was informed by a letter dated 19 June 2020 that the respondent could only participate in any hearing to the extent permitted by the Employment Judge who hears the case.
3. By a letter of the Tribunal dated 12 March 2020 the claimant was ordered by the Tribunal to provide a schedule of loss.
4. On 6 April 2020 the claimant provided a schedule loss providing a detailed breakdown of the sums he was claiming. The total amounted to £1,302.49.
5. The respondent disputed the payments and by email dated 24 April 2021 provided the claimant's time sheets and wage slips for August 2019 to December 2019.

6. At the hearing before me today the respondent was represented by Ms Kim Sharpe, Payroll Manager and Mr Michael Crampton the Company Secretary. I reminded Mr Crampton and Ms Sharpe that as no Response had been submitted the respondent would only be able to participate in the hearing to the extent permitted by me.
7. The claimant did not attend the hearing today. As such, I asked the clerk to call the claimant to ascertain his whereabouts. Unfortunately, the Tribunal did not have the claimant's telephone number. As such, an email was sent to the claimant asking him to make contact. I adjourned the hearing until 10.30am to enable the claimant to make contact. No reply was received by the claimant and the respondent indicated that it did not have the claimant's mobile either. As such, I decided to proceed with the hearing and make a determination based upon the information before me.

## **Facts**

8. I make the following findings of fact based on the information before me and clarification from the respondent on certain points:
  - 8.1 The claimant was employed by the respondent as a driver from 23 August 2019 to 1 December 2019. This was the claimant's second period of employment with the respondent with his initial period being from 15 October 2018 to 30 April 2019.
  - 8.2 The claimant earned £8.81 basic pay per hour for up to 48 hours per week. Overtime was paid at the rate of £11.02 per hour and Saturday work attracted an hourly rate of £11.75. Overnight working attracted a night out allowance payment of £30.00.
  - 8.3 The claimant's Schedule of Loss was broken down according to tax months.
  - 8.4 For tax month 6 he claimed £36.70 in respect of a shortfall in pay for him working on a Saturday and £60 in respect of 2 nights unpaid night allowances on 5 and 13 September 2019. In the absence of any evidence from the respondent rebutting this calculation I was satisfied that the claimant was entitled to £96.70 in respect of under paid wages for tax month 6.
  - 8.5 For tax month 7 the claimant sought £6.10 in underpaid wages. In the absence of any evidence from the respondent rebutting this calculation I was satisfied that the claimant was entitled to £6.10 in under paid wages for tax month 7.
  - 8.6 For tax month 8 the claimant sought £107.68 for underpaid overtime and £120 in respect of 4 instances where the night out allowances were not paid. I was satisfied in the information before me that the claimant was entitled to the sum of £107.68 in respect of underpaid overtime. However, the claimant's timesheets only showed night working on 14 November 2019 and not the other nights (13, 19 and 22 November 2019) he is claiming for. As such, I am only able to award a night out allowance payment for 14 November 2019 in the sum of £30.00.
  - 8.7 For tax month 9 the claimant sought underpaid wages in the sum of £13.82 and a night out allowance of £30.00 for 28 November 2019. He also sought the repayment of a deduction from his wages in the sum of £70.60. The respondent clarified that this deduction of £70.60 related to an overpayment of wages as a result of the claimant over claiming hours on his timesheet on

the following occasions: 28 August 2019 (where the claimant had indicated that he had worked from 5pm to 9.45pm which amounted to 4.45 hours worked but the claimant had claimed 9.5 hours); 2 September 2019 where the claimant had claimed 9.5 hours when his own timesheets showed he had worked 7.5 hours; 3 September 2019 where the claimant had claimed 9.5 hours when he had worked 9 hours and 4 September 2019 where the claimant had worked 6 hours but claimed 9.5. As such, I was satisfied that this the deduction of £70.60 was not an unlawful deduction and could not, therefore, be claimed. However, I was satisfied on the evidence before me that he was entitled to the payment of £30.00 for the night allowance on 28 November 2019 and the underpayment of wages in the sum of £13.82. The claimant also sought a holiday pay shortfall of £104.47. The respondent had based its calculation on basic pay only and the claimant had calculated correctly based on the preceding 12 weeks which I was satisfied was the correct way to calculate the claimant's holiday pay given that his weekly pay varied. As such, the claimant was awarded the sum of £104.47 underpaid.

8.8 The claimant also sought the sum of £590.34 for 2018 and the sum of £160.78 for the period of 1 January 2019 to 26 April 2019 when his first period of employment came to an end. The claimant provided no explanation as to why he had not sought to reclaim these monies when his first period of employment came to an end on 26 April 2019.

## The Law

9. Regulations 16(1) and 16(2) of the Working Time Regulations 1998 (WTR) provide that:

*“(1) A worker is entitled to be paid in respect of any period of annual leave to which he is entitled under regulation 13 [and regulation 13A], at the rate of a week’s pay in respect of each week of leave.*

*(2) Sections 221 to 224 of the 1996 Act shall apply for the purposes of determining the amount of a week’s pay for the purposes of this regulation, subject to the modifications set out in paragraph (3) [and the exception in paragraph (3A)].*

10. Sections 221 of the Employment Rights Act 1996 (ERA) provides:

*222 (3) Subject to section 222, if the employee’s remuneration for employment in normal working hours (whether by the hour or week or other period) does vary with the amount of work done in the period, the amount of a week’s pay is the amount of remuneration for the number of normal working hours in a week calculated at the average hourly rate of remuneration payable by the employer to the employee in respect of the period of twelve weeks ending—*

*(a) where the calculation date is the last day of a week, with that week, and*

*(b) otherwise, with the last complete week before the calculation date.*

*(4) In this section references to remuneration varying with the amount of work done includes remuneration which may include any commission or similar payment which varies in amount”*

Section 222 of ERA provides

*“(1) This section applies if the employee is required under the contract of employment in force on the calculation date to work during normal working hours on days of the week, or at times of the day, which differ from week to week or over a longer period so that the remuneration payable for, or apportionable to, any week varies according to the incidence of those days or times.*

*(2) The amount of a week’s pay is the amount of remuneration for the average number of weekly normal working hours at the average hourly rate of remuneration.*

*(3) For the purposes of subsection (2)—*

*(a) the average number of weekly hours is calculated by dividing by twelve the total number of the employee’s normal working hours during the relevant period of twelve weeks, and*

*(b) the average hourly rate of remuneration is the average hourly rate of remuneration payable by the employer to the employee in respect of the relevant period of twelve weeks.*

*(4) In subsection (3) “the relevant period of twelve weeks” means the period of twelve weeks ending—*

*(a) where the calculation date is the last day of a week, with that week, and*

*(b) otherwise, with the last complete week before the calculation date.”*

11. Regulation 30(2) of the WTR provides:

*“(2) [Subject to [[regulation] 30B]. an employment tribunal] shall not consider a complaint under this regulation unless it is presented-*

*(a) before the end of the period of three months... beginning with the date on which it is alleged that the exercise of the right should have been permitted...or, as the case may be, the payment should have been made;*

*(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three...months.”*

12. Regulation 30(3) provides that:

*“(3) Where an employment tribunal finds a complaint under paragraph (1)(a) well-founded, the tribunal—*

*(a) shall make a declaration to that effect, and*

*(b) may make an award of compensation to be paid by the employer to the worker.*

*(4) The amount of the compensation shall be such as the tribunal considers just and equitable in all the circumstances having regard to—*

*(a) the employer’s default in refusing to permit the worker to exercise his right, and*

*(b) any loss sustained by the worker which is attributable to the matters complained of.*

*(5) Where on a complaint under paragraph (1)(b) an employment tribunal finds that an employer has failed to pay a worker in accordance with regulation 14(2) or 16(1), it shall order the employer to pay to the worker the amount which it finds to be due to him.”*

13. Section 13 of ERA provides:

*(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.*

*(2) In this section “relevant provision”, in relation to a worker’s contract, means a provision of the contract comprised—*

*(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or*

*(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.*

*(3)Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion."*

14. Section 27(1) of 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.."*

## **Conclusions**

15. In relation to the claimant's claim for holiday relating to this first period of employment with the respondent which ended on 26 April 2019 I am satisfied that the claim has been presented out of time. I have heard no evidence from the claimant as to why it was not reasonably practicable for the claim in respect of this period of holiday to be presented in time and, as such, I am not able to extend the time limits. As such, no holiday pay can be awarded in respect of the period of employment during 15 October 2018 to 30 April 2019.
16. In respect of the remainder of the claim I am satisfied, based upon the findings of fact set out above and the evidence before me, that claimant is entitled to the sum of £388.77 in respect of under paid wages as he has not been paid for all the wages properly payable to him nor has he been paid for his night out allowance. In addition, his holiday pay has not be calculated using the calculation of a week's pay as prescribed by statute.

Signed by  
Employment Judge Choudry  
On 9 October 2022