



EMPLOYMENT TRIBUNALS

Claimants): (1) Mr Paul Groom
(2) Mrs Rachel Groom
Respondent): Samuel Smith Old Brewery (Tadcaster)

AT A REMEDY HEARING

Heard at: Leeds On: 21st October 2022
Before: Employment Judge Lancaster

Representation

Claimants: Mr P Groom
Respondent: Mr G Vials, solicitor

JUDGMENT

1. The Respondent is ordered to pay to each Claimant the following sums which were taken as unauthorised deductions from their wages:

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| 1.1 | From their July 2021 salaries (gross) | £166.66 |
| 1.2 | From their August 2021 salaries (gross) | £913.98 |
| 1.3 | From the returnable £1000 bond with interest (half each) | <u>£542.25</u> |
| | | £1622.89 |

2. The claims for accrued holiday pay due at the date of termination are dismissed.

3. The Respondent is ordered to pay to the Claimants respectively compensation for unfair dismissal as follows:

3.1 Mr P Groom

| | | |
|--------|-------------------------------|-----------------|
| 3.1.1 | Basic award | £1328.67 |
| 3.1.2 | Loss of statutory rights | £400.00 |
| 3.1.3 | Loss of earnings, 24 weeks | £7,714.08 |
| 3.1.4 | Loss of pension contributions | £190.56 |
| 3.1.5. | Loss of accommodation (half) | <u>£1130.77</u> |
| | | £10,764.08 |

Cases: 2501758/2021 &
2501759/2021
3.2 Mrs R Groom

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|--------|-------------------------------|-----------------|
| 3.2.1 | Basic award | £885.75 |
| 3.1.2 | Loss of statutory rights | £400.00 |
| 3.1.3 | Loss of earnings, 14 weeks | £4,499.88 |
| 3.1.4 | Loss of pension contributions | £111.16 |
| 3.1.5. | Loss of accommodation (half) | <u>£1130.77</u> |
| | | £7,027.56 |

4. The Employment Protection (Recoupment of Benefits) Regulations 1996 apply to the Unfair Dismissal awards as follows:-

4.1 Mr P Groom

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|---|------------|
| Total award for unfair dismissal | £10,764.08 |
| Prescribed amount | £7,714.08 |
| Prescribed period 17 th August 2021 to 6 th February 2022 | |
| Excess of total award over prescribed amount | £3,050.00 |

4.1 Mrs R Groom

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| Total award for unfair dismissal | £7,027.56 |
| Prescribed amount | £4,499.88 |
| Prescribed period 17 th August 2021 to 23 rd November 2021 | |
| Excess of total award over prescribed amount | £2527.68 |

5. There is no separate award for breach of contract (wrongful dismissal)

REASONS

1. The amounts of the unauthorised deductions from wages are not contentious. The deduction in July is the maximum which might have been subtracted had it been duly authorised, that is 10 percent of the gross salary. The salary for August, up to the date of resignation with immediate effect on the 17th of that month is the gross figure taken from the pay slip which was produced but not paid. The net figure is £911.18, but that depends upon the authorised deductions for tax, national insurance and pensions in fact having been already paid over and upon the tax calculation still being correct. The amount of the returnable bond and the calculated interest are agreed.
2. The Claimants had each taken their full pro-rata holiday entitlement for the leave year from 1st January up to the date of termination. That is because the memorandum issued by the Respondent in January 2021, whilst the Claimants were both furloughed, is sufficient notice that they were required to take 3 days leave in each month that they were not required to work. For three lots of 3 days deemed holiday in that period they were duly paid at full salary, and not just at 80 per cent.

Cases: 2501758/2021 &
2501759/2021

3. The earlier authority of S and U Stores Ltd. v Wilkes [1974] ICR 645 indicates that benefits in kind do not count towards a week's pay, but in Paggetti v Cobb UKEAT/136/01 it was made clear that the National Minimum Wage ("NMW") does impact upon the calculation of a week's pay for the purposes of sections 221 to 229 of the Employment Rights Act 1996. The National Minimum Wage was, of course, not in force in 1974. I have also been referred to Best v St Austell China Clay Museum Ltd UKEAT/0924/03, but that is about whether the provision of no more than reasonable accommodation in itself triggers an entitlement to the NMW, and is not on point.
4. Mr Vials therefore now accepts that to calculate the basic award for unfair dismissal based solely on the £20,000 annual salary would result in a weekly figure that is less than the NMW, and that it must be increased. The only issue is by how much?
5. A week's pay for the purposes of Part XIV Chapter II of the Employment Rights Act 1996 is calculated by reference to the remuneration received. Under regulations 7, 9(e) and 16 of the National Minimum Wage Regulations 2015 the amount for provision of living accommodation is also categorised as remuneration.
6. The applicable amount under regulation 16 at the date of termination was £8.36 per day. That gives yearly figure of £3,051.40, which equates to £56.68 per week. That sum is therefore to be included within the figure for remuneration when calculating a week's pay.
7. Even though the Claimants in their contracts of employment agreed that only the "daily average agreement" to work 7 1/3 hours per day (44 hours per week) is definitive of the amount of unmeasured work for the purposes of the NMW entitlement, that does not affect the application of regulations 7, 9 (e) and 16. The amount of a week's pay is not limited by the contractual agreement to 44 hours at the applicable NMW rate, which at £8.91 would give £392.04. That is because the full amount of the accommodation allowance is to be regarded as remuneration and not simply the additional sum required to bring the salary of £384.21 per week up to the minimum requirement. This is not a case where, by reference to the totality of the regulations (including 7, 9 (e) and 16) the Claimants have in fact been remunerated at less than the NMW where section 17 of the National Minimum Wage Act 1999 would apply so as to achieve only the £7.83 increase in wages. (The contract is wrongly expressed as applying Regulation 29 of the 1999 Regulations, this is now largely repeated in regulation 50 of the 2015 regulations, but this mistake is not material as neither provision is relevant.)
8. With two years completed continuous service the Claimants are therefore entitled respectively, because of their ages, to three and two weeks' pay. That is at the weekly rate of £442.89. That is the annual salary of £20,000 divided by 52, which is £384.21, plus the additional £58.68 per week.
9. I assess the conventional award for loss of statutory rights in this case at £400, which approximates to the weekly wage.
10. The Respondent has not proved a failure to mitigate loss. The Claimant's had given up good and stable employment to change direction and take on this public house. After

Cases: 2501758/2021 &
2501759/2021

their experience, culminating in being unfairly dismissed, it is not at all unreasonable that they should turn their backs on the licensing trade and seek to resume their previous careers.

11. That involved Mr Groom, who had previously had his own building business, saving up enough to finance the re-obtaining of the health and safety qualification, with a view to then also regaining his Construction Industry licence, which would ordinarily be required if he were to get work on a building site, for instance by registering with an agency. It was not until December 2020 that he had been able to save up enough out of his benefits to fund that retraining. Of course he had not been paid £1622.89 which was owing to him. The fact that when he did in fact secure new employment in January, to start on 6th February 2021 it did not in fact require him to have these qualifications is purely coincidental and exceptional. He has now gone on to obtain further employment at a salary of some £40,000 per annum, which is commensurate with his skills and experience in the building trade. It is not unreasonable for him to have pursued that course, rather than seek another minimum wage job. I also accept that attempts to sound out acquaintances with a view to seeing if temporary work was available was a proportionate attempt to mitigate in the circumstances. And of course the Claimant met the requirements imposed upon him by the benefits agency, and the demands of his job coach, which entitled him to receive Universal Credit whilst unemployed for 24 weeks.
12. The compensatory award for loss of earnings is therefore for the full 24 week period. It is claimed in the Schedule of Loss at £7,714.08 which is evidently calculated at a net rate, £321.42, and that is the sum which the Respondent must pay.
13. Mrs Groom has accountancy qualifications, but had latterly worked in her husband's business. It is entirely reasonable that she should have taken 14 weeks to secure a suitable position, again using her skills and qualifications and at a properly commensurate rate of pay (£24,000 rising to £24,500) which then serves to mark a cut off point in any continuing claim for compensation.
14. The compensatory award for loss of earnings is therefore for the full 14 week period. It is claimed in the Schedule of Loss at £4499.88 which is also evidently calculated at a net rate, £321.42, and that is the sum which the Respondent must pay.
15. The Claimants were both enrolled in the NEST pension scheme, and the loss of employers' contributions for the respective periods of 24 and 14 weeks in the Schedule of Loss at £7.94 per week has not been challenged.
16. In addition the Claimants must be compensated for the loss of the value of their tied accommodation. As I have not factored in the accommodation allowance of £58.68 when assessing the loss of earnings there is no double recovery. The actual net value of a three bedroomed flat, all inclusive, I consider is certainly no less than the £700 per month claimed. This is an integral part of the remuneration package, and without this provision the Respondent would not be paying the NMW. Although the Claimants were able to return immediately to their own home, that does not mean as the Respondent seeks to argue that they suffered no continuing loss. That owned property had been let to a friend at £800 per month and that income was necessarily lost when the Claimants re-took possession. It would however be highly artificial to seek to apportion the value

Cases: 2501758/2021 &
2501759/2021

of what was joint accommodation so as to compensate the Claimants for different time frames. I therefore award each of them compensation only for the 14 weeks up to the cut-off point in Ms Groom's claim for continuing loss of earnings. At a yearly value of £8,400, that is £2261.54, which I split equally between the Claimants.

17. The Recoupment Regulations , which were explained orally, will apply to the loss of earnings award.
18. Th unexpired portion of the due notice period has already been compensated for within the unfair dismissal award, and no separate damages for breach of contract are appropriate.

EMPLOYMENT JUDGE LANCASTER

DATE 24th October 2022

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