

Case Number: 3314849/2021



EMPLOYMENT TRIBUNALS

Claimant

Mr. A Fairclough

AND

Respondent

Mr. P Wiffen

T/A Live and Let Live

HEARD AT: Cambridge Tribunal

(hybrid)

ON: 12 December 2022

BEFORE: Employment Judge Douse (Sitting alone)

Representation

For Claimant: Mrs. K MacLennan, lay representative

For Respondent: In person

RESERVED REMEDY JUDGMENT

1. The Respondent is ordered to pay the claimant the gross sum of **£3,211.62** as payment in lieu of notice
2. The Respondent is ordered to pay the claimant the gross sum of **£12,998.37** in relation to unlawful deductions from wages
3. The Respondent is ordered to pay the claimant the gross sum of **£1,726.56** in relation to unpaid holiday pay

In respect of any gross amount, the respondent can comply with this element of the award by deducting and paying any relevant tax and national insurance, and by providing evidence that this has been paid, before paying the net amount to the claimant. If this is not done, the gross amount is payable to the claimant.

REASONS

1. This remedy judgment follows a liability judgment that:
 - 1.1 The Claimant is entitled to pay in lieu of notice from 19 February 2021;
 - 1.2 The Respondent unlawfully deducted wages from the Claimant from 29 August 2019 to 18 February 2021 inclusive, by failing to pay the National Minimum Wage/National Living Wage (“NMW”);
 - 1.3 The Claimant is entitled to pay for accrued and unused holiday entitlement between 1 April 2020 and 18 February 2021.

General

2. At the relevant time, after 29 August 2019, the Claimant was paid £795 monthly (this equates to £183.46 weekly). He was paid £500, in cash, each month as £295 per month was deducted for accommodation costs.
3. The Claimant worked 40 hours per week at the relevant time. As he was paid the same amount each month, regardless of how many days/weeks in a month, he was effectively paid for 173.33 hours each month.
4. From 1 March 2020, the Claimant was furloughed and received £636 per month (80% of £795) in line with the government’s furlough scheme.
5. The Claimant’s wages claim was based on the Respondent’s failure to pay the NMW, which was:

5.1 £8.21 per hour from 1 April 2019

5.2 £8.72 per hour from 1 April 2020

6. Based on a 40-hour week, between 29 August 2019 and 31 March 2020 the Claimant should have been paid £328.40 per week, before any accommodation costs were taken into account (paid monthly, this would be £1,423.07).
7. Based on a 40-hour week, between 1 April 2020 and 18 February 2021 the Claimant should have been paid £348.80 per week, before any accommodation costs were taken into account (paid monthly, this would be £1,511.47).
8. The Claimant's annual salary would have exceeded the personal tax-free allowance, making him liable for tax and national insurance.
9. Where an employer, provides accommodation to a worker, it is entitled to count a notional amount of providing this benefit, known as the 'accommodation offset', towards discharging its NMW liability in respect of the worker. However, any amount requested from the worker in respect of the living accommodation that exceeds the accommodation offset will reduce the amount of total earnings for NMW purposes. In other words, the worker must still be left with at least the NMW once any excess has been deducted.
10. Where an employer does not charge a worker for using the accommodation provided, it is entitled to deduct the accommodation offset from the worker's pay without this reducing the worker's NMW pay. This may, however, have the effect that the worker's contractual pay is, legally, less than the NMW.
11. As the Claimant's accommodation came with his job, the Respondent was entitled to offset accommodation costs against the NMW, at the following rates:
 - 11.1 £52.85 per week from April 2019 (this equates to £229.02 monthly)
 - 11.2 £57.40 per week from April 2020 (this equates to £248.73 monthly)
12. If an employer charges the same as the accommodation offset or less, the amount charged for accommodation has no effect on the calculation of NMW pay. If an employer charges more than the accommodation offset, any amount that exceeds the offset will reduce the worker's NMW pay.

Notice pay

13. The Claimant's employment was terminated on 19 February 2021.
14. He was entitled to 12 weeks' pay in lieu of notice from that point. 12 weeks at £348.80 per week is £4,185.60.
15. The Claimant continued to be paid furlough until 6 April 2021. The amount paid is to be deducted from the amount of notice pay above.
16. For the pro rata period from 19 until 28 February 2021, the Claimant was paid £222.60.
17. The Claimant was paid £636 furlough for March 2021.
18. For the pro rata period from 1 until 6 April 2021, the Claimant was paid £115.38.
19. The Claimant was paid a total of £973.98 between 19 February and 6 April 2021, which is to be deducted from £4,185.60
20. The Respondent is to pay £3,211.62 to the Claimant in lieu of notice.

Wages

21. The Claimant's pay reference period was a month. His gross monthly pay was £795.

29 August 2019 - 31 March 2020

22. The applicable monthly accommodation offset was £229.02
23. The amount charged in excess of the accommodation offset was £295 - £229.02 = £65.98
24. Subtract the excess from gross pay to calculate NMW pay: £795 - £65.98 = £729.02
25. Find the hourly rate by dividing NMW pay by the hours worked: £729.02 ÷ 173.33 = £4.21 per hour
26. The Claimant was underpaid by £8.21 - £4.21 = £4 per hour.

27. For the full months of September 2019 – March 2020 (7 months), the Respondent unlawfully deducted $\text{£}4.00 \times 173.33 \text{ hours} = \text{£}693.32$ each month from the Claimant's wages.

28. For the pro rata period of 29 - 31 August 2019, the Respondent unlawfully deducted $\text{£}68.19$ ($173.33 \text{ hours} \times 12 \text{ months}$, divided by 366 days = 5.68 hours per day, multiplied by $\text{£}4.00$ per hour = $\text{£}22.73$ per day) from the Claimant's wages.

1 April 2020 – 18 February 2021

29. The applicable monthly accommodation offset was $\text{£}248.73$

30. The amount charged in excess of the accommodation offset was $\text{£}295$ minus $\text{£}248.73 = \text{£}46.27$

31. Subtract the excess from gross pay to calculate NMW pay: $\text{£}795$ minus $\text{£}46.27 = \text{£}748.73$

32. Find the hourly rate by dividing NMW pay by the hours worked: $\text{£}748.73 \div 173.33 = \text{£}4.32$ per hour

33. The Claimant was underpaid by $\text{£}8.72$ minus $\text{£}4.32 = \text{£}4.40$ per hour.

34. For the full months of April 2020 – January 2021 (10 months), the Respondent unlawfully deducted $\text{£}4.40 \times 173.33 \text{ hours} = \text{£}762.55$ each month from the Claimant's wages.

35. For the pro rata period of 1 – 18 February 2021, the Respondent unlawfully deducted $\text{£}451.44$ ($173.33 \text{ hours} \times 12 \text{ months}$, divided by 365 days = 5.7 hours per day, multiplied by $\text{£}4.40$ per hour = $\text{£}25.08$ per day) from the Claimant's wages.

Total

36. The Respondent unlawfully deducted a total of $\text{£}12,998.37$ from the Claimant's wages, as follows:

36.1 $\text{£}68.19$ (29 – 31 August 2019)

36.2 $\text{£}4,853.24$ (1 September 2019 – 31 March 2020)

36.3 £7,625.50 (1 April 2020 – 31 January 2021)

36.4 £451.44 (1 – 18 February 2021)

Holiday pay

37. The Claimant was entitled to 5.6 weeks paid holiday for the holiday year starting 1 April 2020. Based on a 40-hour week, this is 224 hours per year.

38. At the date of termination, 10.65 months of the holiday year had expired and the Claimant had not used any of his entitlement due to being on furlough.

39. 10.65 months of leave equates to 198 hours. At the relevant hourly NMW of £8.72, the Claimant is owed £1726.56 for accrued but untaken annual leave.

Interest accrues at a daily rate of 8% from the date of judgment, unless payment is made within 14 days.

Employment Judge K Douse

Dated: 28 March 2023.....

Sent to the parties on: 11 April 2023

For the Tribunal Office