



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr D Marchel  
**Respondent:** EMGS Recruitment Ltd  
**Heard at:** East London Hearing Centre (by telephone)  
**On:** 09 February 2023  
**Before:** Employment Judge B Beyzade

## Representation

**For the Claimant:** In person  
**For the Respondent:** Not present and not represented

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the tribunal is that:

- 1.1. Judgment having been sent to the parties on 13 February 2023 following oral judgment issued on 09 February 2022 and written reasons having been requested in accordance with Rule 62(3) of the Schedule 1 of the *Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013*, the following reasons are provided.

## REASONS

### Introduction

1. The claimant presented a claim for unauthorised deductions from wages (holiday pay) and breach of Regulation 5 of the Agency Workers Regulations 2010 (difference in pay).

2. A Final Hearing was listed on 09 February 2023 at 2.00pm before an Employment Judge sitting alone with a time estimate of 2 hours. Notice of Hearing was issued to the claimant and respondent on 11 October 2022.
3. At the hearing the claimant appeared in person and the respondent was not present or represented.
4. The Clerk to the Tribunal attempted to make contact with the respondent albeit without success. An email was sent to the respondent on 09 February 2022 at 2.15pm attaching a copy of the Notice of Hearing and advising that the hearing was scheduled to start at 2.00pm, and if the respondent did not attend the hearing by 2.25pm, the Final Hearing will proceed in the respondent's absence.
5. At 2.27pm, as the respondent did not attend the hearing or contact the Tribunal to advise in relation to any reason for their non-attendance, the hearing proceeded in the respondent's absence.
6. I considered the documents on the Tribunal file which included the pleadings, the ACAS Early Conciliation Certificate, Notice of Hearing and standard directions issued to parties, correspondences with the parties, and a copy of the claimant's payslip dated 30 September 2022.
7. I recorded the issues before the Tribunal in the following terms, the claimant being in agreement with these:
  - (1) Whether the claimant should be awarded a sum of money in respect of his unauthorised deductions from wages claim (holiday pay)?
  - (2) Whether the claimant should be awarded equal pay as an agency worker in comparison to a full a time worker pursuant to Regulation 5 of the Agency Workers Regulations 2010?
8. During the hearing, I heard evidence from the claimant.
9. The claimant also made oral submissions, which I took into account and considered fully prior to reaching my decision.

**Findings of Fact**

10. On the documents and oral evidence presented the Tribunal makes the following essential findings of fact restricted to those necessary to determine the list of issues –
11. The claimant commenced employment with the respondent on 23 May 2022 as a Warehouse Operative.

12. He was engaged as an agency worker by Gable Recruitment Limited. He was paid £9.50 (gross) per hour, he worked 5 shifts each week and he worked 8-hour shifts per day (totalling 40 hours per week).
13. The claimant was entitled to 28 days holiday leave (inclusive of bank holidays) per year under his terms of employment. When he worked on a bank holiday, he was entitled to take a day off in lieu of this.
14. During the course of the claimant's employment, he accrued 7 days' holiday entitlement. He was paid in respect of 5 days' holiday entitlement. There were four days during which the claimant did not work, and he was not paid (namely two bank holidays, a day when he took leave due to back pain and an additional day off, he had taken for personal reasons).
15. The claimant received new terms and conditions from the respondent as a PDF file by email. He sent correspondence to the respondent after receiving the new terms they had sent to him advising the respondent that the holiday year differed from his previous terms of employment. The claimant advised that the holiday year in his original contract of employment was from 1 September until 31 August, but under the new agreement that the respondent sent to him his holiday year was to change to 1 August until 31 July.
16. The respondent replied to the claimant advising him that before his previous employer's company had been purchased by them, staff were paid in respect of any untaken holidays, and that he had been paid those dates already (which was sent on 10 August 2022). However, the claimant did not believe that this was correct, so he undertook some online research which suggested to him that his new employer was responsible for his employment and his pay.
17. The claimant left his employment with the respondent on 28 August 2022.
18. Two weeks prior to leaving his employment, the claimant spoke to his manager and asked how much wages he would receive if he had joined the respondent as a permanent employee. The claimant was told that he will receive £9.83 (gross) per hour and that all his other terms relating to hours (and so on) would be the same.
19. The claimant commenced work as a permanent employee on 29 August 2022.
20. The claimant commenced ACAS Early Conciliation on 13 August 2022, and he was issued an ACAS Early Conciliation Certificate on 22 September 2022.
21. The claimant presented his claim to the Employment Tribunal on 25 September 2022.

### Observations

22. On the documents and oral evidence presented the Tribunal makes the following essential observations on the evidence restricted to those necessary to determine the list of issues –
23. The claimant gave evidence on his own behalf. His evidence was clear and consistent. I accepted the claimant's evidence that he was entitled to 28 days' holiday (inclusive of bank holidays) per year. This was consistent with the statutory minimum holiday entitlement. I accepted that his annual leave year in his original contract ran from 01 September until 31 August. There was no evidence that this had been varied or effectively varied by the respondent, and no consultation with the claimant appears to have taken place.
24. Furthermore, I had no difficulties accepting the claimant's evidence that his hourly rate was £9.50 (gross) and that he was told that if he had worked as a permanent employee in the same role during the same period that he worked at the £9.50 per hour rate, he would have been paid £9.83 (gross) per hour. There was no evidence before the Tribunal to explain the difference in treatment (and the claimant was not aware of any reason for the different treatment).
25. The evidence that I heard from the claimant was consistent with the matters contained in the documents including his Claim Form. The respondent did not attend the hearing to challenge the claimant's evidence and they did not provide any reason for their nonattendance.

### The Law

26. To those facts, the Tribunal applied the law –

#### *Unauthorised deductions from wages*

27. Section 13 of the *Employment Rights Act 1996* ("ERA 1996") provides that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised by statute, or by a provision in the worker's contract advised in writing, or by the worker's prior written consent. Certain deductions are excluded from protection by virtue of s14 or s23(5) of the ERA 1996.
28. A worker means an individual who has entered into or works under a contract of employment, or any other contract whereby the individual undertakes to personally perform any work for another party who is not a client or customer of any profession or business undertaking carried on by the individual (s230 ERA 1996).
29. Under Section 13(3) of the ERA 1996 there is a deduction from wages where the total amount of any wages paid on any occasion by an employer is less than the total amount of the wages properly payable by him to the worker on that occasion.

30. Under Section 27(1) of the ERA 1996 “wages” means any sums payable to the worker in connection with their employment including salary and holiday pay. S 27(2)(c) of the ERA 1996 excludes pension contributions from the scope of unlawful deduction from wages claims: *Somerset Council v Chambers* [2017] IRLR 1087 and therefore a claim for pension contributions would need to be brought as a breach of contract claim.
31. The words 'properly payable' refer to a legal entitlement on the part of the employee to the payment (*New Century Cleaning Co Ltd v Church* [2000] IRLR 27). The claimant’s case is that his legal entitlement to payment derives from his contract of employment with the respondent.
32. A complaint for unlawful deduction from wages must be made within 3 months beginning with the due date for payment (Section 23 ERA 1996). If it is not reasonably practicable to do so, a complaint may be brought within such further reasonable period.
33. There is a right to holiday pay arising from the *Working Time Regulations 1998* (“the Regulations”). The Regulations give effect to the Working Time Directive 2003/288/EC (“the Directive”). The Directive is part of retained law under the European Union (Withdrawal) Act 2018.
34. The Regulations state that there is an entitlement to annual leave in Regulations 13 and 13A, which total 5.6 weeks per annum. Compensation related to annual leave is provided for in Regulation 14 for those cases where employment terminates during the course of a leave year. The ability to enforce the rights under the Regulations is conferred in Regulation 30.

*Regulation 5 of the Agency Workers Regulations 2010*

35. The Agency Worker Regulations 2010 (“AWR 2010”) provide by Regulation 5(1)(a) and (b) that temporary work agencies and hirers must ensure that an agency worker who has completed a twelve-week qualifying period receives the same basic working and employment conditions as he or she would be entitled to for doing the same job had he or she been recruited directly by the hirer at the time the qualifying period commenced.
36. The Regulations do not affect the employment status of agency workers or their entitlement to other employment rights.
37. By virtue of Regulation 6 of the Regulations “relevant terms and conditions” means terms and conditions relating to pay, the duration of working time, night work, rest periods, rest breaks, and annual leave. Regulation 6(5) defines “working time” as “any period during which that individual is working, at the disposal of the employer of that individual and carrying out the activity or duties of that individual”.
38. The right to “equal treatment” extends to the terms and conditions that would have been “ordinarily included” in the agency worker’s contract had he or she

been recruited directly by the hirer to do the same job (Regulation 5(2)). That would cover terms and conditions as if the agency worker had been directly employed being the terms and conditions normally set out in standard contracts, a pay scale or structure, a relevant collective agreement or the company Handbook.

39. Under Regulation 18 a complaint to a Tribunal of breach of Regulation 5 must be made within 3 months of the last date of an act of breach or infringement. The Tribunal can extend time if it considers it just and equitable to do so.

*Preparation time orders*

40. *Rule 76 of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (“the ET Rules”) provides:*

*“When a costs order or a preparation time order may or shall be made*

*76.—(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—*

*(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or*

*(b) any claim or response had no reasonable prospect of success; or*

*(c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins.”*

**Submissions**

41. The claimant made oral submissions, which the Tribunal found informative. I will deal with any essential points from those when setting out my own reasoning.

**Discussion and decision**

42. On the basis of the findings made the Tribunal disposes of the issues identified at the outset of the hearing as follows –

*Holiday pay claim*

43. I was entirely satisfied that the claimant gave credible and reliable evidence. I accepted all that he said. I was also satisfied that the claim was within the jurisdiction of the Tribunal.

44. I then considered whether the claimant had demonstrated an entitlement to holidays for 2022, which had not been paid, which fell either as an unlawful

deduction from wages or a breach of Regulation 14 of the Regulations or both. I was satisfied that he had.

45. The holiday year was 01 September until 31 August. The full contractual entitlement was to 5.6 weeks (28 days inclusive of bank holidays). His start date was 23 May 2022 and his employment ended on 28 August 2022. He accrued seven days' leave during that time. Five days' leave had been taken. The balance is 2 days. The period to termination was two days prior to the end of the leave year and the claimant started his employment part way through the leave year. That reduces the entitlement accordingly.
46. I accepted the claimant's evidence that he had taken five days of paid annual leave in the holiday year. I also accepted his evidence that he had two days leave remaining and had remained in employment until he resigned on 28 August 2022.
47. I calculate that the entitlement accrued during the period of employment is 5.6 weeks x 40 hours per week = 60 hours, reduced to reflect the claimant's start and end dates which are short of the full year. 5 days were taken, reducing the total to 2 days (or 16 hours). The balance owed to the claimant is 16 hours. I consider accordingly that the respondent has not paid all the holiday pay that accrued during the holiday year, and that there has been an unlawful deduction from wages, and breach of Regulation 14, as a result. The claimant calculates (and I accept his calculation) that the balance due to the claimant is the sum of £154.64 (gross), from which tax and national insurance requires to be deducted.

*Agency Workers Regulations 2010 claim*

48. The provision within Regulation 5 of the AWR 2010 entitles the claimant to the same "basic working and employment conditions" as he would have been entitled to for doing the same job had he been recruited by the end user directly. Those terms and conditions would include pay and the duration of working time (Regulation 6).
49. Regulation 5 does not apply unless an agency worker has completed the qualifying period of twelve continuous weeks' service in the same role with the same hirer (Regulation 7). The claimant completed that qualifying period and so was entitled to make his claim under Regulation 5.
50. The claimant's discussion with his line manager two weeks prior to the termination of his employment provided him with information on permanent employees' rates of pay at the end user across all shifts at £9.83 (gross) per hour. The hours of work were identified as shifts of eight hours. In terms of the payslip the claimant produced the claimant was being paid at a lower rate than the comparable workers with the end user. The claimant made a calculation of the sums due to him in terms of the period between 22 August 2022 and 28 August 2022. The sum brought out was £13.20 (gross) subject to any required deductions in respect of tax and national insurance.

51. There is no requirement for a comparator according to the AWR 2010 Guidance. In any event I am satisfied that the claimant was treated differently to a permanent worker in respect of pay during the last week of his employment.
52. The Tribunal was satisfied that there was a breach of Regulation 5 of the AWR 2010 in that the claimant was entitled to the same rate of pay and working time as those employed directly at the end user once completing 12 continuous calendar weeks in the role of "Warehouse Operative". The remedy is such compensation as the Tribunal consider is "just and equitable" having regard to the loss attributable to the infringement to include the loss of any benefit which the claimant might have reasonably expected [Regulation 18(8)(10) and (11)]. The Tribunal was satisfied it was just and equitable to award the sum calculated by the claimant.
53. This means that the claimant is entitled to the difference in terms of 40 hours of pay at £0.33 per hour which amounts to £13.20 (gross). This is the calculation which the claimant provided me with (which I accept is the correct calculation).

*Preparation Time Order*

54. The claimant made an application for a preparation time order. The claimant is not legally represented. I gave myself a self-direction on the relevant law, as regards Preparation Time Orders, as set forth at Rules 74 to 84 of the ET Rules.
55. Rule 76(1) provides that a Tribunal may make a costs order, or a preparation time order, and shall consider whether to do so, where it considers that (a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or (b) any claim or response had no reasonable prospect of success.
56. In Employment Tribunal litigation costs or preparation time order awards are usually regarded as the exception rather than the rule. Costs do not follow the event, as in the civil courts, but are only made if one or more of the grounds in Rule 76 are satisfied. Even then, the grounds for making a costs order are discretionary.
57. The Tribunal "may" make a costs order or preparation time order if a ground is made out, but it is not obliged to do so. Nevertheless, so far as grounds (a) and (b) are concerned, the Tribunal "shall" consider whether to make a costs or preparation time order. In other words, Rule 76(1) imposes a two-stage test: first, a Tribunal must ask itself whether a party's conduct falls within Rule 76(1)(a) or (b). If so, it must go on to ask itself whether it is appropriate to



exercise its discretion in favour of awarding costs or preparation time against that party.

58. In this case, neither party is legally represented. As such, both parties are in the same situation, being unrepresented, party litigants, and while neither party is immune to the risk of costs or preparation time order, some account must be given for the fact that neither party is professionally represented. This is relevant to both the threshold test for considering making a costs or preparation time order award and the exercise of discretion whether to do so.
59. Costs or preparation time orders in the Employment Tribunal are designed to be compensatory rather than punitive. Rule 84 also makes it clear that in deciding whether to make a costs order or preparation time order, and if so, in what amount, the Tribunal may have regard to the paying party's ability to pay. There is no obligation to have regard to ability to pay.
60. In the present case, the Tribunal did not have any information in relation to the respondent's ability to pay directly from the respondent. The claimant advised that the respondent's business was a going concern, and they continued to operate as a temporary recruitment agency. According to Companies' House, their filings were up to date.
61. The Tribunal is satisfied that the initial threshold for making a preparation time order against the respondent has been met, subject to the Tribunal's discretion in the matter and its consideration of the respondent's ability to pay an award. Rule 76(1)(a) is satisfied.
62. The claimant relies on the ground that the respondent conducted itself in a manner that could be described as "otherwise unreasonably." The claimant quite properly states he provided the respondent with the correct figures. He states they did not engage with him or pay him the correct amount. The respondent did not attend today's hearing.
63. I consider that the respondent has acted unreasonably. The respondent's conduct falls within Rule 76(1)(a).
64. The Tribunal then asked itself whether it is appropriate to exercise its discretion in favour of awarding a preparation time order against the respondent. The Tribunal acknowledges that the respondent is not legally represented. They are not lawyers nor are they a professional Tribunal advocate. The respondent is a party litigant, who are a temporary recruitment agency. Their lay status does not, however, afford the respondent automatic immunity from an award of a preparation time order against them. The conduct of the respondent is also a relevant factor, as at each stage of the proceedings.
65. This is self-evidently unreasonable, and it has put the claimant to wholly unnecessary wasted time and expenses, together with inappropriate use of judicial resources. I am satisfied it is appropriate to make a preparation order taking into account the correspondences to which I was referred, the

pleadings and the claimant's submissions. I have received no explanation in terms of why the respondent did not attend today's hearing or continued not to pay the claimant the monies owed to him. I will therefore award preparation time.

66. The Tribunal reminds itself that costs and preparation time orders are designed to be compensatory rather than punitive. Nevertheless, subject only to consideration of the respondent's ability to pay, the threshold for an award of costs / preparation time order has been passed in the present case by some margin. Rule 84 makes it clear that in deciding whether to make a costs / preparation time order, and if so, in what amount, the Tribunal may have regard to the paying party's ability to pay. Apart from the information referred to above, no evidence or confirmation of any inability to pay has been provided to the Tribunal. In these circumstances, the Tribunal is left with no evidence at all as to the respondent's ability to pay and so cannot take this matter into account. It is not for the Tribunal to speculate as to the respondent's means or his ability to pay. The Tribunal thus proceeds to consider the amount of an award of preparation time on the basis under Rule 79.
67. This does not mean that the Tribunal can award an arbitrary figure. Regard must be had to the Rules for preparation time orders, and to the actual sum of preparation time incurred. The order must be in respect of preparation time incurred by the claimant as the potential "receiving party." That is, as per Rule 79. The amount of the Tribunal's order must reflect this.
68. The amount being fixed by the Tribunal has not simply been plucked out of the air. The expenses incurred are rational and reasonable sums to have been incurred by the claimant, in preparing for and attending the Final Hearing in person at London East Employment Tribunal (remotely).
69. Although a detailed assessment is not being undertaken here, the preparation time incurred by the claimant has been subjected to my judicial scrutiny and a summary assessment.
70. The claimant advised that he has spent 18 hours working on his claim. He has not provided a breakdown of how much time was spent on each activity.
71. In terms the amount of preparation time claimed, the claimant claims 18 hours. I am not satisfied that the claimant has spent 18 hours preparation time in relation to his claim and he has provided no breakdown of his time spent. He submitted that he is seeking the amount of £171.00. I do not consider this sum to be reasonable or proportionate given the circumstances. Rule 79(2) of the ET Rules states I can award £42.00 (as at 6 April 2022) for each hour that I believe has been properly spent by the claimant in terms of his preparation time. Without any breakdown from the claimant and taking into account the nature and the gravity of the respondent's conduct, I award £99.00 to the claimant.

72. Specifically, I have assessed that the claimant will reasonably and necessarily have spent at least 2.36 hours in preparing, over the period from the date of issue of his claim to 9 February 2022, and at the applicable hourly rate of £42.00, in force since 6 April 2022, that computes as the sum awarded by me in respect of preparation time at £99.00.
73. I find the amount of £99.00 is a reasonable sum in all the circumstances. As such, I have awarded that sum to the claimant by way of a preparation time order award under Rule 79, in respect of the claimant's preparation time incurred in connection with his attendance as a witness and party litigant at the Final Hearing held on 09 February 2023.

### **Conclusion**

74. The claimant's claim for unauthorised deductions of wages (holiday pay) succeeds in respect of which the claimant is awarded £154.64 (gross) subject to any required deductions in respect of tax and national insurance. The claimant's claim for breach of Regulation 5 of the Agency Workers Regulations 2010 succeeds, and the claimant is awarded £13.20 (gross), subject to any required deductions in respect of tax and national insurance. A preparation time order is made, and the respondent is ordered to pay to the claimant the amount of £99.00 in respect of his preparation time.

**Employment Judge B Beyzade**

**Dated: 10 July 2023**