



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4101754/2023

**Final Hearing held in Glasgow remotely by Cloud Video Platform
on 3 July 2023**

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Employment Judge A Kemp

15 **Mr Dilan Flanagan**

**Claimant
In person**

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SBC Empire Ltd

**Respondent
No appearance**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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- 1. The respondent made unlawful deductions from the wages of the claimant, and is in breach of their contract with him, and the claimant is awarded the sum, net of any tax if due, of ONE THOUSAND THREE HUNDRED AND SEVENTEEN POUNDS THIRTY NINE PENCE (£1,317.39), payable by the respondent.**
- 2. The claim of unfair dismissal is dismissed as the Tribunal does not have jurisdiction to consider it.**

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REASONS

Introduction

1. This was a Final Hearing, held remotely. The claims are for unlawful deductions from wages, firstly for pay and secondly for accrued annual leave, and for notice pay as a claim for breach of contract. The respondent has not defended the claims and did not appear at this hearing. This hearing was therefore conducted to assess the remedy to which the claimant was entitled, as the sole issue before the Tribunal.
2. The claimant had initially sought to claim unfair dismissal in his Claim Form, but for that required to have two years' continuous service, under section 108 of the Employment Rights Act 1996, which he did not have. The Tribunal does not have jurisdiction for that claim.

Evidence

3. The claimant had prepared and intimated documents that he wished to rely on. He gave evidence orally, and in doing so read out details of online records of payments made by the respondent to his bank account.

Facts

4. The following facts, material to the issues before the Tribunal, were found to have been established:
5. The claimant is Dilan Flanagan.
6. The respondent is SBC Empire Limited. It is a company incorporated under the Companies Acts. It operates Oscar Bar and Kitchen in Glasgow ("the restaurant").
7. The claimant was employed at the restaurant by the respondent as a Kitchen Chef, commencing on 27 December 2021.
8. The claimant worked normally around 35 hours per week, five days per week, and was paid on the basis of an hourly rate of £10.50. His net weekly wage was on average £227.89.

9. On or around 30 December 2022 the claimant was summarily dismissed by the respondent. No notice was given to the claimant.
10. The claimant had had retained from his wages as what the respondent described as a lie payment the sum of £250, in around August 2022. That
5 has not been paid to him.
11. The holiday year was the calendar year. In 2022 the claimant took three days' holiday, for which he was paid. He received the sum of £300 to account of holiday pay due from the respondent on or around 21 December 2022.
- 10 12. The claimant commenced Early Conciliation on 14 January 2023. The Certificate was dated 6 February 2023. The Claim Form was presented on 17 February 2023.

The law

13. The Employment Rights Act 1996 ("the Act") provides for a right not to
15 have unlawful deductions made from wages under section 13. Wages are defined in section 27 to include pay and holiday pay. A claim may be taken to the Tribunal under section 23. There is an entitlement to annual leave under the Working Time Regulations 1998 ("the Regulations"). The Regulations implement the Working Time Directive 2003/88/EC and
20 require a purposive interpretation in that regard so far as they do so. The Directive is retained law under the European Union (Withdrawal) Act 2018. The entitlement to holidays is set out in Regulation 13 as four weeks, implementing the Directive, and in Regulation 13A as an additional 1.6 weeks, which is a UK measure. The total is to 5.6 weeks for the full year.
25 For those working five days per week that equates to 28 days, which is a maximum figure for annual leave under the Regulations. There is an entitlement to payment for leave accrued but untaken as at the date of termination of employment under Regulation 14. The amount is related to the week's pay, and amounts to a proportion of the full year taken where
30 the period of employment is less than a year. It may be an unlawful deduction from wages if not paid, or a claim may alternatively be made under Regulation 30.

14. A claim may be made under the Employment Tribunals (Extension of Jurisdiction) (Scotland) Order 1994 for a breach of contract where that arises or is outstanding on termination.

Discussion

5 15. I was satisfied that the Tribunal had jurisdiction. I considered that the claimant was honest and reliable in his evidence. Whilst this was a hearing on remedy only it did appear to me from what was said in evidence that there had been no proper basis for the summary dismissal. There was no evidence of wrongdoing on the claimant's part. The claims were not
10 defended, and I was satisfied that the claim for breach of contract by dismissing without giving notice was well founded in any event.

16. Calculating the sums due was not straightforward. The claimant had not been provided with payslips for most of the payments made to him, with pay paid weekly, but the respondent did provide a form which included the
15 rate of pay of £10.50 per hour, which was gross. His hours of work varied but were normally around 35 hours per week on average. There were however some periods where the hours worked were less, as less work was available.

17. He provided details of the net income he received in the period from
20 5 October 2022 to the last payment before termination on 21 December 2022. From that I calculated that his net weekly wage was £227.89 on average during that period. That figure was I considered the proper basis to use to calculate holiday pay, having regard to the terms of sections 212 to 214 of the Act.

25 **Unlawful deduction from wages**

18. I accepted firstly that **£250** had been retained for a lie payment, from around August 2022, and that that had not been paid and was therefore due as an unlawful deduction from wages.

19. The second aspect of the claim of unlawful deduction from wages is for
30 accrued holiday pay. I accepted the claimant's evidence on this, that he had a holiday year of the calendar year. His entitlement was to 28 days for the full year, and the dismissal was on 30 December 2022, with the

extra day being *de minimis*, and separately the claimant had a right to a week's notice which would have taken him beyond the full calendar year. He had taken and been paid for three days' holidays in 2022, leaving a balance due at termination of 25 days. He worked five days per week, such that the net daily rate was £45.58. At that rate the amount outstanding for 25 days under Regulation 14 of the Regulations is £1,139.50. He confirmed that on 21 December 2022 the respondent had paid a sum of £300, said to be for holiday pay and which I consider must be taken to be a payment towards the sum due. That leaves the sum outstanding of **£839.50**. That has not been paid to him such as to be an unlawful deduction from wages in that sum.

20. The claimant had separately an entitlement to notice at a minimum level having regard to section 86 of the Employment Rights Act 1996 of one week, and that is due, which is the net sum of **£227.89**. The claimant did not work during that period but did seek to mitigate his loss, and secured a new role on 10 January 2023. I was satisfied that that sum was the appropriate measure of damages for the respondent's breach of contract in not giving him notice of termination of employment, as he was entitled to.

20 **Conclusion**

21. The total award of those sums is the sum of **£1,317.39**, and I award that sum to the claimant. This has been calculated net of tax, as I am required to. I understand that no tax is due on the sum, but if any tax is due, for the avoidance of doubt the responsibility to pay that falls on the respondent.

25 The claim of unfair dismissal requires to be dismissed.

30 **Employment Judge: A Kemp**
Date of Judgment: 18 July 2023
Entered in register: 19 July 2023
and copied to parties