



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr S Sharma  
(and respondent in the counterclaim)

**Respondent:** Samanta Private Ltd  
(and claimant in the counterclaim)

**Heard at:** Hull (by Video)                      **On:** 28 July 2023

**Before:** Employment Judge Miller

**Representation**

Claimant: in person  
Respondent: Mr S Samanta (director)

## RESERVED JUDGMENT

1. The claimant's claims of unauthorised deductions from wages and breach of contract in respect of additional pay for additional hours worked is not well founded and is dismissed.
2. The claimant's claims of unauthorised deductions from wages and breach of contract in respect of his wages for December 2022 are well founded, The respondent must pay the claimant the **gross** sum of **£2133.33**.
3. The claimant's claim of unauthorised receipt of a payment under section 15 Employment Rights Act 1996 by his employer in his capacity as employer is well founded and the respondent must pay the claimant the net sum of **£2,000**
4. The respondent's claim for breach of contract is well founded and the claimant must pay the respondent the sum of **£1808**.

# REASONS

## Introduction

1. The claimant was employed by the respondent as a Chef in the respondent's Indian restaurant in Ilkley from mid December 2021 until 31 December 2022. The exact start date is not material. The claimant undertook early conciliation from 17 January 2023 until 20 February 2023 and he submitted his claim to the Tribunal on 28 February 2023. The claimant brought claims for breach of contract and unauthorised deductions from wages.
2. The respondent responded on 23 March 2023 denying the claims and made an employer's counter claim for breach of contract. The claim for breach of contract appeared to be for repayment of the remainder of a loan that was outstanding on the claimant's termination of employment and payment for some additional meals, in excess of his allowance, that the claimant ate at the restaurant.
3. The claimant responded to the counter claim. In so far as it turned out to be relevant (see below) the claimant said there was no written contract between him and the respondent requiring him to repay any loan. The claim and counterclaim were listed to be heard together at this hearing.
4. The respondent had produced a file of documents, which was agreed by the claimant. I was also provided with some WhatsApp messages, which the claimant had also seen, and a copy of a forecasted and actual rota, again which the claimant had.
5. The claimant had not produced a witness statement, and I allowed him to give oral evidence at the hearing. I also allowed oral evidence from Mr Rahul Sutradhar on behalf of the claimant. He is the claimant's new employer and a mutual friend of the claimant and the respondent's owner, Mr Samanta. Mr Samanta was representing the respondent and had produced a witness statement. I also allowed Mr Samanta to give additional oral evidence.
6. At the start of the hearing, I clarified the issues. They are as follows:
7. The claimant's claim was for:
  - a. Payment of overtime for hours worked in excess of 48 hours per week
  - b. Payment of his wages for the month of December 2022
  - c. Repayment of deductions of £200 per month for ten months.
8. The first two claims were put as claims of breach of contract and unauthorised deductions from wages. The third claim is a claim of a receipt of unauthorised payments from a worker by their employer.

9. The respondent's counter claim was as follows. The respondent says that they had lent the claimant £3808 to cover the costs of him moving from India to work for the respondent. The claimant had agreed to repay that at £200 per month, which he had done for ten months during his employment, and there was £1808 outstanding on the termination of his employment. The respondent is counter claiming for that amount.
10. Mr Samanta clarified that the respondent was not making a claim for payment for additional meals and there is no claim related to tips (as potentially suggested in the response/counterclaim form).
11. This case was listed for a 2 hour hearing I had time to hear evidence and submissions but there was insufficient time to make a decision and give judgment before my next case so I reserved the decision.

### **Findings of fact**

12. The claimant, an experienced chef, agreed to move from India to work for the respondent at its restaurant in Ilkley. The respondent had originally been seeking to recruit a chef in the UK but had not had success. As he was, or at least had been, friends with the claimant, Mr Samanta offered the job directly to the claimant.
13. The respondent had to agree to sponsor the claimant for the purposes of his immigration status and Mr Samanta said that that had come at a cost of over £4,000 to the respondent.
14. There were some conversations between Mr Samanta and the claimant before he travelled to the UK. Some of these conversations were by way of exchange of WhatsApp messages, and some were telephone calls. When the claimant initially found out about the cost of coming to the UK, he told Mr Samanta that he could not afford it. He could pay some of the costs, but his savings were insufficient to cover the whole costs.
15. It is agreed that the respondent agreed to make a payment to, or on behalf of, the claimant to cover his Visa costs in the sum of £3808. It is disputed whether that payment was by way of a loan or a non-repayable payment. There is nothing in the written WhatsApp messages about this arrangement. The claimant and Mr Samanta agree that this arrangement was concluded in telephone calls.
16. Mr Samanta said that the agreement was for the claimant to repay the amount at £200 per month. The claimant said that Mr Samanta had said he "would take care of that", meaning his additional costs, in a telephone call which the claimant says he understood to mean that the respondent would pay those additional costs without requiring repayment.
17. When the claimant started working for the respondent, he did start transferring £200 every month to Mr Samanta's wife. This was from February 2022, the last payment being made on 8 December 2022. I do not know why the money was paid to Mr Samanta's wife (who is also part of his business). Mr Samanta did not seek to argue that the payments were for

anything else other than the repayment to the respondent. It was agreed at the hearing that this is what they were for. I find that the money was initially paid from the respondent, not from Mr Samanta or his wife personally and that the repayments of £200 were for the benefit of the respondent.

18. At this time, the claimant was staying with Mr Samanta and paying him some board. It is clear that some payments made to Mr Samanta's wife comprised payments for board plus the £200 payment.
19. The claimant did not have the payments deducted from his wages. He arranged the transfer of the money. He said that he was forced to make the payments or else the respondent would have sent him back home. He said that the respondent threatened to dismiss him and he had spent all his savings and would be jobless if he went home.
20. I also note that Mr Samanta said in his witness statement, which was not challenged, that he had in fact paid for the claimant to return home to visit his father, who was very ill, in March 2022. Whether that was a gift or a loan is unclear, but it does not seem to be material.
21. I prefer Mr Samanta's evidence about the arrangement for the sum of £3808. It is consistent with the claimant arranging to pay back the £200 each month. I find that the claimant's account of Mr Samanta's conduct is implausible. I find that the respondent agreed to lend the claimant £3808 to cover some of the costs of moving to the UK from India including his visa costs and the claimant knew, and agreed, that he would repay it at £200 per month.
22. The claimant was employed as a chef on salary of £25,600. The claimant said that this is the minimum salary for a sponsorship arrangement.
23. The claimant says that he was contracted to work for 48 hours per week but in fact he worked many more and is owed money for those hours.
24. The respondent produced a copy of a contract that Mr Samanta said sets out the terms of the contract. This is dated 25 December 2022 and signed by Mr Samanta but not by the claimant. The claimant said he did not receive a copy and Mr Samanta fairly accepted that that might be true. However, he said that the contract did reflect the terms agreed even if it had not been provided.
25. I find that the claimant did not receive a copy of the contract until these proceedings. The written contract provides, at paragraph 5, that  
  
"Your normal hours per week are 48. You may be required to work such additional hours in excess of your normal hours as are reasonably necessary for the proper performance of your duties and to meet the needs of the Company's business. No extra payment will be made for any additional hours worked, unless expressly authorised by your line manager".

26. Of course, I have found that the claimant did not receive a copy of this contract so these terms cannot be said to apply to him by reason of the fact that they are written in the contract. However, I find that Mr Samanta did explain to the claimant, before he moved to the UK, that there is what he described as a different work culture in the UK. In effect, he said that in a small business in the UK everyone is expected to contribute to all the jobs including cleaning and similar jobs that might not be expected of a chef in a larger establishment. I find, therefore, on the balance of probabilities that these terms reflect broadly what was discussed between the parties about the job.
27. The claimant also complained that he was required to do cleaning jobs, kitchen porter jobs and to work longer hours. Mr Samanta said that although the claimant was a very good chef, his hygiene standards were not at the standard required in the UK and that he had to provide additional training to the claimant to get him up to standard.
28. The other relevant matter is that the claimant complained that he was not required to clock in and out of work. The implication was that the claimant was forced to work more unrecorded hours than other workers who did clock in and out.
29. Mr Samanta's evidence was that only hourly paid staff were required to clock in and out, salaried staff were not, and salaried staff were expected to work such hours as were required. The claimant said that it must be the rule that everyone should clock in and out – that has always happened at other places he worked.
30. I prefer Mr Samanta's evidence about this. It is consistent with the time recording screen shots I have seen. I also note that the fact that other places that claimant has worked required all employees to clock in and out is irrelevant. There is no rule that requires such a process in this jurisdiction.
31. Further, in respect of this point, Mr Samanta said that periods after work would be spent sharing a beer. In challenging Mr Samanta about this, the claimant referred again to having to do Kitchen Porter tasks after the kitchen closed.
32. I also find that the claimant knew he was a salaried (rather than hourly paid) employee. He said that he was underpaid initially when he came, although that is not part of his claim, and from December 2021 or January 2022 he was paid his full salary. His complaint then was that the number of staff reduced so he had to do more work and the parties agree that the restaurant was struggling financially somewhat. I heard no evidence that the claimant asked, at any time to be paid overtime. He did ask if he could clock in and out but was told no.
33. On balance, I prefer Mr Samanta's evidence and find that it was agreed that the claimant would be salaried, that he would need to work such hours as were required to make the restaurant work and that there was never any agreement that the claimant would be paid extra for working in excess of 48 hours per week.

34. I heard some argument about how many extra hours the claimant actually worked, but in the event it is not necessary for me to make any specific findings about that.
35. In September 202, the claimant decided he no longer wanted to work for the respondent. There was some discussion about notice, but it is not material to this claim. The claimant worked in December 2022 and his last day was 31 December 2022. He worked late that night.
36. Mr Samanta believed that the claimant was going to return to India after leaving his employment. He was therefore concerned how the claimant would repay the remaining money he said he owed the respondent which was £1808. I prefer Mr Samanta's evidence that the claimant said he would continue paying him £200 per month. Mr Samanta was concerned about this because of the difficulty in transferring money from India to the UK. He therefore decided to withhold the whole of the claimant's pay and treat the debt as satisfied.
37. Mr Samanta agreed that the claimant had not agreed to the money being withheld and he had not certainly agreed in writing. It was a unilateral decision by Mr Samanta.

### **Law and conclusions**

38. In respect of the claim of unauthorised deduction from wages, section 13 Employment Rights Act 1996 says, as far as is relevant:

#### **13 Right not to suffer unauthorised deductions**

(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) ...

(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.

39. The Employment Tribunal has the jurisdiction, under section 13 (3) Employment Rights Act 1996 to determine whether a sum is properly payable including the jurisdiction to determine the meaning of any

contractual terms in dispute. The interpretation of the contract is a question of law (*Agarwal v Cardiff University* [2019] IRLR 657).

40. Section 15 of the Employment Rights Act 1996 says:
- (1) An employer shall not receive a payment from a worker employed by him unless—
    - (a) the payment 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 payment.
  - (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 receiving the payment 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) For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the receipt of a payment on account of any conduct of the worker, or any other event occurring, before the variation took effect.
  - (4) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the receipt of a payment on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.
  - (5) Any reference in this Part to an employer receiving a payment from a worker employed by him is a reference to his receiving such a payment in his capacity as the worker's employer.
41. I have been unable to identify any commentary or case law about the meaning of "capacity as the worker's employer". The purpose of part 2 of the Employment Rights Act 1996 is to ensure that workers receive the amount of wages that they earn. There must, in my judgment, be some connection between the reason for the payment and the relationship of worker and employer for subsection 5 to be satisfied. It is, my view, an anti-avoidance provision so that employers cannot avoid the provisions of section 13 by enforcing repayment later wages have arrived in the hands of the employer.
42. The provision refers to the receiving of a payment, it does not require the compelling of a payment or a provision requiring payment to be made, just that payment is received, in the employer's capacity as employer, from an

employee. In my view, therefore, where there is a payment from a worker to an employee, the burden must fall on the employer to show that any payment is received other than in the capacity of employer. It seems likely that this is a question of fact to be determined on the particular circumstances, and I set out my conclusions about this below.

43. In respect of the remedies available to the Tribunal where it finds there has been an unauthorised deduction from wages, or an obligation to make a payment to the employer, section 24 Employment Rights Act 1996 provides that the tribunal shall make a declaration to that effect and shall order the employer to repay the amount found to have been deducted or received by the employer.
44. Any claim to the tribunal must be made within three months of the deduction or payment or, where there is a series of deductions or payments, within three months of the last one.
45. In respect of breach of contract, the provisions of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 apply as follows:

Extension of jurisdiction

3 Proceedings may be brought before an [employment tribunal] in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if—

(a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;

(b) the claim is not one to which article 5 applies; and

(c) the claim arises or is outstanding on the termination of the employee's employment.

4 Proceedings may be brought before an [employment tribunal] in respect of a claim of an employer for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if—

(a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;

(b) the claim is not one to which article 5 applies;

(c) the claim arises or is outstanding on the termination of the employment of the employee against whom it is made; and

(d) proceedings in respect of a claim of that employee have been brought before an [employment tribunal] by virtue of this Order.



46. This means that the Tribunal has the jurisdiction to hear a claim for breach of contract by an employee if the claim is outstanding on the termination of the employment, and the respondent can bring a counter claim for breach of contract against the employee if the employee has brought a claim for breach of contract.
47. The exclusions are not relevant to this case.
48. In terms of determining the contract terms, it is a matter of law as to the meaning of a contract. There is no requirement, for a breach of contract claim, for the contracts in dispute to be in writing. I must simply decide if there has been agreement (offer and acceptance), consideration between the parties and intention to create legal relations.
49. Damages for breach of contract are awarded on the basis that any damages should put the claimant in the same position as if the contract had been performed. This includes damages for losses arising directly and naturally from the breach.

### **Conclusions**

50. I consider first the claim for underpayment of wages for hours worked.
51. As set out above, the first question is whether in respect of this claim, the claimant received the wages that were properly payable. In so far as it applies to the claims before me, the claimant agrees that he received his salary of £25,600 per year. I must therefore decide if there was a contractual agreement that the claimant would be paid for any hours worked in excess of 48 hours per week.
52. In my judgment, there was no such agreement. I have found that the claimant knew he would receive a salary. I have found that Mr Samanta explained the different work culture to the claimant. The claimant might have had a belief, or even an expectation, that he should be paid extra for the hours he worked above 48 per week, but that was not agreed with the respondent. It is, in this case, for the claimant to show that there was an entitlement to additional hourly rate of pay and how much that was. The claimant has not done so.
53. The claimant did, therefore, in respect of this part of his claim, receive the wages that were properly payable. Consequently, the respondent is not in breach of contract for failing to pay correct wages and nor has there been an unauthorised deduction from the claimant's wages in relation to the claim for additional hours worked.
54. I consider next the claims related to the claimant's costs of travelling to the UK.
55. Firstly, I find that there was an agreement between the claimant and the respondent for the respondent to lend the claimant £3808. It is not disputed that the respondent paid the claimant this money, and in my judgment it is a question of fact whether it was an agreement for a loan, or a gift. I have

found that I prefer Mr Samanta's evidence and the agreement was for a loan.

56. The elements of a contract were present – there was offer and acceptance – the claimant said he could not afford to move to the UK, the respondent said if he comes then the respondent would provide an interest free loan and the claimant agreed to come on that basis. There is therefore also consideration. Although Mr Samanta and the claimant were friends, this was a business deal – it was to allow the claimant to work for the respondent. There was therefore intention to create legal relations.
57. I also find, for reasons set out above, that there was an oral agreement for the claimant to repay the loan at £200 per month. In purely common law terms, then, the claimant had a contractual obligation to repay the respondent. However, the agreement was not set out in writing.
58. In my judgment, the provision of section 15 Employment Rights Act 1996 do apply to these payments. The respondent did receive payments from its worker (the claimant). There is no statutory obligation for the claimant to make the payments, and the agreement to make the payments was not made or recorded in writing as required by sections 15 (1) and (2).
59. The question is whether the payment was received in the capacity of the claimant's employer.
60. In my judgment, it must have been. The purpose of the loan was to enable the claimant to work for the respondent. This was inherently linked to the respondent's capacity as the claimant's employer. The claimant had made it clear that he would not be able to work in the UK for the respondent without the loan – it was therefore inherently connected with the claimant's employment and therefore with the respondent's capacity as the claimant's employer.
61. The payments were received as repayment of the loan. Had the respondent not made the loan as employer, the claimant would not have repaid the payments. Were it not for the relationship of worker and employer, there would have been no loan and no payments.
62. For these reasons I find that the payments were received by the respondent in its capacity as the claimant's employer.
63. The provisions of section 15 are clear. Even though there was, I have found, an oral agreement that the claimant would repay the money, because it was not agreed in writing or an oral agreement was not later confirmed in writing prior to the first payment, the payments are prohibited under part 2 of the Employment Rights Act 1996.
64. There was obviously and clearly a series of payments, payment being made regularly each month, the last being in December 2022. The claim for all of the payments is therefore in time in accordance with section 23 of the Employment Rights Act 1996. There were ten payments of £200. There has therefore been an unauthorised receipt of payments by the respondent from the claimant in the sum of £2000.

65. I have no discretion under section 24 of the Employment Rights Act 1996. I must order that the respondent pays the claimant the amount of the unlawfully received payments. I therefore order that the respondent must pay the claimant the sum of £2000.
66. I consider finally the claim and counter claim in respect of the December pay.
67. The claimant was entitled to 1/12 of his salary of £25,600 for December 2022 being £2,133.33 (gross). The claimant did not receive any of his salary as it was withheld as payment for the remaining £1808 of the loan. It is agreed that this was withheld without any written, statutory or contractual authorisation. The claimant clearly did not receive the wage that was properly payable and his claim of unauthorised deductions from wages and breach of contract succeeds in respect of the December 2022 payment.
68. However, the respondent has counter claimed for £1808 being the amount of outstanding loan owed to him. I have found that there was an agreement for the claimant to repay the loan and it was agreed that the amount outstanding at the termination of the claimant's employment was £1808. I therefore find that the respondent's counter claim for breach of contract for failing to make the requisite loan repayments succeeds.
69. I order that the respondent must pay the claimant the gross sum of £2,133.33 in respect of the unauthorised deduction from wages for the claimant's pay in December 2022 but also that the claimant must pay the respondent the sum of £1,808 as damages for his breach of contract in not repaying the loan.

Employment Judge Miller

Date 7 August 2023