



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103123/2023

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Held in Inverness on 16 August 2023

Employment Judge M Sutherland

10 **Mr Sam Cumming**

**Claimant
In Person**

15 **Mills Milk**

**Respondent
No response and
No appearance**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

25 The judgment of the Tribunal is that the respondent has made an unlawful deduction from wages and that the claimant is entitled to payment of the following sums -

1. holiday pay in sum of £350 (gross)
2. arrears of wages in sum of £800 (gross)
3. repayment of employee pension contributions in sum of £80 (gross)

30 It is for the respondent to make any deductions for any tax and employees' national insurance due on these sums and to account to HMRC.

ETZ4(WR)

REASONS

Introduction

1. The claimant had presented complaints of unlawful deduction from wages in respect of failure to pay holiday pay, arrears of pay, and repayment of employee pension contributions which were not resisted by the respondent.
5 The claimant confirmed at this hearing he was not seeking payment of notice pay.
2. A final hearing was listed for today to determine all issues including remedy and was conducted by video (CVP).
3. The claimant gave evidence on his own behalf. He had not lodged any
10 documents but made reference to his payslips during the hearing.
4. During the course of the hearing the claimant raised concerns that he had not been paid minimum wage because some of his shifts were longer than 9½ hours. Following discussion he confirmed that he did not seek to make an application to amend and would instead raise the issue with HMRC.

15 Findings in fact

5. The Tribunal makes the following findings in fact:
6. The respondent operates a Scottish milk delivery business. The claimant was employed to deliver milk. His first day of work was 1 March 2023 and his last day of work was 21 April 2023. He resigned on 23 April in respect of a dispute
20 regarding sickness absence. He worked 4 nights a week (Sunday, Monday, Wednesday and Thursday) and was paid £100 gross per night. He was paid on Friday of each week fortnightly in arrears.
7. He did not take any holidays during his employment.
8. An employee pension contribution of £16 was deducted from his wages each
25 week despite having opted out of auto enrolment timeously.
9. He last received payment of wages on 21 April which was in respect of work undertaken to 7 April. He had not received payment of wages for work undertake between 8 April and 23 April.

Observations

10. The standard of proof is on balance of probabilities, which means that if the Tribunal considers that, on the evidence, the occurrence of an event was more likely than not, then the Tribunal is satisfied that the event did occur.
- 5 Facts may be proven by direct evidence (primary facts) or by reasonable inference drawn from primary facts (secondary facts).
11. The claimant came across as entirely credible and reliable in his testimony although it is recognised that his evidence was not tested under cross examination.

10 **Relevant Law***Unlawful deduction from wages*

12. Section 13 ERA 1996 provides that an employer shall not make a deduction from wages of a worker so employed unless the deduction is required or authorised by statute, or by a provision in the workers 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.
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13. Under Section 13(3) 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.
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Holiday pay

14. Under the Working Time Regulations 1998 (WTR) workers are entitled to 5.6 weeks' annual leave. Annual leave must be taken, and may not be replaced by a payment in lieu except upon termination in the final leave year. Where there is no relevant written agreement the leave year begins on the anniversary of an employee's start date. A week's holiday pay is calculated with reference to the average gross pay in the 52 weeks preceding termination.
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Decision

15. As at his termination date the claimant had accrued 0.81 weeks of annual leave (53 days (1 March to 23 April)/365 days x 5.6 weeks days). The claimant worked 4 days a week. The claimant was therefore due 3.3 days of holiday.
- 5 A fraction less than a half falls to be treated as a half. The claimant had not taken any leave. The claimant was paid £100 a day. Accordingly, the claimant is due holiday pay in sum of £350 (3.5 days x £100).
16. The claimant did not receive payment of wages on 28 April and 5 May in respect of work undertaken in weeks ending 14 April and 21 May. Accordingly,
- 10 the claimant has suffered an unlawful deduction from wages in the sum of £800 (2 x £400) (gross).
17. The respondent deducted £16 each week in respect of employee pension contributions but the claimant had opted out of auto enrolment timeously. Accordingly, the respondent is due to repay to the claimant £80 (5 weeks x
- 15 £16).

Employment Judge: M Sutherland**Date of Judgement: 16 August 2023**

20 **Date sent to Parties: 17 August 2023**