



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101937/2023

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Held via Hybrid in Glasgow on 9 October 2023

Employment Judge P O'Donnell

10 **Mr D Palethorpe**

**Claimant
In Person**

15 **Trossachs Pie & Pastry Company Ltd**

**Respondent
Represented by:
Mr Stewart – Owner/
Director [via CVP]**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that:

- 20 1. The claimant was dismissed by the respondent on 17 January 2023 and that he was dismissed without notice. The Tribunal awards the claimant the sum of £495 (Four hundred and ninety five pounds) as damages for this breach of contract.
- 25 2. The respondent has made an unauthorised deduction from the claimant's wages and is ordered to pay the claimant the sum of £614.35 (Six hundred fourteen pounds and thirty five pence).
3. The respondent has failed to pay the claimant's holiday entitlement and is ordered to pay the claimant the sum of £346.50 (Three hundred forty-six pounds and fifty pence).

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REASONS

Introduction

1. The final hearing had originally called on 17 August 2023. For reasons set out in a Note of that diet of the hearing, it had not been possible for the hearing
5 conclude. The Tribunal does not intend to repeat those reasons and the previous Note is referred to for its terms.
2. The issues to be determined by the Tribunal were identified at the previous diet as follows:
 - a. A claim of breach of contract in respect of notice pay. This claim turns
10 on the question of whether or not the claimant was dismissed.
 - i. It is the claimant's position that he was dismissed by Mr Stewart (on behalf of the respondent) on 17 January 2023 based on the words used during a dispute relating to duties the claimant was being asked to perform.
 - 15 ii. The respondent's position is that the claimant resigned by refusing to carry out painting in the bakery and walking out.
 - iii. If there was a dismissal then it is not in dispute that the claimant was not given any notice by the respondent. The notice pay claim, therefore, turns solely on the question of whether or not
20 there was a dismissal.
 - b. There is a claim of deduction of wages. The claimant does not consider that he has been paid for all of the hours actually worked during his employment. There are two issues to be resolved:
 - i. Whether the claimant has been paid for all the hours he worked.
25 There is a dispute between the parties as to the number of hours worked by the claimant.
 - ii. Whether the respondent lawfully deducted the sum of £495 from the claimant's final salary. The respondent say that they

are authorised to make such a deduction by clause 4.4 of the contract because the claimant resigned without notice.

- 5 c. A claim for holiday pay which the claimant says is due either on the basis that he was not paid for holidays over the Christmas and New Year period 2022/23 when the business was closed or that he had not been received pay in lieu of untaken holidays at the end of his employment. It was not in dispute that some form of holiday pay was due and this claim turned on the amount payable.

Evidence

- 10 3. The Tribunal heard evidence from the claimant and from David Stewart on behalf of the respondent.
4. There were certain matters where there was a dispute of fact between the claimant and Mr Stewart which were crucial to the determination of the issues in this case. The Tribunal will address how it resolved those disputes when it sets out its decision below.
- 15 5. Parties had produced various documents at the last diet of the hearing and in advance of this hearing. These documents were not in any form of paginated or chronological bundle and will be identified below by way of description of the document.

20 Findings in fact

6. The Tribunal made the following relevant findings in fact.
7. The claimant commenced employment with the respondent as a bakery production operative on 5 December 2022.
8. The respondent is a bakery and shop, owned and run by Mr Stewart. The
25 respondent sells its products from its own shop as well as supplies goods to other businesses. The number of employees fluctuates depends on the amount of work but there is usually about three people working in the business including Mr Stewart and his wife.

9. The job was advertised at £10.50 an hour but this was increased to £11 an hour shortly after the claimant started his employment and the payslips provided by the parties show that all wages paid to the claimant were paid at £11 an hour.
- 5 10. A written contract was provided to the claimant by Mr Stewart. This contract was not signed by either party but there was no dispute between the parties that this set out the terms under which the claimant was employed by the respondent.
11. The contract contains the following relevant clauses:
- 10 a. Clause 4.4 states that if the employee leaves without giving the notice required under the contract then the company is entitled to pursue them for “*associated recruitment costs and damages*”. It is silent as to the method by which such costs and damages can be recovered.
- 15 b. Clause 5.1 states the normal hours of work are 7am to 5pm, Monday to Friday.
- c. Clause 8.1 states that the holiday year is 1 April to 31 March. Employees who work a five day week are entitled to 28 days a year. The remainder of clause 8 sets out further information about holiday entitlement but does not designate any particular days (for example, when the business is closed) as holidays.
- 20
12. It was not in dispute between the parties that the claimant’s hours fluctuated according to the needs of the business. The claimant recorded his start and finish times in a notebook, copies of which were produced at the hearing. For reasons set out below, the Tribunal accepts that the claimant’s records are an accurate record of his hours and finds that the claimant worked the following hours over the period of his employment.
- 25

Date	Start time	Finish time	Hours worked
5 December 2022	08.00	15.30	7.5
6 December 2022	07.00	15.30	8.5

7 December 2022	07.00	15.30	8.5
8 December 2022	07.00	17.00	10
9 December 2022	07.00	16.00	9
12 December 2022	07.00	16.30	9.5
13 December 2022	07.00	16.00	9
14 December 2022	07.00	16.00	9
15 December 2022	07.00	16.15	9.25
19 December 2022	07.00	15.15	8.25
20 December 2022	07.00	15.15	8.25
21 December 2022	08.45	15.00	8
22 December 2022	07.00	15.45	8.75
23 December 2022	07.00	13.45	6.75
28 December 2022	07.00	15.15	8.25
29 December 2022	07.00	16.00	9
30 December 2022	07.00	15.45	8.75
4 January 2023	07.00	15.45	8.75
5 January 2023	07.00	15.00	8
6 January 2023	07.00	14.45	7.75
9 January 2023	07.00	15.15	8.25
10 January 2023	07.00	15.45	8.75
11 January 2023	07.00	15.15	8.25
12 January 2023	07.00	15.00	8
13 January 2023	07.00	15.00	8
16 January 2023	07.00	15.15	8.25
17 January 2023	07.00	13.00	6

13. The claimant was paid monthly and his first payment was made on 30 December 2022. The payslip provided to the claimant recorded 118.80 hours worked in that pay period. The respondent contracted with an accountant to run their payroll; Mr Stewart would prepare a timesheet for each employee which he would send to the accountant; the accountant would then use this to calculate the gross wage and make the relevant deductions for tax, National Insurance and pension.
14. The business was closed on 26 & 27 December 2022 and 2 & 3 January 2023. Neither the claimant nor the respondent gave any notice to the other that these were to be taken as holidays.
15. On 17 January 2023, Mr Stewart asked the claimant to clear the toilet in the bakery in preparation for the floor to be repainted. The claimant did so. Mr Stewart then asked the claimant to paint the floor. The claimant had a number of concerns about this task which he raised with Mr Stewart; he had not been provided with personal protective equipment (PPE) for this task; it was an enclosed space; he had not been told what paint was being used; he had not been told how the painting was to be done; he was wearing white clothing, that he had bought at his own expense to wear in the bakery, he did not want to get paint on this clothing and did not have a suitable change of clothing.
16. Mr Stewart insisted that the claimant carry out the painting task. The claimant asked if it could be done another day when he could bring suitable clothing. Mr Stewart insisted that the painting had to be done that day. He became angry at the claimant and stated, three times, that if the claimant did not do the paint work then there was no more work for him. The claimant understood that he was being dismissed and collected his belongings before leaving the premises. He sat in his car outside the bakery for 15 minutes before driving off.
17. Shortly after this, the claimant received a text message from Mr Stewart stating that he had not had a chance to speak to the claimant as he had walked out and asking if the claimant was intending to work his notice period.

This text was repeated at 17.00 when the business was closing and Mr Stewart then sent a further text stating, having not heard from the claimant, he was making arrangements for someone else to cover the claimant's shifts over the notice period.

5 18. The claimant replied to Mr Stewart by email dated 18 January 2023. He stated that the text was misleading and that he had been dismissed by Mr Stewart by way of what he described as an ultimatum by Mr Stewart that the claimant either did the *"paint work"* or he would have *"no work"*.

10 19. Mr Stewart replied to this email by a further email of 24 January 2023 in which he stated that the claimant had walked out after refusing to do the paint work without any explanation.

20. A further payment of wages was made to the claimant on 31 January 2023. The payslip for this payment shows a total number of hours for the pay period of 92.60 and a deduction of £495 described as "unworked notice".

15 **Relevant Law**

21. An employee is entitled to notice of the termination of their employment. The amount of any such notice can be found in the contract of employment or by way of the minimum statutory notice to be found in section 86 of the Employment Rights Act 1996 which is based on length of service.

20 22. Where an employer does not give the correct notice of dismissal then an employee can recover damages for this breach of contract equivalent to the salary they have lost for the relevant period.

23. The Tribunal was given the power to hear breach of contract claims by the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994.

25 24. Section 13 of the Employment Rights Act 1996 (ERA) provides that an employer shall not make a deduction from a worker's wages unless this is authorised by statute, a provision in the worker's contract or by the previous written consent of the worker.

25. In terms of s13(3) ERA, a deduction of wages arises in circumstances where the total amount of wages paid by an employer to a worker on any occasion is less than the total amount of wages properly payable on that occasion.

5 26. Regulations 13 and 13A of the Working Time Regulations make provision for workers to receive 5.6 weeks' paid holidays each year.

27. Where a worker leaves employment part way through the leave year then Regulation 14 of the 1998 Regulations provides for compensation to be paid to the worker in respect of untaken holidays in the following terms:

(1) *This regulation applies where—*

10 (a) *a worker's employment is terminated during the course of his leave year, and*

15 (b) *on the date on which the termination takes effect ('the termination date'), the proportion he has taken of the leave to which he is entitled in the leave year under [regulation 13] [and regulation 13A] differs from the proportion of the leave year which has expired.*

(2) *Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).*

20 (3) *The payment due under paragraph (2) shall be—*

(a) *such sum as may be provided for the purposes of this regulation in a relevant agreement, or*

25 (b) *where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula—*

(AxB)-C

where—

- A is the period of leave to which the worker is entitled under [regulation 13] [and regulation 13A];*
- B is the proportion of the worker's leave year which expired before the termination date, and*
- C is the period of leave taken by the worker between the start of the leave year and the termination date.*

Decision – notice pay

28. The claim for notice pay turns on the question of whether or not the claimant was dismissed on 17 January 2023; if he was then there is no dispute that he was dismissed without notice; if he resigned then there was no obligation on
5 the respondent to give notice at all.
29. The Tribunal was presented with two very different versions of events. Mr Stewart says that he asked the claimant to clear the toilet in preparation for painting the floor which the claimant did. However, when he then asked the claimant to paint the floor, he says that the claimant simply said “no” (giving
10 no reason or explanation), picked up his coat and left the premises saying nothing further.
30. The claimant gives a different version of events. He states that he had cleared the toilet but had raised issues about the painting such as the provision of PPE, what paint was to be used and, in particular, that he was
15 not wearing clothing suitable for painting (he was wearing white garments he bought to wear in the bakery and did not want to get paint on them). He states that he asked if the work could be done another day but that Mr Stewart was insistent that the floor was painted that day. The claimant describes Mr Stewart becoming angry about the claimant’s objections to doing the painting
20 that day and that matters escalated to the point where Mr Stewart gave the claimant an ultimatum that if he did not do the painting work then the claimant would have no more work. At that point, the claimant considered that he had been dismissed.

31. The Tribunal bears in mind that the burden of proof in relation to this issue lies with the claimant.
32. This is not a case where one party is saying that the other has misinterpreted what was said. For example, the respondent has not sought to say that the ultimatum the claimant says was given by Mr Stewart only meant that there was no more work that day rather than that there was no more work for the claimant at all (he denies making any ultimatum at all). Rather, the evidence given by Mr Stewart stands in stark contrast to that of the claimant and it has not been argued that the claimant has misinterpreted what was said or “jumped the gun” in assuming he had been dismissed.
33. The subsequent text messages and emails exchanged between the claimant and Mr Stewart do not provide any particular assistance. Both parties very quickly take the positions which they have set out in evidence and it is not the case that either of them has suggested that the other has misinterpreted what was said or done.
34. The initial text messages from Mr Stewart do not expressly state that the claimant resigned, simply that Mr Stewart had not had a chance to confirm whether the claimant was going to work his notice. This is potentially consistent with both versions of events; the claimant, believing that he had been dismissed, could read this as a reference to working notice given by the respondent; Mr Stewart, believing that the claimant had resigned, could be using the term “walked out” to mean a resignation. It is only the emails of 18 and 24 January 2023 that crystallise the respective positions.
35. At that stage, there is no suggestion by either of them that there has been some form of misunderstanding. Neither is it suggested by either of them that things were said or done in the heat of the moment that they later wish to take back or reach some form of compromise.
36. Having considered the evidence led by both parties, the Tribunal considers that the claimant’s evidence is more inherently plausible than that of the respondent.

37. The respondent is asking the Tribunal to accept that the claimant, having done some of the work involved (that is, clearing the toilet floor) then, out of the blue and apropos of nothing, simply refused to do anything further without reason or explanation and, rather, walked out of a relatively new job without a further word. This simply does not ring true.
38. Further, there was no evidence of any prior disputes between the claimant and Mr Stewart that might have soured relations; there was no evidence of the claimant being unhappy in this new job; there was no evidence to suggest any reason why the claimant would suddenly walk out without another word.
39. The claimant's version of events has more of the ring of truth about it; he was willing to do some of the work but had objections to doing the rest on the day in question for reasons given by him at the time. This escalated into an ultimatum by Mr Stewart where the claimant either did the painting or was dismissed. The Tribunal considers that this describes a scenario that is, on the balance of probabilities, far more likely to have occurred.
40. The Tribunal is satisfied that the words used by Mr Stewart were words of dismissal. There has been no evidence led or arguments made by the respondent that the claimant had misinterpreted the words used nor was this a case where it was being argued that something had been said in the heat of the moment which was later withdrawn.
41. The Tribunal finds that the claimant was dismissed by the respondent on 17 January 2023 and that he was dismissed without notice. The Tribunal awards the claimant the sum of £495 (that is, one week's wage based on a 5 day working week of 9 hours a day at £11 an hour) as damages for this breach of contract.

Decision - wages

42. There are two issues to be resolved in order to determine whether or not the claimant has been paid the correct wages over his employment with the respondent.

43. First, there is the dispute between the parties as to the hours actually worked by the claimant.
44. The claimant has produced a breakdown of his start and finish times on each day he worked for the respondent. This was in the form of copies from notebooks in which he recorded his start and finish time. The claimant then transcribed these into handwritten tables setting out the total hours he said he had worked.
45. In comparison, the respondent produced payslips which recorded the total hours said to have been worked by the claimant in the relevant pay period with no detail of how these had been determined.
46. The Tribunal pauses to note that different versions of the payslips had been produced; there were two versions for each pay period with different dates; the two versions of the final payslip recorded the deduction of £495 in two different ways, one version showing a monetary deduction and the other showing the deduction as a reduced number of hours. However, nothing particularly turned on there being different versions of the payslips.
47. The evidence given by Mr Stewart was that he completed timesheets for each employee which he sent to his accountant each month to run the payroll. There were, therefore, contemporaneous documents which the respondent could have produced showing the hours of work recorded for the claimant but they did not do so despite the fact that directions had been made at the August hearing for them to set out the detail of the basis on which the respondent disputed the hours which the claimant said he worked.
48. In these circumstances, there was no evidence led by the respondent which directly disputed the claimant's evidence as to his start and finish times. The Tribunal had nothing presented to it which, in any way, contradicted the claimant's evidence on these matters.
49. For these reasons, the Tribunal prefers the evidence of the claimant on the issue of the hours worked. The respondent's evidence was lacking in the

necessary detail and the Tribunal does not consider it to be sufficient to contradict the detailed evidence provided by the claimant.

50. The Tribunal, therefore, finds that the claimant worked a total of 222.25 hours during his employment with the respondent.

5 51. The second issue to be determined is whether the respondent was entitled to make the deduction of £495 from the claimant's final payment relying on clause 4.4 of the contract.

52. This has, in effect, been resolved by the finding made above that the claimant was dismissed rather than having resigned without notice. In light of this
10 finding, the conditions which trigger this clause do not apply.

53. However, even if the Tribunal had found that the claimant had resigned without notice, it would not have held that clause 4.4 entitled the respondent to make the deduction in question. The wording of the clause does not state that any sums which the respondent is entitled to recover from an employee who leaves without notice can be recovered by way of a deduction from
15 wages.

54. In order for a deduction to be lawful under s13 of the Employment Rights Act, the contract needs to expressly and unambiguously state that a deduction can be made in the relevant circumstances. Clause 4.4 is wholly silent on this
20 point; it is not a question of any ambiguous wording, it does not say anything about any sums being recovered by way of a deduction from wages and so there is no authority for the respondent to make a deduction from wages even if the claimant had resigned without notice.

55. Indeed, the Tribunal considers that clause 4.4 is wholly superfluous and
25 unnecessary. If an employee was to leave without notice then that can amount to a breach of contract and the respondent would be entitled to take legal action to recover any losses flowing from any such breach whether or not the contract contained clause 4.4 or not. The inclusion of clause 4.4 makes no difference to this.

56. If the intention of clause 4.4 was to allow for losses to the respondent flowing from an employee leaving without notice to be recovered by way of a deduction from wages then it simply does not do so.

57. The Tribunal would also point out that the sum deducted was not, in fact, a
5 loss to the respondent which would be caused by an employee leaving without notice. The respondent has fallen into the common trap of assuming that they have lost the wages they would have paid to the claimant during any notice period. However, if an employee leaves without notice then the respondent would not have had to pay such wages and so there is no loss.
10 Similarly, if an employer has to pay a replacement employee those wages then they are in the same position as they would have been if the original employee had given notice, worked that notice and was paid for it. There is no loss to an employer in such circumstances.

58. The Tribunal, therefore, finds that the respondent unlawfully deducted the
15 sum of £495 from the claimant's final pay. The Tribunal would draw attention to s25(4) of the Employment Rights Act which prevents an employer from recovering, by other means, any sum which has been unlawfully deducted.

59. In these circumstances, the claimant was entitled to be paid £2444.75 gross
20 over the period of his employment (222.25 hours at £11 an hour). He was paid £1830.40 gross. There was therefore a deduction of £614.35 gross.

60. The deduction has been calculated using gross pay on the basis that the causes of the deduction (that is, the difference in hours and the £495 deduction) impact on the claimant's gross wage. Deductions for tax and National Insurance will be a matter for parties.

25 **Decision – holiday pay**

61. There is no dispute between the parties that the claimant is entitled to some form of holiday pay. The claimant also accepts that he is either entitled to payment for the four days when the business was closed or pay in lieu of untaken holidays but not both.

62. The Tribunal is not persuaded that the four days in question were holidays. There was nothing in the contract which specifies these days would be taken as holidays. Neither was there any evidence from the claimant or Mr Stewart that there had been clear notice given by either party that these days would be holidays. Further, there was nothing in the payslips produced by the respondent which showed that the payments made to the claimant included any holiday pay or payments for the days in question.
63. In these circumstances, the Tribunal does not consider that these were holidays nor does it consider that the claimant has been paid for these days. The claimant has, therefore, taken no paid holidays during his employment.
64. The claimant is, therefore, entitled to pay in lieu of untaken holidays. He had worked 6.4 weeks so the proportion of the leave year worked was $6.4/52$ multiplied by 28 days which results in 3.5 days (rounding up as required by Regulation 15A(3) of the Working Time Regulations).
65. Based on 9 hours a day at £11 an hour, the holiday pay owed to the claimant is £346.50. Again, this has been calculated gross.

20 **Employment Judge: P O'Donnell**
Date of Judgment: 13 October 2023
Entered in register: 13 October 2023
and copied to parties