



EMPLOYMENT TRIBUNALS

Claimant: Miss E Kimber

Respondent: Ms L Smalley and Mr M Pullman

Heard at: Bristol (by video)

On: 6 October 2023

Before: Employment Judge Bradford

Representation

Claimant: In Person

Respondent: In Person (Ms Smalley)

RESERVED JUDGMENT

1. The Claimant's claim of unlawful deduction from wages in respect of a failure to pay the National Minimum Wage is well-founded. The gross sum to be paid by the Respondent is £1,736.41;
2. The Respondent made unlawful deductions from the Claimant's wages in that there was a failure to pay the Claimant for accrued but untaken holiday. The gross sum to be paid by the Respondent is £1,033.80.

REASONS

1. By claim form presented on 6 March 2023 the Claimant brought complaints of:
 - a) Unlawful deduction from wages in that the Claimant was paid less than the National Minimum Wage;
 - b) Unlawful deduction from wages in that the Claimant was owed pay for accrued but untaken holiday during the period of her employment.
2. The Respondent's response submitted that from July 2021, the Claimant was no longer paid at an hourly rate, but was given a salary, which

included accommodation, food and utilities. Further, the Respondent's case was that from September 2021 to October 2022 the Claimant was an apprentice and that her pay was above the Apprentice Minimum Wage.

3. At the hearing, the Claimant's position was that there had been no agreement that there would be an accommodation off-set. Nor had she agreed to move to a salaried position, but had expected to be paid for the hours she worked, at the National Minimum Wage (NMW), throughout the period of her employment.

Background

4. Miss Kimber, the Claimant, applied for a job as Head Chef at the Thelbridge Cross Inn, which was run by the Respondents. She did not have the required experience, so was offered the role of Trainee Head Chef. There was some dispute as to her exact job title, but what was not in dispute was that from 9 June 2021 she was employed at an hourly rate of £8.36, the NMW.
5. It was further agreed that from 21 July 2021, Miss Kimber stopped being paid at for each hour she worked, but was paid a salary of £1,000/month. The Claimant's evidence was that she was given no say in this decision and she never in fact agreed to that wage. The accommodation had been rented to her partner at £200/month. She had been allowed to stay there, but that was separate from her pay.
6. The Respondent stated that there was agreement reached in July, which was that, in addition to the £1,000, the Claimant was given accommodation, food and utilities. She was to keep her hours to an average of 40/week.
7. Following the hearing, at the Judge's request, the Respondent sent the Claimant's pay-slips to the Tribunal. The payslips showed that the change to a fixed monthly salary of £1,000 began at the beginning of July 2021.
8. From 15 September 2021 the Claimant began an apprenticeship. This was in association with Exeter College. It was a level 3 Senior Production Chef Apprenticeship. Her salary remained the same, £1,000/month. In November 2021, following the Claimant's request for a pay rise, her salary was increased to £1,200/month. In October 2022, her salary was again increased, to £1,500/month.
9. At the end of October 2022 Miss Kimber resigned. She worked two of her four weeks' notice, her last day being 15 November 2022. Her final pay slip gave gross earnings for that month of £750. No adjustment was made in respect of holiday pay.

Hours worked

10. With regard to hours worked, this was in dispute. The Respondent's position was that the agreement was that the Claimant would work an average of 40 hours/week. The Claimant's evidence was that she worked far more, working six or 7 days a week. This was supported by the rotas provided (see below). She said worked at least 50 hours/week, and often more, up to 75 hours/week. When it was put to the Claimant in cross examination that she did the rotas, and should have limited her hours, the

Claimant's response was that Mr Pullman (co-respondent) pressured her to do more shifts. The Respondent's position was that Ms Kimber, and her partner who also worked at the pub, had two consecutive days off together each week. Not many rotas were available, most had been destroyed. Those that were in the Claimant's possession were sent to the Tribunal after the hearing. Unfortunately these were not particularly helpful as in the Claimant's column, in respect of the majority of days the Claimant worked, her line on the rota simply stated 'on'. It gave no details of hours she was scheduled to work. Where there was reference to hours, such as 8-14 November [year not stated], it often stated '1 – F' or '3 – F'. I have interpreted 'F' as 'finish' I do not know what time 'finish' for the kitchen was. However the rotas provided did show that the Claimant generally worked 6 days/week. The absence of other rotas suggests to me that that the Claimant kept those which supported her claim. I was not, for example, sent consecutive rotas for a period. Months were often not stated and the dates did not run consecutively. There has, it seems been a level of selectivity. As such, I treat the rotas with caution.

11. Both the Claimant and Respondent's evidence has some inconsistencies when viewed in the context of the limited documentary evidence, namely payslips and rotas. Miss Kimber was not paid at an hourly rate of the NMW until 20 July 2021, as asserted by the Respondent, as the July payslip gives gross pay of £1,000, which was the 'salary' said to commence on 21 July 2021. In relation to the rotas, one showed the Claimant 'on' for a day when the pub was closed. There is then the matter of likely selectivity, as referred to above. There being no reliable or useful documentary evidence which enables me to determine the number of hours/week that the Claimant worked, I have effectively taken a middle ground. I find on average that the Claimant worked 50 hours/week. I have reached this number as I cannot accept that either party's evidence was entirely accurate, but I do find that the Claimant was probably content, at least until towards the end of her employment, to do more hours than the 40/week that Respondents demanded of her. This is due to the fact that her partner worked at the pub, and the Claimant did not dispute the Respondent's evidence was that she would spend time there, sitting in the bar, when not working. I find that the Respondents, through their consistent presence at the pub, were aware that the Claimant was routinely working more than 40 hours/week and did not attempt to stop that practice.

Holiday

12. With regard to holiday, it was agreed that the holiday year ran from April to March. There was no written contract in place, and I am therefore working on the basis of the holiday entitlement of 5.6 weeks, or 28 days/year, in accordance with the Working Time Regulations. Between her starting employment in June 2021 and expiry of the leave year in March 2022, the Claimant's evidence was that she did not take holiday. She said she had a holiday booked for March 2022, but had to cancel it due to the pub being short staffed. There was dispute as to the reason this holiday was cancelled. Between April 2022 and November 2022, the Claimant said she took three days' holiday. However, in her claim form the Claimant stated she had taken a week and two days' holiday in the time that she worked for the Respondent.

13. The Respondent's evidence was that between June 2021 and March 2022 the Claimant took 9 days holiday. Under cross-examination the Respondent stated that the Claimant had taken the following days during that period: 10 April, 1 - 9 September, November 2 and 24, Christmas day and Boxing day, January 5, 12, 26 and March 10 and 16. [this is 19 days]. Between April and November 2022, the Respondent's evidence was that the Claimant had 15 days pro-rata entitlement that year, and had carried over 12 days. She took 18 days excluding bank holidays. There had been no conversation about annual leave, but the Respondent carried over what was remaining from the Claimant's first leave year as a gesture of goodwill.

Law

14. The starting point is the law in relation to the minimum wage, set out in the National Minimum Wage Regulations 2015, at regulation 4A:

4A.— Workers who qualify for the national minimum wage at a different rate

- (1) The hourly rate of the national minimum wage is—
 - (a) [£10.18] for a worker who is aged 21 years or over (but is not yet aged [23 years]);
 - (b) [£7.49] for a worker who is aged 18 years or over (but is not yet aged 21 years);
 - (c) [£5.28] for a worker who is aged under 18 years;
 - (d) [£5.28] for a worker to whom the apprenticeship rate applies, as determined in accordance with regulation 5.
- (2) If the rate in paragraph (1)(d) applies to a worker, the national living wage rate and the rates in paragraph (1)(a), (b) and (c) of this regulation do not apply to that worker.

15. These are the current rates, the rates in the regulations being updated each year. For ease of reference, the government publishes the previous rates on the gov.uk website. For the years in question, these were as follows:

Rates from 1 April 2021

	23 and over	21 to 22	18 to 20	Under 18	Apprentice
April 2022 to March 2023	£9.50	£9.18	£6.83	£4.81	£4.81

	23 and over	21 to 22	18 to 20	Under 18	Apprentice
April 2021 to March 2022	£8.91	£8.36	£6.56	£4.62	£4.30

16. The regulations also set out when the apprentice rate applies:

5.— Determining whether the apprenticeship rate applies

- (1) The apprenticeship rate applies to a worker—
 - (a) who is employed under a contract of apprenticeship, apprenticeship agreement (within the meaning of section 32 of the Apprenticeships, Skills, Children and Learning Act 2009) or approved English apprenticeship agreement (within the meaning of section A1(3) of the Apprenticeships, Skills, Children and Learning Act 2009) , or is treated as employed under a contract of apprenticeship, and
 - (b) who is within the first 12 months after the commencement of that employment or under 19 years of age.
- (2) A worker is treated as employed under a contract of apprenticeship if the worker is engaged—
 - (a) in England, under Government arrangements known as Apprenticeships, Advanced Apprenticeships, Intermediate Level Apprenticeships, Advanced Level Apprenticeships or under a Trailblazer Apprenticeship;

17. It follows that the Claimant was only entitled to be paid the Apprentice MW for the first year of her apprenticeship. Thereafter, she should have been paid the NMW.

18. The Regulations allow some deductions, specifically in respect of living costs, to be made from an employee’s salary. This means that they can be treated as having been paid the NMW or apprentice MW, where the money paid to them was in fact less, due to a process of off-setting. This is dealt with in regulations 14 and 16:

14.— Deductions or payments as respects living accommodation

- (1) The amount of any deduction the employer is entitled to make, or payment the employer is entitled to receive from the worker, as respects the provision of living accommodation by the employer to the worker in the pay reference period, as adjusted, where applicable,

in accordance with regulation 15, is treated as a reduction to the extent that it exceeds the amount determined in accordance with regulation 16, unless the payment or deduction falls within paragraph (2).

[paragraph 2 is not relevant in this case]

16.— Amount for provision of living accommodation

(1) In regulations 9(1)(e), 14 and 15, the amount as respects the provision of living accommodation is the amount resulting from multiplying the number of days in the pay reference period for which accommodation was provided by [£9.10].

(2) Living accommodation is provided for a day only if it is provided for the whole of a day.

(3) Amounts required to be determined in accordance with paragraph (1) as respects a pay reference period are to be determined in accordance with the regulations as they are in force on the first day of that period.

19. As in respect of the NMW, the daily amount which can be deducted increases each year. The current rate is £9.10. The previous rates are given on the gov.uk website:

Previous rates

Year	Daily accommodation offset rate	Weekly accommodation offset rate
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2022	£8.70	£60.90
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2021	£8.36	£58.52
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20. This means that where the employer does not charge the employee for using the accommodation provided, it is entitled to deduct the accommodation offset from pay. So where, as here, the employee is paid either the NMW or apprentice MW, the result is that the pay shown on employee's pay-slip each month can lawfully be less than the MW.

However where more is deducted than the rates set out above, and as a consequence, the employee's pay falls below the MW, then an unlawful deduction will have been made.

21. With regard to holiday pay, as there was no written contract in place, I have based the Claimant's entitlement on regulations 13 and 13A of the Working Time Regulations. This gives an entitlement of 5.6 weeks, or 28 days holiday per year. Whilst in accordance with those Regulations, leave is not generally to be carried over, in the present case, the Respondent had agreed to carry over accrued but untaken leave.

Decision

Deductions/failure to pay MW

22. The Claimant's evidence was that as her partner was paying for the accommodation, then there should have been no off-set from her salary. I was given details of the accommodation, suggesting that its monthly rental value was very small. It is not for me to determine the monthly rental value, or whether the sum of £200/week, rising to £250/week paid by the Claimant's partner was all that should have been paid. The Regulations that I have cited above allow an employer to deduct a daily sum from salary where accommodation is provided as a 'benefit' of employment. I am satisfied that the accommodation was properly classed as a benefit of employment in the Claimant's case.
23. The Respondent has pointed out that in addition to the accommodation, utilities and food were benefits of employment that the Claimant received. Benefits in kind do not count towards the NMW (regulation 10f). Therefore, the accommodation is the only item that can be taken into account.
24. No issue is taken by the Claimant with the wages she was paid in June 2021. It was agreed between the parties that she was paid at the NMW of £8.36/hour. She was, at that time, living with her parents.
25. I move to the period July 2021 – 14 September 2021. This was before the Claimant started her apprenticeship, and when she was living at accommodation provided by the Respondent. She should have been paid the minimum wage, subject to the accommodation off-set. I find that on average the Claimant worked 50 hours per week.

July 2021 and August 2021

If paid NMW: 50 hours/week x 4.4 weeks x 8.36 = £1,839.20

Actually paid £1,000

Accommodation off-set at £8.36/day

31 days x £8.36 = £259.16

Equivalent month's pay = £1,259.16

Shortfall = £580.04 per month. 2 months = £1,160.08

September 2021

If paid 2 weeks at NMW: 50 hours x 2 weeks x 8.36 = £836

Then 2.2 weeks @ apprentice minimum wage of £4.30/hour

50 hours x 2.2 weeks x 4.30 = £473

The Claimant should have been paid £1,309, subject to the accommodation off-set (30 days x 8.36 = £250.80), giving a gross salary for pay-slip purposes of £1,058.20. Her pay-slip in fact shows she was paid £1,000, so there is a shortfall of £58.20

Remainder of first year of apprenticeship: October 2021 – 14 September 2022

26. In October 2021 the Claimant was paid £1,000

Apprentice MW due: 50 hours x 4.30 = £215/week

215 x 52 = £11,180 annual salary. Monthly salary of £931.66. This could have been reduced by the accommodation off-set. There was however no reduction from the agreed £1,000.

The Claimant was paid above the apprentice MW during this period.

27. In November 2021 the Claimant had a pay-rise to £1,200. It follows that she was paid above the apprentice MW. This was also the case for December 2021 – March 2022. There was no shortfall during this period.

28. In April 2022 the apprentice minimum wage and accommodation off-set rates increased. The apprentice MW became £4.81. Before applying for the accommodation off-set the Claimant was due:

50 x 4.81 = £240.50/week. This equates to an annual salary of £12,506, and a monthly salary of £1,042. The Respondent could then have reduced this by the accommodation off-set. It follows that the Claimant, with her monthly pay of £1,200, continued to be paid above the MW.

29. The position remained the same through to 14 September 2022, the remainder of the first year of the Claimant's apprenticeship. There was no shortfall in pay during this period.

Period following first year of apprenticeship

30. By 15 September 2022, the Claimant had completed the first year of her apprenticeship, and her pay should then have increased to the NMW. She was then aged 23, and should have been paid at £9.50/hour.

50 hours x 9.50 = £475/week, an annual salary of £24,700, equating to a monthly salary of £2,058.33.

1 – 14 September 2022 = 2 weeks at apprentice MW

Salary due was 240.50 x 2 = £481

15 – 30 September 2022 = 16 days or 2.3 weeks

Salary due was $475 \times 2.3 = \text{£}1,092.50$

September 2022 salary before accommodation off-set = $\text{£}1,573.50$

Accommodation off-set

$30 \text{ days} \times 8.70 = \text{£}261$

Salary due = $\text{£}1,312.50$

The Claimant was paid $\text{£}1,200$, leaving a shortfall of $\text{£}112.50$

31. In October 2022 the Claimant was due a monthly salary of $\text{£}2,058.33$.

Less accommodation off-set

$31 \text{ days} \times 8.70 = 269.70$

Salary due = $\text{£}1,788.63$

Salary paid (following increase that month) = $\text{£}1,500$

Shortfall = $\text{£}288.63$

32. In November 2022 the Claimant worked for 2.1 weeks. She should have been paid $475 \times 2.1 = \text{£}997.50$.

Less accommodation off-set: $15 \text{ days} \times 8.70 = \text{£}130.50$

Salary due = $\text{£}867$

Salary paid was $\text{£}750$, so there was a shortfall of $\text{£}117$.

33. I find that the Claimant's pay, on occasion, fell below the NMW, as set out above. There were shortfalls in the Claimant's pay during her period of employment with the Respondent totalling $\text{£}1,736.41$.

Holiday

34. Moving to holiday, again there was no documentary evidence. The Claimant's evidence was inconsistent, in that her written claim was different to her evidence to the Tribunal. The Respondent, when citing the dates for the 9 days she said the Claimant had taken as holiday in 2021, she gave 19 days, which included an April date, notwithstanding that the Claimant did not commence work for the Respondent until June 2021.

35. The Respondent did however accept that the Claimant did not take 12 days of her leave entitlement in her employment up to March 2022, and said that she had agreed to carry those over.

36. The starting point is the Claimant's entitlement to holiday. In accordance with the Working Time Regulations, employees are to be given a minimum of 28 days holiday/year, which can include bank holidays. It follows that that the Claimant was entitled to 22.5 days for the period 9 June 2021 to

31 March 2022, and to 17.5 days between 1 April 2022 and 15 November 2022. Whilst the employer does not, save in certain circumstances, have a duty to carry over accrued but untaken leave, the Respondent had volunteered to do so in this case. It was accepted by the Respondent that the Claimant was not encouraged to take leave. Carrying over leave was therefore, I find, appropriate in the circumstances.

37. The Claimant had accrued 40 days leave during her period of employment. There were 11 bank holidays during this period.
38. The Respondent gave dates of 19 days that she said the Claimant had taken as holiday. Whilst she was asked about the first holiday year, I find that the Respondent gave all the days taken over both years in her answer. Some of these were bank holidays. The Claimant said in her claim form that she had taken a week and two days holiday. She did not appear to be of the view that bank holidays were included in her holiday entitlement. The Claimant often worked 6 days/week, according to the rotas she provided, so I find that on her evidence, the Claimant took 8 days holiday plus bank holidays, totalling 19 days. Whilst there was apparent disagreement, given that the two accounts can be reconciled, I find that the Claimant took 19 days holiday. Her final pay was not adjusted to include pay for accrued but untaken holiday.
39. I am conscious that holiday pay should be calculated using a week's pay, and a 52 week reference period is generally understood to be appropriate. Holiday pay should be 'normal pay'. Much case law relates to whether matters such as overtime and commission are to be included for the purpose of the calculation. This does not assist in this case.
40. The difficulty here is that the Claimant has been paid at very different rates, because she was, for a year of her employment, paid at the apprentice rate. Further, her rate of pay changed when she was no longer on the apprentice MW, in October 2022. I am therefore unable to accurately calculate a week's pay, nor will a 52 week reference period assist.
41. The period 9 June 2021 to 31 March 2022, the first holiday period, was 42 weeks. I find, in view of the Respondent's evidence, that the Claimant took 9 days holiday during this period. This means that the Claimant is owed 13.5 days from this period.
42. During this period, the Claimant should have been paid the NMW of £8.36/hour for 14 weeks (to 14 September 2021). Her pay from 15 September to the of October was £1,000/month, above the apprentice MW, and for the remainder of the period was £1,200/month, also above the MW of £4.31/hour. Her average pay over this period of 6.5 months or 28 weeks (15 September 2021 to 31 March 2022) was £1,153.85/month. I therefore calculate that one third of the Claimant's outstanding holiday should be paid at the NMW and two thirds at her actual salary. One third of 13.5 days is 4.5 days, and two thirds equates to 9 days. I find that she is owed 4.5 days' pay at £8.36/hour, and 9 days' pay at her actual rate of pay. On the Claimant's evidence she generally worked 6 days/week. So a day was 8.33 hours. She is owed:

4.5 days x 8.33 hours x 8.36/hour = £313.37

9 days = 0.3 of a month. 0.3 x £1,153.85 = £346.16

43. For the period 1 April 2022 to 15 November 2022 (32.4 weeks), I find that the Claimant took 10 days holiday (as she took 19 in total), out of her entitlement of 17.5 days. She had 7.5 days remaining. The period 1 April 2022 to 14 September 2022 is to be paid at her actual salary of £1,200/month. This was 23.7 weeks, or 73% of the period. She was entitled to 5.5 days holiday during this period. The remaining 8.7 weeks (27% of the period) she should have been paid at the NMW of £9.50/hour. She was entitled to 2 days holiday during this period.

5.5 days = 0.18 month. 0.18 x £1,200 = £216

2 days x 8.33 hours x 9.50 = £158.27

44. I conclude that that Claimant is owed holiday pay for accrued but untaken annual leave, in the sum of £1,033.80.

Employment Judge Bradford
Date 16 October 2023

Reserved judgment & reasons sent to the Parties on 07 November 2023

For the Tribunal Office