



THE EMPLOYMENT TRIBUNAL

Case number 2304004/2022

HEARD AT: LONDON SOUTH
BEFORE: EMPLOYMENT JUDGE C O'NEILL (sitting alone)
ON: 16 October 2023

BETWEEN:

Adam Knell

Claimant

and

David Brooker

Respondent

Representatives:

For the Claimant: Mr Chris Knell (lay representative)

For the Respondent: Mr Peter Collins (Peninsula Law)

JUDGMENT

1. The claimant's complaints of an unlawful deduction from wages in respect of tips and pension contributions are not well-founded and fail.
2. The claimant's claim for statutory holiday pay is not well-founded and fails.
3. The claimant's claim for breach of contract in respect of notice pay does not succeed and is dismissed.
4. The claimant's claim for interest on unpaid amounts does not succeed and is dismissed.
5. The claimant's complaint of an unlawful deduction from wages in respect of the national minimum wage respondent is well-founded and succeeds.

6. The respondent failed to give the claimant a written statement of particulars of employment, as required by s1 ERA96.
7. The respondent is therefore ordered to pay to the claimant the **gross sum of £3,401.52**. This is calculated as follows:
 - a) **£2,601.52** in respect of underpayment of the national minimum wage that was unlawfully deducted from the claimant's wages; and
 - b) **£800** in respect of the respondent's failure to provide written particulars.

REASONS

BACKGROUND & ISSUES

8. The respondent runs the Foresters Arms, a brewery-tied public house in Fairwarp, Sussex. The claimant was employed by the respondent to work in the bar from April 2021, the exact start is disputed by the parties. The claimant resigned with immediate effect in a letter dated 18 August 2022.
9. The claimant has presented a complaint that:
 - a) he has not been paid the National Minimum Wage
 - b) he has not been paid for annual leave
 - c) he has not been paid his share of tips
 - d) he has therefore been credited with the appropriate pensions contributions
 - e) he is entitled to interest on the unpaid amounts.
10. The claimant presented his claim to the Tribunal on 5 November 2022 after a period of early conciliation which started on 5 September 2022 and ended on 17 October 2022.

HEARING & EVIDENCE

11. The final hearing took place in person at London South Employment Tribunal on 16 October 2023. I was provided with a bundle of 538 pages, 3 witness statements and I heard oral evidence from the claimant, the respondent and the respondent's witness Dr P Handley. Oral submissions were made by the representatives of both parties. All of the witnesses gave clear and consistent evidence.
12. The claimant's representative clarified

- a) that he was not pursuing a complaint of unpaid salary, but a failure of the respondent to pay the national minimum wage; and
 - b) that he agreed that the relevant notice period was the statutory minimum of one week.
13. The issues to be determined were discussed at the outset of the hearing, with reference to the issues identified at the preliminary hearing for case management on 25 July 2023 and the formal list later agreed between the parties and appended to this judgment.

FINDINGS OF FACT

14. The respondent is the landlord of the Forester's Arms pub in the village of Fairwarp in Ashdown Forest, Sussex. The claimant also resides in Fairwarp and had been friends with the respondent for a number of years, as evidenced from the WhatsApp messages included in the bundle.
15. As the covid restrictions were eased in early 2021, the claimant helped the respondent prepare the pub for re-opening. The claimant undertook considerable voluntary work for the respondent, ranging from utilising his professional IT skills to more manual work on the premises.
16. There is no written contract or written evidence of the start date of the claimant's employment. The lack of formality of the claimant's work arrangements are the cause of much of the dispute in this case.
17. I find that it is more likely than not that the claimant started employment at the Forester's Arms on 19 April 2021. The claimant's position is that he formally started employment on the 12th April 2021 when the pub officially re-opened for business, however he was unable to produce any written evidence of the employment relationship or payment for the period. Although he provided oral evidence that he had been paid by personal bank transfer, no evidence of this was included in the extensive bundle. The claimant relied on the WhatsApp messages to indicate that he was an employee but in my view, the WhatsApp messages of the period that show a very informal relationship that is consistent with the idea of a friend 'helping out' another when they had time. For example, the claimant had booked a table for 3 people to dine at 7pm on the 12th April, the day he says he started paid employment.
18. It was agreed between the respondent and the claimant that his salary would be £400 per week for 40 hours of work. This is not disputed by either party but is not evidenced in writing.
19. The claimant's payslips show that he was paid for 5 weeks on his first payslip (dated 22/05/2021 and consistent with a start date of 19 April 2021). He was then paid £1600 (4 weeks' pay) every four weeks until his final payslip dated 10/9/2022 which was for £480.

20. I find that the claimant held a genuine and real expectation that he would be made a business partner by the respondent. All three witnesses gave evidence that was consistent on this point. I find that this was an expectation throughout the period in question as there is no evidence to indicate that the claimant believed himself to have already been made partner.
21. This partnership expectation and prior friendship with the respondent meant that the claimant had a unique role and status amongst the staff. The claimant assumed more responsibility than the other bar staff. There was oral and written evidence that he was treated differently from other bar staff by the respondent, the staff and the wider village. It was noted that he was not a licensee and did not make any effort to acquire a license.
22. The claimant clearly worked enthusiastically and diligently for the respondent and took on a senior and responsible role. The special relationship between the respondent and claimant meant that he was not obliged by the respondent to clock-in or clock-out as the other staff (including Dr Handley, the co-licensee) nor did he work fixed hours. The respondent claims that this was to afford the claimant more flexibility but claimant believes that it was with a view of his becoming a business partner in due course. I do not need to make a finding in respect of why the claimant had this flexibility but simply find the fact that it existed.
23. The flexibility is relevant to the lack of written evidence that could demonstrate the hours that the claimant worked. In the absence of any clock-in/out evidence, the claimant has submitted a 13 page spreadsheet showing the hours worked compiled from the rota, till transactions and WhatsApp messages. The claimant submits a usual working day of two shifts, generally consisting of 9:00-15:30 and then 16:30-until closing time (usually corroborated by till closure times).
24. I have cross-referenced a number of days on the WhatsApp disclosures to the hours and claimed and I can find little of substance in the WhatsApp messages to support the claimant's claim that he started punctually every day at 9:00 and worked consistently until 15:30. As this is a six-hour shift it is crucial to the claimant's NMW claim that this was consistently worked. The WhatsApp messages are generally fairly silent about start times.
25. The respondent was repeatedly asked during cross-examination how he could show that the claimant did not work the hours he claimed. The respondent was unable to produce any evidence to the contrary and stated that the claimant "*sometimes worked more and sometimes worked less*" and sometimes worked perhaps up to 48 hours per week.
26. The claimant admitted in evidence that he had taken holiday in 2021 but was unsure how many days. He was taken to a table prepared by the respondent that showed that he had taken 31 days off. The claimant's own 13 page spreadsheet shows

- a) 32 days for calendar year 2021
 - b) 40 days for the year ended 19 April 2022
 - c) 28 days for calendar year 2022
 - d) 20 days for the period 20 April 2022 – 18 August 2022.
27. The Forester’s Arm ran an a tip system. Since covid most tips were made via card transaction rather than cash. The claimant admitted during cross-examination that he administered the electronic tip system and was aware of the process of dividing tips amongst staff. He explained that he had not asked for tips or complained about the lack of tips as he had agreed not to receive them, in order to benefit the business that he hoped to co-own in due course. I find that because of his expectation of partnership, the claimant agreed not to receive tips. The witness evidence was consistent on this that was mutually agreed..
28. I do not find that the claimant took a £1000 bonus at Christmas 2021 in lieu of tips. I find the claimant’s evidence in this regard to be credible and I believe that this was a genuine one-off Christmas bonus.
29. There is no written contract so no evidence of the terms, if any, agreed between the parties as regards notice. The claimant accepts that the statutory minimum notice period of one week applies. Notice was not discussed by the parties when the claimant resigned. The claimant resigned with immediate effect and did not in fact give notice.

THE LAW

Unauthorised deductions from wages

30. An employer shall not make an unlawful deduction from a worker's wages. (s.13 of the Employment Rights Act 1996 ‘ERA96’)
31. Wages are defined as “any sums payable to the worker in connection with his employment” and the legislation contains a non-exhaustive list of types of sums that would be included in the term ‘wages’. (s27(1) ERA96)
32. An unlawful deductions claim must be brought in an employment tribunal within three months of the date of the deduction or the last in a series of deductions. (s23(2) ERA96). For unlawful deductions claims brought on or after 1 July 2015, an employment tribunal cannot look back more than two years before the date of the claim. (Ss 23(4A) & (4B) ERA96)
33. Employment tribunals have the power to interpret the relevant provisions of a contract of employment to determine the amount properly payable to an employee. (Agarwal v Cardiff University & Anor [2018] EWCA Civ 1434)

National Minimum Wage (NMW)

34. The NMW is “wages” and so can be claimed in an unlawful deduction of wages claim (s27 ERA96).
35. If a worker who is entitled to be paid the NMW is paid less than the NMW, the worker is entitled to be paid the difference between the relevant remuneration received by the worker for the pay reference period; and the relevant remuneration which the worker would have received for that period had he been remunerated by the employer at a rate equal to the NMW (s17 of the National Minimum Wages Act 1998 ‘NMWA’).

Calculating NMW shortfall

36. A ‘pay reference period’ is a month, or in the case of a worker who is paid wages by reference to a period shorter than a month, that period (Reg 6 National Minimum Wage Regulations 2015 ‘NMWR’).
37. The relevant national minimum wage rates in that period were £8.91 to 31 March 2022 and £9.50 from 1 April 2022.
38. Remuneration in a pay reference period is determined by the calculation “R/H” where “R” is the remuneration received and “H” is the hours of work or hours worked (reg 7 NMWR).
39. Remuneration for the purposes of the NMWR is payments paid by the employer to the worker that are not expressly excluded by the regulations. This means that any bonus is included as pay for the pay reference period in which it is earned. For an annual bonus paid in December, 11/12th will be allocated the payment reference period and 1/12th allocated to the previous pay reference period. (Reg 9 NMWR)
40. ‘Unmeasured work’ is any work that is not time work, salaried hours work or output work (reg 44 NMWR). The hours of unmeasured work in a pay reference period are either
 - a) the total number of hours which are actually worked by the worker in that period; or
 - b) the hours the worker is treated as working under a ‘daily average agreement’ (reg 45 NMWR)
41. A daily average agreement is an agreement in writing which specifies the average daily number of hours the worker is likely to spend working where he is available to work for the full amount of time contemplated by the contract, and is made before the beginning of the pay reference period to which it relates. (reg 49 NMWR)

Burden of proof

42. Where an unlawful deduction of wages claim for NMW is made to the Tribunal, it shall be presumed for the purposes of the complaint, so far as relating to the deduction of that amount, that the worker was remunerated at a rate less than the national minimum wage unless the contrary is established. (s28 NMWA)
43. The employer of a worker who qualifies for the NMW must keep in respect of that worker records sufficient to establish that the employer is remunerating the worker at a rate at least equal to the national minimum wage. The employer of a worker who does unmeasured work, and with whom the employer has entered into a daily average agreement in accordance with regulation 49, must keep a copy of that agreement. (reg 59 NMWR).

Annual leave

44. Holiday pay is considered “wages” s27(1)(a) ERA96
45. Workers are entitled to 5.6 weeks’ annual leave. The right is made up of basic leave of 4 weeks and additional leave of 1.6 weeks. The maximum aggregate of the basic and additional entitlement is 28 days. (Regs 13 & 13A Working Time Regs 1998 ‘WTR’). Claims for unpaid statutory holiday pay may be made under Reg 30(1)(b) WTR.
46. Where there is no relevant written agreement, the leave year begins on the anniversary of an employee’s start date. (Reg 13(3)(b)(ii) WTR)

Tips

47. Tips are not expressly included in the non-exhaustive list of ‘sums payable’ in (s.27(1) ERA96). The method of collecting and distributing the tips will be determinative as only tips and gratuities paid by the employer can be treated as wages. Tips paid by cheque and credit card are wages (Nerva and ors v RL&G Ltd 1997 ICR 11, CA). Tips collected by the employer and contractually distributed to staff are wages (Saavedra v Aceground Ltd [1995] IRLR 198)

Notice

48. The definition of wages does not usually include pay in lieu of notice (Delaney v Staples [1992] ICR 483) so any claim must be brought as a breach of contract claim. Under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 the Tribunal has jurisdiction to hear the following contractual claims that arise from or are outstanding on termination of the employee’s employment:
 - a) damages for breach a contract of employment;
 - b) the recovery of a sum due under such a contract; and/or
 - c) the recovery of a sum in pursuance of any enactment relating to the terms or performance of such a contract.

49. The notice required to be given by an employee who has been continuously employed for one month or more to terminate his contract of employment is not less than one week. (s86(2) ERA96)
50. There is no statutory right to payment in lieu of notice therefore the employee needs to demonstrate that there was a contractual agreement, either written or oral. In order to be legally binding, the agreement for PILON must be made with the intention of creating legal relations and the agreement must be supported by consideration and the individual terms of a contract must be sufficiently certain to be able to give them meaning.

Pensions

51. An employer's pension contributions are not payable 'to' the employee and are therefore not 'wages' within s27(1). "Wages means any sums payable to the worker in connection with his employment, it does not mean contributions paid to a pension provider on his behalf" (Somerset County Council v Chambers UKEAT/0417/12).

Interest

52. The employment tribunal only has jurisdiction to award interest for a period prior to the hearing in respect of discrimination cases. The employment tribunal does not have jurisdiction to award interest on a breach of contract.

Written particulars

53. Where an employee begins employment with an employer, the employer shall give to the employee a written statement of particulars of employment. (s 1 ERA96 96)
54. If a Tribunal finds in favour of an employee in relation to a particular type of claim (whether or not an award is actually made) then the tribunal must make an award of not less than two weeks' pay or four weeks' pay depending upon the circumstances. (s38 Employment Act 2002 'EA02')
55. The types of claim are listed in schedule 5 of EA02 include the unlawful deductions and payments.

APPLICATION OF THE LAW TO THE FACTS

Failure to pay NMW

56. The claimant was paid every four weeks, which is less than a month, so this is his 'pay reference period'.
57. I must rely on the claimant's spreadsheet to determine the hours worked ('H'):

- a) The respondent failed to produce any evidence that the claimant did not work the hours he has claimed and admitted in evidence that the claimant sometimes worked more than the 40 hours. Therefore the respondent failed to rebut the statutory presumption that the worker was remunerated at a rate less than the national minimum wage.
- b) The claimant did not have to clock-in or clock-out and did not work fixed hours, therefore the claimant undertook 'unmeasured work' for the purposes of the NMWA. The hours of unmeasured work in a pay reference period are either the total number of hours actually worked by the worker or the agreed hours in the 'daily average agreement'. In order to rely on a daily average agreement it must be made in writing before the beginning of the pay reference period to which it relates. No such written agreement was produced in evidence.

58. The claimant was paid £1600 every reference period, but also received an annual bonus paid in December 2021, so 11/12th will be allocated the payment reference period and 1/12th allocated to the previous pay reference period ('R').

59. The relevant national minimum wage rates in that period were £8.91 to 31 March 2022 and £9.50 from 1 April 2022.

60. For each pay reference period the R/H calculation is as follows:

Pay ref period (end date)	'H' Hours worked¹	Pay ref period for NMW ²	'R' £s actually received³	NMW shortfall
22/04/2021	6.00	£53.46	£400	0
22/05/2021	216.75	£1931.24	£1600	0
19/06/2021	198.75	£1770.86	£1600	£170.86
17/07/2021	191.75	£1708.49	£1600	£108.49
14/08/2021	162.25	£1445.65	£1600	0
11/09/2021	232.75	£2073.80	£1600	£473.80
09/10/2021	154.50	£1376.60	£1600	0
06/11/2021	151.75	£1352.09	£1600	0
04/12/2021	243.25	£2167.36	£1683.33	£484.02
01/01/2022	237.00	£2111.67	£2516.67	0
29/01/2022	188.75	£1681.76	£1600	£81.76
26/02/2022	217.75	£1940.15	£1600	£340.15

¹ Claimant's spreadsheet

² Hours works multiplied by the NMW for the period

³ Payslips and cash bonus – (1/12th in Nov & 11/12th in Dec)

26/03/2022	180.25	£1606.03	£1600	£6.03
23/04/2022 ⁴	44.25 127.75	£394.27 <u>£1213.63</u> £1607.90	£1600	£7.90
21/05/2022	186.25	£1769.38	£1600	£169.38
18/06/2022	202.50	£1923.75	£1600	£323.75
16/07/2022	156.50	£1486.75	£1600	0
13/08/2022	214.25	£2035.38	£1600	£435.38
10/09/2022	19.75	£187.63	£1600	0
Total				£2601.52

61. In his submissions, the respondent's representative argued that the claim for unlawful deductions in respect of NMW for the year ended 31 March 2022 was out of time. The claimant pursued his claim within three months of the final unlawful deduction and the above table shows that there was a series of deductions, however the legislation places a 2-year limit on claims for unlawful deductions from wages involving pay so I find the claimant's claim to be in time.
62. The claimant suffered an NMW shortfall for a number of pay reference periods during his period of employment. The claimant's claim for unlawful deduction of wages in respect of NMW is well founded and succeeds in the sum of £2,601.52, the total amount of NMW shortfall.

Unpaid holiday pay

63. There was no written or oral contract as regards the amount of holiday pay, so the statutory minimum applies and the claimant was entitled to 28 days/5.6 weeks paid holiday per year and his leave year ran from the date he started employment.
64. In his submissions, the respondent's representative argued that the claim for unlawful deductions in respect of holiday for the calendar year of 2021 was out of time. The legislation places a 2-year limit on claims for unlawful deductions from wages involving pay so I find the claimant's claim to be in time.
65. The claimant had 40 paid days of holiday for the year ended 19 April 2022 and 20 paid days for the period 20 April 2022 – 18 August 2022. These amounts are in excess of the statutory minimum and I therefore find that the claimant's claim for holiday pay to be not well-founded and it fails.

⁴ NMW increases on 1/4/2022 so the calculation is divided

Unpaid Tips

66. In order for his unlawful deduction of wages claim for tips to succeed the claimant needed to demonstrate that they were part of his wages by (i) the method of distribution (i.e. a payment from the employer) and that (ii) he was contractually entitled to the tips.
67. The tribunal heard evidence on the method of collection and distribution of tips at the Forester's Arms and having regard to the case law on tips and the facts of the case, I conclude that the tips were paid by the employer to the staff. However I do not find that the claimant had a contractual entitlement to a share of the tips. The claimant did receive tips for a few months and then expressly agreed to waive any further entitlement to the tips.
68. As there was no contractual entitlement to the tips, the claim for unlawful deduction from wages is not well-founded and fails.

Claim for notice pay

69. The claimant accepted that the relevant notice period was one week. The claimant resigned with immediate effect on 18 August 2022 and did not work any notice period, nor did he offer to or ask to be paid one's week notice instead.
70. Whilst the claimant accepted that the relevant notice period was one week, he failed to show that there was a contractual agreement between him and the respondent that either party could be paid in lieu of working his notice. Therefore his contractual claim for notice pay fails.

Claim for interest

71. The claimant claimed interest under The Late Payments of Commercial Debts (Interest) Act 1998. In his submissions, the respondent's representative argued that s2(4) of the Late Payment of Commercial Debts (Interest) Act 1998 prevented the claimant from recovering interest on any unpaid sums.
72. Neither the claim nor the response are correct as the legislation does not apply to the employment tribunals. The claimant is prevented from recovering interest because the employment tribunal has no inherent jurisdiction to do so.
73. The claimant's claim for an interest award does not succeed.

Failure to Provide Written Statement of Employment Particulars

74. The claimant ought to have received a written statement of employment particulars on, or prior to, commencing employment, but did not. He did not receive that at any point during his employment with the respondent or thereafter.
75. Given that I uphold the claimant's claims for unlawful deduction of the NMW and find that the respondent failed to provide a written statement of terms and

conditions, I am required to make an award equivalent to 2 weeks' pay, namely £800. I do not consider that it is just and equitable to award a higher sum in all the circumstances.

Employment Judge O'Neill

Date 20 October 2023