



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr A Mason  
**Respondent:** J Melton Limited  
**Heard at:** Midlands East Tribunal via Cloud Video Platform  
**On:** 4 December 2023  
**Before:** Employment Judge Brewer

## Representation

**Claimant:** In person (with the support of Mrs Mason)  
**Respondent:** Mr C Peel, Consultant

# JUDGMENT

The judgment of the Tribunal is that the claimant's claim succeeds in part. The claimant has suffered unauthorised deductions from wages and the respondent shall pay to the claimant the net sum of £1,085.04

# REASONS

## Introduction

1. This case was set down for a final hearing by letter of 23 December 2023. The case had previously been listed to be heard on 21 August 2023, but that date was postponed. However, case management orders were made for that hearing and they applied equally to this hearing. Those orders included for documents and witness statements.
2. In the event the claimant did not provide any witness statement but nevertheless I decided that I would hear oral evidence from him, and he gave me evidence under oath. The respondent was content to rely on submissions. I

had only the documents which appear on the Tribunal's file which had previously been sent in by the parties.

### Issues

3. The claimant made claims for unpaid holiday pay, notice pay, and redundancy pay. I need not deal with either notice pay, or redundancy pay because the clear evidence is that the claimant remains employed and therefore not entitled to either of those payments.
4. In relation to holiday pay, the question would be whether the claimant took holiday for which he has not received the appropriate pay and when.

### Law

5. In relation to a claim for unlawful deductions from wages, the general prohibition on deductions is set out in section 13(1) Employment Rights Act 1996 (ERA), which states that:

*'An employer shall not make a deduction from wages of a worker employed by him.'*

6. However, it goes on to make it clear that this prohibition does not include deductions authorised by statute or contract, or where the worker has previously agreed in writing to the making of the deduction (section 13(1)(a) and (b)).
7. In order to bring an unlawful deductions claim the claimant must be, or have been at the relevant time, a worker. A 'worker' is defined by section 230(3) ERA as an individual who has entered into or works under (or, where the employment has ceased, has worked under):
  - a. a contract of employment (defined as a 'contract of service or apprenticeship'), or
  - b. any other contract, whether express or implied, and (if express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.

8. Section 27(1) ERA defines 'wages' as:

*'any sums payable to the worker in connection with his employment'*

9. This includes *'any fee, bonus, commission, holiday pay or other emolument referable to the employment'* (section 27(1)(a) ERA). These may be payable under the contract 'or otherwise'.

10. According to the Court of Appeal in **New Century Cleaning Co Ltd v Church** 2000 IRLR 27, CA, the term *'or otherwise'* does not extend the definition of

wages beyond sums to which the worker has some legal, but not necessarily contractual, entitlement.

11. Finally, there is a need to determine what was 'properly payable' on any given occasion and this will involve the Tribunal in the resolution of disputes over what the worker is contractually entitled to receive by way of wages. The approach tribunals should take in resolving such disputes is that adopted by the civil courts in contractual actions — **Greg May (Carpet Fitters and Contractors) Ltd v Dring** 1990 ICR 188, EAT. In other words, tribunals must decide, on the ordinary principles of common law and contract, the total amount of wages that was properly payable to the worker on the relevant occasion.

## Findings of fact

12. The key findings of fact are as follows.
13. Having been a subcontractor of the respondent for a period of time, the claimant became an employee in around 2000.
14. In 2016 the claimant went off sick and has not worked since, however he remains employed by the respondent.
15. The claimant was entitled to the statutory minimum holidays which in his case amounted to 20 days plus bank holidays the period there was in 2019 an extra bank holiday for the late Queen's funeral.
16. The dates for which the claimant claims unauthorised deductions from wages are as follows:
  - a. 19 September 2022,
  - b. 26 to 30 December 2022,
  - c. 2 to 6 January 2023,
  - d. 7 April 2023,
  - e. 10 to 14 April 2023,
  - f. 1 May 2023,
  - g. 8 May 2023,
  - h. 29 May 2023,
  - i. 28 August 2023, and
  - j. 10 days in September 2023.
17. The above dates are a mixture of statutory bank holidays, shut down days and what I might refer to as ordinary holidays.
18. I find as a fact that the claimant was not required to book holidays for days which were bank holidays or shut down days but he was required to book holidays for ordinary holidays.
19. The claimant contacted ACAS for early conciliation on 5 April 2023. The notional last date for which the claimant could claim an unauthorised deduction was that for 6 January 2023. Given that he is claiming a series of deductions, provided there is not a break of more than three months the claimant is entitled to go back two years for his claims. However, there is a gap of more than three

months between 19 September 2022 and 26 December 2022 which are the first two dates of the claimant's claims.

20. It follows from this that he is only entitled to claim from 26 December 2022.
21. In terms of the claims themselves, a number of them post-date the presentation of the claim but pragmatically Mr peel accepted that given that the claimant could simply make another claim for those payments he was content that they were added to the claim form.
22. In terms of payment, it was agreed between the parties that statutory bank holidays were paid at 9 hours per day whereas ordinary holidays were paid at 8 hours per day.
23. The claimant's last hourly pay was £7.92 net. There was no evidence that he had been given a pay rise since 2016.

### **Conclusions**

24. Mr Peel argued that of course the claimant was all sick, the position in relation to bank holidays another fixed shut down periods was that he would not expect to be paid these in the normal course of events but rather he had somehow reverted to having 28 free floating days holiday which he had to book and if he had not booked them then he was not entitled to be paid for them.
25. I did not accept that argument. There is no logical reason why somebody who is working would simply receive pay for a bank holiday without having to book that day off but somehow different rules apply to someone who is off sick at least without there being a contractual term to that effect and no such term was presented to me.
26. The claimant could not provide any evidence that he had booked ordinary holidays.
27. In the circumstances my conclusion is that the claimant should have been paid for bank holidays and shut down holidays save for the claim in relation to the bank holiday on 19 September 2022 which is out of time.
28. Therefore, the claimant's claim succeeds in part and his entitlement is as follows:
  - a. Payment for the following bank holidays at 9 hours per day:
    - i. 26 and 27 December 2022,
    - ii. 2 January 2023,
    - iii. 7 April 2023,
    - iv. 10 April 2023,
    - v. 1 May 2023,
    - vi. 8 May 2023,
    - vii. 29 May 2023,
    - viii. 28 August 2023.

b. Payment for the following shutdown holidays:

- i. 28, 29, 30 December 2022,
- ii. 3, 4, 5 6 January 2023.

29. I reject all of the other dates claimed for by the claimant as these were ordinary holidays and there is no evidence that these were, booked, taken and not paid for.

30. The calculation of loss is as follows:

- a. 9 days @ 9 hours per day @ £7.92 per hour = £641.52
- b. 7 days @ 8 hours per day @ £7.92 per hour = £443.52
- c. Total £1,085.04

31. I therefore give judgment in favour of the claimant in the above sum.

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Employment Judge Brewer  
Date: 4 December 2023

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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