



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4106296/2023

Final Hearing heard in Edinburgh on 8 April 2024

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Employment Judge A Kemp

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Mr Kittisak Poomchai

**Claimant
In person**

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Mrs Tiwaporn Sutawan Reid

**First respondent
In person**

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All About Thai Ltd

**Second Respondent
Represented by:
Mrs T Reid
Director**

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JUDGMENT

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1. The claimant's claim of unauthorised deduction from wages under section 13 of the Employment Rights Act 1996 is within the jurisdiction of the Employment Tribunal.

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2. The respondent made unauthorised deductions from the claimant's wages under section 13 of the Employment Rights Act 1996 as it failed to pay the claimant for annual leave due to him under Regulation 14 of the Working Time Regulations 1998, and to pay wages due to him for the period 1 December 2022 to 2 May 2023.

3. **The respondent was in breach of contract in not paying the claimant said wages due to him and for accrued annual leave pay.**
4. **The Tribunal awards the claimant the total sum of ELEVEN THOUSAND THREE HUNDRED AND SIXTEEN POUNDS SIXTY SIX PENCE (£11,316.66), payable by the first respondent, net of all statutory deductions and subject to the first respondent paying all income tax and national insurance contributions due on the wages paid and payable to the claimant.**
5. **The claim against the second respondent is dismissed.**

REASONS

Introduction

1. This was a Claim originally presented against the first respondent. The claim against the second respondent was intimated after a Hearing on 1 February 2024. Following that Hearing, a Judgment and Note were issued.
2. The first respondent did not enter any Response Form timeously. She sought to make an extension application but that was refused by a Legal Officer, as referred to in that Note. Following the said Preliminary Hearing the second respondent did not enter any Response timeously. It then also sought to apply for an extension by email of 4 March 2024 but that was refused the following day. The present hearing therefore proceeded on an undefended basis.
3. The first respondent attended the Final Hearing. I explained that she could do so, and could participate in it to the extent considered appropriate under Rule 21, having regard to the overriding objective in Rule 2. I allowed the first respondent to participate, given that the claimant seeks an award against her, and is not legally represented. She did not wish to cross examine the claimant after he gave evidence, but wished to give evidence herself, which I allowed, and the claimant did not object.

4. The Final Hearing was heard in person. The claimant does not speak other than very basic English, and a Thai interpreter Mrs P Phombud attended. The claimant attended with a Bundle of Documents, to which he spoke. The first respondent did not tender any documents. It was not easy to
5 conduct the hearing with neither the claimant nor first respondent having English as a first language. The first respondent was offered the use of the interpreter but chose not to, and to give evidence in English. I asked questions of both witnesses to elicit facts under Rule 41, and having regard to the terms of Rule 2.

10 **The issues**

5. I explained to those present that from the Preliminary Hearing I had identified the following issues:
- (i) Whether the claimant was employed by either the first respondent or second respondent.
 - 15 (ii) Whether there had been unauthorised deductions from wages, for both wages and accrued holiday pay.
 - (iii) Whether the respondents, or either of them, were in breach of contract.
 - (iv) Whether any claim was not within the jurisdiction of the Tribunal.
 - 20 (v) If any claim succeeds to what remedy was the claimant entitled.
6. Those present were content with that.

The facts

7. I found the following facts, material to the issues before me, to have been established:
- 25 8. The claimant is Mr Kittisak Poomchai. His date of birth is 11 June 1978. He is a Thai national, who does not speak good English.
9. The first respondent is Mrs Tiwaporn Sutawan Reid.
10. The second respondent is All About Thai Ltd.

11. The claimant was employed to carry out cleaning and repair works at a takeway restaurant known as Ed's Thai Kitchen in Corstorphine Road, Edinburgh. The restaurant was not at that stage operating. He commenced work on or around 1 December 2022. He spoke with the first
5 respondent, who gave him instructions. It was agreed between them orally that he would be paid the sum of £500 net per week.
12. No written statement of particulars of employment was ever provided to the claimant.
13. The claimant worked five days per week in the period from December
10 2022 to April 2023 inclusive, at an average of 40 hours per week. The claimant received during that period only sums to allow purchase of items of equipment or stock to prepare the restaurant to open. Payments to him were made on various dates and in various sums to his bank account, the records for which are accurate. Payment was made by the first
15 respondent, her husband Mr Keith Reid, or the second respondent.
14. The restaurant opened for business on or around 16 April 2023.
15. The first respondent paid the claimant £500 in cash on 9 May 2023, and the same amount in cash on 15 May 2023. Those payments were the first
20 wages that the claimant had received, and were paid net of income tax and national insurance contributions. Neither then nor later did the claimant ever receive payslips.
16. With effect from 29 May 2023 the claimant was paid, by transfer direct into his bank account, wages in the sum of £500 per week. It was noted on the account was "weekly wages". The payment of wages was made by the
25 second respondent save for on 6 July 2023, which it was paid by the first respondent. The first respondent and second respondent continued to make payment to him for items of stock or equipment by direct transfer to his bank account. Payment for wages continued weekly until 31 July 2023. Payment of such wages was again made on the basis that it was net of
30 income tax and national insurance, which it had been agreed was to be paid by the employer.

17. On 31 July 2023 the claimant met with the first respondent and her sister. There was a discussion as to the position between them, and there was a form of argument.
18. The claimant provided a written resignation to the first respondent at a meeting on 4 August 202, and his last day of work was on 4 August 2023. The first respondent agreed at that meeting that she would pay the claimant the sum of £4,000 net for wages for the period between December 2022 and April 2023, and would do so within two weeks. That payment was not made.
19. The claimant did not take any annual leave in the period from April 2023 to 4 August 2023 inclusive. He has not received any payment for accrued annual leave in relation to that period.
20. Neither the first nor second respondent has paid the amounts of income tax or national insurance due in respect of any of the wages paid to the claimant.
21. The claimant attempted to research how to address the lack of payment of sums he considered due to him in around July 2023, but found that very difficult as his English is so poor. He was told by Mrs Reid and her husband in discussions on various occasions during 2023 that payment would be made to him. When it was not, and shortly after the employment terminated, he consulted with Citizens Advice. With assistance from them he wrote to the email address for the restaurant on 21 September 2023 by two separate emails, one about wages due to him, the other holiday pay, in both cases seeking payment. No response was received by the claimant. He then commenced early conciliation firstly with the first respondent, and then the second respondent. He was not certain which was his employer as he did not have any documentation provided to him by either respondent.
22. The claimant commenced Early Conciliation in respect of the first respondent on 30 August 2024, and the second respondent on 12 September 2023. The Certificate was issued on the same day for both being on 9 October 2023, and the Claim Form was presented on 15 October 2024.

The law

23. The EAT in ***Clark v Harney Westwood and Reggels and others*** **UKEAT/0018/20** reviewed the authorities bearing on the issue of who was the employer, and having done so said the following:

5 “In my judgment, the following principles, relevant to the issue of identifying whether a person, A, is employed by B or C, emerge from those authorities:

a. Where the only relevant material to be considered is documentary, the question as to whether A is employed by B or C is a question of law: ***Clifford*** at [7].

b. However, where (as is likely to be the case in most disputes) there is a mixture of documents and facts to consider, the question is a mixed question of law and fact. This will require a consideration of all the relevant evidence: ***Clifford*** at [7].

15 c. Any written agreement drawn up at the inception of the relationship will be the starting point of any analysis of the question. The Tribunal will need to inquire whether that agreement truly reflects the intentions of the parties: ***Bearman*** at [22], ***Autoclenz*** at [35].

20 d. If the written agreement reflecting the true intentions of the parties points to B as the employer, then any assertion that C was the employer will require consideration of whether there was a change from B to C at any point, and if so how: ***Bearman*** at [22]. Was there, for example, a novation of the agreement resulting in C (or C and B) becoming the employer?

25 e. In determining whether B or C was the employer, it may be relevant to consider whether the parties seamlessly and consistently acted throughout the relationship as if the employer was B and not C, as this could amount to evidence of what was initially agreed: ***Dynasystems*** at [35].”

30 24. The cases referred to are ***Clifford v Union of Democratic Mineworkers [1991] IRLR 518***; ***Secretary of State for Education and***

Employment v Bearman & Others [1998] IRLR 431; Autoclenz Ltd v Belcher [2011] ICR 1157; and Dynasystems for Trade and General Consulting v Moseley, UKEAT/0091/17/BA.

25. There is a right not to suffer unauthorised deductions from wages under section 13 of the Employment Rights Act 1996. The matter may be raised in an Employment Tribunal under section 23 of that Act. Under section 23(2) it must be raised within three months of the deduction. Where there is a series of deductions under section 23(3) the claim must be commenced within three months of the last in the series of deductions. There is provision for early conciliation under section 23(3A) and section 207B of the Act. Further section 23(4) provides that a Tribunal may consider a complaint if satisfied that it was not reasonably practicable to have presented the complaint within the three month period, if it is then presented within such further period as the Tribunal considers reasonable.
26. The issue of what is a series of deductions was addressed in the Supreme Court in ***Chief Constable of Police Service of Northern Ireland v Agnew [2024] IRLR 56***, which has the practical effect of overruling EAT authority in Scotland in ***Bear Scotland Ltd v Fulton; Hertel (UK) Ltd v Woods; Amec Group Ltd v Law [2015] IRLR 15***.
27. There is a right to paid annual leave under the Working Time Regulations 1998 (“the Regulations”). Under Regulation 14 a payment in lieu may be an entitlement where a worker’s employment terminates part way through a leave year. If not paid it may be an unauthorised deduction from wages under section 13 of the Act, with wages defined in section 27.
28. The Tribunal has jurisdiction to consider a claim for breach of contract under the Employment Tribunals (Extension of Jurisdiction) (Scotland) Order 1994. There is a right to make a claim to the Employment Tribunal under Regulation 7 in terms equivalent to those in relation to deductions above. The issue of reasonable practicability arises both under section 23 and the 1994 Order under Regulation 7. The terms are essentially the same.

Discussion

29. I was entirely satisfied that the claimant was a credible and reliable witness. Where there was a conflict with the evidence given by the first respondent I preferred his. He went through the detail of his bank statements in evidence, and explained that payments made to him were in effect for expenses incurred or to be incurred by him in getting the restaurant ready to open, and then to operate. I accepted his explanations on that, and that he could not recall what exactly the sums were spent on. He produced a series of photographs to show the condition of the premises and as that changed with the work he did. I considered that they supported his evidence. I also considered that the two emails he sent on 21 September 2023 supported his position.
30. The first respondent's evidence was inconsistent in several respects. I concluded that it was not credible or reliable. She initially said that the claimant was working as a friend, but accepted when questioned by the claimant that she had agreed to pay £4,000 to him at the meeting on 4 August 2023. She accepted that she had not made that payment. She said separately that she had paid him a sum of £2,000. As she did not question the claimant that was not put to him. She accepted that she had no receipt. For reasons I come to I did not accept that evidence from her.
31. She also accepted that no written statement of particulars of employment was ever provided, nor were payslips. She accepted that no tax or national insurance contributions have yet been paid for the weekly pay paid to the claimant, as she accepted were due and have been due since at the very latest the cash payments she made in May 2023. That is a serious breach of statutory duty. She accepted that she had made those cash payments, as well as one transfer to the claimant's bank account for the weekly salary in July 2023, which is not consistent with the second respondent being the employer, particularly that last bank transfer. She accepted that the position was a "mess". It is relevant also that the emails sent on 21 September 2023 attracted no reply,
32. This is in the context that the respondents did not enter any Response Form. This was therefore an undefended Final Hearing under Rule 21.

Whilst I considered it within the overriding objective to allow the first respondent to appear as indicated, that is to be seen in that light.

5 33. The first issue is by which entity, if either, the claimant was employed. It appears to me appropriate to discuss that first also. The claimant's evidence was that it was the first respondent. Her's was that it was the second respondent. I considered that the evidence for the claimant was, for the reasons given above, to be preferred in general but also on this. It was the first respondent who discussed matters with him and agreed a net weekly wage of £500. She gave him instructions. She made some of the payments for stock and equipment to him. She paid him the first two cash payments for wages. She then made one of the bank transfers for wages. These payments of wages on three occasions are not consistent with the second respondent being the employer. That the second respondent made the majority of the payments is not conclusive evidence that it was the employer, albeit that it is a fact to consider. She held the discussions on 31 July 2023 and 4 August 2023. No written particulars of employment or payslips were provided, contrary to the requirements in the 1996 Act, and there was no written evidence to support the contention that the second respondent was the employer when such written evidence would not only be expected but is a statutory duty. It appeared to me, given the context set out above, the evidence I heard, and the authorities to which reference is made above that the first respondent was the employer.

25 34. The second issue which I consider appropriate to address next, although it was the fourth set out above, is jurisdiction. The claimant sought wages for the period December 2022 to April 2023 inclusive. In the Preliminary Hearing Note that was labelled as an unauthorised deduction from wages claim, which it is, but it is also a claim for breach of contract, and falls under the 1994 Order. I considered it to be in accordance with the overriding objective to treat it as a claim for breach of contract as that simply adds a legal label to what was claimed in the Claim Form, in circumstances where the claimant is a party litigant who speaks little English.

35. The contract termination date was not disputed as being on 4 August 2023. The Claim has been commenced timeously for that claim. It is therefore within the jurisdiction.
36. There is a separate claim under section 13 of the 1996 Act. Section 23
5 requires that to be commenced within three months of the deduction or the last in a series of deductions if there is such a series. So far as the holiday pay claim is concerned it is timeous, as it arose on termination on 4 August 2023 under Regulation 14 of the Working Time Regulations 1998. It is therefore within jurisdiction.
- 10 37. So far as the claim for pay for the period December 2022 to April 2023 inclusive is concerned the series was, I consider, broken when wages started to be paid in May 2023. The claim for the said period was not therefore commenced timeously as Early Conciliation was not started by 1 August 2023. But the next question is whether or not it was reasonably
15 practicable to have done so. I concluded that it was not. The claimant does not speak English at other than the most basic level. He tried to find out what to do about the non-payment, but struggled to understand what he researched. I accepted his evidence on that. He also was told that payment would be made, and I again accepted that. It was thereafter when
20 he consulted Citizens Advice and commenced Early Conciliation, following the termination, that he acted and that two emails were sent. He has not had legal advice from a solicitor at any stage, and is a party litigant before me.
- 25 38. Given all the evidence I considered that he had discharged the onus of proving that it had not been reasonably practicable for him to have presented the unauthorised deduction from wages claim for the December 2022 to April 2023 period timeously, and that he did present it within a reasonable period of time thereafter. I concluded that the unauthorised deduction from wages claim in this respect was within the jurisdiction of
30 the Tribunal accordingly.
39. I concluded that the claims for breach of contract and unauthorised deduction from wages each succeeded for the said period. Whilst both claims succeed, the remedy is singular.

40. So far as holiday pay is concerned, I accepted the claimant's evidence that in the period April to August 2023, being the period he claimed for in this regard, he did not take holidays and was not paid for them. That is an unauthorised deduction from wages.

5 41. He had also claimed for notice pay, but I considered given the evidence of a written resignation that that was not appropriate. It was not clear to me that there had been a breach of contract on which a breach was founded. The entitlement, had there been such a breach, was for one week's pay under section 86 of the 1996 Act.

10 42. The next issue is of remedy. The first sum sought is for the wages of £500 net per week for the period from 1 December 2022 to 2 May 2023. It was in the following week that the claimant received the first payment of wages, in cash. The period is for 21 weeks and 5 days. At £500 per week the sum due is **£10,857.14** net. I reject the first respondent's evidence of a payment
15 to account of £2,000 having been made, she said in about July 2023. Given all of the evidence I heard, the lack of any receipt, the lack of it being put to the claimant as the first respondent did not cross examine him, and that this was an undefended case, and having regard to the evidence of both witnesses considered in the round, it did not appear to me either
20 credible or reliable evidence. The claimant had indicated that he would accept the sum of £4,000 net which the first respondent offered both orally on 4 August 2023 and by the email of 21 September 2023. It was however a compromise he offered, and was on the basis of the first respondent paying the sum, as she had agreed to do, within two weeks. She did not
25 make that payment, and I consider that the full sum remains due. I have awarded that. That he offered such a compromise was I considered further evidence of his evidence being credible and reliable, in contrast to that of the first respondent.

30 43. There is a claim for **holiday pay** in the sum of **£816.66** which I consider is correctly stated in the email of 21 September 2023 and as the claimant spoke to in his evidence. It was calculated by him between April and August 2023, although he might have sought payment for the earlier period. He did not also make claims for the lack of particulars in writing and payslips.

44. The total sum I award is therefore **£11,316.66**. The award made is net of tax, and no deduction is due from it. There is separately income tax and national insurance due both on the awards, and on the wages paid to the claimant from 9 May 2023 to the end of employment on 4 August 2023, which is the responsibility of the first respondent. Should the first respondent not make such payments, and should the claimant suffer any prejudice from that, he may apply to the Tribunal for a further award for the same, which I consider in accordance with the overriding objective in Rule 2.

45. In respect that the tax and national insurance sums due for the wages paid net to the claimant are outstanding, as well as those to be paid herein, and I direct that a copy of this Judgment be sent to His Majesty's Revenue and Customs for their information.

46. With some hesitation I decided against raising with the first respondent the issue of a potential penalty under section 12A of the Employment Tribunals Act 1996. The first respondent may wish to consider carefully the need to comply with statutory obligations when running a business, and what documents are required to do so.

A Kemp

Employment Judge (signature)

Alexander Kemp

Employment Judge (Name)

11 April 2024

Date of judgment

Date sent to parties
