



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 8000125/2024

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**Final Hearing heard at Glasgow remotely by Cloud Video Platform on
21 May 2024**

Employment Judge A Kemp

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Ms Jessica O'Toole

**Claimant
In person**

Arisaig Hotel Ltd

**Respondent
Represented by:
Mr J Kingswood
Director**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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1. **The respondent made unlawful deductions from the wages of the claimant under section 13 of the Employment Rights Act 1996 in the sum of £983.60 in respect of accrued pay for annual leave and £5.72 in relation to wages, the sum of £989.32.**
2. **The respondent did not provide written particulars of employment as required by section 1 of the Employment Rights Act 1996 and she is awarded the sum of £950.34 in compensation therefor.**
3. **The Tribunal makes a declaration that the respondent did not provide a payslip for the period 26 – 30 October 2023.**
4. **The claim of breach of contract does not succeed, and is dismissed.**

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E.T. Z4 (WR)

5. The claim in relation to the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 does not succeed, and is dismissed.

5 6. The Tribunal accordingly awards the total sum of ONE THOUSAND NINE HUNDRED AND THIRTY NINE POUNDS SIXTY SIX PENCE (£1,939.66) payable by the respondent.

7. The application for a preparation time order is granted under Rules 75, 76 and 79 and is made in the sum of SIX HUNDRED AND SIXTY POUNDS (£660), payable by the respondent to the claimant.

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REASONS

Introduction

15 1. This was a Final Hearing held remotely. The claimant is a party litigant, and the respondent was represented by Mr Kingswood a director. Neither party had legal qualifications or experience. I explained about the giving of evidence to them before the hearing of evidence commenced, about cross-examination, re-examination and about making submissions.

20 2. There had been case management orders issued on 13 March 2024. The claimant had produced documents, but the respondent had not.

Issues

3. I proposed to the parties the following as the issues before the Tribunal, which they were content with:

25 (i) Did the respondent fail to provide written particulars of employment as required by section 1 of the Employment Rights Act 1996 ("the Act")?

(ii) Did the respondent fail to provide a payslip for the claimant under section 8 of the Act?

- (iii) Did the respondent make any unauthorised deductions from wages due to the claimant under section 13 of the Act?
- (iv) Was the respondent in breach of contract?
- (v) Did the respondent breach the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002?
- (vi) If any claim succeeds to what remedy is the claimant entitled?

Evidence

4. The claimant had produced a Bundle of Documents. I heard evidence from the claimant. In her Bundle of Documents she had provided what was titled a Statement of Truth. I explained that such a document was not part of the practice in Scotland, and that no order for use of written witness statements had been made. The said statement was therefore disregarded. The evidence for the respondent was given by Mr Kingswood. As stated the respondent had not provided any documents in compliance with the case management orders.

Facts

5. I found the following facts established.
6. The claimant is Ms Jessica O'Toole.
7. The respondent is Arisaig Hotel Limited.
8. The respondent employed the claimant from 18 June 2023 as a receptionist. Her duties also included bar work and waitressing.
9. The claimant had received an email from Ms Joanne Foley of the respondent on 8 June 2023 confirming that her hourly rate would be £11 per hour, and that an amount of £50 per week would be deducted for accommodation and meals. That was the only document the claimant received in relation to the particulars of her employment.

10. The claimant had replied to an advertisement for a role as a seasonal worker. Save for the bar, the hotel is closed for the period of approximately November to March each year.
- 5 11. The claimant normally worked five days per week, sometimes six, with variable hours.
12. Ms Foley informed the claimant orally during her employment that she was not able to take annual leave as she was a seasonal worker, who would be working until 30 October 2023, when the season ended. The claimant was informed orally by her that the holiday year was from April to April.
- 10 13. The claimant did not take any holidays during her employment with the respondent. The claimant did not request holidays during her employment with the respondent save for one occasion on which she wished to attend an optician's appointment in Inverness, for which she was able to swap a non-working day.
- 15 14. The respondent provided payslips for the claimant for the period to 25 October 2023.
15. The claimant's employment terminated on 30 October 2023. She did not receive a payslip for that period. She did not receive a Form P45 for tax purposes.
- 20 16. The respondent failed to pay the claimant for accrued holiday pay. The respondent did not make full payment for the period from 26 – 30 October 2023, with the shortfall being £34.29 less the proportionate cost for accommodation for that period.
- 25 17. As the claimant did not receive her accrued holiday pay she sent emails to the respondent on 2 and 6 December 2023 seeking that and a final payslip. She did not receive a reply.
- 30 18. On 6 March 2024 the claimant sent two letters to the respondent at its registered office, the first seeking documents, and the second asking for reasons for what she alleged was less favourable treatment as a fixed term worker. The letters were received and sent to the respondent by email by its accountants, which operate at the registered office, on

7 March 2024. She did not receive a reply to either of them from the respondent.

19. The claimant worked on average 40.44 hours per week whilst working for the respondent. Latterly her income increased to an hourly rate of £11.75
5 per hour. Deductions were made from wages to include accommodation and meals, latterly at £177.14 per month.

20. The Arisaig Hotel has about 25 employees during the season from around March to early November each year.

21. The claimant commenced early conciliation on 6 December 2023, the
10 Certificate was issued on 17 January 2024 , and this Claim was presented on 12 February 2024.

Submissions

22. The parties made brief submissions setting out their respective positions.

Law

15 23. There is a right not to have unauthorised deductions from wages under section 13 of the Employment Rights Act 1996 (“the Act”). Wages are defined in section 27, which includes wages due and holiday pay.

24. The entitlement to holiday pay, or pay for annual leave, arises from the Working Time Regulations 1998. Where employment ends the entitlement
20 is calculated under Regulation 14. The right accrues for the period of employment against the entitlement in Regulations 13 and 13A which total 5.6 weeks per annum, capped at 28 days per annum.

25. There is a requirement for written Particulars of employment under sections 1 and 2 of the Employment Rights Act 1996, for specified terms
25 including matters which are changed. If not provided, and a relevant other right is breached, an award of two to four weeks’ pay may be made under section 38 of the Employment Act 2002.

26. There is a requirement for payslips to be provided under section 8 of the Act.

27. The Tribunal has jurisdiction in relation to a claim as to breach of contract by an employee under the Employment Tribunals (Extension of Jurisdiction) (Scotland) Order 1994.
28. The Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2000 have provisions in relation to fixed term workers. The fixed term employee and comparable permanent employee are defined in Regulation 1. Regulation 2 provides for the right not to suffer less favourable treatment, as defined therein. Regulation 5 allows a worker to ask for reasons for treatment, and for any lack of reply to be considered when assessing whether such treatment took place or not. A claim may be taken to an Employment Tribunal under Regulation 7, which sets out the basis for compensation if the claim succeeds in Regulation 7(8).

Discussion

29. I was satisfied that the Claim was within the jurisdiction of the Tribunal. I was satisfied that the claimant was a credible and reliable witness. She gave her evidence clearly, and had provided documents in support. The respondent's evidence I did not accept. Firstly, although Mr Kingswood alleged that there was a statement of particulars that the claimant had signed, it was not provided in accordance with the case management order, it had not been sent to the claimant when she asked for it by letter of 6 March 2024, and it was not even before Mr Kingswood when he gave evidence. Secondly, although it was accepted that holiday pay was due and had not been paid, when the claimant pointed that out, the respondent did not pay what it accepted was due. It was said that that was on advice, but it appeared to me that if such advice had been given it was wrong advice. Thirdly, Ms Foley who could have given evidence as she remains an employee of the respondent did not do so, and Mr Kingswood who did spoke about what he understood the position to have been, or ought to have been, or might have been, but not what in fact had happened from his own knowledge.
30. The first issue was whether any unauthorised deductions from wages had occurred. That in turn depended on what wages and holiday pay was due. Mr Kingswood did not dispute that the calculation made by the claimant in

her Schedule of Loss was incorrect. It appeared to me that it had been carried out correctly under the terms of the Working Time Regulations 1998. The sum due is £983.60.

- 5 31. There is a second part of this claim, as an underpayment in the period 26 – 30 October 2023. Mr Kingswood again did not really dispute that there was a lesser sum paid than due of £34.29, but it would have been subject to a proportionate charge for accommodation, as the claimant herself accepted. I calculate that charge as £28.57. The balance therefore is £5.72. The total of the unauthorised deductions from wages is £989.32.
- 10 32. The second issue was in relation to the written particulars of employment. I had no hesitation in preferring the claimant's evidence. If the respondent thought that such a document existed, indeed Mr Kingswood claimed that it had been signed by the claimant, it required to have provided it in accordance with the case management orders issued. Mr Kingswood said
15 that he did not know how to do so. I find that incredible, as it simply requires to be copied and sent. Many party litigants appear before the Tribunal and do so providing documents in accordance with these orders. That the claimant had also asked for the copy earlier, which the respondent did not respond to although it had received the request, was
20 also something I found incredible. It had been passed to the respondent by its accountants on 7 March 2024. If it had not reviewed it until later, as Mr Kingswood claimed, that did not prevent a late response being sent.
33. Whilst there was an email from Ms Foley on 8 June 2023 it did not remotely
25 cover the aspects necessary under section 1 of the Act. Nor was that contended for by the respondent.
34. The claimant sought the minimum of two weeks' pay for that failure, which I awarded. Her calculation of its amount is accurate, and I accepted it. The award is £950.34.
35. The third issue was in relation to whether payslips were provided. One
30 was not, being that for October 2023. Mr Kingswood said that it existed, but again it had not been provided. I have made a declaration to that effect,

but no compensation for it is awarded as there is no particular basis to do so.

36. The fourth issue is a claim for breach of contract. There clearly was a contract between the parties, but it was not committed to writing from the evidence before me. The claimant argued that her statutory rights were incorporated into the contract, but that is not accurate. Statutory rights are separate to contractual rights, save where the statute imposes specific contractual terms. Holiday pay is a statutory right, as is that for written particulars of employment. In the absence of any contract established in evidence, neither matter is a contractual right. It appeared to me from the evidence before me that the claimant had not made out her claim for breach of contract, and it is dismissed accordingly.

37. The fifth issue was in relation to the 2002 Regulations. It was not obvious what the claim was. It appeared to be that the respondent had not provided written reasons for less favourable treatment but that is not a right of itself, rather it is a procedure an employee may follow, which allows inferences to be drawn in appropriate circumstances. The claimant did however allege that she had been told by Ms Foley that she could not take holidays as a seasonal worker. It appeared to me that that might have been a detriment, but the claimant accepted that she had not asked to take any holidays during employment, rather had gone on holiday to Jordan after the employment terminated. It did not appear to me that the claimant had established that she had suffered a detriment, nor that she had suffered any loss. I have therefore dismissed that claim.

38. The last issue is in relation to remedy. The amounts due are set out above, and total the sum of £1,939.66.

Preparation Time Order

39. The claimant sought a preparation time order. It is a matter regulated by Rules 75 to 79, and is subject to the overriding objective in Rule 2. I considered that it was appropriate to make such an order. The respondent accepted that it had not paid holiday pay correctly in its Response Form, but had not made any payment. It had not provided to the Tribunal in

accordance with the case management orders made any evidence of written particulars of employment having been provided to the claimant, although it alleged that one existed in its Response Form. Existence is not however the requirement, it is to provide that to the claimant. On the basis
5 of the evidence before me, as assessed above, the defence to the claims was unreasonable and misconceived on those two matters. It appears to me that the respondent in this regard acted unreasonably in the way in which it sought to defend the proceedings. Having regard to the overriding objective it appeared to me appropriate to make a preparation time order.

10 40. Some of the claims however were not successful, in particular for breach of contract and that under the 2002 Regulations. The claimant had received almost all of the payslips required, bar one. The amount of the order requires to reflect that context.

15 41. In all the circumstances I considered that a moderate award was appropriate in this regard, far less than the sum claimed. I had regard to Rule 79. Whilst the claimant said that she had spent over 50 hours on the case, including research and preparation for it, it appeared to me that that was beyond a reasonable and proportionate amount of time. The claimant had produced a statement of truth document which was not appropriate
20 for the reasons given above. The proceedings were not in my view complex, and there were only two witnesses in total. The sum at issue was moderate. The documents before the Tribunal were simple ones, and relatively few in number. In my view, a reasonable and proportionate time for pursuing the claims for failure to provide written particulars, and for the holiday pay, including preparing the documentation initially, preparing for
25 the Final Hearing, including the documents for it, and attendance at the hearing, was 15. The current hourly rate for such orders is, as I understand it, £44, and the award is therefore the sum of £660.

30 42. I did separately consider whether to impose a financial penalty under section 12A of the Employment Tribunals Act 1996, for what were breaches of statutory rights of the claimant on the part of the respondent. There was I considered no possible basis not to pay the holiday pay admittedly due, and it should have been done by no later than the end of November 2023. Providing written particulars of employment is a basic

5 statutory right, and providing evidence that that has been done is normally simple and straightforward. The respondent did not provide any copy when asked by the claimant by letter of 6 March 2024 nor did they tender that as evidence before the Tribunal in accordance with the orders referred to. It was from that obvious that the claim for particulars would succeed. These failures were concerning, but I concluded that there were not, just, the necessary aggravating features to justify doing so.

10 43. I therefore did not further consider imposing such a penalty, but the respondent would be well advised to check its systems and procedures on such issues for the future. The respondent has not provided the last payslip, although Mr Kingswood said that it existed, nor has it provided as it is required to the P45. Those matters should be attended to without further delay.

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20 **Employment Judge: A Kemp**
Date of Judgment: 22 May 2024
Entered in register: 22 May 2024
and copied to parties