



EMPLOYMENT TRIBUNALS

Claimant: Mr D Aylett

Respondent: The Guinness Partnership Limited

Heard at: Liverpool

On: 13 June 2024

Before: Employment Judge Aspinall

Representation

Claimant: in person

Respondent: Ms Headford

JUDGMENT

The judgment of the Tribunal is:

1. The claimant's complaint of unauthorised deduction from wages succeeds. The contractual overtime element of holiday pay wages properly due to the claimant were £1544.45.
2. The respondent's right to off-set an amount already paid is established in the sum of £1439.97
3. The respondent is ordered to pay to the claimant £ 104.48 made up as set out below.

REASONS

4. By a claim form dated 25 February 2024 the claimant brought a complaint of unauthorised deduction from wages. He said that for 11 years he had been underpaid holiday pay. He said that contractual overtime payments had not been included in the formula for calculation of his holiday pay. The respondent accented that the claimant was due contractual overtime payments as part of his holiday pay

but defended the complaint on the basis of the time period and amounts claimed. A case management order was made for the claimant to provide a schedule the amount of underpayment he says he had suffered and for the respondent to provide a counter schedule setting out the basis of calculation of his holiday pay.

5. The matter came to final hearing before me today. The claimant was a litigant in person. The respondent was represented by Ms Headford. There was a 47 page bundle of the documents which included the claimant's schedule of underpayments. The respondent had provided written submissions which had been shared with the claimant and a bundle of authorities.

The list of issues

6. At the start of the hearing we agreed the following simple list of issues
 1. How far can Mr Aylett go back in claiming underpaid holiday pay ? Is it the 11 years he seeks or the 2 years the respondent says is all the Tribunal is allowed to go back ?
 2. How should any underpayment of holiday pay be calculated ? In particular how should we arrive at "a weeks pay" and what will the reference period be to find the average amount of overtime payments to the claimant given that the amounts changed from week to week ? How will we work out what was the daily rate of holiday pay ? (will we divide by 7 or 5 to get from a weeks pay to a day's pay ?)
 3. To which days of the claimant's holiday entitlement did the right to have contractual holiday pay calculations included attach ? Is it just the 20 days that the respondent said under regulation 13 of the Working Time Regulations, or was it the full 29 days holiday entitlement which the claimant had each year ?
 4. What amount of holiday pay element of wages were properly payable to the claimant ? What amount of holiday pay element of wages were paid to the claimant and what, if any, was the shortfall in payment to the claimant ?
 5. What right of offset if any does the respondent have for any payments made to the claimant ?
 6. Has the claimant established that he suffered any financial loss as a result of the underpayment ? Is the claimant entitled to interest on the underpayment ?
7. We agreed to proceed by way of submission only given that many of the facts were agreed. During a short adjournment in which I considered question 1 above, the backstop date, the parties agreed the following facts:

The Agreed facts

8. The claimant was employed by the respondent as a multiskilled joiner from 20 June 2011. There were changes to terms and conditions of employment during his employment which were not material to the issues before the Tribunal. His salary for 2022 was £31,629, for 2023 was £33,659 and his salary for 2024 was £34,190. The claimant had 29 days holiday per year. He had fixed working hours, working five days per week on his fixed hours, and in addition to those hours was required to work contractual overtime. The basis for calculation of the overtime payment was agreed between the parties. The total amount of overtime paid for the whole 24 months before he brought his claim was £ 18769.68. That was apportioned over the two years so that a year's average was agreed to be £ 9384.84

9. The claimant received £1439.97 which the respondent calculated to be the shortfall in holiday pay prior to this final hearing. The claimant agrees that the respondent is entitled to offset that amount from any amount the Tribunal awards.

Relevant Law

10. The starting point for this complaint was in the provisions of the Employment Rights Act in relation to unlawful deduction from wages complaints at sections 13, 23 and 24. I also had regard to the Working Time Regulations, regulations 13, 13A and 16 and provisions at section 221 and thereafter in the Employment Rights Act 1996 for calculating a weeks pay. I had regard to the Deduction from Wages (Limitation) Regulations 2014.

11. I'm grateful to Ms Headford who put copies of cases that have been decided in this tricky area of law by higher courts into her bundle of authorities which included: Agnew in the Supreme Court, Bear Scotland and Lock. I also had regard to Flowers, Williams and Bamsey. I explained the principles to Mr Aylett in the way that I went through how the respondent had done its calculations.

Applying the Law

12. The Deduction from Wages (Limitation) Regulations insert a clause into the Employment Rights Act 1996 which says

“(4A) An employment tribunal is not (despite subsections (3) and (4)) to consider so much of a complaint brought under this section as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint.”

13. That means that the Tribunal does not have jurisdiction to go back more than two years before the presentation date of the complaint. We all agreed to use the months January 2022 to January 2024 as the relevant two years because we had figures for those months and so as to save any tricky apportionments.

14. The Working Time Regulations refer us to the relevant provisions in the Employment Rights Act that set out how to determine a weeks pay for the purposes of calculation of holiday pay. The respondent had done those sums on that basis in its closing submission but in its counter schedule had used the a different formula for calculating the average overtime pay by dividing the total for 24 months by 2, then by 52.14 , then by 5 to get a day's pay. The annual overtime payment was agreed at £ 9384.84. The respondent then divided that by 52.14 to achieve a week's pay. That gave a weeks pay of £179.99. The respondent had then divided that by five to get a day's pay. This was an important denominator figure to reflect the working time and not the calendar time and that gave a daily rate of contractual overtime element of holiday pay of £36 a day. I approve the formula used by the respondent for that calculation. I then had regard to the point about how many days is the claimant entitled to claim the overtime attaches to, the full 29 or just to the 20 and my finding is that the claimant is only entitled to the contractual overtime element in relation to the 20 days because it only attaches to the regulation 13 leave.

15. I find in the claimant's favour that there was a shortfall in wages properly payable to him, which has been accepted by the respondent and that the amount that ought to have been paid to the claimant was £ 1544.48. We all agreed that it would have been disproportionate today to have to adjourn and recalculate the average by reference to the 52 week from each instance of leave reference period. What had really made a difference and mattered to the claimant was whether or not he could go back 11 years and he could not. The respondent has the right to offset the amount paid in satisfaction of the judgment that I make and therefore find that the amount due to the claimant by way of shortfall is £104.48

16. During the hearing I raised the remedy point about whether or not the claimant was seeking any financial loss under section 24(2) flowing from the non-payment at the time or any interest. The claimant had not claimed any loss in his Claim Form and did not give provide oral or documentary evidence to substantiate any loss. I could not award any. Then we talked about interest on unpaid wages. I summarised to both parties the recent arguments in other cases on this point and I heard submissions from each side. It seems to me that the tribunal does not have a statutory jurisdiction for the award of interest on unauthorised deduction from wages complaints, whereas for example it does in discrimination law, and therefore I make no award for interest

The total amount therefore awarded to the claimant is the £104.48

Employment Judge Aspinall
Date: 13 June 2024

JUDGMENT SENT TO THE PARTIES ON
28 June 2024

FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>



NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990 ARTICLE 12

Case number: **2401238/2024**

Name of case: **Mr D Aylett** v **The Guinness
Partnership Limited**

Interest is payable when an Employment Tribunal makes an award or determination requiring one party to proceedings to pay a sum of money to another party, apart from sums representing costs or expenses.

No interest is payable if the sum is paid in full within 14 days after the date the Tribunal sent the written record of the decision to the parties. The date the Tribunal sent the written record of the decision to the parties is called **the relevant decision day**.

Interest starts to accrue from the day immediately after the relevant decision day. That is called **the calculation day**.

The rate of interest payable is the rate specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as **the stipulated rate of interest**.

The Secretary of the Tribunal is required to give you notice of **the relevant decision day, the calculation day, and the stipulated rate of interest** in your case. They are as follows:

the relevant decision day in this case is: 28 June 2024

the calculation day in this case is: 29 June 2024

the stipulated rate of interest is: **8% per annum**.

Mr S Artingstall
For the Employment Tribunal Office

GUIDANCE NOTE

1. There is more information about Tribunal judgments here, which you should read with this guidance note:
www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

If you do not have access to the internet, you can ask for a paper copy by telephoning the Tribunal office dealing with the claim.

2. The payment of interest on Employment Tribunal awards is governed by The Employment Tribunals (Interest) Order 1990. Interest is payable on Employment Tribunal awards if they remain wholly or partly unpaid more than 14 days after the **relevant decision day**. Sums in the award that represent costs or expenses are excluded. Interest starts to accrue from the day immediately after the **relevant decision day**, which is called **the calculation day**.
3. The date of the **relevant decision day** in your case is set out in the Notice. If the judgment is paid in full by that date, no interest will be payable. If the judgment is not paid in full by that date, interest will start to accrue from the next day.
4. Requesting written reasons after you have received a written judgment does **not** change the date of the **relevant decision day**.
5. Interest will be calculated as simple interest accruing from day to day on any part of the sum of money awarded by the Tribunal that remains unpaid.
6. If the person paying the Tribunal award is required to pay part of it to a public authority by way of tax or National Insurance, no interest is payable on that part.
7. If the Secretary of State has claimed any part of the sum awarded by the Tribunal in a recoupment notice, no interest is payable on that part.
8. If the sum awarded is varied, either because the Tribunal reconsiders its own judgment, or following an appeal to the Employment Appeal Tribunal or a higher court, interest will still be payable from **the calculation day** but it will be payable on the new sum not the sum originally awarded.
9. The online information explains how Employment Tribunal awards are enforced. The interest element of an award is enforced in the same way.