



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Mark Morgan-Lloyd  
**Respondent:** JFG Telemetry  
**Heard at:** Southampton Employment Tribunal  
**On:** 21, 22, 23, 24, and 25 August 2023 and 19 April 2024  
**Before:** Employment Judge Teresa Hay

## Representation

**Claimant:** Mr Christian Maher-Loughnan (Lay representative)  
**Respondent:** Mr James Fraser-Petherbridge (Director of Respondent Company)

# RESERVED JUDGMENT

1. The complaint of unauthorised deductions from wages is well-founded, The respondent made an unauthorised deduction from claimant's wages, which were due to him as paid annual leave, in the period 2007 to 2018. This means the respondent failed to pay the claimant holiday pay.
2. The respondent shall pay the claimant £5384.60 which is the gross sum deducted. The claimant is responsible for the payment of any tax or National Insurance.

## The Claim

3. The claimant, Mark Morgan-Lloyd, brought a claim against his former employer JFG Telemetry in circumstances which were unusual to say the least.
4. Mr Morgan-Lloyd had been previously employed by a different telemetry company which was part of a much larger international company. When that previous employer decided to sell off part of their business, it included the part that Mr Morgan-Lloyd worked in alongside various colleagues and a manager called James Fraser-Petherbridge.
5. With the original company's agreement, Mr Fraser-Petherbridge took over the unit of the business in which he worked, and started a new concern which effectively took on the existing customers of the previous company.

He also recruited several of the staff, including the claimant, Mr Morgan-Lloyd.

6. Mr Morgan-Lloyd was employed on the same terms by JFG as he had been employed by the previous company, and at the same salary of £25000.00 per annum.
7. At the time of starting this new venture it was intended that by taking over the provision of a telemetry service to existing customers the staff previously employed would be able to retain their employment, not under a transfer, but with a wholly new company "JFG Telemetry" (JFG). Some of the staff, including the claimant Mr Morgan-Lloyd invested some of their redundancy money into the new business.
8. For a time this worked well but as the contracts that JFG had taken over ran their course, many customers did not renew. Although there was work in the run up to 2000, particularly concerning the possible threat posed by the turning of the millennium, this decreased over time. By 2006 the business was in decline.
9. By then they had moved premises to a farm just outside Brighton, and the equipment necessary to service and run the telemetry business was located there. Also located there was Mr Morgan-Lloyd, who had taken a cottage on the farm while he continued to work for JFG. Mr Morgan-Lloyd had his own property but by the end of 2007 he had lost it due to the poor state of his finances, caused in part by the fact he was not regularly being paid money by JFG. He had to sell his house, and he agreed to invest the proceeds in JGF. There was an agreement under which Mr Morgan-Lloyd agreed to the deferment of his wages, and being paid for the time being with board and a small amount of groceries, and occasional additional items as he needed them. No formal agreement or re-worked contract, either relating to the loan he had made or the status and terms of his employment, was ever made beyond this ad hoc variation. By the end of 2006, Mr Morgan-Lloyd was living at the farm, being "paid" by the provision of board and food, with his occasional other needs for clothing and the like being provided by the Directors of JFG, including Mr Fraser-Petherbridge.
10. At this time Mr Fraser-Petherbridge started another company, JFG Farming, which too was based at the farm where JFG Telemetry was located. Mr Morgan-Lloyd sometimes did work related to the farming business, although he had no contract of employment with that business.
11. That arrangement continued until late 2018, by which time Mr Morgan-Lloyd was living almost in penury. He was not being paid anything at all in money but was living on the farm and continuing to work for or for the benefit of JFG Telemetry.
12. In September of that year he persuaded Mr Fraser-Petherbridge to take

him to a bank and was told by Mr Fraser-Petherbridge, that if the bank employee asked, Mr Morgan-Lloyd was to say that he worked “with” JFG and nor “for” JFG. This conversation put Mr Morgan-Lloyd on notice that his employers had a different view of the situation than he did. As a result he raised a grievance with them, in which he raised the issue of the outstanding loan which had never been repaid to him, and also his outstanding wages. Mr Fraser-Petherbridge, on behalf of the Directors of JFG, engaged in that process for a period, but not for long. His position was that notwithstanding Mr Morgan-Lloyd had never resigned, or been sacked, nor had JFG provided any alternative employment or contractual arrangement other than the one which they had originally employed Mr Morgan-Lloyd, that in fact Mr Morgan-Lloyd had ceased to be an employee of JFG several years previously.

13. Following a 5 day in person hearing held in Southampton between 21 and 25 August 2023, Judge Hay determined the following:

13.1 Mr Morgan-Lloyd, the claimant, had been employed by the first Respondent JFG Telemetry since 1998.

13.2 That employment ended with an effective date of termination of 18 December 2018.

13.3 Mr Morgan-Lloyd left JFG Telemetry’s employment when, in September 2018, he came to understand that the Directors of the company, including Mr Fraser-Petherbridge, no longer considered him an employee. This revelation was a breach of the implied term of mutual trust and confidence included in every employment contract, and amounted to a dismissal under section 95 (1) (c ) of the Employment Rights Act 1996.

13.4 The 18 December 2018 was the date on which Mr Morgan-Lloyd’s employment ended. This was the last date on which he attempted to address his dispute with the company and its Directors as part of a grievance procedure. When they declined to attend a meeting he had requested this demonstrated they would not do anything to address the situation between them.

13.5 The company, JFG Telemetry, had never formally changed or ended Mr Morgan-Lloyd’s status as employee, although the terms of his employment had been varied with his agreement when the company stopped paying him cash wages sometime in 2006. From then on, Mr Morgan-Lloyd received consideration under his employment contract in the form of rent-free accommodation on South Hill Farm, food provided for him, and groceries and other necessities purchased for him by the Directors of the company, Mr Fraser-Petherbridge and Mrs Jean Robertson.

13.6 Mr Morgan-Lloyd was not employed by nor a worker of, JFG Farming. Many of the tasks he undertook on the farm were as directed by his actual employer JFG Telemetry.

13.7 Work Mr Morgan-Lloyd undertook on the farm which produced food which he and others living on the farm ate, was for the benefit of his employer because it reduced the amount of cash money they needed to spend to retain his services.

13.8 He last received an itemised pay statement in 2000.

13.9 There were two loans made to the Respondent company which have not been repaid. The failure to repay those loans is a breach of

contract which was outstanding at the date of the termination. Mr Morgan-Lloyd decided not to pursue that breach of contract claim in the Employment Tribunal. It was withdrawn, but not dismissed, pursuant to rule 52 of the Tribunal Rules.

14. Having made the findings of fact which are summarized above, Judge Hay concluded and declared that:
  - 14.1 Mr Morgan-Lloyd was unfairly dismissed.
  - 14.2 Mr Morgan-Lloyd was subjected to unauthorised deductions from his wages.
  - 14.3 Mr Morgan-Lloyd may have been paid less than the legal minimum wage.
  - 14.4 Mr Morgan-Lloyd was not given an itemised pay statement.
  - 14.5 Mr Morgan-Lloyd does not appear to have ever been paid holiday pay.
15. Judgment to the above effect was given orally at the hearing and was issued by the Tribunal subsequently. No party to the case made a request for written reasons and the time for making such a request has now passed.
16. A remedy hearing was held on 19 April 2024 at which Employment Judge Hay made determination of most of the relevant sums which were owed to Mr Morgan-Lloyd and gave judgment on those sums on the same day. Employment Judge Hay reserved a judgment on the so-called “holiday pay” claim because of a lack of Tribunal time. This judgment should be read and understood in tandem with the earlier judgments on both liability and remedy.
17. At the remedy hearing Mr Morgan-Lloyd said that he could not recall receiving holiday pay but he may have, but the last time he could recall taking any leave or holiday was before he lost his house in 2007.
18. Employment Judge Hay accepted that evidence for the following reasons:
  - 18.1 it was consistent with his other evidence about what he had received as “wages” and what he had not;
  - 18.2 it was consistent with the photographs of the cottage in which Mr Morgan-Lloyd was living which was full of technical equipment connected to the telemetry business, which meant there was no realistic way for him to have a proper period of annual leave whilst he was at home;
  - 18.3 it was uncontested evidence that he had not left the farm for a considerable period;
  - 18.4 for the respondent JFG Telemetry, Mr Fraser-Petherbridge had not provided any evidence in response or rebuttal on any issue concerning remedy including holiday pay specifically which was identified in a list of issues contained in a Case Management Order sent to the parties in advance to assist them;
  - 18.5 for the respondent Mr Fraser-Petherbridge had the opportunity to challenge Mr Morgan-Lloyd with questions, and there had been no

challenge to Mr Morgan-Lloyd's assertion that he had not "had a holiday" since he lost his house.

19. That means that from 2007 onwards Mr Morgan-Lloyd has not received paid annual leave.
20. The statutory basis for Mr Morgan-Lloyd's claim was unclear. In his ET/1 he ticked a box to indicate that he was owed holiday pay and in the expanded box below it he said "Holiday pay has not been made". Neither in the ET/1 claim form nor in subsequent case management agendas or hearings did he specify whether his claim was one for damages under the Working Time Regulations or for unauthorised deduction of wages under the Employment Rights Act 1996.
21. By order dated 4<sup>th</sup> November 2019 he was permitted to amend his claim form to add a claim for unauthorised deduction of wages for the period of 2 years prior to 14 February 2019 (the date of his ET/1) but this made no specific reference to holiday pay.
22. The case was then stayed (or paused) several times. It was next listed for a preliminary hearing on 2 March 2023. Again the issue of the statutory basis for Mr Morgan-Lloyd's holiday pay claim was not addressed and all his claims were referred to as Unauthorised Deductions (Part II of the Employment Rights Act 1996). A further preliminary hearing was conducted on 6 July 2023 where once again monetary claims relating to wages were expressed as claims under Employment Rights Act.

#### Entitlement to paid leave ("Holiday pay")

23. In England and Wales a statutory entitlement to paid annual leave comes from the implementation of the Working Time Regulations 1998 SI1998/1833 (the "WTR").
24. Regulations 13, 13A, and 14 together entitle an employee to four weeks annual leave (Reg 13) plus an additional 1.6 weeks (Reg 13A). The additional periods added by Reg 13A were added incrementally between October 2007 and April 2009.
25. Regulation 16 requires a worker to be paid for any period of annual leave to which they are entitled.
26. The regulations provided a definition of a "leave year" as the date provided for in any relevant agreement or where there are no relevant agreements, then if the worker's employment began before 1 October 1998, on that date and on each anniversary thereafter. This means in the absence of any specific date agreed between employer and employee, the law assumes the leave year runs from 1 October to 30 September of the following year.

27. Regulation 13 (9) states that leave may be taken in instalments but only in the leave year in which it is due and it may not be replaced by a payment in lieu except where the worker's employment is terminated.
28. Upon termination of employment, Regulation 14 entitles a worker to be paid the sum equivalent to that which would be paid to them for any leave that they have accumulated but not yet taken during the leave year in which their employment ends. In other words, if they have accrued or "earned" more leave entitlement than they have taken and been paid for then a worker is entitled to be paid that outstanding holiday pay.
29. In summary, that means that in each year from October to September, a worker is entitled to 5.6 weeks paid annual leave, to be taken in the year in which it accrues, and such leave may not be replaced by a payment except on the termination of the employment. An employer cannot pay an employee an additional sum instead of allowing them to take paid annual leave, but if an employee has leave which is outstanding at the time the employment ends, then they are entitled to be paid that amount instead. The theory behind this exception is to help an employee afford a period of rest before they start any new employment.

"Use it or lose it"

30. If an employee does not take their annual leave entitlement they may be able to carry it over and then seek payment in lieu upon the termination of their employment.
31. A law cannot provide for the automatic loss of payment in lieu of annual leave on termination unless an employer can show that they have enabled the employee to exercise the entitlement to leave. An employer does not have to force an employee to take their annual leave entitlement, but they should encourage workers to take their holiday and inform workers of the risk that they might "lose" their annual leave either at the end of any permitted carry over period or upon termination of employment. If an employer can show that they did so, then any employee who declines to take holiday and was aware that as a result they might "lose it" may forgo the possibility of claiming it all upon termination: *Kreuziger v Land Berlin Case C-619/16* and *Max-Planck-Gesellschaft zure Forderung der Wissenschaften eV v Shimzu Case C-684/16*.
32. An employee who is refused annual leave or told it will be unpaid, and as a result does not take their full entitlement, may be entitled to carry over and accumulate paid annual leave rights until the termination of employment: *King v Sash Window Workshop and another 2018 ICR 693 ECJ*.
33. An employer must encourage workers to take paid leave. Simply allowing them to take unpaid leave is not sufficient because it prevents a worker from exercising their right under the WTR to paid periods of leave. A worker can only lose the right to paid leave if they have had the opportunity to exercise that right and chosen not to. If they had not been given that opportunity, then it came to fruition on termination of the

contract and a claim could be made for all accumulated unpaid annual leave: *Smith v Pimlico Plumbers Ltd* 2022 IRLR 347 CA.

34. The Court of Appeal in that case read into Reg 13 the following:

*“Where in any leave year an employer*

- i) Fails to recognise a worker’s right to paid annual leave and*
- ii) Cannot show that it provides a facility for the taking of such leave, the worker shall be entitled to carry forward any leave which is taken but unpaid, and / or which is not taken into subsequent leave years”*

35. This line of cases refer to the right to paid leave given by Article 7 of the EU Directive from which the Regulations derive. Article 7 states *“Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to and granting of such leave laid down by national legislation and / or practice”*.

36. Under the Working Time Regulations, the national legislation and practice in England and Wales is that from the time of implementation the minimum four weeks has been added to incrementally, and any entitlement to annual leave will be applied under both Reg 13 and Reg 13A.

#### Appropriate remedy

37. A worker may bring a complaint relating to unpaid annual leave to an Employment Tribunal under regulation 30 of the Working Time Regulations where their employer has refused to permit them to exercise their right under regulations 13 or 13A, or has failed to pay them the whole or any part of any amount due under regulations 14(2) (the calculation of holiday pay) and reg 16 (the right to be paid for annual leave).

38. A Reg 30 claim must be presented within three months from the date on which it is alleged that the exercise of the right should have been permitted or the payment should have been made, or such further period as the Tribunal considers reasonable in a case where the Tribunal is satisfied it was not reasonably practicable to bring the claim within three months.

39. There is no provision in Reg 30 to link any series of non-payments or under payments, which means that strictly a claimant may have to bring a claim every time they are denied their statutory holiday pay entitlement. Whether Reg 30 provides an adequate remedy for an employee who has never had paid annual leave because the mechanism for doing was not provided by the employer is unclear.

40. Alternatively a worker may bring their complaint under the Employment Rights Act sections 13 and 23 which grant the right not to suffer unauthorised deductions from wages and to complain about it to an

Employment Tribunal if they do. Complaints under s13 must be presented within 3 months of the date of the payment of the wages from which the deduction was made. Where the complaint relates to a series of deductions then the claim must be made within 3 months of the last of them. Provided that the deductions which a claimant asserts are a “series” are sufficiently similar, taking into account all the circumstances which might allow them to be characterised as a series of deductions then, provided the claim is presented within three months of the last of them, there is no requirement to present a claim within three months of each of them: *Chief Constable of the Police Service of Northern Ireland and another v Agnew and others 2023 UKSC 33 SC*.

41. Where a Tribunal finds a complaint under s23 well founded it shall make a declaration to that effect and order the employer to pay to the worker the amount of any deduction made: Employment Rights Act 1996 s24 (1) (a).
42. Any remedy claim for unauthorised deductions under the Employment Rights Act is limited to a period of 2 years: *Deduction from Wages (Limitation) Regs 2014 SI2014/3322* which inserted the following words into s23;  
“4A an employment tribunal is not to consider so much of a complaint brought under this section as relates to a deduction where the date of the payment of the wages from which the deduction was made was before the period of two years ending with the date of the presentation of the complaint”.
43. A claimant should identify for the Tribunal which piece of legislation they are claiming under. Mr Morgan-Lloyd has not done so.
44. In the absence of any election or clarification about which piece of legislation Mr Morgan-Lloyd was bringing his claim under, and because at all relevant case management hearings his wages claims were referred to as Employment Rights Act claims, Employment Judge Hay treated his claims as claims under s13 and 23 of the Employment Rights Act. For that reason, the question of adequate remedy under Reg 30 was not considered.

### Conclusion

45. The respondent has proffered no evidence that there was any means by which Mr Morgan-Lloyd could take or be paid for annual leave; that he was ever encouraged to do so; or that he was ever warned that if he did not he may forfeit the right to be paid for it. The respondent has not shown that they have complied with their obligations under the Working Time Regulations and so Mr Morgan-Lloyd is entitled to be paid such leave entitlement as he has accumulated, subject to any relevant limitation.
46. Neither party identified any specific leave year, so applying WTR reg 13



Mr Morgan-Lloyd's leave year ran from 1 October to 30 September each year.

47. His employment was terminated on 18 December 2018 by which time he had accrued 6 days in the leave year 1 October 2018 – 30 September 2019. He had taken no leave in that leave year, nor in any previous year since approximately 2007. Upon termination he was entitled to a payment in lieu of paid annual leave accrued up until that date, subject to a maximum of two years entitlement.

48. His accrued entitlement by December 2018 was;  
For the year 1 October 2007 – Sept 2008 4 weeks plus 0.8 weeks (Reg 13 (2) (a));  
For the year 1 October 2008 - Sept 2009 4.8 weeks plus an additional 0.8 weeks (Reg 13 (2) (d)); and  
in every leave year after April 2009 (including the leave year beginning October 2009) 5.6 weeks (Reg 13 (2) (e)).

From October 2009 to October 2018 is 9 years at 5.6 weeks per year, plus 5.6 weeks for the leave year 2008 to 2009, plus 4.8 weeks for the leave year 2007 to 2008 making a total accumulated entitlement of 60.8 weeks plus 6 days paid annual leave.

49. Section 24 of the Employment Rights Act entitles him to a declaration and an order that the respondent pay the amount of unpaid annual leave which has been deducted from him.

50. His annual salary was £25000.00 and was not increased at any time during his employment. The sum due to him for paid holiday for each year in which his entitlement had increased to 5.6 weeks was £2692.30, calculated as  $£25000.00 \div 52 \times 5.6$ . This included the last two years of his employment prior to dismissal.

51. His entitlement is capped at 2 years and so any remedy in respect of unpaid annual leave is limited to £5384.60.

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Employment Judge Hay  
Date 14 May 2024

JUDGMENT SENT TO THE PARTIES ON  
29 May 2024 By Mr J McCormick

FOR THE TRIBUNAL OFFICE