

Neutral Citation Number: [2025] EAT 40

Case No: EA-2023-001083-RN and EA-2023-000647-RN

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 21 March 2025

His Honour Judge James Tayler

Between:

Alexandru Bucur

Appellant/Respondent

- and -

The Soho Sandwich Company Ltd

Respondent/Appellant

Ms A Bucur for the Appellant
Mr E McFarlane for the Respondent

Hearing date: 13 March 2025

JUDGMENT

His Honour Judge James Tayler:

1. The parties are referred to as the claimant and respondent as they were before the Employment Tribunal.
2. These appeals are against the judgment of Employment Judge Bartlett dismissing complaints of unauthorised deduction from wages pursuant to the **Employment Rights Act 1996 (“ERA”)** and under the **Working Time Regulations 1998 (“WTR”)**. The complaints related to occasions on which the claimant worked on bank holidays but was not paid an additional day’s pay and/or was not granted a day off in lieu as was provided for in his contract of employment.
3. The substantive determinations are appealed by the claimant: EA-2023-001083-RN.
4. The claimant was also awarded £1,929 in respect of the respondent’s failure to provide a Statement of Initial Employment Terms in accordance with section 1 **ERA**. That award was revoked on reconsideration because there was no underlying successful complaint that would permit the award. As a result of the reconsideration determination the respondent applied to withdraw their appeal against this award: EA-2023-000647-RN. I granted permission for the appeal to be withdrawn.
5. The claimant appealed the substantive decision on two grounds. Both were permitted to proceed at the sift stage on the basis that they were arguable, without any further explanation. I found the grounds and arguments advanced in their favour hard to follow and would have benefited from knowing in broad terms why they were considered to be arguable at the sift stage.
6. The unauthorised deduction from wages was said to be in relation to days on which the claimant worked bank holidays, was paid an additional day, but did not take an additional day of leave in lieu. The claim was for contractual holiday pay.
7. The claimant’s contract of employment provided:

Due to the nature of our business you may be required to work on any of the public/bank holidays listed below, and it is a condition of employment that you work on these days when required to do so. If you are required to work on any of these days you will be paid at double time and given an alternative day of leave in lieu. The date when a day off in lieu is to be taken is to be mutually agreed with us. The public/bank holidays each year are ...
8. The Employment Tribunal considered the claim for double pay:

30. The claimant's claim has several parts:

30.1. if the claimant worked a bank holiday he was to be paid double pay;

30.2. if the claimant worked a bank holiday he was paid his normal monthly salary for that month and in addition, for each and any bank holiday worked, £112.18;

30.3. the claimant agreed that £112.18 was his day rate;

30.4. he claimed that if he worked a bank holiday he should be paid his normal salary plus two times £112.18.

31. The respondent does not dispute that the claimant is entitled to double pay for bank holidays worked. The respondent asserts that the claimant was paid correctly for the bank holidays worked which is his normal monthly salary plus £112.18 for each and any bank holiday worked.

32. The dispute between the parties is therefore was the claimant paid double pay? The amount paid is not disputed. The claimant asserts that he was only paid single pay if he was paid an additional £112.18 for a bank holiday he worked.

33. I find that the claimant is mistaken. The claimant worked a bank holiday and was paid his normal salary and an additional one day's pay of £112.18. I find that this is double pay. This is evident of the face of it. The claimant's normal salary includes the payment for bank holidays worked in his holiday entitlement this effectively gives him normal pay for the bank holiday. The extra day rate he receives on top of it makes it double pay.

9. The claimant does not challenge in this appeal the approach the Employment Tribunal took to double pay, as was expressly accepted in the grounds of appeal. Although Ms Bucur seemed to challenge the approach to the double pay issue in some of her submissions she subsequently confirmed that the appeal was limited to a complaint about the manner in which during the relevant period when the claimant worked a bank holiday, he was paid for an extra day, but did not take a day off in lieu.

10. Despite this argument being advanced on appeal it was disavowed in the Employment Tribunal:

Payment in lieu

34. I asked Ms Bucur if the real complaint concerned failing to have a day off in lieu for a bank holiday and she said it was not. Even if the claimant's complaint was that he had not been given a day off in lieu, he cannot bring this as an unlawful deduction from wages because a day off in lieu does not satisfy the definition of wages.

35. As a result of the above the claimant's claim for unlawful deduction from wages must fail.

Failure to provide holiday

36. It has long been established that statutory holiday claims can be brought as an unlawful deductions from wages claim in certain circumstances.

37. The claimant did not take annual leave which was unpaid or paid at a lesser rate as a result of my findings above and therefore his claim under unlawful deductions from wages fails in respect of untaken holiday. A claim that he did not take holiday because he did not know about it does not fall within an Unlawful Deductions from Wages Act claim.

11. I can see no error of law in the determination of the Employment Tribunal of this complaint of unauthorised deduction from wages. The approach adopted by the Employment Tribunal to the claim about untaken contractual leave in excess of the entitlement to annual leave pursuant to regulation 13 **WTR** is in accordance with the decision of Simler J, as she then was, in **King v Sash Window Workshop Ltd** [2015] IRLR 348. That component of her reasoning was not challenged in the subsequent appeals.

12. The claimant also contended in respect of holiday years up to 2020 that he had not been permitted to carryover additional annual leave above his entitlement pursuant to regulation 13 **WTR**.

13. The Employment Tribunal rejected this complaint in respect of the relevant holiday years on the basis that there was no right to carryover untaken additional annual leave:

66. I have found that the claimant took 24 days of leave in all his holiday years which means that he has taken his entitlement under regulation 13 of the **WTR**. The claimant's claims in respect of additional leave under regulation 13A fail because the CJEU case law and the Court of Appeal have made it clear that the rights discussed above do not apply to the additional leave.

14. The claimant asserts in this appeal that the bank holiday term in his contract of employment and associated documents constituted a workforce agreement that permitted him to carryover unused leave pursuant to section 13A(7) **WTR** which provides:

(7) A relevant agreement may provide for any leave to which a worker is entitled under this regulation to be carried forward into the leave year immediately following the leave year in respect of which it is due.

15. The simple answer to this ground of appeal is that the argument was not run in the

Employment Tribunal. An application for reconsideration on this basis was refused in a judgment sent to the parties on 2 August 2023, which has not been appealed, in which it was stated:

6. I consider that there was no reasonable prospect of the original decision being varied or revoked because the grounds of reconsideration raise arguments that were not presented at the original hearing. No argument was made by the claimant that his terms and conditions provided for carry over of holiday. The reconsideration refers to numerous sections of various documents. These arguments were not made at the hearing. Submissions were not heard on the interpretation of the clauses in the various documents. Further, the contract of employment contains no clause about holiday carryover and I did not hear any argument about the clauses in the handbook at the hearing.

16. I do not consider that there is any good reason that this argument in respect of entitlement to holiday in excess of that provided for by regulation 13 **WTR**, that could and should have been raised before the Employment Tribunal, should now be permitted on appeal. The claimant has not complied with Section 8.13 of the EAT Practice Direction in seeking to advance an argument not raised below. This ground is dismissed, particularly because it would require consideration of the status of the various documents in addition to the contract of employment that the claimant sought to rely upon to establish the existence of a workforce agreement which were not considered in the judgment of the Employment Tribunal and so would be likely to require further evidence.

17. The appeal is dismissed.