



# EMPLOYMENT TRIBUNALS

**Claimant:** Charmayne Kelland

**Respondent:** ASDA Stores Limited

**Heard at:** Bristol ET (by CVP)

**On:** 2<sup>nd</sup> May 2024

**Before:** Employment Judge Sanger

**Representation**

Claimant: in person.

Respondent: Ms Sarah Harty, Counsel.

## JUDGMENT

1. The claim for unlawful deduction of wages is dismissed.
2. The claim for unpaid holiday pay was dismissed upon withdrawal.

## REASONS

### **The Background and Issues**

3. The Respondent company operates over 600 grocery stores in the UK and employs 145,000 individuals.

4. The Claimant was employed by the Respondent at their Creechbarrow Road, Taunton store as a Night Replenishment Operative, from 8<sup>th</sup> September 2023. She remains employed in the same role.
5. The Claimant claimed that, after an accident at work on the night of 23<sup>rd</sup> May 2024, she was not paid accident pay or sick pay in full.
6. The Claimant brought a claim against the Respondent on 31<sup>st</sup> July 2024.

### **The issues**

7. It was not clear from her claim form, or from her subsequent schedule of loss or witness statement exactly what was claimed and therefore which jurisdiction the claim fell into. The matter was recorded on the Tribunal system as a claim for the unlawful deduction of wages and a claim for unpaid holiday pay.
8. This being the first hearing in the matter, no list of issues having been determined in advance of today's hearing. It therefore fell to the Tribunal today to establish the nature of the claim.
9. The Claimant confirmed that she did not seek to pursue a claim for holiday pay. Her claim was in relation to wages only.
10. The issues were determined as:
  - a. What is the precise amount the Claimant is claiming she is owed by way of properly payable wages? How has this been calculated by the Claimant?
  - b. Has the Respondent failed to pay the Claimant the total amount owed to her, constituting an unlawful deduction from wages?

### **The Evidence**

11. I reviewed the bundle of documents that was provided to the Tribunal on 30<sup>th</sup> April 2025 and was assisted by two further witness statements: those of the Claimant and Mr Justin Elliot on behalf of the Respondent.
12. I heard evidence from Justin Elliott, Night Section Manager, for the Respondent and Charmayne Kelland, who is the Claimant.

### **Findings of fact**

13. The following facts were found on the balance of probabilities.
14. The Claimant suffered an accident in the workplace on the night of the 23<sup>rd</sup>-24<sup>th</sup> May 2024. She stayed on for some time but did not, in the end, complete her shift.

15. The Claimant was off sick until 3 October 2024 and submitted statutory fitness for work certificates to cover that time period.
16. The Claimant had been employed, at the time of the accident, for 37 weeks. She had previously been employed by the Respondent and left, but returned to work for them on 8<sup>th</sup> September 2023. It was accepted by the Claimant that this was a new employment and that 37 weeks was the correct length of service.
17. The Respondent's Sick Pay policy for hourly paid employees differentiates between Statutory Sick Pay (SSP) and Company Sick Pay (CSP). CSP is more generous and is available to employees who have been continuously employed for 39 weeks before a period of sickness absence.
18. Under CSP an employee will be paid a higher rate of sick pay, in many cases amounting to full pay, for periods specified in the Sick Pay policy.
19. The Claimant was not eligible for CSP, having been employed for less than 39 weeks. She was only eligible for SSP in the relevant period.
20. The Sick Pay policy also states that no sick pay is payable to hourly rate employees for absences of three days or less, unless the following applies:

*Colleagues will not receive any SSP or CSP or CSP for absences of 3 days or less, these are called waiting days. There may be exceptions to receiving company sick pay on these days such as, if the absence is related to a third party accident or if the colleague joined Asda through a TUPE transfer.*
21. The Claimant was told, when she finished her shift early on the night of the 23<sup>rd</sup>/24<sup>th</sup> May 2024, that she would be paid for her time off. This was in an oral conversation with her manager, Justin Elliott.
22. The Claimant contended that Mr Elliott had been clear to her that she would be paid her full wage. The wording she attributed to him was that he would do everything in his power to make sure she got paid correctly.
23. In his evidence Mr Elliott did not accept having reassured the Claimant that she would be paid "in full". He did note, however, that he did not have a full working knowledge of everybody's contracts and that he was only aware of the newer contracts, having been employed for a relatively short period of time himself.
24. While I find it more likely than not that Mr Elliot did reassure the Claimant that she would be paid in full, this was a mistake and I accept his evidence which was that he did not have a working knowledge of her contractual conditions. In any event he did not have the authority to make such a promise binding.
25. From the evidence given by the Claimant, it appears likely that there is a general understanding through the workforce that "accident pay" is something to which all employees are entitled after an accident in the workplace. This was not, however,

recorded in any of the documentary evidence and does not form part of the Sick Pay policy.

26. That said, there was more than one reference to what might be construed as “accident pay” in the Respondent’s documentation and it is not difficult to see how such a misconception might have arisen, leaving aside the Claimant’s anecdotal evidence of colleagues receiving full pay after a workplace accident.
27. The first is a reference on the payslip of 13<sup>th</sup> July 2024, which says, under the column for *pay and allowances*, “accident: £309.00”. The wording of this provision is perhaps unfortunate, given that the policy does not make any provision for accident pay.
28. This was later determined to be a clerical error based, presumably, on the fact that the Claimant had left and returned to the company and her payroll ID had not been properly separated.
29. The second reference was contained within the undated correspondence with People Services, in which a reference to the overpayment made under the mistaken assessment that the Claimant was entitled to CSP was described as “*3 waiting days paid as Accident at Work in July*” with an explanation that that would be recovered.
30. That wording has led me to find that the Respondent must have, albeit not explicitly expressed within the documentation, a policy of paying CSP to those who are eligible and who suffer a workplace accident.
31. I also heard evidence that a day of pre-booked holiday pay had been incorrectly paid to the Claimant during the period of sick leave, which was then recovered. The Claimant’s evidence was that her holiday pay should have been automatically cancelled when she submitted a statutory fitness for work note. I did not find this to be supported by any policy documents, and found that she had misinterpreted the policy. In any event this evidence was outside the scope of the issues to be determined.
32. Statutory sick pay was paid, at the correct rate, up to at least 10<sup>th</sup> August 2024. This is evidenced in the bundle in the form of an enquiry to the People Services team made by Justin Elliott, in which he queries whether the sick pay was properly calculated.
33. The conclusion of that correspondence is that the sick pay was properly calculated at SSP rates. The Claimant accepted, in evidence, that the SSP had been properly calculated.

### **Submissions of the parties**

34. The Claimant submitted that:

- a. She should have been paid her accident pay;
- b. the Respondent ought to have worked out her pay properly in the first place;

- c. she had relied on assurances from Mr Elliott that she would be paid “in full” while she was off;
- d. the subsequent toll on her personal life had been significant in that her then husband had had to work extra hours but the strain that had been put on the relationship had resulted in the end of their marriage;
- e. holiday pay ought to have been automatically cancelled and should never have been paid.

35. The Respondent submitted, in summary, that:

- a. The Claimant had failed to set out, to the required standard, the amounts claimed, the basis and the time period; there is therefore no claim in unlawful deductions;
- b. that this case was predicated around the mistaken belief of the existence of an accident pay policy, but that there was no evidence to support a finding that there was;
- c. the onus, when suggesting that there has been a miscalculation by the Respondent in what the Claimant was owed, is on the Claimant; she has not discharged that burden and it is not for the Respondent to do the re-calculations.

## Conclusions

36. The issues were determined as follows.

*What is the precise amount the Claimant is claiming she is owed by way of properly payable wages? How has this been calculated by the Claimant?*

37. The Claimant was not able to clearly set out the amount she was claiming. I note that this would have been extremely difficult given the way in which the payslips and explanations for the corrections of errors were presented.

38. I found that the Claimant was genuinely confused by the manner in which her pay had been amended on numerous occasions and I have sympathy with her frustration, both in that regard and in relation to her evidence that a clear answer did not appear to be forthcoming as to the reasons for that. In her evidence she repeatedly explained that she would not have brought the case to the Tribunal had she not genuinely believed that she was entitled to “accident pay”.

39. It was also clear that there is a discretion available to the Respondent when determining whether to pay an hourly rate employee for the first three days of their sickness absence as CSP. I have no doubt, from the wording on the payslip and the wording used by People Services in responding to Mr Elliott’s enquiry, that it is customary, if not policy, for CSP eligible employees to be paid in full for the first three

days of any sickness absence where that absence is owing to a workplace accident. It is hardly surprising, therefore, that the Claimant was confused.

40. The burden may rest on the Claimant to establish a claim but, in the event of clerical errors, particularly where what has finally been paid is unclear, I do not accept that it is not the responsibility of the Respondent, which has an obligation to its employees, not to mention the Tribunal, to undertake any re-calculations.

*Has the Respondent failed to pay the Claimant the total amount owed to her, constituting an unlawful deduction from wages?*

41. The Claimant had been employed by the Respondent company for fewer than 39 weeks and the right to CSP, under which there was a discretion to pay a form of “accident pay”, therefore did not arise.
42. The SSP was properly calculated and ran from day 4 of her absence to the end of the claim period, 31<sup>st</sup> July 2024.
43. I do not find that the Respondent has failed to pay the Claimant any amounts owed. There is consequently no unlawful deduction from her wages.

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*Employment Judge Sanger*

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Date: 24th May 2025

JUDGMENT & REASONS SENT TO THE PARTIES ON

10 June 2025

Jade Lobb

FOR THE TRIBUNAL OFFICE