EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8002074/2024

Held in Glasgow via Cloud Video Platform (CVP) on 12 May 2025

Employment Judge E Mannion

Mr S Mohammed	**Claimant** **In Person**
RD&T Limited	**Respondent** **Represented by:** **Mr D Shayer -** **Lay Representative**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Employment Tribunal finds that there has been no deduction to the claimant's wages and so his claim is unsuccessful.

REASONS

1. The claimant lodged a claim for unpaid wages on 9 December 20254. This is resisted by the respondent.

2. A bundle of documents was prepared and lodged for the hearing. Additional documentation was presented and included on the morning of the hearing as it related to geolocations of where the claimant clocked in and out.

3. At the outset of the hearing, I went through the process of hearing, who would speak first, the types of questions to ask in examination in chief (open questions, who what when where how) and the difference in cross examination, the requirement to put the case to the witnesses and challenge evidence where it is not agreed. I also explained that while the bundle of documents has been prepared, I do not read this in full but instead consider documents that the parties bring into evidence by asking their witnesses about them. During the course of evidence, I explained again the need to challenge evidence where it is not agreed and that statements made when asking a question of the claimant for example does not amount to evidence that I can take into account when making findings of fact.

4. We discussed the witnesses who would be giving evidence. The claimant was giving evidence on his own account. Mr Shayer, who was acting as a representative, indicated that he would be giving evidence and that his wife, Roberta Shayer who was present, would also give evidence. It was explained that Mrs Shayer could not be present while the claimant and Mr Shayer gave their evidence. The order of witnesses was as follows – the claimant, Mr Shayer, Mrs Shayer.

Submissions

5. Both parties made submissions at the conclusion of the evidence. For brevity, these are not included in detail here but for the avoidance of doubt, these submissions were carefully considered when coming to the decision below.

Findings of fact

6. I made the following findings of fact after considering the evidence on the balance of probability.

7. The claimant was employed by the respondent as a Chef de Partie. His employment began on 27 April 2024 and he was contracted to work 20 hours per week, which aligned with the maximum working week as per his student visa. At that time, he was paid an hourly rate.

8. On 31 May 2024, the claimant's contract changed from hourly rate to an annual salary of £27,000. He was also informed that he would be employed on a full time basis, working 173.33 hours per month.

9. He was provided with a contract of employment [pgs 38-44] which set out his rate of pay as above. This contract was signed by the claimant on 17 July 2024. It makes no account for overtime.

10. The contract does not set out the claimant's full time hours, but instead noted that the claimant was contracted to work 20 hours per week. This was an error on the part of the respondent. The claimant was informed by Mrs Shayer that he was employed on a full time basis and that full time meant 173.33 hours per month.

11. In June 2024, the claimant worked 97.03 hours in excess of his full time hours. In July 2024, he worked 94.23 hours in excess of his full time hours. In August 2024, he worked 75.11 hours in excess of his full time hours. In September he worked 66.27 hours in excess of his full time hours. In October he worked 64.21 hours in excess of his full time hours. The respondent was aware of this.

12. The claimant was given a weekly rota from the head chef which set out his days and hours of work. He was given this rota a week in advance. This rota

was sent to the claimant electronically via the Connect Team app and he could then accept or reject the rota. More often than not, the claimant accepted the proposed hours and days of work on the rota.

13. As well as the rota the claimant was required to complete electronic timesheets by clocking in and out on the app when he began and finished his shift. The respondent required their employees to clock in and out on these electronic timesheets so they had oversight that their employees were at work when they were supposed to be at work. Once a timesheet was complete, it was sent to the claimant's line manager, the head chef, for approval.

14. Mrs Shayer was involved in the day to day running of the restaurant and had responsibility for HR and payroll. She was in the restaurant most days. Mr Shayer was in the restaurant less often as he has a job elsewhere. The payroll data was based on the rotas drawn up for the employees. The timesheets were not used by Mrs Shayer to pay salaries; only the rotas informed payroll.

15. In or around October 2024, the claimant and Mrs Shayer had a conversation about the potential for the restaurant to close temporarily in January and February 2025 which are often slow months in the industry. The claimant was informed that even if the restaurant was closed during those months, he would continue to be paid.

16. The respondent was aware of the amount of hours undertaken by the claimant from June to October 2024. These hours in excess of his full time hours were not included on the rota but undertaken by the claimant to complete his duties or to cover additional shifts for example in September 2024 when the respondent did not have a chef in place. They were noted on his timesheets which were approved by the head chef. Neither Mr nor Mrs Shayer raised an issue with the hours undertaken by the claimant. The respondent did not pay the claimant for these hours because there was no provision for overtime in his contract.

17. On or around the 31 October 2024, Mrs Shayer had a discussion with the claimant about his role in the restaurant and informed him that they may not be able to retain him in a full time role. It was suggested that he look for alternative work. The claimant did so and resigned from his employment with the respondent. His employment came to an end on 3 November 2024.

18. The claimant raised a grievance on 4 December 2024 seeking payment of the hours worked in excess of his full time hours. This was denied by the respondent.

19. The claimant did not receive any further payments from the respondent after his final salary payment on 1 December 2024.

Relevant law and Decision

20. Section 13 of the Employment Rights Act 1996 states that

> *(1) An employer shall not make a deduction from ages of a worker employed by him unless –*
>
> *(a) The deduction is required or authorized to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or*
>
> *(b) The worker has previously signed in writing his agreement or consent to making of the deduction.*
>
> *And*
>
> *(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions) the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.*

21. The claimant's case is that he was working in excess of his full time hours and was not paid for these hours. He stated that he should have been paid this overtime on a monthly basis and if not, received payment in January and February 2025 as per agreement with the respondent in October 2024.

22. The respondent resisted the claims on the basis that the contract does not provide for the payment of overtime. They disputed that there was any agreement to make a payment to the claimant in January and February 2025. Instead it was submitted that employees were informed that when the restaurant was closed in January and February 2025, staff would continue to be paid. As the claimant was not employed by the respondent at that time, he was not paid.

23. The claimant gave specific evidence on the hours he worked in excess of his full time hours each month and the work undertaken with reference to timesheets at pages 50 – 61. On the whole this was not challenged, despite the claimant being recalled to specifically address this point. The general respondent position was that when clocking out on the app, the claimant was not always at the work location and so they could not tell when he finished work. This was a general position only. There was only one instance where it was put to the claimant that on 14 September 2024 the geolocation on the app showed he clocked in at 22 High Street and clocked out at 23 High Street. The restaurant address is 16 High Street. The geolocation at pg 70 shows the claimant clocked on at 23a High Street and clocked out at 12 – 22 High Street.

He maintained that there was no real difference in location and that he clocked in and out at the restaurant. I accepted the claimant's position that there was no real difference between 23a and 16 High Street and noted that the geolocation of 12-22 High Street where he clocked out includes 16 High Street.

24. I found that the claimant worked the additional hours as stated and that as he was required to clock in and out each day, the respondent was aware of the hours worked.

25. In order to make a successful claim under Section 13(3), it is not enough that the claimant has undertaken the hours claimed. He needs to show that wages were properly payable by the employer for those hours and that non-payment of these amounted to a deduction from wages. The phrase 'properly payable' was considered by the Court of Appeal in **New Century Cleaning Co v Church 2000 IRLR 27, CA** where they found that in order for a payment to fall within the definition of wages properly payable, there must be some legal entitlement to the sum in question. A contractual entitlement would amount to a legal entitlement.

26. The claimant's contract [pgs 38 – 44] sets out his terms of employment and at clause 8 is states that he will receive an annual gross salary of £27,000. There is no provision for overtime in the contract. Clause 20 of the contract states that the claimant will work 20 hours per week and that his pay "will be pro-rated based on this." It was accepted by the parties that from 1 June 2024 the claimant was no longer working 20 hours per week but 40 hours per week and his contracted should have been updated to reflect his full time hours. Clause 2 which sets out the claimant's position of Chef de Partie states that "in addition to your normal duties, you may be required to undertake additional or other duties as necessary to meet the needs of the business."

27. I found that there was no legal entitlement based on the contract of employment to overtime payments. The contract was clear as to the salary level and included a provision that the claimant may be required to undertake additional or other duties as necessary. The contract was silent on overtime. One would expect that if overtime was payable, the rates of pay for overtime would be included as a minimum. While the hours of work were incorrect, this did not have a bearing on the potential for overtime payments being due to the claimant.

28. I then considered the claimant's position that he had a discussion with Mrs Shayer of the respondent and the allegation that she informed him that he would be paid when the restaurant was closed in January and February 2025. This was to reflect the additional hours undertaken by the claimant. This

conversation was denied by Mrs Shayer but she confirmed that employees were paid in January and February while the restaurant was closed.

29. I found that on the balance of probabilities, the conversation took place. The claimant's employment ended on 3 November and Mr and Mrs Shayer both confirmed in evidence that they did not make a decision until mid-December to close the restaurant in January and February. If that was the case and no conversation took place with the claimant as alleged by the respondent, he would have no knowledge of the proposed closure and payment of staff.

30. Unfortunately the mere fact that the conversation took place does not mean the hours are properly payable. There was no entitlement to payment for these hours in the claimant's contract of employment. Any discussion between the claimant and the respondent to make a payment at a later date is on a discretionary basis only. I did not hear evidence that the respondent through Mrs Shayer or anyone else agreed to pay a specific amount of money in January and February 2025 to reflect specific hours worked. As such, the alleged payment in January and February was non-contractual and discretionary.

31. The Court of Appeal finding in **New Century Cleaning Co** as outlined above provides that unless an employee can show some other legal entitlement to a non-contractual discretionary payment, an employee is unable to raise a Section 13 claim for unlawful deduction of wages. While the respondent informed the claimant that he would receive a payment in January and February 2025, they did not agree to a quantifiable amount. They did not agree to pay a set amount of money to reflect a set number of hours worked to be paid at a set time. They stated generally that he would be paid in these months. Had they provided such specific agreement, this could have created a legal obligation to pay. In the absence of this, no legal obligation is created and a claim cannot be made that there are wages properly payable as a result.

32. For the reasons set out above, the claimant's claim for unlawful deduction of wages does not succeed.

Date sent to parties **24 September 2025**