



EMPLOYMENT TRIBUNALS

Claimant: Miss H De Oliveira

Respondent: Dhaliwal Restaurants Limited

Heard at: Cardiff, in person

On: 7th November 2024

Before: Employment Judge A Williams

REPRESENTATION:

Claimant: In person

Respondent: Harjinder Dhaliwal, Director

JUDGMENT

The judgment of the Tribunal is as follows:

Holiday Pay

1. The complaint in respect of holiday pay is well-founded. The respondent made an unauthorised deduction from the claimant's wages by failing to pay the Claimant for holidays accrued but not taken on the date the Claimant's employment ended.
2. The respondent shall pay the Claimant **£411.84** calculated as follows:

Failure to provide a written statement of employment particulars

3. When the proceedings were begun the Respondent had failed in its duty to provide the Claimant with a written statement of employment particulars. There are no exceptional circumstances that make an award of an amount equal to two weeks' gross pay unjust or inequitable. In accordance with section 38 Employment Act 2002 the Respondent shall therefore pay the claimant **£915.20**.

Written Itemised Pay Statements

4. The Respondent failed to give the Claimant written itemised pay statements as required by section 8 Employment Rights Act 1996 in the period **28th March 2024 to 3rd June 2024**.
5. The Respondent made unnotified deductions totalling **£125.18** from the pay of the Claimant in the 13 weeks prior to presentation of the claim form. The Respondent shall pay the Claimant **£125.18** in respect of those deductions.
6. All sums are awarded in gross terms. The Claimant is responsible for paying any tax or National Insurance.

REASONS

Introduction

1. The Claimant, Ms De Oliveira, was employed by the Respondent, Dhaliwal Restaurants Limited, as a shop assistant from 28th March 2024 to 3rd June 2024.
2. The Claimant claims, by way of an ET1 received on 23rd June 2024, for unlawful deduction of wages by way of unpaid holiday pay, failure to provide a written statement of employment particulars, and failure to provide written itemised pay statements.
3. The Respondent agrees that the Claimant was not paid for holiday entitlement accrued during her employment. The Respondent denies that it failed to provide a written statement of employment particulars. The Respondent accepts that it failed to provide written itemised pay statements. The Respondent relies upon the failings of its former accountant.

The Hearing

4. I heard the claim on 7th November 2024. The Claimant represented herself, and was supported by Ms Tayla Lloyd-Jones in the hearing room. The Respondent was represented by its Director, Mr Dhaliwal. I had received, in advance of the hearing, a witness statement, bundle of correspondence (comprising Whatsapp messages and e-mails between the Claimant and Mr Dhaliwal) and Schedule of Loss from the Claimant, which I considered. The Respondent had not filed any witness

statements or evidence. I permitted Mr Dhaliwal to admit the contents of the ET3 into evidence and to give oral evidence.

5. I heard oral evidence from both the Claimant and Mr Dhaliwal.
6. The Claimant's ET1 and written statement raised other concerns arising from her employment with the Respondent, primarily that no tax or National Insurance contributions were paid by the Respondent to HMRC during her employment. I explained at the outset of the hearing that I cannot resolve disputes relating to what should, or should not have been paid to HMRC, and the Claimant confirmed that she understood.
7. The Claimant confirmed that she understood why her claim for unfair dismissal was struck out on 27th August 2024.
8. The Claimant told me she was making a claim for loss of earnings. She told me she felt she had lost earnings when she left her employment with the Respondent and before she was able to secure alternative employment. She told me she left the Respondent's employ on mental health grounds because she felt she could not continue to work there. I explained that she appeared to be describing a claim for constructive dismissal and explained the requirement for 2 years employment prior to being entitled to bring such a complaint. The Claimant confirmed that she understood.
9. On the day prior to the hearing, Mr Dhaliwal e-mailed the Tribunal stating that the Respondent has ceased trading since 30th June 2024 and is in liquidation, and that

evidence of this can be provided. At the commencement of the hearing I informed the parties that I had consulted the Companies House website which listed the company as being active. Mr Dhaliwal did not dispute this. He did not bring evidence that the company was in liquidation with him to the Tribunal. I told the parties that on that basis I considered the hearing could and should proceed. Neither party sought to argue that it should not.

10. During his closing submissions Mr Dhaliwal asked for permission to produce a text message on his phone as evidence. He said that during a break in the hearing the manager who had texted the employment contract to the Claimant on 15th May 2024 had provided that text to him.

11. I denied on the basis that it was neither fair nor just for the Respondent to adduce new evidence during closing submissions, particularly when the Respondent had otherwise failed to engage with the Tribunal's directions as to witness statements and evidence. The Respondent had been on notice from the outset of the Claimant's claim as to the written contract. The existence of the text was also at odds with the oral evidence given to me as to how and when the written contract had been given to the Claimant. I considered it would be disproportionate to the issues in the claim to reopen the issue, as to do so carried the risk of a delay which would have prevented the Tribunal from dealing with the hearing within the listed time.

12. I discussed the issues with the parties and all were agreed that the issues for determination were as follows. I explained to the parties that I need only hear evidence and submissions relevant to the determination of the following issues:

Holiday Pay

- 1) Did the Respondent fail to pay the Claimant for annual leave the Claimant had accrued but not taken when her employment ended?
- 2) If so, how many days had the Claimant accrued and what should the award be?
- 3) Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
- 4) Did the Respondent or the Claimant unreasonably fail to comply with it?
- 5) If so it is just and equitable to increase or decrease any award payable to the Claimant?
- 6) By what proportion, up to 25%?

Written Statement of Employment Particulars

- 7) When these proceedings were begun, was the Respondent in breach of its duty to give the Claimant a written statement of employment particulars or of a change to those particulars?
- 8) If the claim succeeds, are there exceptional circumstances that would make it unjust or inequitable to make the minimum award of two weeks' pay under section 38 of the Employment Act 2002?
- 9) Would it be just and equitable to award four weeks' pay?

Written Itemised Pay Statements (payslips)

- 10) Did the Respondent fail to give the Claimant written itemised pay statements (payslips) as required by section 8 Employment Rights Act 1996 in the period 28th March 2024 to 3rd June 2024?
- 11) Did the Respondent make unnotified deductions from the pay of the Claimant in the 13 weeks prior to presentation of the Claim Form on 23rd June 2024?

Findings of Fact

7. The relevant facts are as follows. Where I have had to resolve any conflict in the evidence, I indicate how I have done so at the material point.
8. The Claimant commenced work with the Respondent on 28th March 2024. Apart from a period of training when she worked slightly different shifts, the Claimant worked between the hours of 2pm-10pm Monday-Friday. These were set shifts orally agreed between the Claimant and Mr Dhaliwal. The Claimant was paid an hourly rate of £11.44 per hour. These material facts were not in dispute. I have seen payslips the Claimant says she received at the end of her employment which are consistent with the Claimant working 40 hours per week at a rate of £11.44 per hour. As such I accept that these were the agreed terms in respect of hours and pay.
9. In relation to holiday pay, Mr Dhaliwal did not dispute that the Claimant's holiday entitlement started to accrue when she started her employment on 28th March 2024. He told me he accepted that the Claimant had accrued holiday entitlement for which she had not been paid throughout her employment with the Respondent. He told me he did not object to paying the Claimant what she is owed, but that he had been trying to obtain the relevant information from his

accountants when he received a notification of this claim from the Tribunal. Not knowing what to do, he decided to wait for this hearing.

10. The Respondent has a policy that employees cannot take paid leave during their probationary period of 3 months. This policy was not before me in any written form. In any event, Mr Dhaliwal accepted that notwithstanding the Respondent's policy the Claimant is entitled to holiday pay for the leave accrued but not taken during her employment with the Respondent.

11. The Claimant maintained in her evidence before me that she had not received written particulars of her employment terms at any point during her employment. Mr Dhaliwal does not accept this. He told me during his evidence that a contract was e-mailed to the Claimant. He was not able to tell me when, stating that it was either prior to the Claimant starting her employment or during her training. During submissions, Mr Dhaliwal told me that the contract had been texted to the Claimant on 15th May 2024. This would be approximately 6 weeks after she started her employment.

12. Mr Dhaliwal was unable to give a consistent account of when he said the written contract had been provided to the Claimant. There was no evidence of the written contract being provided to the Claimant, despite the fact that one might expect such evidence to have been easily produced, if it was sent by e-mail or text.

13. I also note that the Claimant raised a grievance with Mr Dhaliwal by e-mail on 3rd June 2024, the day she left employment, in which she states “...*I have a right to a written statement of employment particulars on the first day I started*”

working for you which would have been the 28/3/2024 I have received no such thing...”

14. I accept therefore that the Claimant never received written particulars of her employment terms at any point during her employment and that at the time these proceedings had begun, she still had not received written particulars.

15. Mr Dhaliwal accepted that he did not formally respond to the Claimant's grievance of 3rd June 2024. Notwithstanding that, I accept from the Whatsapp messages before me that Mr Dhaliwal did seek to resolve the Claimant's complaints informally through Whatsapp.

16. Mr Dhaliwal accepted that he had not provided statements of pay (payslips) to the Claimant until after she left employment. I have seen the Whatsapp messages in which payslips for the months of April and May 2024 are sent to the Claimant after she had left employment. I accept therefore that the Claimant only received payslips after she had left the Respondent's employment.

Relevant Law and Conclusions

Holiday Pay – Unlawful Deduction from Wages

17. Section 13 of the Employment Rights Act 1996 provides that an employer shall not make deductions from the wages of a worker employed by it except in certain circumstances (which do not apply here). Section 13(3) provides that a deduction occurs where the total amount of wages paid to the worker on any occasion is less than the amount properly payable to the worker on that occasion.

18. Employees are entitled to be paid in lieu of holiday accrued but not taken on termination of employment (The Working Time Regulations 1998 Regulation 14(2)). In the absence of a contractual entitlement to leave, as in this case, the Claimant is entitled to 5.6 weeks leave of annual leave.

19. The Respondent did not dispute that the Claimant was not paid for the leave accrued but not taken during her employment. The parties were agreed that the Claimant had accrued but not taken 4.5 days holiday during her employment. Based upon my findings above as to the contractual terms relating to hours and pay, the Claimant is entitled to the following:

Holiday entitlement: 5.6 weeks (28 days) / 2.33 days per month

Holiday pay accrued: 4.5 days

Hourly rate of pay: £11.44

Hours of work: 8 hours, 5 days per week

$£11.44 \times 8 \times 4.5 = \textbf{£411.84}$

20. Section 207A(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 provides where it appears to the employment tribunal that the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies, the employer had failed to comply with the Code in relation to that matter, and the failure was unreasonable, the employment tribunal may, if

it considers it just and equitable in all the circumstances to do so, increase the award it makes by no more than 25%.

21. In this case, in which the Claimant raised a grievance on 3rd June 2024, the relevant code of practice is the ACAS Code of Practice on disciplinary and grievance procedures. The Claimant invites me to uplift the award by 10% because the Respondent failed to respond to or investigate the Claimant's grievance.

22. I do not consider it just and equitable to do so. Whilst there was no formal response to the Claimant's grievance, it is clear to me from the Whatsapp messages produced by the Claimant that Mr Dhaliwal made a genuine effort to resolve the Claimant's complaints relating to holiday pay, which he always intended to pay. I also accept that Mr Dhaliwal encountered difficulties with his previous accountancy firm whom he had thought, until then, were adequately dealing with the payroll on his behalf.

Failure to provide written statement of employment particulars

23. Section 1(1) Employment Rights Act 1996 requires employers to give a written statement of employment particulars to workers when a worker begins their employment. I have already found that the Respondent failed to do so in this case. This was not rectified by the time these proceedings were brought.

24. Section 38(2) Employment Act 2002 requires me to make an award, in such circumstances, of the 'minimum amount' of two weeks pay. I do not consider

that there are any exceptional circumstances in this case that makes such an order unjust or inequitable, in accordance with section 38(5). Taking into account all the circumstances of the case, in particular the brief period of employment, I do not consider it just and equitable to award the higher amount of four weeks pay. I therefore award two weeks pay as follows:

$$£457.60 \times 2 = £915.20$$

Failure to provide written itemised pay statements

25. The Respondent does not dispute that the Claimant did not receive any payslips during her employment. Section 8(1) Employment Rights Act 1996 provides that a worker has the right to be given a written itemised pay statement by his employer *“at or before the time at which any payment of wages or salary is made to him”*. The Respondent failed to do so in this case, having provided payslips for April and May 2024 after the Claimant’s employment ended in June 2024.

26. Having found the Respondent is in breach of its duty under section 8(1), I go on to consider whether the Respondent made any unnotified deductions from the Claimant’s pay in the thirteen weeks immediately preceding the date of the Claimant’s claim to the Tribunal, in accordance with section 12(4) Employment Rights Act 1996. If I find that it has, I may order that it pays the Claimant a sum not exceeding the aggregate of the unnotified deductions so made.

27. On examining the payslips for April and May 2024 the Respondent made deductions of £62.59 on each month to account for tax and national insurance. I therefore order that the Respondent pay the Claimant the sum of £125.18, the aggregate of the unnotified deductions made which are evidenced before me.
28. All sums are awarded in gross terms. The Claimant is responsible for paying any tax or National Insurance.

Employment Judge Williams
7th November 2024

Judgment sent to the parties on:
25 November 2024

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For the Tribunal:

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Note

Public access to employment tribunal decisions

Judgments (apart from judgments under rule 52) 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.

