

THE INDUSTRIAL TRIBUNALS

CASE REF: 18585/21

CLAIMANT: Julian Sahadatalli

RESPONDENT: XSRE.ME Ltd

JUDGMENT

The unanimous judgment of the tribunal is as follows:-

- (i) The claimant did suffer an unauthorised deduction from wages, in respect of the respondent's failure to pay him 16 days' accrued holiday pay, and the Tribunal awards the claimant **£1,052.05**.
- (ii) The claimant's claim for notice pay, outstanding at the termination of his employment, is well founded against the respondent. The respondent is hereby ordered to pay the claimant the sum of **£92.05** in respect of notice monies.
- (iii) The respondent was in breach of its obligation to give a written statement of employment particulars to the claimant. The tribunal therefore awards the claimant two weeks' gross pay which amounts to **£923.08**.

CONSTITUTION OF TRIBUNAL

Employment Judge: Employment Judge Sturgeon

Members: Mr B Heaney
Mr S Pyper

APPEARANCES:

The claimant was self-represented.

The respondent was represented by Ms Claire-Louse Mooney of Copacetic Business Solutions.

THE CLAIMANT'S CASE

1. The claimant presented a complaint for unauthorised deduction from wages to the Industrial Tribunal on 14 February 2021. Within his claim form, the claimant alleged that he had not been provided with notice to take annual leave, that he had suffered an unauthorised deduction from his wages (in relation to holiday pay and failure to pay notice pay) and that he had failed to receive a written statement of terms. The claimant also made a complaint for damages for the stress and suffering caused to him by his employer.

Failure by the respondent to provide notice requiring employee to take annual leave and unauthorised deduction from wages

2. This claim arises out of an unusual situation. The claim advanced to the tribunal, by the claimant, was that he was on furlough during the month of October 2020. The claimant gave notice to the respondent of the termination of his employment in November 2020. At the conclusion of his employment, with the respondent, the claimant's belief was that he had 16 days' holiday accrued which he expected to receive payment for in his final payslip. When he received his final payslip, he noticed that there was no payment made for the accrued holidays. When he queried this with the respondent, he was told that he had received payment for the holidays in his October pay. The claimant's complaint was that he had never told the respondent he wished to use holidays, in October 2020, nor had the respondent ever told him to use his holidays in October 2020. The claimant therefore argued that he was still due payment for the accrued 16 days because he had not taken the leave owed to him.

Failure to pay notice pay at the correct rate

3. The claimant also complained that the respondent had paid him his notice pay at the furlough rate of pay (i.e. only 80%), that it should have been paid at the normal rate of pay and that he was therefore entitled to an additional 20% to ensure he was paid at the full rate.

Failure to provide a main statement of employment terms

4. The claimant further complained that he had never received a written statement of terms since starting work with the respondent company.

THE RESPONDENT'S CASE

5. The respondent presented its response to the claimant's claim on 8 April 2021. The respondent denied the claimant's claim in its entirety. The respondent argued that the claimant's payslips for October and November showed payment of all holiday pay due to him. At tribunal, the respondent argued that the claimant had been given a written statement of terms but that he had refused to sign a copy. The respondent also argued that the claimant had been paid all holiday monies owing to him as well as all notice pay owing to him.

THE ISSUES

6. No final list of agreed legal and factual issues was lodged with the Industrial Tribunal in advance of the commencement of the case. However, through discussion with the parties at the hearing, issues were settled and these were as follows:-
 - (i) Did the respondent inform the claimant that he required the claimant to take 16 days annual leave in October 2020?
 - (ii) If not, has the claimant suffered an unauthorised deduction from wages by not being paid for 16 days' holiday pay due and owing to him?

- (iv) Has the claimant not been paid notice pay at his full rate of pay?
- (v) Did the respondent fail to provide a written statement of particulars of employment to the claimant?

PROCEDURE AND SOURCES OF EVIDENCE

- 7. This case had been case managed and detailed directions had been given in relation to the interlocutory procedure and the witness statement procedure. The claimant was informed, at the case management preliminary hearing, on 21 October 2021, that the tribunal had no jurisdiction to hear a free standing complaint of stress and suffering. The claimant confirmed that he understood this position.
- 8. At the commencement of the hearing, each witness swore or affirmed and then adopted their previously exchanged witness statement as their entire evidence-in-chief before moving on to cross-examination and brief re-examination.
- 9. At the substantive hearing, the claimant gave evidence on his own behalf.
- 10. On behalf of the respondent, the tribunal heard evidence from Mr Samuel Ovadia, owner of the respondent company.
- 11. The tribunal also received a core bundle of documents, containing both parties' witness statements, all pleadings in the case and all discovery exchanged between the parties.

STATEMENT OF RELEVANT LAW

- 12. This section of the decision sets out the relevant law in respect of the key issues in this case:-
 - (A) notice in respect of leave;
 - (B) unauthorised deduction from wages;
 - (C) payment of notice pay; and
 - (D) failure to provide a main statement of employment terms.

(A) NOTICE IN RESPECT OF LEAVE

- 13. With regard to the obligations of a worker when requesting to take leave and an employer when requesting a worker to take leave, Section 18 of the Working Time Regulations (NI) 2016 applies:

Dates on which leave is taken

- 18.—(1) A worker may take leave to which the worker is entitled under regulation 15 and regulation 16 on such days as the worker may elect by giving notice to the employer in accordance with paragraph (3), subject to any requirement imposed by the employer under paragraph (2).*

- (2) *A worker's employer may require the worker—*
- (a) *to take leave to which the worker is entitled under regulation 15 or regulation 16; or*
 - (b) *not to take such leave, on particular days, by giving notice to the worker in accordance with paragraph (3).*
- (3) *A notice under paragraph (1) or (2)—*
- (a) *may relate to all or part of the leave to which a worker is entitled in a leave year;*
 - (b) *shall specify the days on which leave is or (as the case may be) is not to be taken and, where the leave on a particular day is to be in respect of only part of the day, its duration; and*
 - (c) *shall be given to the employer or, as the case may be, the worker before the relevant date.*
- (4) *The relevant date, for the purposes of paragraph (3), is the date—*
- (a) *in the case of a notice under paragraph (1) or (2)(a), twice as many days in advance of the earliest day specified in the notice as the number of days or part-days to which the notice relates, and*
 - (b) *in the case of a notice under paragraph (2)(b), as many days in advance of the earliest day so specified as the number of days or part-days to which the notice relates.*

...

(B) UNAUTHORISED DEDUCTION FROM WAGES

14. The following various sections of the Employment Rights (Northern Ireland) Order 1996 apply in relation to a claim for unauthorised deduction from wages:

Employments with no normal working hours

- 20.—**(1) *This Article applies where there are no normal working hours for the employee when employed under the contract of employment in force on the calculation date.*
- (2) *The amount of a week's pay is the amount of the employee's average weekly remuneration in the period of twelve weeks ending—*
- (a) *where the calculation date is the last day of a week, with that week, and*
 - (b) *otherwise, with the last complete week before the calculation date.*

- (3) *In arriving at the average weekly remuneration no account shall be taken of a week in which no remuneration was payable by the employer to the employee and remuneration in earlier weeks shall be brought in so as to bring up to twelve the number of weeks of which account is taken.*
- (4) *This Article is subject to Articles 23 and 24.*

Right not to suffer unauthorised deductions

- 45.—**(1) *An employer shall not make a deduction from wages of a worker employed by him unless—*
- (a) *the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or*
 - (b) *the worker has previously signified in writing his agreement or consent to the making of the deduction.*

...

- (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.*

...

Complaints to industrial tribunals

- 55.—**(1) *A worker may present a complaint to an industrial tribunal—*
- (a) *that his employer has made a deduction from his wages in contravention of Article 45 (including a deduction made in contravention of that Article as it applies by virtue of Article 50 (2)),*

...

- (2) *Subject to paragraph (4), an industrial tribunal shall not consider a complaint under this Article unless it is presented before the end of the period of three months beginning with—*
 - (a) *in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or*
 - (b) *in the case of a complaint relating to a payment received by the employer, the date when the payment was received.*

(3) *Where a complaint is brought under this Article in respect of —*

(a) *a series of deductions or payments,*

...

the references in paragraph (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

(4) *Where the industrial tribunal is satisfied that it was not reasonably practicable for a complaint under this Article to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.*

Determination of complaints

56.—(1) *Where a tribunal finds a complaint under Article 55 well-founded, it shall make a declaration to that effect and shall order the employer—*

(a) *in the case of a complaint under Article 55(1)(a), to pay to the worker the amount of any deduction made in contravention of Article 45,*

...

Meaning of “wages” etc.

59.—(1) *In this Part “wages”, in relation to a worker, means any sums payable to the worker in connection with his employment, including—*

(a) *any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise, ...*

(C) PAYMENT OF NOTICE PAY

15. The following various sections of the Employment Rights (Northern Ireland) Order 1996 apply in relation to the payment of notice pay:-

Rights of employer and employee to minimum notice

118.—(1) *The notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more—*

(a) *is not less than one week's notice if his period of continuous employment is less than two years,*

(b) *is not less than one week's notice for each year of continuous employment if his period of continuous employment is two years or more but less than twelve years, and*

(c) *is not less than twelve weeks' notice if his period of continuous employment is twelve years or more.*

...

(D) FAILURE TO PROVIDE A MAIN STATEMENT OF EMPLOYMENT TERMS

16. The following various sections of the Employment Rights (Northern Ireland) Order 1996 and the Employment (Northern Ireland) Order 2003 apply in relation to a claim for failure to provide a main statement of employment particulars:-

Employment Rights (Northern Ireland) Order 1996

Statement of initial employment particulars

33.—*(1) Where an employee begins employment with an employer, the employer shall give to the employee a written statement of particulars of employment.*

(2) The statement may (subject to Article 34(4)) be given in instalments and (whether or not given in instalments) shall be given not later than two months after the beginning of the employment.

(3) The statement shall contain particulars of—

(a) the names of the employer and employee,

(b) the date when the employment began, and

(d) the date on which the employee's period of continuous employment began (taking into account any employment with a previous employer which counts towards that period).

...

Employment (Northern Ireland) Order 2003

Failure to give statement of employment particulars, etc.: industrial tribunals

27.—*(1) This Article applies to proceedings before an industrial tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule 4.*

(2) If in the case of proceedings to which this Article applies—

(a) the industrial tribunal finds in favour of the employee,, and

(b) when the proceedings were begun the employer was in breach of his duty to the employee under Article 33(1) or 36(1) of the Employment Rights Order (duty to give a written statement of initial employment particulars or of particulars of change), the tribunal shall, subject to

paragraph (5), make an award of the minimum amount to be paid by the employer to the employee and may, if it considers it just and equitable in all the circumstances, award the higher amount instead.

...

(4) *In paragraphs (2) and (3)—*

(a) *references to the minimum amount are to an amount equal to two weeks' pay, and*

(b) *references to the higher amount are to an amount equal to four weeks' pay.*

(5) *The duty under paragraph (2) or (3) does not apply if there are exceptional circumstances which would make an award or increase under that paragraph unjust or inequitable.*

RELEVANT FINDINGS OF FACT & CONCLUSIONS

17. Having considered the evidence given by all the witnesses and the content of relevant documents, referred to by the parties, along with the submissions of both parties, the tribunal found the relevant facts proven on the balance of probabilities. This judgment records only those findings of fact necessary for determination of the issues and does not include all the competing evidence.
18. The claimant commenced employment with the respondent on 3 December 2018 on an annual salary of £24,000.
19. The claimant's employment with the respondent ended on 26 November 2020.

Annual Leave Notice and Payment for Accrued Holidays

20. The first issue which this tribunal had to determine was whether or not the respondent told the claimant that he required him to take 16 days untaken holiday leave in October 2020.
21. The claimant gave verbal notice of the termination of his employment, on 6 November 2020, for his employment to end on 26 November 2020. When giving this notice, the tribunal accepts the claimant's evidence of his belief that he had 16 days holiday accrued which he would be paid for at the termination of his employment.
22. However, when the claimant received his final pay slip, on 27 November, he noticed that 16 days' holiday pay was not included.
23. The claimant queried this with the respondent.
24. When he queried this with Mr Ovadia initially, Mr Ovadia replied that all calculations were correct and he also commented, "*What do you think I can pay ... more and more and more ... ?*"

25. The respondent's accountant sent the claimant a breakdown of how the calculations, in his final payslip, were made on 5 January 2021. The claimant queried the matter further with the respondent's accountant, Dalypark and Company Ltd, on 5 January 2021. No evidence was presented to the tribunal of a reply from the accountant. However, Mr Ovadia replied to the claimant, via email, stating that the final payslip sent to him was correct.
26. The key issue in dispute between the parties was whether or not the respondent had provided the claimant with the relevant notice, as required by Regulation 18 of the Working Time Regulations (NI) 2016, that he should use his accrued leave in October 2020. The respondent alleges that he had provided the claimant with verbal notice of this in September 2020. The claimant denies ever being given verbal notice that he was required to take his accrued leave in October 2020.
27. The tribunal prefers the evidence of the claimant, on this disputed point, for the following reasons:-
- (i) the respondent has not set out, as part of its case, either within its ET3 or its witness statement, that it gave the claimant verbal notice to use his accrued annual leave in October 2020;
 - (ii) the tribunal was only told by the respondent, for the first time, under cross-examination, that it gave the claimant verbal notice to use his accrued annual leave in October 2020;
 - (iii) there is a WhatsApp message, provided in discovery and to which the tribunal was referred to by the claimant, from the respondent to the claimant, which states, "*What do you think I can pay more and more and more....?*" The tribunal considers this message to be a very telling document summing up the attitude of the respondent at having to pay holiday pay at the conclusion of his employment. The tribunal considers this message, from the respondent, to effectively mean, "*I don't want to pay you any accrued holiday pay.*"
 - (iv) this matter was only explained to the claimant, in January 2021, when he queried his pay slip;
 - (v) the tribunal had concerns that the claimant was provided with three different payslips providing him with a breakdown of how his October payslip was calculated. The first payslip was provided to the claimant in October 2020. It makes no reference to payment for 16 days holiday within it. A further payslip was sent to the claimant on 23 November, by which time he had provided notice of his intention to end his employment, which does detail payment for 16 days holiday. When the claimant queried this further in January 2021, a further revised payslip was sent to him again. The tribunal had concerns that the payslips were drafted in an entirely self-serving manner by the respondent and the tribunal also notes that the respondent did not call its accountant as a witness to verify or explain this point further.
28. The tribunal therefore concludes that, on the balance of probabilities, the respondent paid the claimant his holiday pay in October, when the claimant was still employed by him, and without the claimant's consent, so as to avoid having to pay

him the holiday pay, at the conclusion of his employment. The claimant should have received payment for 16 days accrued but untaken holidays at the termination of his employment. The claimant should therefore receive the following amount for 16 days accrued holiday pay: £24,000/365 x 16 = £1,052.05. **This is subject to statutory deductions.**

Payment of Notice Pay

29. The claimant's argument is that, throughout his notice period, which he alleges should be three weeks, he was not paid at the full rate of pay but rather only at the furlough rate of pay (i.e. 80%) and that there was therefore a shortfall of 20% in the pay due to him. The respondent disputes that the claimant should have been paid three weeks' notice given that he was only employed with the company for just under two years. The respondent's argument was that, given his length of service, the claimant was only entitled to one week's notice pay.
30. Having examined the claimant's notice pay, the tribunal finds that there is insufficient evidence to demonstrate that the claimant was paid his notice pay at the correct rate of pay and the tribunal is therefore satisfied that the claimant is entitled to the shortfall of 20% due to him ($£24,000/365 = £65.75$ (daily rate of pay)/5 = £13.15 per day).
31. As the claimant has less than two years' service with the respondent, the claimant concludes that the claimant is entitled to one week's notice pay. Given that the claimant has already been paid 80% percent of his notice pay, the remainder due to him is £13.15 x 7 days which equals **£92.05. This is subject to statutory deductions.**

Provision of main statement of employment terms

32. The next issue for the tribunal to determine, in this case, was whether or not the claimant was provided with a written statement of particulars, within two months of the beginning of his employment, as required by Article 33 of the Employment Rights (Northern Ireland) Order 1996.
33. The claimant alleges that he never received a copy of his contract of employment nor that he signed a copy.
34. The respondent alleges that the claimant was given a copy of his contract of employment, on his start date, but that the claimant did not sign and return the contract to him.
35. There was limited evidence before the tribunal on this matter. While a copy of a contract was produced by the respondent, the claimant's case was that he never saw this contract until it was produced in discovery. Despite the limited evidence available in relation to this dispute, the tribunal prefers the evidence of the claimant and finds that the claimant was not provided with a contract of employment within two months of the commencement of his employment. The tribunal has reached this finding for the following reasons:-
 - (i) the respondent did not address, within his response form, when he provided the claimant with a contract if at all;

- (ii) the respondent provided no evidence, within his witness statement, to demonstrate that the claimant was provided with a copy of this contract within eight weeks of the commencement of his employment;
- (iii) under cross-examination, the respondent indicated that the claimant had been given a contract of employment by the respondent's accountant, at the respondent's office, but the respondent's accountant neither provided a witness statement confirming this nor did the accountant attend the tribunal to confirm this in evidence;
- (iv) the contract provided by the respondent, in discovery, had no handwritten signatures from either the claimant or the respondent but it did have typed signatures purporting to be from both parties. In his witness statement, however, the respondent stated that the claimant was given a contract but did not sign it. The tribunal therefore finds that this statement, from the respondent in its witness statement, completely contradicts the evidence provided by the respondent under cross-examination. Accordingly, the tribunal therefore concludes from this that the contract was never issued to the claimant for him to sign.
- (v) the contract provided was incomplete as it provides no final entitlement for the number of allocated holidays. The tribunal therefore infers that the contract was never finalised.

36. The tribunal is therefore satisfied that the respondent was in breach of its obligation to give a written statement of employment particulars to the claimant and the tribunal finds that the claimant was never given a written statement of employment particulars. The tribunal awards the claimant 2 weeks' gross pay. As the claimant earned £24,000 per annum, a week's pay is equal to $24,000/52 = 461.54$ x 2 weeks' gross pay is $461.54 \times 2 = \text{£}923.08$.

SUMMARY

37. In summary, the tribunal concludes as follows:-

- (i) Has the claimant suffered an unauthorised deduction from wages by not being paid for 16 days' holiday pay due and owing to him? **The claimant did suffer an unauthorised deduction from wages and the tribunal awards the claimant the sum of £1,052.05.**
- (ii) Has the claimant not been paid notice pay at his full rate of pay? **The respondent was not paid his notice pay at the full rate of pay and the tribunal awards the claimant the sum of £92.05 being payment for the outstanding 20% due to him for one week.**
- (iii) Did the respondent fail to provide a written statement of particulars of employment to the claimant? **The respondent was in breach of its obligation to give a written statement of employment particulars to the claimant. The tribunal awards the claimant 2 weeks' gross pay which amounts to £923.08.**

38. This is a relevant decision for the purposes of the Industrial Tribunals (Interest) Order (Northern Ireland) 1990.

Employment Judge: EJ Sturgeon

Date and place of hearing: 15 February 2022, Belfast.

This judgment was entered in the register and issued to the parties on: