



EMPLOYMENT TRIBUNALS

Claimant: (1) Mrs B Davies
(2) Miss M Davies

Respondent: RB Hotels (Marford) Ltd

Heard at: Mold Law Courts

On: 6 July 2022

Before: Employment Judge Othen

Representation

Claimants: In person

Respondent: Mr. Hendley (consultant)

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The respondent made an unauthorised deduction from wages by failing to pay the claimants furlough pay to which they were entitled for the month of April 2021 and is ordered to pay to the first claimant the sum of £529.04, and the second claimant the sum of £637.58 being the gross sums unlawfully deducted.
2. The respondent made an unauthorised deduction from wages by failing to pay the claimants in lieu of accrued but untaken holiday and is ordered to pay to the first claimant the sum of £1,524.60, and the second claimant the sum of £1541 being the gross sums unlawfully deducted.
3. The Claimants were not provided with itemised pay statements in accordance with their rights under section 8 of the Employment Rights Act 1996. Such pay slips should have included details regarding their hours worked, hourly rate of pay and total gross and net pay for the relevant periods. The tribunal makes no award.

REASONS

Introduction

1. The claimants were employed as 'Front of House' staff (working behind the bar and waiting on customers) by the respondent from 15 July 2015 and 1 February 2017 respectively until 25 April 2021 when they both resigned.
2. They claim unpaid furlough pay and holiday pay for the periods set out below. They also claim that they received no pay slips for the duration of their employment.
3. The respondent initially asserted in its ET3 response to the claims that "on an initial review", there was no money owed to either claimant but that it would review its accounts and pay any outstanding monies "without delay".

Procedure, documents and evidence heard

4. I was able to consider a small bundle of documents which comprised the ET1 claims and ET3 responses only. Both claimants had produced short written witness statements to which various documents were attached as appendices. I also had access to a previous Case Management Order made by Employment Judge Sharp on 24 March 2022 and various other preliminary Orders.
5. I heard evidence from both claimants in person.

Preliminary matters

6. Two days before the hearing, on 4 July 2022, the respondent's recently appointed representative applied to postpone the hearing. This application was refused by Employment Judge Jenkins on 5 July 2022.
7. On the day of the hearing, shortly before it was due to commence, the Tribunal received an email from a Prathees Tharmalingam, purportedly on behalf of the respondent, to say that he was unable to attend the hearing that day and to ask for a postponement.
8. Mr. Hendley informed me that he was unaware of this email and had not been informed by anyone at the respondent's organisation that the respondent was unable to attend. Indeed, he had been informed that a Mr. Ambu would be in attendance for it.
9. After adjourning the hearing for a short period of time for Mr. Hendley to take further instructions from his client and to read the claimants' witness statements, of which he was given copies, he confirmed that he had spoken to his client and had informed it that someone should attend the tribunal hearing to give evidence on its behalf. He could offer no reason for their non-attendance. He made no further application to postpone the hearing and said that he had informed his client that the hearing would proceed in the respondent's absence.
10. Mr. Hendley produced no documents or witness statements for the respondent, saying that requests had been made of the respondent to provide these but no response had been received.
11. It appeared from EJ Jenkin's Order refusing to postpone the claims on 5 July 2022 that

the respondent's first representative who had been in place at the time of the ET3 response and Case management Hearing, had come off the record on 4 April 2022.

Issues for the Tribunal to decide

12. The issues set out in the Case Management Order of Employment Judge Sharp dated 24 March 2022 were as follows:

a. Holiday Pay (Working Time Regulations 1998)

- i. Did the Respondent fail to pay the Claimant for annual leave the Claimants had accrued but not taken when their employment ended?

b. Unauthorised deductions

- i. Were the wages due to be paid to the Claimants on 5 May 2021 less than the wages they should have been paid?
- ii. Was any deduction required or authorised by statute?
- iii. Was any deduction required or authorised by a written term of the contract?
- iv. Did the Claimants have a copy of the contract or written notice of the contract term before the deduction was made?
- v. Did the Claimants agree in writing to the deduction before it was made?
- vi. How much are the Claimants owed?

c. Failure to provide pay statements (pay slips)

- i. Did the Respondent fail to provide pay slips or access to them?
- ii. If so, can the Tribunal reconstruct their contents?

Findings of fact

13. The claimants were employed as "Front of House" staff (working behind the bar and waiting on customers) at the Trevor Arms, a pub owned by the respondent in Wrexham.

14. The first claimant started work on 15 July 2015 and the second claimant on 1 February 2017. Neither claimant ever received a contract of employment nor any pay slips at any stage.

15. The second claimant remembers being shown a contract of employment but was never given a copy. There was no contract of employment in the bundle of documents.

16. The claimants worked different weekly hours. They were paid by the hour. They received different hourly rates of pay.

17. The first claimant worked 22 hours a week and was paid £9 an hour. Her weekly pay was therefore £198 per week. This weekly amount was different to that stated in her witness statement. The first claimant explained that she had made a mistake with her calculations and could not explain the amounts in her witness statement which didn't

make sense. She was adamant, upon further questioning by me about her weekly hours and rate of pay and I found her to be a credible witness.

18. The hours worked by the second claimant varied between 28 and 40 per week. She was paid £8.50 per hour. Her average weekly gross pay was £270.35.
19. Both claimants stated their understanding that the holiday year for their employment ran according to the calendar year.
20. Neither of them was ever prevented from taking any holidays but the first claimant was not paid for any holidays taken. There was never any discussion about holidays or holiday pay; she was simply never paid when she did take any holidays and did not receive pay in lieu of any undertaken holidays at any stage.
21. The second claimant was only ever paid for two separate weeks of holiday:
 - a. One week taken in October 2019, and
 - b. One week taken in February 2020.
22. The Trevor Arms closed during the periods of Covid lockdown in 2020 to 2021. During furlough, both claimants receive furlough pay which they would receive on a monthly basis until a date on or around 14 April 2021.
23. The last payment received by the first claimant from the respondent was £656.04 on 14 April 2021. This was corroborated by a copy of her bank statement which was attached as an appendix to her witness statement.
24. The last payment received by the second claimant from the respondent was £779.76, also on 14 April 2021. This was also corroborated by a copy of her bank statement which was attached as an appendix to her witness statement.
25. Both claimants resigned on 25 April 2021 because they had received no wages or furlough pay since mid April 2021 and the respondent did not answer any phone calls or messages from them chasing further amounts that they were owed.
26. Both claimants subsequently made enquiries with HMRC and discovered that the respondent had reported making furlough payments to both claimants which were not, in fact, paid.
27. This assertion was corroborated by an appendix to the first claimant's witness statement which was a statement from HMRC which reported that the respondent had paid an amount of £529.07 on 5 May 2021 to the first claimant but no corresponding amount had been received by her (as evidenced by her bank accounts statements appendix).
28. For the second claimant, the same evidence demonstrated that an amount of £637.58 had been reported by HMRC that had not been paid to the second claimant as demonstrated by her bank statement.

Relevant Law

29. Employees and workers have the right to be given a written, itemised pay statement by an employer (Section 8 Employment Rights Act 1996 (ERA)).
30. Section 13(1) of ERA provides that an employer shall not make a deduction from wages of a worker employed by him unless 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 the worker has previously signified in writing his agreement or consent to the making of the deduction. An employee has a right to complain to an Employment Tribunal of an unauthorised deduction from wages pursuant to Section 23 ERA. The definition of "wages" in section 27 ERA includes holiday pay.

31. Article 7 of the Working Time Directive (WTD) provides that each member state must ensure that every worker is entitled to paid annual leave of at least four weeks
32. In England and Wales, workers have a right to a minimum of 5.6 weeks' paid annual leave under the Working Time Regulations 1998 (SI 1998/1833) (WTR)
33. WTR 1998 also give a worker the right to bring a claim:
 - a. That the employer has prevented them exercising the right to take annual leave under regulation 13 or 13A (regulation 30(1)(a), WTR 1998).
 - b. That the employer has failed to pay them for annual leave taken accordance with regulation 16 (regulation 30(1)(b)).
 - c. That the employer has failed to pay them in lieu of untaken leave following termination of employment in accordance with regulation 14(2) (regulation 30(1)(b)).
34. The Working Time (Coronavirus) Amendment Regulations 2020 (SI 2020/365) amended regulation 13 of WTR to permit the carry-over of any untaken WTD leave where it was not reasonably practicable to take it in the leave year "*as a result of the effects of the coronavirus (including on the worker, the employer or the wider economy or society)*". Carried-over leave may be taken in the two leave years immediately following the leave year in respect of which it was due. Regulation 14 of WTR is also amended to ensure a worker will be paid in lieu of any untaken carried-over holiday where their employment is terminated before they have had a chance to take it
35. In King v Sash Window Workshop Ltd and another (Case C-214/16) (King), the European Court of Justice held that the right under article 7(1) of the WTD is a "single right" to paid leave, although WTR defines it as two separate rights: the right to leave and the right to pay. If an employer refuses to grant paid leave, the court held that it must bear the consequences for this decision. It also held that a worker/employee is entitled to be paid on termination for any periods of annual leave that have accrued during employment if they have been discouraged from taking that leave because it would have been unpaid. It was not an effective remedy for the worker to have to take the leave and then take legal action to recover holiday pay. No limit was placed on the amount of leave that could be carried over in this type of case as this would amount to a validation of the employer's unlawful conduct.
36. In Kreuziger v Berlin (Case C-619/16) and Max-Planck-Gesellschaft zur Forderung der Wissenschaften eV v Shimizu (Case C-684/16), the ECJ went on to hold that national law cannot provide for the automatic loss of accrued but untaken annual leave entitlement unless the employer could show that it had given the worker an effective opportunity to take the paid leave to which they were entitled. Where it cannot do so, the right to accrued leave carries over from year to year and the worker is entitled to payment in lieu on termination.
37. King was considered, applied, and its effect extended in the Court of Appeal case of Smith v Pimlico Plumbers [2022] EWCA Civ 70 (Smith v Pimlico).

Law applied to facts of the case

Unpaid wages/furlough pay

38. I accept the first claimant's unchallenged evidence that the respondent should have paid her the sum of £529.04, in furlough pay, on or around the end of April or beginning of May 2021 and as such, that this was an unlawful deduction from her wages.
39. I accept the second claimant's unchallenged evidence that the respondent should have paid her the sum of £637.58 on or around the end of April or beginning of May 2021 and as such, that this was an unlawful deduction from her wages.

Holiday pay

40. Both claimants' claim for holiday pay is for untaken leave from July 2019 until their effective dates of termination. This was their evidence.
41. I accept the unchallenged evidence of both claimants that, aside from the short and isolated two weeks of annual leave taken by the second claimant in October 2019 and February 2020 (for which she did receive payment, as set out in paragraph 21 above) they were not paid by the respondent for any annual leave that they did take. Further, they understood that were they to take annual leave, they would not receive payment.
42. As such, and applying the cases of King and Smith v Pimlico and their effect on the correct application of WTR set out above, I consider that both claimants are entitled to be paid for any periods of untaken leave to which they were entitled under WTD, by virtue of Regulation 14 WTR. In addition, the effect of The Working Time (Coronavirus) Amendment Regulations 2020 is such that the claimants were entitled to carry forward any period of untaken annual leave from April 2020 to the two years thereafter. I am of the view that it was not reasonably practicable for them to take leave during this time as they did not believe that they would be paid for such periods of leave.
43. This means that the claimants are entitled to pay in lieu of all untaken WTD leave from July 2019 until the end of 2020. For the first claimant, this means that she is entitled to pay in lieu of six weeks' leave (two weeks for 2019 and four weeks for 2020). The second claimant is entitled to 4 weeks for the same period to take account of two weeks' leave for which she was paid during this timeframe.
44. For the year commencing 1 January 2021, both claimants are entitled to pay in lieu of untaken WTR leave from that date until their effective date of termination on 25 April 2021 (approximately 16 weeks). The annual WTR entitlement is 5.6 weeks. Therefore, pro rata, they are entitled to approximately 1.7 week's leave for 2021.
45. In total therefore, the first claimant is entitled to pay in lieu of 7.7 weeks' annual leave and the second claimant is entitled to pay in lieu of 5.7 weeks' annual leave
46. I calculate the amount of payment on a gross basis, but the respondent is entitled to make any deductions which are due for tax and national insurance contributions before payment is made to the claimants.
47. The first claimant's gross weekly pay was £198. The amount due was $7.7 \times £198 = £1,524.60$. The second claimant gross weekly pay was £270.35. The amount due was $5.7 \times £270.35 = £1541$

Failure to provide pay statements (pay slips)

48. I find that neither of the claimants were provided with itemised pay statements (pay slips) in accordance with their rights under ERA. Such pay slips should have included details regarding their hours worked, hourly rate of pay and total gross and net pay for the relevant periods. I make a declaration to this effect under section 12 ERA.

Employment Judge Othen

V.Othen

18 August 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 22 August 2022

FOR EMPLOYMENT TRIBUNALS Mr N Roche