



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4104159/2023**

**Held via Cloud Video Platform (CVP) in Glasgow on 8 February 2023**

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**Employment Judge: Claire McManus**

**Ms Jayne Russell**

**Claimant  
Represented by:  
Mr P Whyte -  
Partner**

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**Mr George Urquhart t/a 3G Catering Services UK**

**Respondent  
Represented by:  
Mr G Urquhart -  
Owner**

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### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Tribunal is that:-

- The correct identity of the respondent is 3G Catering Services UK Limited. On application of Rule 34 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, that respondent is substituted for 'Mr Geoge Urquhart'.
- The respondent has made an unauthorised deduction from wages contrary to Section 13 of the Employment Rights Act 1996 in terms of unpaid wages and the respondent is ordered to pay to the claimant the sum of £1,152.22 (ONE THOUSAND ONE HUNDRED AND FIFTY TWO POUNDS AND TWENTY TWO PENCE) to the claimant, being comprised of £804.22 in respect of unpaid wages, £170 in respect of Statutory Sick Pay and £178 in respect of accrued but untaken holidays.
- The respondent shall be at liberty to deduct from the above sums prior to making payment to the claimant such amounts of Income Tax and Employee National Insurance Contributions (if any) as it may be required by law to deduct from a payment of earnings of that amount made to the claimant, and

if it does so, duly remits such sums so deducted to Her Majesty's Revenue and Customs, and provides to the claimant written evidence of the fact and amount of such deductions and of the sums deducted having been remitted to HMRC, payment of the balance to the claimant shall satisfy the requirements of this Judgment.

## REASONS

### Introduction

1. The claimant's claim is for unpaid wages, notice pay and accrued but untaken holiday pay. The claims are denied. At a Preliminary Hearing ('PH') the ET3 was allowed, though late.
2. Case Management Orders were issued. The respondent did not provide any documents in respect of these Case Management Orders. A Bundle was lodged by the claimant's representative for this hearing. The numbers in brackets in this decision (A1 – A18) refer to numbers in that Bundle (as added to with additional documents during the hearing).
3. Evidence was heard from the claimant and, for the respondent, from Mr George Urquhart (Owner). All evidence was taken on oath or affirmation.

### Issues for Determination

4. I required to determine whether the claimant is properly due outstanding payments from the respondent in respect of her employment with them. Following discussion, it was identified that the sums sought are in respect of
  - Salary
  - Accrued but untaken holidays
  - Notice Pay

### Relevant Law

5. I dealt with this case in terms of the Tribunal's overriding objective as set out in Rule 2 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ('The Procedure Rules'), being:

5 *"The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly.*

*Dealing with a case fairly and justly includes, so far as practicable –*

(a) *ensuring that the parties are on an equal footing;*

(b) *dealing with cases in ways which are proportionate to the complexity and importance of the issues;*

10 (c) *avoiding unnecessary formality and seeking flexibility in the proceedings;*

(d) *avoiding delay, so far as compatible with proper consideration of the issues; and*

(e) *saving expense.*

15 *A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."*

- 20 6. The Employment Rights Act 1996 ('the ERA') at section 13 provides for the right of an employee not to suffer unauthorised deductions from wages. Section 14 sets out the provisions in respect of excepted deductions and section 16 sets out the provisions in respect of excepted payments. Section 13(3) states:

25 *'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.'*

7. Section 27 sets out provisions with regard to meaning of wages, including at section 27(1)(a) 'any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise.' Statutory Sick Pay (SSP) is included by section 27(1)(b).
- 5 8. Statutory Sick Pay is payable for 'qualifying days', as defined in Regulation 5(2) of the Statutory Sick Pay (General) Regulations 1982 ('the SSP Regs'). SSP is not payable for the first three qualifying days in any period of entitlement (Social Security Contributions and Benefits Act 1992, section 155). Regulation 19 of the SSP Regs sets out the provisions for calculation of 'normal weekly earnings'.
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9. Statutory sick pay ('SSP') is calculated on a weekly basis. There is a standard rate of SSP. The rate of SSP for the period from April 2022 to April 2023 was £99.35 per week. The Social Security Contributions and Benefits Act 1992 ('SSCBA') contains provisions in respect of SSP. The daily rate of SSP is calculated by dividing the weekly rate by the number of days in the week that the employee normally works (SSCBA section 157(3)). Employers can recover payments of SSP, as provided for in SSCBA section 158.
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### Findings in fact

10. The following material facts were agreed or found to be proven.
- 20 11. The respondent operates a café and catering business. The claimant has considerable experience in the catering industry. Following a successful interview on 24 October 2022, the claimant was employed by the respondent to work in the EATrium café. At the interview, the respondent's owner, George Urquhart, indicated to the claimant that she would be working 30 hours a week.
- 25
12. The written terms of the claimant's employment with the respondent are set out in the contract of employment between the parties, signed by both on 27 October 2022 (at A1 / 1 – 6). All of the clauses in that contract are (erroneously) numbered '1'. That contract contains the following clauses:

30 **"Pay**

*Your hourly rate is £10.00 per hour on a full time basis payable on or around the last business day of the month, by BACS, in arrears.”*

and

***“Hours of Work***

5 *You will be expected to work the hours necessary to fulfil your responsibilities in your role. These hours will be organised according to a rota which the business will notify to you in advance.*

*You will be expected to keep your working hours flexible to a reasonable extent, depending on the needs of the Business. At times the needs of the*  
10 *Business will require these hours to be modified and you will be expected to vary your hours of work accordingly.”*

and

***“Break Entitlement***

*You are entitled to a 30 minute unpaid break.”*

15 and

***“Holiday Entitlement***

*The holiday year runs from 1<sup>st</sup> January to 31<sup>st</sup> December.*

*The annual holiday entitlement in any holiday year is 5.6 weeks(subject to a maximum of 28 days). The Business does not recognise public holidays,*  
20 *which are viewed as normal working days.*

*You will be paid your normal salary in respect of periods of annual holiday.*

.....

*In the event of termination of employment, you will be entitled to holiday pay calculated on a pro-rata basis in respect of all statutory holiday already*  
25 *accrued in the current holiday year, but not taken at the date of termination of employment.*

*If you are dismissed for gross misconduct, or you fail to give the required notice of resignation, you are not entitled to be recompensed for unused holidays in excess of the minimum statutory entitlement in the current holiday year.”*

5 *And*

**“Statutory Sick Pay**

*You will be entitled to Statutory Sick Pay for any period of absence due to sickness or injury subject to meeting the required qualifying conditions....”*

*And*

10 **“Notice**

*You are required to give four weeks’ notice in writing to terminate your employment with the Business.*

*You are entitled to receive the following written notice on termination of employment from the Business:*

15 *Length of Service* *Notice Period*

*Less than one month* *No notice*

*At least one month but less than two years’ continuous service* *One week*

*Two years’ or more continuous service*

20 *One week per completed year of service up to a maximum of 12 weeks”*

13. The claimant’s diary entries (A16/ 7 – 23) show that the claimant worked the following hours:

	<b>Date</b>	<b>Times</b>	<b>Hours</b>
	<b>October</b> 24/10/22	9.30 – 4.30	7
25	25/10/22	9 – 4.30	7 ½

		26/10/22	9 – 4.45	7 <sup>3</sup> / <sub>4</sub>
		27/10/22	9 – 4.30	7 <sup>1</sup> / <sub>2</sub>
		28/10/22	9 – 4.45	7 <sup>3</sup> / <sub>4</sub>
			<u>Total for October</u>	<u>37 <sup>1</sup>/<sub>2</sub> hours</u>
5	<b>November</b>	1/11/22	9.15 – 4	6 <sup>3</sup> / <sub>4</sub>
		2/11/22	9 – 4.15	7 <sup>1</sup> / <sub>4</sub>
		6/11/22	12 – 3	3
		12/11/22	12 – 4.30	4 <sup>1</sup> / <sub>2</sub>
			<u>Total for November</u>	<u>21 <sup>1</sup>/<sub>2</sub> hours</u>
10				
	<b>December</b>	10/12/22	12 – 3	3
		16/12/22	1 – 4	3
		17/12/22	12 – 3	3
		26/12/22	12 – 3.30	3 <sup>1</sup> / <sub>2</sub>
15		30/12/22	12 – 2	2
		31/12/22	12 – 3	3
			<u>Total for December</u>	<u>17 <sup>1</sup>/<sub>2</sub> hours</u>
	<b>January</b>	2/1/23	12 – 2.30	2 <sup>1</sup> / <sub>2</sub>
20		7/1/23	12 – 3	3
		9/1/23	12 – 3	3
		11/1/23	12.30 – 3.30	3
		12/1/23	12.30 – 3.30	3

	13/1/23	12 – 3	3
	14/1/23	12 – 3.30	3 ½
	17/1/23	12 – 3	3
	20/1/23	12 – 2.30	2 ½
5	21/1/23	12 – 3	3
	23/1/23	11 – 4	5
	28/1/23	1 – 4	3
	29/1/23	12.30 – 3.30	3
	30/1/23	11 – 4	5
10		<u>Total for January</u>	<u>45 ½ hours</u>
	<b>February</b>		
	4/2/23	12 – 3	3
	5/2/23	12.30 – 3.30	3
	6/2/23	12 – 4	4
15	11/2/23	12 – 4	4
	12/2/23	12.30 – 4	3 ½
	13/2/23	12 – 4	4
	17/2/23	11 – 3	4
	18/2/23	12 – 4	4
20	20/2/23	12 – 3	3
	25/2/23	12 – 3	3
	27/2/23	12 – 3	3
		<u>Total for February</u>	<u>38 ½ hours</u>



	<b>March</b>	4/3/23	12 – 3.30	3 ½
		5/3/23	12 – 4	4
		6/3/23	12 – 3	3
5		7/3/23	12 – 4	4
		11/3/23	12 – 3	3
		<u>Total for March</u>		<u>17 ½ hours</u>

14. The claimant received the following from the respondent in respect of wages:

	<b>Date</b>	<b>Hrly Rate</b>	<b>Amount</b>	<b>Method</b>
10	16/12/22		£300	Cash
	7/1/23		£95.29	Cash
	31/1/23	£9.50	£372.50	BACS
	28/2/23	£9.50	£298.28	BACS

15. The claimant's partner suffered a health emergency in November 2022. On 14 November 2022 the claimant sent a text to the cafe manager stating:-

*"I'm sorry but can't come in, I have to look after him 24/7, I did tell you I wasn't coming back till at least 21<sup>st</sup> & you still put me on the rota, not sure why. I'll just leave. It's too much pressure for me at the moment."*

16. On 1 December 2022, the claimant sent a text to the café manager (A16/5-6) stating *"when will my wages be paid into my bank please?"*. The reply was *'Not sure need to speak to George'*.

17. On 16/12/22, the claimant worked for the respondent providing catering for a funeral reception at the ice rink. On that day the claimant worked 3 hours, from 1pm – 4pm. Mr Urquhart's normal practice is to pay staff £80 for working at a catering event, no matter how many hours are worked. The claimant was

paid cash (£95.29) in an envelope for that day's work (A18). That cash was made up of £80 for working at the event, and £15.29 as the claimant's share of tips from that event.

5 18. The claimant was due to work for the respondent on 13 March 2023, from 12 – 3. On that day, Mr Urquhart phoned the claimant and told her that she was not required to work because the café would be quiet, due to the weather. In any event, the claimant was unable to work on that day because she had broken her wrist. The claimant was unfit for work for the remainder of her employment with the respondent.

10 19. Following advice from the receptionist at her GP surgery, the claimant completed an online SC2 form and sent this to Mr Urquhart. He received that SC2 form (A2/1) claiming Statutory Sick Pay ('SSP'), with the details there given as '*Broken wrist*' and the '*Date sickness started*' being 12 March 2023. On 18 March 2023, Mr Urquhart phoned the claimant, challenging the validity  
15 of that SC2 form. The claimant considered Mr Urquhart's position to be inappropriate and that she therefore could not continue in her employment with the respondent. The claimant confirmed her position in letter sent to Mr Urquhart dated 20 March 2023 (A3 /1), which included the following:-

20 *"You would not let me explain the advice I was given and proceeded to talk over my comments insisting I was wrong and you knew better. Your manner was crude and rude, it was unwarranted and I found it personally unconscionable. It was not professional or mature. Consequently I advised you that I could not, in good conscience return to your employment after my period of sick leave. You may take this letter as confirmation of such.*

25 *I am awaiting receipts of the doctors certificate which I mentioned. I expect to receive this in the next few days. I will have it delivered to my place of work immediately thereafter.*

30 *As you should be aware I have not received any payslips from you. Please produce these promptly and send them to me (I have given you my up to date address details as you requested). You should ensure that the balance of worked hours (est. 68.5) is paid at the appropriate rate and paid into my bank*

*account timeously. You have my bank details. This shall be promptly followed by the requisite SSP payments.”*

20. Mr Urquhart did not reply to that letter. On 29 April 2023, the claimant again wrote to Mr Urquhart. In that letter (A4), the claimant noted that Mr Urquhart had not contacted her since her letter of 20 March 2023, and that that letter, the SC2 form and fit note dated 20 March 2023 (for 21 days) had all been hand delivered to the EATrium. In that letter the claimant sought:-

- Payslips for entire period of employment
- Specification of hours worked (68.5 @ £10 per hour estimated by claimant to be unpaid)
- Issue of P45
- Payment re unpaid hours worked
- Tips
- Payment of accrued but unpaid holidays, including during notice period

21. Mr Urquhart did not reply to that letter. On 6 May 2023, the claimant again wrote to Mr Urquhart. In that letter (A5) the claimant stated that she was intending to bring a claim to the Employment Tribunal for:

- 1 month's notice pay
- Payment of accrued but unpaid holidays
- Unpaid hours

22. The claimant 'handed in her notice' during the phone call to Mr Urquhart on 18 March 2023. In accordance with the contract, the claimant required to give 4 weeks' notice. The claimant was certified unfit for work for the entire notice period. The claimant is due SSP during her certified period of absence. In the period before the start of the claimant's absence, she was working 3 days a week for the respondent.

23. Wage slips were issued to the claimant in respect of work done in January and February 2023. (A8) Payment in respect of work done in those months was paid to the claimant by BACS transfer. No deductions were made in respect of tax, National Insurance or pension contributions.

5 **Observations on the evidence**

24. Generally, there are a number of factors taken into account when making findings in fact. These factors include:

- internal consistency (i.e. that the individual's version of events does not change throughout their evidence);
- 10 • consistency of oral evidence with contemporaneous documentary evidence;
- consistency of oral evidence with written case;
- consistency with evidence from other witnesses
- openness in answering questions
- 15 • any evasion or avoidance in answering questions
- willingness to make appropriate concessions
- demeanour and character (both to be approached with caution).

25. Consistency is an important aspect in the assessment of evidence. In *Gestmin SGPS SA v Credit Suisse (UK) Ltd [2013] EWHC 2560 (Comm)* it was concluded that:

20 *"In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its*

25 *length. But its value lies largely, as I see it, in the opportunity which cross-*

examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

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26. It is well established that 'contemporary documents are always of the utmost importance' (*Onassis and Calogeropoulos v Vergottis* [1968] 2 Lloyd's Rep 403, at para 431).
- 10 27. As noted by Lord Hoffman in *Re B (Children)* [2008] UKHL 35 "The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof." In this case the standard of proof is 'on the balance of probabilities' and it is for the claimant to prove her claim.
- 15 28. The claimant's Bundle had contained an extract from the claimant's diary, where she had recorded her hours worked for the respondent. The claimant's position was that there were similar diary entries, covering the entire period of her employment with the respondent and recording the hours worked by her for the respondent. Although the respondent objected to the additional diary pages being included in the Bundle, given the significance of that contemporary record, and taking into account the respondent's delay in communication with the claimant's representative in respect of the Bundle, I considered that it was in line with the overriding objective in Rule 2 of the Tribunal Rules to allow the further diary extracts to be included. At the same time, a copy of an envelope alleged by the claimant to have been given to her by Mr Urquhart enclosing payment for the event at the ice rink was also allowed to be submitted. Time was given for Mr Urquhart to consider these documents, once received by him.
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- 25
29. It was significant that Mr Urquhart admitted in his evidence that he was not in the café premises on a regular basis. He could not personally testify as to whether or not the claimant was in fact working on any particular day. His
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evidence was that he relied on 'rota sheets' being 'signed in and out'. He did not rely on those rota sheets. His repeated position was that the only documentary evidence he wished to rely on was the contract and pay slips, which were included in the claimant's Bundle. It was significant that Mr Urquhart's evidence on when shifts started was not in line with the text messages from the café manager, which were included in the claimant's Bundle. Mr Urquhart's position was that 12 was not a usual start time at the café. He could not explain the text messages from the café manager to the claimant on 3 November 2022, and on 12 November 2022, (A16/1 and A16/2) confirming start times of 12.

30. Mr Urquhart displayed a lack of concern about the statutory provisions covering employment law. His evidence was that he was not aware of any legislation requiring him to tell an employee about their wage rate, or any change in their wage rate. His evidence was inconsistent. He said that the claimant had initially been employed in a supervisory role, given her experience, with an hourly rate of £10. His evidence was that because that *'hadn't worked out'* the claimant was then employed on £9.50 an hour. There was no attempt by him to reconcile that position with the position in the written contract.

31. Mr Urquhart's position at the hearing was that the claimant was due 1 week's pay in lieu of notice. He had taken no steps to calculate what the claimant was due in respect of that, or in respect of holidays accrued but untaken as at termination of employment. He gave no explanation for the basis of calculation of the cash payment to the claimant of £300.

32. The claimant's representative's initial position was to seek payment for 30 hours worked in each week the claimant was employed by the respondent. His position was that the claimant had been contractually entitled to work 30 hours a week and should be paid in respect of that, even when those hours were not worked. That position was not reflected in the terms of the contract, as set out in the Findings In Fact. There was no contractual obligation on the respondent to offer the claimant 30 hours work pr week. The claimant's

entitlement to payment of wages from the respondent is in respect of hours worked by her.

- 5      **33.** There was a lack of clarity as to exactly what sums the claimant was seeking as sums which ought to have been paid to her by the respondent. The claimant relied on her partner. The claimant did make some concessions during cross examination. The claimant's representative had prepared breakdowns of the sums said to be due to the claimant from the respondent (A14 and A12). I based my calculations on the documentary evidence of hours worked and sums paid, rather than these calculations.

10      **Decision**

*Wages*

- 15      **34.** On Mr Urquhart's evidence, the cash of £95.29 was in respect of wages and tips only for the claimant's work at the funeral event in the ice rink. That payment is therefore taken as separate from the claimant's entitlement to wages paid at her hourly rate of £10 an hour. That rate is set out in the contract. Although it was Mr Urquhart's position that that rate was then reduced, to £9.50 an hour, there was no evidence that the claimant had agreed to that lesser hourly rate. I therefore calculated the wages due to the claimant based on the hours worked by her (less the hours worked on the day of the ice rink event (16/12/22), and the sums received for that work. On the basis of the diary evidence, the total number of hours worked by the claimant for the respondent was  $(37 \frac{1}{2} + 21 \frac{1}{2} + 17 \frac{1}{2} + 45 \frac{1}{2} + 38 \frac{1}{2} + 17 \frac{1}{2})$  178 hours. Less the 3 hours worked on 16/12/22, the total number of hours is  $(178 - 3)$  175 hours. At the hourly rate of £10 an hour, that equates to £1,750.
- 20
- 25      **35.** The statutory right to a (20 minute) rest break applies after 6 hours of work. There were 7 occasions when the claimant worked more than 6 hours in a shift. The claimant was entitled to a contractual unpaid rest break of 30 minutes. There are no contractual provisions as to how many hours are to be worked before that rest break provision applies. The statutory provisions apply. The amount equivalent to  $(7 \times 30 \text{ minutes} = 7 \times £5$  (based on an hourly rate of £10)) requires to be deducted from the hours worked, to take
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into account that on those 7 occasions when the claimant worked a shift of more than 6 hours, she would have had 30 minutes unpaid break.

36. Separate from the cash paid to the claimant for the ice rink event, the claimant was paid from the respondent (£300 + £372.50 + £298.28) £970.78. The balance in respect of wages is (£1,750 - £970.78) £779.22. From that amount (7 x £5) £35 is to be deducted in respect of 7 unpaid breaks of 30 minutes. The sum of (£779.22 - £35) £744.22 is due to the claimant from the respondent in respect of these unpaid wages.
37. Mr Urquhart did not dispute the claimant's position that she was due £60 in respect of tips. The claimant is awarded a total of (£744.22 + £60) £804.22 in respect of unpaid wages.

#### *Notice Pay*

38. The claimant 'handed in her notice' on 18 March 2023. The contract provides that the applicable notice period in circumstances when the claimant resigned is 4 weeks. The claimant was unfit for work for that entire 4 week notice period. As the claimant was unfit for work, her entitlement to payment during that period is only in respect of SSP. On the basis of the claimant having worked 3 days a week, and the then SSP weekly rate of £99.35, the claimant was due weekly SSP of £42.58.
39. There is no entitlement to SSP for the first 3 days of absence. The first 3 days of the claimant's absence were before she handed in her notice on 18 March 2023. The claimant is entitled to SSP @ £42.58 for the entire 4 week notice period. The claimant is entitled to the sum of (4 x £42.58) £170.32 in respect of SSP during that 4 week notice period.

#### *Holiday Pay*

40. There was no evidence before me of any agreement with the claimant that she take her accrued holidays during her notice period. The claimant's contractual entitlement to holidays was for 28 days, with holiday year running from 1 January to 31 December, with no public holidays recognised. The effective date of termination of employment was (4 weeks from 18 March



2023) 15 April 2023. Based on the number of hours worked by the claimant in the period from 1 January to 11 March (before the claimant commenced sick leave), the claimant worked an average of (101 ½ hours over 9 weeks). On that basis, the claimant worked an average of 11 hours a week. On the basis of the claimant working an average of 11 hours a week, over 3 working days, her entitlement to holidays from 1 January to 15 April is 17.8 hours. On a rate of pay of £10 per hour, that equates to £178 due in respect of accrued but unpaid holidays.

41. In making all the above calculations I applied Rule 2(b) of the Procedure Rules and dealt with the case proportionately to the complexity of the issues.

C McManus

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**Employment Judge**

**19February 2024**  
**Date of Judgment**

**Date sent to parties**