

# EMPLOYMENT TRIBUNALS



**Claimants**

Mr R Levy

v

**Respondent**

34 and Co Limited

Heard at: London Central

On: 23 July 2019

Before: Employment Judge Mason

**Representation**

Claimant: Mr. J. Taylor, FRU.

Respondent: No attendance or representation

## JUDGMENT

**The judgment of the Tribunal is that:**

1. The Tribunal declares that the Respondent made unlawful deductions from the Claimant's wages contrary to section 13 of the Employment Rights Act 1996. The Respondent is ordered to pay the Claimant the sum of £148.62 (gross).
2. The Tribunal declares that, contrary to the Employment Rights Act 1996, the Respondent has failed to provide the Claimant with a written itemised pay statement. The Tribunal has not ordered the Respondent to pay the Claimant a sum equivalent to the unnotified deductions as this sum is covered by the s13 ERA award (para. 2 above).
3. Interest on the sum awarded accrues from the day after this Judgment at the rate of 8% per annum unless the full amount is paid within 14 days.

## REASONS

### Background

1. The Claimant was employed by the Respondent as a Chef de Partie from 29 October 2018. His last working day was 25 November 2018.
2. On 27 February 2019, the Claimant first contacted ACAS and an Early Conciliation Certificate was issued on 27 March 2019.
3. On 30 March 2019, the Claimant presented this claim:
  - 3.1 He claims that the sum of £148.62 has been unlawfully deducted from his wages, calculated as follows:
    - (i) He worked 134.5 hours at an agreed hourly rate of £8.50 (£1,143.25) and is owed accrued untaken holiday (£136.00) = £1,279.25.
    - (ii) He has been paid £1,130.63 (three payments of £121.88, £888.75 and £120.00).
  - 3.2 He claims that the Respondent has failed to provide itemised pay statements.
4. On 26 June 2019 the Respondent lodged a response (ET3) defending the claim:
  - 4.1 It states that the unpaid amount the Claimant is seeking is in fact tax and NI deducted from the Claimant's pay as £8.50 per hour is a gross figure.
  - 4.3 The P45 provided to the Claimant shows deductions for taxes.
5. In the ET3, the Respondent does not challenge the hours the Claimant says he worked (134.5) and does not comment on (i) his claim in respect of accrued untaken holiday or (ii) his claim that he was not provided with itemised pay statements other than to refer to the P45.

### The issues

6. The issues to be determined by the Tribunal are as follows:
  - 6.1 Did the Respondent make unlawful deductions from the Claimant's wages by failing to pay him £148.62?
  - 6.2 If so, how much is he entitled to?
  - 6.3 Did the Respondent fail to issue the Claimant with itemised pay statements?

### Procedure at the Hearing

7. This hearing was originally listed to start at 10.00 am but was moved at the Tribunal's instigation to 2.00 pm. The clerk telephoned the parties the day before the hearing to advise them of this. The Respondent informed the clerk that it would not be attending the hearing and would not be represented and "*would leave it to the judge to decide*".
8. The Claimant attended and was ably represented by Mr. Tayler (FRU).
9. On 16 July 2019, EJ Elliott ordered the parties to exchange documents by no later than 19 July 2019 and to bring with them to the hearing at least 3 copies of any documents together with 3 copies of any witness statements. Mr. Tayler told me that the Claimant provided the Respondent with a bundle of documents and a copy of the

Claimant's witness statement but has not received any documents or witness statements from the Respondent.

10. The Claimant provided me with copies of his witness statement and the bundle (pages 1-57). The Claimant gave verbal evidence and adopted his witness statement as his evidence in chief. I gave my decision with reasons verbally at the hearing and, in view of the Respondent's absence, I have elected to give written reasons.

### **Findings of fact**

11. Having considered all the evidence I make the following findings of fact having reminded myself that the standard of proof is the balance of probabilities.
12. The Claimant was employed by the Respondent as a Chef de Partie from 29 October to 28 November 2018.
13. His gross hourly rate of pay was £8.50. The Respondent implicitly accepts this in the ET3 (para 6.). A Starter Form [page 34] shows gross monthly salary of £1,500 (£1,300 net) but I accept that this was not seen by the Claimant until about end of March 2019 (via ACAS) well after the Claimant had left and I therefore place no weight on this.
14. During the period of his employment he worked 134.5 hours. The Respondent does not dispute this and in the ET3 (box 16) [page 17] they have ticked to confirm that the Claimant's hours of work are correct.
15. He had accrued 16 hours holiday by the time his employment ended; this equates to £136.00. The Respondent has not disputed this.
16. On 8 November 2018, the Claimant received an itemised statement of pay dated 5 November 2018 showing a gross and net payment of £121.88 (i.e. zero deductions) [page 28]. He was not given any other pay statements. He received this payment on 19 November 2018 by bank transfer.
17. At the end of November, the Claimant asked the Respondent about further wages due and was told the Respondent could not pay him for at least three weeks. The Claimant then resigned.
18. On 19 December 2018, the Claimant received the sum of £888.75 from the Respondent by bank transfer but no pay slip or pay statement. He queried this and on 22 February 2019 he received a further £120 by bank transfer, but again no pay slip despite chasing via WhatsApp.
19. The Claimant has therefore received a total sum of £1,130.63. The Respondent does not dispute these amounts and does not dispute that the Claimant has only received one pay slip.

20. I do not accept the Respondent's assertion that the difference between the gross monies earned and the actual amount paid was deducted on account of income tax and NI contributions for the following reasons:
  - 20.1 The Respondent has failed to provide any documentary evidence to support this and elected not to attend and explain this at the hearing before me.
  - 20.2 On 12 March 2019, the Claimant received a P45 [pages 43-46]. This shows a total sum paid of £1,036.10 and the box "Total tax to date" is left blank.
  - 20.3 On 5 July 2019, the Claimant phoned HMRC [transcript pages 47-53]; HMRC confirmed to him that the Respondent had not paid to HMRC any income tax on his behalf.
  - 20.4 The Claimant phoned HMRC again on 17 July 2019 [transcript pages 54- 57] to query NI but HMRC were unable to confirm one way or the other whether the REespondent had paid any NI on his behalf; however, I accept that his earnings were below the NI threshold for the relevant financial year.
  - 20.5 The itemised statement of pay dated 5 November 2018 showed a gross and net payment of £121.88 (i.e. zero deductions) [page 28].

## **The Law**

### **21. Unlawful Deduction from Wages**

#### **21.1 Section 13 ERA 1996** gives workers the right not to suffer unauthorised deductions from their wages:

- "13 (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.*
- (2) In this section 'relevant provision', in relation to a worker's contract, means a provision of the contract comprised—*
- (a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or*
  - (b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.*
- (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."*

#### **21.2. Sections 23-26 ERA 1996** sets out provisions relating to complaints to employment tribunal the relevant parts of which are as follows:

- "23(1) A worker may present a complaint to an employment tribunal —*
- (a) that his employer has made a deduction from his wages in contravention of section 13 ..."*
- "24(1) Where a tribunal finds such a complaint under section 23 well-founded, it shall make a declaration to that effect and order the employer –*
- (a) in the case of a complaint under section 23(1)(a), to pay to the worker the amount of the deduction made in contravention of section 13."*

22. Failure to give itemised pay statements

22.1 In accordance with ss 8, 9 and 11 ERA, an employer must give an employee, at or before the time at which payment of wages/salary is made to him, a pay statement in writing containing the following information:

- (i) the gross amount;
- (ii) amounts of deductions both variable and fixed (unless prior statement of fixed deductions) and the purposes for which they are made; and
- (iii) the net amount of wages payable.

22.2 If the employer has failed to give a pay statement, the tribunal must make a declaration to that effect.

22.3 The tribunal has the power to make a declaration and, if unnotified deductions have been made, to order a sum not exceeding them to be paid.

**Conclusions**

23. Applying the relevant law to my findings of fact to determine the issues, I have concluded as follows.

24. Unlawful deductions:

24.1 For the reasons set out above (para. 20), I have not accepted the Respondent's assertion that the deductions were authorised statutory deductions in respect of income tax and NI contributions.

24.2 The Respondent does not challenge the Claimant's assertion that he is owed monies in respect of accrued untaken holiday.

24.3 I therefore award the Claimant the total sum claimed of £148.62 gross.

25. Failure to give itemised pay statement

The Respondent does not challenge the Claimant's assertion that he was not given itemised pay statements. A P45 does not fulfil this obligation. This claim therefore succeeds.

26. In conclusion:

26.1 The Respondent made unlawful deductions from the Claimant's wages in the sum of £148.62 and the Respondent is ordered to pay this sum to the Claimant.

26.2 The Respondent failed to give the Claimant an itemised pay statement and I make a declaration to that effect but make no further award as this would amount to double recovery.

Signed by \_\_\_\_\_ on 23 July 2019

Employment Judge Mason

Judgment sent to Parties on

24 July 2019