



## **EMPLOYMENT TRIBUNALS**

**Claimant:** Mr M A Cordero Cardenas

**Respondent:** ISS Facility Services Ltd

## **JUDGMENT**

The Tribunal finds the unauthorised deduction from wages complaint made under s. 23 Employment Rights Act 1996 (ERA) to be well-founded. The Tribunal makes a declaration under s.24 ERA, although for the reasons set out below, there is in fact no sum due to the claimant.

## **REASONS**

1. On 23/3/2020 the respondent and on 27/3/2020 the claimant, agreed this claim would be dealt with by means of written representations, rather than attending the hearing in person.
2. On 2/10/2019 the claimant presented a claim for unauthorised deductions from wages. The claimant originally claimed the sum of £1,214.75.
3. The respondent conceded the claimant was entitled to a payment for 16 days, less any holiday pay overpaid.
4. The Tribunal has reviewed the: ET1; ET3; a witness statement from Grecia Arancivia (the respondent's account manager); the documents appended to that statement; and the claimant's schedule of loss, statement and documents appended thereto.
5. Going methodically through the claim as it is understood from the papers, the Tribunal makes the following findings. Not all of the documents submitted by the claimant were legible; payslips were in portrait format which meant that information on either side was missing. The respondent however, had provided complete copies of the relevant payslips. Obviously, making a determination on the papers does mean there is no opportunity for the Tribunal to ask questions of the parties. In view of that and the overriding objective, the Tribunal has done the best it can from the information which was available to reach a just and fair conclusion.

6. The claimant worked five-day-a-week, shifts of seven-hours for which he was paid the hourly rate of £8.50. His daily rate of pay is therefore £59.50 and the weekly rate is £297.50.
7. The claimant was unfit for work during the period 24/12/2018 to 23/4/2019. He was certified as fit for work on 24/4/2019 provided he was placed on light duties. The respondent misunderstood the claimant's GP's advice and did not provide the claimant with any work until 31/5/2019.
8. It appears that during the period the claimant was unwell, he had booked two-weeks' holiday, which he was unable to take. The claimant was paid this holiday on 11/1/2019 - £297.50 and on 25/1/2019 - £297.50. In fact, the claimant actually received the sums of £329.10 and £320.30, so in total the sum of £658.40. It appears this is due to a tax refund.
9. The claimant worked on the 31/5/2019 and 3/6/2019 and was then again unfit for work on 4/6/2019.
10. The Tribunal accepts the respondent paid all of the 'missing' SSP for the period 24/12/2018 to 23/4/2019 the sum of £1,531.37 (16.5 weeks' pay) on 23/5/2019.
11. The period 24/4/2019 to 30/5/2019 comprises of 27 working days. The respondent submits that on 23/5/2019 the claimant was paid:
  - £59.50 for 7-hours for the bank holiday on 6/5/2020 (1 day); and
  - £238 for 28-hours (4 days).
12. On 20/6/2019 the claimant was paid:
  - £119 for 14-hours representing the shifts worked on 31/5/2019 and 3/6/2019 (2 days);
  - £178.50 representing 21-hours (3 days);
  - £59.50 representing 7-hours for the bank holiday on 27/5/2019 (1 day); and
  - £188.50 representing two-weeks' SSP.
13. The payslips confirm these payments.
14. At this point therefore, the claimant was still owed 16 days' pay. The respondent agrees with that calculation. What the respondent then says is:

'I therefore believe he is owed an additional 16 working days equivalent to £952 (gross) based on the rate of £8.50 as 7 hours per day.

I also deducted the annual leave payments for his pre-booked holiday he did not take that was paid on 11 and 25 January 2019. As I have set out above, he was not entitled to [this] as he was paid SSP for this time and claimed the holiday back at a later date. I have deducted this amount £535 (gross) from the £952 (gross) due to him. I believe he was therefore owed £417 (gross).

I arranged this this payment to be made shortly after concluding my investigation and this is reflected on his payslip dated 4/12/2019.

...

[The claimant] was on annual leave from 11 November 2019 and should have received £297.50 on his payslip dated 4 December 2019 but was incorrectly paid £238. After looking at this payslip, I therefore believe [the claimant] is owed £59.50.

For the reasons set out above I believe that [the claimant] is owed £59.50 and no further money is due in respect of this claim.'

15. That witness statement is dated 23/3/2020 and it refers to conducting investigations once the claim was received on 15/10/2019. If that is the case and if there is a concession, there is no explanation as to why that sum has not been paid to the claimant. Certainly, the witness statement does not confirm it has been paid.
16. The Tribunal agrees with the respondent's calculations, up to a point. It agrees the sum of £952 is due to the claimant in respect of 16 days' outstanding pay. In respect of the holiday pay, it would appear that when holiday is taken, this shows on the payslip as 'holiday pay'. Not all organisations separate out holiday pay from everyday pay. This does not appear to be a case where a payment in lieu of taking the holiday is paid (which would be unlawful). As the claimant remained employed, this was not a payment of accrued, but untaken holiday pay upon termination of employment.
17. The fact remains that holiday pay totalling £595 was paid to the claimant in January 2019, as well as SSP for that period. The claimant is still entitled to take the 10-days holiday. He was not able to take annual leave due to his illness and so he must be given an opportunity to take it at a later date. There are two options: he can either take the 10-days leave in the future, but he will not be paid for that period as he has already received the payment; or, he can reimburse the respondent and then be paid when he does in future take the leave.

18. If the respondent's methodology is followed and the claimant is to reimburse the respondent (and then take the holiday in future and be paid for it at the currently hourly rate); the sum to reimburse is £595. There may well be a consequential tax recalculation. To be clear, the claimant is reimbursing the respondent, he has not 'lost' the 10-days holiday and will have the opportunity to take it in future.
19. As it is probably beneficial for the claimant to take the holiday and be paid for it at the time the holiday is taken (which is in any event the objective of the Working Time Regulations 1998) this judgment will proceed on that basis.
20. The sum outstanding and owed to the claimant is £952, less the overpayment of holiday pay of £595, which leaves the sum of £357 (gross (not £417)) due to the claimant. The sum of £417 (base upon the respondent's calculation) was paid to him on 4/12/2019. The respondent says the claimant was underpaid by £59.50 and that sum is owed to him.  $£417 \text{ less } £357 = £60$  overpayment less the £59.50 owed to the claimant, results in the claimant being overpaid by 50p.
21. The claimant seeks interest on the sums deducted. In fact, there is an overpayment. The claimant does not cite any authority for his claim for interest and interest runs from the date of the Judgment, but will not accrue if the Judgment is settled within 14 days. No interest is awarded.
22. Furthermore, the claimant claims a 25% uplift for the 'respondent's unreasonable failure to comply with the Acas Code of Practice on Disciplinary and Grievance Procedures'. This remedy was sought in the ET1. There is however, no evidence from the claimant as to how the respondent has failed to comply with the Acas Code. There was no evidence that the claimant has raised a grievance, or that the respondent had failed to follow the procedure set out under the Code. No uplift is therefore awarded in this respect.
23. Finally, the Tribunal is obliged to make a comment regarding the respondent's method of paying its staff. This claim has unnecessarily used Tribunal time in a system which is severely over-stretched. The respondent should have met with the claimant or his representative and gone through the figures. The claimant clearly did not understand the respondent's position on holiday pay and says he is 'unclear'. A face-to-face meeting may well have resolved the outstanding issues, or would have at least narrowed down what was in issue. Similarly, once the respondent identified that there was an outstanding sum due to the claimant, that sum should have been paid to the claimant in the next payroll run. This is a claimant who is earning slightly more than the national minimum wage and it is not acceptable that there are repeated errors made in respect of his pay. This is also a claim which could have been resolved through the conciliation services of Acas, so as to avoid the necessity of involving the Tribunal.

24. The respondent also, keeps making mistakes in respect of the claimant's pay, as it did in November 2019, after receipt of this claim. It is not the Tribunal's role to rectify the respondent's mistakes and to re-make the calculations which the respondent should have made.

25. For those reasons, the claimant's claim succeeds to the extent set out above.

Employment Judge Wright

Date: 17/4/2020

FOR THE TRIBUNAL OFFICE