



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Jonathan Davies

**Respondent:** Harold Davies and Partners Ltd

**HELD AT:** Manchester

**ON:** 9 January, 30  
January, 6 March & 13  
April 2023 (in  
chambers)

**BEFORE:** Employment Judge Ficklin

## REPRESENTATION:

**Claimant:** Ms Tracy Cooper, the claimant's partner

**Respondent:** Mr Brian Hendley, Croner Consulting

The JUDGMENT of the Tribunal is:

1. The claimant's complaint that there was an unauthorised deduction from his wages contrary to section 13 of the Employment Rights Act 1996 is well-founded and succeeds.
2. The claimant's complaint that there has been a failure to pay untaken annual leave converted to pay in lieu under the Agricultural Wages (England and Wales) Order 2012 is well-founded and succeeds.
3. In respect of arrears of wages, the respondent is ordered to pay the claimant the gross sum of £40,792.12.
4. In respect of pay in lieu of untaken annual leave, the respondent is ordered to pay the claimant the gross sum of £1380.89
5. In respect of the respondent's failure to provide written particulars of employment under s. 38 of the Employment Act 2002, the respondent is ordered to pay the claimant the gross sum of £2572.00.
6. The total sum that the respondent is ordered to pay the claimant is £44,745.01.

# REASONS

## PREAMBLE

1. In a claim form received on 15 September 2022 following ACAS Early Conciliation on the same date, the claimant, has brought complaints of unpaid wages and unpaid holiday pay. The claimant continues to be employed by the respondent.
2. In this judgment I shall at times refer to witnesses by their first names to avoid confusion. This is because every witness has the same surname, ie Davies. No disrespect is intended.

## EVIDENCE

3. I heard evidence from the claimant on his own behalf. I also heard from Mrs Brenda Davies, the claimant's mother and Mr Leslie Davies, the claimant's father. The claimant also relied on a statement from Mr Philip Clarke, who did not give oral evidence.
4. For the respondent I heard from Mr Ronald Davies, the claimant's paternal uncle.
5. The bundle mostly consisted of correspondence between the parties, and conflicting estimations of the claimant's hours.

## AGREED ISSUES

6. The issues were agreed between the parties, as follows:

### Unauthorised deductions/Unpaid wages

- 6.1 Were the wages paid to the claimant on [date] less than the wages s/he should have been paid?
- 6.2 Was any deduction required or authorised by statute?
- 6.3 Was any deduction required or authorised by a written term of the contract?
- 6.4 Did the claimant have a copy of the contract or written notice of the contract term before the deduction was made?
- 6.5 Did the claimant agree in writing to the deduction before it was made?
- 6.6 How much is the claimant owed?

### Holiday pay

- 6.7 Did the respondent fail to pay the claimant for annual leave the claimant had accrued but not taken when their employment ended?
- 6.8 What was the claimant's leave year?
- 6.9 How much of the leave year had passed when the claimant's employment ended?
- 6.10 How much leave had accrued for the year by that date?
- 6.11 How much paid leave had the claimant taken in the year?
- 6.12 Were any days carried over from previous holiday years?
- 6.13 How many days remain unpaid?
- 6.14 What is the relevant daily rate of pay?

**FACTS**

7. The respondent company is a family dairy business. Leslie Davies, Brenda Davies, Ronald Davies and Diane Davies are the directors.

8. The claimant has worked for the respondent since he turned 16 in July 2000. He raised a grievance with the company on 25 July 2022 because he was paid a flat rate of £300 per week gross wages for several years, which he says did not reflect at least the National Minimum Wage (NMW) for his hours, which he claimed to be 78 per week. As the claimant is over 23 (and over 25 in 2021), it is the National Living Wage (NLW) that is relevant. The NLW for the relevant period (15 September 2020-15 September 2022) is £9.50.

9. The respondent's case was that the claimant worked only 51 hours per week, and was provided various benefits such as life insurance, accommodation, car insurance etc that further offset his due wages.

10. There was a grievance hearing that took place on 22 August 2022, conducted by Croner Human Resources consultancy. Croner produced a report dated 14 September 2022 which in summary did not uphold the claimant's claim to have worked 78 hours per week. The report did find that the claimant was entitled to some unpaid wages as his £300 weekly pay was not equal to the NLW, even on the respondent's calculation that he worked 51 hours per week and taking into account that £1.50 per hour should be subtracted for his accommodation.

11. The claimant's appeal against the report's findings was partially upheld to the extent that it was accepted that there was no prior agreement to deduct £1.50 per hour for his accommodation, and so that deduction could not be made. There was a recommendation to engage in further dialogue with the respondent.

12. The claimant has never had a written contract of employment or received written particulars of his employment. In response to the claimant's grievance the respondent offered him a new contract on 19 August 2022, which he did not accept. The terms of that new contract offer are not relevant to my decision because it was not in force during the period of the claimant's claim.

13. The claimant contacted ACAS and lodged a claim for unpaid wages and unpaid holiday pay with the Employment Tribunal on 15 September 2022. The respondent's ET3 accepts that the claimant is owed unpaid wages. The liability in this matter was acknowledged at the hearing by the respondent's representative Mr Hendley. The issue is the remedy, based on the calculation of how many hours the claimant actually worked, his rate of pay, and whether there are any authorised deductions.

14. The claimant was paid additional amounts by other directors of the respondent company, ie his parents Mr Leslie Davies and Mrs Brenda Davies, on two occasions. On 30 August 2021 there is a handwritten payslip for £534.44 that states "2x weeks pay in lieu of not taking holidays (covid 19) 2020". There is also a handwritten document dated 1 December 2021 that state "Feeder box carried out during Ron's absence £600.00".

**FINDINGS**

15. The Tribunal was referred to an agreed bundle of documents totalling 342 pages, with additional witness statements. Having considered the oral and written evidence and submissions presented by the parties (the Tribunal does not intend to repeat all of the oral submissions, but has attempted to incorporate the points made by the parties within the body of this judgment with reasons), I have made the following findings of the relevant facts having resolved conflicts in the evidence on the balance of probabilities.

### **Hours Worked**

16. The primary issue in this case is the number of hours the claimant works in a week. There is no formal system of timekeeping on the farm. The claimant says that he works 13 hours per day on a weekday, and at least 6 per day on weekends. He claims that in total he usually works 78 hours per week.

17. The respondent says that he works no more than 9 hours per day on a weekday, because he takes, it is claimed, three hours for meal breaks. The respondent's position is that the claimant works no more than 51 hours per week.

18. The evidence on this point for the claimant consists primarily of witness evidence from the claimant and his father Leslie Davies who works with him on some of the farming tasks and so attests to the claimant's presence; some timesheets the claimant prepared in relation to his grievance dating between 25 August and December 2022; and some photographs purporting to show that the claimant was in work at various times.

19. The respondent's evidence on the claimant's hours consists of Ronald Davies' written and oral evidence, and purported records of the claimant's time dating from February 2021 through October 2021, and then January 2022 through 14 August 2022. This record is purportedly based on Ronald Davies' observations as relayed to Diane Davies. Neither the fact that the records were purportedly being kept nor the records themselves were disclosed to the claimant until after his grievance was submitted in August 2022.

20. Ronald Davies also provided a series of photographs dated in October and November 2022 of the milking parlour at various times purporting to show that, since the claimant was not present, he was either not yet, or no longer, at work.

21. The claimant disputed that conclusion, pointing out that he could have been engaged anywhere else on the farm and that in some of the photographs, lights or remaining mess indicated that the work was not finished. The photographs depict one room on the farm, and I accept the claimant's evidence that they do not definitively show that the claimant had either not arrived or not left the farm, nor that he was even finished with tasks in that room. The respondent accepts that the claimant has duties that range across the farm. I find that these photographs carry no weight in indicating whether the claimant was working at those times. I also find that the claimant's photographs do not indicate whether he was engaged in any paid work at the times they were taken, and I attach no weight to them.

22. Ronald Davies disputed Leslie Davies's claim that he worked alongside the claimant for 7-8 hours per day, and said he thought it was more like 2-3 hours.

Ronald's evidence was that many of the claimant's responsibilities were jobs for a single person, and so there was no reason that they would have worked together. He accepted that the claimant was responsible for numerous tasks of varying length and complexity that he undertook without supervision. He did not work alongside the claimant but said that he moved around the farm and knew who was working. He insisted in his evidence that the claimant took 2-3 hours for meals during the workday and this was how he calculated a 9-hour day. He also said that there were days that the claimant left work early and did not return.

23. The respondent has no formal system to keep track of hours worked by anyone on the farm. The claimant is apparently the only worker that was subject to any kind of monitoring. Ronald Davies claimed to be on the farm consistently at start and finish times, but Leslie Davies gave evidence that Ronald usually left before milking was finished in the evening. Leslie also said that his own hours were about 6am to 7pm and that he himself was usually the last to leave. He was aware of how long the claimant was there and worked directly with him about 7-8 hours per day. Leslie rejected Ronald's evidence that the claimant took 2-3 hours per day for lunch.

24. At no point in the respondent's evidence, either given by Ronald Davies or in the bundle, is there any suggestion that the claimant has duties that were not completed, or that his normal tasks had to be covered by someone else. The respondent's evidence is nothing more than Ronald Davies' perceptions based on being unable to physically see the claimant at a given time. He accepted in cross examination that there were circumstances in which he would not know whether the claimant was there, for example if the claimant had climbed the gate instead of unlocking it in the morning, but insisted that he had a comprehensive overview of whether the claimant was at work. I reject this. I attach little weight to Ronald Davies' purported records of the claimant's working hours.

25. I prefer the claimant's evidence, and that of Leslie Davies who was the only witness who actually carries out daily tasks with the claimant, about the claimant's usual working patterns and times.

26. The claimant provided records purporting to be his hours worked for the period. These records are impossible to verify. Of more weight, the claimant set out the details of his responsibilities on the farm at various points in his evidence. While not all of his duties are required daily, he lists numerous tasks that may need to be dealt with on a given day, including some that are exclusively his responsibility, eg dealing with the hoof trimmer, feeding calves, and administering medicines, among others. I find that there are enough tasks that the respondent accepts fall within the claimant's purview that on the balance of probabilities, he was working for the hours he claims in the relevant period.

27. While I accept that the nature of farm work may mean that hours can vary, I accept that the claimant is on the farm carrying out tasks under his purview for about 12 hours per day on weekdays, and about 6 hours on Saturday, which I understand to be the claimant's expected working hours. My understanding is that his day off is Sunday. The parties agreed that sometimes the claimant worked on Sunday but would then take a different day or part of a day off in lieu. I find that this does not affect his total hours.

28. The claimant believed that his breaks were paid as an agricultural worker. That is not my understanding from the Agricultural Wages (England and Wales) Order 2012 (Article 44).

29. I find that the claimant works a net of 12 hours per day during the week, which is also consistent with the working hours of Ronald Davies and Leslie Davies, and so is consistent with the respondent's working day. This takes account of periodic breaks and lunch. On Saturdays I find that the claimant works about 6 hours. I find that the claimant worked a total of 66 hours weekly in the relevant period, which was the preceding two years to the date of his claim, ie 15 September 2020-15 September 2022.

### **Rate of pay/Worker Grade**

30. The claimant began his employment as a farm worker for the respondent before 1 October 2013. Because of this, his employment is still subject to the Agricultural Wages (England and Wales) Order 2012 (AWO) (Article 1(2)). On this basis, he is entitled to be paid according to his grade as an agricultural worker for his first 39 hours per week, and the corresponding rate of overtime pay for any time over that. Due to national minimum wage legislation, his pay cannot be less than the relevant NLW. In short, he is entitled to the pay calculated in line with the AWO taking into account the NLW.

31. The claimant accepted in cross examination that he has no job description that indicates what grade he is. This is part of the respondent's failure to establish any formal particulars of the claimant's employment. The claimant has never worked under a written contract or been given particulars of his employment in 22 years, a surprising failure. The first presentation of a written contract to the claimant was, the respondent admits, a response to the claimant's grievance. That was clearly a variance of the claimant's contract up to that point and I find that it did not represent the terms and conditions of his employment for the preceding 22 years.

32. In order to calculate his pay under the AWO, it is necessary to determine the claimant's grade as an agricultural worker.

33. The respondent maintains that to the extent that the AWO applies in terms of the claimant's minimum rate of pay, he is a Grade 2 worker. This was originally on the basis that he does not have agricultural qualifications and his responsibilities are not such that he would be a higher grade. It was found in the claimant's grievance appeal, and I accept, that he has a City & Guilds National Vocational Qualification (NVQ) Level 3 in Livestock Production, as well as various lesser qualifications. In response, the respondent then claimed in an email dated 21 October 2022 that the NVQ did not count because it was 20 years old. There is nothing in the AWO to suggest that the NVQ ceases to be relevant for the purposes of his grade as an agricultural worker.

34. According to the AWO (Article 7, Schedule 4), a farm worker meets the requirements for "Craft grade-grade 4" if:

- a. the worker has been working in agriculture for an aggregate period of at least two years in the last five years, and;

- b. the worker holds and has disclosed to their employer any one of the vocational qualifications from the list specified in Schedule 4 (which includes a level 3 NVQ in Livestock Production), as long as the worker is working wholly or mainly in the craft covered by that qualification.

35. I find that that the claimant clearly meets these requirements, and that the respondent has been notified of them. By contrast, Grade 2 requires an NVQ only at level 2 (Article 5, Schedule 2A). I find that the claimant is Craft grade-grade 4.

36. For a grade 4, the first 39 hours per week is paid at a minimum of £320.19, an hourly rate of £8.21 (Article 25, Table A), however this must be upgraded in line with the NLW. Overtime is paid at a minimum of £12.32 per hour (Article 26, Table B). I calculate the resulting pay under Conclusions.

### **Authorised Deductions**

37. There is no legal basis in the AWO for deductions from wages for the various benefits that the respondent provides to the claimant such as car insurance, life insurance etc with the exception of the accommodation (Articles 29, 30). There is no tenancy or rental agreement in place to reduce the claimant's wages for his accommodation. There is no evidence that the respondent even considered such a reduction until the claimant raised his grievance.

38. It was not disputed that other workers or shareholders have lived in the accommodation on the farm at times without paying rent and without any type of agreement. But in any case, a deduction for accommodation under an assured agricultural tenancy may only be made by agreement, and in any event such a deduction cannot take a worker's wages below the NLW. No such agreement has ever been made, and no deduction is authorised. I find that this is an example of the respondent attempting to retrospectively justify the unauthorised deductions.

### **Holiday Time**

39. The AWO states that the holiday year for workers to whom it applies runs from 1 October to 30 September (Article 45). Annual leave entitlement is also specified (Article 46, Table G). A worker who works more than 5 but not more than 6 days is entitled to 35 days annual leave. This means that the claimant is entitled to 35 days' holiday per year.

40. Normally, a claimant cannot claim for holiday time not taken while still employed by a respondent. The AWO also allows a worker to be paid for holiday time not taken while still employed, up to 7 days per year for a worker who works 6 days per week (Article 51, Table H). The AWO does not allow holiday to be carried forward if not taken or converted to pay in the holiday year except by agreement (Article 51(1)). There is clearly no agreement regarding holiday time between 1 October 2020 - 30 September 2021, so I find that the claimant cannot claim for any untaken holiday time in that holiday year.

41. It was incumbent upon the respondent to ensure that the claimant took his holiday for 1 October 2021-30 September 2022. The respondent made no effort to do so, even on the erroneous basis that the claimant was only entitled to 28 days. The

claimant's claim was submitted before the end of that holiday year, and I find that the claimant is entitled to claim for 7 days' holiday time that he was entitled to convert to pay in lieu. The calculations for holiday pay and for converting holiday time not taken to pay are set out in the AWO in Articles 49(3), 49(5), 51, and 51(4)(d)(i)-(ii). I calculate the resulting pay under Conclusions.

### **LAW**

42. Section 13 of the Employment Rights Act 1996 (ERA 1996) provides that a worker has the right not to suffer unauthorised deductions from his wages. A deduction from wages cannot be made without the worker's written consent unless the employer is authorised by a statutory provision or by a relevant provision in the worker's contract. Paying a worker for fewer hours than he worked at his contractual rate or at least the relevant minimum wage or NLW is an unauthorised deduction.

43. Under s. 23(4A) of the ERA 1996, the claim for unauthorised deductions ie unpaid wages may only apply to the period of two years before the date of claim.

44. Under s. 1(2) of the National Minimum Wage Act 1998 (NMWA 1998) a person qualifies for the national minimum wage (NMW) if they are an individual who:

- a. Is a worker;
- b. Is working, or ordinarily works, in the United Kingdom under his contract; and
- c. Has ceased to be of compulsory school age.

45. Section 17 of the NMWA 1998 states that a worker is entitled to receive at least the relevant minimum wage for a period of work, if he has not already received it.

46. Section 38 of the Employment Act 2002 (EA 2002) states that where a claimant succeeds in a relevant claim to the Employment Tribunal, and the employer has failed to provide a statement of written particulars of the worker's employment when the claim is made, the Tribunal must additionally award at least 2 weeks' pay to the claimant, and may award an additional 4 weeks' pay if just and equitable to do so.

47. Schedule 5 of the EA 2002 refers to the jurisdictions under which s. 38 applies. Section 23 of the ERA 1996 is included, which means that, in a claim to the Employment Tribunal for unpaid wages, s. 38 of the EA 2002 applies.

48. The Agricultural Wages (England and Wales) Order 2012 (AWO) applies to agricultural workers in England who have worked in continuous employment prior to 1 October 2013. It sets out minimum wages and overtime rates for agricultural workers of different grades, and the qualifications and other requirements to meet those grades. It also sets out holiday entitlements and entitlement to pay in lieu of holiday time. I have referenced the relevant articles of the AWO in the body of this judgment.

### **CONCLUSION**

49. In determining this claim, I am acutely conscious that all the witnesses are family members. Ms Cooper, the claimant's partner, aptly described it as a "family at



war". Notwithstanding that, the respondent company has legal responsibilities regarding its employees.

50. I have found that the claimant works 66 hours per week. Mr Hendley's submissions framed the unpaid wages as a calculation based on the NLW, ie £9.50 per hour. I agree that the claimant cannot be paid a sum that amounts to less than the NLW for the hours he works. But, since the AWO applies to the claimant, the claimant is entitled to overtime at the minimum specified rate. Overtime applies to any time worked over 39 hours.

51. Under the AWO and taking into account the NLW at £9.50, the claimant is entitled to £370.50 for his first 39 hours ( $39 \times £9.50 = £370.50$ ), and a further £12.32 per hour for the remaining 27 hours (ie £332.64), for a total of £703.14 per week.

52. He has 104 weeks for the relevant period (two years before his date of claim) and a shortfall in his wages of £403.14 per week because he was paid £300 per week in that time (ie  $£703.14 - £300 = £403.14$ ). 104 weeks at £403.14 comes to £41,926.56.

53. From his unpaid wages, I subtract the payments that the directors Leslie and Brenda Davies made to the claimant, totalling £1134.44. The claimant is entitled to a total of £40,792.12 in unpaid wages.

54. The claimant is entitled under the AWO to claim up to 7 days per holiday year as pay in lieu of time, out of his 35 days' holiday. I have found that he is entitled to make this claim for the holiday year 2021-2022. On that basis he is entitled to 7 days' pay calculated in line with Articles 49 and 51 of the AWO. 7 days' holiday pay is calculated by adding the totals calculated under 51(4)(d)(i) and 51(4)(d)(ii) together.

55. Under the AWO Article 51(4)(d)(ii), the claimant's contractual weekly pay excluding overtime ( $39 \text{ hours} \times £9.50 = £370.50$ ) is divided by the number of days usually worked (6), which comes to £61.75. That is multiplied by the number of holiday days claimed, ie 7, for a total of £432.25.

56. Under Article 51(4)(d)(i), he is also entitled to "payment of wages at the minimum overtime rate applicable under this Order to their grade or category for work carried out by the worker on that day". For this calculation I use the hours the claimant regularly works over 6 days, ie 66 hours, on the basis that his untaken holiday is most fairly distributed over a normal week.

57. There remains the calculation of hours for the 7<sup>th</sup> day of holiday, which I calculate at 11 hours because he works 6 days per week, so 1/6 of his weekly hours. There are therefore in total 77 hours payable at the overtime rate of £12.32. That comes to £948.64 payable under Article 51(4)(d)(i).

58. The calculations from Article 51(4)(d)(i) and Article 51(4)(d)(ii) added together come to £1380.89 ( $£948.64 + £432.25 = £1380.89$ ).

59. The respondent never provided the claimant with a written statement of the particulars of his employment. I do not accept that the contract variation offered in response to the claimant's grievance represented the particulars of the claimant's employment as it was at that time. I must award an additional 2 weeks' pay under s. 38 of the EA 2002, and may award 4 weeks' pay if just and equitable to do so. I find that it is, on the basis of the respondent's persistent failure to ameliorate the claimant's deficient wages, even in the face of his grievance, and the attempts to minimise liability by retrospectively attempting to offset his due wages with reference to his accommodation and other in-work benefits.

60. I award the claimant a further 4 weeks' pay, calculated as per s. 221 of the ERA 1996, which would be £703.14 per week. Under s. 227 of the ERA 1996, the amount of weekly pay that may be awarded under this provision is capped at £643.00 per week. 4 weeks' gross pay at £643.00 per week is £2572.00.

61. I find that the claimant is entitled to unpaid wages of £40,792.12, pay in lieu for untaken holiday time of £1380.89, and an award under s. 38 EA 2002 of £2572.00 for a total of £44,745.01.

Employment Judge Ficklin  
21 April 2023

JUDGEMENT & REASONS SENT TO THE PARTIES ON  
24 April 2023

FOR THE SECRETARY OF THE TRIBUNALS



## NOTICE

### THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990 ARTICLE 12

Case number: **2407173/2022**

Name of case: **Mr J Davies** v **Harold Davies and  
Partners Ltd**

Interest is payable when an Employment Tribunal makes an award or determination requiring one party to proceedings to pay a sum of money to another party, apart from sums representing costs or expenses.

No interest is payable if the sum is paid in full within 14 days after the date the Tribunal sent the written record of the decision to the parties. The date the Tribunal sent the written record of the decision to the parties is called **the relevant decision day**.

Interest starts to accrue from the day immediately after the relevant decision day. That is called **the calculation day**.

The rate of interest payable is the rate specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as **the stipulated rate of interest**.

The Secretary of the Tribunal is required to give you notice of **the relevant decision day**, **the calculation day**, and **the stipulated rate of interest** in your case. They are as follows:

**the relevant decision day** in this case is: 24 April 2023

**the calculation day** in this case is: 25 April 2023

**the stipulated rate of interest** is: **8% per annum**.

Mr S Artingstall  
For the Employment Tribunal Office

## GUIDANCE NOTE

1. There is more information about Tribunal judgments here, which you should read with this guidance note:  
[www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426](http://www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426)

If you do not have access to the internet, you can ask for a paper copy by telephoning the Tribunal office dealing with the claim.

2. The payment of interest on Employment Tribunal awards is governed by The Employment Tribunals (Interest) Order 1990. Interest is payable on Employment Tribunal awards if they remain wholly or partly unpaid more than 14 days after the **relevant decision day**. Sums in the award that represent costs or expenses are excluded. Interest starts to accrue from the day immediately after the **relevant decision day**, which is called **the calculation day**.
3. The date of the **relevant decision day** in your case is set out in the Notice. If the judgment is paid in full by that date, no interest will be payable. If the judgment is not paid in full by that date, interest will start to accrue from the next day.
4. Requesting written reasons after you have received a written judgment does **not** change the date of the **relevant decision day**.
5. Interest will be calculated as simple interest accruing from day to day on any part of the sum of money awarded by the Tribunal that remains unpaid.
6. If the person paying the Tribunal award is required to pay part of it to a public authority by way of tax or National Insurance, no interest is payable on that part.
7. If the Secretary of State has claimed any part of the sum awarded by the Tribunal in a recoupment notice, no interest is payable on that part.
8. If the sum awarded is varied, either because the Tribunal reconsiders its own judgment, or following an appeal to the Employment Appeal Tribunal or a higher court, interest will still be payable from **the calculation day** but it will be payable on the new sum not the sum originally awarded.
9. The online information explains how Employment Tribunal awards are enforced. The interest element of an award is enforced in the same way.