



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms Nellie Ariane

**Respondent:** White Haus Hair and Beauty Ltd

**HELD AT:** Via Cloud Video Platform  
(Manchester)

**ON:** 25 April 2023

**BEFORE:** Employment Judge Mellor

**REPRESENTATION:**

**Claimant:** In person

**Respondent:** Mr Johnson (Director)

Ms L Richardson (In person)

## JUDGMENT

1. The complaint of unauthorised deduction from wages due to an underpayment in National Minimum Wage succeeds and the respondent shall pay to the claimant the sum of **£2225.29** .
2. The complaint of unpaid holiday pay (both taken and unpaid and accrued but untaken) succeeds and the respondent shall pay to the claimant the sum of **£3,360**.
3. The respondent did fail to provide a pay statement in accordance with section 8 of the Employment Rights Act 1996.
4. The **total** sum payable to the claimant is **£5585.29**.

## REASONS

5. The claimant worked for the respondent as a stylist/hairdresser from 1 April 2014 until her resignation on 18 August 2019. She entered the early conciliation period on 3 October 2019 which ended on 3 November 2019 and she issued this claim in the tribunal on November 2019.
6. In her claim she raised complaints of:

- i. Unpaid holiday pay (in respect of both holiday that was taken and accrued but untaken) contrary to the Working Time Regulations 1998 regulation or alternatively section 13 ERA 1996;
  - ii. Unauthorised deduction of wages, specifically underpayment of National Minimum Wage, brought under section 13 ERA 1996;
  - iii. Failure to provide itemised statements of pay contrary to section 8 ERA 1996;
  - iv. Being denied the opportunity to take rest breaks to which she is entitled under regulation 12 Working Time Regulations 1998.
7. The respondent submitted a protective response on 15 January 2020 and a full amended response (undated at page 25 of the bundle). The respondent, at that time, denied the claimant was either an employee or a worker, but alleged she was a self-employed stylist. As a result of that position all claims were denied.
8. The matter has been listed on several occasions for a final hearing: 27/3/20; 22/10/20; 6/9/21; 4/7/21 and 2/3/23. The matter was listed before myself via CVP with a time estimate of 2 days.

#### **Updated parties positions**

9. At the commencement of the hearing the respondent confirmed a change in position on the following issues:
  10. It was conceded that the claimant was a worker. Mr Johnson also said he accepted for the limited purposes of this claim the claimant was an employee. His acceptance on employee status was more equivocal, but given he conceded worker status and that is sufficient for her to bring all of her claims it was not necessary to determine the issue of status beyond that concession.
  11. It was noted in EJ Johnson's case summary that if the claimant wanted to pursue her claim for rest breaks under regulation 12 WTR 1998 then the matter would have to be listed in front of a full panel. Section 4(3)(ce) ETA 1996 provides for holiday pay claims brought under regulation 30 WTR 1998 to be resolved by a judge sitting alone, but not regulation 12 claims.
  12. I asked the parties whether they would consent to me dealing with that claim alone, but Ms Ariane did not consent. I explained to her that I would not adjourn the other elements of the claim which I could deal with today given the number of postponements that had taken place in this case. Further I asked Ms Ariane more detail about her claim for rest breaks. She said that she was not denied rest breaks, but that the work environment often made it difficult. There was evidence in the bundle of messages between the parties which suggested there were breaks taken, and the claimant accepted on occasion that is true. Given the claimant accepted she was not prevented or denied a break I considered this claim to have little prospects of success because (a) the claimant could not point to any specific occasion she did not get rest breaks (b) she could not point to occasions when she had rest breaks refused (c) there is a conflicting line of authority on what amounts to a refusal (d) I have seen a schedule produced by the respondent which suggests there were set break times in the rota [44 R's bundle]. Taking all of that into account, applying the overriding objective and having a view to both parties' and judicial resources I ordered the claimant to write a letter to the tribunal

with notice to show cause why her claim under regulation 12 has reasonable prospects of success before it is listed for a final hearing before a full panel. If she does not write in that claim will be dismissed. A separate case management order has been sent out.

## **The issues**

13. The claim has been case managed at two preliminary hearings. The list of issues issued was set out by EJ Johnson as follows (amended to take into account the respondent's concessions):

### **14. Employment Status:**

- a. It was conceded the claimant was a worker.

### **15. Holiday Pay (Working Time regulations 1998)**

- a. It was conceded that the claimant was entitled to 28 days annual leave per year running the calendar year (which was the contractual position [73]).
- b. How much of the leave year had passed when the claimant's employment ended?
- c. How much leave had accrued for the year by that date?
- d. How much paid leave had the claimant taken in the year?
- e. Were any days carried over from previous holiday years?
- f. How many days remain unpaid?
- g. What is the relevant daily rate of pay?

### **16. Unauthorised deduction from wages (Employment Rights Act 1996)**

- a. Were the wages paid to the claimant on (the dates set out in the claimant's schedule of loss) less than the wages she should have been paid?
- b. Was any deduction required or authorised by statute?
- c. Was any deduction required or authorised by a written term of the contract – the respondent accepted it was not because he thought the claimant was self-employed.
- d. How much is the claimant owed.

### **17. Written Pay Statement (Employment Rights Act 1996)**

- a. Did the respondent fail to provide a written pay statement or adequate pay statement to the claimant? The respondent conceded this.

## **The Evidence**

18. I was provided with two bundles. The first was prepared on behalf of the claimant titled 'joint bundle' which was 311 pages long. The respondent had also prepared a bundle which was 62 pages long. I considered the documents I was taken to, or those which were referred to, during the evidence.

19. I heard oral evidence from the claimant who affirmed the content of her statement. She was cross examined by Mr Johnson.

20. On behalf of the respondent Mr Johnson and Ms Richardson gave evidence. The claimant put questions to both of them.

21. Both parties had the opportunity to make submissions after the evidence was completed and the claimant had prepared a written submission which I also read and considered.

### Findings of Fact

22. The claimant applied for a job with the respondent after seeing a part time stylist role advertised on their social media account. A part time role suited the claimant because she has a child and so it fitted around her child care needs.
23. When she was interviewed for the job she was told by Mr Johnson and his then partner that the role would be on a self-employed basis and the claimant would have to pay her own tax and national insurance. She was also told that she would not receive entitlements such as sick or holiday pay.
24. The claimant did sign two contracts during the time she worked at the respondent. The first of these was on the 2/5/14 [74] and the second was 26/6/17. Both of these are headed self-employed contract, but the content of them was clearly intended for an employee/employer contractual relationship.
25. The claimant did pay her own national insurance and tax.
26. She commenced her role working for the respondent on the 1 April 2014.
27. The rate of pay was set at £60 per day and the hours were 9am to 5pm. Most other staff worked until 6pm but because of the claimant's child care needs she worked until 5pm.
28. The claimant was inconsistent in her evidence about how long her days were, but she did accept that she had to accommodate her son and at one point she said "always 9-5". I therefore find she did not work beyond 5pm unless it was exceptional.
29. When she started work she worked Wednesday, Friday and Saturday. In her statement she said this was 22 hours per week. In evidence she said she worked 8 hours per day, which was disputed by the respondent. 8 hours three days per week would be 24 hours. When I pointed this out to the claimant she said she meant 24 hours not 22.
30. I find that the initial agreement was that the claimant would work 22 hours over three days. This is because in her statement she referred to and relied on the handwritten invoiced in the bundle [113A-153] most of those are for 22 hours. On occasion she worked fewer hours (such as 16) whereas on other days she worked more (such as 30).
31. I further find the reason she changed that in evidence to 8 hours per day is because that was the basis upon which her solicitor prepared the schedule of loss and so she changed it to fit with that document. I will return to that schedule later in the judgment.
32. For the period April 2014 to September 2016 the claimant accepted in evidence that the money paid into her bank account (and so recorded on her

schedule) reflected the number of days she worked. So for example where it said £120 she agreed that meant she would have worked 2 days (16 hours maximum and therefore well within national minimum wage).

33. She was unable to say why the schedule recorded her as consistently working 3 days at 8 hours a week. She accepted that she did not do so, but rather the payments into her account properly reflected the work she had done. In other words for that period she was not underpaid.
34. The pay arrangement changed in 2016. At this point the pay was not on a daily rate basis but a percentage of money brought in i.e. commission. The claimant was to receive 25% of the money she brought in below £1100, anything over £1100 she was paid 30%, that rose to 30% over £1,300 and to 40% over £1600. The claimant says in her statement this change occurred in June 2016, but I find that it did not commence properly until around September 2016. I find this based upon (a) the noticeable difference in the sums paid into the claimant's account and (b) a text message on 30 August 2016 notes the payments changing.
35. The claimant and Mr Johnson had a very good working relationship until 2019. There are numerous text messages in which the claimant asked if she could bring her son into work due to child care issues and that was agreed. There are other examples of Mr Johnson giving gifts of £50 to the claimant and exchanges of jokes between them.
36. The text messages also show exchanges between the claimant and Mr Johnson in connection with pay. There is no evidence that the claimant at any time raised a complaint with Mr Johnson with the amount she was being paid. The claimant accepted that she would have approached Mr Johnson immediately if she felt there had been any problems, she would ask him for clarification.
37. In 2019 the relationship broke down and on 18 August 2019 the claimant resigned via text message.

### **Holidays**

38. The claimant's evidence on this was that she did take holidays in school half terms or summer breaks to travel and see her family. On one occasion she took a 26 day holiday staying abroad. For the most time she would take 3 to 4 weeks of each year, although she did not take that in 2018.
39. Neither party produced a record of holiday taken. The respondent accepted that whether she took holiday or accrued it the claimant was not paid for it, but she was free to manage her own diary and take time off when she chose.

### **The Claimant's Schedule of Loss**

40. The claimant produced a schedule in the form of an excel spreadsheet. This was prepared by her solicitor (not instructed to conduct the hearing). The schedule calculated the date of payment, type of payment, days and hours worked, minimum pay owed under NMW, actual pay and then calculates a shortfall.

41. This schedule does not accurately reflect the hours worked by the claimant for the period 2014 to September 2016. It has been calculated on the premise that the claimant worked 8 hours per day for three days a week. As I have already found, that is not true. The claimant did not consistently work those hours.
42. The second period when the pay structure changed from September 2016 until August 2019 equally assumes that the claimant worked 4 days per week and later 5 days per week (November 2018) for a period of 8 hours.
43. The schedule then calculates what should have been paid for those hours and what was actually paid, but only records the deficit. It does not calculate any credit/surplus payments.
44. Mr Johnson put to the claimant that she was overpaid when applying the above premise. He put to the claimant that she was only complaining about the underpayment and not giving credit for any overpayment. The claimant did not dispute that there were overpayments.
45. I accept the claimant was sometimes overpaid and that both parties viewed it as an overpayment. An example of the respondent overpaying the claimant is in a text message exchange in December 2017 [page 58 R's bundle]. At the end of an exchange the claimant wrote: "*Chris sorry to bother you but have you checked my salary from last week please coz last week you paid me £175 (which I think should be less) for 2 days only but this week I worked one day extra and you paid £300? Make sure you took all money out that I own [sic] you*".
46. The respondent did keep some records of hours and days worked, but they were deleted and/or his access was removed when he could no longer afford to pay the software licence after his business fell into financial difficulties as a result of COVID. Therefore there are no records available for me to consider.
47. I do accept that he kept some records, on the basis of some information he has been able to provide, but not of hours worked because he did not consider the claimant to be an employee, so did not need to keep those records.
48. HMRC carried out a check into the respondent's worker's rate of pay and he was found to be "*paying your workers at least the NMW*" [42 R's bundle]. There was no evidence before me that the claimant had attempted to enforce her MNW claim through HMRC, or at least there has not been prior judicial determination of her claim.
49. The claimant did produce some pay slips, albeit they did not contain much detail. The respondent conceded pay slips were not given to the claimant, because he genuinely believed she was self employed.

#### **The applicable law**

50. The key provision applicable to unauthorised deductions claims is s.13 Employment Rights Act 1996 (ERA), which states the following:

**13 Right not to suffer unauthorised deductions**

(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.

(4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion

(5) For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect

(6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.

(7) This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting “wages” within the meaning of this Part is not to be subject to a deduction at the instance of the employer.

51. The Employment Tribunal has jurisdiction to determine unauthorised deductions claims by virtue of **section 23 ERA**.

52. In respect of claims brought for an unauthorised deduction in wages in respect of an underpayment of the national minimum wage it shall be presumed for the purposes of the complaint, so far as relating to the deduction of that amount that the worker in question was remunerated at a

rate less than the national minimum wage unless the contrary is established (reversal of the burden of proof **s28 National Minimum Wage Act 1998 (NMWA)**).

53. The enforcement of underpayment of national minimum wage is provided by **Section 17 NMWA**: (1) If a worker who qualifies for the national minimum wage is remunerated for any pay reference period by his employer at a rate which is less than the national minimum wage, the worker shall be taken to be entitled under his contract to be paid, as additional remuneration in respect of that period, whichever is the higher of—

(a) the amount described in subsection (2) below, and

(b) the amount described in subsection (4) below.]

(2) The amount referred to in subsection (1)(a) above] is the difference between—

(a) the relevant remuneration received by the worker for the pay reference period; and

(b) the relevant remuneration which the worker would have received for that period had he been remunerated by the employer at a rate equal to the national minimum wage.

(5) Subsection (1) above ceases to apply to a worker in relation to any pay reference period when he is at any time paid the additional remuneration for that period to which he is at that time entitled under that subsection.

54. **Regulation 12 National Minimum Wage Regulations 2015** provides for certain deductions to be made which are not to be treated as reductions to the NMW calculation:

12.—(1) Deductions made by the employer in the pay reference period, or payments due from the worker to the employer in the pay reference period, for the employer's own use and benefit are treated as reductions except as specified in paragraph (2) and regulation 14 (deductions or payments as respects living accommodation).

(2) The following deductions and payments are not treated as reductions—

(c) deductions, or payments, as respects an accidental overpayment of wages made by the employer to the worker.

55. For claims brought after 2015 the **Deduction from Wages (Limitations) Regulations 2014** apply and "An employment tribunal is not (despite subsections (3) and (4)) to consider so much of a complaint brought under this section as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint.

56. The key provisions in relation to holiday pay claims are set out in the **Working Time Regulations 1998**, and I reproduce those which are relevant to this case as follows:

13.—(1) Subject to paragraphs (5) and (7), a worker is entitled in each leave year to a period of leave determined in accordance with paragraph (2).

(2) The period of leave to which a worker is entitled under paragraph (1) is—



- (a) in any leave year beginning on or before 23rd November 1998, three weeks;
- (b) in any leave year beginning after 23rd November 1998 but before 23rd November 1999, three weeks and a proportion of a fourth week equivalent to the proportion of the year beginning on 23rd November 1998 which has elapsed at the start of that leave year; and
- (c) in any leave year beginning after 23rd November 1999, four weeks.

(3) A worker's leave year, for the purposes of this regulation, begins—

- (a) on such date during the calendar year as may be provided for in a relevant agreement; or
- (b) where there are no provisions of a relevant agreement which apply—
  - (i) if the worker's employment began on or before 1st October 1998, on that date and each subsequent anniversary of that date; or
  - (ii) if the worker's employment begins after 1st October 1998, on the date on which that employment begins and each subsequent anniversary of that date

14.—(1) This regulation applies where—

- (a) a worker's employment is terminated during the course of his leave year, and
- (b) on the date on which the termination takes effect ("the termination date"), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13(1) differs from the proportion of the leave year which has expired.

(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).

16.—(1) A worker is entitled to be paid in respect of any period of annual leave to which he is entitled under regulation 13, at the rate of a week's pay in respect of each week of leave

57. Holiday pay claims of this nature may be presented to an Employment Tribunal by virtue of **reg.30(1)(b)**.

## **Analysis and Conclusions**

58. The claimant as a worker was entitled to paid annual leave and to be paid the national minimum wage.

### *Holiday Pay*

59. The respondent conceded that the claimant was not paid her annual leave. The claimant had not explained in her evidence or schedule which parts of her claim related to holiday accrued but untaken, holiday taken but unpaid, nor did she give any evidence that she was refused leave.

60. It has therefore not been possible to determine her claim with specific reference to the Working Time Regulations. I have not been able to determine, for example, which element of the claim relates to a regulation 16 claim as opposed to regulation 13.
61. The claimant's alternative claim was for unauthorised deduction from wages and in light of the respondent's concession that the claimant should have been entitled to 28 days annual leave and that she was not paid it, applying the two year cap under the Deduction from Wages Regulations I find the claimant's claim for unpaid holiday pay succeeds. That amounts to 28 days at £60 x 2 years = **£3,360**.

*National Minimum Wage*

62. On the evidence I heard there are two distinct periods where the claimant was paid based on different pay schemes. The first of these was between 2014 and September 2016 when she was paid a daily rate. The claimant's schedule of loss records an underpayment of the NMW for that period.
63. Applying the reversal of the burden of proof I have to presume the claimant was underpaid unless the contrary is established. It is right that the respondent did not produce any records. However, the claimant confirmed in her evidence that her payments correctly represented the number of hours she worked. Therefore the contrary has been established by the claimant's evidence of the payments she received at that time. There were no underpayments.
64. As I have already set out, a change came about in September 2016 when the claimant changed to 'commission' based payments. For the purposes of NMW the number of hours worked in generating that commission still need to be calculated.
65. The claimant's evidence is based on that period of time working 9-5 and therefore on the face of the schedule there are weeks where she was not paid for those hours. Whilst I have my doubts about whether she was consistently working 8 hours I remind myself that unless the contrary is shown I have to presume she was and that means she was underpaid. Given the respondent has not been able to show me any records of hours worked I cannot find the '*contrary has been established*' regarding this second period.
66. For the avoidance of doubt it was on the basis of the claimant's evidence that I am satisfied the contrary was shown up to September 2016. From that point neither she nor the respondent were particularly clear on hours worked, but the respondent has not been able to discharge its burden of proof.
67. However, it was also clear from the evidence, that the claimant was regularly over paid. The claimant's schedule applied the 8 hours per day premise, which also evidenced overpayments. The claimant was cross examined on those overpayments and she accepted that is what the schedule showed, but she felt that they should not be set off.
68. Under section 17 NMWA the claimant is entitled to the difference between her actual wage and that which she should have been paid applying the national

minimum wage. However, that provision ceases to apply “to a worker in relation to **any** pay reference period when he is **at any time** paid the additional remuneration for that period to which he is at that time entitled under that subsection”. Therefore the overpayments (which can be paid at any time in relation to any pay reference period) do reduce the liability of the respondent.

69. Further or alternatively additional remuneration is an accidental overpayment (within the meaning of regulation 12) and therefore reduces the liability. It cannot be right that on the claimant’s evidence, in which she accepted she was at times overpaid, that the respondent is not given credit for those overpayments.

70. Applying that to the claim I have found the difference between what the claimant was paid, including overpayments, and what she ought to have been paid under the national minimum wage as claimed is **£2,225.29**.

71. The respondent accepted the claimant was not provided with adequate pay slips and so I make a declaration to that effect. I have awarded the claimant the value of the deductions and so do not make a further award.

Employment Judge Mellor  
3 May 2023

JUDGMENT SENT TO THE PARTIES ON  
9 May 2023

FOR THE TRIBUNAL OFFICE

Notes

2. Judgments and reasons for the judgments are published, in full, online at [www.gov.uk/employment-tribunal-decisions](http://www.gov.uk/employment-tribunal-decisions) shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.



## NOTICE

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

Case number: **2414722/2019**

Name of case: **Ms N Ariane** v **White Haus Hair And  
Beauty 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: 9 May 2023

**the calculation day** in this case is: 10 May 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.