



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr R. Raczewski

**Respondent:** Staffline Group PIC

## RECORD OF A PRELIMINARY HEARING

**Heard at:** Nottingham **On:** 07.02.2018

**Before:** Employment Judge Dyal

### Appearances:

For the claimant: in person  
For the respondent: Ms Rushforth, Legal Executive

## JUDGMENT

1. The Claimant's basic hourly rate of pay was as follows:
  - a. 1 January 2017 – 31 January 2017: £7.20 per hour
  - b. 1 February 2017 – 31 March 2017: £7.30 per hour

- c. 1 April 2017 to 21 April 2017: £7.60 per hour
  - d. 22 April 2017 onwards: £7.75 per hour.
2. They were terms of the Claimant's contract that:
- a. The basic hourly rate applied to the first 39 hours of work done on Monday – Friday;
  - b. The basic hourly rate was enhanced by 50% for any work in excess of 39 hours done on Monday – Friday;
  - c. The basic hourly rate was enhanced by 50% for work done on Saturdays;
  - d. The basic hourly rate was enhanced by 100% for work done on Sundays.

## CASE MANAGEMENT ORDERS

1. By 4 pm on 7 March 2018 the Respondent shall:
  - i. state the sum (if any) by which it accepts that the Claimant was underpaid in each weekly pay period between 1 January 2017 and 11 July 2017; and
  - ii. respond in detail to each of the allegations of underpayment of wages and/or holiday pay set out in the Claimant's further particulars of 19 October 2017 indicating what if anything is dispute and, where there is a dispute, the basis of it.
2. By 4pm on 28 March 2018 the parties should exchange any further witness evidence upon which they rely.
3. The remaining issues will be determined at a trial at Nottingham Employment tribunal on 16 April 2018 with a time estimate of 1 day.

## REASONS

### Background

1. The Claimant complains of unauthorised deductions from wages in the period of January to July 2017. There are multiple dimensions to this. He complains that there have been ongoing failures to pay him at the correct hourly rate, that on specific occasions he has not been paid for days that he has worked and that he has been underpaid or not paid for his holiday pay. The Claimant further complains that he has been prevented from taking all of his holiday entitlement.
2. The matter came before the tribunal today for a trial of all of the issues. EJ Britton made careful case management orders so as to prepare the case for today's hearing. The Respondent produced a table setting out detailed pay data. The Claimant responded on 19

October 2017 methodically and chronologically setting out why, notwithstanding the data provided, he maintained that he had been underpaid (although he did not say by how much). Witness statements were exchanged. The Claimant's statement repeated the particulars of 19 October 2017. Mr Ward's statement was broad-brush and did not engage with the detail of the Claimant's case.

3. Unfortunately, the Respondent's representative, Claire Johnson, who has had conduct of the case throughout, was taken ill yesterday evening. The tribunal saw and accepted evidence that she attended A&E and was admitted to hospital as an inpatient. Ms Rushforth had therefore only picked up the case late last night in what were emergency circumstances. There is a lot of detail and in the time she had, understandably, Ms Rushforth had not been able to master it.
4. Ultimately, Ms Rushforth applied for the tribunal to adjourn all but one family of issues to another day. She was content to (and proposed to) deal today with the disputed issue of the Claimant's hourly rate(s) in the period January 2017 to July 2017. She said that the dispute about the hourly rate was a barrier to ADR and that it would be useful for that reason to deal with the matter today.
5. The Claimant opposed the application to adjourn not least because the matter has previously been adjourned. The tribunal had considerable sympathy, but ultimately considered that the partial adjournment Ms Rushforth proposed was necessary for a fair trial of the issues. For reasons beyond the Respondent's control its representative was unable to attend and the replacement for reasons of time was unable to master the detail of the issues.
6. The tribunal therefore agreed to adjourn all issues other than the Claimant's hourly rate a matter which all agreed could be dealt with today.
7. The tribunal records that Ms Rushforth conceded that there were errors in the Claimant's holiday pay calculation. She suspected that this might be because 'basic pay' rather than 'normal remuneration' had been used to perform the calculations but she could not say for sure.

### **Findings of fact**

8. The tribunal heard live evidence from the Claimant and from Mr Ward.
9. The Claimant is engaged by the Respondent as a worker (no finding is made as to whether or not he is additionally an employee – it does not matter for the purposes of the current dispute). The Respondent is an employment agency.
10. Since around 1 October 2016 the Claimant has worked under a permanent contract with the Respondent which is intended to meet the requirements of reg. 10 Agency Worker Regulations 2010. He has since that date been on assignment with Hovis. He was previously engaged by the Respondent on another basis.
11. Before being offered the assignment with Hovis, the Claimant was interviewed by a manager employed by Hovis. He was told that his pay would be as follows:
  - a. Basic rate of pay: £7.20 p/h for the first 39 hours.

- b. Rate of pay for work in excess of 39 hours done on Monday – Friday: time and a half
  - c. Rate of pay for work done on Saturday: time and a half
  - d. Rate of pay for work done on Sunday: double time.
12. He was also told that his performance would be reviewed approximately every three months and that, subject to the outcome of the review, he may receive a pay rise in the order of 10 – 15p per hour.
  13. Shortly after the interview, but before he started working in this new role, the Claimant saw the Respondent's site manager on site. He relayed to the site manager, Cataline, the terms that Hovis said he would enjoy with the Respondent and Cataline agreed that those terms were correct.
  14. At p34 and 35 of the bundle there is a document entitled 'Assignment Details Form'. The Claimant's name appears in handwriting and so too does the date 01.10.2016. The Claimant was not familiar with this document and his considered view in evidence was that the handwriting was not his. The pay details on the document do not reflect the terms set out above and are materially different. The tribunal finds that the Claimant did not see this document contemporaneously nor did he otherwise agree the terms set out in it, nor did the terms reflect the reality of the situation. The reality of the situation was that the Claimant was in fact paid in accordance with the terms discussed at the interview and set out above from October 2016 until January 2017. I note that the Respondent does not say that the true terms are as set out in this document.
  15. The Claimant also signed the signature page of a document titled '*Regulation 10 Compliant Employment Contract*' with the Respondent. For reasons that are not clear, but are unlikely to be good ones, only the signature page was in evidence before the tribunal. The tribunal decided the case on the basis of the evidence that it had.
  16. In January 2017 the Claimant had a performance review with his team leader, Andy. The review was positive. Andy decided that the Claimant should have a 10p per hour pay rise.
  17. Before the tribunal both the Claimant and Ms Rushforth agreed that this pay rise should have been effective from 1 February 2017 onwards. In fact it was not implemented until around mid-March.
  18. Between January and April 2017 the Claimant complained of a large number of putative deductions from his wages. No finding today is made about whether those complaints were well founded, but what is important is that the complaints led to a meeting between the Claimant and Clare Keats, Contract Manager, over the Easter break in April 2017 (on Monday 17 April 2017).
  19. Before coming to that, the tribunal finds (and this is not disputed) that from 1 April 2017 the Claimant's basic pay increased to £7.60. This was because the National Minimum Wage increased to £7.50 on this date and the Claimant had been awarded a 10p per hour increment as a result of his pay review in January 2017.

20. Returning to the meeting of 17 April 2017, Ms Keats was sympathetic to the Claimant who among other things explained to her that he ought by now to have had a further performance review and increment although he had not in fact had either. Ms Keats agreed to look into matters including that one.
21. The Claimant's payslip for the week commenced 22 April and ended 28 April 2017, recorded his basic hourly rate as £7.75. The tribunal has not seen the payslip for 5 May 2017 but accepts the Claimant's evidence that it also identified his basic hourly rate as £7.75.
22. However, on 12 May 2017 and in subsequent payslips, and without any explanation, the Claimant's hourly rate reverted to £7.60. The Claimant has been in dispute with the Respondent about that (among other things) ever since.
23. In his evidence, Mr Ward could not explain why the rate of pay had increased and then decreased: it predated his involvement in this case. He speculated that it might be an inputting error. Pay details are manually typed into an Excel spreadsheet and it was possible that the wrong rate was entered.
24. The Claimant, however, considered that there was a different explanation. Namely, that following his meeting with Clare Keats, she had seen merit in his complaint that he had not received an increment and had increased his pay accordingly.
25. It is not in dispute that within a few weeks of the meeting between Ms Keats and the Claimant, Ms Keats was transferred to another site and a new manager replaced her. That timeframe broadly coincides with the reduction in the Claimant's pay on 12 May 2017.
26. The tribunal has very limited information to go on, but considers that the Claimant's explanation for the increase to be the more plausible and finds it, on balance, to be the true explanation. The Claimant's pay was increased to £7.75 by Ms Keats. It was later decreased after Ms Keats left the site.
27. Pausing there the tribunal directs itself that a term can be implied into a contract if it is so obvious that the parties must have intended it. One well known formulation of the test is that set out by Mackinnon LJ in *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206:

*Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying, so that if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement they would testily suppress him with a common "Oh, of course."*

28. The tribunal has no difficulty at all in accepting that it was an implied term that the Respondent had a power to unilaterally increase the Claimant's wages. The officious bystander would have said 'oh, of course' if asked whether the Respondent had such a power.
29. However, there is no basis upon which the tribunal could find that it was also a term of the contract that the Respondent could unilaterally decrease the Claimant's wages. Decreasing wages, which runs counter to the worker's interest rather than in favour of it, is another matter altogether. There is no evidence of an express term to that effect and there is no factual basis for implying such a term.

30. The tribunal therefore finds that from 22 April 2017 onwards the Claimant's basic rate of pay increased to £7.75. This was because through Ms Keats the Respondent exercised its contractual power to increase the Claimant's pay.
31. Thereafter, the Claimant's pay could not be unilaterally reduced and, as a matter of contract, it remained at £7.75 per hour.

07.02.2018

---

Employment Judge Dyal

SENT TO THE PARTIES ON

10 February 2018

.....  
.....  
FOR THE TRIBUNAL OFFICE

---

**NOTES: (1) Any person who without reasonable excuse fails to comply with a Tribunal Order for the disclosure of documents commits a criminal offence and is liable, if convicted in the Magistrates Court, to a fine of up to £1,000.00.**

**(2) Under rule 6, if this Order is not complied with, the Tribunal may take such action as it considers just which may include (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84.**

**(3) Anyone affected by this Order may apply under rule 29 for it to be varied, suspended or set aside.**