



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr K Horsfall

**Respondent:** Casa Yeadon

**Heard at:** By CVP  
**On:** 12 January 2021

**Before:** Employment Judge Anderson

## Representation

**Claimant:** In person

**Respondent:** Mr Imani (Owner/Manager)

# RESERVED JUDGMENT

1. The claim of unauthorised deduction from wages succeeds.
2. The Respondent shall pay the Claimant £209.30 and the Claimant will be responsible for the payment of any tax or National Insurance.

# REASONS

## Technology

3. This hearing was conducted by CVP (V - video). The parties did not object. A face to face hearing was not held because it was not practicable and all the issues could be dealt with by CVP.
4. An interpreter attended the hearing and translated the proceedings.

## Introduction

5. This was a claim of unauthorised deduction from wages, brought by the Claimant,

Mr Horsfall, against his former employer, Casa Yeadon, which operates a takeaway known as Casa Pizza. The Claimant appeared in person. Mr Imani (owner/manager) represented the Respondent.

## Preliminary Matters

6. Shortly before the hearing began, I was sent some screenshots of a text conversation between the Claimant and another person (Miss Y), which the Claimant asked me to consider. These were sent by the Tribunal to Mr Imani. At the start of the hearing, it became clear that a witness statement signed by the three witnesses to be called by Mr Imani had not been sent to or received by the Tribunal.
7. Both pieces of evidence were provided late. Both pieces of evidence were very brief. The Claimant had in fact had sight of the statement, which essentially repeated information contained within the ET3 response form. I told Mr Imani that I could give him time to consider the text conversation provided by the Claimant if necessary. Neither party objected to the evidence provided by the other being considered as part of the proceedings. Both parties had an opportunity to respond to the late evidence. In light of these factors and applying the principles of the overriding objecting, I determined that both items ought to be admitted and considered. During the hearing, I read out the entirety of the text messages, which were translated for Mr Imani.

## Evidence

8. There was a very small bundle of documents running to 29 pages. There were no formal witness statements. The Respondent provided a single statement signed by the three witnesses who all gave evidence at the hearing.
9. I heard evidence from the Claimant. For the Respondent, the Tribunal heard from Mr Imani, Miss A Menzies (cashier), Miss A Williams (driver) and Miss S Webb (cashier).
10. After the hearing and during my deliberations, I considered it appropriate to ask the parties whether they considered the National Minimum Wage Act 1998 and National Minimum Wage Regulations 2015 applied in this case. They each provided written comments in response. The Respondent's response included matters and details not raised during the hearing and which the Claimant had not had an opportunity to respond to. It also included a screenshot of a text message sent by the Respondent to the Claimant on 18 June 2020, which again had not been produced during the hearing. This repeated information given at the hearing. Given the lateness of this information and that the Claimant could not respond, I did not consider these new pieces of evidence. The Claimant's response states that he thinks he should be paid at least the minimum wage for the hours he says he worked.

## The Claims and Issues

11. The Claimant brings a complaint of unauthorised deduction of wages. The Claimant says he worked for the Respondent, at a takeaway called Casa Pizza, for eight days between 6 and 14 June 2020. The Claimant says he was not paid any wages, but that he should have been, and he was not told he would not be paid. The Respondent says this was a period of training and the Claimant was not entitled to be paid. The Respondent says the Claimant was repeatedly told he would not be paid during this

period.

12. The issue for the Tribunal is whether the wages paid to the Claimant (zero) were less than the wages properly payable?
13. In order to determine this, I needed to consider whether there was an agreement or contract and if so, what the terms were in so far as they are relevant, and in particular, to payment?
14. I later decided that I also needed to consider whether the National Minimum Wage Act and the National Minimum Wage Regulations apply.

## **The Facts**

15. The Tribunal made the following findings of fact:
16. At or around the beginning of June 2020, Casa Pizza placed an advert in its window advertising the position of 'cashier'.
17. The Claimant made contact with Casa Pizza via its Facebook page.
18. The Claimant spoke with Mr Imani's daughter by telephone on 4 June 2020.
19. The Claimant attended the premises on 5 June 2020 to meet with Mr Imani as agreed the previous day with Mr Imani's daughter.
20. Mr Imani told the Claimant to come back the following day (Friday 6 June 2020), which the Claimant did.
21. There was no written contract or agreement between the Claimant and Respondent.
22. The days the Claimant would work were never discussed, either with Mr Imani or his daughter.
23. The facts listed above were accepted by both parties.
24. The Respondent does not routinely provide written contracts to its employees/workers at Casa Pizza. This was clear from the evidence from Mr Imani and his three witnesses. None of these three individuals have a written contract, despite working there for periods of between 14 months and 3 years.
25. I find that the practice at Casa Pizza was for new staff to be 'trained-up' prior to starting their own independent shifts and I find that this period was intended by the Respondent to be unpaid. Mr Imani was clear this was his policy. He said that while new workers are learning, they eat there, take food home and come and go whenever they want. This was supported by the evidence of Miss Menzies.
26. Miss Williams, Miss Menzies and Miss Webb confirmed the 'no pay whilst training' policy. Miss Williams confirmed this had been her own experience and the training had lasted three days.
27. I consider that the evidence produced from the Claimant from Miss Y further supports this finding; Miss Y had ceased working/attending at Casa Pizza for the very reason that she was not paid for the 1-2 days she was there.

28. The Claimant knew training was required. He told me that during the conversation with Mr Imani on 5 June 2020, he was told to 'come in and start training on the Saturday', which he did.
29. The Claimant accepted he was receiving training during the period in question and that this included learning how to work the till, answer the phone, stack boxes and take pizzas out of the oven. He said he thought he was getting trained and doing the job at the same time. He said he worked by himself with the cashier on shift was taking a break.
30. The Respondent and the witnesses agreed there was no defined training period; it depended on how quickly an individual 'picked it up'. The Claimant accepted that elements of the job were difficult, for example working the till. He said that at the time he left, he could use 'most of it', though he forgot 'a few bits'.
31. I have to weigh the evidence as to what, if anything, the Claimant was told about the initial 'training-up' period being unpaid. The Claimant is adamant that he was not told, by anyone, that the training period was unpaid. He said the only conversation about pay was with Mr Imani's daughter on the telephone on 4 June 2020 when she told him the daily rate.
32. Mr Imani says that he told the Claimant that training was unpaid. He says he also told others to communicate this message to the Claimant. Miss Williams says she was present when the Claimant attended the shop on 5 June 2020 and Mr Imani told her to make it clear to the Claimant that training was voluntary and unpaid. Miss Williams told me that she told the Claimant that Mr Imani had asked her 'to make sure you are aware this is unpaid' and she told the Claimant all training was unpaid. Miss Williams was clear that she had further conversations with the Claimant about this and explained that one conversation came about due to the Claimant asking why different workers were paid differently (daily/weekly).
33. Miss Menzies said she was also present on 5 June 2020. She said she spoke to the Claimant in depth about the day to day work. She said she told the Claimant that the training was voluntary, and that he could come and go as he liked until his training was complete, he understood it all, did it correctly and got his own day to work by himself.
34. Miss Webb said she told the Claimant that the training period was unpaid, on one occasion, on 6 June 2020. This was at Mr Imani's request, which she said was to ensure that the Claimant understood he would not be paid during training/learning.
35. I have then, clear, consistent and unequivocal evidence from four witnesses that the Claimant was told he would not be paid. On the other hand I have the Claimant equally adamant that he was not told.
36. I take into account that the Claimant accepts he was told 'multiple times' that he could leave early, both by Mr Imani and others working at Casa Pizza. I find it unlikely that a worker in a small takeaway would be invited to leave early on 'multiple' occasions within their first week and be paid their full rate of pay. I note that when asked if he was ever told the training would be unpaid, the Claimant replied 'no, never and even if I was, I should have been told in that phone call'.
37. On balance, I find it more likely than not that the Claimant was told that he would not be paid during the initial training up period. I make this finding on the basis of the consistency of the evidence of the Respondent's witnesses and particular, each of the

witnesses abilities to provide details of the specific conversations in which this information was given.

38. There was no written agreement and the general terms of any oral agreement are extremely hard to clarify. For example, the Claimant did not know what the procedure would be if he was sick, or wanted to take holiday. He said that he had contact details of some of the other people that worked there and so would just 'snapchat' them.
39. There was even a lack of clarity on the rate of pay. The Claimant understood this was £40 per shift, regardless of the day worked. Mr Imani said the rate of pay was £40 for a weekday shift and £45 for a weekend shift.
40. However, I am satisfied and so find that there was an agreement between the Claimant and Respondent that he would work at Casa Pizza.
41. The Claimant communicated on or around 17 June 2020 that he would not be returning to the Casa Pizza, because he had not been paid.

## Legal Principles

42. Section 13 of the Employments Rights Act 1996 (ERA) provides that an employer shall not make an unauthorised deduction from a worker's wage.
43. Section 230 ERA provides the following definition of worker:
  - (3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—
    - (a) a contract of employment, or
    - (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.
44. Subsection (2) provides that a "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.
45. Contract law is governed by well-known common law principles, including:
  - There must be an agreement (usually consisting of an offer which is then accepted) made between two or more people.
  - The agreement must be made with the intention of creating legal relations.
  - The agreement must be supported by consideration — i.e. something of benefit must pass from each of the parties to the other.
  - The individual terms of a contract must be sufficiently certain for the courts to be able to give them meaning.
46. As above, contractual terms may be either express or implied. Express terms are those which have been specifically agreed between the parties, whether in writing or under an oral agreement. Implied terms are those that exist either because of the nature and circumstances of the contract itself or because the law states that such a term is to be implied in the particular circumstances.

47. Tribunals will be slow to conclude that a contract is too vague to be enforced and will seek to identify the terms from the information and evidence available. In this case however, the information is extremely limited.

48. During my deliberations, I considered it appropriate to ask the parties whether they thought the National Minimum Wage applied to this case.

49. The National Minimum Wage Act 1998 (NMWA) provides that:

(1) A person who qualifies for the national minimum wage shall be remunerated by his employer in respect of his work in any pay reference period at a rate which is not less than the national minimum wage.

(2) A person qualifies for the national minimum wage if he is 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.

50. There is no continuous employment requirement, so a qualifying worker is entitled to the national minimum wage even if he or she is only hired for one day or is doing temporary seasonal work.

51. At s28 NMWA provides that:

(1) Where in any civil proceedings any question arises as to whether an individual qualifies or qualified at any time for the national minimum wage, it shall be presumed that the individual qualifies or, as the case may be, qualified at that time for the national minimum wage unless the contrary is established.

(2) Where—

(a) a complaint is made—

(i) to an employment tribunal under section 23(1)(a) of the Employment Rights Act 1996 (unauthorised deductions from wages),

...

and

(b) the complaint relates in whole or in part to the deduction of the amount described as additional remuneration in section 17(1) above, 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

52. The National Minimum Wage Regulations 2015 provide that:

*Hours of work for determining whether the national minimum wage has been paid*

17. In regulation 7 (calculation to determine whether the national minimum wage has been paid), the hours of work in the pay reference period are the hours worked or treated as worked by the worker in the pay reference period as determined—

(a) for salaried hours work, in accordance with Chapter 2;

(b) for time work, in accordance with Chapter 3;

(c) for output work, in accordance with Chapter 4;

(d) for unmeasured work, in accordance with Chapter 5.

*Hours spent training*

19.—(1) In this Part, references to “training” include hours when the worker is—

(a) attending at a place other than the worker’s normal place of work, when the worker would otherwise be working, for the purpose of receiving training that has been approved by the employer;

- (b) travelling, when the worker would otherwise be working, between a place of work and a place where the worker receives such training;
  - (c) receiving such training at the worker's normal place of work.
- (2) In paragraph (1), hours when the worker would "otherwise be working" include any hours when the worker is attending at a place or travelling where it is uncertain whether the worker would otherwise be working because the worker's hours of work vary either as to their length or in respect of the time at which they are performed.

*The meaning of time work*

30. Time work is work, other than salaried hours work, in respect of which a worker is entitled under their contract to be paid—  
(a) by reference to the time worked by the worker;

*Training treated as hours of time work*

33. The hours a worker spends training, when the worker would otherwise be doing time work, are treated as hours of time work.

*The meaning of unmeasured work*

44. Unmeasured work is any other work that is not time work, salaried hours work or output work.

*Determining hours of unmeasured work in a pay reference period*

45. The hours of unmeasured work in a pay reference period are the total number of hours—  
(a) which are worked (or treated as hours of unmeasured work in accordance with regulations 46 and 47) by the worker in that period; or  
(b) which the worker is treated as working under a daily average agreement in that period, as determined in accordance with regulation 50.

*Training treated as hours of unmeasured work*

46. The hours when a worker is training, where the worker would otherwise be doing unmeasured work, are to be treated as hours of unmeasured work.

53. I have also considered the government guidance on eligibility for national minimum wage and in particular the case examples relating to 'unpaid work trial periods'<sup>1</sup>, which I consider provide good guidance for the case before me. Those examples suggest that where tasks are carried out in simulated environment, for only a short amount of time, this is unlikely to attract the minimum wage. However, longer periods and where there is a benefit to the employer, this is more likely to indicate that the national minimum wage does apply.

## Application of the Law to the Facts

54. The Claimant was a worker in June 2020, by virtue of the fact there was an oral and implied contract whereby he undertook to do or perform personally work or services for the Respondent i.e. the role of cashier.
55. I accept that the Respondent's practice was to train staff prior to them taking on their own shifts, at which point they would be paid. The attractiveness of this practice is not a matter for the Tribunal.
56. The Claimant did not question or challenge why he was not being paid. He told me that he noticed other staff being paid each night and he wasn't. He said he was confused about not being given a contract. He said he realised after about a week and

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<sup>1</sup> <https://www.gov.uk/guidance/calculating-the-minimum-wage/eligibility-for-the-minimum-wage>

his parents advised him to stop going. I understand that the Claimant's inexperience in the workplace may have made him hesitant, nervous or embarrassed to question his own pay situation.

57. Mr Imani did not intend to pay the Claimant until such time as the training period had been completed; as I note above, it was confirmed by the witnesses, that once trained, a cashier would 'get their own day' and be paid.
58. I therefore conclude that there was no requirement for the Respondent to pay the Claimant wages under the oral agreement between the parties. However, I go on to consider whether the National Minimum Wage Act and Regulations apply.
59. I consider that they do apply. I have determined that the Claimant was a worker within the meaning of the Employment Rights Act and was so from the point he and the Respondent agreed the contract – it is clear to me that the question was when the Claimant would get his own shift, not whether he would.
60. The starting point is that a worker will be paid at least the minimum wage.
61. I was not referred to any legal principles or case law on the point of non-payment during training and I was unable to identify any case law 'on point'.
62. Whilst not binding on the Tribunal, I considered that the government guidance on eligibility for national minimum wage ('the Guidance') reflects the proper interpretation of the legislation. I further consider that it is consistent with my own view that the length of time and carrying out of tasks by the Claimant makes him eligible for the national minimum wage.
63. I note in particular, the case examples in the Guidance, I consider the case before me has some features from the first two case examples:
  - a. In 'Case Example 2', as here, the working environment was real, there was some benefit provided to the owner, but this was balanced with the need to settle in to the role. In the example, the worker was unlikely to be entitled to the minimum wage, but the worker there only worked for a two-hour period. In the Claimant's case, he spent 54 hours at the takeaway.
  - b. In the first case example, a one-week trial period "appears an excessive amount of time to test the skills which that person requires to perform the role." The example commented on the benefit to the employer from the work undertaken by the trial worker and that it could not easily be distinguished from work undertaken by a paid member of staff. I accept that in the case before me, there was another cashier working at the same time as the Claimant, but he was performing the same tasks, and did so alone at times, for example when the existing cashier was on a break.

## Conclusions

64. I conclude that the Claimant was a worker within the meaning of the Employment Rights Act and was so from the point he and the Respondent agreed the Claimant would work at Casa Pizza.
65. I conclude that the intention of the Respondent was that the Claimant would not be paid for the 'training' period.



66. I conclude that the Claimant was told this information. I think it likely there was a level of hesitancy on the Claimant's part to seek clarification about how long this might last, and he stayed at the takeaway longer than necessary in order to make a good impression.
67. I therefore conclude that there was no requirement for the Respondent to pay the Claimant wages under the oral agreement between the parties.
68. However, I conclude that the National Minimum Wage provisions do apply to this case and that the Claimant is entitled to a payment.
69. Whilst not binding on the Tribunal, the Guidance is, in my view, consistent with the correct interpretation of the law and is consistent with my own conclusions that this was simply to lengthy a period to properly fall within a trial period without pay.

## **Remedy**

70. The Claimant was 16 years of age in June 2020 and so the applicable rate of the national minimum wage for the relevant period is £4.55 per hour.
71. The Claimant is claiming for 54 hours, but accepts he was told he could leave early 'multiple times' and chose to stay. I therefore reduce the hours by 8, to reflect a two hour reduction on half of the days he worked.
72. I consider that the appropriate payment is £209.30, which is £4.55 for 46 hours.

Employment Judge Anderson

Date: 18 March 2021