EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111378/2021

Public Final Hearing held in Dundee by Cloud Based Video Platform (CVP) on 2 February 2022 and 16 March 2022

Employment Judge Tinnion

Mr. Arkadiusz Choina	**Claimant** **In person**
Scotbeef Ltd.	**Respondent** **Mr. Millar (Solicitor)**

JUDGMENT

1. The Claimant's wages claim against the Respondent under s.13 of the Employment Rights Act 1996 and/or for breach of contract is not well founded and is dismissed.

REASONS

Claim

1. By an ET1 presented on 14 September 2021, Claimant Mr. Arkadiusz Choina (a litigant in person whose first language is Polish) presented a complaint against his former employer Respondent Scotbeef Ltd. for unpaid wages when working for it as a Hygiene Operative in the following terms: "*I have got my contract over a year later then they hire me. When they hire me they told me that I will from mon-ther 16:30 – 01:30, fri 16:30 – 00:30. They told me that I have 2 x 30min breaks but never says if they are pay or not. On my payslip always pay me for*

39 hrs. per week. On 15/6/2021 my manager say that we start working from 17:00 – 01:30 mon-fri 2x30 breaks. When I ask how they will pay he say Probobly will be the same. And nothing changes after that, so I steel get wage every week for 39hrs."

2. In its ET3 and Paper Apart, Scotbeef resisted the claim on the following grounds:

    a. Mr. Choina's contract indicated his shift pattern would be 5pm – 1.30am Monday to Friday (total hours per week: 42.5 hours);

    b. Mr. Choina's contract entitled him to two unpaid 30 minute breaks each day (total break time per week: 5 hours), thus Mr. Choina only worked 37.5 hours each week;

    c. Scotbeef and USDAW had an agreement that all Scotbeef employees were paid for the first 1.5 hours of all breaks;

    d. Scotbeef paid Mr. Choina for 39 hours each week at the applicable hourly rate (excluding overtime, holiday pay, etc., this fact was not in dispute);

    e. Mr. Choina was therefore paid the correct amount – he was paid for 39 hours of work, having performed 37.5 hours of work and being paid for the first 1.5 hours of his weekly breaks as well.

3. As can be seen, Mr. Choina's original formulation of his wages claim in his ET1 was somewhat inchoate. However, at the hearing on 2 February 2022 – listed for a final hearing, but which had to be adjourned due to the Covid-related unavailability of a key witness – Mr. Choina (ably assisted by translator Mrs. M. Magdalena) clarified his claim related only to the period 29 June 2020 – 14 June 2021 (no claim was asserted in respect of the period after 15 June 2021) and in respect of that earlier period was put on the following basis:

a. on Monday – Thursday each week, Mr. Choina was required to and did attend Scotbeef's premises for a 4.30pm (not 5pm) - 1.30am shift each day (9 hours), did 8 hours work during each shift, took a total of 1 hour for breaks each day (2 breaks, each 30m long), and was entitled be paid for a total of 32 hours of work for those 4 days (4 days x 8 hours of work/day);

b. on Friday each week, Mr. Choina was required to and did attend Scotbeef's premises for a 4.30pm (not 5pm) to 12.30am (8 hours) shift each day, did 7 hours work during each shift, took a total of 1 hour for breaks (2 breaks, each 30m long), and was entitled be paid for 7 hours of work that day;

c. in addition to being entitled to be paid for the 39 hours worked above (32 hours Monday-Thursday, 7 hours Friday), Mr. Choina alleged he was also entitled to be paid an additional 1.5 hours for the first 1.5 hours of the breaks he took each week;

d. Mr. Choina's total contractual entitlement was therefore wages equating to 40.5 hours/week (39 hours of work, 1.5 hours paid break);

e. Scotbeef paid Mr. Choina only 39 hours per week, hence (on his case) Mr. Choina had consistently been underpaid by 1.5 hours per week;

f. Mr. Choina's claim was an extra 1.5 hours/week for the 50 week period beginning 29 June 2020 and ending 14 June 2021 at the applicable hourly rate (originally £8.93/hour, later increased to £9.09/hour).

4. On closer examination, it appears the proper end date of Mr. Choina's claim must be 13 June 2021, as it is not in dispute that on 14 June 2021 Mr. Choina started a new shift pattern in respect of which he asserts no wages claim.

Evidence

5. On 16 March 2022, the final hearing was held via video/CVP. Mr.Choina gave evidence. Scotbeef called two witnesses: Danny Thompson and Lisa Warcup. The Tribunal was satisfied all witnesses sought to assist the Tribunal by giving their honest recollection of events. Documentary evidence consisted of a production of less than 60 pages, including spreadsheets best viewed on a screen. References in square brackets are to the relevant page of the production.

Findings of fact

6. The Tribunal makes the following findings of fact, including any in its Discussion/ Conclusions section, on the balance of probabilities.

7. Scotbeef is a fresh meat company which supplies meat to retailers in and outside the UK. Between 29 June 2020 and 19 July 2021, Scotbeef employed Mr. Choina as a Hygiene Operative at its Bridge of Allan site. His job involved cleaning up work areas at the site after meat had been butchered.

8. It is not in dispute that Mr. Choina did not sign a written contract when he joined Scotbeef, and the Tribunal accepts his evidence that he was not given a written contract when he joined. Scotbeef did not call any witness evidence from the individual who offered him employment confirming that either (i) the written contract at [23-25] was provided to him, or (ii) the terms of that written contract (save as set out below) were verbally agreed with him. The Tribunal accepts Mr. Choina's evidence that the first time he saw a contract was towards the end of his employment in 2021 when he asked for a copy.

9. When he joined Scotbeef's employment, an unknown officer/employee of Scotbeef on an unknown date asked Mr. Choina to work a 4.30pm to 1.30am shift on Mondays to Thursdays (a 9 hour workday) and a 4.30pm to 12.30am shift on Fridays (an 8 hour workday). The Tribunal does not accept Mr. Choina was ever asked, or agreed, to start his shifts at 5pm prior to 14 June 2021. Mr. Choina agreed to attend work at those times to work those shifts. Mr. Choina was therefore required to be at work for shifts totalling 44 hours a week.

10. When he joined Scotbeef's employment, Mr. Choina was told he would get two 30 minute unpaid breaks a day (totalling 1 hour each day). Mr. Choina accepted employment on those terms, hence knew from the beginning of his employment that he would not be required to do work for 5 hours of his weekly 44 hour shift. Mr. Choina's understanding was that he would be at work and be paid for 39 hours work a week – his total shift time of 44 hours minus the 5 hours unpaid break he would take each week.

11. When he joined Scotbeef's employment, Mr. Choina was offered £8.93 per hour. He agreed that rate (which subsequently increased to £9.09 per hour).

12. In its ET3 Paper Part, Scotbeef accepts that on a date unstated Scotbeef and recognised union USDAW reached an agreement that all employees are paid for the first 1.5 hours of all breaks. Mr. Choina knew nothing about this agreement when he joined Scotbeef. He subsequently heard 'rumours' to this effect later on.

13. During the period 29 June 2020 – 13 June 2021, Mr. Choina attended Scotbeef's Bridge of Allen site and worked the shifts he had agreed to work (subject to holidays, etc.).

14. Mr. Choina had a fob/electronic key which he used to log his arrival at work and his departure, enabling Scotbeef to generate a non-disputed record [26] of his attendance times and time at work [58] in the period 3 August 2020 - 21 July 2021. No record akin to [26] has been provided for the period 29 June – 2 August 2020, but given its short duration (effectively 1 month) and the absence of any suggestion that the 'picture' for July 2020 would be any different to that for the period 3 August 2020 - 13 July 2021, the Tribunal infers the same pattern of attendance and time at work would likely be shown.

15. Scotbeef's electronic records shows that in the period 29 June 2020 – 13 June 2021, Mr. Choina almost always logged in at work before 430pm. In the majority of cases, Mr. Choina's departure time (when he was not working overtime) were around or a few minutes before 1.30am Monday to Thursday, and around or a

few minutes before 12.30am on Fridays. The Tribunal finds as a fact that Mr. Choina worked his contracted shifts in the period 29 June 2020 – 13 June 2021, and that Scotbeef must have given its express or implied consent for Mr. Choina to leave a few minutes early on the occasions he did so. The reality of the situation is that Mr. Choina left work when his work for the day was done (there was no suggestion that Mr. Choina ever left early when there was still work for him to do), and no practical purpose would have been served by Mr. Choina hanging around Scotbeef's site until exactly 130am or 1230am to press his fob/key on the device recording his exit time.

16. During the period 29 June 2020 – 13 June 2021, the typical pattern of a normal working day for Mr. Choina on Mondays to Thursdays was as follows:

    a. 4.30pm: Claimant arrives at work in ordinary clothes

    b. 4.30pm – 4.40-4.45pm: Claimant changes into work clothes, washes up, goes to beef line

    c. 4.40-4.45pm – 7pm: Claimant performs cleaning/hygiene duties

    d. 7pm – 730pm: Claimant takes #1 scheduled 30m break

    e. 7.30pm – 10pm: Claimant performs cleaning/hygiene duties

    f. 10pm – 1030pm: Claimant takes #2 scheduled 30m break

    g. 1030pm – 1130pm: Claimant performs cleaning/hygiene duties

    h. 1130pm – 12am: variable – Claimant sometimes takes 30m break, sometimes takes shorter break, sometimes takes no break at all

    i. 12am – 1am: Claimant performs cleaning/hygiene duties;

    j. 1am – 1.15-1.20am: Claimant's work winds down – Claimant finishes cleaning/hygiene duties, tidies up, returns equipment;

    k. 1.15-1.20am – 1.30am: Claimant washes up, changes into normal clothes, leaves work.

17. Save for an earlier end time (1230am not 130am), Mr. Choina's work pattern on Fridays was similar.

18. At the hearing, two questions arose dividing the parties: first, whether Scotbeef was required to pay Mr. Choina for the time he spent at the beginning and end of each day changing into/out of his work clothes and washing up (he said yes, Scotbeef said no); second, whether Mr. Choina had a regular 30m break between 11.30pm – 12 midnight each day and, if he did, whether Scotbeef was required to pay him for that break (he denied having a regular break of this length and said he was entitled to be paid for this time, Scotbeef asserted he had a regular 30 minute break then and was not entitled to be paid for it). These issues are addressed below.

19. During the period 29 June 2020 – 13 June 2021, Mr. Choina regularly received weekly payslips showing his "basic" pay was "39.00" [ie, 39 hours] at £8.93/hour or £9.09/hour – see [28-36, 38-39, 42-51, 53]. Mr. Choina understood this to mean – reasonably, in the Tribunal's view - that he was being paid basic pay for 39 hours of work a week, based on his weekly 44 hour shifts minus his 5 hours per week scheduled breaktime. The Tribunal finds that there was nothing in these particular payslips which would have suggested to Mr. Choina at the time that he was being underpaid.

20. From 14 June 2021, Mr. Choina worked a slightly shorter shift as he was now required to start his shift at 5pm, not 430pm. Notwithstanding that, Mr. Choina's basic pay did not reduce, even though he was being required (on his case) to do 2½ hours less work a week (the 30 minute slot between 4.30pm-5pm). It was some time after this point (the precise date is unknown) when Mr. Choina queried his pay, and was given a copy of an unsigned contract. At the Tribunal hearing, two copies of an unsigned employment contract with Mr. Choina were provided. Para. 7 of both contracts stated Mr. Choina's paid hours of work per week were "39 Hrs". Para. 7 of both contracts stated the Claimant was entitled to "2x30min breaks during your working day".

21. Para. 19 of both contracts provided: "*There is a collective agreement in place between Scotbeef Ltd. and the recognised union USDAW which covers*

paragraphs 9 and 15 of this document." Paragraph 9 of both contracts covered holiday entitlement and holiday pay. Paragraph 15 of both contracts covered entitlement to lump sum payments on death during employment. Nothing in either contract made any overt reference to the collective agreement Scotbeef reached with USDAW referred to in para. 12 above.

Relevant law

22. Sections 13(1)-(3) of the Employment Rights Act 1996 provide:

> (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."

23. The fundamental bargain between employer and employee is work for pay – if an employee does the work they are meant to do, the employer must pay the employee for that work. The question arises as to what happens if an employee

attends work during their normal contracted hours but does not actually work – is the employer still obliged to pay the employee in this situation? If the employee is ready, able and willing to work, the starting point is that the employer must pay the employee unless an express or implied term in the employee's employment contract entitles the employer not to pay. Per Lord Justice Coulson in North West Anglia NHS Foundation Trust v Gregg [2019] EWCA Civ 387, [2019] IRLR 570: *"the starting point for any analysis of [whether the employer is entitled to withhold pay] must be the contract itself… Was a decision to deduct pay for the period [in question] in accordance with the express or implied terms of the contract*?"

24. If there is no contractual right to withhold pay, the employer may establish it has a common law right to withhold pay if the employee's inability to work is voluntary (eg, the employee goes on strike) but not if the employee's inability to work is involuntary (eg the employer fails to provide the necessary tools the employee needs to work) or due to an unavoidable impediment (eg the employer requires the employee to catch a train to a particular work location, the employee shows up at the train station on time only to find all trains that day have been cancelled).

25. Under s.179(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 (**TULRCA 1992**), a collective agreement shall be conclusively presumed not to have been intended by the parties – the employer and relevant union - to be a legally enforceable contract unless the agreement is (a) in writing, and (b) contains a provision which (however expressed) states that the parties intend that the agreement shall be a legally enforceable contract.

26. Whether or not a collective agreement is legally enforceable, in order to sue on it an individual employee must be able to show that the relevant term relied upon has been adopted or incorporated into their own individual employment contract (such incorporation may occur by express or implied agreement between the employer and employee).

27. Per Hobhouse J in Alexander v Standard Telephones and Cables Ltd (No 2) [1991] IRLR 286*:*

> "'*The principles to be applied can therefore be summarised. The relevant contract is that between the individual employee and his employer; it is the contractual intention of those two parties which must be ascertained. In so far as intention is to be found in a written document, that document must be construed on ordinary contractual principles. In so far as there is no such document, or that document is not complete or conclusive, their contractual intention has to be ascertained by inference from other available material including collective agreements. The fact that another document is not itself contractual does not prevent it from being incorporated into the contract if that intention is shown as between the employer and the individual employee. Where a document is expressly incorporated by general words it is still necessary to consider, in conjunction with the words of incorporation, whether any particular part of that document is apt to be a term of the contract; if it is inapt, the correct construction of the contract may be that it is not a term of the contract. Where it is not a case of express incorporation, but a matter of inferring the contractual intent, the character of the document and the relevant part of it and whether it is apt to form part of the individual contract is central to the decision whether or not the inference should be drawn' (per Hobhouse J, where, on the evidence, redundancy procedures were not intended to be incorporated into individual contracts).*

Issues

28. Mr. Choina's wages claim gives rise to the following issues concerning the period 29 June 2020 – 13 June 2021**:**

29. First, what did Mr. Choina's contract provide about his work each week?

30. Second, what work did Mr. Choina do each week?

31. Third, what was Mr. Choina contractually entitled to be paid for the work he did each week?

32. Fourth, was Mr. Choina paid what he was contractually entitled to be paid?

33. Fifth, did Mr. Choina have a contractual entitlement to be paid for any part of the time he spent on breaks *not* working?

34. Sixth, if he had any such entitlement, was Mr. Choina paid for it?

Discussion / Conclusions

35. First, during the period 29 June 2020 – 13 June 2021, the Tribunal accepts Mr. Choina's case that his contract required him to do a total of 39 hours of work each week spread over a weekly shift totalling 44 hours, with 5 hours of that 44 hour shift to be taken as unpaid breaks.

36. Second, the Tribunal finds as a fact that Mr. Choina either did work for Scotbeef or was ready, able and willing to work for Scotbeef for 39 hours each week. The Tribunal rejects as highly implausible Scotbeef's suggestion that Mr. Choina regularly arrived at work at 4.30pm (30 minutes early) each day voluntarily – it is far more likely that Mr. Choina arrived at work at/before 4.30pm each day because that was the time his agreed shift started. The Tribunal also rejects Scotbeef's case that Mr. Choina was regularly not working nor ready, able and willing to work between 11.30pm and 12am each day: (i) Scotbeef's pleaded case [21-22] makes no mention of a third 30 minute break on top of the two scheduled 30 minute breaks each day, nor does the written contract on which Scotbeef relies ("*You will be entitled to 2x30m breaks during your working day*") [23] (ii) there is insufficient evidence before the Tribunal which enables it to make a properly informed finding about how often Mr. Choina took a break at or around 11.30pm or how long those breaks normally were (iii) the Tribunal accepts Mr. Choina's evidence that often he got no break at 11.30pm at all (if he was working then, he had to finish what he was doing before taking a break), and that when he did take a break around then it was sometimes significantly less than 30 minutes (iv) most importantly, unlike his two earlier scheduled breaks (7pm-7.30m, 10pm-10.30pm) Mr. Choina had to be ready, able and willing to do work during 11.30pm – 12am, and if jobs remained unfinished during this period or he had been asked to do jobs during this period, Mr. Choina had, and would have had, no choice but to do those jobs, even if that took him until midnight to do.

37. Third, the Tribunal finds that Mr. Choina was contractually entitled to be paid weekly basic pay of 39 hours multiplied by the applicable hourly rate because he

was either working during those 39 hours or was at work ready, able and willing to work during that time. A literal reading of the two unsigned employment contracts results in the same conclusion (albeit by a different route). Nothing in Mr. Choina's contract (the one he verbally agreed on commencement of his employment in June 2020) or the written contract on which Scotbeef relies (which the Tribunal has found was not the employment contract on which he was employed) states or implies that Mr. Choina was not to be paid for the time at work immediately after his shift started or for the last 30 minutes of his shift each day (or any part of that time slot) as he finished his work and readied to leave.

38. Fourth, during the period 29 June 2020 – 13 June 2021, Scotbeef paid Mr. Choina the correct basic wage – 39 hours at the applicable hourly rate – for the 39 hours of work he did each week. Mr. Choina admits this – his complaint relates solely to the fact he was not paid for the first 1.5 hours of break he took each week as well.

39. Fifth, Mr. Choina has not established that he had a contractual right to be paid for the first 1.5 hours of his breaks each week. The Tribunal accepts that at some point before Mr. Choina commenced employment, Scotbeef and USDAW entered into a collective agreement – almost certainly in writing, although the Tribunal has not seen a copy – which contained terms (amongst others) stating that all employees would be paid for the first 1.5 hours of their break each week. The Tribunal's starting point is the assumption that that collective agreement was not intended to be directly enforceable by either the parties to it (Scotbeef and USDAW) or any third party beneficiaries under it (Mr. Choina and other employees) unless the collective agreement contained a provision which (however expressed) stated that the parties intended that the collective agreement shall be a legally enforceable contract. Mr. Choina has not suggested that there was any such provision, and without a copy of that collective agreement before it the Tribunal cannot find that it contained such a term.

40. That is not the end of the story, however, as Mr. Choina could contend that the term of the collective agreement giving rise to a right to be paid for the first 1.5

hours of weekly breaks, although not itself directly legally enforceable by Scotbeef, USDAW or third party beneficiaries, was adopted or incorporated into his own individual employment contract. Here, however, the Tribunal finds that Mr. Choina's case encounters three insurmountable difficulties:

a. Mr. Choina never formulated his case this way (and it is not the Tribunal's job to formulate his case for him, even though he is a litigant in person) or put this case to either of the Respondent's witnesses;

b. Mr. Choina accepted that when he entered into his verbal employment contract with Scotbeef in June 2020 he knew nothing about any collective agreement(s) Scotbeef had with USDAW at the time, and Mr. Choina did not suggest at any point that the terms of his contract changed in the relevant period so as to incorporate terms which had not been there from the very beginning;

c. para. 19 of Scotbeef's unsigned employment contracts for Mr. Choina provide: "*There is a collective agreement in place between Scotbeef Ltd. and the recognised union USDAW which covers paragraphs 9 and 15 of this document*." As noted above, para. 9 of those contracts covers holiday entitlement/pay, and para. 15 covers lump sum payments on death. In contrast, nothing in para. 19 refers to the collective agreement in place between Scotbeef and USDAW which covers para. 6 (hourly rate) or para. 7 (paid hours of work, breaks, working pattern). The Tribunal infers from that omission, which must be deliberate, that it was not Scotbeef's intention to adopt or incorporate into Mr. Choina's employment contract the term in its collective agreement with USDAW giving its employees a right to 1.5 hours paid break a week - had that been its intention, para. 19 would most likely have referred to paras. 6 and/or 7.

41. Sixth, in light of the above, this final issue is moot – the Tribunal has found that no express or implied term existed in Mr. Choina's employment contract giving

him the right to be paid for the first 1.5 hours of breaks he took each week. Without such a clause, Mr. Choina's claim cannot succeed.

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Employment Judge: **A Tinnion**

Date of Judgment: **17 April 2022**

Date Sent to Parties: **19 April 2022**

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