



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr. I Bouhzam

**Respondent:** STR48 Limited

**Heard at:** London South via CVP      **On:** 6 February 2023

**Before:** Employment Judge D Wright (Sitting Alone)

## **Representation**

Claimant: Miss Kajal Patel, Lay Representative

Respondent: Did not attend

# JUDGMENT

1. The Respondent's application for an adjournment is refused.
2. The Respondent has made unlawful deductions from the Claimant's pay as follows:
  - a. £2,115.35 gross in respect of the tronc element of pay from 27 April 2022 to 1 June 2022;
  - b. £3,288.45 gross in respect of unpaid notice period; and
  - c. £484.60 gross in respect of unpaid and untaken holiday which had accrued at the time of the Claimant's dismissal.
3. The total sum due to the Claimant is £5,888.40 gross of deductions.
4. The Respondent is to account to HMRC for any tax and national insurance due on this sum and is to pay the balance to the Claimant within fourteen days of this order being sent out.

# REASONS

## Adjournment Request

1. The respondent has made an application this morning by email seeking to adjourn the hearing. Their application simply says "Please note that

unfortunately our representative is unwell and unable to attend today. Could we please have this rescheduled?"

2. The Tribunal emailed back:

"So that the Tribunal can consider the adjournment request please could you confirm the following (with copies of emails/documents to evidence the same where possible):

1. Who your representative is and what firm they are from?
2. When you discovered they were ill?
3. What steps you have taken to find alternative representation?
4. Whether you have discussed this adjournment request with the Claimant and what their response was?
5. Why there is no-one else at the company who can deal with the matter considering the Tribunals are set up to allow anyone to appear before them, regardless of legal qualification. For instance, the Tribunal would anticipate that Luke Jenkins will be attending to give evidence, is he not in a position to represent the Respondent? The Tribunal notes that a day has been set aside for this hearing but does not envisage a full day will be required, therefore the Tribunal would be content to start late to allow time to prepare.

Unless and until an adjournment is granted, the matter remains as listed and the parties are to appear at 1000 where further discussion of an adjournment may take place if necessary."

3. Attempts were made by my clerk to contact Kelly Butterfield, who requested the adjournment and signed her email as "Chief of Staff" but no reply was received. The telephone number on the case management system was called but the person who answered informed my clerk that Ms. Butterfield was working at the Richmond Office and gave an alternative number. When my clerk tried that number she received an automated message saying that the office was closed on Mondays.
4. The Tribunal has received no response from Ms. Butterfield. One would expect that when a party requests an adjournment on the day of a hearing, that they would be checking their email regularly for a response to their application.
5. I also remind myself of the Presidential Guidance issued on 4 December 2013 which sets out, albeit not in a mandatory way, the process for seeking an adjournment. The application should state the reason why it is made and why it is considered that it would be in accordance with the overriding objective to grant a postponement.
6. It further says that when a party, witness or representative is unable, for medical reasons to attend a hearing all medical certificates and supporting

medical evidence should be provided in addition to an explanation of the nature of the health condition concerned.

7. Where medical evidence is supplied, it should include a statement from medical practitioner that in their opinion, the applicant is unfit to attend the hearing, the prognosis of the condition and an indication of when that state of affairs may cease.
8. Where parties, witnesses or representatives are not available this should be notified to the tribunal as soon as possible, stating the details of the witness or party concerned what attempts have been made to make alternative arrangements, the reason for the unavailability and in the case of a witness the relevance of their evidence. Any supporting documents should also be provided.
9. Other than a broad statement that the unknown representative was unwell none of this information has been provided to the Tribunal.
10. As I indicated in the response to the request I would at least expect Mr. Jenkins to attend today as a witness, but no witness has joined the hearing to support the Respondent's case. The Respondent has not submitted any documentary evidence to support their claim either.
11. Having considered the need to balance the efficient use of the Tribunal's time, avoiding delay, and the parties right to a fair hearing I find that the balance comes down in favour of proceeding today.

#### The claim

12. The claimant brings a claim for unlawful deduction of wages. Firstly, in relation to the monthly salary payments, where he says that the respondent unlawfully deducted the tronc payment aspects of his pay. His salary was £45,000, made up of £23,000 basic salary and £22,000 tronc payment.
13. The claimant also brings a claim for unpaid notice pay, saying that he was not given any pay in lieu of notice and was not allowed to work his notice period. And finally, the claim brings a claim for unpaid holiday pay which had accrued prior to his dismissal.
14. The claimant also brings a claim for unpaid sick pay. I note that this is not included in the ET1 and therefore is not a claim that is before the tribunal. Any attempt to amend the claim would be out of time now and therefore I award nothing for the sick pay.
15. The first question I have to decide is, what is the claimant's salary? The claimant says that his full annual salary of £45,000 was guaranteed. The respondent in their ET3 says "we believe the claimant is perhaps confused, as the tronc was not paid to them as this is discretionary as part of the overall contract of employment, which is clear in our contracts which the claimant signed upon commencing employment in our organization". Therefore, the parties are in dispute as to whether the £22,000 element of the salary was discretionary or not.

16. I have a copy of the claimant's contract before me. On the first page, on the second column, there is a section entitled "Salary". This says "Your salary will be £45,000 in respect of 52 weeks worked per annum, paid in 12 equal monthly payments. Your salary is made up of £23,000 house pay and £22,000 tronc. Your salary will be paid to you monthly on the fifth of each month. If the fifth falls on a weekend it will be paid on the following Monday. Salaries are paid by transfer into a UK bank account of your choice. Your salary will be paid after making any necessary statutory deductions and you authorise the company to deduct any sums owing to us that can be proved.
17. For the purposes of the Employment Rights Act 1996 section 13 you agree that the company may deduct from your pay any expenses or benefits and or any sums that you owe to the company including from your final salary on termination. This includes any overpayments, payments made in error, or loans made to you by the company. Any change to your salary will be notified to you in writing."
18. There is nothing in that section of the contract which says that the tronc payment is discretionary. The only mention that I can find in the contract of "discretion" is on page three. The first column has a section entitled "Bonus" which says "The company will from time to time, operate a bonus scheme. Any such group scheme is non contractual, wholly discretionary and will be reviewed annually. It can be modified or withdrawn at the discretion of the company. Details of any such scheme will be communicated to you separately." So, the contract clearly is capable of setting out what is discretionary and what is not. It does not say that the tronc payment is discretionary.
19. Therefore I find that the Claimant is entitled to the tronc element of his salary. The claimant worked from 27 April 2022 to 1 June 2022. This amounts to five weeks.
20. The £22,000, divided by 52, would give a weekly payment of £423.07. Noting that five weeks of tronc pay has not been paid this gives a total of £22,115.35 gross.
21. For the remaining questions about notice period and unpaid holiday I will be using the total figure of £45,000 which, divided by 52, give a weekly payment of £865.38. I'm informed that the claimant worked five days a week and therefore the daily rate of pay would be £173.07.
22. In determining what notice period the claimant was entitled to I look at the contract. Page three on the second column deals with notice periods. This starts off in relation to probationary period. "Your Employment with us will be on the basis of a probationary period of three months. During the first month of your probationary period two weeks' notice is required by either party. After the first month to the end of your probationary period four weeks' notice is required by either party".

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23. The claimant was employed from 27 April 2022 until 1 June 2022. He was given his notice on 31 May 2022. In essence, he was given one day's notice.
24. I find at this point he had been working for more than one month and therefore under the contract was entitled to four weeks' notice for which He has not been paid, other than one day. Four weeks at £865.38 would give a total of £3,461.52. But one day has been paid so I would deduct from that figure £173.07 giving notice period payments due of £3,288.45 gross.
25. I find that the Claimant had accrued 2.8 days annual leave during this time, and I find that he did take any holiday during this period. 2.8 days at £173.07 a day would give unpaid holiday pay of £484.60 gross.
26. That gives a grand total which the respondent has to pay to the claimant of £5,888.40. The respondent is to account to HMRC for any taxes, National Insurance contributions or other statutory deductions before paying the balance to the claimant.

Employment Judge **D Wright**

Date\_\_06 February 2023