

# THE INDUSTRIAL TRIBUNALS

CASE REFS: 1832/20IT

**CLAIMANT:** Christopher Higgins  
**RESPONDENT:** Stockman's Management Ltd

## JUDGMENT

The unanimous decision of the tribunal is:

1. The title of respondent be changed to Stockman's Management Ltd.
2. That the claim is dismissed.

### Constitution of Tribunal:

**Employment Judge:** Employment Judge Travers

**Members:** Mr A Kerr  
Mr T Wells

### Appearances:

The claimant was represented by Mr Vernon Hegarty (Siptu).

The respondent was represented by Mr Seamus McGranaghan, Solicitor, (O'Reilly Stewart Solicitors).

## REASONS

### Change of Name of Respondent

1. These proceedings were commenced by an ET1 dated 16/12/19. At that time the respondent was identified as 'Drinks Inc.'. In the respondent's ET3 dated 21/02/20 the respondent's correct title was identified as 'Drinks Inc. Ltd'.
2. At the hearing the tribunal was informed by the respondent that the name of the company was changed to Stockman's Management Ltd on 14/04/20. An application was made by the respondent that the title of these proceedings should reflect this change of name. The claimant raised no objection.

3. In all the circumstances, the tribunal directs that the title of the respondent be changed to Stockman's Management Ltd.

### **Issue**

4. Has the claimant suffered an unauthorised deduction from his wages by reason of an underpayment in respect of his holiday pay?
5. The alleged underpayment occurred in the final months of the claimant's employment. The parties are agreed that this case turns on whether or not the claimant was paid monthly in advance or monthly in arrears. If the claimant was paid monthly in arrears, he will succeed in his claim. If the claimant was paid monthly in advance, his claim will fail.

### **Sources of evidence and information**

6. The tribunal heard oral evidence from the claimant, and from Gareth Nethercott who was the respondent's finance director.
7. The tribunal read the two witness statements of the claimant and the witness statement of Mr Nethercott. The tribunal was also provided with a bundle containing the pleadings and the parties' respective discovery.

### **Facts**

8. Where the tribunal has made a finding of fact, it has been determined on the balance of probabilities having taken into account the evidence, information and submissions presented to the tribunal.

#### *The claim*

9. Following receipt of the claim form by the tribunal on 17/12/19, the claimant was notified by letter dated 23/01/20 that a complaint of, 'Failure to Pay Wages – Unauthorised Deduction from Wages' had been registered.
10. There were two components to the registered claim:-
  - An allegation of 'underpayment of statutory sick pay'.
  - An allegation of 'unpaid statutory holiday pay'.
11. The element of the claim in respect of underpaid statutory sick pay was subsequently withdrawn by the claimant and consequently dismissed by Employment Judge Hamill on 10/03/21. The only claim which remains is that in respect of unpaid holiday pay.

#### *Background*

12. The claimant was employed by the respondent as a driver/warehouse man. At all material times the respondent was a company engaged in the wholesale distribution of drinks.

13. The claimant had two periods of employment with the respondent. The claimant's first period of employment came to an end amicably when he left to pursue other opportunities.
14. Insofar as there is any dispute as to the precise date when the claimant's second period of employment began with the respondent, the tribunal finds that it commenced on 12/03/07 as set out in the evidence of Mr Nethercott and the unsigned and undated copy of the 'Statement of Main Terms and Conditions of Employment' provided to the tribunal.
15. On the claimant's account he was very pleased to return to work for the respondent after his period away working elsewhere. He described it as a 'great company' to work for. The tribunal infers from the fact that the claimant was re-employed by the respondent that the claimant must have been regarded by the respondent at that time as a valuable and diligent member of the team.
16. Unfortunately, towards the end of his employment with the respondent the claimant suffered ill health. He left work on 31/05/19 and was thereafter signed off by his doctor as unfit for work in a series of pro forma statements of fitness for work.
17. On 18/09/19 the claimant resigned and brought his employment with the respondent to an end. He had not returned to work since leaving on 31/05/19.

*Pay during period from 31/05/19 onwards*

18. Paragraph 12.4 of the 'Statement of Main Terms and Conditions of Employment' states that the respondent does not operate an occupational sick pay scheme. Consequently, in the event of sickness the claimant's entitlement was limited to statutory sick pay and any holiday pay entitlement.
19. On 31/05/19 the claimant received his last pay for a full month's work. He was paid by BACS transfer.
20. The claimant received just one further BACS payment from the respondent prior to his resignation on 18/09/19. This was in respect of statutory sick pay due for the month of July 2019.
21. No BACS payments were made by the respondent to the claimant in respect of statutory sick pay for August or for the period in September prior to the claimant's resignation.
22. The respondent's explanation for this is rooted in its assertion that the claimant was paid monthly in advance.
23. On the respondent's case the BACS payment made on 31/05/19 was advance payment for the month of June. Given that the claimant was entitled only to statutory sick pay for the month of June, the respondent says that advance payment of a full month's salary represented a substantial overpayment to the claimant. This overpayment was recouped by the respondent not making further BACS transfers to the claimant other than that relating to statutory sick pay for the month of July.

24. The parties are agreed that the claimant has an outstanding entitlement to be paid for 6.1 days of holiday.
25. The parties are also agreed that if the claimant's salary was paid monthly in advance then the overpayment represented by the 31/05/19 BACS payment would extinguish the respondent's liability to make any payment to the claimant in respect of outstanding holiday pay.
26. In the event that the 31/05/19 BACS payment represented payment in arrears for a month's work, Mr Hegarty puts the value of the outstanding claim at £716.19. In evidence the claimant suggested that the outstanding payment due to him is £804.06. The respondent's case is that payment in respect of 6.1 days holiday pay equates to £668.92 gross.
27. In view of the tribunal's determination that the claimant was paid monthly in advance for the reasons set out in this judgment, it has not been necessary for the tribunal to resolve the discrepancies between the different figures advanced in respect of the value of the holiday pay claim. It is agreed that if the claimant was paid monthly in advance that his entitlement to holiday pay has already been met by the salary over-payment on 31/05/19.

*Paid monthly in advance or arrears?*

28. The crucial dispute between the parties is whether the payment on 31/05/19 represented a payment made in advance or in arrears of work done.
29. Historically, the respondent paid its drivers on a weekly basis in arrears. This changed when the respondent transitioned the payroll from weekly payments to payment monthly in advance. The claimant says that this occurred around the time that he returned to employment with the respondent in March 2007.
30. The claimant agrees that from this time onwards his colleagues were all paid monthly in advance. The claimant asserts however that for reasons specific to the circumstances of his re-engagement by the respondent in 2007, he was always paid monthly in arrears.
31. The claimant's case is that when he re-commenced employment with the respondent in 2007, Stephen Brown who was then the respondent's logistics director provided him with three £200 advances against pay due. The claimant is specific about the dates of these advances. He says that they took place on 16, 23 and 30 March 2007. The claimant is equally specific that the advances were subsequently repaid by three £200 deductions from his monthly pay. These deductions are said to have been made on 1 May, 1 June, and 1 July 2007.
32. The claimant asserts that despite his repayment of the £200 advances in respect of pay for his first 3 weeks work, he was subsequently never actually paid his wages for the first 3 weeks of work. It is on this basis that he argues that, unlike his colleagues, he must have always been paid in arrears. By implication the claimant asserts that this has to be the case otherwise he has been deprived of 3 weeks pay for no good reason. He assumed that he was paid in arrears.

33. Mr Nethercott very fairly states that he cannot say whether or not what the claimant alleges is accurate either about the loans or the ultimate failure to pay the claimant for his first three weeks work. He does however acknowledge that there have been occasions when Mr Brown has made advances to staff members which Mr Nethercott says were made in Mr Brown's personal capacity.
34. The claimant's initial failure to pursue the issue of the arrears of pay is consistent with his stated belief that he was being paid in arrears. There came a time in approximately 2012 when he did mention the issue to the owner of the business. The owner told him that he would look into it but the claimant heard nothing more. It appears that the claimant did not pursue the issue further at that time.
35. The claimant agrees that his Written Statement of Main Terms and Conditions of Employment, in common with all his colleagues, states at paragraph 5.1 that, 'Payment [of salary] is made in **monthly instalments in advance** on or about the first working day of the following month by bank transfer [emphasis added].'
36. In 2016 the respondent issued new contract documentation for staff, including the claimant. The new contract documentation included provision that payment of salary would be made monthly in advance. At that time the claimant did not challenge the respondent about this.
37. Mr McGranaghan on behalf of the respondent highlights the fact that the payment in advance or arrears issue is not referred to in either the claim form or in the claimant's first witness statement dated 20/01/21. These are formidable points which are made on behalf of the respondent.
38. It is also said on behalf of the respondent that the claimant's second statement dated 24/06/21 does not make explicit the claimant's case that throughout his employment he was paid monthly in arrears.
39. The claimant's second witness statement refers to the advances in March 2007 and the subsequent repayment of those advances, concluding: 'Therefore, I worked for three weeks without pay.' While his second statement makes clear that the claimant was unpaid for three weeks work, the statement does not refer to the basis of that underpayment as being that the claimant's salary was paid monthly in arrears.
40. Evidentially, there is an absence of contemporaneous payroll documentation either to support of, or to refute what the claimant says in respect of the non-payment of 3 weeks wages at the outset of his employment in March 2007. This is perhaps unsurprising in view of the passage of time.
41. The tribunal found the claimant to be a straightforward witness.
42. It was notable that during the hearing when Mr Hegarty properly sought a moment to clarify with the claimant whether he did accept the respondent's case as to the number of days of outstanding holiday to be taken into account, the claimant unhesitatingly and firmly indicated that the respondent's calculation was correct. This was despite the fact that the respondent's case represented a reduction in respect of the number of days which the claimant had originally asserted to be due. It was plain that the claimant is a person who was not trying to secure relief to which he knew he was not entitled. He had fully taken on board and considered the case

made by the respondent on this issue and readily accepted it because it seemed to him that on reflection the analysis of the respondent was correct.

43. The claimant's evidence in respect of the non-payment of wages for the first three weeks of his employment was clear and coherent. His evidence of an advance provided by Mr Brown attunes with the evidence of Mr Nethercott about Mr Brown providing advances, albeit that Mr Nethercott says that so far as he is aware advances made by Mr Brown have been made in Mr Brown's personal capacity.
44. During his evidence to the tribunal Mr Nethercott indicated that after he commenced employment as the respondent's management accountant in February 2007 the company moved away from informal arrangements, and any formal request for an advance would come to him for approval. It is notable that, although the company was to transition away from informal arrangements under Mr Nethercott's guidance, the arrangement alleged by the claimant occurred right at the start of the period of Mr Nethercott's employment.
45. Crucially, from his own knowledge Mr Nethercott was unable to say one way or the other whether the claimant did suffer the non-payment of three weeks wages at the outset of his employment.
46. On the balance of probabilities the tribunal finds that the claimant was advanced money and repaid it as he describes. The tribunal also accepts the claimant's evidence that after repaying the loans he never received the wages due in respect of his first 3 weeks of his employment.
47. There is no evidence to suggest that the non-payment was due to anything other than an administrative error and/or oversight. The claimant's own experience and perception that the respondent was a 'great company' to work for is consistent with this conclusion.
48. The tribunal is satisfied that the claimant genuinely believes that he was paid monthly in arrears. On this analysis he is able to rationalise to himself why it is that he has never received payment for the three weeks work in March 2007.
49. The claimant's belief that he was paid monthly in arrears, however genuinely he has come to hold that belief, does not make it well founded. Overwhelmingly the evidence indicates that from the time when he received his first monthly salary payment, his wages were paid monthly in advance.
50. The claimant testified that around the time when he commenced employment in March 2007, that the respondent was changing its payroll procedures to make salary payments monthly in advance. The claimant acknowledges that his colleagues were all paid thereafter on this basis.
51. No evidence has been adduced that the respondent has at any time informed the claimant, either verbally or in writing, that he was to be paid on a different basis to that of all his colleagues. The claimant does not seek to challenge the respondent's case that the claimant's written contract documentation specifically includes provision that he is to be paid monthly in advance.

52. Save for his conversation with the owner of the respondent in 2012 about whether the claimant was being paid in arrears, the claimant does not suggest that he raised the issue with the respondent at any other time during the 12 years of his employment. He did not follow up on the 2012 conversation when the owner of the company did not get back to him with an answer.
53. In 2016 contract documentation was issued by the respondent which included provision for the payment of the claimant's salary monthly in advance. The claimant did not challenge this provision.
54. In all the circumstances, the tribunal finds as a fact that the terms of the claimant's contract of employment included that he would be paid **monthly in advance**.

### Law

55. Article 45 of The Employment Rights (Northern Ireland) Order 1996 ['ERO'] prohibits unauthorised deductions from an employee's wages.
56. Article 46(1)(a) of the ERO provides that it is permissible for an employer to make a deduction from wages where the purpose of the deduction is the reimbursement to the employer of an overpayment of wages.
57. Under Article 55(2) of the ERO, the primary time limit for making a claim of unauthorised deduction of wages is 3 months from the date of the deduction. Article 55(4) provides that this time limit can be extended where the tribunal is satisfied that it was not *reasonably practicable* for the claim to be made within the 3 month primary time limit.

### Conclusion

58. The parties agreed that if the claimant was paid monthly in advance then his claim fails. The tribunal has found that the claimant was paid monthly in advance, consequently the claim is dismissed.
59. The tribunal has found as a fact that the claimant was not paid for the first 3 weeks of his employment in March 2007. The tribunal has also found that it is more likely than not that this was due to an administrative error/oversight rather than due to any improper purpose or dishonest intent on the part of the respondent. It is unfortunate that the claimant did not adequately follow up on this at the time.
60. The issue of pay for the first 3 weeks of the claimant's employment is not before the tribunal for determination and sensibly no application has been made to extend time to make such a claim. Any claim would now be more than 14 years out of time. On the basis of the facts known to this tribunal, it considers it overwhelmingly unlikely that any tribunal would extend time for the claimant to make such a claim. The test for extending time is that of 'reasonable practicability'. In the circumstances of the case, this tribunal is unable to identify a basis on which a tribunal could properly find that it was not reasonably practicable to make the claim either within the primary 3 month time limit or at any other point before the claim was made more than 14 years out of time.

61. The claimant obliquely referred to his health during the course of his evidence. It is clear from the medical records contained within the bundle that the last few years have been challenging for the claimant. The tribunal knows that the decision to dismiss the claim will be a disappointment to him. In making this decision it is right for the tribunal to record its positive impression of the claimant as a fundamentally straightforward and helpful witness. The dismissal of this claim is not an adverse comment on the claimant, it is simply the product of the tribunal's legal analysis of the facts which it has found on the evidence and information presented to it.
62. The tribunal is grateful for the assistance provided to it by Mr Hegarty and Mr McGranaghan who each presented their respective cases in a focussed and proportionate manner.

**Employment Judge:**

**Date and place of hearing: 11 August 2021, Belfast.**

**Date judgment recorded in register and issued to parties:**