

FORM: ET3

States of Guernsey



EMPLOYMENT & DISCRIMINATION TRIBUNAL

APPLICANT: Mrs Margareta Stoica
Represented by: Mr F Stoica (by submission of written documents)

RESPONDENT: ESS Limited
Represented by: Mrs P Scambler

Decision of the Tribunal Hearing held on 09 January 2014

Tribunal Members: Mrs Caroline Latham (Chairman)
Ms Christine Le Lievre
Ms Georgette Scott

DECISION

1.0 Minimum Wage Claim

1.1 Having considered all the written and oral evidence produced in connection with this claim, the Tribunal determined that the Applicant, Mrs Margareta Stoica, was paid below the minimum wage within the meaning of Section 10(1) of The Minimum Wage (Guernsey) Law, 2009, as amended.

1.2 In accordance with Section 10(2) of The Minimum Wage (Guernsey) Law, 2009, as amended, the Respondent shall pay to the Applicant an Award of £370.65, this being determined by the Tribunal as the difference between the remuneration received by the Applicant and the remuneration she would have received had she been paid at the minimum wage during the period 28 June – 31 August 2013.

Amount of Award: £370.65

Mrs Caroline Latham
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Signature of the Chairman

6 February 2014
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Date

Any Notice of an Appeal should be sent to the Secretary to the Tribunal within a period of one month beginning on the date of this written decision.

The detailed reasons for the Tribunal's Decision (Form ET3A) are available on application to the Secretary to the Tribunal, Commerce and Employment, Raymond Falla House, PO Box 459, Longue Rue, St Martins, Guernsey, GY1 6AF.

FORM: ET3A

The Law referred to in this document is The Minimum Wage (Guernsey) Law, 2009 as amended (“MW Law”),

Extended Reasons

1.0 Introduction

- 1.1 The Applicant, Mrs Margareta Stoica, claimed that she had been paid below the minimum wage by the Respondent during the period from 28 June 2013 and 30 August 2013 (her last day of employment with the Respondent) within the meaning of Section 10 of The Minimum Wage (Guernsey) Law, 2009, as amended.
- 1.2 The Respondent, ESS Limited, (which operates the Jerbourg Hotel), was represented by Mrs P Scambler (a Director of the Company) and disputed the claim. Mrs Scambler gave evidence under Oath. In addition to Form ET2 she presented documents ER1 and ER2.
- 1.3 The Applicant did not appear in person and had agreed prior to the Hearing that the Tribunal should rely on the written evidence presented by her Form ET1 and document bundle EE1 and EE2.

Claim of failing to pay the Minimum Wage

2.0 Facts Found by the Tribunal

- 2.1 The following facts have been derived from the evidence presented by both the Applicant and the Respondent. All written evidence, submissions and arguments put forward by both parties were considered by the Tribunal, whether they are mentioned specifically in this judgement or not, the Tribunal noted the following key points:
- 2.2 The Applicant was employed as a chambermaid at the Jerbourg Hotel from 28 June 2013 to 30 August 2013.
- 2.3 Her husband also worked at the hotel and he had secured employment with the Respondent both for himself and his wife (the Applicant) in June 2013 following electronic correspondence between himself and Mrs Scambler during the period April – June 2013 (EE1, section 1 refers).
- 2.4 The offer of employment contained in electronic correspondence dated 18 June 2013 stated “We are now looking for a chambermaid/kitchen porter couple to start next week if that would be of interest to you. Starting salary for new team members is £1000.00 per month and we offer live in here at the hotel for £303.00 per month to include all meals, linen, laundry facilities etc.” The offer was accepted on behalf of Mrs Stoica the same day.
- 2.5 The dates of employment and pay were agreed between the parties in correspondence. The gross pay per calendar month was £1000.00 subject to a deduction for living accommodation and food of £303.00 per calendar month. The Applicant was not given a written contract of employment.
- 2.6 The Applicant arrived at the hotel on 27 June 2013 and commenced work the following day.

2.7 The Respondent did not keep a record of the hours actually worked by the Applicant (or any other staff member) during the period from 28 June 2013 to 30 August 2013. A shift roster was kept on the staff notice board that gave the management's proposed working hours for each member of staff for each week. Staff members frequently changed shifts with each other and this was accepted practice by the hotel management. None of the changes to the staff rota were formally recorded by the Respondent.

2.8 The Respondent's records (ER1, section 2 refers) showed the following hours and pay for each period:

Month	Number of Hours	Pay
June	13.5	£100.00
July	147.0	£1000.00
August	162.0	£1000.00

2.9 The Applicant's ET1 and document bundle EE1 showed the following hours and pay for each period:

Pay Period	Number of Hours	Pay
June	21	£100.00
July	182	£1000.00
August	189	£1000.00

2.10 The Applicant's record of hours worked included the written statement "I have to mention that this was her daily schedule but there was days where she finished the work much later than 15.30 but she did not keep records".

3.0 The Law

3.1 The Law referred to within this section is The Minimum Wage (Guernsey) Law, 2009, as amended ("the MW Law") and The Minimum Wage (prescribed Rates and Qualifications) (Guernsey) Regulations, 2010, as amended ("the MW Regulations") is also referenced.

3.2 In accordance with Section 7 of the MW Law, an employer is required to keep records "sufficient to establish that he is remunerating the worker at a rate at least equal to the minimum wage".

3.3 Section 10(1) of the MW Law states that "If a worker who qualifies for the minimum wage is remunerated by his employer at a rate which is less than the minimum wage, the worker shall be taken to be entitled under his contract to be paid, as an additional remuneration in respect of that period, the amount described in subsection (2)."

3.4 Section 10(2) of the MW Law states "That amount is the difference between – (a) the relevant remuneration received by the worker for the pay reference period, and (b) the relevant remuneration which the worker would have received for that period had he been remunerated by the employer at a rate equal to the rate of minimum wage which was payable in respect of the worker during that period."

3.5 In making her claim, the Applicant exercised her right under Section 10(3)(a) of the MW Law.

3.6 Section 20(2) of the MW Law states that "Where in any civil proceedings a person seeks to recover the amount described in Section 10(2), it shall be presumed for the purposes of the

proceedings, so far as relating to that amount, that the individual in question was remunerated at a rate less than the minimum wage unless the contrary is established.”

3.7 Section 21(1) of the MW Law states that “If the employer of a worker who qualifies for the minimum wage refuses or wilfully neglects to remunerate the worker for any pay reference period at a rate which is at least equal to the minimum wage, that employer is guilty of an offence.”

3.8 Section 21(2) of the MW Law states that “If a person who is required to keep or preserve any record in accordance with Section 7 fails to do so, that person is guilty of an offence.”

4.0 Conclusions

4.1 In this case, the Tribunal had to consider whether or not the Applicant had been paid the minimum wage during her period of employment. In accordance with Section 20 of the Minimum Wage Law, the respondent must demonstrate that the minimum wage was paid.

4.2 Mrs Stoica was paid £1000.00 gross per calendar month, from which a deduction of £303.00 per calendar month was made for accommodation and all food (this sum was apportioned for pay period June). The Tribunal concluded that the pay reference period for determining the hourly rate was as follows:

June 2013 – three days

July 2013 – one calendar month

August 2013 – one calendar month

4.3 The Respondent claimed that Mrs Stoica was “never asked to work more than 40 hours per week”. A shift roster was kept on the staff notice board showing the shifts that the hotel management intended that staff should work each week. By her own admission, Mrs Scambler stated that there was no record of the hours actually worked by the hotel staff and that there was no system in place for supervisors or management to check the hours worked by any staff member during any pay period. It was accepted custom and practice for staff members to change shifts on a regular basis, resulting in manuscript changes made by them to the roster sheet each week.

4.4 There was conflicting evidence regarding the daily shift worked by Mrs Stoica. Mrs Scambler claimed that when a full shift was worked the start time was 8.30 am and it finished at 3.30 pm with a one hour break. The only exception to this shift pattern was on the Head Housekeeper’s day off when Mrs Stoica would start at 7.30 am. There were no records to support this evidence. On the other hand, Mrs Stoica’s written evidence showed that on those days when she worked a full shift her hours were 7.30 am – 3.30 pm with a one hour break. The written evidence was described as “her daily schedule but there were days where she finished the work much later than 3.30 pm but she did not keep records”.

4.5 In this case, neither party had contemporaneous records of the working hours. Section 20(2) of The Minimum Wage Law is explicit with regard to the evidential burden, “it shall be presumed for the purposes of the proceedings, so far as relating to that amount, that the individual in question was remunerated at a rate less than the minimum wage unless the contrary is established”.

4.6 The Tribunal considers that the burden of evidence rests solely with the Respondent to prove that its employee has been paid the minimum wage. In the absence of time sheets, contemporaneous records or even corroborative evidence provided by the Respondent, the

Tribunal must rely on the hours noted in Mrs Stoica's written evidence and the agreed payslips in order to determine the hourly rate of pay.

- 4.7 For the period 28 June – 31 August 2013 the minimum wage was £6.30 per hour. The Tribunal's analysis of Mrs Stoica's records and the calculated shortfall per hour are summarised below:

Pay Period	Hours	Pay £	£ per hour	Shortfall/hour
June	21	100.00	4.76	1.54
July	182	1000.00	5.49	.81
August	189	1000.00	5.29	1.01

- 4.8 For pay period June 2013, the Applicant was paid £1.54 per hour below the minimum wage for a total of 21 hours equating to $21 \times £1.54 = £32.34$ underpayment. For pay period July 2013, the Applicant was paid £0.81 per hour below the minimum wage for a total of 182 hours equating to $182 \times £0.81 = £147.42$ underpayment. For pay period August 2013, the Applicant was paid £1.01 per hour below the minimum wage equating to $189 \times £1.01 = £190.89$ underpayment.
- 4.9 The Applicant's pay records were used to calculate the underpayment in accordance with Section 10(2) of the Law.
- 4.10 As the deduction made from the Applicant's pay for food and accommodation was within the £87.13 offset allowed within the Law, no adjustment to gross pay was required in order to determine whether or not the minimum wage had been paid.
- 4.11 The Tribunal strongly recommends that the Respondent keeps an accurate, verifiable and written record of the hours worked by its employees.

5.0 Decision

- 5.1 Having considered all the written and oral evidence produced in connection with this claim, the Tribunal determined that the Applicant, Mrs Stoica, was paid below the minimum wage within the meaning of Section 10(1) of The Minimum Wage (Guernsey) Law, 2009, as amended.
- 5.2 In accordance with Section 10(2) of The Minimum Wage (Guernsey) Law, 2009, as amended, the Respondent shall pay to the Applicant an Award of £370.65, this being determined by the Tribunal as the difference between the remuneration received by the Applicant and the remuneration she would have received had she been paid at the minimum wage during the period 28 June to 31 August 2013.

Mrs Caroline Latham
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Signature of the Chairman

Date