



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr A Forde

**Respondent** NDJ Wakefield Limited trading as Kare Plus Wakefield

**HELD AT:** Leeds

**ON:** 2 April 2019

**BEFORE:** Employment Judge Shulman

## REPRESENTATION:

**Claimant:** In person

**Respondent:** Mr Z Akbar (owner)

# JUDGMENT

1. The correct title of the Respondent is NDJ Wakefield Limited trading as Kare Plus Wakefield.
2. The Respondent is ordered to pay the Claimant the sum of £673.05 holiday pay, being seven days, at the rate of £96.15 per day.

# REASONS

## Introduction

1. In this case the Claimant was employed between 10 September 2018 and 23 November 2018 as a recruitment consultant. The Respondent is in the business of employment agency.
2. When the Claimant's employment was terminated the Respondent calculated that the Claimant had taken 16 days holiday pay, that he was at that time entitled to six days holiday pay and therefore deducted 10 days holiday pay

from his wages. The Claimant claims that the deduction of 10 days was unlawful.

### **Issue**

3. The sole issue in this case is whether all or part of the payment of 10 days holiday was lawfully or unlawfully deducted.

### **Matters for decision during the hearing**

4. The Claimant put in his claim form, in addition to his claim relating to holiday pay, a claim for £10,000 because of stress which he also clarified during the hearing was for loss of earnings. The Tribunal explained to the Claimant that this course was not open to him and he withdrew that claim.

### **Facts**

The Tribunal having carefully reviewed all the evidence (both oral and documentary) before it finds the following facts (proved on the balance of probabilities):

5. The Respondent did indeed deduct 10 days from the Claimant's final salary cheque. His final salary cheque represented payment for the period 1 to 23 November 2018, being 17 days at a daily rate of £96.15 giving a total gross pay of £1634.55.
6. After deductions the Respondent calculated that the Claimant had taken 16 days holiday and as he was entitled to six days holiday there was an overpayment of 10 days holiday amounting to £961.50 with a daily rate of £96.15 so that the gross pay less deductions was £673.05.
7. The Claimant claimed that he did not take any of the 16 days holiday which are below.
8. The Claimant was at pains to say that there was a clause in his contract (8.7) allowing him to take his holidays only after he had completed three months' employment (unless agreed otherwise at interview) but on the other hand when the Claimant was written to about the deductions on 5 December 2018 by Mr Akbar, the owner of the Respondent, the cheque was attached to the letter as full and final payment. The Claimant was invited if he disagreed to return the cheque marked as cancelled. The Claimant did not do that but cashed the cheque, even though he was dissatisfied with the amount of the cheque, because he said he had bills to pay.
9. It is also true that in clause 8.11 of the contract that if the contract terminates then any holiday entitlement accrued at the date of termination may be taken as part of the notice period and if at the date of termination an employee has taken more holiday than his entitlement then he agrees that the Respondent may deduct the value of the excess from his final salary. Accordingly there is no question that in respect of overpaid holiday the Respondent had the right to make a deduction and indeed the Claimant agreed that this was so.
10. The Respondent came to the 16 days by effectively looking at the times that the Claimant clocked in. There were nine specific days where there was more evidence than a mere clocking in and clocking out.
11. The first of these was the period 10 to 19 September inclusive when the Claimant did not work. The Claimant did not agree that this was holiday but

he did accept that he did not work during these days and that the logging in and the logging out represented a clear record.

12. The Respondent produced a memorandum of agreement, which appears to have been signed both on behalf of the Respondent and the Claimant, whereby the Respondent wanted to assure the Claimant that the Claimant's request that the Respondent agreed to pay the Claimant from that date and any time not worked would be treated as holiday and would be adjusted in the annual holiday entitlement. The Claimant alleges that his signature on that memorandum was a forgery and that he had never seen that document. The Tribunal does not have to adjudicate as to whether or not there was forgery. It is clear during the period concerned that the Claimant did not work. The Tribunal is therefore of the view that that period can be taken as holiday.
13. There was also another date of 1 November 2018 when for personal reasons the Claimant did not attend work and indeed took it upon himself to take half a day off once his personal commitment had been completed and he indeed accepted that he did not come back to the office that day. The Tribunal is satisfied that that was holiday.
14. As for the rest of the dates which are recorded on a schedule produced by the Respondent there is no doubt that the Claimant did not show for all or part of those dates but there is no evidence whatsoever that these days were taken as holiday. Mr Akbar was unable either to produce any relevant written evidence or any recorded oral conversation with the Claimant.

#### **Determination of the issues**

(After listening to the factual legal submissions made by and on behalf of the respective parties) the Tribunal finds:

- (1) There is evidence on the balance of probabilities that the Claimant took nine days holiday during the time he was employed.
- (2) There is no evidence that the Claimant took agreed holidays during the other seven days. Those seven days amounted to instances where the Claimant was absent for all or part of a day but were not tied to holidays.
- (3) In the circumstances when the Respondent purported to deduct monies in respect of those seven days as holiday, the Respondent did so unlawfully.
- (4) In all the circumstances the Respondent is ordered to pay the Claimant the sum of £673.05 in wrongfully deducted holiday pay amounting to seven days at £96.15 per day.

Employment Judge Shulman

Date 29 April 2019

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