

- (2) An Employment Judge shall decide whether on the available material (which may include further information which the parties are required by a Judge to provide), a determination can properly be made of the claim, or part of it. To the extent that a determination can be made, the Judge shall issue a judgment accordingly. Otherwise, a hearing shall be fixed before a Judge alone.
- (3) The respondent shall be entitled to notice of any hearings and decisions of the Tribunal but, unless and until an extension of time is granted, shall only be entitled to participate in any hearing to the extent permitted by the Judge.

2. Employment Rights Act 1996: s.13 Right not to suffer unauthorised deductions.

- (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.

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3. Employment Rights Act 1996 - s95(1)(c):

- (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) ... only if) –
 - (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

4. Working Time Regulations 1998: Reg 14. Compensation related to entitlement to leave
- (1) This regulation applies where—
 - a. a worker's employment is terminated during the course of his leave year, and
 - b. (b) on the date on which the termination takes effect (“the termination date”), the proportion he has taken of the leave to which he is entitled in the leave year under [regulation 13]¹ and regulation 13A² differs from the proportion of the leave year which has expired.
 - (2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3)
 - (3) The payment due under paragraph (2) shall be—
 - a. such sum as may be provided for for the purposes of this regulation in a relevant agreement, or
 - b. where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula—

$$(A \times B) - C$$

where—

A is the period of leave to which the worker is entitled under regulation 13 and regulation 13A;

B is the proportion of the worker's leave year which expired before the termination date, and

C is the period of leave taken by the worker between the start of the leave year and the termination date.

5. *Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978* the Court of Appeal listed five questions that it should be sufficient to ask in order to determine whether an employee was constructively dismissed:
- a. What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
 - b. Has he or she affirmed the contract since that act?
 - c. If not, was that act (or omission) by itself a repudiatory breach of contract?
 - d. If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence?
 - e. Did the employee resign in response (or partly in response) to that breach?

Facts and Analysis

6. This hearing was listed as a Preliminary Hearing to consider Case Management. The respondent has not submitted a defence to this claim. On 16 December 2019 the tribunal wrote to the respondent at its registered address stating that no

response had been received to the claim and stating “A Default Judgment is about to be issued against you” and asking for a response by 23 December 2019.

7. On 2 January 2020 the Group Legal Counsel of another company, Abercrombie and Kent, wrote to the tribunal saying that the respondent had vacated its registered office, 6th Floor, 30 Millbank, also noting that the owners of the respondent, Prometheon Enterprise Limited, was in administration. While not explicitly stating so, the letter appeared to be suggesting that the respondent had not had notice of the claim.
8. The respondent did not attend the Preliminary Hearing on 24 January 2020. At this hearing the claimant produced evidence from which I was satisfied that the respondent’s two directors, who were also the claimant’s line managers, had actual knowledge of the claim and of this hearing.
9. The claimant’s evidence showed that the respondent was “active” on Companies House on 23 January 2020, and its registered office remained 6th Floor, 30 Millbank. He provided an email from Duff and Phelps which says they have been appointed administrators of Prometheon Enterprises Limited but they have had no involvement with the respondent.
10. The claimant provided emails showing that he had corresponded with the respondent’s directors Peter and Urrshila Kerkar and the respondent’s HR manager, Ms Emma Bigwood, about the claim. One email dated 13 December 2019 from Ms Bigwood to the claimant states *“as the claim was in regards to [the respondent] everything was passed to Peter and [Urrshila]. I am afraid I do not know if any action was taken.”* I saw documents which showed that the claimant has copied Ms Bigwood and the Kerkars in correspondence with the Tribunal. The claimant stated that one email had bounced back, to Peter Kerkar, but all other emails appeared to have been received – he received no error message suggesting otherwise. The claimant also wrote to the Mr & Mrs Kerkar and Ms Bigwood asking for the respondent’s List of Documents.
11. Prior to this, ACAS had been involved for six weeks in a conciliation process in which there were discussions between the claimant and the respondent’s solicitors.
12. On the basis of the claimant’s documentary and oral evidence, I accepted that the respondent via its directors had been properly served with the claim which was posted to its current registered office, and that they had been sent the claim by Ms Bigwood. I concluded that despite having actual notice of the claim, the respondents had chosen not to respond to it.
13. I next considered documentation provided by the claimant on the potential merits of his case. I determined based on the evidence I saw that there was sufficient material available on which I could make a determination on liability. C
14. I noted that the claimant’s contract of employment with the respondent specifies a pay date of the 26th of each month. I noted that the claimant’s letter of resignation dated 9th August 2019 states that the reason for his resignation is

because he was not paid on time. I further noted evidence showing that the claimant had been paid late, and not at all, as follows:

- April 2019 - paid on April 30th
- May 2019 – paid on May 31st
- June 2019 – paid on July 8th
- July 2019 – not paid.

15. I saw documentation which showed the claimant had written to the respondent seeking an explanation why he was not being paid on time. I saw no evidence that the respondent had addressed his written concerns about the failure to pay him on time, and the claimant stated that at no stage had the respondent provided any explanation for its failure to pay him.
16. I was satisfied on the evidence that the claimant had been paid late in April – June and as at his date of resignation on 9th August, had not been paid at all for July 2019.
17. Was this failure to pay the claimant a repudiatory act or series of repudiatory acts? I considered yes. A failure to pay employees on time, with no explanation from the employer, is a clear breach of the express term set out above – a pay date of the 26th of each month. I accepted that on occasion an employer may pay late without this amounting to a repudiatory breach, but in such a circumstance an employer acting reasonably would inform the employee of the issue and provide details of when payment would be made. By the claimant's date of resignation, I was satisfied that the respondent had committed 4 repudiatory breaches of contract, of which the final failure, on 26 July 2019 was the most serious breach as he was not paid at all, without any explanation, by his resignation on 9 August 2019. I also concluded that the claimant resigned in response to this repudiatory breach of contract.
18. The claimant is owed wages as at the date of his dismissal. His claim for unlawful deduction from his wages also succeeds.
19. The claimant was not paid for a period of contractual notice. His claim of wrongful dismissal also succeeds.
20. The claimant has not been paid for his accrued but untaken holiday entitlement to his date of resignation. His claim of breach of the Working Time Regulations also succeeds.

Remedy Hearing

21. This case remains listed for a one day Remedy Hearing, to take place on 11 May 2020. The respondent can fully participate at this hearing, meaning it can adduce evidence on all issues of relevance at this hearing as set out in the separate Order.

Employment Judge Emery
Dated: 23 February 2020

JUDGMENT SENT TO THE PARTIES ON

05/03/20.....

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FOR THE SECRETARY TO EMPLOYMENT TRIBUNALS