Case No: 2206278/2020

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr J H Garcia Serna	**v**	Lopal Limited

Heard at: Central London Employment Tribunal On: 2 February 2021
Before: Employment Judge Norris, sitting alone (via CVP)(V)[1]

Representation:
Claimant – In person
Respondent – No appearance

JUDGMENT

1. The Claimant's claim of unlawful deductions from wages and a failure to pay holiday pay is well-founded and succeeds under section 23 Employment Rights Act 1996.
2. The Respondent is ordered to pay the Claimant the following amounts:
    a. £4,176 (gross) being his pay for 1 March to 14 August 2020 inclusive; and
    b. £504.00 (gross) in lieu of 14 days' accrued but untaken annual leave.
3. The total amount that the Respondent is ordered to pay (without deduction) is accordingly £4,680.00.

REASONS

1. The Claimant began working for the Respondent on 3 February 2020. He was engaged as an office cleaner, working four hours a day, five days a week, at a rate of £9.00 per hour.

2. The Claimant did not receive a written contract of employment and on 1 March 2020 was paid, cash in hand, for the 20 days' work he had done in February. He continued to work until 27 March 2020, when the offices he was cleaning (for a company called Splunk) were closed because someone elsewhere in the premises had tested positive for COVID-19 and the building was closed. The Claimant was told by Miss Palacio (director of the Respondent) that he should not worry and that he would continue to be paid.

3. The Claimant was not, however, paid, either for the days he had worked in March or otherwise. He tried to contact Miss Palacio but either she put him off saying he would be paid or did not respond to his call. He turned down

[1] This has been a remote hearing which was consented to/not objected to by the parties. A face-to-face hearing was not held because it was not practicable, no-one requested the same and all issues could be determined in a remote hearing.

other work so that he remained available to work for the Respondent. In July he went to the restaurant run by the Respondent (on Companies House it is listed as being in the business of Licensed Restaurants) and spoke in person to Miss Palacio. She said that she was still waiting for payments from Splunk. Afterwards, she claimed falsely in the employee group chat that the Claimant had threatened her. The Claimant denies having done so, and I accept his evidence.

4. On 9 August, Miss Palacio told the employees in the group chat that she had no more work for them. She said that they had not managed to join the Government's furlough scheme. I find that the Claimant's employment accordingly came to an end on 16 August 2020, because in the absence of a written agreement to the contrary, he was entitled to statutory notice of one week.

5. I further find that the Claimant did not agree to receive less than his agreed £36 a day because Miss Palacio did not discuss placing him on furlough and indeed, as I have noted above, subsequently informed the Claimant and his colleagues that the Respondent had not set up the scheme. It is unclear in fact whether she had ever put the Claimant on the Respondent's payroll, given that he was paid cash in hand for his work in February.

6. In September 2020, the Claimant lodged his claim for unfair dismissal, a redundancy payment, breach of contract (notice), holiday pay, unlawful deductions from wages and other payments. The Respondent did not submit an ET3 and has not been in contact with the Claimant or the Tribunal. Default judgment could not be entered because the Tribunal did not have jurisdiction to hear the complaints of unfair dismissal and redundancy, since the Claimant lacked sufficient continuous service.

7. At the Hearing on 2 February 2021, I explained the jurisdictional point. I heard evidence on oath from the Claimant (who was helpfully assisted by his daughter) and accept that he worked for 22 days in March, and should have been paid for those, plus an additional 20 working days in April, 19 in May, 22 in June, 23 in July and 10 in August up to the deemed date of termination on 16 August. That is a total of 116 days at a rate of £36 per day, amounting to £4,176 gross.

8. In addition, the Claimant had accrued 14 days annual leave by the date of his termination and is therefore owed an additional £504 gross in respect of that accrual. Since he has not ever been on the Respondent's payroll, both these sums, totalling £4,680.00, are to be paid without deduction so that he can account to HMRC for his tax.

9. Finally, I note that if the Respondent had been in attendance, I should have considered making an employer penalty as a result of its conduct towards the Claimant. However, section 12A Employment Tribunals Act 1996 requires me to have regard to the payer's means in deciding whether to order such a penalty and if so, the amount thereof, and I did not have evidence of the Respondent's means though I note it continues to be active according to the Companies House website. It is to be hoped nonetheless that the Respondent will now appreciate that it is not entitled to behave in such a manner and will not make unlawful deductions from its employees'

salaries (and meet the claims of any former employees in a similar situation). Miss Palacio as the sole director of the Respondent may wish to take a view on this, as I understand that some of this Claimant's former colleagues have similar claims waiting to be heard.

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Employment Judge Norris
Date: 2 February 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON

22 February 2021

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FOR THE TRIBUNAL OFFICE