



# EMPLOYMENT TRIBUNALS

**Claimant** Davood Jalalian v N Wholesale Ltd **Respondent**

**Heard at:** Watford

**On:** 11 January 2021

**Before:** Employment Judge Anderson

## Appearances

**For the Claimant:** In person

**For the Respondent:** Mr S Gittins (counsel)

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by Cloud Video Platform (V). A face to face hearing was not held because it was not practicable during the current pandemic and all issues could be determined in a remote hearing.

## JUDGMENT

The Claimant's claim for holiday pay, unauthorised deductions from wages and wrongful dismissal are unfounded and are dismissed.

## REASONS

1. The Claimant claims that he was dismissed by the Respondent on 4 January 2019 and was underpaid accrued holiday pay. In addition, he claims that he was underpaid in wages both by failure of the Respondent to pay overtime and was underpaid for his standard working week. Finally, the Claimant claims that he was dismissed without notice and notice pay is owed.
2. In his ET1 the Claimant claimed unfair dismissal and a redundancy payment in addition to the matters set out above. The unfair dismissal claim was dismissed by way of an order dated 24 November 2019, on the grounds that the claim had no reasonable prospects of success. The redundancy payment claim was dismissed on withdrawal by the Claimant at a hearing on 9 March 2020 and recorded in an order of the same date.

Claims and issues

3. The issues for the Tribunal to determine were set out in the order of 9 March 2020 and are summarised below:

*Termination of employment*

4. Whether the Claimant's contract of employment terminated on or after 4 January 2019 and, whether the contract was summarily terminated on that date by Mr Rana Ahmed of the Respondent or whether the Claimant failed to turn up for work after 4 January 2019 and in so doing, terminated the contract of employment himself. Alternatively, whether the contract is still subsisting.

*Wrongful dismissal*

5. If the Claimant's contract of employment was terminated by the Respondent, whether the Claimant was wrongfully dismissed in that he was not given the contractual notice to which he was entitled.

*Unpaid holiday pay – Working Time Regulations 1998*

6. If the Tribunal decides that the Claimant's contract was terminated by either party on or after 4 January 2019, whether the Claimant was entitled upon termination to a payment of accrued holiday pay pursuant to regulation 14 of the Working Time Regulations 1998? The Respondent concedes that the statutory entitlement was 5.6 weeks holiday per annum, not 22 days.

*Unauthorised deductions*

7. Did the Respondent make unauthorised deductions from the claimant's wages in accordance with section 13 of the Employment Rights Act 1996 by failing to pay him the amount of wages which were properly payable.

*Section 38 Employment Act 2002.*

8. Whether the Tribunal has jurisdiction to consider whether the Claimant is entitled to an award under section 38 of the Employment Act 2002, despite the claim not being pleaded and if so, whether the Tribunal must make an award to the Claimant under section 38.

Procedure, documents, and evidence heard

9. A small, agreed bundle of documents was supplied along with two statements from the Claimant and one from the Respondent's witness Adil Ahmad. The Claimant's witness statements were undated and unsigned but sent to the Tribunal on 14 April 2020 and 16 April 2020. The Claimant and Mr Ahmad gave evidence.

Law

10. Section 13(1) of the *Employment Rights Act 1996 (ERA)* provides that an employer shall not make a deduction from wages of a worker employed by him unless 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 the worker has previously signified in writing his agreement or consent to the making of the deduction. An employee has a right to complain to an Employment Tribunal of an unauthorised deduction from wages pursuant to

Section 23 ERA. The definition of “wages” in section 27 ERA includes holiday pay.

11. Under Regulations 13 and 13A of the *Working Time Directive 1998* workers are entitled to 5.6 weeks leave per annum.

Fact finding

12. The Claimant, Mr Jalalian, was employed from 21 March 2018 by the Respondent, N Wholesale Ltd, as a management accountant. His contract included terms that he was entitled to 22 days holiday and that both parties to the contract had the right to terminate it by giving 30 days’ notice. The contract of employment was for a fixed term ending on 20 February 2019, and the wage was £25000 per annum.
13. The Respondent has conceded that the Claimant was entitled to 28 days annual leave and not 22 as set out in the contract, as recorded in the order of 9 March 2020.
14. During the summer of 2018 the Claimant took three weeks annual leave (15 days).
15. On 19 September 2018 the Respondent sent a letter to the Claimant giving notice to terminate his contract on capability grounds. The letter said:  
*“We have reviewed your position after six months of you being in the post as a cost accountant and have reached a decision that regrettably your employment is being terminated because the main objectives of the cost accountant have not been fulfilled. Your termination will end on the 20th of October 2018 which gives you more than the required one weeks’ notice.”*
16. Shortly after receiving the letter the Claimant and Mr Ahmad met to discuss its contents. As a result of this conversation the Claimant was either re-engaged on a different contract (on the Respondent’s submission) or continued to work under his old contract (on the Claimant’s submission) from the week commencing 22 October 2018.
17. From the 22 October 2018 the Claimant commenced working weekends and was paid at the rate of £8 per hour through October 2018 to 4 January 2019
18. I find that on the evidence of the letter of termination and the evidence that the Claimant commenced working for £8 per hour and at weekends from 22 October 2018, the first contract was terminated on 20 October 2018 and the Claimant was engaged on a new and different contract on 22 October 2018.
19. The Claimant took leave from 23 November 2018 until 1 December 2018 but did not return to work until 2 January 2019. He left work on 4 January 2019 and did not return.
20. On 23 January 2019 the Claimant emailed Sadia, his line manager, stating that he had been underpaid for October and November 2019.

21. The Respondent paid the Claimant's final salary on 31 January 2019 in the sum of £1435.08 net.

Conclusions and reasons

22. To decide whether there were unauthorised deductions from the Claimant's wages I need to decide first if the contract that commenced on 21 March 2018 was terminated on 20 October 2018.

23. The Respondent provided evidence of termination of employment on 20 October 2018 by way of a letter dated 19 September 2018. The Claimant accepts that he received the letter but that he did not accept the termination. Mr Gittins says that the termination is unequivocal and it was not up to the Claimant to accept or refuse it. The Claimant says that the termination was discussed at a meeting with Mr Ahmad but he did not say in evidence that Mr Ahmad had agreed to rescind it nor did he provide any evidence that it had been.

24. The Respondent has provided evidence that from the 22 October 2018 the Claimant commenced working weekends and was paid at the rate of £8 per hour through October 2018 to 4 January 2019.

25. I find that the Claimant's employment as a management accountant under the contract signed on 21 March 2018 was terminated with the effective date of termination being 20 October 2018 and that he was engaged on a different contract from 22 October 2018.

26. The Respondent states that the Claimant returned to work on 2 January 2019 and worked until 4 January 2019. It stated that the Claimant left on 4 January 2019 and did not return to work. No further action has been taken by the Respondent in relation to dismissing the Claimant.

27. The Claimant says that he was told by Mr Rana, the Company Director, on 4 January 2019 that the company no longer required his services and he should find another job. He said he left his belongings at the Company offices even though he did not expect to return.

28. As the Respondent very clearly terminated the first contract by way of a letter and the Claimant does not refer to the alleged dismissal in his communication with Sadia on 23 January 2019, I find that on balance the Claimant's contract was subsisting at the time that this claim was brought.

29. As I do not find that the Claimant's contract was terminated by the Respondent on 4 January 2019, there can be no award for wrongful dismissal.

30. Though I have found that the contract was subsisting at the time the claim was made I have gone on to consider the holiday pay claim.

31. The Claimant stated in oral evidence that his claim on this matter was that he was entitled to holiday pay at a rate of 28 days per annum. He also accepted that he had taken three weeks leave in the summer of 2018. He was employed in total from 21 March 2018 to 4 January 2019. He agrees that he took four weeks annual leave during that period which includes the week of 23 November 2018 and the summer leave) and in addition there were eight bank holidays in the relevant period. The Claimant would have been entitled to a maximum of 22 days holiday in that period, and as he had 20 days annual leave and 8 bank holidays, he is not entitled any further holiday pay.
32. The Claimant claims that his hourly rate under the contract signed on 12 March 2018 applied until 4 January 2019, his last day of work for the Respondent. The Respondent says that it agreed to re-employ the Claimant on an hourly wage of £8 per hour after the termination of the first contract on 20 October 2018. The Claimant said in evidence that Mr Ahmad had suggested that he could continue to work on a minimum wage contract. Mr Ahmad agrees that he did offer the Claimant a minimum wage contract. The Respondent has provided evidence that from 20 October 2018 the Claimant was paid at £8 per hour, he was required to clock in and that he was required to work weekends. The Respondent has also provided a table of weekly hours worked and evidence that those hours have been paid. The Claimant does not agree with the evidence but has provided no evidence of his own to challenge it. He states that he kept his own time sheet but he has not asked the Respondent for a copy of that so he could provide it to the tribunal. The Claimant queried his wages for November and December only on 23 January 2019.
33. There are two aspects to the claim for unauthorised deductions. I find that:
- (i) the Respondent has shown that the Claimant was paid for all hours worked between 20 October 2018 and 4 January 2019; and
  - (ii) the contract under which the Claimant was paid a higher wage was terminated on 20 October 2018. He worked from 22 October for a lower hourly wage of £8 per hour, and there has therefore been no unauthorised deduction from his wages.
34. As I have not found for the Claimant on any of the matters set out above then I have no jurisdiction to make an award under s38.
35. On that basis I dismiss the Claimant's claim for holiday pay, unauthorised deductions from wages and wrongful dismissal.

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Employment Judge Anderson

Date: 11 January 2021

Sent to the parties on: ...14.04.2021....  
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For the Tribunal Office