



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms Monica Yadira Guzman Murillo

**Respondent:** Total Clean Service Ltd

**Heard at:** London South Employment Tribunal (by CVP)

**On:** 8 and 11 January 2021

**Before:** Employment Judge Rahman sitting alone

**Representation**

Claimant: Her lay representative Mr Vittori

Respondent: Litigation consultant Ms Duffy

## JUDGMENT

It is the judgment of the Tribunal that the:

1. Claimant's claims for notice pay, holiday pay and arrears of pay are dismissed
2. There is no order as to costs.

**EMPLOYMENT JUDGE RAHMAN**  
**14 February 2021**

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## REASONS

**Claims and Issues**

1. The Claimant initially brought claims for notice pay, holiday pay, arrears of pay, other payments, unfair dismissal and redundancy pay. She also asked the court for compensation and asserted discrimination. On 23 January 2020 the case was referred to Employment Judge Khalil who decided that only the following claims be accepted, namely breach of contract, holiday pay and arrears of pay; all other complaints were rejected.
2. The issues were therefore agreed at the outset of the hearing and confirmed as follows:
  - a. Was the Claimant entitled to notice pay. This includes consideration of whether the Claimant was wrongly dismissed or whether she resigned.
  - b. Was the Claimant entitled to holiday pay; if so how much.
  - c. Arrears of pay: Was the Claimant entitled to arrears of pay – she asserted:
    - i. Her daughter worked hours for which it was agreed she should be paid.
    - ii. It was agreed she would be paid at the rate of £8.50 not £8.21 as the Respondent asserted.
    - iii. She worked 263 hours but the Respondent states she worked 199.5 hours. She therefore says she is owed the difference at a rate of £8.50 per hour.
3. Given correspondence that was sent to the Tribunal on behalf of the Claimant in December 2020 that appeared to introduce new claims, at this Tribunal hearing the Claimant was asked to confirm if she was seeking permission to amend her claim. She confirmed she was not. She made no application to adduce further evidence and the Tribunal confirmed at the outset the documents that it had seen and would be considering during the hearing, as set out below.

**Procedure**

4. The Tribunal heard evidence from the Claimant and Mr Musa on behalf of the Respondent. The Claimant has had the benefit of an Italian interpreter throughout the hearing.
5. There was a bundle that was prepared by the Respondent that was seen by the Tribunal. The Tribunal also had the benefit of a statement from Mr Musa. The Claimant confirmed she had not provided a statement for this hearing.
6. The hearing was conducted remotely by CVP. Breaks were offered throughout the hearing. There was no break for the Tribunal to read papers; these having been received in advance and read in advance of the hearing. Notwithstanding this it was clear that the time allocated for this hearing – namely 1 hour – was insufficient. This was particularly given the need to translate each sentence verbatim. Moreover the interpreter and the legal representative for the Respondent had professional commitments beyond 4pm on the first day; therefore despite the Tribunal's intention to sit late it became clear that the hearing would have to be adjourned. It was therefore adjourned to the next working day after it was ascertained that each attendee was able to attend again on the second day, namely 11 January 2021.

7. As a preliminary matter the Tribunal was not clear as to whether the ACAS conciliation had been followed. The Claim Form indicated it had not – yet at page 15 of the bundle there was an ACAS reference number. At page 20, namely in the Response, the Respondent suggests conciliation had been followed. This was raised with both parties who were clear the ACAS conciliation procedure had been followed. In any event, as the claim is dated 12 December 2019 it was brought in time.

### **Fact-Finding**

8. The Claimant is a cleaner. She worked for the Respondent company from a date in May 2019 until 26 October 2019. She worked at one site in London. The Respondent is a limited company with approximately 450 employees and is a provider of cleaning services across London and other areas in the UK. Mr Musa is a commercial director employed by the Respondent company.
9. The case of the Respondent is that the Claimant started work on 28 May 2019. When asked in evidence, the Claimant confirms this was the case. Moreover 28 May 2019 is the start date as set out in the contract (at page 37 of the bundle, see paragraph 15 below). The Tribunal accordingly finds that the date the Claimant commenced working for the Respondent was 28 May 2019.
10. The Claimant's employment ended on 26<sup>th</sup> October 2019 following either her resignation or dismissal.
11. A contract of employment is in the bundle at page 37. It has been signed by the Claimant on 17 June 2019 (page 43 of bundle). It sets out that the Claimant works 2 hours per day contract for 5 days each week and shall receive £8.21 per hour.
12. The Respondent states that on 31 August 2019 the Claimant changed her hours so she worked 4 hours per day, once per week, the rate of pay staying the same.
13. On 31 October 2019 the Claimant received her final pay which the Respondent states was inclusive of her hours worked, notice pay and holiday pay. It totalled £388.61.
14. On 14 November 2019 the Claimant queried the amount of pay and there was an internal review.
15. On 29 November 2019 the Claimant was paid a further £124.66 to account for her notice period and holiday pay. The calculation of this amount is set out at page 47 of the bundle.
16. This claim was issued on 12 December 2019.

### **Law**

17. A claim for wrongful dismissal / notice pay is a common law action based on breach of contract. In other words the termination of a contract without due notice is a wrongful dismissal.

18. This Tribunal has to consider whether the employment contract has been breached. If it has and dismissal is the result, then it is wrongful. The burden of proof falls on the employee to show a dismissal. The standard of proof is the 'balance of probabilities' as normally applied in civil courts: the Tribunal has to consider whether it was more likely than not that the contract was terminated by dismissal rather than, for example, resignation or by mutual agreement between employer and employee.
19. Section 13(1) of the Employment Rights Act 1996 enshrines the right not to suffer an unauthorised deduction from wages; section 23 gives a worker a right of complaint to the Employment Tribunal. Section 230(3) sets out the definition of a 'worker' which includes a person who works under an employment contract.
20. A claim for holiday pay can be brought as a breach of contract claim, a complaint of unauthorised deduction of wages under the ERA (WA) or a complaint under the Working Time Regulations 1998 (WTR). Under the Regulations workers are entitled to 5.6 weeks' paid leave per year (pro rata for part-time employees). In this case the Claimant signed a form of consent opting out of the Working Time Regulations (page 46 of the bundle). In any event the claim for holiday pay was not ultimately pursued at the hearing.

### **Conclusions**

21. The Tribunal has considered all the material provided for the hearing and listened carefully to the evidence of the Claimant and Mr Musa. The Tribunal also takes into account that the Claimant appears in person, albeit assisted by her lay representative who is her husband.
22. The Tribunal makes the following findings of fact.

### **Wrongful Dismissal**

23. The Claimant states she was dismissed about a week before her last day on 26 October 2019. The Respondent states she resigned and provided a week's notice.
24. One difficulty has been that there has been no firsthand evidence in the form of a witness statement or testimony from the person who had dealings with the Claimant, namely Mr Juan Romero who was her manager.
25. The Respondent states one reason for this is the Claimant's case has not been clear – and this is a justified assertion as there is no witness statement from her and very little narrative in her claim form. She has also not requested Mr Romero as a witness at any stage.
26. The evidence before the Tribunal is therefore simply the oral evidence of the Claimant which is in essence a simple assertion she was fired by Mr Romero. There is no other corroborating evidence whether by contemporaneous material or otherwise. The Respondent's case is that she resigned orally and it is common practice to accept an oral resignation in this sector. It is for the Claimant to prove her assertion and the Tribunal is not satisfied given the lack of detail or a consistent narrative that she was dismissed. In particular the Tribunal refers to the inconsistent narrative in relation to holiday pay – which was not pursued at this hearing and the changing account in

relation to how she was dismissed: the account in relation to Mr Romero was made at this hearing for the first time.

27. The case for wrongful dismissal is therefore not made out as there was no dismissal.

**Arrears Pay**

28. The case of arrears pay is not particularised in the claim form and there is no statement of evidence from the Claimant that provides any detail as to this claim. When pressed in oral evidence, the Claimant said her case was that she was owed more money as:

- a. It was agreed she would be paid more than the hourly rate in the contract; namely she should be paid £8.50 per hour. This is denied by the Respondent and the Claimant has provided no written evidence whether in the form of an amended contract, an additional email or a witness statement from any witness of fact evidencing such an agreement. In the absence of such evidence the Tribunal finds that the correct hourly rate that was agreed between the parties is that which is set out in the contract, namely £8.21 per hour.
- b. She states it was agreed she should be paid for work her daughter did. The Claimant states that her daughter worked before her, namely from 19 May 2019 until 28 May 2019. The Claimant states it was agreed with the Respondent that the wages for the daughter would be paid to the Claimant, as that work was done on behalf of the Claimant. The Respondent denies there was any such agreement. The Respondent has not provided first-hand evidence from the Claimant's manager or immediate senior personnel who would have provided the Claimant with any additional responsibilities in May 2019. However the Tribunal does have the contract of employment at page 37 of the bundle. The Claimant confirms, when taken to this, that her signature is contained within this document, albeit she states she was never given a copy of that contract. In the contract there is no reference to any other person undertaking the Claimant's job or any agreement that the Claimant should be paid for another person's work. The Tribunal would have expected such a term to have been contained in the contract as it is unusual and significant or at least evidenced in writing whether by email or a text message, even from the Claimant. But there was no such evidence adduced. In addition the Claimant was not able to provide sufficient detail as to the assurances given to her in her evidence as to when this was said and exactly what was said save for a generalized assertion in her testimony that she asked Mr Romero a number of times verbally. Accordingly the Tribunal accepts the Respondent's case that the Claimant was to be paid only for the work she undertook, as is clear from the contract the Claimant signed.
- c. The Claimant says she did more hours than that which the Respondent sets out. Most regrettably this is again a claim that is not particularised. There is no detail whatsoever in the Claim Form as to the basis on which this is claimed. There is no statement of evidence from the Claimant. There is a schedule at page 80 to which the Tribunal was referred – but this is not complete as the Claimant states there were more hours in October that were not included. In evidence there were generalized statements and an assertion that 263 hours were worked but not all paid for. The Respondent states that 199.5 hours were

worked. It is the Claimant's case to prove and she must prove to the required standard that the additional hours were worked and had not been paid. The great difficulty with her case is the lack of detail, the lack of an analysis of her case and an absence of corroborating evidence. The Claimant mentioned pictures in the bundle – and the Tribunal looked very carefully at the evidence adduced. Regrettably the generalized assertions and snapshots of diary entries or sporadic images of sign-in sheets are insufficient to substantiate her claim that she worked the additional hours she claims and the Tribunal is not satisfied that this claim is proven to the required standard.

### **Holiday pay**

29. There was an original claim for holiday pay by the Claimant.
30. The Claimant's entitlement to holiday pay is set out in the contract at pages 39 – 41 of the bundle. The Respondent states that the payments made to the Claimant in October and November 2019 include her entitlement to accrued but untaken leave. They state the Claimant was entitled to 1.67 days per month worked, which was reflective of the hours worked and that the Claimant took no leave during her employment. The accrued holiday entitlement is set out in the schedule at page 47 of the bundle.
31. The Claimant has not provided any detail as to her claim for holiday pay. Her claim form provides no detail; she has not provided any written evidence particularizing her claim for holiday pay and when pressed in oral evidence as to what she was claiming in addition to that which she received she stated 'nothing'.
32. She also confirmed she was not pursuing this during the hearing.
33. The claim for holiday pay is therefore unsuccessful.

### **Costs**

34. The Respondent made an application for wasted costs for the hearing on 16 October and the Tribunal has seen a schedule of costs of some £1301. The Tribunal heard arguments from each party, both in favour of and against the award of costs to the Respondent. The starting point is each party bears their own costs. The Claimant provided an explanation as to why she was not able to attend the hearing in October. In this case the Claimant was a litigant in person, assisted by her husband as her lay representative. English is not the first language of the Claimant and the Tribunal is satisfied she has had little experience of Tribunal or court proceedings. The Tribunal has had regard to the overriding objective that cases be dealt with fairly and justly, including, so far as is practicable, dealing with cases in ways which are proportionate to the complexity and importance of the issues, and avoiding delay and saving expense. The Tribunal is satisfied there is no reason for departing from general rule.

### **Order**

35. The Tribunal therefore orders as follows.

(1) The claims for notice pay, holiday pay and arrears of pay are not successful.

(2) No order as to costs.

**EMPLOYMENT JUDGE RAHMAN**  
**14 February 2021**