



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr N Chacon

**Respondent:** Aspire Cleaning Contractors Limited

**Heard at:** London South Employment Tribunal

**On:** 27 January 2022 (as a hybrid hearing) &  
28 January 2022 (by remote video hearing)

**Before:** Employment Judge Ferguson

## Representation

**Claimant:** Ms J Gutierrez (Claimant's niece)

**Respondent:** Mr M Gilliam (Managing Director)

**JUDGMENT** having been sent to the parties on 8 February 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

# REASONS

## INTRODUCTION

1. By a claim form presented on 3 February 2020 the Claimant brought complaints of wrongful dismissal, unfair dismissal, unauthorised deductions from wages and for holiday pay.
2. The issues to be determined were agreed as follows:

### Unfair dismissal

2.1. What was the reason or principal reason for dismissal? The Respondent says the reason was a substantial reason capable of justifying dismissal, namely the client had requested that the Claimant's working hours were done in the evening and the Claimant refused to change his hours.

2.2. Did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant?

2.3. If the Claimant was unfairly dismissed, is there a chance he would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

Wrongful dismissal

2.4. It is not in dispute that the Claimant was entitled to 12 weeks' notice of termination of employment. He was given three weeks' notice. He is therefore entitled to 9 weeks' net pay as damages for wrongful dismissal, subject to mitigation of loss.

Unauthorised deductions from wages

2.5. The Claimant claims unauthorised deductions in May, August, September and October 2019. The September and October 2019 deductions are admitted, amounting to £1,614.16. The complaint about the August deduction was abandoned during the hearing. The only deduction that remains in dispute relates to 30 hours' overtime the Claimant says he worked in May 2019 and was not paid for. The sum claimed is £302.19.

Holiday pay

2.6. It is not in dispute that the Claimant is entitled to £1,346.25 in respect of accrued untaken annual leave as at the date of termination.

3. The hearing took place as a hybrid hearing on the first day because the Claimant had not received notification of the hearing being converted to a remote video hearing. The second day took place as a wholly remote hearing by CVP. These arrangements were discussed and agreed with the parties.
4. A Spanish interpreter had been booked for the Claimant, but as she was not physically in the same location as the Claimant it was agreed that the Claimant's niece, who also acted as his representative, would translate for him during the hearing. The Tribunal interpreter was used, however, for the Claimant's evidence. On behalf of the Respondent I heard evidence from Michael Gilliam, managing director. I also heard evidence from the Claimant.

**FACTS**

5. Painshill Park is a landscaped garden open to the public, with various buildings including a coffee shop, toilets, a shop, offices and an education centre. The Claimant commenced employment as a Cleaner and Facilities Assistant at the park on 1 November 2015. He was originally employed by Painshill Park Trust Limited and at the time his sister was the finance manager of the company and her husband was the CEO. The Claimant was one of two cleaners employed to work 30 hours a week each. His contract states:

“The days and hours worked will be varied to meet the demands of our visitor hours and programme of events”

6. In practice the Claimant's normal hours were 4pm to 9pm, five days a week, with the remaining hours worked as required. At some stage Painshill Park asked the Claimant to come into work earlier to check the toilets, so after this he would arrive closer to 2pm.
7. In early 2019 Painshill Park Trust Limited decided to outsource the cleaning and the Claimant's employment was transferred to the Respondent on 1 April 2019. By this time both the Claimant's sister and her husband had left the company and there appears to have been a falling out between them and the senior staff who remained.
8. Prior to the transfer a meeting took place between the Claimant and Steve Roach, Head of Visitor and Commercial Operations at Painshill, in which the Claimant requested to change his hours. The request was not agreed because of the pending transfer to the Respondent.
9. Mr Gilliam, the managing director of the Respondent, became the Claimant's manager after the transfer.
10. Mr Gilliam's evidence was that his understanding was that the Claimant worked 2pm to 8pm, and that that was what he had been informed by Painshill when he took on the contract.
11. Mr Gilliam's evidence to the Tribunal was that the 2pm start time was not practical because the buildings were still open to the general public at that time. Painshill had told him it was not working for them and the working hours needed to be addressed. He said he explained the problem to the Claimant but the Claimant was unwilling to change his working times. Mr Gilliam said in his oral evidence to the Tribunal that he spoke to the Claimant at least twice on the telephone about this. The Claimant denies that any such conversations took place, and denies that he ever refused a request to start his shift later in the day.
12. A meeting took place on 15 May 2019 between the Claimant and Mr Gilliam. The Claimant's niece, Ms Gutierrez (then Ms Arias), whom the Claimant had appointed to deal with all employment matters on his behalf, and who appears for him at this hearing, also attended. Mainly the meeting was about the Claimant's terms and conditions, to ensure the Respondent was aware of what had been agreed when the Claimant commenced employment with Painshill. There appears to have been some discussion of the Claimant's hours but neither party has given any evidence about precisely what was said. It was put to Mr Gilliam in cross-examination that he had asked the Claimant at that meeting why he was coming in at 2pm and the Claimant explained the reasons, namely that Painshill had asked him to check the toilets at that time. Mr Gilliam did not dispute that that conversation took place, but commented (in his evidence to the Tribunal) that it was not in the Claimant's contract to do a lunchtime clean.
13. The Claimant did not give any evidence in his witness statement about working overtime in May 2019, but he said in his oral evidence he had worked 30 additional hours to cover his colleague's absence. He said this was agreed with Mr Gilliam and he had never been told he had to make a claim for those hours

with payroll. Mr Gilliam did not accept that the Claimant worked the overtime claimed, and said he had never agreed to it. Even if the Claimant had worked those hours, he said the Claimant would have known he had to submit a time sheet to payroll.

14. On 24 June 2019 Ms Gutierrez emailed Mr Gilliam a copy of the Claimant's contract and set out the main terms, including regarding hours of work. She also said:

“Regarding his hours of work, he was told to clean the toilets half-way through the visitor day, therefore he agreed to come early afternoon, but he has always been flexible in this respect to meet the needs of the company. For example, last Thursday he was told not to complete the clean of the visitor toilets because there was an event, so he resumed the cleaning of the toilets on Friday morning.”

15. From 25 June 2019 the Claimant was off work due to a chest infection. He also had an operation shortly after this. In the event the Claimant did not return to work after 25 June 2019.

16. On 14 August 2019 Ms Gutierrez informed Mr Gilliam that the Claimant was fit to return to work from the following day. On 15 August 2019 Mr Gilliam contacted Ms Gutierrez and told her the Claimant should not return because a lot of changes had taken place in his absence. Mr Gilliam requested a meeting on 22 August 2019.

17. The meeting on 22 August 2019 took place in Starbucks. The Claimant, Ms Gutierrez and Mr Gilliam attended. Ms Gutierrez took notes. No notes of the meeting have been produced by the Respondent. Ms Gutierrez sent a copy of her notes to Mr Gilliam on 9 September 2019 and he did not dispute their accuracy.

18. The notes include the following [“JA” refers to Ms Gutierrez]:

“MG stated that he had not allowed NC to go back to work at Painshill because there was considerable change undertaking place at Painshill resulting in MG allocating 4 cleaners to meet the current needs of Painshill Park Trust Ltd (Painshill).

...

MG confirmed that he had not received any other written information regarding the transfer from Painshill in spite of his requests, apart from an email dated 21 March 2019 giving the contact numbers for NC and Jamal, the hours they work and their salary stated in an hourly basis.

...

MG stated that following the transfer of the cleaning contract on 01 April 2019, he met with 3 senior managers at Painshill and felt misled by Painshill, and from that meeting it was evident from their non-complementary remarks about NC's broader family members who had

been previous employees at Painshill , that Painshill did not want any ongoing employment of a family member.

...

MG made reference to possible redundancy or alternative employment on a varied contract as his arrangements with Painshill were not economically viable for him. He was also concerned that NC's command of the English language limited NC's ability to be placed in alternative employment.

...

JA stated that in spite of every effort to have a successful outcome to the current unsatisfactory employment position that there has been no resolution and it now needs to be resolved without further delay in the interest of all parties. MG agreed and acknowledged the need. JA requested on behalf of NC that MG responds in writing to outstanding requests for information and monies due. MG stated that he would provide a written response within one week of the meeting or at the latest by the end of August."

19. When asked about these notes in cross-examination Mr Gilliam said there were things he would "pick holes in", but he did not specifically dispute the accuracy of any of the above.
20. He said in his oral evidence that while the Claimant was away on sick leave, they had made the cleaners do the work in the evening as opposed to during the day. He said that shortly after taking on the contract he had a meeting with Steve Roach and the CEO of Painshill at the time, Paul Griffiths. They were "not very complimentary about the Claimant's family" and indicated that they did not want the Claimant to remain employed. Mr Gilliam says he told them that he has the right to continue his employment, but there was an issue about his hours.
21. Mr Gilliam said that he asked the Claimant in the meeting of 22 August to change his hours to start at 6pm, and that the Claimant refused. That is not recorded in the notes and the Claimant denies that it was said.
22. On 9 September 2019 Ms Gutierrez emailed Mr Gilliam attaching the notes of the meeting and saying

"Nilton Chacon still awaits your proposals that you undertook to provide by the end of August/19.  
Clearly, Nilton feels very unsettled about the ongoing situation, which is placing him in a vulnerable and stressful situation.  
Can you please advise without delay."
23. Mr Gilliam did not respond to that email and accepts that he did not send any written response to the Claimant after the meeting of 22 August, despite having promised to do so by the end of August.

24. Mr Gilliam said in his evidence that he considered whether he could offer the Claimant employment at an alternative site. At the time he employed around 40 cleaners at around 30 sites within a radius of about 30 miles of Aldershot, where the Claimant lived. He said the Claimant had stipulated he would only work in a position where he could start around lunchtime, and the Respondent had no such posts.

25. On 16 September 2019 Mr Gilliam wrote to the Claimant as follows:

“Further to our meeting on 22th August 2019 it is with regret that we must give you notice that your position with the company will be made redundant effective on 7<sup>th</sup> October 2019, due to changes within the working hours as requested by our client.

We have made every effort to find alternative employment for you but unfortunately there were no suitable positions available at this present time.

You are entitled to the following redundancy benefits:

Statutory redundancy pay	£1553.85
Pay lieu of notice	<u>£1035.90</u>
	£2589.75

I will arrange for the above sum to be paid into your bank account on 7<sup>th</sup> October.

If you require a reference please do not hesitate to give my details to any prospective employer. If you have any questions or wish to discuss the above please do not hesitate to contact me.”

26. On 23 September 2019 Ms Gutierrez wrote to Mr Gilliam objecting to the redundancy letter. She said:

“Nilton has always and remains available to undertake his duties at all reasonable times to meet his employment requirements and those of the employer. He has not been asked to attend at any particular times in order to undertake his duties. Variation of his working hours are included in his duties contained in his contract of employment with Painshill Park Trust Ltd, and it was confirmed that in their decision and your acceptance to transfer Nilton's employment that his conditions of contract would continue and remain unchanged.”

27. Mr Gilliam did not respond to that letter.

28. The Respondent has produced in the bundle a letter from Steve Roach to Mr Gilliam, dated 1 August 2019, which states:

“Following our recent conversation regarding the change of the working times of Aspire Cleaning staff.

The temporary changes in start time of cleaning staff is a much better working practice and far more practical than the previous 22om (sic) start time. In part this is due to members of the public and staff still being on site and using the facilities. When the school terms restarts in September we will also have school children on site and the 2pm start time raises some safeguarding issues.

If you could keep these changes on a permanent basis I would be grateful as this suits our business model much better than the historical working practices”

29. It is not in dispute that Mr Gilliam did not show this letter to the Claimant or to Ms Gutierrez.

## **THE LAW**

30. Pursuant to section 98 of the Employment Rights Act 1996 (“ERA”) it is for the employer to show the reason for the dismissal and that it is one of a number of potentially fair reasons or “some other substantial reason” (“SOSR”). According to section 98(4) the determination of the question whether the dismissal is fair or unfair “depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee” and “shall be determined in accordance with equity and the substantial merits of the case.”

31. To establish SOSR as the reason for dismissal where there has been a business reorganisation, the employer does not have to show that a reorganisation or rearrangement of working patterns was essential. It is sufficient to show that the reason for the reorganisation was one that “management thinks on reasonable grounds is sound” (Hollister v National Farmers’ Union 1979 ICR 542; Scott and Co v Richardson EAT 0074/04).

32. As in all unfair dismissal claims, the Tribunal must decide the fairness of the dismissal by asking whether the decision to dismiss fell within the range of reasonable responses that a reasonable employer might adopt (Iceland Frozen Foods Ltd v Jones [1982] IRLR 439). Depending on the circumstances, this may involve consideration of matters such as whether the employee was consulted, warned and given a hearing, and/or whether the employer searched for suitable alternative employment.

33. If the Tribunal finds the dismissal unfair, it should assess the chance that the employee would have been dismissed in any event and take that into account when calculating the compensation to be paid (Polkey v AE Dayton Services Ltd 1988 ICR 142).

## **CONCLUSIONS**

34. The complaints that remain in dispute are the unfair dismissal complaint and the wages claim regarding the Claimant’s pay in May 2019.

### Unfair dismissal

35. The first issue is whether the Respondent has established the reason for dismissal was the reason claimed, namely that the client had requested that the Claimant's working hours were done in the evening and the Claimant refused to change his hours.
36. The Respondent's evidence on this issue is wholly inadequate. There is no documentary evidence of the Claimant having been asked to change his hours, or of the Claimant having said he was unwilling to do so. On the contrary, there is evidence of the Claimant having confirmed that he was flexible about his hours, both prior to his dismissal, on 24 June 2019, and after the termination letter (but before his employment ended), on 23 September 2019. Mr Gilliam did not respond to either letter.
37. Mr Gilliam's evidence about the telephone calls is not reliable. He gave that evidence for the first time orally during the hearing. He was unable to give any dates or other details of the calls. I also note that the Claimant has very limited English, and had made it clear he wished Ms Gutierrez to represent him in all employment matters, so that also makes it unlikely that the conversations took place as Mr Gilliam alleges. As for the meeting on 22 August, there is no record in the notes of Mr Gilliam having asked the Claimant to start at 6pm as he claims. I note that Mr Gilliam did not dispute the notes when they were sent to him at the time. On the balance of probabilities I find that Mr Gilliam never asked the Claimant to change his hours, and the Claimant never said that he was unwilling to do so.
38. There is strong evidence in the notes of the meeting on 22 August of two possible alternative reasons for the Claimant's dismissal. First, Mr Gilliam said that he had made changes during the Claimant's sickness absence and there were now four cleaners at Painshill. Secondly, Mr Gilliam said (and he accepted in his oral evidence) that Painshill had made it clear they did not want the Claimant to remain employed because of the family connection.
39. Mr Gilliam did not put any proposals in writing after 22 August and did not hold a further meeting with the Claimant to discuss his possible dismissal before the letter giving notice of redundancy on 16 September.
40. The Claimant's contract made it clear that the hours were variable, and Ms Gutierrez's email of 24 June confirmed the Claimant accepted that remained a term of his contract. It could perhaps have been argued by the Claimant that his regular hours had become part of his contractual terms, or that his employer's right to vary his hours was constrained by reasonableness. But that stage was never reached. According to a strict reading of the contract, if the Respondent had wished to change the Claimant's hours it could simply have written to him saying that he was now required to attend at the new starting time.
41. In light of all that evidence I do not accept that the Claimant was dismissed because he refused to change his working hours. I find that he was dismissed because Painshill had told Mr Gilliam they did not want the Claimant to remain in employment and Mr Gilliam had effectively replaced the Claimant during his sickness absence.



42. The Respondent has not therefore established a potentially fair reason for dismissal and the complaint of unfair dismissal succeeds.
43. Even if the Respondent had shown that its claimed reason was the real reason for the dismissal, I would have found the dismissal was unfair due to the lack of any proper consultation or fair procedure. The Claimant had asked in the meeting on 22 August for any proposals to be put in writing. Mr Gilliam did not do so and the next correspondence with the Claimant was the letter of dismissal. Further, even if the Claimant had refused to change his hours, there was no proper consultation about alternative employment. The Claimant might have been willing to consider different hours in other roles. There is no evidence of Mr Gilliam having actually investigated alternative roles, and certainly nothing was shared with the Claimant.
44. Given that the Respondent has not established a potentially fair reason for dismissal, the Polkey issue does not arise.

Unauthorised deduction from wages

45. It is for the Claimant to show that the Respondent made a deduction from his wages. In order to do so he would need to prove that he worked the additional hours in May 2019, that this was approved overtime, and that additional pay was therefore due to him that was not paid. He did not give any evidence about this in his witness statement. There is a straight dispute of fact as to whether the hours were worked, and I am not satisfied on the basis of the Claimant's oral evidence alone that the additional hours were worked and that they were approved overtime. This complaint therefore fails and is dismissed.

**REMEDY**

46. The Claimant confirmed that he no longer sought reinstatement or re-engagement as a remedy for unfair dismissal. The following figures in respect of remedy were agreed.
47. For wrongful dismissal: £2,724.84 less income received during the notice period of £950 = **£1,774.84**.
48. Unpaid wages: **£1,614.16**
49. Holiday pay: **£1,346.25**
50. For unfair dismissal: a basic award of **£1,553.37** and a compensatory award of **£7,643.86**.
51. The total sum payable to the Claimant is **£13,932.48**.
52. Recoupment applies.

Employment Judge Ferguson

Date: 16 March 2022