



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr E Cantir

**Respondent:** JRC Cardiff Bay Ltd

**Heard at:** Cardiff (by CVP) **On:** 20 May 2022

**Before:** Employment Judge C Sharp  
(sitting alone)

**Representation:**

Claimant: In person

Respondent: Ms G Holden (Counsel)

Interpreter: Ms K Dunning (Int. License no: 17322) (FDE-DCO-LSF)  
(Russian)

**JUDGMENT** having been sent to the parties on 24 May 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

1. The Claimant has brought the following claims to the Tribunal:

1.1 An unauthorised deduction from wages claim;

1.2 A failure to pay holiday pay claim.

2. As the Claimant is not represented and requires the assistance of an interpreter, both the oral reasons and these written reasons have been written in as simple terms as possible. I do not consider a lengthy recitation of the case law to be likely to be of assistance. However, the relevant legislation enabling the Claimant to bring these claims is s13 and s23 Employment Rights Act 1996 (the wages claim)

and Regulations 13, 13A, 14, 16 and 30 of the Working Time Regulations 1998 (holiday pay claim).

3. The case has been through significant case management, and at each point the Claimant has confirmed the above are the claims he wishes to bring, including after an explanation of the relevant law was provided to him by the Tribunal in previous preliminary hearings. He has not asserted that he has been prevented from taking holiday; he is seeking the money (payment in lieu).

4. The Claimant was not permitted to give evidence orally as he had failed to provide a witness statement, despite previous repeated warnings from the Tribunal that if he failed to do so, this could result. Refusal was on the basis that the Claimant knew what was required, that his assertion he believed someone else would write it and investigate on his behalf was not consistent with the Tribunal's previous explanations of the process or the directions made, and that it was not in the interests of justice to allow the Claimant to give evidence in all the circumstances (including the limited contents of the claim form).

5. It is agreed that the Claimant is a waiter for the Respondent and remains employed.

6. There is a dispute between the parties about the start of the employment. The Claimant says his employment started on 18 September 2019; the Respondent says it is 18 November 2019. The Claimant says that the contract of employment which says he is a zero hours worker and the start date is 18 November 2019 is fake. The Respondent denies this.

7. I prefer the evidence of the Respondent, because:

5.1 the Claimant has not given evidence;

5.2 there is no challenge that the Claimant did sign a contract and that the contract itself clearly states the start of the employment is 18 November 2019;

5.3 there is no evidence on which I could find that the statement of employment particulars has been faked or falsified; and

5.4 even evidence which I consider is likely to have come from the Claimant, such as his HMRC tax records of what he was paid as income and his own bank statements, indicate that the earliest date that he received any money from the Respondent was in November 2019.

8. I therefore find that the start of the contract was on 18 November 2019 and the Claimant was a zero hours worker. The contract states that he is a zero hours worker, and it is signed by both parties. The Claimant asserted that he worked regular hours; the timesheet evidence showed a variation (see below) and even if correct, working similar hours does not override the terms of the contract entered into by the parties.

9. I further find, having looked at the weekly worksheets provided by the Respondent, particularly the weekly payroll sheets, that they show that the Claimant did not work 60 hours a week as he claimed, nor did he work the same number of hours every week. It appears that he broadly worked 40 hours a week in the early part of the employment and then 28 hours. They also show, as Mr Zhao confirmed in his oral evidence, that the Claimant has not taken any paid holiday.

10. The Claimant's wages claim is based on the fact that once the Covid-19 pandemic struck the UK, the restaurant closed and he received no pay. His claim form refers to wanting a grant, which I understand to be a reference to furlough pay. There is no right to furlough pay, though in some circumstances it can potentially be a breach of the mutual trust of trust and confidence not to offer it. Such an eventuality is not relevant to the claims the Claimant has brought. I am willing to take judicial notice that in Wales hospitality was shut down on 20 March 2020 and there is no dispute that the restaurant was shut. In addition, the Respondent has shown that it chose not to use the furlough scheme for virtually all its employees. This is a decision which it was entitled to make.

11. This has some consequences for the Claimant. To successfully bring a claim of unauthorised deduction of wages as a zero hours worker, he needs to show he did work and was not paid for it. This is the opposite of the Claimant's case. The Claimant is saying that he should have been paid when he did not do any work and could not do any work due to the COVID-19 pandemic. As a zero hours worker, that was why the furlough scheme (or the HMRC grant) was created - to help those in the position of the Claimant receive money. Both sides agree that the Claimant was not in the furlough scheme; this means he cannot receive pay for work he did not do. The wages he seeks are not properly payable.

12. The last shift that the Claimant undertook is in fact a matter of dispute between the parties. I do not consider it to be an important dispute because both parties agree that the Claimant has been paid for the work he did. However, I find that the last shift worked was on 14 March 2020, not the date of 16 March as asserted by the Claimant. I prefer the evidence of the Respondent that is supported by the HMRC payroll entries. The weekly payroll records that show the Claimant did not carry out work on or around 16 March 2020. Even the payment that was received a few days later in the HSBC bank account of the Claimant does not confirm precisely what dates of work are covered by that payment and therefore does not assist.

13. What I have to do is assess has an amount that is properly payable to the claimant not been paid? My decision is that the Claimant has been paid the money to which he was entitled. The Claimant has been paid for the work that he has done, and he is not entitled to be paid for work he has not done because he is a zero hours worker and not on the furlough scheme.

14. Turning to the annual leave claim, as I have already said the Claimant is still employed. Both the Working Time Regulations and the decisions of the European courts and the UK courts are clear the workers who are still in employment should not receive holiday pay; they should be able to take their holiday or carry it forward.

A refusal to allow holiday to be taken is a different claim, and not one brought by the Claimant. He has not asserted that he has been prevented from taking his holiday; he wants the money.

15. Holidays are regarded as being important for workers to take for health and safety reasons. It is not lawful to pay a worker for holidays they have not taken. You can only do so if the worker has left the employment. This means that the Claimant's claim for holiday pay must fail.

16. I make no findings about the Respondent's point that the Claimant has brought his claims too late to the Tribunal. As the Claimant's claim has failed on its merits, I do not consider it a good use of limited resources to deal with this point.

17. My final comments are strictly speaking outside my power as a judge determining the claims before me, but I add them to assist the parties as they remain in an employment relationship. The Claimant can (as confirmed by Mr Zhao in his oral evidence) ask to take his holiday and, if his holiday request is granted, the Respondent will pay him as if he is working when he is not as he will be on holiday. However, the Claimant should understand that his entitlement to holiday leave is connected to the hours he actually worked as a zero hours worker. That will be the dates and times he worked between 18 November 2019 and 14 March 2020 only. If the Claimant's employment is terminated, he will then be able to seek payment of his untaken accrued holiday.

Employment Judge C Sharp

Date: 9 June 2022

REASONS SENT TO THE PARTIES ON 10 June 2022

FOR THE TRIBUNAL OFFICE Mr N Roche

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