



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs Dagmara Wojcik

**Respondent:** Northman Coffee Ltd

**Heard in Person and by Video on:** 14 March 2022 and 22 April 2022

**Before:** Employment Judge Corrigan

## Appearances

For the claimant: In person

For the respondent: Mr D Dabin, Director

## RESERVED JUDGMENT

1. The claimant's complaint of unlawful deduction of wages is well-founded and **the respondent is ordered to pay £441** to the claimant subject to the appropriate deductions for tax and National Insurance.
2. **The respondent failed to pay the claimant the accrued holiday pay to which she was entitled and is ordered to pay the claimant the amount due of £1023** subject to the appropriate deductions for tax and National Insurance.
3. The respondent wrongfully dismissed the claimant and **the claimant is awarded damages of £1,344.08 (net) to be paid by the respondent to the claimant.** This sum is based on net weekly pay of £336.02 x 4 weeks (the period of notice given by the claimant).
4. The claimant's complaint that the respondent refused to permit her to exercise her right to a rest break is well-founded **and the claimant is awarded compensation of £240 to be paid by the respondent to the claimant.**
5. **The total to be paid to the claimant is £3,048.08 subject to the appropriate tax and national insurance to be deducted from the sums in paragraphs 1 and 2 only.**

# REASONS

## Claims and issues

1. The claimant made the following complaints in her claim form dated 12 July 2021 (ACAS conciliation was 13 May 2021 – 21 June 2021):
  - 1.1 Unpaid hours;
  - 1.2 unpaid accrued holiday pay;
  - 1.3 wrongful dismissal without her contractual notice (after she gave notice until 8 May 2021); and
  - 1.4 working without breaks.
  
2. The issues for the tribunal are:
  - 2.1 how many hours did the claimant work in the months referred to in her claim?
  - 2.2 Was she paid for them?
  - 2.3 Was the claimant owed outstanding accrued holiday pay when her contract terminated?
  - 2.4 Did the Claimant commit conduct so serious that it justified the respondent dismissing her without notice?
  - 2.5 Was the claimant required to work without rest breaks to which she was entitled?
  - 2.6 If so, what compensation is she entitled to, if any?

## Hearing

3. The hearing took the form of a discussion with both parties under oath, and where appropriate each was able to give evidence and ask each other questions. At the resumed hearing the Respondent also produced brief written statements from two other employees and his wife, but they were not present and did not give oral evidence. I note that Mr Dabin wanted to call his wife to join the hearing on the 14 March, but I refused at that time because it was a spontaneous offer made after the hearing had already run over the allotted time. Between the two hearings Mr Dabin also prepared a witness statement for himself dated 16 March 2022.
  
4. Both parties submitted documentation in advance and produced further documentary evidence during the hearing as they referred to additional evidence. Further documentation was produced for and during the resumed hearing. This evidence was not compiled in a bundle but provided as attachments to emails. Eventually during the resumed hearing, I had to draw a line and not allow any further new documentation referred to by the parties to be produced. The parties were aware that the first hearing was adjourned to allow them to prepare their documentation for the resumed hearing and the Order following that hearing made the duty to disclose relevant documents

clear so it should not have been necessary to find and produce further documentation during the resumed hearing.

5. The claimant had not been sent the signed copies of the witness statements for the respondent. I instructed the respondent to send them to the claimant during the hearing, but she still had not received them by the end of the hearing. She had had the unsigned versions. It was left that the respondent should resend them to the claimant and if she had any further comments, she could send them in, copying in the respondent. I had not received anything else from the parties by the date the decision was signed.
6. Based on the evidence heard and documents before me I found the following facts.

### **Facts**

7. The respondent is a coffee shop which opened in July 2020. The claimant began working for the respondent on 24 July 2020 as a Barista.
8. The contract provides that the holiday year began on 1 January and ended 31 December. It says that holiday is to be incorporated into salary, but this was not the reality. Both sides agree that the claimant was entitled to take holiday (which is what the Working Time Regulations require). That is also clearly reflected in the employee handbook.
9. She took 36 hours leave in October 2020 and was paid for 3 public holidays on 1 February 2021 (New Year's Day, Christmas Day and Boxing Day) otherwise the holiday balance for the year did not change from £360 (even after 1<sup>st</sup> January 2021 when the new leave year commenced according to the contract). It is clear from the pay slips that despite what the contract says about the leave year the holiday accrued over the financial year up to April 2021.
10. The claimant claims she was underpaid from November 2020 to March 2021. She says she was paid for 96 hours a month (£960) but worked 105 hours 30 minutes in November, 99 hours in December, 97 hours in January and 105 hours in March. In fact, the claimant's pay slip shows she was paid £816 hours for December and £888 hours for January (along with the £72 a day for the bank holidays which brings the totals up to £960 per month).
11. There is a dispute about the number of hours worked. I accept that the claimant's colleague, referred to as Monika, kept a record at the relevant time of all three staff members' hours in a book. The claimant has provided photos of the pages from 5 October 2020 to end of January 2021. I accept the claimant's evidence that Monika told the claimant that she provided these at the time to Mr Dabin each month. The claimant has produced WhatsApp messages stating this (though one does not show a date, and the other, dated 23 December 2020, does not clearly show what was attached). Nevertheless, they support that hours were being sent on the claimant's behalf to Mr Dabin as she says. Mr Dabin gave inconsistent evidence about

this. At one point he said the only record of the hours was the till system but then also said each staff member sent him their hours.

12. I accept the claimant believed Monika’s records to be the basis of her pay. I find the handwritten book inherently credible as it includes the hours for all three staff members and additional comments for the claimant and the other staff members. Mr Dabin says he has not looked at them or assessed whether their hours have been correctly recorded – a task that he could have done. I find it inherently implausible that the claimant would have created this document since the last hearing as he suggests. She has included pages for October for which she is not claiming she was underpaid which adds to the credibility of the document as it is not credible that she would have created irrelevant pages.
13. The respondent asserts that the timecards show the claimant worked the following hours and was paid the additional hours as holiday.

<b>“Timecard recorded Hours (E2)</b>	<b>Claimed Holiday Entitlement</b>	<b>Paid Salary</b>
96 hours	0 in November 2020	96 hours
64 hours	32 in December 2020	96 hours
72 hours	24 in January 2021	96 hours
32 hours	64 in February 2021	96 hours
32 hours	64 in March 2021	96 hours
26.5 hours	3.5 in April 2021	40 hours”

14. I do not accept this evidence. These figures have been taken from spreadsheets that Mr Dabin has created though he provided an example of the till records themselves during the hearing when requested. These records are not consistent with the payslips. They are clearly not accurate as they show the claimant being logged in consistently for consecutive days without logging off and then other days when she logged in for just 1 minute. Where she logged in and logged out within a day most days record about 8 hours. However, some days she was logged in less than 8 hours, some more than 8 hours. It is not clear how the log in and out times have then been converted to the total days and hours given each month. These clearly are not automatically generated from the log in and out times as presented by the respondent, but someone has added them manually. For November the pay rate is calculated by reference to 12 days at 8 hours a day. However, for example, the claimant’s records show she worked 11 November but this does not appear to have been included in the number of days total by the respondent as it fell during a period where the claimant was logged in consistently over consecutive days. Again, she says she worked 10, 16 and 18 December, a period where she was logged in consistently for almost two weeks and so no credit has been given for these by the respondent. Similarly, the claimant’s record shows she worked 22, 23 and 27 January which are a period where she was consistently logged in for several days, but the respondent’s tally gives no credit for this.

15. I also find it is not credible that the respondent would be paying monthly amounts of holiday as claimed as it would be well over what she would be entitled to and there is no reference to this in the pay slips.
16. I prefer the claimant's records of her hours. I also accept the claimant's calculation of hours worked in November, December and January as set out in Monika's records. The Claimant accepts she could not find the March records and so there is no evidence to support her evidence about that. However, I do note that she raised issues with her March pay and hours in her letter of 15 April 2021 which was the month after and shortly after she would have been paid for March on 1 April 2021. Her evidence about the other months has matched the documents and I therefore accept it is accurate. I find she is likely to have known the number of hours she had just worked in March when she wrote the letter dated 15 April 2021 and that the letter is likely an accurate record of this.
17. I find the pay slips to be an accurate record of the leave taken. This was three bank holidays and 36 hours. No credible evidence has been provided that the claimant was paid any other bank holidays. The respondent produced a WhatsApp message from the claimant saying she had booked 23-29 November 2020 as holiday by way of example, but the claimant said this was cancelled and the handwritten book of hours shows she worked 3 days that week. There is no credible evidence of the claimant being paid any other holidays. She did take the week of 11 January 2021 off but has not been paid for that week.
18. The claimant's details of the hours also support her evidence that between November and January she rarely worked with another employee, although I accept Mr Dabin regularly attended the coffee shop, sometimes with his wife. In October there was some overlap with her colleagues. I do not have the hours after January but accept she was still working on her own by April as she raised the issue in messages then, see below. I accept that the claimant had the opportunity to ask for a break when someone else was present. I also accept that Mr Dabin has no issue with staff shutting the café briefly to have a break. If she had asked Mr Dabin would have let her have a break. However, in his statement he also said: "**Time taken, or number of breaks taken is not monitored as I prefer not to micromanage staff. As long as customers receive good service I do not get involved**".
19. I accept that the claimant did not feel she could take a break when she was in the shop alone and that even when he was there Mr Dabin did not ensure she did feel she could take a break. I accept she did not always feel she could. However there is no supporting evidence of the claimant raising her issue with breaks with Mr Dabin, not even when they were messaging about how many people should be on duty together (WhatsApp messages undated but sent before lockdown ended discussing number of days the claimant wanted to work after lockdown). In the morning of 11 April 2021, the claimant raised an issue about working on her own all the time while her two colleagues were

together but that does not raise breaks. She did raise it in her grievance and referred there to having raised the issue of working on her own and asking for staff to cover. Although at this point, she was clear in the connection between this and breaks the way it is phrased corroborates that her focus prior to that was on the working alone and needing extra staff, not on the breaks.

20. On 5 April 2021 the parties agree that there was a conversation about the condition of the shop and whether it had been cleaned adequately. The respondent says the claimant shouted at him and demanded that he sack other employees. The claimant disputes this. Her account is in the grievance letter below. It is not necessary to find as a fact whose account is accurate as the respondent did not discipline the claimant in any way for this and she carried on being employed. He also accepted that this alone would not be reason to dismiss without notice.
21. The claimant's contract provided for one month's notice by either side.
22. The respondent said the claimant called in and spoke to two colleagues on either 10 April 2021 or 11 April 2021 and that it was the behaviour in this call which was the main reason for her dismissal without notice. In the first hearing he said the call was 10 April 2021, the day before the resignation and termination letters. In the response and in the evidence for the resumed hearing he said it was 11 April 2021.
23. The claimant produced phone records showing a number of telephone calls to Monika's number on 9 April 2021 and 11 April 2021, but no other calls were made in that period. The respondent said he believed the call was made by WhatsApp but there is no evidence of this.
24. In the response Mr Dabin said
25. **"on 11/04/2021 two younger members of staff were called by [the claimant] while at work, instructed to not show up for work on the following Monday (day of covid restrictions partially lifting). Instructed to never return to work and to have no contact with myself. This would leave the shop closed and I would not know if they were off sick or planning to return. This would delay my ability to recruit new staff. This call was put on speaker so I could hear the above. When [the claimant] realised I was present she hung up"**.
26. I agree with the claimant that this account is not consistent with the account in the dismissal letter which followed. That made no mention of the phone call and reads as though the respondent was told about this rather than witnessed it himself via loudspeaker. There is also a discrepancy with the employee's statement about this incident as she said the phone was passed to Mr Dabin- not that the call was put on loudspeaker. She does however support that **"the claimant was very unhappy, asking us for details of income and pensions, saying negative comments about the company and the owner and saying we should never return to work. The call made us both feel unsettled, and we did not want to take any part of it"**.
27. Mr Dabin's wife also produced a statement but did not give oral evidence. She stated as follows

**"I can confirm that on the 11/04/2021 myself and my husband Mr Daniel Dabin attended our shop ...during the morning. On entering the shop two members of staff that were**

working that day were listening to a call which was clearly upsetting them. The call was put on speaker so we could all hear.

Ms Dagmara Wojcik was talking on this call, she sounded angry. She was instructing the other staff to not show up the next day Monday, and most importantly don't speak to Dan, my husband. That way he won't know that they will never be returning to work. This will keep the shop shut long enough that he may have to close the business. My husband then said he could hear what was said, asked what the situation was. Ms Wojcik then hung up".

28. I note that written statements have limited weight where the person has not been present to give oral evidence. I prefer the evidence written contemporaneously at the time and the phone records.
29. On the balance of probability, I find there was no call. It was not mentioned in either of the contemporaneous letters written that day and there is no record of it in phone records. If there had been such a call then it is likely it would have been mentioned in one or other letter and the respondent would have done something straight away, rather than wait until after receipt of the claimant's resignation letter.

30. On 11 April 2021 the claimant wrote to the respondent as follows:

**"Please accept this as a letter of resignation from my position as a barista with Northmann Coffee. In accordance with the period of notice agreed within my contract, my last day will be 08/05/21.**

**Please notify me of any holiday entitlement of which I have accredited and how you wish to pay this to me".**

31. She also raised an issue about the pension scheme.

32. The respondent responded on 11 April 2021 as follows:

**"I confirm receipt, and acceptance of your resignation letter received on 11/04/2021.**

**Normally, following resignation you would be expected to work your notice period as per your contract however this will not be possible.**

**It is with great regret I must terminate your employment with immediate effect for breach of contract. Today, I have learned your recent behavior towards the company, customers and other members of staff has been unacceptable.**

**I am greatly disappointed to learn you attempted to undermine the company and promote the idea that staff are underpaid, treated unfairly and should quit.**

**This is completely unacceptable, appears vindictive. You have attempted to cause damage to the company by encouraging all staff to resign together.**

**On Monday, the 05/04/2021 you suggested the other members of staff were not capable of conducting their work correctly. You stood in the shop shouting at me that they are not good enough, that it was in the company's best interest to remove them from employment. This includes a trainee who has only just started her training.**

**Also, negative customer's feedback regarding your service has also been received this week. Confrontational, aggressive, felt uncomfortable are what was reported."**

33. The respondent in his statement also said he had notes of the claimant's behaviour as follows, and again there is no mention of the call:

**“05/04/2021 - Rude, aggressive to myself. Shouting at me on entering the shop. Demanding I sack the other staff for laziness and incompetence.  
11/04/2021 - Telling other staff to resign because they are not getting paid adequately, or enough benefits  
11/04/2021 - Asking for confidential info from other staff such as income  
11/04/2021 - Rude to Kiran, demanding to know why she does the rota, told her she should legally have a company pension  
11/04/2021 – messaging staff that I am committing fraud by not paying their tax?  
11/04/2021 – learned today customer complaints regarding Dagmara recent service, being confrontational and aggressive. Questioning why customer had a completed loyalty card, suggested it was not real?  
Other staff now refuse to work with her, say she is a bully, has shouts at them”**

34. I find that letter and these notes to be the more accurate account of what happened. Namely that Mr Dabin learned about complaints about the claimant’s behaviour rather than was party to a call himself. I accept there was one customer complaint and that staff reported the claimant had made comments as described above about their pay, tax and pension. She may even have discussed resignation though I also agree with the claimant that she and her colleagues were peers and she was not their supervisor or manager and therefore was not in a position to “instruct” them not to attend work. I also accept that she had no intention of resigning without notice as she resigned with notice and intended to work it. I therefore do not accept she was also suggesting colleagues did the same. With respect to allegations of bullying there was no substance to this in either letter and there is insufficient information for me to find as a fact this happened. The respondent also had only one side of that account. He mentioned other incidents, but I find that it was the alleged behaviour above that was the reason for the dismissal before the expiry of the notice period.
35. The claimant wrote a grievance on 15 April 2021. She raised the fact that no process had been followed in deciding to dismiss her and then gave her response as follows:

**“I have worked for Northman Coffee Ltd since the 22nd of July 2020. I have always received positive feedback from my customers and the manager. I have been a very productive employee of this company and I never caused any damage to Northman Coffee Ltd. On Monday, 5th of April of 2021 I have reported to you about the unacceptable state (dirty and not cleaned) the store has been left in. You agreed and said that on Sunday, 4th of April 2021, you have found the store in the same state. You told me that the staff must be retrained and asked me to do it in which I agreed. I never shouted at you. I have never under any circumstances told you to remove the employees from employment. I have never said to my work colleagues at Northman Coffee Ltd that they are being underpaid or treated unfairly and I have never told or asked them to resign.**

**I have always treated all customers with full respect and provided excellent customer service. There were multiple important issues I have been raising with you to investigate and resolve throughout my employment.**

...



My working hours were different each month and the total working hours have been provided to you by the manager every month. I notified you that you have been underpaying me my working hours since November 2020. You have only paid me 96 working hours every month since November 2020. When my actual working hours were 105 hours in November 2020, 99 hours in December 2020, 97 hours in January 2021 and 105 hours in March 2021.

...

I spoke with you on multiple occasions that it is not fair that most of the time I had to work long shifts (8-9 hours long) on my own, without any lunch breaks or possibility to use a toilet break which on multiple occasions, has put me under a very uncomfortable situation as a woman and caused me great distress for hours. There were many occasions where I could only have my meal once I came back from my shift. I have asked you on many occasions for extra staff to cover my breaks.

According to the rules and regulations of my contract which you have breached. I am entitled to receive my monthly notice payment from 11th of April 2021, Holiday pay from 1st of January 2021 up to 11th of April 2021 which is 55 hours in total..."

36. The claimant did also raise an issue that the respondent had not been paying her tax for 5 months.
37. The respondent replied on 21 April 2021 reverting back to the reasons he had already given.

## Conclusions

*How many hours did the claimant work in the months referred to in her claim?*

38. I have accepted the claimant's evidence that she worked 105 hours 30 minutes in November 2020, 99 hours in December 2020, 97 hours in January 2021 and 105 hours in March 2021.

*Was she paid for them?*

39. The claimant's pay slip shows she was paid £816 for her hours in December and £888 for her hours in January. She was paid £960 for November and March. She should have been paid £1055, £990, £970 and £1050. The respondent therefore owes the claimant £441.

*Was the claimant owed outstanding accrued holiday pay when her contract terminated?*

40. The claimant claims 123.9 hours holiday (145.9 total minus 36 hours that she took in October 2021 as clearly marked on her pay slip). The respondent took no issue with the claimant's calculation that her annual entitlement was 145.9 hours.
41. I agree that the 36 hours should be deducted as should the 3 bank holidays for which she was paid £72 (7.2 hours) each. This amounts to 21.6 hours.

42. This leaves a balance of accrued holiday outstanding of 102.3 hours, namely £1023 approximately.
43. For the avoidance of doubt, as found in the facts above, although the contract referred to a leave year running January to December it is clear from the pay slip that actually the leave year was the financial year.

*Did the Claimant commit conduct so serious that it justified the respondent dismissing her without notice?*

44. I do not find the claimant committed conduct that was so serious that the respondent was justified in dismissing her before she could work her notice period. I note the burden of establishing the claimant, in fact, committed such conduct falls on the respondent.
45. Whatever the claimant did on 5 April it was clearly not so serious that it justified dismissal as the respondent did not take any steps to discipline or dismiss at that time. He also accepts that getting angry at him would not be sufficiently serious on its own. He accepts that he needs to take a certain amount of negativity directed at him as it comes with the territory of being an employer.
46. Turning to comments made to colleagues about pay discrepancies, failure to pay tax and pension. The claimant was not being paid properly over several months and from Monika's records there was a significant example of this for Monika also (November 2020). Mr Dabin also discussed having made an error in respect of another member of staff's pay. The respondent had not paid tax for the claimant for a number of months, for whatever reason, and the claimant did have questions about her pension. It is not gross misconduct to discuss such matters at work with peers. Staff are free to resign with notice at any time. It is not gross misconduct to talk about the merits of resigning employment, particularly where there are issues with staff being underpaid. Employees can have such conversations and each employee will make their own decisions as clearly has happened here. The claimant in the event resigned with notice and her colleagues did not. She did not cause any financial damage to the respondent as alleged.
47. I also do not consider that one customer complaint in a customer facing role justifies dismissal without either discussing the complaint with the staff member or giving notice of the dismissal.
48. With respect to the claimant's treatment of other staff and colleagues finding her forceful, alleging they were bullied and being upset by her comments, there is insufficient evidence for me to find as a fact that this happened. I've accepted that most of the time in the period for which we have hours the claimant was working on her own. In any event such an allegation merits a discussion or investigation with the claimant prior to any disciplinary finding or action which did not happen here.
49. The claimant was therefore entitled to her notice pay. She is awarded damages of £1,344.08 (net). This sum is based on net weekly pay of

£336.02 x 4 weeks (the period of notice given by the claimant). The claimant had asked for one month's net pay, but she did not give a complete months' notice.

*Was the claimant required to work without rest breaks to which she was entitled?*

50. Regulation 12 of the Working Time Regulations provides that where a worker is working at least 6 hours she is entitled to a rest break of at least 20 minutes away from her workstation. Where an employer has refused to permit a worker to exercise her right under regulation 12 then under regulation 30, she may bring a complaint to an employment tribunal. If the employment finds the complaint well-founded then it may make a declaration and an award of compensation that it considers just and equitable having regard to the default and any loss attributable to the default.
51. I had regard to *Grange v Abellio London Ltd* 2017 ICR 287, EAT in which it was held that the entitlement to a rest break, provided by regulation 12 was intended to be actively respected by employers proactively ensuring working arrangements allowed for workers to take breaks. A "refusal" within the meaning of regulation 30 is not limited to an active refusal in response to a positive request for a break but can cover circumstances where the arrangement of the working day do not proactively enable the worker to take a rest break. It is not necessary that the worker has requested the break.
52. I accept there were a number of occasions that the claimant did not take a break as she did not feel able to do so when working a shift on her own. I accept that she did not actively request this, and the respondent did not refuse such a request. However, he did not actively ensure working arrangements that allowed the claimant to take her break away from the workplace, for example by actively suggesting she took one or by scheduling it in. He accepts himself that he did not get involved. Although he would not have minded if the claimant took her break, he did not make sure she was aware of this or institute working practices that ensured the claimant felt able to take a break.
53. I find the claimant's claim well-founded. I find a nominal award of compensation of £240 (a week's pay) to be just and equitable in the circumstances. The respondent did not intend to deny the claimant breaks and had she specifically requested one she would have been allowed one. Although she raised issues with working on her own, she did not expressly link this to an inability to take a break until her grievance after her employment ended. I find this only became an issue when she had legal advice about her case (as she stated during the hearing). Nevertheless, she repeatedly did not get a break because the respondent had not put in working practices that ensured she was able to. I accept this on occasion caused her discomfort. The period she was working on her own was from November 2020 to April 2021 (as I note it was still an issue in the message

dated 11 April 2021). She generally worked about 8 hours so had to do 2 hours after she should have had a break. She did not lose anything financially as she was paid whether she had a break. I also take account that this was during lockdown when the workplace was not as normal.

54. I note that the respondent did not follow the ACAS Code of Practice in respect of either the decision to dismiss, nor the Claimant's grievance letter. I therefore can, if this failure was unreasonable and if I consider it just and equitable, increase the awards to the claimant by up to 25%.
55. I am considering doing this in respect of the notice pay and the failure to pay wages and holiday pay as the failure to follow processes was in my view significant. However, I have not had submissions from the parties as to whether I should do this, and how much any increase should be. I therefore shall give the parties an opportunity to make submissions before I make this decision.
56. I do not intend to uplift or downlift the award in respect of breaks as the claimant had stopped working by the time, she raised that grievance and so the respondent could not have rectified this issue by that time. I consider the sum awarded already takes account that the claimant never raised this issue expressly until the grievance. Neither side raised the issue of uplift or downlifts themselves.

Employment Judge Corrigan  
26.5.2022

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