



# EMPLOYMENT TRIBUNALS

**Claimant:** Zahra Akbar

**Respondent:** Butt & Hobbs Limited T/A Hobbs Pharmacy

**Heard at:** London South (remotely by CVP)

**On:** 14 June 2022

**Before:** Employment Judge Kumar

## Representation

Claimant: Mr R. O'Keeffe (counsel)

Respondent: Ms J. Laxton (counsel)

# RESERVED JUDGMENT

1. The name of the respondent is amended to Butt & Hobbs Limited T/A Hobbs Pharmacy.
2. The respondent made unauthorised deductions from wages by failing to pay the claimant her wages for January 2021 and is ordered to pay to the claimant the sum of £2,032.80 being the total gross sum deducted.
3. The claim in respect of holiday pay succeeds and the respondent is ordered to pay the claimant the sum of £564.32 being the gross sum unlawfully deducted in respect of accrued but untaken holiday entitlement.

# REASONS

## Introduction

1. By way of an ET1 presented on 18 May 2021, following a period of early conciliation which lasted from 9 March 2021 to 20 April 2021, the claimant brought a claim for unlawful deduction from wages and holiday pay. The claim was resisted by the respondent.

2. The claimant is Ms Zahra Akbar. She is a pharmacist. The respondent is Butt & Hobbs Limited, T/A Hobbs Pharmacy. The respondent operates a chain of 14 pharmacies throughout the UK and employs approximately 85 members of staff across all of its branches.

### **Preliminary**

3. The claimant's complaint has two aspects i) unauthorised deduction from wages in that the respondent failed to pay the claimant her properly payable wages for January 2021 contrary to section 13 of the Employment Rights Act 1996, and ii) a further unauthorised deduction from wages in that the respondent failed to pay the claimant in lieu of accrued but untaken holiday entitlement under the Working Time Regulations 1988 or the Employment Rights Act 1996.
4. The respondent resisted the claim. In respect of the January wages the respondent argued that it was entitled to make deductions from the claimant's wages by virtue of the fact that the claimant had provided her consent to the deduction of wages within her signed employment contract. As to holiday pay the respondent argued that the claimant had taken all of her accrued holiday as at the date of termination and/or it had been taken during her notice period.
5. The claimant was represented by counsel, Mr O'Keeffe, and the respondent by counsel, Ms Laxton. No accommodations were sought.
6. I heard evidence from the claimant and from Mr Saeed Younis, a director of Butt & Hobbs Limited, on behalf of the respondent. I read the written statements of the claimant and Mr Younis and I was referred to documents contained within a small bundle.
7. The respondent sought a minor amendment to its name (to add its trading name). No objection was raised by the claimant and no injustice or hardship arose from the amendment which was granted.
8. The tribunal sought to agree a list of issues with the parties at the start of the hearing and a preliminary issue arose as to whether that list should include consideration by the tribunal of an argument that the claimant's employment was terminated by dismissal rather than resignation. It was agreed by the parties that the effective date of termination was 24 February 2021. Mr O'Keeffe sought to argue that whilst the claimant had resigned, her resignation was subsequently converted into a dismissal as the respondent through its actions terminated her contract earlier. Mr O'Keeffe asserted that the relevance of this was that if the claimant had been dismissed, the term in the contract upon which the respondent relied as the claimant's consent to deduction from wages would not apply. Ms Laxton on behalf of the respondent took issue with the fact that this argument was raised at a late stage (she had notice that Mr O'Keeffe intended to pursue it the evening before the hearing). The pleadings did not address dismissal. However, the evidential basis for the argument that it was a dismissal and not a resignation was already contained in the parties' witness statements. I therefore did not consider the respondent was put at a disadvantage if this argument was pursued and I therefore proceeded to hear the evidence.

9. The list of issues was agreed as follows:
- a. Was the claimant's employment terminated by resignation or dismissal?
  - b. Was any deduction to the claimant's pay made by the respondent authorised by a written term of the contract?
  - c. What was the claimant's entitlement in respect of holiday pay?
  - d. Was the respondent entitled to make any deduction from holiday pay?

### Findings of Fact

10. The claimant worked for the respondent from 19 October 2019 to 24 February 2021. The claimant was employed initially as a pharmacy assistant working 24 hours a week and then from 1 August 2020 as a pharmacist working 45 hours a week.
11. The claimant's contract, which was signed by the claimant on 9 October 2019, provided for her to give a month's notice if she had been employed for less than a month, 3 months' written notice after one month's service until the completion of the probationary period and 3 months' written notice subsequent to completion of the probationary period. The probationary period was 6 months. Under the contract the claimant was entitled to 28 days annual leave, including bank holidays, and the holiday year ran from 6 April to 5 April.
12. The contract further provided as follows:

*General*

*If you leave without giving and working your full notice, any additional cost in covering your duties during the notice period not worked will be deducted from any termination pay due to you. The Company may require you to take some or all of any outstanding holiday entitlement that you may have during your notice period.*

13. On 2 January 2021, the claimant wrote to Mr Younis, a director of the respondent, by email, requesting permission to take holiday from 1 to 12 February 2021 to visit her parents in Dubai. Mr Younis responded on 4 January 2021 confirming that the claimant's holiday dates were approved.
14. On 24 January 2021, the claimant again wrote to Mr Younis, by email stating the following:

*"As you are aware, I will be travelling to Dubai next Saturday and have booked two weeks of paid annual leave. I have checked the latest travel guidelines and it is now a mandatory requirement to isolate for 10 days upon return from Dubai, I would therefore like to request to use up the rest of my remaining paid annual leave holidays this year to cover those 7 days commencing from 15th-23rd of February. I will be able to return to work on the 24th February.*

*I will only have 3 working days left of February after which I've made the decision that I will not return back to work. My forthcoming GPhC qualification exam is due to sit on March 17th and understandably I require*

*necessary preparation time.*

*Regretfully, this email serves as my resignation notice commencing a month from today. Thank you for the opportunity to work at Hobbs pharmacy and please do not hesitate to contact me for future employment insha'Allah after I'm fully qualified."*

15. It is not self-evident from the email whether the claimant was under the mistaken belief that her notice period at that time was one month rather than three or whether she wished to curtail her contractual notice period.
16. No response to that email from the claimant was received. A screenshot of a WhatsApp exchange within the bundle shows that on 26 January 2021, the claimant sent a message to Mr Younis stating  
  
*"Salaam Saeed, hope you're recovering well. I've sent an email, have you had a chance to look at it yet, thanks xx"*
17. The screenshot shows that no response to that message was received.
18. On 28 January 2021 the claimant sent a further email to Mr Younis checking if he had received her original email. Again no response was received.
19. On 29 January 2021 the claimant found out that she had not been included on the pharmacy rota for February 2021. Ordinarily, as Mr Younis accepted in his oral evidence, the rota was sent to all individual pharmacists as well as the pharmacy branches. The claimant had not been sent the February rota. She obtained it from colleagues and noted her absence on it, including from 24 February. On the same day (which was the last working day of the month and the day on which payment of wages was due) the claimant checked her bank balance and noticed that she had not been paid for January. Her January payslip was received by her on 31 January 2021 and showed gross pay of £2,032.80 was due.
20. On 1 February 2021, still having not received a response to either of her emails, the claimant telephoned Mr Younis. The screenshot of the WhatsApp exchange shows that Mr Younis sent the claimant a message on that day at 11.44am stating *"Sorry, I can't talk right now"* to which the claimant responded *"Please call me back when convenient, thank you"*. I surmise from this that the claimant had rung Mr Younis and she either rang again later or he rang her back. During the conversation that followed Mr Younis explained to the claimant that her notice period was three months rather than one month.
21. Following the conversation the claimant sent an email to Mr Younis on 2 February 2021 apologising for misreading her employment contract. She confirmed that she was willing to rectify the mistake and work until the end of April to allow the respondent to find a replacement. She asked for her January salary to be paid and indicated that if the respondent wished to terminate the contract earlier Mr Younis should let her know.
22. In response on 3 February 2021 Mr Younis sent the claimant an email that read as follows:

“Dear Zahra

Thank you for your email.

*I acknowledge your acceptance that you have been in error. Unfortunately it is not possible to accommodate your request as RP rotas are determined well in advance.*

Regards

Saeed”.

23. On the same day, the claimant sent a further email thanking Mr Younis for his reply and asking when she might expect to receive her January salary. The response from Mr Younis sent on the same day shortly afterwards read as follows:

*“I am looking into the matter of your pay very carefully. As you are aware now since I pointed out to you that you did not give us notice that we were entitled to. In your contract it is stated:*

*If you leave without giving and working your full notice, any additional cost in covering your duties during the notice period not worked will be deducted from any termination pay due to you.*

*It is my belief that the additional cost covering your position during the notice period will [sic] significantly in excess of what you may be owed.”*

24. The respondent thereafter did not pay the claimant for the 140 hours she had worked in January and did not make any payments in respect of accrued but untaken holiday pay. The respondent considered it lawfully deducted any sums due to the claimant by virtue of the provision within her contract.
25. Having considered the contemporaneous communications and having heard the claimant and Mr Younis’ oral evidence I find that the claimant was indeed under the mistaken belief that her notice period was one month and it had been her intention, when she sent the email on 24 January 2021 tendering her resignation, that she would work out her full contractual notice period. The claimant is intelligent and well-educated and confirmed in her oral evidence that she accepted her employment contract was straightforward, easy to read and that she had read it before signing it. However I accept the claimant’s oral evidence that she had not refreshed her memory of its contents when she sent the email on 24 January and that she genuinely believed that her notice period was one month.
26. I note that Mr Younis appears to have had Coronavirus around the time the claimant gave the respondent notice. However that does not explain his failure to respond to the claimant’s emails and WhatsApp message. On his case over the same period he was busy organising locums to cover the claimant’s shifts and compiling the February rota.

27. It is clear to me that Mr Younis could and should have promptly responded

to the claimant's email clarifying whether it was indeed her intention for her to curtail her notice period and/or warning her that the costs of obtaining covering for the whole of her contractual notice period could result in deductions from her pay. Mr Younis acknowledged in his oral evidence that he was aware of his duty to mitigate any losses arising. Ascertaining the claimant's true intention and whether she was willing to work out her notice period should have been his first port of call in mitigating loss.

28. I do not accept that Mr Younis considered that the claimant was intentionally seeking to give short notice. I am satisfied that Mr Younis' failure to respond to the claimant's email of resignation, her WhatsApp message sent on 26 January 2021 and her follow up email on 28 January 2021 was deliberate and he willfully sought to take advantage of the claimant's mistaken belief about her notice period and to withhold her pay. It was clear from Mr Younis' oral evidence that he thought little of the claimant and I find that his actions were in all likelihood vindictive.
29. Mr Younis asserts that the respondent incurred considerable costs arranging locums to cover the claimant's shifts. He produced a schedule of loss that was within the bundle showing additional costs to the respondent of £2,876.45. He relied on the clause within the claimant's employment contract which provided for any additional costs incurred through arranging cover to be deducted from any termination pay. The respondent's case was that the costs incurred were in excess of any sums that were due the claimant.
30. I do not accept Mr Younis' schedule of loss as an accurate picture of the costs incurred by the respondent. The names of the locums have been largely redacted so that only the first initial or the first two letters of the names can be seen. The claimant pointed out that from the initials some of the names stated to be locums appear to be the names of permanent employees of the respondent and when I compared the part of the names that can be seen to the names on the unredacted rota for February 2021 what appear to be corresponding names do appear on the rota assigned to other branches. Mr Younis explained in his oral evidence that this was because pharmacists from other branches were deployed to cover the claimant's shifts and then local cover arranged to cover for those employees. Had this been the case I would have expected Mr Younis' detailed schedule of loss to identify this. It did not. I found Mr Younis' evidence on this point unconvincing and conclude the redactions were made to try to conceal that at least some shifts were being covered by permanent employees. I further accept the claimant's evidence that the rota was not usually settled months in advance. The fact that the respondent was able to approve the claimant's original holiday request at relatively short notice supports this. Mr Younis' evidence was that it was cheaper to book locums significantly in advance. It was suggested to him in cross-examination that, if had booked locums in January, he would have been able to cancel the locums to mitigate loss when the claimant offered to work out her notice. His response to this was that it was his custom when he had booked a locum to pay them regardless of whether this resulted in double cover for a shift. The difficulty for the respondent here is that it was specifically invited by the claimant to provide evidence of loss including evidence of the locum agreements and cancellation fees. The request was made by email on 4 May 2021, more than a month before the hearing. No

such evidence was produced by the respondent. I am led to the conclusion that the absence of such evidence is on account of it not existing or existing but contradicting the respondent's case. I find on the balance of probabilities Mr Younis did not seek to mitigate the losses arising from the termination of the claimant's employment and moreover that the losses he asserts in the schedule provided cannot be relied on by the tribunal. Inadequate evidence has been produced to establish *any* costs incurred by the respondent in covering the claimant's duties and I therefore conclude there were no such costs which could not have been mitigated by allowing the claimant to work out her full notice as she suggested.

31. As to the claimant's holiday entitlement and number of days of holiday taken I accept the claimant's evidence that during the period of her part-time employment she worked 4 days a week from 11am to 6pm with an hour's break. Mr Younis confirmed in oral evidence that he did not know the claimant's working patterns and that she would have agreed them with the branch manager, although he considered the usual pattern for a 24-day contract was for an employee to work 3 days a week.

## **The Law**

32. Section 13(1) of the Employment Rights Act 1996 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.
33. The Working Time Regulations 1998 provide for minimum periods of annual leave and for payment to be made in lieu of any leave accrued but not taken in the leave year in which the employment ends. The Regulations provide for 5.6 weeks leave per annum. The leave year begins on the start date of the claimant's employment in the first year and, in subsequent years, on the anniversary of the start of the claimant's employment, unless a written relevant agreement between the employee and employer provides for a different leave year. There will be an unauthorised deduction from wages if the employer fails to pay the claimant on termination of employment in lieu of any accrued but untaken leave.

## **Conclusions**

*Was the claimant's employment terminated by resignation or dismissal?*

34. Although the claimant resigned on 24 January 2021 and gave one month's notice, her final working day as confirmed in her email was the last day of February. The respondent would have been entitled to bring forward the date of termination by relying on a clause within her employment contract that enabled it to do so by making a payment in lieu of notice (**Marshall (Cambridge) Limited v Hamblin [1994] ICR 962**). However the respondent made no such payment in lieu of notice and so cannot be said

to have exercised the contractual term. As confirmed by the EAT in **Fentem v Outform EMEA Ltd [2022] EAT 36** at paragraph 42,

*“The position, in such a case, remains that it is the unilateral conduct of the employer that has caused the employment to end on the earlier date, and so that must be a termination by the employer, regardless of the fact that it is parasitic upon a resignation, and was carried out in a manner permitted by the contract.”*

35. By not including her on the February rota, the respondent unilaterally brought the effective date of termination forward to 24 February 2021, the last day of the claimant’s holiday. It therefore follows that the claimant was dismissed.

*Was any deduction to the claimant’s pay made by the respondent authorised by a written term of the contract?*

36. The term the respondent relies on states as follows:

*If you leave without giving and working your full notice, any additional cost in covering your duties during the notice period not worked will be deducted from any termination pay due to you.*

37. The clause envisages a scenario where an employee has resigned. It does not contemplate the scenario where a resignation has been converted into dismissal by the employer. I have found that the termination was a dismissal rather than a resignation and I therefore conclude that the respondent was not, by way of that clause, contractually entitled to deduct any additional cost of cover from the claimant’s pay.

38. In any event, in light of the findings I have made in paragraph 29 no costs were incurred or should have been incurred by the respondent in covering the claimant’s duties.

*What was the claimant’s entitlement in respect of holiday pay?*

39. Under her contract the claimant was entitled to 28 days holiday including bank holidays. The holiday year commenced on 6 April 2020. The claimant’s effective date of termination was 24 February 2021. Mr O’Keeffe argued that when the claimant’s contract was varied upon her promotion to pharmacist it became a no normal hours contract with no basic contract hours and that the tribunal should therefore calculate holiday entitlement under the Working Time Regulations 1998. I endorse this approach.

40. For part of the holiday year from 6 April 2020 to 31 July 2020 the claimant worked part-time as a pharmacy assistant. This amounted to 32.05% of the year and on a full-time basis would have entitled her to 8.97 days of holiday. She worked 4 days a week and therefore this was reduced to 7.18 days. The period for which she was a full-time employee was from 1 August 2020 to 31 January 2021 and amounted to 50.41% of the year. Her holiday entitlement for that period was therefore 14.11 days. Her total holiday entitlement was over the two periods was 21.29 days.

41. The claimant accepted in her evidence that she had taken 13 days holiday



including the bank holidays. As at 1 February 2021 she was therefore entitled to a further 8.29 days holiday.

42. The claimant's payslips show that she was paid at an hourly rate of £13.68 until November 2020 and thereafter at an increased rate of £14.52.
43. An average of the claimant's gross pay over 52 weeks from February 2020, to January 2021 comes to £352.69 per week and £70.54.
44. 8 days of accrued but untaken holiday leave at a rate of £70.54 per day provides a calculation of £565.32. I conclude that this sum is owing to the claimant by way of holiday pay.

*Was the respondent entitled to make any deduction from holiday pay?*

45. The respondent relies on a clause within the employment contract which states that the respondent may require the claimant to take some or all of any outstanding holiday entitlement during her notice period. I have been taken to no document within the bundle that suggests the respondent sought to make use of that clause or notified the claimant that was the respondent's stance prior to these proceedings. I conclude that the claimant was not required to take outstanding holiday entitlement during her notice period. The respondent further asserted that it was entitled to deduct holiday pay by virtue of offsetting cover for the notice period. Given my conclusions that no costs were or should have been incurred by the respondent for cover and that the clause was in any event not applicable, the claimant having been dismissed, I conclude that the respondent was not entitled to make any deduction from the claimant's holiday pay.

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Employment Judge **Kumar**

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Date 9 August 2022