



EMPLOYMENT TRIBUNALS

Claimant: Mr I Diaw

Respondent: Dotcable Africa Ltd

JUDGMENT AND REASONS

HELD AT: London Central (by CVP)

On: 15 & 16 January 2025

Employment Judge: Employment Judge Henderson (sitting alone)

Appearances

For the claimant: In Person

For the respondent: Non-Attendance

JUDGMENT

1. The claimant's claims for unlawful deduction of wages and failure to pay the National Minimum Wage succeed.

The claimant is owed by the respondent

- a) Salary - £1400 per month (gross) for the period March 2023 to 16 January 2025 - £30,100
- b) Expenses - £1100 per month (gross) for the period April 2022 to 16 January 2025- £37,950
- c) Accommodation allowance- £300 per month (gross) for the period April 2022 to 16 January 2025- £10,350
- d) The "shortfall" between these sums and the amount of the National Minimum Wage payable in the UK from April 2021 to 16 January 2025 - £15,560

2. **The Total Monetary Award is £93,960.** NOTE: *This is a gross figure, and the respondent must account to HMRC for the appropriate income tax and National Insurance Contributions.*

REASONS

Background

1. This was a Final Hearing (listed for 2 days) to consider the claimant's claim under section 13 of the Employment Rights Act 1996 (ERA) for unlawful deduction of wages and failure to pay the National Minimum Wage.
2. This case has taken up a fair amount of Tribunal time since the claimant lodged his ET1 with the Tribunal on 17 July 2023, following an Early Conciliation process with ACAS from 9 February to 7 March 2023.

Hearing on 29 September 2023

3. The case was originally scheduled for a full merits hearing on 29 September 2023. However, that hearing was converted to a preliminary hearing for case management as the claimant was unable to give evidence from Senegal. The case summary indicated that the claimant was employed by the respondent as a consultant in photovoltaic construction, from 1 May 2019 and that his employment was continuing.
4. The claim was about unpaid salary, living expenses and accommodation allowances between the dates of April 2022 and June 2023. The claimant also claimed that he had not received pay in accordance with the National Minimum Wage between April 2021 to the date of his ET application.
5. The respondent's defence was that the ET had no jurisdiction to hear the complaints as the claimant was, at all material times, working abroad in Senegal. In addition, they stated that the claimant effectively stopped working for them from January 2023 and therefore he was not entitled to any payments. Further they argued that the claims were presented out of time as they should have been made within 3 months of the end of January 2023 (section 20 ERA). The respondent was granted an extension of time to lodge its ET3 and a public preliminary hearing was listed for 18 December 2023 to consider issues of territorial jurisdiction and whether the claims had been brought within the relevant time limits.

Hearing on 18 December 2023

6. This was a Preliminary Hearing and in a Judgment (with Reasons) dated 19 April 2024, EJ Joyce found that the Tribunal had jurisdiction over the claims and that the claims for the period March -June 2023 had been brought within the time limit. The claims for salary for the period from April 2022 were time-barred, but all the other claims were brought in time.
7. The claimant was advised that he would need to seek a formal amendment to bring claims for unlawful deductions from July 2023 to September 2023 (as per the updated Schedule of Loss provided at that hearing) – which he duly did at the next case management hearing.

8. The respondent requested a reconsideration of this Judgment and Reasons, which was refused. The respondent also sought an adjournment (which was successful) of the case management hearing originally listed for July 2024.

Hearing on 6 November 2024

9. This was a case management hearing before EJ Hopton. The respondent did not attend this hearing and it proceeded in their absence. The Final Hearing was listed for 15 and 16 January 2025. The claimant's amendments to add the period of July 2023 -September 2024 to his claims were allowed.

Conduct of the Final Hearing (15 and 16 January 2025)

10. The hearing was scheduled to commence at 10am but the respondent was not present. I asked my clerk to send an email to the respondent and to make a telephone call to check whether they were planning to attend the hearing. There was no reply to the 'phone call and no facility to leave a voicemail message. I also asked my clerk to check the Tribunal Inbox to see if the respondent had left a message (perhaps late on 14 January or early on 15 January) to explain their non-attendance. There was no such message.
11. At 10.30 my clerk reported that the respondent (S Kostrz) had replied to her email saying that due to "*unexpected and emergency business travel*" he was unable to attend the hearing. No further details were given, and no evidence was provided of the nature of the emergency or of the travel arrangements. There was no request for a postponement.
12. I noted that the parties were notified of the January hearing dates in November 2024 and further, that the parties were sent Joining Instructions for the video hearing on the evening of 14 January 2025. The respondent would have been aware of the hearing dates. The respondent had made no contact until they received the Tribunal's email on the morning of 15 January to which they then responded. This behaviour is discourteous to the Tribunal and to the litigation process generally.
13. I decided to continue with the hearing in the respondent's absence as allowed by Rule 47 of the Employment Tribunal Procedure Rules 2024 (the ET Rules). I asked my clerk to inform the respondent that the hearing was proceeding.
14. The Tribunal was presented with an electronic bundle of 72 pages (previously prepared by the respondent for the December 2023 hearing) and an Annex to that bundle prepared by the claimant (of 38 pages) as requested to do so by EJ Hopton. In addition, in the interests of fairness, I also considered the ET3 and the Grounds of Resistance (although these documents were not included in the bundles).
15. I also requested during the course of the hearing further information from the claimant to support his oral evidence that he was still running the respondent's business in Dakar. The claimant provided the business accounts for Dotcable Africa SARL for 2023; emails (with English translations) from the company's accountant asking for information needed to prepare the 2024 accounts; the rental agreement for the company's shop at Lot33E Ouest Foire in Dakar and a video (taken at 1.02 pm on 15 January 2025) of the shop premises (exterior and interior).

16. The claimant provided an updated witness statement, which he relied on as his main evidence. I then asked him questions and also put to him the points made by the respondent in the ET3 and Grounds of Resistance and in the statement of S Kostrz (undated and unsigned) which had been presented for the 18 December 2023 hearing. I did so in order to attempt to put the respondent's case in their absence to ensure a fair process.
17. I confirmed with the claimant that although he currently resided in Senegal, he had (as agreed at the case management hearing in November 2024) travelled to the UK in order to give evidence and pursue his claim. He confirmed that he was based at an address in Southampton for the period of the hearing.
18. The hearing concluded at 2.45 on the first day and I agreed to give my decision on 16 January. The claimant then submitted written closing submissions (8 pages) on 16 January morning. Not all of these submissions were relevant to the legal issues in this case (for example those relating to constructive dismissal – the claimant said himself in evidence that he had never resigned; and breach of contract – which the claimant accepted he had withdrawn as a claim). I considered the submissions which were relevant to the issues in the case.
19. I delivered my Judgment (with Reasons) orally on the morning of 16 January 2025. As the respondent had not attended the hearing, I have given Full Reasons in writing. I confirmed the sums claimed with the claimant.

Further Amendment to the Claim

20. EJ Hopton allowed the claimant to amend his claim to include unlawful deductions from July 2023 to September 2024. The claimant is claiming losses up to 16 January 2025 – there would, therefore, need to be a further amendment to his claim.
21. I heard the claimant's application to amend his claim on the morning of 16 January 2025.

Findings of Fact

22. I note that the findings of fact set out below (for the period up to June 2023) were made by EJ Joyce having been presented with the evidence in the Main Bundle, which findings I accordingly adopt. I also note that EJ Joyce had the benefit of hearing evidence from Mr Kostrz (which I did not) and that the respondent was represented by Counsel at the December 2023 hearing.

Up to June 2023

23. On a date unknown, the respondent was registered at the claimant's home address of 40-42 Uxbridge Road, London.
24. The claimant signed a contract of employment ("Contract") on 1 May 2019 (pages 10-14 Main Bundle) as a consultant for the respondent. The respondent's managing director is Mrs Emilia Kostrz (the wife of S Kostrz), and the claimant is also a director of the respondent in which he owns a 40% share. The claimant also owns a 40% share in Dotcable Africa SARL, the respondent's Senegalese company.

25. The respondent and Dotcable Ltd are companies under the overall umbrella of Netcable Sp. Z.o.o. which is located in Poland. Dotcable Ltd was established to develop a presence and business in the UK market, whereas Dotcable Africa Ltd (the respondent) was established to develop a presence and business in Senegal. The above companies, including the respondent, specialise in renewable energy.
26. Upon commencing employment, the claimant was assigned overseas to work in Senegal, the country of his birth. Although he signed the Contract on 1 May 2019 he moved to Senegal approximately 1 month later on 3 June 2019.
27. The claimant's salary ("Salary") of £1400 (gross) was paid into a Halifax Bank Account in Great Britain on the 10th day every month (as per his contract of employment). Tax and other social security deductions from the claimant's salary were made in Great Britain. The claimant's Salary was paid in arrears, as evidenced by the claimant's bank statements (pp. 20-26 of the Main Bundle).
28. The claimant's bank statements show that expenses were paid on different dates each month but were being paid monthly. [EJ Joyce] concluded that the claimant's expenses ("Expenses") and accommodation allowance ("Accommodation Allowance") were payable monthly.
29. The Expenses were payable, per the Contract terms, for "travel and other overnight expenses". No evidence of receipts being submitted in relation to Expenses was provided. On the basis of the available, limited bank statements, I [EJ Joyce] concluded that the amount of £1,100 was paid in full regardless of the amount of Expenses actually incurred.
30. The claimant's first project in Senegal was to construct a solar power plant on a remote island for the Senegalese Agency for Renewable Energy. The project was concluded in August 2020, but the Senegalese Ministry of Oil and Energy did not grant an operating licence.
31. From May 2019 to October 2021, the claimant received his Salary, Expenses and Accommodation Allowance as per his contractual terms.
32. The terms of his Contract, as set out above, required the claimant to return to the UK to work as of April 2021 when his overseas assignment to Senegal was due to conclude.
33. In April 2021, the claimant and Mr Kostrz discussed the possibility of opening a shop in Dakar to sell and install solar products/systems while awaiting the above-mentioned operating licence, which the Ministry of Oil and Energy had not yet granted.
34. The lease for a new shop was signed at the end of June 2021 (on 26 June as per the copy presented by the claimant at the hearing).
35. From October 2021 a dispute arose as to the payment of the claimant's Expenses and, also his Accommodation Allowance. It is unnecessary to make a finding as to whether the payment of those items occurred as of October 2021. This is because the claimant's claim for Expenses and Accommodation Allowance is from March 2023 onwards.

36. On the evidence presented EJ Joyce found that the respondent did not make any payments to the claimant for either Expenses or Accommodation Allowance from March 2023 onwards. I agree with that conclusion.
37. On 1 May 2022, 10 months after signing the lease, the claimant opened the aforementioned shop. From the end of May 2022, the respondent had been asking the claimant that dividends be sent to the respondent so that the funds could be used to pay the claimant's Expenses, Accommodation Allowance and Salary.
38. The claimant alleged that as of January 2023, the respondent ceased paying the claimant's salary. The claimant raised his concerns with Mr Kostrz as to the alleged non-payment of sums owed to him in the subsequent months. This included written communications on 3, 16 and 17 January 2023 [pp. 41, 47 and 48 of the Main Bundle]
39. Salary payslips were issued for the claimant for January, February and March 2023, with the claimant's last payslip being issued on 5 March 2023 [pp. 17-19]. However, there was no evidence provided that the claimant was subsequently paid his salary on 10 March 2023, per clause 2 of his Contract.
40. On the evidence presented EJ Joyce concluded (and I concur) that the respondent did not pay the claimant his salary or expenses or accommodation allowance from March 2023 onwards.
41. The claimant's claim for salary (as allowed in time by EJ Joyce) was from March 2023 to June 2023. The claimant's claims for Expenses and Accommodation Allowance from March 2022 were found to be in time by EJ Joyce. The claim for National Minimum Wage was in time as from April 2021.
July 2023 onwards
42. The claimant was allowed (by EJ Hopton) to amend his claim to include the period from July 2023 – September 2024. As regards that period and to date, the claimant said in his oral evidence (in response to my questions) that his employment was continuing as he had not been dismissed and he had never resigned. He said there had been an attempt to remove him as a director of the respondent in July 2023, but that had not succeeded, and he remained listed as a director of that company at Companies House. He also retained his shareholdings in the respondent and the Senegalese company.
43. The claimant said that the shop in Dakar was still a going concern and continued to trade. It sold solar panels and various accessories and cables. I noted the video of 15 January which showed the Dotcable shop stocked with various products. He said he also continued to attempt to resolve the outstanding issues with the Senegalese Government Ministry to obtain the licence for the solar power plant.
44. I asked the claimant about the practical day to day issues concerning his employment. He said he did not communicate at all with Mr Kostrz or the respondent company and did not account to anyone from the Dotcable companies. He referred to a letter from the respondent's solicitor dated 23 February 2023 which had asked that he did not contact Mr Kostrz directly (pages 60 & 61 of the Main Bundle). However, the claimant said he had all the

relevant reports/accounts available if needed. He accepted that the shop was running at a loss and the business was struggling but said this was also a feature of business in general in Senegal at present.

45. I asked the claimant how he managed to survive financially if the respondent was not paying him any salary etc; he said he was being supported by friends and family. The claimant accepted that it was an unusual situation to be running the business and effectively working for the respondent, even though he was not being paid, but he noted that he still had a shareholding in the Dotcable companies and that he had no other choice.
46. I found the claimant to be a credible witness and note that he readily agreed to supply additional evidence concerning the business in Senegal when requested to do so. I find that the respondent has not paid the claimant any salary, expenses or accommodation allowance from July 2023 to September 2024. I find that the claimant has demonstrated on a balance of probabilities that he is still employed and running the shop in Dakar, and therefore, those sums are properly payable to him.
47. The respondent did not attend and did not present any additional evidence. There was no evidence presented by the respondent to show that the claimant was paid the National Minimum Wage from July 2023 to date. Indeed, there was no evidence presented by the respondent at all.

Conclusions

Claimant's Amendment Application

48. I allowed the claimant's application to amend his claim for the period from October 2024 to the date of the hearing (ie 16 January 2025). As noted by EJ Hopton in November 2024, the amendment only expands the claim to include wages that the claimant says he ought to have been paid since the time he put in his claim form. It therefore involves the same law and facts as already specified in the claim.
49. The alternative would be for the claimant to present a new ET1 for the claims which have arisen since September 2024. This would require a new ET3 from the respondent. This would cause additional time and cost for both the parties and the tribunal. There has already been considerable Tribunal time (see Background) spent on this claim.
50. There is therefore very little prejudice to the respondent in allowing this amendment, and there would be significant prejudice to the claimant in refusing it. The balance of hardship and injustice therefore favours the claimant. (**Vaughan v Modality Partnership [2020] UKEAT/0147/20**). Further, the respondent was not present to make any comments on the amendment.

Tribunal Award

51. The claimant is owed by the respondent
 - Salary - £1400 per month (gross) for the period March 2023 to 16 January 2025;
 - Expenses - £1100 per month (gross) for the period April 2022 to 16 January 2025

- Accommodation allowance- £300 per month (gross) for the period April 2022 to 16 January 2025.
- The claimant is also owed the “shortfall” between these sums and the amount of the National Minimum Wage from April 2021 to 16 January 2025.

Calculation of sums owed by the respondent (Gross Figures)

52. The sums are as follows:

- Salary -£30,100 (March 2023 to date)
- Expenses - £37,950 (April 2022 to date)
- Accommodation Allowance - £10,350 (April 2022 to date)
- National Minimum Wage “shortfall” - £15,560 (April 2021 to date)
- **Total Award £93,960.** The respondent must account to HMRC for income tax and National Insurance Contributions payable on this sum.

53. The respondent did not present any evidence regarding the amounts sought by the claimant or provide a Counter Schedule of Loss.

54. As regards the claimant’s updated Schedule of Loss, I explained that the Tribunal could not award him compensation as part of his claims for his solicitor’s fees or his travel costs to the UK for the hearing.

55. I explained that he could make an application for costs against the respondent (which may cover these sums) but he would have to show that the respondent’s conduct was unreasonable in the way they had conducted the proceedings, and the costs award was in the Tribunal’s discretion. I referred the claimant to Rules 72-82 relating to costs orders in the Employment Tribunal Rules of Procedure 2024. The claimant has 28 days from the date on which this Judgment is sent to the parties to make a written application for costs if he so wishes.

56. I also explained that compensation for Injury to Feelings could only be made in discrimination claims and so was not relevant in this claim.

Employment Judge Henderson

JUDGMENT SIGNED ON:16 January 2025

JUDGMENT SENT TO THE PARTIES ON

22 January 2025

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