



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4107177/2020**

**Held on 10 & 11 February 2022**

**Employment Judge N M Hosie  
Members J McCullagh  
F Parr**

**Mr A Malik**

**Claimant  
Represented by  
Mr B Kadirgolah,  
Solicitor**

**Koli Scot Ltd**

**Respondent  
Represented by  
Mr M Howson,  
Senior Litigation  
Consultant, Peninsula**

## **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The unanimous Judgment of the Tribunal is that:-

1. the claimant's unfair dismissal complaints are dismissed;
2. the claim for accrued holiday pay is well-founded and the respondent shall pay to the claimant the sum of Nine Hundred and Ninety-Seven Pounds and Ninety-Two Pence (£997.92); and
3. the respondent shall pay to the claimant the sum of Six Hundred and Fifty-Six Pounds and Eighty Pence (£656.80) in respect of the respondent's failure

**E.T. Z4 (WR)**

to provide the claimant with a written statement of his terms and conditions of employment.

### REASONS

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1. The claimant, Abdul Malik, brought complaints of “standard” unfair dismissal, in terms of s.94 of the Employment Rights Act 1996 (“the 1996 Act”); “automatic” unfair dismissal, in terms of s.103A of the 1996 Act; and for accrued holiday pay. The respondent admitted the dismissal but claimed that the reason was conduct, gross misconduct, and that it was fair. Otherwise, the claim was denied in its entirety. The respondent also maintained that the claimant did not have the required two years’ continuous service to bring a “standard” unfair dismissal complaint.

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### 15 The evidence

2. We heard evidence first from the claimant.

3. We then heard evidence on behalf of the respondent from:-

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- Muhammad Taleb Hussain, a Director and owner of the respondent Company (with the assistance of a Bengali interpreter)
- Rois Miah, Chef and Manager

4. A bundle of documents was submitted by the claimant’s solicitor (“C”), which included a witness statement, on behalf of the claimant, from Muktel Ali, (C86/87). The respondent did not submit any documents.

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5. The respondent is an Indian take-away and restaurant in Nairn ("the restaurant"). Mr Hussain is the owner. He has been in business for some 17 years.
- 5 6. The claimant was employed as a Waiter. His work and role involved taking orders in the restaurant and on the telephone, serving food to customers in the restaurant and handling cash.

### Claimant's length of service

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7. To qualify for the right to claim "standard" unfair dismissal, in terms of s.94 of the 1996 Act, employees must generally show that they have been continuously been employed for at least two years (s.108(1) of the 1996 Act).
- 15 8. In the present case, it was not disputed that the effective date of termination of the claimant's employment was 28 August 2020.
9. The claimant maintained that he had been continuously employed at the restaurant since 14 April 2014, whereas the respondent maintained that he was only employed continuously from 1 September 2019 to 28 August 2020, working 20 hours per week.
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### Claimant's submissions

- 25 10. The claimant's solicitor invited the Tribunal to find that the claimant's evidence in this regard was credible.
11. He submitted that, *"the claimant asked the respondent repeatedly to register him with HMRC as he wanted to sponsor his wife and children"* (to come to the UK from Bangladesh). He referred the Tribunal to an e-mail which the claimant sent to the respondent's accountant on 28 April 2020 (C43).
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12. The claimant's evidence was that he received wages of £1,400 per month which was paid by way of a cheque from the respondent for £711.54 (P. 51-59) and the balance in cash.

5 **Respondent's submissions**

13. The respondent's representative disputed that the claimant had more than two years' continuous employment. He denied that the claimant received cash payments of £700 per month.

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14. In support of his submission, that the claimant was only employed continuously from 1 September 2019 to 28 August 2020, and before that was only employed irregularly, he invited the Tribunal to accept the corroborative evidence of the respondent's witnesses, to that effect, as credible.

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15. In support of his submissions, he referred to a letter from HMRC, dated 17 January 2020, which stated that the claimant's "start date" was 1 October 2018 and the "end date" was 24 December 2018 (P.35).

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16. He also referred to e-mail correspondence which the claimant had with the respondent's accountant, Mr Roy (P.44/45), which had, *"a gap from January 2019 to November 2019 and ties in with the respondent's evidence that there were breaks in the claimant's employment"*.

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17. Furthermore, the respondent's representative referred to the e-mail which the claimant sent to the respondent's accountant on 28 April 2020 (P.43) in which he stated that he had worked, *"on and off last 7 year"*, with the respondent.

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18. He also referred to a letter dated 20 October 2020 which the claimant had sent to Mr Hussain (P.37/38). The claimant's evidence was that this letter had been prepared by the Citizens Advice Bureau whom he had consulted. In that letter, he stated that he had worked for the respondent, *"intermittently"*

*over the last 10 years*". He also only requested "*1 week's pay in lieu of notice*", which indicates that he had less than 2 years' continuous employment.

5     19.     He also referred to the claimant's bank statements (P.51-55) which show no deposits before September 2019.

20.     Further, although it was disputed that the claimant received any cash payments, were that to be the case these payments would be illegal and the  
10     Tribunal would not have jurisdiction to hear the claim.

### **Discussion and decision in relation to the claimant's length of service**

21.     The quality of the evidence from both parties, was poor, often conflicting and  
15     in parts difficult to follow. The absence of any supporting documentation from the respondent, such as a written contract of employment and wages records and no evidence from the respondent's accountant, made our task even more difficult.

20     22.     However, on the evidence, we did not find, in fact, that the claimant received cash payments in addition to the monthly cheques which he received for £711.54. This was a serious allegation. We only had direct evidence from the claimant about this and this was denied by the respondent's witnesses. There was support for the claimant's assertion in Mr Ali's witness statement  
25     (P86) but that evidence was of limited value as he did not give oral evidence at the Hearing, it was not tested in cross-examination and Mr Ali had only worked at the restaurant for about a year, some years before. In our view, his evidence and that of the claimant was outweighed by the respondent's evidence and those documents which supported the respondent's position  
30     that before September 2020 the claimant only worked irregularly at the restaurant.

23. In the claimant's own words, his employment was "on and off" and "intermittent". Further, with the assistance of the CAB, he sent a letter to Mr Hussain, the respondent's Director, after his dismissal, in which he only claimed one week's pay in lieu of notice (P.37). The CAB would know about statutory notice and had he been employed for some 6 years, he would have been entitled to 6 weeks' pay.
24. There was also correspondence from HMRC which supported the respondent's position (P.35/36) and although the P45 which was issued to the claimant after his dismissal was not produced, the claimant gave evidence that it stated he had only been employed for 11 months.
25. Further, the respondent's assertion that the claimant had only been employed continuously from 1 September 2020 was consistent and unwavering throughout, from the time the response form was submitted on 23 November 2020 (P21). The respondent's witness, Mr Miah, completed the response form and we accepted his evidence that he got the claimant's dates of employment from the respondent's accountant.
26. We did question why the claimant was given 2 weeks' notice when he was dismissed (P30). Mr Hussain explained that that was, "*the norm in restaurants*", so far as he was concerned, when an employee was dismissed, equally oblivious, it appeared, to the statutory notice provisions, as he was to the requirement to provide employees with a written statement of their terms and conditions of employment. Albeit with some hesitation, we accepted his explanation and concluded this was not at odds with his assertion that the claimant had only been continuously employed at the restaurant for some 11 months.
27. Further, the onus was also on the claimant to establish that he had the required 2 years' continuous employment. He failed to discharge that onus.

28. For all these reasons, therefore, we decided, unanimously, and find in fact, that the claimant was only employed by the respondent continuously from 1 September 2019 to 28 August 2020.

5 **Decision**

29. As the claimant did not have the required 2 years' continuous employment, his "standard" unfair dismissal complaint, in terms of s.94 of the 1996 Act, is dismissed for want of jurisdiction.

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**Automatic unfair dismissal**

30. In his Further and Better Particulars, the claimant's solicitor set out the basis for this complaint (P.34, para.11):-

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*"It is submitted that the reason or the principle reason for claimant's dismissal was that he had made a protected disclosure to the Home Office and Modern Slavery that the respondent paid the staff less than national minimum wages and that the respondent employed an illegal worker. Therefore, the claimant's dismissal was contrary to section 103A of the Employment Right Act 1996 (ERA 1996) and is automatically unfair. It is submitted that the claimant's disclosures to the Home Office and Modern Slavery amounts to protected disclosures under s.43B(d) Employment Rights Act 1996."*

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31. The respondent admitted the dismissal but claimed that the reason was conduct, gross misconduct, and that it was fair.

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32. The claimant accepted that he was handed a dismissal note (P.30) in the restaurant on 28 August. It was unclear whether this was handed to him by Mr Hussain or a police officer, the claimant having summoned the police to the restaurant that day.

**"Disclosures"**

33. The claimant maintained that around 15 April 2020 (the date was unclear), he had criticised the respondent, by way of a facebook posting in which he

alleged he was only being paid £2 per hour and that he was, *“a victim of modern slavery”*.

- 5 34. He also claimed that he had telephoned the Home Office/“Modern Slavery” to complain about his treatment.
35. He further claimed that in the early hours of 28 August he had *“gone live”* on facebook to complain about his treatment at the restaurant .
- 10 36. His claim of automatic unfair dismissal was predicated on these three “disclosures”. He claimed that these disclosures were the reason for his dismissal. Unfortunately, his facebook post in April was not produced. He claimed that Mr Hussain had asked him to delete it, but this was denied.
- 15 37. Mr Hussain denied that these “disclosures” were the reason for the claimant’s dismissal. While he was aware that Home Office representatives had called at the restaurant in June, he claimed that he was not aware of the claimant’s facebook post in April and the “live” facebook video in the early hours of 28 August. Indeed, he maintained that he was not aware that the claimant had
- 20 contacted the Home Office. He also denied that he had asked the claimant to delete the facebook post. He said that he and the claimant were not facebook “friends”.
- 25 38. So far as the dismissal note was concerned (P30), as Mr Hussain does not speak English, his evidence was that the note was prepared on 27 August 2020 by his son-in-law who was visiting from London at the time.
- 30 39. His evidence was that, a few days before, the claimant had asked him for a loan of £4,000 so that he could deposit the sum in his bank account which would assist with his visa application for his wife and children who were in Bangladesh. When Mr Hussain refused to give him the loan, the claimant reacted with threats and abusive language.



40. We noted that in his email of 28 April (P43) the claimant had advised the respondent's accountant, "*I need lot of money*" and we believed Mr Hussain's evidence in this regard which was consistent and convincing.

5 41. We also heard evidence from the claimant's witness, Mr Miah, of aggressive and threatening behaviour by the claimant and how in the morning of 28 August he had observed an argument in the restaurant with another member of staff, Mr Alam. It appeared that the claimant was on the point of assaulting him with a mop he was holding at the time and was only prevented from doing  
10 so when Mr Miah intervened.

42. This evidence was denied by the claimant but his evidence in this regard was unconvincing and inconsistent. We did not consider his evidence to be either credible or reliable.

15 43. Immediately after the incident with Mr Alam, the claimant called the police. When they arrived at the restaurant, he asked them to arrest Mr Hussain and claimed Mr Alam was an illegal immigrant. The police took no action in that regard. At the request of Mr Miah, they escorted the claimant from the  
20 restaurant. At some point when the police were present, the claimant was handed the dismissal note (P30)

44. Although there were some inconsistencies in the respondent's evidence, it was consistent with the response form (P22) and there was some  
25 corroboration in the evidence of the respondent's witnesses. The respondent's evidence was more consistent and convincing than that of the claimant. For example, at the time Mr Hussain told his Manager, Mr Miah, that the claimant had asked him for a loan and when he refused he had become abusive and threatened him. We were of the unanimous view that  
30 the respondent's evidence was to be preferred.

45. We also find, in fact, that Mr Hussain had no knowledge of the facebook posts and that he was not aware that it had been the claimant who had complained to the Home Office.

46. If follows, therefore, that the claimant could not have been dismissed for making the alleged protected disclosures.

5 47. Indeed, we were satisfied that the real reason for the claimant's dismissal was his conduct, as detailed in the dismissal note (P30).

48. The claimant had the legal burden of proving, on the balance of probabilities, that the reason for his dismissal was an automatically unfair one. He failed  
10 to discharge that burden. Accordingly, his claim of automatic unfair dismissal is also dismissed.

### **Holiday pay**

15 49. Very fairly, the respondent's representative conceded that the claimant was due accrued holiday pay in respect of his admitted period of continuous employment from 1 September 2019 to 28 August 2020.

50. In terms of the Working Time Regulations 1998, the claimant was entitled to  
20 5.6 weeks' holiday pay per annum. We were satisfied, on the evidence, that the claimant worked 20 hours per week. The main reason for this was that he attended College and was limited in the work he was permitted to do. Accordingly, on the basis of a National Minimum Wage of £8.91 per hour, he is entitled to a payment of **£997.92** in respect of accrued holiday pay (20 x  
25 5.6 x £8.91).

### **Failure to provide a written statement of terms and conditions of employment**

51. The respondent accepted that the claimant had not been provided with a written statement of his terms and conditions of employment which he should  
30 have received when he started employment with the respondent on 1 September 2019.

52. S.38 of The Employment Act 2002 does not give employees a free-standing right to claim compensation for failure to provide full and accurate written particulars. The right to compensation is dependent upon a successful claim being brought by the employee under one of the jurisdictions in Schedule 5.  
5 Holiday pay is one of these jurisdictions.
53. In these circumstances, a Tribunal **must** award the “*minimum amount of two weeks’ pay*” and may, if it considers it just and equitable in the circumstances, award the “*higher amount of four weeks’ pay*”.  
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54. We heard that Mr Hussain, the respondent’s Director and owner of the restaurant, had been in business for some 17 years and had many employees over the years. In all the circumstances, we decided that it would be just and equitable to award the claimant the “higher amount” of four weeks’ pay.  
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55. On the basis of weekly pay of £164.20, this amounts of **£656.80**.

**Employment Judge: N M Hosie**

**Date of Judgment: 25 February 2022**

**Date Sent to Parties: 25 February 2022**