



# EMPLOYMENT TRIBUNALS

**Claimants:** 1. Mr J Laranjinha  
2. Mr A Bernadino

**Respondent:** Nazrul Islam Khan

**Heard at:** Liverpool (by CVP)

**On:** 28 September 2022  
18 October 2022  
(in Chambers)

**Before:** Employment Judge Ganner  
(Sitting alone)

## REPRESENTATION:

**Claimants:** Mr B Large (Counsel)  
**Respondent:** Did not appear

# RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The claimants were employed by the respondent Mr Nazrul Islam Khan.
2. Insofar as there was a claim against Amaya Lancaster Ltd, for the avoidance of doubt, that claim is dismissed.
3. The respondent was in breach of his duty to provide written particulars of employment as required by section 38 of the Employment Act 2002 and is ordered to pay to each claimant four weeks' gross pay of £2,284 (capped at £571 per week).
4. The respondent failed to comply with notices to produce records concerning the payment of the National Minimum Wage and is ordered to pay compensation in the gross sum of £697.60 to each claimant.
5. The respondent paid the claimants below the National Minimum Wage throughout their employment. This constituted a series of unauthorised

deductions from their wages. The first claimant is awarded the gross sum of £10,978.21. The second claimant is awarded the gross sum of £27,161.96.

6. The respondent has failed to pay the claimants in respect of untaken holiday pay on termination and is ordered to pay the first claimant the gross sum of £916.11 and the second claimant the gross sum of £1,628.32.
7. The respondent dismissed the claimants in breach of contract in respect of notice and is ordered to pay the first claimant damages of £610.74 and the second claimant damages of £697.85 representing four weeks' gross pay.
8. The total gross sums payable by the respondent to the first claimant is £15,486.56 and to the second claimant £32,469.73.
9. The claimants are responsible for tax and employee National Insurance contributions on the gross sums due.

## **REASONS**

### **Issues**

1. The issues to be determined by the Tribunal were agreed at the outset of the hearing as follows:

#### Identity of the employer

- (1) Was the true employer the respondent, Mr M Khan or Amaya Lancaster Ltd/Wokiin Lancaster Ltd?

#### Unlawful deduction of wages/National Minimum Wage ("NMW")

- (2) Assuming entitlement to the NMW, how many hours did the claimants work in each pay reference period?
- (3) What pay did they receive in wages?
- (4) What was the total shortfall if paid less than their NMW entitlement?
- (5) What uplift should be made by the application of the current rate of NMW to the shortfall as required by section 17 of the National Minimum Wage Act 1998 ("NMWA")?

#### Failure to comply with a production notice (sections 10-11 NMWA)

- (6) Did the claimants' production notices seek production of records and were they drawn in the reasonable belief they may have been underpaid the rate of NMW?
- (7) What date were the production notices dated 19 May 2019 received?

- (8) Did the respondent comply with the notices and do so within 14 days of receipt? If not, the Tribunal should award 80x the current rate of the NMW to each claimant.

Failure to provide employment particulars

- (9) Did the respondent provide the claimants with particulars of employment?
- (10) If not, have the claimants succeeded in any of their other claims?
- (11) If so, should those successful claimants receive two or four weeks' pay each?

Holiday Pay

- (12) What was the claimants' leave year?
- (13) How much leave had each claimant accrued at their effective date of termination?
- (14) What was the daily rate of each claimant's pay?
- (15) How much holiday did each claimant take or receive pay in lieu for?
- (16) What balance is owed to each claimant?

Notice Pay

- (17) What were the claimants' notice period?
- (18) Were they paid for that notice period?

**Preliminary Matters**

2. The claim was originally lodged against Amaya Lancaster Ltd on 16 August 2019 based on payslips and P45s supplied to the claimants post termination which named the company as the employer. The sole director of the company was the current respondent, Mr Nazrul Islam Khan although this was not discovered by the claimants until later.

3. Since the claimants had not received the above documents during the course of their employment, they believed Mr Khan (rather than the company) was their true employer and in September 2019 they sought an amendment of their claim to add him as a further respondent. This was ordered to be treated as an amendment to the original ET1 (which had not yet been served).

4. Post amendment application, in October 2019, Mr Khan terminated his appointment as director of Amaya Lancaster Ltd.

5. Neither respondent entered a response and they were each sent letters indicating that a judgment could now be entered against them and that whilst they were

entitled to receive notice of any hearing, they would only be entitled to participate to the extent permitted by the Employment Judge who heard the case.

6. On 29 June 2020, the claimants wrote to the Tribunal setting out their case why Mr Khan was the true employer. They subsequently, on 20 August 2020, withdrew the case against Amaya Lancaster Ltd.

7. On 10<sup>th</sup> November 2020 the matter was ordered to proceed to a hearing so that the Tribunal could determine whether the claimants were entitled to succeed in their claims and if so, in what amount.

8. The case was listed for a final hearing but this was variously delayed/stayed for pandemic related issues.

9. The hearing was heard by me as above with the notices of hearing being copied to the respondent repeating the warning that he could only participate in the hearing to the extent permitted.

10. Before proceeding, I asked the Tribunal clerk to attempt to contact the respondent to ascertain whether he wished to be heard despite his lack of response to date. This was not initially successful but various contact numbers were supplied by the claimants including a number which was identified in evidence (paragraph 29 below) as one taken by the witness Mr Hewitt for the respondent's business premises "Wokiin" in May 2019. Mr Khan was spoken to by the clerk at this number but said he was no longer part of the business, knew nothing about any claims and needed to speak to a solicitor if there was a claim.

11. In these circumstances the matter proceeded without him.

12. The claimants' native language was Fataluku. An interpreter had been requested but due to an administrative oversight, had not been booked. Mr Large was satisfied the claimants would encounter no difficulties as their support worker, the witness Mr Hewitt, was a fluent speaker and could assist as required thereby facilitating his clients' understanding and effective participation in the hearing. He had full instructions in the matter. He urged me to continue.

13. Having regard to the Equal Treatment Bench Book guidance to proceed with caution in these circumstances, I decided the assistance offered would ensure a fair hearing. The claimants' evidence was limited to confirmation of the authorship and truth of their witness statements with few supplementary questions anticipated. There was to be no challenge by way of cross examination. The first claimant was able to communicate in English well, the second claimant less so. Mr Hewitt would assist from time to time as needed.

### **Evidence**

14. I heard evidence from the claimants in person and from Mr Jim Hewitt, a community worker.

### **The Bundle**

15. There was an agreed bundle of documents which I treated as a witness statement insofar as it dealt with factual matters, and references to page numbers herein relate to that bundle.

### **Relevant Factual Findings**

16. The first claimant is Mr J Laranjinha. He was employed from 26 August 2018. The second claimant is Mr A Bernadino. He was employed from 10 September 2017. They were both dismissed summarily for reasons not related to their conduct on 24 March 2019.

17. The claimants are of Timorese origin and Portuguese nationality. They were engaged by the respondent as chefs under oral contracts. The claimants did not during employment, receive employment particulars nor payslips.

18. The claimants' leave year for regulation 13 holiday pay was their respective start dates, namely 26 August and 10 September.

19. Both claimants worked at a Lancaster University site called Wokiin, though Mr Bernadino moved to a new restaurant in the city some time later.

20. Two people were employed at the city site and four at the university site: a total of six including the claimants. Most, if not all the four other employees' employment predated the claimants' commencement. The claimants tended to work from 10.30am until 10.30pm though the restaurants would stay open up to an hour later.

21. The first claimant worked 78 hours per week from 28 August 2018 until his dismissal on 24 March 2019. He initially received £270 net per week which increased at Christmas 2018 to £300 net per week.

22. The second claimant worked 72 hours per week from 10 September 2017, and from 10 December until his dismissal on 24 March 2019, he worked 85 hours per week. He received £280 per week for the first eight months, which increased to £300 in June 2018. He received a further increase on 10 December 2018 to £340 per week net.

23. The claimants received their pay in cash.

24. At the time of the claimants' respective commencement of employment they had heard around the kitchen that the respondent, Mr Khan ("Naz") was "the big boss". They were paid by him and another individual believed to be his subordinate. They saw, when putting aside mail sent to the business premises, that it was addressed to the respondent, "Mr Nasrullah Imran Khan".

25. Neither claimant took annual leave. The first claimant was not told he was entitled to it and had a request towards the end of his employment rejected. He did however take enforced leave of 6 days during a Christmas holiday/shutdown for which he was not paid.

26. The second claimant was told he did not have entitlement to any holiday as he did not have a contract. He was told he would not be paid for time off when the restaurant closed at Christmas 2018.

27. Both claimants were dismissed without notice on 24 March 2019 and were told by Mr Khan's apparent deputy, Mahmoott, that it was not busy anymore and he did not have the money to keep employing them.

28. Mr Jim Hewitt MBE is a community worker who supports Timorese nationals who work and live in the United Kingdom. Mr Hewitt used to work as a teacher and speaks Fataluku, which is one of many languages spoken in East Timor and the native language of the claimants.

29. After being dismissed, both claimants sought his support and Mr Hewitt drew up production notices with the claimants' input, incorrectly referring to 81.5 hours. These were served by him on 30 May 2019 [44-45].

30. Mr Hewitt visited the restaurant on 30 May 2019 and asked to see the owner. He was told the owner was "Mr Naz" and was given a number which he wrote down. He telephoned the number and did not get an answer. However, a few minutes later, whilst still at the restaurant, he was given a phone and told it was the boss. He told the person on the phone he had delivered a letter from the claimants. "Mr Nhas" [*Sic*-Mr Hewitt's contemporaneous notes] stated he would collect the letter and respond. [25-26]

31. Mr Hewitt handed the envelopes containing the production notices to an associate of the respondent who was asked to effect personal delivery.

32. Mr Hewitt chased the respondent by phone on 15 June 2019. He acknowledged receipt of the letter and Mr Hewitt was told he would receive paperwork shortly, though he was also told that it was, for the respondent, a "waste of time" but that he would send the information out "on Monday" [27-28].

33. The claimants had received payslips and a P45 via another worker some time after dismissal. Mr Hewitt got these documents on 24 June 2019. They purport to show "Amaya Lancaster Limited t/a Wokiin" as employer. The P45s state that the claimants were payroll numbers "1" and "2". The payslips suggest the claimants started on exactly the same day in November 2018 and worked exactly the same hours, 104 (per month) without any sickness, holiday or overtime, receiving approximately £800 cash per month [21-24].

34. Companies House documents indicate that Wokiin Lancaster Limited was incorporated on 6 August 2018. It shows the one company director as Mr Khan and that it was dissolved via voluntary strike-off on 6 August 2020 [55-63]. They also show Mr Khan being a director of Amaya Lancaster Limited which was incorporated on 10 April 2018. He resigned from this position and changed the registered address of the company following the claimants' application to amend their claim in September 2019. His appointment terminated on 1 October 2019 [47-53].

35. Neither of these companies were mentioned by the respondents to the claimants nor Mr Hewitt and they were both incorporated post-commencement of the second claimant's employment.

36. Mr Hewitt's response to the documents received on 24 June 2019 was that he wanted evidence of hours and pay. He explained, in a letter dated 12 July 2019, that

he had received copy payslips and P45s but that the section 10 request was to be allowed to examine records for the claimants' hours and pay "from which you calculate the sums shown in these documents" [46]. Mr Hewitt subsequently received a message seeking more information, and Mr Hewitt replied by text message on 17 July 2019 noting his reply as follows:

*"Both Mr Laranjinha and Mr Bernadino say they worked every day from 11.00am to 11.00pm without a day off.*

*This is 78 hours per week. The minimum wage for 2018 was £7.50 per hour. For 2019 it was £7.83 per hour.*

*Mr Laranjinha was employed from 28.8.18 to 24.3.19 for which period he should have received minimum wage £18,140. He received £8,790. His claim would therefore be for about £9,350..."*

37. Mr Hewitt noted similar calculations for Mr Bernadino, with approximately £24,190 said to be due and owing. He concluded:

*"If a mistake had been made and you are able to show that the hours were in fact less or that they were paid more the claim would have to be reduced" [29-30].*

38. Later, on 19 July, the respondent telephoned Mr Hewitt, angrily stating that he did not keep records and saying it was ridiculous and that the claimants were idiots, but he would engage a solicitor. Mr Hewitt's notes record:

*"We don't keep that [records...] training only. No contract. They were idiots. Can't think why." [31-34]*

39. The respondent complained the hours were less than claimed.

40. Mr Hewitt was not given time to respond with any further suggestions. The 19 July call was the last communication he had from the respondent.

41. No further response was received to the production notices.

## **Relevant Legal Principles**

### The identity of the employer

42. As to the identity of an employer, Choudhury P. in Clark v HWR & Ors UKEAT/0018/20/BA held at paragraph 52 –

- (a) when the evidence is only documentary, the issue is a question of law, but with a mix of documents and facts (i.e., most disputes), it is a mix of fact and law;
- (b) the starting point will be any written agreement drawn up at the start of the relationship, then checking if that truly reflects the intention of the parties;

- (c) if a party alleges that the documentation doesn't show the true employer, consider whether there was a change, and how it happened; and look at how the parties acted during the relationship;
- (d) the EAT cautioned against giving weight to documents created without one party's knowledge, which might point to one party's private intentions rather than what was agreed.

#### Written Particulars of Employment

43. By section 1 Employment Rights Act 1996 an employer is obliged to provide their employee with particulars setting out prescribed terms. On finding a failure to comply an uplift should be made to any claim of either 2 or 4 weeks' pay, capped at 'a week's pay' (s38 Employment Act 2002).

#### Failure to Comply with a Production Notice

44. By s.10(1)-(2) National Minimum Wage Act 1998 ('NMWA') workers can require production, allow them to inspect, examine and copy relevant records if they *believe on reasonable grounds* they suffered underpayment of NMW in a *pay reference period*. Records must be made available within 14 days of receipt (s.10(5) & (9)).

45. The Government's National Minimum Wage and National Living Wage: Calculating the minimum wage Guidance at p57-58 which states *records* should include:

- total pay paid to workers
- the hours they have worked
- overtime, shifts or other circumstances when there are increased rates of pay
- details of any allowances paid to the workers
- any deduction or payment for living accommodation provided by the employer to the workers...
- any absences - for example - rest breaks, sick leave, holidays
- any travel or training undertaken by the workers during work hours
- bank statements or other commercial documentation
- contracts and agreements between you and your workers
- workers' dates of birth
- payments and deductions for expenditure incurred by the worker in connection with the employment



- payments for travelling to a temporary workplace (and any associated subsistence and accommodation) which are allowed as deductions from earnings under section 338 of the Income Tax (Earnings and Pensions) Act 2003
- documents to show why a worker is exempt from the minimum wage.”

46. On finding a failure to comply with s10(5) & (9) a Tribunal shall make an award of 80 times the current hourly rate of NMW (s.11(2) NMWA) (*pleaded at £8.21 ph*).

#### The National Minimum Wage

47. With limited exceptions, workers are entitled to be paid the national minimum wage. The hourly rate depends on the worker's age and the year when the work was carried out.

48. By section 1 National Minimum Wage Act 1998 ('NMWA') and Regulations 4 & 15 of National Minimum Wage Regulations 2015 a relevant employee has a right to be paid at least –

- £7.50 per hour from 1<sup>st</sup> April 2017;
- £7.83 per hour from 1<sup>st</sup> April 2018;
- £8.91 per hour from 1<sup>st</sup> April 2021; and
- £9.50 per hour from 1<sup>st</sup> April 2022

49. Under section 28 of the National Minimum Wage Act 1998, the burden of proof is reversed so there is a presumption that the individual bringing proceedings qualified for the national minimum wage and was underpaid (though the worker must still prove by how much they were underpaid).

50. Under section 17 of the National Minimum Wage Act 1998, if the employer does not pay the national minimum wage and the worker succeeds in a Tribunal claim, the Tribunal awards arrears based on the level applicable at the date of the Tribunal's calculation if that is higher than a calculation based on the level applicable at the time the work was done. The required calculation is essentially (1) calculate the amount of the original underpayment (2) divide by the minimum hourly rate at the date of the underpayment (3) multiply by the minimum wage rate at the date of determination

#### Holiday Pay (Working Time Regulations)

51. Regulations 13 & 13A of the Working Time Regulations 1998 ('WTR') provide entitlement to 4 and 1.6 weeks' holiday in each leave year capped at a combined total of 28 days.

52. Regulation 13 also clarifies a worker's leave year is their commencement date in the absence of contractual provision to the contrary and by Regulation 14 a worker is entitled to the Regulation 13 & 13A leave accrued proportionate to the leave year which has expired.

Notice Pay/Breach of Contract

53. Section 86(1), (3) & (6) Employment Rights Act 1996 provide a right to a week's notice for employees in continuous employment for over a month but under two years unless their employer was entitled to dismiss summarily by reason of their conduct.

**Submissions**

54. Mr Large made both written and oral submissions incorporating some minor adjustments to the remedy calculations.

**Conclusions**General

55. I found the evidence called by the claimants to be both truthful and accurate. Both Mr Laranjinha and Mr Bernadino presented as careful witnesses who only narrated what they themselves had encountered. For example, Mr Bernadino believed his co-worker had, when they were dismissed, expressed a concern to the respondent about their joint anxiety whether paperwork was in order/tax liabilities settled. However, as he had not personally overheard this conversation, he would not confirm it was true.

56. However, their perceptions that Mr Khan held himself out as the employer were mutually supportive, consistent and amply corroborated by Mr Hewitt's interactions with the respondent, (Mr Hewitt having made detailed contemporaneous notes of these). There was, overall, no credible material to undermine or contradict the claimants' cases nor to reach different factual findings to those made above.

The true employer

57. The respondent held himself out to be the employer in his dealings with Mr Hewitt, which I have summarised in my factual findings above. He paid the claimants their wages in cash and they were told he was "the big boss" but did not inform them of Amaya Lancaster Ltd nor of any other corporate entity.

58. Further there was never, prior to or during employment, anything said or done to suggest that **any** company was the employer. Neither Amaya Lancaster Ltd nor Wokiin Lancaster Ltd existed when the second claimant started work on 10 September 2017 being incorporated only in April and August 2018 respectively.

59. There was neither a written contract nor a written statement of employment particulars.

60. Insofar as Amaya Lancaster Limited t/a Wokiin is recorded as the employer on the wage slips and P45s sent to Mr Hewitt, this assertion carries no weight as it is clear (and I have so found) that these documents were not received in employment but created subsequently to act against the financial interests of the claimants when they were seeking production of "relevant records" under section 10. The documents produced by or on behalf of the respondent contain false entries understating hours

worked and wages due, together with other apparent irregularities, e.g., the suggestion the claimants were the first two staff on the payroll

61. The respondent has not submitted any response to the claim. The only evidence was that given by the claimants supported by that of Mr Hewitt and this has fully persuaded me the respondent Mr Khan was the employer and no-one else.

#### National Minimum Wage

62. Both claimants were entitled to be paid the NMW. The hourly rate depends on the worker's age and the year the work was carried out. The hourly rates were as follows:

- £7.50 per hour from 1 April 2017
- £7.83 per hour from 1 April 2018
- £8.91 per hour from 1 April 2021
- £9.50 per hour from 1 April 2022

63. Mr Large helpfully prepared National Minimum Wage schedules which set out week by week the hours worked, the applicable rates of NMW, the amounts received, the monetary shortfall, the quantification of unpaid hours and the multiplication of those hours by £9.50 to give the section 17 uplift.

64. I have scrutinised these schedules with care and was also taken through the very same calculations which are to be found in the bundle and which reflects the evidence given. [35-37]

65. The first claimant worked 78 hours throughout his employment and the second claimant worked 72 hours over six days a week until 10 December when these increased to 85 hours over seven days. The claimants' weekly entitlement at NMW rate and amounts received were as follows:

- (1) The first claimant's entitlement was £610.74. He only received £270 until Christmas 2018 and £300 thereafter (save for nil pay during the Christmas shutdown).
- (2) The second claimant's weekly entitlement was £540 per week until April 2018 and he received only £280 per week. From April 2018 his entitlement was £563 a week but he received £280 until June 2018 and then £300 until 10 December 2018 when he was paid £340 per week until dismissal in March 2019.

66. These wages were rightly described by Mr Large, in his written submissions to the Tribunal, as "mercilessly low".

67. The gross awards (inclusive of the section 17 uplift) are £10,978.21 to the first claimant and £27,161.96 to the second claimant.

68. I base these figures on my acceptance of the claimants' evidence (disregarding the questionable documents received by Mr Hewitt) and taking into account the respondent's non-compliance with the section 10 production orders.

#### Failure to comply with a production notice

69. I am satisfied that the claimants believed, on reasonable grounds, they had been paid at a rate less than the NMW. This is self-evident from their evidence as to hours worked and pay received.

70. Mr Hewitt delivered a production notice which requested the relevant records and signified his intention/wish to inspect, examine and if necessary, copy the material. This was done on 30 May 2019.

71. Thereafter, around 25 June 2019, the claimants and Mr Hewitt each received payslips and P45s which had been drawn up without their knowledge. No further material was received. The "records" (if they were such, given their falsity) were served outside the required 14-day period, or any later time agreed between the parties. They were also incomplete. These were contraventions of section 10 both in relation to the production and to allowing the inspection of relevant records.

72. I therefore declare the complaint well-founded under section 11 and make the required award of 80x the current (pleaded as £8.72) hourly rate of National Minimum Wage, being £697.60 gross per claimant.

#### Failure to provide employment particulars

73. The respondent is liable for breach of his responsibility to provide the claimants with written particulars of employment. This breach of duty requires me to award a minimum amount of two weeks' pay, but if I consider it just and equitable in the circumstances, I am permitted to award a higher amount of four weeks' pay.

74. On my findings, all the claimants' difficulties in establishing the identity of their employer, their contractual terms, their rate of pay and their holiday pay entitlement, could have been averted by the respondent lawfully providing the required particulars. He chose, from the outset, to hide this information, denying the claimants what they needed to exercise basic employment rights. He continued to do so thereafter despite lawful requests for production. Only by good fortune were the claimants, whose first language was not English, able to obtain assistance from Mr Hewitt who helped them to bring their cases to the Tribunal. Appreciating the respondent was a small employer, I nonetheless consider the maximum four weeks' award is just and equitable given the inexcusable nature of the breach.

75. A "week's pay" is limited to £571 so the total sum I award for each claimant is less than their actual wages. The amount is therefore £2,284 for each claimant.

#### Holiday Pay

76. Neither claimant had received written particulars detailing their leave year, and accordingly their respective leave years would reflect their start dates namely 26 August and 10 September. The end date is 24 March 2019 for both claimants. The

first claimant now seeks 9 days pay (down from 11) to reflect 6 days being taken during the Christmas shutdown.

77. The first claimant is entitled to 9 days in respect of accrued but untaken holiday pay @ £101.79 per day = £916.11

78. The second claimant is entitled to 14 days in respect of accrued but untaken holiday pay @£116.30 per day = £1,628.32

Wrongful Dismissal

79. I award one week's notice pay given the dismissal was for redundancy, unrelated to conduct, being £610.74 for the first claimant and £697.85 for the second claimant.

---

Employment Judge Ganner

Date: 21 October 2022

RESERVED JUDGMENT AND REASONS  
SENT TO THE PARTIES ON

26 October 2022

FOR THE TRIBUNAL OFFICE

**Public access to employment tribunal decisions**

Judgments and reasons for the judgments are published, in full, online at [www.gov.uk/employment-tribunal-decisions](http://www.gov.uk/employment-tribunal-decisions) shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

**NOTICE****THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990  
ARTICLE 12**

Case numbers: **2410853/2019,2410854/2019**

Name of cases: **Mr Z A Laranjinha** v **Nazrul Islam Khan**  
**Mr A Bernardino**

Interest is payable when an Employment Tribunal makes an award or determination requiring one party to proceedings to pay a sum of money to another party, apart from sums representing costs or expenses.

No interest is payable if the sum is paid in full within 14 days after the date the Tribunal sent the written record of the decision to the parties. The date the Tribunal sent the written record of the decision to the parties is called **the relevant decision day**.

Interest starts to accrue from the day immediately after the relevant decision day. That is called **the calculation day**.

The rate of interest payable is the rate specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as **the stipulated rate of interest**.

The Secretary of the Tribunal is required to give you notice of **the relevant decision day**, **the calculation day**, and **the stipulated rate of interest** in your case. They are as follows:

**the relevant decision day** in this case is: 26 October 2022

**the calculation day** in this case is: 27 October 2022

**the stipulated rate of interest** is: **8% per annum**.

For the Employment Tribunal Office