



EMPLOYMENT TRIBUNALS

Claimants: Mr T Warda
Ms E Szymura

Respondent: Familijny Continental Food Ltd

Heard at: Reading **On:** 6 February 2017

Before: Employment Judge J Hill

Appearances
For the Claimant: Ms M Inkin (lay representative)
For the Respondent: No attendance or representation

JUDGMENT

1. The claims should proceed in the absence of the respondent.
2. The claim of constructive unfair dismissal (both claimants) succeeds.
3. The claim of breach of contract (notice pay) (both claimants) succeeds.
4. The claim for outstanding holiday pay (Working Time Regulations 1998) (both claimants) succeeds.
5. The respondent is ordered to pay compensation to the claimants as follows:-

Mr Warda:

Unfair dismissal:

Compensatory award:
11 weeks @ £279.26 = £3071.86

Outstanding notice pay:
1 week's pay @ £279.26 = £279.26

Outstanding holiday pay:
13.65 days = £762.38

The respondent failed to provide the claimant with written terms and conditions of employment. Under s.38

of the Employment Act 2002 the respondent is ordered to pay to the claimant the sum of £1209.44, i.e. 4 weeks gross. £1209.44

Total: **£5322.94**

Ms Szymura

Unfair dismissal:

Compensatory award:

9 weeks' pay @£277.86 = £2500.74

together with 4 weeks pay @ £27.86 = £111.44

Outstanding notice pay:

1 week's pay @ £277.86 = £277.86

Outstanding holiday pay: £758.82

The respondent failed to provide the claimant with written terms and conditions of employment. Under s.38 of the Employment Act 2002 the respondent is ordered to pay to the claimant the sum of £1204.83, i.e. 4 weeks' gross pay. £1204.83

Total: **£4853.69**

REASONS

1. On 4 August 2016 both claimants presented claims that they had been unfairly constructively dismissed, were owed their notice pay and outstanding holiday pay. In addition, they asserted that they had never received any written terms and conditions of employment as required under s.1 of the Employment Rights Act (ERA) 1996.
2. The basis of their claim was that when they sought to take holiday, their employer refused to pay them any holiday pay. They both resigned for this reason. They relied on s.104 of ERA (assertion of a statutory right), coupled with s.95(1)(c) of ERA to pursue a claim of unfair dismissal, despite neither of them having the 2 years' service required to bring a claim of unfair dismissal.
3. The respondent presented a response saying that they had been dismissed for gross misconduct, namely theft.
4. The issues before me were:-
 - What was the reason for the termination of employment? Was it because of a dismissal by the respondent; or was it because the claimants had resigned?

- Were the claimants entitled to any notice pay?
 - Were the claimants entitled to any holiday pay?
 - Was there any holiday pay outstanding on termination of employment?
 - Were the claimants provided with any written particulars of employment?
5. Prior to the commencement of my hearing the case on its merits, I had to address the question whether the respondent's response should be struck out for non-compliance with the tribunal's order. The respondent had not served on the claimant any documents by way of disclosure and had not served any witness statements prior to the hearing.
 6. I noted that the respondents had not attended today. I considered that it would be better to hear the case on its merits, albeit in the absence of the respondent. If I were to strike out the response I would not be able to consider the response. If I allowed the case to proceed in the absence of the respondent I would need to look at what information was put forward by the respondent, albeit limited in this case to a scantily pleaded ET3.
 7. I had before me witness statements from the 2 claimants, both of whom were available to be cross examined. I also had statements from Ms Klyta and Mr Bernard, who were not present. I attached less weight to their evidence. I had a bundle which contained only documents from the claimants as the respondents had provided none.
 8. The claimants started working for the respondents on or about 11 September 2015. They are a couple. The place of work is shop selling Polish food. They were both shop assistants.
 9. They planned to go on holiday together in January 2016 but the respondents' director Mr Ali only allowed Ms Szymura to take the time off work. On her return from her holiday she did not receive holiday pay in her January payslip
 10. Ms Szymura spoke to Mr Ali about this. He said that the respondents do not pay holiday pay to their employees.
 11. Although the claimants were unhappy at this statement, which they were aware did not reflect their statutory right, they remained in the employment as they needed the money.
 12. The claimants again sought to take time off work together in May. They ask for the period 7-15 May 2016. Mr Ali agreed to the time off but stated that they would not be paid.
 13. The claimants resigned giving notice to the end of May 2016. There is a text of 2 May 2016 in which Ms Szymura makes it clear that their intention is to work only to the end of May.

14. On 5 May 2016, Ms Szymura wrongly entered a price of £1.79 per kilo, instead of £2.29 per kilo. Mr Warda paid Mr Ali the missing 40p. The claimants believe this undercharging to be the basis of the theft that the respondents refer to in their ET3.
15. The claimants say that when they returned from their week off they were advised by Mr Ali on 15 May 2016 that he had found replacements for them and that they should not work the rest of their notice period.
16. The respondents ET3 states that the claimants were summarily dismissed for theft. They were not therefore entitled to notice pay. They did receive written terms and conditions of employment.
17. In response to the allegation of theft, the claimants drew my attention to an open text from the respondents offering to settle the claim. Their view was that if there was a clear dismissal for dishonesty, the respondents would not have made the offer.
18. I note that no documentation has been produced to me showing any evidence of a theft; any letter of dismissal suggesting the claimants were guilty of theft; any document purporting to be written particulars of employment.

My conclusions on liability

19. There is no evidence to support the respondents' assertion of a dismissal for theft. I do not believe them.
20. The claimants' evidence is consistent. They wanted to take holiday. When they took holiday, they were not paid in that period. They did not receive that pay because their employer refused unlawfully to pay them holiday pay as required under the Working Time Regulations 1998.
21. To seek to be paid holiday pay is an assertion of a statutory right. Resignation in response to a refusal to pay holiday pay clearly falls within the definition in s.95(1)(c) of ERA 1996 as a resignation in response to the serious misconduct of the employer such that this is a dismissal. The reason for the dismissal is because they asserted their statutory right. It is automatically an unfair dismissal.
22. The pay slips produced by the claimants demonstrate that the respondents did not pay them holiday pay when they were not in work, nor did they pay them for their outstanding holiday on termination of employment. They did not receive their notice pay. The claimants have not been given any written terms and conditions of employment. These claims all succeed.

Remedy

23. Following their dismissals, the claimants sought to find work.

Mr Warda

24. Mr Warda remained out of work until 1 August 2016 when he obtained work at a higher rate of pay. He therefore sought his loss of earnings only until that date.
25. He earned £302.36 per week gross; £279.26pw net. He sought £3071.86 as compensatory award for the unfair dismissal. I order the respondents to pay him this sum.
26. Holiday pay. Mr Warda was employed for 178 days, the equivalent of 0.49 of a year. He was therefore entitled to holiday pay for 13.65 days, a sum of £762.38, which the respondents are ordered to pay him.
27. Notice pay. Mr Warda was employed for less than 2 years and as such is entitled to one week's notice. He was not paid this. A week's pay is £279.26 which the respondents are ordered to pay to him.
28. Under s. 38 of the Employment Act 2002, where an employer has failed to give the employee written terms and conditions of employment in accordance with s.1 of the Employment Rights Act 1996 at the time of the commencement of the claim, I can order the employer to pay to the employee either 2 or 4 weeks' gross pay. I consider in this case it is appropriate to award the higher figure as it appears to be a pattern of behaviour to deny the claimants knowledge of their statutory rights. The respondents are therefore ordered to pay to the claimant Mr Warda the sum of £1209.44.

Ms Szymura

29. Ms Szymura found work quickly but was made redundant in mid-June. She obtained work through an agency and then went self-employed. Although she sought to recover loss of earnings for 6 months, I did not consider that that was a realistic time frame. She clearly found work easily when first unemployed. She should have been able to find work in the area within 3-4 months of ceasing to work for the respondents. I limited her loss of earnings to 1 September 2016.
30. Allowing for what the claimant has now been ordered to receive from her first employer post the respondents, (she had to issue proceedings to be paid) she sought to recover 9 weeks' pay @ £277.86, a sum of £2500.74. Her reduction in pay during the time she was self-employed was £27.86 for a period of 4 weeks, a sum of £111.44. The respondents are ordered to pay to Ms Szymura the sum of £2612.18 as compensation for the unfair dismissal.
31. Like Mr Warda, Ms Szymura is entitled to one week's notice pay, a sum of £277.86, to be paid by the respondents
32. Holiday pay. Like Mr Warda, Ms Szymura is entitled to 13.65 days' holiday pay. She was paid £277.86 net. She is entitled to the sum of £758.82 holiday pay. The respondent is ordered to pay this sum to her.

33. S38 award. For the same reasons set out in para. 28 above I award Ms Szymura 4 weeks' gross pay, £301.21, a sum of £1204.83.

Employment Judge J Hill

Date: 07/02/2017

Judgment and Reasons
sent to the parties on: 16/02/2017

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For the Tribunals Office