Case Number: 3200989/2017

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EMPLOYMENT TRIBUNALS

Claimant:	**Mr M Hussain**
Respondent:	**Sumofresh Limited**
Heard at:	**East London Employment Tribunal**
On:	**15 December 2017 and (in chambers) 18 December 2017**
Before:	**Employment Judge C Lewis**
Members:	**Mr P Quinn** **Mr L O'Callaghan**

Representation:

Claimant:	In person
Respondent:	Miss Esther Godwins (Employment Consultant)

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:-

1. **The Claimant was dismissed for asserting his statutory right to paid holiday under the Working Time Regulations 1998 and that dismissal was automatically unfair under Section 104 Employment Rights Act 1996.**

2. **The Claimant is awarded the sum of £6,035.10 in respect of his unfair dismissal, consisting of a basic award of £260.10. and a compensatory award of £5,775.00.**

3. **The Claimant's claim for breach of contract, the failure to pay notice pay, was agreed by the Respondent in the sum of £769.66 net.**

4. The Claimant is entitled to the sum of £854.09 in respect of outstanding holiday pay.

5. The Claimant is awarded two weeks pay, being the sum of £346.80, in accordance with Section 38 of the Trade Union and Labour Relations (Consolidation) Act 1992 for the failure to provide written particulars of employment.

REASONS

1 The Claimant brought claims of dismissal for asserting a statutory right namely the right to holiday pay and sick pay; failure to pay holiday pay; and breach of contract in respect of notice pay. The Claimant withdrew his claim in respect of statutory sick pay which is a claim over which the Employment Tribunal does not have jurisdiction. The Respondent agreed the claim for notice pay in the sum of £769.66 net.

Procedural Matters

2 The Claimant attended the hearing with a bundle of documents, which included a letter to the Respondents dated 27 May 2017, his dismissal letter, a statement upon which he relied as his evidence together with the contents of his claim form, and numerous other documents including screen shots of copies of rotas for drivers and screen shots of text messages between himself and Mr Gerai, a Director of the Respondent and a calculation of the amounts that he was claiming in respect of his claim before the Tribunal.

3 The Respondent, represented by Ms Godwins, appeared without any statements, a bundle or any documents whatsoever. Ms Godwins who was instructed by Regal Law described herself as an Employment Consultant practising out of Law Lane Chambers. The representative on the record as acting for the Respondent and who had been corresponding with the Tribunal was Nouman Hafiz of SKOLARS, Ms Godwins confirmed that she had been instructed by Mr Nouman Hafiz of Regal Law and that he was the same Mr Hafiz. The Notice of Hearing was sent to the parties on 24 August 2017. Mr Skolars was notified on 12 December that the panel was sitting as a Tribunal of 3 and that additional copies of any documents would be required. The Claimant confirmed that he had provided the Respondent with a copy of his document "What I am claiming" by dropping it around in person, he provided Ms Godwins with a copy of the HMRC holiday entitlement calculator and that the remaining documents that were already in the possession of the Respondent, save for a copy of the driver's rota.

4 Mr Gerai had documents that he contended were relevant for the Respondent's case but these were only on his phone. After a short adjournment it was agreed by the Tribunal by Mr Gerai should be allowed to email the documents to the Tribunal, they would then be printed off and copies provided. The document provided was a summary of the accounts for the year ending 28 February 2017 and a copy of a VAT statement of accounts with HMRC dated 4 December 2017.

5 When the hearing reconvened the Respondent confirmed that they agreed the Claimant's claim for notice pay, the gross figure being £781.88 the net figure came to

£769.66.

The Issues

6 The issues the Tribunal had to decide were (1) whether the Claimant was unfairly dismissed for asserting a statutory right; the Respondent says the primary reason for his dismissal was a downturn in business and the secondary reason was his disruptive conduct towards other employees and customers; and (2) whether the Claimant was entitled to any outstanding holiday pay (3) whether the Claimant was owed notice pay..

7 The Respondent had not provided a written statement apart from that attached to the ET3, this was in the form of a statement from Mr Gerai and contained a statement of truth which was signed and dated by him. This was taken by the Tribunal as being his evidence-in-chief and Mr Gerai gave further evidence as to the contents of documents he had produced and was asked questions by the Claimant and by the Tribunal. The Claimant was cross-examined by Ms Godwins and also asked questions by the Tribunal. Having heard the evidence from both parties the Tribunal made the following findings of fact.

Findings of Fact

8 There was a dispute as to the relevant dates of employment for the Claimant however it was agreed by both parties that he did not have two years qualifying period for an ordinary unfair dismissal claim. His claim was for automatically unfair dismissal for asserting a statutory right and that the two year qualifying period does not apply. The Tribunal found having heard evidence from the Claimant that he had started to work for the Respondent as a delivery driver from 1 July 2015 and worked until 31 July 2015 when he had a car accident, somebody ran into his car outside of the Respondent's restaurant, and his car was then off the road for some two months. At first it was understood that he would only be off for a week or so and he would be going back to work once his car was repaired but when it became apparent that the repairs would take longer he was issued with a P45 by the Respondent and he claimed job-seekers allowance. Once the car was repaired, after some two months, he went back to the Respondent and asked for his job back and was re-employed. We find on the basis of that evidence that there was a break in employment and that his continuous employment for the purposes of our later calculations starts from 1 October 2015. He was then employed until 5 May 2017 when he was dismissed by Mr Gerai.

9 The Claimant provided a schedule of the hours that he had worked, what he had been paid and the rate of pay for every two weeks during his employment and we accept that that is an accurate account of his hours and pay.

10 Having heard both the Claimant and Mr Gerai giving evidence we are satisfied that where there is a direct conflict in their accounts we prefer the evidence of the Claimant. He has been consistent throughout and his evidence before us was consistent with his letter to the Respondent dated 27 May shortly after his dismissal and the text messages between himself and Mr Gerai at the time. We accept that the Claimant raised the question of holiday pay with Mr Gerai on a number of occasions during his employment and that Mr Gerai's response was that the Respondent did not pay holiday pay. We also accept that the Claimant spoke to Adam Russell, who was a shareholder in

Sumofresh Limited, on Sunday 30 April 2015 and informed him that Mr Gerai was denying him his statutory rights by denying him holiday pay and sick pay for nearly two years and that he was thinking of going to an Employment Tribunal if the Respondent refused to pay holiday pay and sick pay any longer. We accept he also reminded Mr Russell of his obligations as a shareholder of Sumofresh Limited and that he and the other shareholders and Directors would be held accountable for their dereliction of their duties towards employees of Sumofresh Limited. We accept that Mr Russell replied by telling him he thought Mr Gerai was paying him holiday pay, and the Claimant told him that Mr Gerai had repeatedly refused to pay for nearly two years. We also accept that the Claimant spoke to the staff who were in the office namely Imran and Monica on Thursday 4 May 2017 and told them that he was going to take Sumofresh to a Tribunal over his holiday pay as was right by law.

11 It was not disputed by Mr Gerai that he called the Claimant into the office on Friday 5 May and dismissed him. The Claimant's account was that Mr Gerai told him "there will be no more work for you". Mr Gerai put it slightly differently and said that he explained that he was making him redundant due to a downturn in work. There was some agreement between both parties however that the Claimant was told that he would be paid 30 days notice pay during that conversation.

12 Mr Gerai gave different accounts as to when he asked the accountant to calculate the holiday payments outstanding to the Claimant. At one point he told us that it was after the meeting on 5 May, but later in his evidence he said it was after a conversation with Mr Russell when Mr Russell informed him that the Claimant was complaining that he had not received his holiday pay. We note that Mr Gerai accepted that Mr Russell had raised that with him but he denies that Mr Russell said anything about the Claimant threatening to take Employment Tribunal proceedings. In substance he accepted that the Claimant had raised the failure to pay holiday pay with Mr Russell and Mr Russell had then raised it with him.

13 The Respondent had put the summary of their accounts up to February 2017 in evidence in support of its contention that there had been a reduction in business and that was the principal reason for the Claimant's dismissal. The Respondent's letter dated 5 May 2017 confirming the Claimant's dismissal states the reason as follows, "… due to substantial reduction in deliveries we do not require as many delivery drivers as we have. Considering our requirements we would like to advise you that we no longer require your services". The next paragraph states, "Our decision also on the basis that during the last several months we had several complaints from other employees about your disruptive behaviour which is causing unsettlement between our employees. We have discussed these complaints with you on various occasions but you refuse to change your behaviour with other members of staff". There is no reference in that letter to any complaints from customers.

14 In his evidence Mr Gerai referred to complaints from customers but when asked what those complaints consisted of he was only able to refer to one complaint which he then admitted was in fact from nine months ago. We accept the Claimant's evidence that he had not been spoken to about complaints from other members of staff, he accepted that there would sometimes be arguments or heated discussions between the kitchen staff and the drivers, and among the drivers, but that this was the same for all drivers. We are satisfied after considering Mr Gerai's evidence that the reference to disruptive behaviour

is in fact a reference to his raising his entitlement to holiday pay.

15 We accept that there had been some downturn in business and that Mr Gerai had formed the view that rather than reduce the hours for all the drivers, and thereby risk losing more of the drivers due to dissatisfaction with their reduced hours, he would reduce the number of drivers. Mr Gerai told us that he made other reductions in staff to bring down staff costs, including reducing the number of chefs in the kitchen. We find from the rotas that were produced by the Claimant that the number of drivers reduced in the weeks following the Claimant's dismissal from 8 – 7, and that not all of the Claimant's hours were reallocated. There was a reduction in the total number of drivers' hours of approximately 10 percent during the first week following the Claimant's dismissal and then further 7 percent the week after that. From the evidence before us we accept that there was a reduction in the number of hours required in respect of delivery drivers.

16 Mr Gerai explained that he had chosen the Claimant because he was giving him a headache. We are satisfied, having heard the evidence from Mr Gerai and from the Claimant, that there were often disputes between drivers and the kitchen and there was nothing unusual about that: that was not reason for selecting the Claimant to be dismissed. We are satisfied from the totality of the evidence that the principal reason that the Claimant was considered to be a headache was his repeated requests for his paid holiday. Mr Gerai accepted that the Claimant had made such requests to Mr Russell. He also accepted that he had had a conversation with the Claimant about his holiday in Romania in which the Claimant had asked about his holiday pay. We also find that the Claimant raised his complaints with Monika and Imran.

Relevant law – dismissal for asserting a statutory right

17 Section 104 of the Employment Rights Act 1996 provides :-

> (1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee –
>
> …
>
> (b) alleged that the employer had infringed a right of his which is a relevant statutory right.
>
> …
>
> (4) The following are relevant statutory rights for the purposes of this section –
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> …
>
> [(d) the rights conferred by the Working Time Regulations 1998 …]

Section 105 of the Employment Right Acts 1996 provides:

> (1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if –

(a) the reason 9or if more than one, the principal reason) fro the dismissal is that the employee was redundant,

(b) it is shown that the circumstances constituting the redundancy applied equally to one or more other employees in the same undertaking who held positions similar to that held by the employee and who have not been dismissed by eth employer, and

(c) it is shown that any of subsections [(2A) to [(7N)] applies]

…

[(7A) This subsection applies if the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was one of those specified in subsection (1) of section 104A read with subsection (2) of that section).]

Conclusions

Unfair dismissal

18 We do not find that it is a coincidence the Mr Gerai decided it was the Claimant who was going to be dismissed only a day after he mentioned taking Tribunal proceedings to two members of staff and in the week following his raising the matter with Mr Russell. We are satisfied that the Claimant had asserted that he had a statutory right to paid holiday and that this was the principal reason for his selection for redundancy and for dismissal.

Breach of contract

19 We do not find that the Respondent's description of what took place in the meeting as set out in the letter dated 5 May was an accurate description. We accept the Claimant's evidence that he did not receive that letter until 17 May and that the figures set out in it calculating his holiday pay entitlement must have come from the accountant so would not have been available on 5 May. We find that is consistent with the evidence Mr Gerai gave in respect of who would be responsible for calculating holiday pay and other payments. However, that letter does contain confirmation that the Claimant would be given 30 days notice of his employment and that we find was a formal agreement between the Respondent and the Claimant on which he is entitled to rely.

Written Particulars of Employment

20 The Claimant gave evidence that he was never provided with a contract or any documents setting out the written particulars of his employment. The Respondent disputed that evidence. Mr Gerai asserted that a contract was provided on appointment which would have set out his entitlement to notice and hence the 30 days notice that was provided. Having heard the evidence we are satisfied that no contract was provided to the Claimant nor any document setting out his written particulars of main employment terms and conditions; none has been produced before the Tribunal despite the Respondent being represented. The document would clearly be relevant to the claim for holiday pay before us. Had there been a written contract Mr Gerai would not have been able to refuse

to pay holiday pay in the way that he did.

Holiday pay

21 Ms Godwins did not dispute that the Working Time Regulations 1998 applied in this case. We are satisfied that in the circumstances the Claimant was prevented from taking paid holiday throughout the duration of his employment. His numerous requests for paid holiday were ignored and he was unable to afford to take all his holiday entitlement. We find that at his dismissal he had holiday pay outstanding from the previous holiday year.

Remedy

Unfair dismissal

Polkey

22 We have addressed our minds to whether the Respondent would have dismissed the Claimant fairly in any event. We reminded ourselves that we must have regard to any material and reliable evidence that might assist in fixing a just and equitable compensation even if there are limits to the extent to which we can confidently predict what might have been and we appreciate the degree of uncertainty is an inevitable factor of the exercise *(Software 2000 Ltd v Andrews [2007] ICR825, EAT)*. We are satisfied that there was a downturn in business to some degree and that there was a reduced number of hours for drivers. There were 8 drivers at the time of the Claimant's dismissal and we find that it would be just and equitable to reduce his compensation by 1/8 to reflect the chance that he would have been selected had a fair procedure been followed.

Mitigation

23 The Claimant's told us that he would have remained in employment for a further three years until the date of his retirement; that he had taken steps to mitigate his losses by finding other driving work but that the nature of work that he can do was limited by his health and his age. This evidence was unchallenged and no issue was taken by the Respondent in respect of his attempts to mitigate his losses. The Claimant will soon be 61 years old, he is an insulin dependent diabetic, he suffers from angina, osteoarthritis and diabetic neuropathy. He found work of a similar nature but can only be offered 12 hours a week by this new employer; he is paid £7.50 an hour, his ongoing losses are 11 hours a week , which amounts to £82.50 per week.

24 The Claimant had sought three years loss of earnings. We are satisfied that it was reasonable for him to take the offer of 12 hours per week. He started his new job within one month of his dismissal. We find that continues to be reasonable up to the date of this hearing and for a further year after which time we find that the Claimant ought to be able to further mitigate his loss by finding an additional job or a job with more hours.

Basic award

25 The Claimant had one complete year's employment at the date of dismissal in

which he was not below the age of 41. He is entitled to a basic award of 1 ½ week's pay. 1.5 x £173.40 = £260.10.

Compensatory award

26 We award the Claimant his losses from 6 June to the date of the hearing and then into the future for one year at £82.50 a week. The period from date of dismissal on 5 May 2017 to date of the hearing 19 December 2017 is 28 weeks; 28 x £82.50 = £2,110.00. The award for future loss is 52 weeks at £82.50 a week = £4,290.00 The total loss being £6,600.00 less the *Polkey* reduction of 12 ½ percent (1/8) which is £825. The total compensatory award is £5,775.00. This amount is less than the statutory maximum applicable in this case which is £9,016.80 (52 weeks x the Claimant's week's pay of £173.40).

Uplift for failure to follow ACAS Code

27 We considered whether there should be an uplift for failure to follow the relevant Acas Code. We have found that there was no attempt to follow any procedure in this case. However, we remind ourselves that the Acas code specifically does not cover a redundancy dismissal. The Respondent raised the Claimant's failure to appeal the decision to dismiss but we are satisfied that he cannot fairly be criticised for that: he was not given the benefit of any procedure or indeed notified of any right of appeal. In the circumstances we do not find it appropriate to make any adjustments for failure to follow the Acas code.

Failure to provide Written Particulars of Employment

28 Having found that there was a failure to provide written particulars to the Claimant we considered whether to award two or four weeks pay in accordance with Section 38 of the Trade Union and Labour Relations (Consolidation) Act 1992. Taking into account the size and nature of the employer we are satisfied that two weeks' pay is the appropriate award: two weeks at £173.40 is £346.80.

Notice pay

29 The Respondent conceded the claim for notice pay in the sum of £769.66.

Holiday pay.

30 We are satisfied that this is a case where the Claimant has been prevented from taking paid holiday throughout his employment: due to the denial of that right by his employer. Following the decision of *King v Sash Windows Workshop Ltd ECJ, November 2017* we find that the Claimant is entitled to his outstanding holiday pay for the duration of his employment (that employment being less than the two years which is the maximum provided for under the Regulations). We have calculated the holiday pay in the following amounts.

31 The Respondent and Claimant agreed he worked 23 hours on average per week. We are unable to accept the Claimant's calculations for his holiday pay, these include the

dates of his previous period of employment with the Respondent. We have calculated his outstanding holiday pay entitlement as follows:

> (2) For the period from 1 October 2015 to 31 September 2016 (52 weeks):
>
> 23 hours a week gives him an entitlement of 120 hours and 48 minutes for that year, which falls to be rounded up to 121 hours, at his current rate of pay, of £7.50 per hour entitles him to £967.50 in outstanding holiday pay for that holiday year.
>
> (2) His holiday entitlement from 1 October 2016 to 5 June 2017 (the end of his notice period) is 87 ½ hours multiplied by his hourly rate £7.50 an hour which gives the sum £756.25.
>
> The total holiday pay entitlement is therefore £1,623.75 less the amount paid by the Respondent on termination of employment which was £769.66, this leaves the sum of £854.09 outstanding and that is the sum to which we find that the Claimant is entitled.

Penalty under Section 12A of the Employment Tribunals Act 1996

32 We considered that there were aggravating features in this case; there was a complete denial of the Claimant's entitlement to holiday pay and on top of that a dismissal for asserting the statutory right to that holiday pay. We considered whether to award a penalty against the Respondent, however given the Respondent's evidence in respect of its financial position and its ability to pay we have decided that it would not be just and equitable to order the Respondent to pay a penalty. We are concerned that if we did make such an order this might reduce the prospects of the Claimant receiving the amounts which we have awarded to him and to which we have found he is entitled.

Employment Judge Lewis

15 January 2018