

Case Numbers: 1402595/2018, 1402596/2018, 1402597/2018, 1402597/2018, 1402598/2018, 1402599/2018, 1402600/2018, 1402601/2018, 1402602/2018, 1402603/2018, 1402603/2018, 1402604/2018, 1402605/2018, 1402606/2018 & 1402607/2018



EMPLOYMENT TRIBUNALS

**Claimants: Mr A Sterry, Mr C Bluett, Mr RB Pudge, Mr P King,
Mr B Marangon, Mr O Williams, Mr P Morgan,
Mr P Bridgewater, Mr K Robinson-Elliott, Mr A Frowen,
Mr R Walter, Mr C Moran & Mr I James**

**Respondents: Dean Engineering Limited (1)
Fortis Technical Limited (2)**

Heard at: Bristol

On: 13 November 2018

Before: Employment Judge Maxwell

Representation

Claimant: Mr Evans, CAB Representative

Respondent: no attendance

RESERVED JUDGMENT

1. The claimants' claims for redundancy payments from the first respondent are well-founded and succeed to the following extent:
 - 1.1. Mr Sterry, Mr Bluett, Mr King, Mr Marangon, Mr Williams, Mr Morgan, Mr Walter and Mr James are each entitled to the sum shown in the schedule attached to the judgment;
 - 1.2. Mr Pudge, Mr Bridgewater, Mr Robinson-Elliott, Mr Frowen and Mr Moran are not entitled to redundancy payments.
2. The claimants' claims for unlawful deductions of wages are well-founded and succeed, with each being entitled to the sum shown in the schedule attached to this judgment.

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3. The claimants claims for accrued untaken annual leave due from the first respondent are well-founded and succeed to following extent:
 - 3.1. Mr Sterry, Mr Bluett, Mr Pudge, Mr King, Mr Marangon, Mr Williams, Mr Bridgewater, Mr Robinson-Elliott, Mr Frowen, Mr Walter, Mr Moran and Mr James are each entitled to the sum shown in the schedule attached to the judgment;
 - 3.2. Mr Morgan is not entitled to a payment for accrued untaken annual leave.
4. The claimants' claims for breach of contract with respect to notice pay are well-founded and succeed, with each being entitled to the sum shown in the schedule attached to this judgment.
5. The claimants' claims of unfair dismissal by the first respondent are well-founded and succeed, with no monetary award being made.
6. The claimants' claims against the second respondent are dismissed.

REASONS

7. The claimants bring claims for:
 - 7.1. redundancy payments;
 - 7.2. unlawful deduction of wages;
 - 7.3. notice pay;
 - 7.4. accrued untaken annual leave.
 - 7.5. unfair dismissal;

Evidence

8. I was provided with a bundle of documents, including the claimants' written statement of remedy, setting out the various sums they sought, how this was calculated and relevant data such as start dates, hours of work and rate of pay. Mr Sterry, Mr Bluett and Mr Marangon provided written witness statements. Each of the claimants (including those who had not made written statements) gave oral evidence.

Facts

Background

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9. The claimants in this case were all formerly employed by Dean Engineering Limited (“DEL”). The first respondent business was engaged in precision engineering, toolmaking, the manufacture of jigs, fixtures and other equipment.
10. In about April 2017, the shares in DEL were sold to Fortis Technical Limited (“FTL”). The claimants say that the shares in FTL are owned (either entirely or mainly) by Mr Raymond Dyer and Mr Jeremy Keck. As part of the sale and purchase agreement, Mr Dyer became a director of DEL.
11. On 9 May 2018, DEL held an “at risk of redundancy” meeting. A letter was provided that day instructing employees not to attend for work.
12. The claimants all received letters on 21 May 2018 informing them of immediate dismissal for redundancy, with the result they were summarily dismissed that day.
13. The business was closed, the plant and equipment it utilised was, thereafter, sold off. Whilst DEL appears as ‘active’ on Companies House, it is no longer carrying on the business in which the claimants were employed.

Claimants

14. With a small number of exceptions, the claimants worked a 39-hour week, comprising 8.5 hours Monday to Thursday and 5 hours on Friday.
15. On 8 April 2018, the claimants were due to be paid for the period 1 to 31 March, but received nothing.
16. On 10 April 2018, a part-payment in the sum of £400 was paid to each claimant for March.
17. On 13 April 2018 all the claimants, save for Mr Sterry, received the balance of wages due for March. Taking into account all of the payments made up to that point, Mr Sterry had received half of what was due to him for his wages and nothing for the reimbursement of travel expenses.
18. The claimants received no payment whatsoever for the period 1 to 30 April 2018.
19. The claimant’s received no payment whatsoever for the period 1 to 21 May 2018.
20. The schedule attached to this judgment summarises my findings of fact with respect to the claimants’:
 - 20.1. date of birth;
 - 20.2. start date of employment;

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- 20.3. weekly and hourly rates of pay (gross), together with the hours they worked each week;
 - 20.4. weekly and hourly rates of pay (net);
 - 20.5. the hours they worked in the period from 1 April to 21 May 2018 and the amount of pay they were due in this regard;
 - 20.6. the balance of accrued annual leave after deducting that which they took in the period 1 January to 21 May 2018 (DEL's annual leave year ran from 1 January to 31 December);
 - 20.7. The amount of notice they were entitled to.
21. Because Mr Sterry's position with respect to unpaid wages is somewhat more complex, I set-out my findings below:
- 21.1. he was a salaried employee on £36,000 per annum;
 - 21.2. equating to gross pay of £3,000 per month or £692.31 per week;
 - 21.3. and net pay of £2,321.89 per month or £535.82 per week;
 - 21.4. having received only half his salary for March 2018, a net balance of £1,160.95 remained due;
 - 21.5. having received nothing for April 2018, a net balance of £2,321.89 remained due;
 - 21.6. for the period 1 to 21 May 2018, a net balance of £1,572.89 remained due (being 21/31 x £2,321.89);
 - 21.7. unpaid expenses (mileage) remained due:
 - 21.7.1. £260.55 for March 2018;
 - 21.7.2. £630.90 for April 2018;
 - 21.8. Total unpaid: £5,947.18 (being £1,160.95 + £2,321.89 + £1,572.89 + £260.55 + £630.90)

Law

Unlawful Deductions

22. Section 13(1) and (3) of the **Employment Rights Act 1996** ("ERA") provides:
- (1) **An employer shall not make a deduction from wages of a worker employed by him unless-**

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(a) the deduction is authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

Redundancy

23. As to redundancy, ERA section 139 provides:

“(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to...

(b) the fact that the requirements of that business--

(i) for employees to carry out work of a particular kind, or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish.”

Unfair Dismissal

24. As to a fair redundancy selection process, guidance was provided by the EAT in **Williams v Compair Maxam [1982] IRLR 83**, Browne-Wilkinson J presiding set-out principles of good practice:

“1. The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.

2. The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.

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3. Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.

4. The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.

5. The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment.”

WTR

25. Regulation 13 of the Working Time Regulations 1998 (“WTR”) provides that a worker is entitled to 4 weeks’ paid annual leave, subject to the qualification at 13(9), which does not allow for the rollover of untaken leave from one year to the next or the payment of monies as an alternative to taking leave:

(9) Leave to which a worker is entitled under this regulation may be taken in instalments, but –

(a) it may only be taken in the leave year in respect of which it is due, and

(b) it may not be replaced by a payment in lieu except where the worker’s employment is terminated.’

26. There is a right to additional annual leave of 1.6 weeks under WTR regulation 13A.

27. The prohibition on payment as an alternative to taking leave is subject to an exception in the final year of employment, in which payment will be due on termination for any accrued untaken annual leave. Pursuant to WTR regulation 14:

(1) This regulation applies where –

(a) a worker’s employment is terminated during the course of his leave year, and

(b) on the date on which the termination takes effect (“the termination date”), the proportion he has taken of the leave to which he is entitled in the leave year under [reg. 13] and [reg. 13A] differs from the proportion of the leave year which has expired.

(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3) ...’

Conclusion

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Correct Respondent

28. In his closing argument, Mr Evans conceded that, for the reasons given previously by EJ Ford QC, the claimants claims could only proceed against DEL.
29. Irrespective of the concession made, FTL is not a proper respondent to these claims. The claimants were all employed by DEL. The fact of the ownership of their employer changing hands in 2017 or that Mr Dyer was a director of both DEL and FTL, does not affect the identity of their employer and the correct respondent theses proceedings.
30. The claimant's claims, as against the second respondent, are dismissed.

Redundancy Payment

31. The claimants were all dismissed for the reason of redundancy. The requirements of the respondent business for employees to carry out work of the particular kind the claimants did had ceased, on account of the business being closed.
32. As at the termination of their employment on 21 May 2018, the following claimants had more than 2 years' continuous employment and were entitled to a redundancy payment:
 - 32.1. Mr Sterry;
 - 32.2. Mr Bluett;
 - 32.3. Mr King;
 - 32.4. Mr Marangon;
 - 32.5. Mr Williams;
 - 32.6. Mr Morgan;
 - 32.7. Mr Walter;
 - 32.8. Mr James.
33. The amount of the redundancy payment due has been calculated using the statutory formula and my findings are set-out in the schedule attached to this judgement.

Unpaid Wages

34. All of the claimant's received less than was properly payable:

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34.1. none of the claimants were paid at all for the period from 1 April to 21 May 2018 and to this extent received less than was properly payable;

34.2. additionally, Mr Sterry received only half of the pay due to him for March 2018 and none of the expenses due for either March or April 2018 and to this further extent he received less than was properly payable.

35. My findings as to the hours unpaid and amounts due to the claimants in this regard are set-out in the schedule attached to this judgment and were arrived at by the following method:

35.1. hours for the period 1 April to 21 May x net hourly rate of pay.

Annual Leave

36. In the case of each claimant, save for Mr Bridgewater, the proportion of the annual leave year which had expired as at the date of their dismissal was 141/365. That factor, when applied to the 5.6 weeks annual leave under WTR (Regulations 13 & 13A) produces an entitlement of 2.16 weeks. For the many claimants who worked 39 hours per week, the starting point in their cases would be an entitlement to 84.37 hours (being 2.16 x 39 hours). Although he was salaried, Mr Sterry agreed that his entitlements should be calculated on the basis of a notional 39 hour week.

37. My findings as to the balance of leave and sum due in this regard are set-out in the schedule attached to this judgment and were arrived at by the following method:

37.1. normal weekly working hours x 2.16;

37.2. deducting the annual leave actually taken in the period 1 January to 21 May 2018 gives the balance of hours owed;

37.3. hours owed x net hourly rate of pay gives the sum due.

38. Mr Bridgewater did not commence his employment until 19 February 2018. The period to 21 May 2018 was 92 days. The calculation in his case was:

38.1. $92/365 = 0.25$;

38.2. $0.25 \times 5.6 \text{ weeks} = 1.4 \text{ weeks}$;

38.3. $1.4 \times 39 = 54.6 \text{ hrs}$;

38.4. less 22 hours taken in the period;

38.5. 32.6 hours accrued untaken annual leave;

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38.6.32.6 x £9.49 = £309.37.

Notice Pay

- 39. The claimants were all summarily dismissed on 21 May 2018. In no case was the respondent entitled to dismiss without contractual notice. Accordingly, the claimants' dismissals were in breach of contract. They are each entitled to damages, being the pay they would have received in their statutory notice periods.
- 40. My finding as to the sum due in each case is set-out in the schedule attached to this judgment.

Unfair Dismissal

- 41. Whilst dismissal was for a potentially fair reason, namely redundancy, dismissal on that ground was unfair. The respondent gave little warning and did not engage in any meaningful consultation with the claimants about their potential dismissal on this ground. Accordingly, their dismissals were unfair with ERA section 98(4).
- 42. I make no award under this heading. The claimants may not recover both a redundancy payment and a basic award. Furthermore, no compensatory award can properly be made in this case. Given the closure of the business, fair consultation would not have resulted in the employment of the claimants being extended for any longer period; they would have been dismissed in any event. As such, they have suffered no loss of earnings or any other financial loss which would not otherwise have occurred.

Employment Judge Maxwell

Date: 14 November 2018

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE