



EMPLOYMENT TRIBUNALS

Claimant: Mr G Butler

Respondent: WTG Wing Shooting Ltd

Heard at Mold **On:** 7 November 2018

Before: Employment Judge R McDonald

Appearances

For the Claimant: Mr Winrow (Citizens Advice)

For the Respondent: Not in attendance or represented

JUDGMENT

The Judgment of the tribunal is as follows:

1. The claimant's claim that he was unfairly dismissed succeeds.
2. The claimant's claim that the respondent breached his contract by:
 - a. failing to give him the notice required under his contract when it dismissed him ("the notice pay claim")
 - b. failing to pay the claimant a bonus of £4000 ("the bonus claim")
 - c. failing to pay the claimant expenses due under his contract ("the expenses claim")

all succeed.

3. The claimant's claim that the respondent made unlawful deductions from his wages by failing to pay his accrued holiday pay entitlement ("the holiday pay claim") succeeds.

4. The claim that the respondent made unlawful deductions from the claimant's wages by not paying his wages in full for January, February and part of March 2018 ("the wages claim") succeeds.
5. The respondent's counter claims in relation to damage to the company vehicle and overconsumption of oil fail.
6. The respondent shall pay the claimant by way of remedy for the successful claims a total of £12,899.79 made up of:
 - a. Compensation for the unfair dismissal:
 - i. A basic award of £2208.00
 - ii. A compensatory award of £577.39
 - b. In relation to the notice pay claim: £1419.39
 - c. In relation to the bonus claim: £4000
 - d. In relation to the expenses claim: £618.52
 - e. In relation to the holiday pay claim: £1366.82
 - f. In relation to the wages claim: £2709.67.

These figures are gross of any tax or national insurance. Any responsibility for any tax due on these is the claimant's and not the respondent's.

REASONS

1. The claimant claimed that the respondent company, which is his former employer, unfairly dismissed him and also failed to make various payments due to him.
2. The claimant was represented by Mr Winrow of Citizens Advice Gwynedd.
3. The respondent did not attend the hearing. Rule 47 of the Employment Tribunal Rules of Procedure 2013 deals with non-attendance by a party. It says that:

"If a party fails to attend or to be represented at the hearing, the Tribunal may dismiss the claim or proceed with the hearing in the absence of that party. Before doing so, it shall consider any information which is available to it, after any enquiries that may be practicable, about the reasons for the party's absence."

4. I asked the clerk to check whether the respondent intended to attend. The tribunal office in Cardiff contacted Avensure Ltd who represent the respondent. Mr Hendley from Avensure Ltd confirmed that the respondent would not be attending the hearing due to it being insolvent. Mr Winrow showed me on his mobile phone an email to the tribunal from Avensure Ltd saying the same thing.
5. In those circumstances I heard the case in the respondent's absence. I heard brief evidence from the claimant and Mr Winrow helpfully clarified how the various elements of the claim had been calculated. I've set out below my findings of fact. In making those findings I took into account the claimant's evidence and the evidentiary documents in the 86 page bundle of documents prepared by Mr Winrow. In this judgment I've referred to it as "the bundle" and references to page numbers in this judgment are to pages in it. I reserved my judgment.

The issues in the case

6. There was no agreed list of issues. Based on the Claim Form and discussions with Mr Winrow the issues I had to decide were as follows:
 - a. Was the claimant unfairly dismissed? ("the unfair dismissal claim")
 - b. Did the respondent breach the claimant's contract of employment by:
 - i. failing to give him the notice required under his contract when it dismissed him ("the notice pay claim")
 - ii. failing to pay the claimant a bonus of £4000 ("the bonus claim")
 - iii. failing to pay the claimant expenses due under his contract ("the expenses claim")
 - c. Did the respondent fail to pay the claimant pay in lieu of holiday accrued but untaken at the time of dismissal ("the holiday pay claim")
 - d. Did the respondent make unlawful deductions from the claimant's wages by:
 - i. failing to pay in full the basic wages due to him in January and February 2018 ("the basic wages claim")
 - ii. failing to pay the £600 "housing allowance" in January and February 2018 ("the "housing allowance" claim")
 - e. Did the respondent have valid counter-claims for breach of contract by the claimant for:
 - i. damage to the company vehicle he used ("the vehicle claim")
 - ii. excessive use of oil at the property he occupied ("the oil claim").

The relevant law

The unfair dismissal claim

7. S.94 of the Employment Rights Act 1996 (ERA) gives qualifying employees the right not to be unfairly dismissed by their employer. The claimant was a qualifying employee.
8. For there to be an unfair dismissal there has to be a dismissal. Where it is disputed that there has been a dismissal, the burden of proof is on the employee to show, on the balance of probabilities, that there was a dismissal.
9. There is a dismissal where the employer terminates the contract of employment (s.95(1)(a)). Section 95(1)(c) of the ERA provides that it is also a dismissal (known as a constructive dismissal) where:
 “...the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer’s conduct.”
10. In order to claim constructive dismissal, the employee must establish that:
 - a. there was a fundamental breach of contract on the part of the employer
 - b. the employer’s breach caused the employee to resign
 - c. the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.
11. S.98(1) of the Employment Rights Act 1996 (ERA) provides that it is for the employer to show the reason (or if more than one the principal reason) for dismissal and that it is a potentially fair reason within s.98(2) ERA or some other substantial reason such as to justify dismissal of an employee holding the position which the employee held.
12. Where an employer fails to show a potentially fair reason for dismissal, a tribunal is not obliged to ascertain the real reason for dismissal if there is insufficient evidence to do so: **Hertz (UK) Ltd v Ferrao – UKEAT 0570/05**. This essentially means that the dismissal, if shown, will be unfair because no potentially fair reason for dismissal has been given.
13. If a tribunal finds a dismissal was unfair the claimant is entitled to a basic award calculated by reference to his age at dismissal; length of service and gross weekly pay. It can also make a compensatory award of “such amount as the tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the complainant in consequence of the dismissal” (s.123(1) ERA).

The notice pay claim

14. The minimum notice an employer must give to terminate an employee's contract will be that set out in their contract of employment, as long as that entitlement is not less than the minimum notice periods set out in s.86 ERA. In this case, the minimum notice required by s.86 would be 4 weeks because the claimant had been employed for between four and five years.
15. Entitlement to pay during notice is governed by the employee's contract of employment. There is only a right to the pay and benefits set out in the contract.
16. If an employee is dismissed in breach of contract the tribunal can award compensation for the loss resulting from the breach. That award will usually be for the amount the employee would have earned during the notice period. Because the award is compensatory, the employee is under a duty to mitigate and has to give credit for any salary and other benefits earned during the loss period.

The claims for failures to pay wages, bonus and expenses

17. Section 23(1) of ERA gives workers the right to complain to an employment tribunal that an employer has made an unlawful deductions from wages. Wages is defined at s.27 and excludes expenses and benefits in kind.
18. In terms of time limits, s.23(4) says that "an employment tribunal shall not consider a complaint under s.23 unless it is presented before the end of the period of three months beginning with – (a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made....(3) Where a complaint is brought under this section in respect of – (a) a series of deductions or payments..... the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received."
19. An employment tribunal also has jurisdiction to hear a contractual claim brought by an employee, if it arises or is outstanding on the termination of the employee's employment; and seeks one of the following:
 - a. damages for breach of a contract of employment or any other contract connected with employment
 - b. the recovery of a sum due under such a contract
 - c. the recovery of a sum in pursuance of any enactment relating to the terms or performance of such a contract.

20. The time limit for bringing a claim for breach of contract and/or for recovery of a sum due under that contract is within three months of the effective date of termination of the employment. In **Mitie Lindsay Ltd v. Lynch [2003] UKEAT 0034_03_2008** the Employment Appeal Tribunal (EAT) confirmed that that time limit is entirely separate from the time limit for a deduction of wages claim under s.23 ERA. If the claim for a sum due under the contract is still outstanding on the termination of the employee's employment, the employee can bring a contract claim relating to it in the tribunal even if they did not raise a s.23 ERA claim within 3 months of the non-payment. That is relevant to the bonus claim in this case because the bonus related to 2017.
21. As Mr Winrow accepted, certain payments by employers to workers are specifically excluded from the definition of "wages" meaning that a worker can't seek recovery of such payments by bringing an unlawful deduction from wages claim. These include any payment in respect of "expenses incurred by the worker in carrying out his or her employment" (S.27(2)(b) ERA). This means the claimant's expenses claim could not be brought under s.23 as a deduction from wages claim. However, it could be brought as a contractual claim if there was a contractual entitlement to expenses and that claim was outstanding at the termination of the employee's employment.

The holiday pay claim

22. The minimum basic holiday entitlement for a worker is set out in regulation 13 of the Working Time Regulations 1998 ("WTR"). It is 20 days a year with a further 8 additional days a year provided by reg.13A making a statutory minimum of 28 days per year.
23. Reg.14 WTR provides that where a worker's employment is terminated during the course of his leave year and the leave taken is less than the leave accrued during that year, the employer must pay the worker in lieu of accrued but untaken leave. The formula for calculating the pay in lieu due involves calculating the proportion of the leave year which had expired before the "termination date" (reg. 14(3)(b)). The "termination date is defined by reg. 14(1)(b) as "the date on which the termination takes effect".
24. Regulation 16(1) of the WTR says that a worker must receive a week's pay for a week's holiday. A 'week's pay' for these purposes is to be calculated in accordance with Ss.221–224 ERA.

25. A holiday pay claim under WTR reg.14 falls within s.23 ERA: **Revenue and Customs Commissioners v Stringer 2009 ICR 985, HL**. That means the claim has to be brought within three months of the date of the deduction. In the case of payment in lieu for holiday untaken at the date of termination of employment, in this case 6 March 2018.

The employer's counterclaim - vehicle damage and overuse of oil

26. An employment tribunal has jurisdiction to hear a contract claim brought by an employer where the employee has an existing and unresolved tribunal claim.

Findings of fact

27. The claimant was employed by the respondent as a gamekeeper from 1 August 2013.
28. His contract of employment was at pp. 36-41. The following contract terms are relevant to this claim:
- a. His basic salary was £12000 p.a.
 - b. He was also entitled to a house, payment of council tax and water or a £600 allowance ("the housing allowance"). He elected to take the allowance.
 - c. Salaries were paid by BACS on the last working day of each calendar month (para 1 on p.37).
 - d. He was entitled to use of a company vehicle and company phone.
 - e. There was a contractual bonus scheme ("the bonus"). Payment was dependent on meeting conditions set out in the contract at p.36.
 - f. The contract included an entitlement to reimbursement of expenses incurred in the performance of duties (para 2 on p.37). The expenses were to be claimed no more than two months in arrears of being incurred.
 - g. The contractual holiday entitlement was 20 days per annum (para 4 on p.38). The leave year was to be taken in February and March unless exceptional circumstances were agreed. If the claimant left during the holiday year the claimant was entitled to be paid for any untaken accrued holiday pay or required to repay any holiday taken in excess of that accrued to the date of termination.
 - h. There was no company pension scheme (para 5 on p.38).
 - i. The minimum notice period to be given by the respondent to terminate the claimant's employment was 1 month (para 9 on p.39).
 - j. There was no clause in the contract giving the respondent a right to make deductions for damage to the company vehicle or in relation to over-consumption of oil at the property occupied by the claimant.

29. Based on the documents, the claimant's evidence in his statement and in his answers to my questions at the hearing I make the following findings of fact. There was no witness evidence from the respondent but in making my findings I took into account what the respondent said in its response to the claim and in the documents in the bundle.

Holiday entitlement

30. The claimant's holiday year ran from April to March. The claimant's contract entitled him to 20 days holiday which is the minimum basic holiday entitlement under regulation 13 WTR. However, reg.13A WTR also entitles a worker to an additional 8 days holiday. I therefore find that the claimant was entitled to 28 days holiday in every holiday year.

31. The claimant's oral evidence was that he had not taken any holiday in the holiday year April 2017 to March 2018. The respondent in its letter to Mr Winrow on 26 July 2018 refers to the claimant having taken "the holiday month of February". That does seem consistent with what the claimant's contract says, i.e. that holiday would normally be taken in February or March. However, in the absence of any witness evidence from the respondent I accept the claimant's evidence that he had not taken any of his accrued holiday in the year April 2017 to March 2018.

Bonus

32. The claimant was entitled to a bonus of £4000 but payment was outstanding when his employment ended. Although in its letter to Mr Winrow dated 26 July 2018 the respondent denied that the claimant had met the targets entitling him to a bonus that is contradicted by its own email to the claimant dated 19 April 2018 (p.86). That email, from Mr Garton, a director of the respondent confirms that "[the claimant] is owed £4000 bonus for the rearing season 2017)." Although Mr Garton goes on to suggest that the bonus could be offset against the alleged overconsumption of oil by the claimant, he clearly accepts the claimant's entitlement to the bonus.

Expenses

33. When his employment ended the claimant had unpaid expenses of £845.91. In his claim form the claimant had claimed that he was owed £8471.47. In his initial schedule of loss that figure had reduced to £4471.47.

34. The bundle included copies of the claimant's bank statements. Mr Winrow and the claimant had gone through those statements and marked those items of expenses incurred by the claimant. It seemed clear to me that

the items shown could not amount to the figure in the schedule of loss. During the interval in the hearing taken to establish whether the respondent was going to attend Mr Winrow and the claimant went through the expenses figures again. Having done so the claimant confirmed that his evidence was that he was owed £618.52 for expenses in November and early December which he had claimed. He produced a photo of that claim form on his phone. In addition, he identified 6 further expense items incurred in January and February 2018 for which he had not been reimbursed. They amounted to £227.39. A handwritten schedule of these unpaid expenses was handed up by Mr Winrow.

35. In Mr Garton's email at p.86 he says that he is "100% sure all expenses are paid up to date" but that "there may be an expense form to come for Jan and Feb". Mr Garton's email does not mention the expenses claim form for £618.52 for November and December. The claimant's bank statement at p.79 showed two payments of expenses by the respondent on 26 January 2018. One was for £528.24 and the other for £292.29. Obviously neither of those matches the claim for £618.52 for November and December. There was a payment of £600 on 29 December 2017 (p.77) but I accept the claimant's evidence that this was payment of the "housing allowance" for December.

36. In the absence of any sworn evidence from the respondent I accept the claimant's evidence that when his employment ended he had unpaid expenses of £845.91. However, I also find that by the claimant's own evidence, he had not yet made a claim for the expenses incurred in January and February of £227.39. That is relevant to the question of whether the respondent was in breach of contract for failing to pay them, a point discussed below.

Basic wages and "housing allowance"

37. The claimant's evidence was that he did not receive his usual monthly salary of £1000 for January or February 2018. He accepted that after he complained about this he was given £800 in cash (para 8 of his statement).

38. In its letter to Mr Winrow dated 26 July 2018 the respondent says that the claimant was "paid in full".

39. The email from Mr Garton at p.86 confirms that the claimant is owed wages for January and February but puts the figure at £153.60 for each month. There is no detailed breakdown to explain how that figure is reached. The claimant's explanation is that this was the shortfall based on the "varied offer" of £800 salary per month made by the respondent in February 2018. That does not seem to explain the figures in Mr Garton's

email. Even if the shortfall was based on the revised wage of £800 p.c.m the shortfall would have been £800 (£800 wage due for Jan and £800 wage due for February less the £800 cash). In any event, that would only work if the £800 p.c.m wage applied retrospectively to January.

40. The claimant's bank statements do not show any payments in to the claimant's bank account from December onwards other than those I've referred to at para 35 above. The claimant's evidence about non-payment (or at least a shortfall in payment of wages) for January and February is consistent with Mr Garton's p.86 email (save as to the amount). It is also consistent with the evidence about the respondent's financial difficulties acknowledged in the respondent's letter to the claimant of 6 March 2018 (p.85) which refers to the respondent being "in a very bad situation". I accept therefore that the claimant was owed unpaid wages for January and February. Since his employment did not end until 6 March 2018 he was also owed wages for March to that end date.
41. In the absence of any sworn witness evidence to the contrary, I accept the claimant's evidence that the only payment towards his basic salary he received for January, February and March (up to and including March 6) was £800. He was entitled to a basic salary of £1000 for January, £1000 for March and £193.54 for March ($6/31 \times £1000$). That gives a shortfall of £1393.54.
42. I also accept his evidence that he did not receive payment of the "housing allowance" of £600 per month for the same period. In his statement (para 4) he says that this was not paid for January, February or March. As mentioned in para 15, the last payment of £600 shown on his bank statement was on 29 December 2017. His statement says that he was entitled to £1800 for these "unpaid wages" (para 4). Although it seems to me correct to include the housing allowance as an element of his wages, I do not think it is correct to characterise the full £1800 as "unpaid wages". Instead it seems to me that the "housing allowance" for January and February and for March (up to and including the 6 March) are "unpaid wages" but any payment relating to after 6 March fall to be considered as either unpaid notice pay or as future loss of earning because they relate to the period after the claimant's employment had ended. On that basis I calculate the unpaid "housing allowance" element of his wages up to and including 6 March to be £600 for January, £600 for February and £116.13 ($6/31 \times £600$) up to and including 6 March. That gives a total shortfall for this element of wages of £1316.13. That means I find the total of unpaid wages at the time the claimant's employment ended on 6 March 2018 was £2709.67.

Termination of employment and notice payment

43. The claimant's evidence (para 10 of his witness statement) is that on the 28 February 2018 he received a letter in the form of an email from the respondent. His evidence is that it stated that his job would be changed from Head Gamekeeper to overseeing vermin control and that his monthly salary would be £800 with no £600 "housing allowance". The claimant's evidence (para 11 of his witness statement) was that on 6 March 2018 he had a meeting with Mr Souter, the respondent's General Manager, during which he declined the variation to his contract because the pay cut meant he would not have enough to live on.
44. The claimant says that "further to that meeting" he received a letter "accepting [his] resignation, but at no time had I handed in my notice or mentioned leaving" (para 12 of his statement). The letter referred to was at p.85 of the bundle. It is from Mr Souter and in its second paragraph says "I fully understand that you cannot work for what has been offered and therefore it is with regret I accept your decision to leave the shoot. Please stop working from today". It goes on to express disappointment "that we could not reach agreement. However if you can't afford to work for the amount offered and we can't to afford to pay it, that only leaves one route. The gap was just to [sic] great".
45. There were no notes of the meeting on 6 March 2018. In the absence of oral evidence from Mr Souter I accept the claimant's version of what happened at that meeting. In particular, I find that he did not resign. Instead he was dismissed by the respondent for refusing the variation of his contract proposed by the Respondent.
46. In its response to the claimant's claim, the respondent said "the claimant worked out 3 months' notice with one of those months equating to 1 month paid holiday" (box 5.3 of the Response Form). That is inconsistent with the letter of 6 March 2018 (p.85) which clearly states that the claimant should stop working from the date of that letter. It does not mention payment of notice moneys. I accept the claimant's evidence that he did not receive the one month's notice he was entitled to under his contract of employment or payment in lieu of notice.

The claimant's losses after employment with the respondent ended

47. The claimant's evidence was that he obtained alternative employment which started on 1 April 2018. The respondent in its email to Mr Winrow dated 26 July 2018 said that the claimant started work with a new employer on 2 April 2018. Mr Winrow confirmed that there was no continuing loss of earnings after 1 April 2018.

The respondent's counter claim

48. The claimant's evidence (para 15 of his statement) was that there was at no time serious damage caused to a vehicle he was driving. In the absence of any evidence from the respondent to the contrary I accept his evidence on this point.
49. I also accept his evidence (para 19 and 20 of his statement) that any increased consumption of oil was due to use of oil by parties staying in an adjoining property which shared the same oil tank as he used.

Discussion and conclusions

50. Returning to the issues I need to decide in light of the relevant law and my findings of fact. There is one preliminary point which I will deal with here because it is relevant to a number of the claims, namely the status of the "housing allowance" of £600 paid to the claimant. I referred to s.27(5) ERA which makes it clear that benefits in kind do not count as "wages". This includes provision of free accommodation. In this case, however, the claimant elected to take the "housing allowance" of £600 instead of the "House, Council tax and Water" referred to in his Employment Contract (p.36). I find that £600 was part of his "wages" for the purposes of the ERA being "a sum payable to him in connection with his employment". It follows that I should take it into account in calculating the claimant's "week's pay" under the ERA.

The unfair dismissal claim

51. I have found that the claimant was dismissed without notice on the 6 March 2018. The burden is on the employer to show that there was a potentially fair reason for dismissal. I find the respondent has failed to do so. There is no potentially fair reason set out in its ET3 response form and its absence from the hearing meant there was no evidence given as to a potentially fair reason.
52. As **Hertz** makes clear a tribunal is not obliged to ascertain the real reason for dismissal if there is insufficient evidence to do so. This essentially means that the dismissal, if shown, will be unfair because no potentially fair reason for dismissal has been given. That is the case here. The claimant's complaint that he was unfairly dismissed succeeds.
53. If a tribunal finds a dismissal was unfair the claimant is entitled to a basic award calculated by reference to his age at dismissal; length of service and gross weekly pay (capped at £489 at the relevant time). The claimant was 59 when dismissed and had 4 years' service.

54. I have found that both his “basic salary” of £1000 pcm and his “housing allowance” of £600 pcm should be taken into account in calculating his gross week’s pay. Re-calculating them on a weekly basis gives a basic salary of £230 pw and a housing allowance of £138 pw. That gives a gross week’s pay of £368. His basic award is therefore £368 x 4 (years’ service) x 1.5 (because he was 41 or over for each year of service). That gives a total basic award of £2208.

55. If a tribunal finds that a dismissal was unfair the compensation it should award is “such amount as the tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the complainant in consequence of the dismissal” (s.123(1) ERA). Because there is overlap between the losses suffered by the claimant as a result of his unfair dismissal and those relating to his other claims I will return to the question of the appropriate compensatory award after considering those other claims.

The notice pay claim

56. I find that the claimant was entitled to one month’s notice of termination under his contract of employment and that the respondent failed to give that required notice. The respondent was in breach of contract and the claimant is entitled to compensation for that breach.

57. Had the respondent lawfully terminated the contract the notice period would have run from 6 March 2018 to 5 April 2018. The claimant is entitled to damages for that breach. However, he has to give credit for the earnings in his new employment from 1 April 2018. The earnings from the new job cancelled out his losses from that date onward. His losses arising from the breach are therefore primarily the wages he was contractually entitled to from the 7 March 2018 to the 31 March 2018. That is a period of 25 days. Using the week’s pay figure of £368 to calculate a daily rate of £52.57 per day this gives total losses for 25 days of £1314.25. However, as I explain below, there was an additional loss in this case. Had he been given the notice required the claimant would also have accrued a full year’s holiday entitlement. The respondent’s breach of contract meant that he suffered a loss of £105.14 being the 2 further days’ holiday he would have accrued up to 31 March 2018 and for which he was not entitled to pay in lieu under reg. 14 WTR because of the unlawful termination without notice. To put the claimant in the position he would have been had the required notice been given I add payment in lieu for those 2 days to the award for the breach of contract by failing to give notice. That gives a total award for the notice claim of £1419.39.

The bonus claim

58. I have found that the claimant was entitled to a contractual bonus of £4000. Although it was payable in 2017 it was “outstanding” at the time of termination of his employment. The claimant’s claim was made within 3 months of the effective date of termination of his employment so this claim is in time under the tribunal’s contractual jurisdiction.

The expenses claim

59. I have found that the claimant had unpaid expenses of £845.91. However, he had not put in claims to his employer for all of those expenses, only the £618.52 relating to November and December. To be due under the contract, expenses had to be claimed (para 2 of the contract of employment at p.37). I find that the respondent was in breach of contract in failing to pay the expenses of £619.52 due for November and December. That claim was outstanding when the claimant’s employment terminated. The claimant’s claim was made within 3 months of the effective date of termination of his employment so this claim is in time under the tribunal’s contractual jurisdiction.

60. I find that the expenses of £227.39 incurred in January and February had not fallen due under the contract because the claimant had not yet claimed them as required by the contract. That means that the respondent was not yet in breach of contract in relation to those expenses. I therefore award £619.25 to the claimant as compensation for the expenses claim.

61. I return to the question of compensation for the £227.39 unclaimed expenses below where I consider the appropriate compensatory award for unfair dismissal.

The holiday pay claim

62. I have found that the claimant did not take any of his holiday entitlement for the holiday year 1 April 2017 to 31 March 2018 before he was dismissed. The claimant in his schedule of loss claimed pay in lieu of a full year’s entitlement, i.e. 28 days. However, reg.14 WTR only provides for holiday accrued up to the date when termination of employment took effect. In this case that was the 6 March 2018. WTR does not seem to include any provision deeming the termination date to be later when there is a failure to give proper notice. On that basis the claimant’s entitlement is to 48.5 weeks’ worth of his annual entitlement of 28 days’ holiday, i.e. 26 days. Based on the daily rate of £52.57 that gives an entitlement to accrued holiday pay under the WTR of £1366.82.

63. Had the respondent given the notice required under the claimant’s contract, he would have accrued the remaining 2 days’ holiday for that

holiday year. I therefore include the sum of £105.14 in the losses for the notice pay claim. It seems to me that is within the scope of damages allowable for that breach of contract. If I am wrong about that I would have added it to the compensatory award for the claimant's unfair dismissal. Not to compensate him for those "missing" days would be to allow the respondent to benefit from its failure to give notice as required under the claimant's contract of employment.

Unlawful deductions from wages due to the claimant in January and February 2018

64. I have found that the respondent made deductions (by failing to pay) of £2709.67 for his wages in January, February and part of March 2018. That figure includes the "basic wage" and "the "housing allowance" which I have found formed part of the claimant's wages. That claim is brought as a deduction of wages claim under s.23 ERA. It is in time because it was made within 3 months of the last of the series of deduction (for the March wages).

Compensatory loss for unfair dismissal

65. The claimant's case was that he had started another job and had no losses as of 1 April 2018. The losses for the period from 7 March 2018 to 31 March 2018 are covered by the breach of contract award for failure to give notice. It would be allowing double recovery to award the claimant compensation for loss of earnings during that same period as compensation for the unfair dismissal.

66. I do find it just and equitable to make and award for the expenses of £227.39 which the claimant had incurred in January and February 2018 but which had not fallen due under his contract because he had not claimed them when he was dismissed. I find that had he not been unfairly dismissed he would have claimed those expenses.

67. I also make an award for loss of statutory rights which, given the relatively short length of service the claimant had, I set at £350.

68. The claimant is therefore entitled to a compensatory award of £577.39.

69. The respondent's counter claims: the vehicle claim and the oil claim

70. The respondent's counterclaims are based on contract. However, I have found there is no contract term entitling the respondent to recover moneys for damage to company vehicles nor overconsumption of oil. In the absence of a contractual right to recover the respondent's claims fail.

Employment Judge McDonald
Dated: 21 November 2018

JUDGMENT SENT TO THE PARTIES ON

.....1 December 2018.....

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS