



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr S Butler

**Respondent:** (1) BM Furniture Limited  
(2) BJ Management Limited

**HELD AT:** Manchester **ON:** 29 August 2018

**BEFORE:** Employment Judge B Hodgson

## REPRESENTATION

**Claimant:** In person

**Respondent:** Ms J Ferrario, Counsel

**JUDGMENT** having been sent to the parties on 13 September 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

# REASONS

## Background

1. This was the hearing of claims of unfair dismissal and for various payments which were clarified at the hearing to comprise claims of failure to pay notice pay, failure to pay accrued holiday pay and unlawful deduction from wages.
2. It is common ground between the parties that the claimant did not have the necessary length of service to make a claim of "standard" unfair dismissal and his claim of unfair dismissal was based under section 104 Employment Rights Act 1996 - dismissal claimed to be for the reason (or if more than one, the principal reason) that he alleged

the respondent had infringed a right of his which is a relevant statutory right, namely the right to holiday.

3. The claimant had issued proceedings against two different respondents as he was uncertain as to the correct identity of his employer which would fall to be determined by the Tribunal.
4. At the outset of the hearing, the parties were able to reach agreement as to the amounts outstanding in respect of notice pay, holiday pay and pay accrued but unpaid in the month of November 2017 but not in respect of the claim of unlawful deduction from wages in the months of April May and July 2017. Those agreed sums are set out in the Tribunal's Judgment.
5. The respondent did not accept that the Tribunal has jurisdiction to hear the claim for unlawful deductions from wages in respect of the months of April, May and July 2017 it being presented out of time, any pay deducted in respect of those months (no such deductions being admitted) not forming a series of deductions culminating in the deduction made in respect of the month of November 2017.

#### Issues

6. The Tribunal accordingly identified with the parties the following issues to be determined in summary:
  - 6.1. What is the correct identity of the employer at all material times?
  - 6.2. Has there been any unlawful deduction from wages in respect of the months of April, May and July 2017?
  - 6.3. Is any such deduction (if found) part of a series of deductions?
  - 6.4. If not, was it reasonably practicable for the claimant to have made the claim for such deductions in time and, if not, within a reasonable period of time thereafter?
  - 6.5. What is the reason for dismissal?

#### Facts

7. The Tribunal came to its conclusions on the facts, on the balance of probabilities, and based upon the evidence, both oral and documentary, produced to it.
8. The parties each produced a bundle of documentation with a degree of overlap. This was notwithstanding a direction from the Tribunal that a joint bundle be produced. Reference within this Judgment to page numbers are to page numbers within such bundles – pages within the claimant's bundle being preceded by the letter "C", pages within the respondent's bundle being preceded by the letter "R".
9. The claimant gave evidence on his own behalf. The respondent called Mr William Margerison.
10. Mr Margerison is the owner of a number of interlinked companies with various trading outlets, his trade in general terms being the sale of bedroom furniture.

11. He decided in early 2017 to open a new store in Ashton, Preston. He advertised for staff and the claimant answered that advertisement. Mr Margerison discussed the role he had in mind with the claimant and the claimant was appointed as a retail sales assistant commencing on 10 March 2017. His annual salary was £10,920 together with commission. There was however no offer letter or contract of employment given to the claimant.
12. The property from which the business traded was owned by Mr Margerison's group of companies and he was entitled to a 12 month rate free trading period. The intention therefore potentially was to trade for 12 months and then gauge the performance of the outlet but that position would be subject to ongoing review.
13. The agreement was that the claimant would work 28 hours a week over 4 days, those days being Thursday, Friday, Saturday and Monday. He would be the only member of staff covering those days. The intention was that Mrs Lisa Margerison, Mr Margerison's wife, would cover the remaining days of Tuesday and Wednesday but she ceased to do so from about June 2017.
14. It fell to the Tribunal to determine the correct identity of the employer from the evidence given. In their discussions leading up to the employment of the claimant, Mr Margerison had identified himself as a director in the company BM Furniture Limited (the first respondent). In the absence of any evidence to the contrary, the claimant assumed and believed that was the identity of his employer.
15. The only documentation produced to the Tribunal to assist in this point were the claimant's payslips showing his employer to be BJ Management Limited, the second respondent (pages R51 – 54). Mr Margerison's evidence was that all of his staff were employed through BJ Management Limited for consistency of pay-roll records but he concedes this was never notified to the claimant. The claimant's evidence was that he had never received any pay slips and this was supported by correspondence he had sent to Mr Margerison requesting sight of his payslips both in August 2017 (page C6) and October 2017 (page R48). Mr Margerison could only comment that he left it to his accountants to send out payslips. The Tribunal in the circumstances accepted the claimant's evidence in this regard.
16. The claimant's bank statements simply indicated "BJM" as the payer of his wages but this meant nothing to the claimant.
17. In all the circumstances, the Tribunal conclusion is that the correct identity of the claimant's employer was, throughout his period of employment, BM Furniture Limited (the first respondent), this being the only company identified to the claimant, entitling him to assume that it was his employer.
18. It is clear from the evidence of both parties that the unit traded badly. The claimant has set out his own record of the monthly sales figures (page C19).
19. Mr Margerison indicated to the claimant in or about August 2017 that he was looking to sell the premises. The claimant checked the position on the internet and saw that the premises were indeed being advertised (see pages C7 - 8).
20. The claimant sent a letter dated 27 October 2017 (page R48) which, in addition to requesting his payslips, indicated that he intended to take some holiday in November. Mr Margerison is clear that he had not had sight of that letter prior to it being disclosed

to him in the course of the current proceedings. The claimant has produced proof of posting (page C10). Mr Margerison's evidence was that unless precisely addressed specifically to "Unit 1", post often was not received by him (number "71" comprising a number of units). The Tribunal notes the address given on the certificate, which does not specify "Unit 1", and can be contrasted with the reference to "Unit 1" set out in another certificate of posting – see also page C10. The Tribunal has no reason to doubt Mr Margerison's evidence that he did not have sight of the letter. No subsequent events are inconsistent with that position.

21. It is common ground between the parties that the claimant previously took and was paid for holidays, for example when a Bank Holiday fell on one of the Mondays the claimant was scheduled to work.
22. Mrs Margerison spoke to the claimant at the premises on or about 10 November 2017 indicating that the likelihood was that the store would shut down towards the middle of December. There is no suggestion that holidays were raised or discussed at this meeting. Mr Margerison's evidence, which is not challenged and is accepted by the Tribunal, is that he had decided to have a "fire sale" to empty the property of stock and then close it.
23. The claimant commenced his holiday as planned on Saturday, 18 November 2017.
24. On Thursday, 23 November 2017, the claimant was still on holiday but noted a delivery man parked outside the store. The delivery man stated that there had been no indication from Mr Margerison that the claimant had been expected to be on holiday.
25. The claimant accordingly tried to speak to Mr Margerison by telephone and left a message for his call to be returned. It was in fact returned by a member of the admin staff. The claimant has produced a transcript of that call which he covertly recorded (pages C12 – 14). It was agreed that he would return to work the following day, as no holiday cover had been arranged, and he did so.
26. Over the weekend of 25 – 26 November 2017, Mr Margerison discussed matters with his wife. As indicated, he had intended to have a fire sale but had been too busy with his other commitments to do so. He and his wife took the view that there was no purpose to be served in continuing the business at the Ashton outlet. It was losing money and it appeared clear to them that it would continue to do so for as long as it remained open. They accordingly decided to close the premises immediately.
27. Mrs Margerison attended the premises on 27 November 2017 and advised the claimant of their decision. The claimant suggested in his oral evidence that there was discussion at that meeting between himself and Mrs Margerison relating to holidays. There was no mention of this in his written witness statement. He was unclear exactly what was alleged to have been said by Mrs Margerison but it centred on what he was entitled to be paid arising from holidays taken or accrued.
28. The claimant's employment accordingly ended on 27 November 2017. The claimant was issued with a P45 (pages R56 - 57). This indicates a termination date of 27 October 2017. Mr Margerison accepts that there has been some degree of misunderstanding as to the precise termination date but concedes the correct date is 27 November 2017 as contended for by the claimant.

29. The claimant lives locally and confirms, from his own observations, that the business has not subsequently re-opened.
30. In respect of outstanding pay, this relates to the period April, May and July 2017. There is uncertainty as to the basis of the claim but the claimant's contention is that he was asked to cover Mrs Margerison on certain days during this period and that he would either be paid for these or possibly be given time off in lieu. He refers to the diary entries to this effect made, he alleges and not disputed by Mr Margerison, by Mrs Margerison (pages R42 – 45).

Law

31. Under section 23 of the Employment Rights Act 1996, a worker may present a complaint for unlawful deduction of wages to an Employment Tribunal but
- (2) Subject to subsection (4), an Employment Tribunal shall not consider a complaint under this section 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 ...
- (4) Where the Employment Tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the Tribunal may consider the complaint if it is presented within such further period as the Tribunal considers reasonable.
32. Section 104 of the Employment Rights Act 1996 states:
- (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.
- (2) It is immaterial for the purposes of subsection 1
- (a) whether or not the employee has the right, or
- (b) whether or not the right has been infringed;
- but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.

(3) It is sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.

[The rights include those conferred by the Working Time Regulations 1998].

### Submissions

33. The respondent's representative made oral submissions summarised as follows.
34. The request for holiday was contained within the letter dated 27 October 2017 and it is denied that that was received. The business was winding down but the evidence was that this remained an amicable relationship. The evidence was that had the request been received it would have been discussed with the claimant by Mr Margerison. The telephone conversation on 23 November 2017 did not support the allegation.
35. In fact, the claimant's role became redundant, which was the true reason for dismissal, arising out of the closure of the business. The evidence was that the business did not re-open and has not traded since then.
36. The relationship between the parties was very informal and friendly.
37. There is a dispute over the P45 and it is not known why the date of 27 October 2017 is in there but the P45 itself is not a relevant factor.
38. The claimant also gave his submissions orally.
39. He disputed that the letter of 27 October 2017 was not received. The true position was exposed by his conversation with the member of the admin. staff on 23 November. He was dismissed for requesting holiday.

### Conclusions

40. It is common ground between the parties that the claims for outstanding pay in respect of the months of April, May and July 2017 are on the face of matters out of time. The Tribunal is satisfied that subsequent payment of salaries for the months of August, September and October 2017 were made, which it is not in dispute were full, and concludes that there was no series of deductions.
41. The claimant's evidence puts forward no practicable reason why he could not have issued his claims in respect of those periods of time in time. He gives no explanation for why he did not issue proceedings within the statutory timescale, accepting that he had the right to do so and was aware of that.
42. In all the circumstances the Tribunal finds that it does not have jurisdiction to hear such claims.
43. In terms of the merits of the claims, were the Tribunal to have found that it did have jurisdiction to hear them, the Tribunal would have concluded that the claimant has not proven unlawful deductions in light of the inconclusive evidence he gave as to what the claims comprised and whether or not they were reflective of payments due and accrued not being made.

44. In respect of the claim of unfair dismissal, it is clear that there was ongoing difficulty in trading with clear indications being given over a period of time as to the prospect of closure.
45. The Tribunal has accepted in its findings of fact that the claimant's letter dated 27 October 2017, albeit sent, was not received.
46. The claimant accepts that there were no earlier issues raised with him with regard to holiday being taken. Were the Tribunal to have accepted that the letter had been received and if his employer had for whatever reason taken exception to him requesting holiday, logic would suggest that such exception would have been raised upon receipt of the letter, rather than ignoring it, not raising objection to him taking the holiday and then reacting adversely when he did so.
47. The Tribunal accepts the explanation given by Mr Margerison that he came to the decision he did, when he did, purely in the light of the extremely poor trading performance of the unit.
48. In all the circumstances, the Tribunal concludes that the assertion of a statutory right, if that is what the letter of 27 October 2017 amounts to, was not the reason for the termination of the claimant's employment. The sole reason was the closure of the business and the ensuing redundancy of the claimant.
49. Were the Tribunal to be wrong in that conclusion, the Tribunal is clear from the facts that, irrespective, the business would have closed in any event within a period of no more than four weeks thereafter and the claimant's employment would have ceased by reason of redundancy at that stage.

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Employment Judge B Hodgson

Date: 5/11/2018

REASONS SENT TO THE PARTIES ON

07 November 2018

FOR THE TRIBUNAL OFFICE