



# THE EMPLOYMENT TRIBUNALS

Claimant  
Mr C Dunn

Respondent  
Scotch Corner Autos Ltd

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT MIDDLESBROUGH  
EMPLOYMENT JUDGE GARNON ( sitting alone)

ON 1<sup>st</sup> December 2017

Appearances

For the claimant in person

For the respondents Mr B Hendley Consultant

## JUDGMENT

1 The claims of breach of contract and unlawful deduction of wages are not well founded and are dismissed .

2 The claim for compensation for untaken annual leave is well founded. I order the respondent to pay compensation to the claimant of **£ 310.32** gross of tax and national insurance .

## REASONS

### 1. Issues

The claim was presented on 3<sup>rd</sup> October 2017. The claimant started employment on 1<sup>st</sup> April 2016 as a Recovery Technician working 40 hours per week at £360 gross. It is common ground he handed in his notice on or about 25<sup>th</sup> July 2017 to take up a better paid job. He was entitled to be paid for a week he had worked (£ 360 gross) and for holidays accrued but not taken of £310.32 . The respondent's case is it was legally entitled not to pay either of those agreed sums. The only issue is whether that contention is correct. It will be clearer if I set out the relevant facts before dealing with the points of law.

### 2. Findings of Fact

2.1. I heard the evidence of Mr Nicholas Constantine for the respondent, who is experienced in its operations. I heard the claimant and had an agreed document bundle.

2.2. On 10 June 2017 the claimant was sent to recover a broken down car which was towing a caravan. As he should have, he winched the car on to the flatbed of the lorry he was driving and hitched the caravan to its towbar. After driving for some time, he noticed in the mirrors of the lorry smoke coming from one of the caravan tyres. He pulled onto the hard shoulder and discovered a piece of apparatus called a "motor mover" on the caravan was rubbing the tyre causing the smoke. He jacked up the caravan, removed the wheel and dismantled the motor mover.

2.3 I accept the claimant's evidence the customer was not exactly cooperative. Whilst the claimant was trying to resolve the problem on the hard shoulder, the customer kept leaving the lorry and wandering around. There was a spare wheel for the caravan in the boot of the car beneath the customer's holiday luggage and the customer did not want the claimant to disturb that luggage. Mr Constantine was in no doubt the claimant should have told the customer in no uncertain terms he was not prepared to do what the customer wanted which was to reattach the wheel which had been emitting smoke from its tyre. Nevertheless in order to get off the hard shoulder and placate the customer that is what the claimant did. He then resumed towing the caravan. A few miles later the caravan crashed and was a total write off.

2.4. It was first thought the tyre blew out. Subsequent investigation showed the whole wheel had come off. The heat generated by the friction of the motor mover against the tyre may well have distorted the hub and caused bolts to vibrate loose.

2.5. The other step which Mr Constantine says the claimant should have taken if he were in doubt what to do for the best was to ring for help on a phone provided to enable him to do so. Mr Hendley referred to other incidents of the claimant not doing his job properly but Mr Constantine was clear the incident upon which he relied to justify not paying wages and holiday pay was this, rather than the others.

2.6. The claimant referred me to a document at page 16 which does contain a signature of the customer purportedly exempting the respondent from liability for damage caused to the caravan or car during the course of recovery. I need not go into the detailed law relating to such exemption clauses. Suffice to say the customer made a claim that his caravan was written off as a result of the wheel coming off due to negligence and the respondent has insurance against such claims. The insurers originally resisted the claim arguing not only the existence of the exemption clause but also that the customer had caused or contributed to the accident by his insistence upon the claimant re-attaching the wheel. The customer produced expert evidence the wheel should not have come off if properly reattached.

2.7. At about the same time as the claimant handed in his notice, Mr Constantine received word from the insurance company they had concluded they had no arguable defence to the customer's claim, would have to pay out £4256 and the respondent would be liable for the excess on the policy of £1000. It is far more likely than not, no insurer would pay out unless convinced that if the claim were to go to court any defence would fail. The claimant says it was "sour grapes" on the part of the respondent that an incident over which they had taken no action in June was used as an excuse not to pay him when he had handed in his notice. I do not agree at all. Initially, Mr Constantine accepted the claimant was not entirely to blame and

had an awkward customer. It was pure co-incidence he found out in the same week the respondent would have to incur cost.

2.8. When the claimant started work for the respondent in 2016 he was given and signed a statement of terms and conditions of employment and was given an Employee Handbook to supplement it. At page 41 of the document bundle are extracts headed "Summary of our rights to deduct" including :

*Whilst we understand that accidents do happen we expect you should take all reasonable care with all company clients/customers or any third party's property. Therefore if we suffer any loss or damage to any property or stock or equipment which is due to your failure to follow our rules of procedure ... or unreasonable carelessness or neglect, then we will deduct the cost of repair or replacement of any item from any payments due to you including holiday pay, contractual sickness payment or any other monies owed to you by the company.*

*if we suffer any loss fine or cost due to your actions and failure to follow our rules and procedures or legal requirements or your carelessness or neglect, then we will deduct the cost of the loss or fine from any money owed to you by the company*

### **3. The Relevant Law**

3.1. The claims are breach of contract, alternatively unlawful deduction of wages, and failure to pay compensation for untaken annual leave. The claimant drafted his own claim form Neither Mr Hendley nor I take issue with the fact he failed to tick the box for unpaid wages. No employer's contract claim is made. The claim for holiday pay, although it could be expressed as a claim of unlawful deduction , is also pursued as a claim under Reg.30 the Working Time Regulations 1998 ( the WTR)

3.2. The relevant law relating to unlawful deduction of wages is in s13 of the Employment Rights Act 1996 (the Act):

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or 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.

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(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.

3.3. Section 23 includes

(1) A worker may present a complaint to an Employment Tribunal—

(a) that his employer has made a deduction from his wages in contravention of section 13 ...”.

The remedy available, should I find the complaint well founded, is in section 24. The meaning of “wages” is dealt with in section 27 and includes holiday pay.

3.4. A Tribunal may deal with a claim of breach of a contract of employment provided it occurs or is outstanding on termination of the employment . The failure to pay wages earned could be put as such a claim but the defence payment was not due because of a provision of the contract would work even if the provision were not in writing. So if the defence to the s23 would work as a defence to a contract claim.

3.5. The law in relation to compensation for untaken annual leave is contained in the WTR where Regulation 14 says:

(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 regulation 13 and regulation 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).

(3) The payment due under paragraph (2) shall be -

(a) such sum as may be provided for the purposes of this regulation in a relevant agreement, or

(b) where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula -

$$(A \times B) - C$$

where -

**A** is the period of leave to which the worker is entitled under regulation 13(1);

**B** is the proportion of the worker's leave year which expired before the termination date, and

**C** is the period of leave taken by the worker between the start of the leave year and the termination date.

3.6. Reg 30 includes

(1) A worker may present a complaint to an employment tribunal that his employer—  
(b) has failed to pay him the whole or any part of any amount due to him under regulation 14(2) ..

(5) Where on a complaint under paragraph (1) (b) an employment tribunal finds that an employer has failed to pay a worker in accordance with regulation 14(2) .., it **shall order** the employer to pay to the worker the amount which it finds to be due to him.

3.7. Reg. 35 says any provision in an agreement which purports to exclude or limit the operation of any provision of the WTR, save in so far as the WTR provides for such an agreement to have that effect, is **void**. I have seen in other cases provisions which rely on Regulation 14 (3) (a) to define circumstances in which on termination a nominal payment of say £1 will be made. There is no such clause here. Rather there is a clause purporting to permit no payment.

#### **4. Conclusions**

4.1. Whilst I have some sympathy with the claimant in relation to the events on 10 June, quite simply the customer is not always right. It was the claimant's responsibility as the driver of the recovery vehicle to ensure he was driving in accordance with legal requirements and safely. His decision to re-attach the wheel upon which the tyre had been smoking departed from the standard of care which a reasonable recovery driver would exercise, was the direct cause of the caravan being written off and of the respondent bearing the excess of £1000. In turn that was lawful justification for the non-payment of the £360. The non payment was lawful by virtue of a relevant provision of the claimant's contract which satisfies the requirements on section 13 (2).

4.2. In contrast, there was no lawful right not to pay the sum due under Reg. 14 of the WTR and I have no discretion under Reg. 30 not to order its payment .

-----  
**TM Garnon Employment Judge**  
**Date signed 4<sup>th</sup> December 2017**