THE EMPLOYMENT TRIBUNAL

BETWEEN

Claimant	**and**	**Respondent**
Mr A Thompson		**Parker Hannifin Manufacturing Limited**

Held at North Shields **On 19 October 2018**

BEFORE: Employment Judge S A Shore

MEMBERS: Ms L Georgeson
Mr D Cartwright

Representation

For the Claimant: **Mr J McHugh, Counsel**

For the Respondent: **Mr R Kohanzad, Counsel**

JUDGMENT

The unanimous Judgment of the Employment Tribunal is:-

1. The claimant's claims of failure to allow time off for care for a dependent contrary to section 57B Employment Rights Act 1996 (ERA) and detriment due to requesting time off to assist a dependent contrary to section 47C ERA succeed.
2. The respondent shall pay the claimant £500 for injury to feelings resulting from the refusal and detriment.

REASONS

Background

1. The claimant brings claims of failure to allow time off for care of a dependent contrary to section 57B ERA and detriment due to requesting time off to assist a dependent contrary to section 47C ERA.

Claims

2. All Tribunal claims are vetted on receipt and allocated one or more codes depending on the claims that the administration believe are being made. I was concerned in this case that the codes that had been allocated to the claim were not correct and sought to clarify the claims with the representatives at the start of the hearing. The codes allocated to the claim were WTR(AL): non-payment of holiday pay contrary to Regulations 13, 14(2) and 16(1) Working Time Regulations 1998; unauthorised deduction from wages contrary to sections 13 – 27 ERA; breach of contract contrary to the Employment Tribunals (Extension of Jurisdiction England and Wales) Order 1994; failure to allow time off to care for dependents contrary to section 57B ERA and detriment due to requesting time off to assist a dependent contrary to section 47C ERA.

3. Mr McHugh confirmed that only the last two of the five claims coded above were being pursued by the claimant.

Issues

4. There had been a private preliminary hearing in this matter before Employment Judge Hargrove on 31 August 2018 that had produced a case management order dated 14 September 2018. The case management summary noted that the issues between the parties were all set out in the ET1 and ET3 and paragraph 4.1 of the claimant's case management agenda. I had looked at that document prior to the hearing and had concerns that the issues were not properly set out. It was therefore agreed by the representatives in the Tribunal that it was appropriate to define and list the issues that would be relevant before we began the hearing. It was agreed that the following issues stood to be decided by the Tribunal:-

    4.1. Is section 57A(1)(d) ERA engaged and did the claimant have time off for an unexpected issue arising with a dependent?

4.2. If he did, was the amount of time off a reasonable amount of time in order to take action that was necessary? If it was, the claimant would be entitled to dependency leave.
4.3. Was the claimant subjected to a detriment for requesting dependency leave?
4.4. If he was, what compensation is just and equitable?
4.5. Is an award for injury to feelings payable if there was no detriment?

5. The representatives confirmed they had spoken before the hearing and it would be appropriate for the matter to proceed on submissions only, the evidence of the claimant being agreed.

6. Having read the statements of the parties, we asked the representatives if the difference between the respondent's evidence and the claimant's evidence as to the time of day that the claimant had made the request for dependency leave was material. Both Mr McHugh and Mr Kohanzad confirmed that it was not.

7. Mr McHugh raised the issue of a document that had been provided on the morning of the hearing by the respondent; a history of the claimant's applications for previous dependency leave.

8. Mr Kohanzad said that it was evidence of what a reasonable employee would do. He said that if the claimant had two children, one could see from the frequency of the previous requests for dependency leave he had made that he had not put cover in place and therefore it was submitted that he had not made "arrangements" that had failed. It would be the respondent's case that cover was the claimant's wife, then his mother in law and finally the claimant himself. Mr Kohanzad said that the issue of prior dependency leave related to a submission he would be making that a reasonable employee has to have provisions or arrangements in place and that the argument was that this claimant had no provisions in place to deal with the situation that arose. Mr McHugh agreed that there was a point of dispute about whether it would be reasonable to have a bank of childminders in place, but that this could be dealt with on submission.

9. I commented that I did not think that it would be a major factor in the case. The document appeared to show that the claimant had taken some holiday to cover dependency requirements and had also taken some dependency leave in the past.

Respondent's Submissions

10. Mr Kohanzad advised that in the light of the issues that had been agreed, some of his skeleton argument was now otiose as only subsection (d) of section 57A(1) was in issue. Subsection (d) is a prerogative that is open to individual member states of the EU. This was important in terms of his submissions as he has taken a "legal" approach to the case.

11. There is a natural tendency to feel sympathy for the claimant as his child was ill and he took time off to look after her. The question for the Tribunal, however, was not one of sympathy for the claimant; it is a question of whether the circumstances of the case fit the categories of section 57A(1). If they do, then the question is whether the leave was reasonable and necessary. Paragraph 2 of his skeleton sets out the different options. This case was about section 57A(1)(d). It was accepted that the claimant's child is a dependent. It was accepted that she was ill. It was accepted that the claimant's wife picked up their daughter from school on 6 February 2018. It was accepted that the school said that the child could not attend on 7 February 2018 because of the nature of her illness. It was accepted that the claimant's mother in law was not free to look after the child. It was accepted that he claimant's wife was unable to look after their daughter because she had just started a new job and could not take time off. It was accepted that the claimant did not look for alternative childminders, and he decided that he was the one that had to take time off.

12. It was submitted by Mr Kohanzad that this situation is not of an unexpected disruption or termination of arrangements for the care of a dependent. At best, the claimant says that there is an unexpected disruption of the arrangements for the care.

13. We were referred to the Department for Business Enterprise and Regulatory Reform's guide on time off for dependants dated October 2007. On page 5 of the guide, under the heading of: "Dealing with an Unexpected Disruption or Breakdown of Care Arrangements for a Dependant", it is stated that:

> *"time off can be taken when the normal carer of the dependant is unexpectedly absent; for example, a childminder or a nurse who fails to turn up as arranged, or the nursery or nursing home may close unexpectedly."*

14. It was submitted that the guidance fits the wording of the statute and focuses on the idea of "arrangement". The example given in the guidance suggests that an arrangement is in place, but the person or body with whom the arrangement is made has cancelled. It was submitted that there has to be an arrangement in place. The difficulty for the claimant is that no arrangement was in place in this case. It was a haphazard way of dealing with the situation if care was needed. The claimant did not have an arrangement; there was merely a description of how the family deals with disruption.

15. It is a distortion of language to say that if the children are ill, either the mother, mother in law or the claimant take care of the children. That is not an arrangement. If the mother in law takes care of the children every Wednesday, that is an arrangement. When you look at the number of days off that the claimant took for dependency leave, there is obviously no arrangement to deal with it.

16. In paragraph 12 of his skeleton, Mr Kohanzad sets out submissions on the point. He says that what is clear from the both the statutory wording of subsection (d) and the guidelines is that subsection (d) is focused on circumstances where care is being provided (e.g. by a carer, childminder), even if there has been a disruption in the provision of that care or that the care arrangements were broken down. This was not a case where a childminder had been booked and had to unexpectedly cancel, or whether the relationship between the family and the childminder had broken down, with the result that the family was left with no childminder.

17. The operative cause of the claimant's difficulty was the fact that his daughter was ill, rather than that there had been an unexpected disruption of arrangements for the care of his daughter. The purpose of subsection (d) is providing dependency leave where the normal carer of the dependant is unexpectedly absent; for example, a childminder may fail to return as arranged or the nursery may close unexpectedly. Those are not the facts of this case and the claimant seeks to distort the ordinary meaning of "an expected disruption concerning the arrangements of care" so that the facts of the case fit into subsection (d). It was submitted that there is no argument before us that the daughter's school was providing care. Mr McHugh intervened at this point to say that he would be making exactly that point in closing.

18. Mr Kohanzad responded by saying that the School had said it could not provide care because the child was ill. Schools are not there to provide care. They are there to provide education.

19. I asked him to comment on the fact that there was a good body of law regarding the duty of care and safeguarding by schools, to which Mr Kohanzad replied that the word "care" in this context is not the statutory meaning in the health arena. It cannot be what the statute intended if you read subsections (d) and (e) of section 57A(1) together. Subsection (e) refers to "…an incident which involves a child …" at "…an educational establishment which the child attends…", so deals solely and exclusively with a situation where the child is at school. This is not a case involving subsection (e).

20. What happened to the claimant's daughter in this case was not "incident", it was an illness at school. We should have regard to the Government guidance, which states that an employee can take time off to deal with a serious incident involving his or her child during school hours. For example, if the child has been involved in a fight, is distressed, has been injured on a school trip or indeed suspended from school.

21. Mr Kohanzad then went on to address the claimant's failure to try and find a childminder. He handed up a Newcastle Local Authority website page which said that the average cost of a childminder in the local area is £3.50 per hour. He

accepts that many parents do not want childminders to look after their children, but that is not the issue. This issue is whether it is reasonable to take action that is necessary. The claimant says he cannot afford a childminder. Dependency leave is unpaid, so if he took it, he would be paid less than he would have got on holiday. The claimant was on £83.50 per day.

22. It was submitted the claimant should have used his holiday pay to pay for a carer, if he could find one. The question is not whether he would employ a childminder; it was whether it was a reasonable or necessary for him to take the time off. The history of the claimant is that it happens relatively regularly. A parent who was behaving reasonably would set up an arrangement to cover the sort of circumstances that occurred in this case, or arrange for the equivalent of a babysitter or carer. There were options available. It is understandable that he did not wish to employ them, but that is not the test. If a carer was available, it was not necessary for him to take time off.

23. There had been seven occurrences of dependency leave in 2 years. That is just the claimant's history. There are also provisions for the mother and the mother in law to take care of the child, so it would be reasonable to look into a proper arrangement or provision for cover. The Tribunal cannot be satisfied that it was both necessary and/or reasonable for him to take time off.

24. Turning to the issue of detriment, Mr Kohanzad submitted that the claimant's claim to have suffered detriment was misconceived and was a misunderstanding of what detriment means. The wording is similar to the use of "detriment" in PID cases and in plain English is expressed as the proposition that because an employee makes a request, the employer mistreats him. The claimant says that the detriment in this case is his being required to take holiday. The reason why he has had to take holiday is not because he made the request. What he had to establish is that he requested dependency leave and the respondent refused it because he asked for it. That is bizarre. The respondent said that the claimant could take holiday. He has confused a "but for" test with a "reason why" test. All the respondent did in this case was refuse a request. The refusal was not because the request was made. For the claim for a detriment to succeed, the employee must

have requested dependency leave and, because of that request itself, be subjected to detriment. The type of detriment that one sees throughout the case law are things like dismissal and disciplinary action. The respondent did not say no because the claimant asked for dependency leave. He said no because the respondent felt the circumstances did not mean the circumstances of the act. The history shows that the claimant was sometimes granted dependency leave and sometimes he was not.

Claimant's Submissions

25. For the claimant, Mr McHugh asked me to start with the statute which was set out in full in his skeleton argument. Section 57A(1) says that "an employee is entitled to be permitted by his employer to take a reasonable amount of time off during the employee's working hours to take action which is necessary …" The reasonableness test relates to the *amount* of time off taken, not to necessity of the action required. In this regard, Mr Kohanzad submission is wrong.

26. Having determined whether or not reasonable time off was taken, the test is then whether time off was necessary because of the unexpected disruption or termination of arrangements for the care of a dependent.

27. It was submitted that the facts outlined and agreed in this case fit section 57A(1)(d). The claimant had been informed by the school that his daughter had a type of sickness that meant that she could not return to school the following day. That must be an unexpected disruption to care arrangements for the child. Mr Kohanzad had said that a school is not a care provider. That is not agreed. I was invited to look at the facts and decision in **RBS v Harrison [2009] IRLR 28**. When that case talks about importing definitions, it says that the words of the statute are not legal terms but ordinary words to be assigned their natural meaning.

28. A school would naturally fall into the category of organisations providing care. They do not only provide education. They provide food, they provide medicinal care, they provide safeguarding and they require attendance. Schools have a duty of care to students. We were invited to look again at the Government guidance

and note that one of the examples given of where section 57A(1)(d) applies is where “the nursery or nursing home may close unexpectedly”; those examples are not ones where someone was due to turn up and failed to do so. The examples given in the guidance under section 57A(1)(e) deal with emergencies at school. It may be that on 6 February 2018, the situation fell into subsection (e) but where a child is ill and cannot return to school, then the circumstances fall into subsection (d).

29. Mr McHugh repeated that it is not a question of whether the absence was reasonable. The reasonableness relates to the time requested. It is not argued that the time request was unreasonable and, indeed, the guidance and case law both suggest that one or two days off is reasonable for dependency care.

30. The question then turns to whether it was necessary for the claimant to take leave. The respondent says that leave was not necessary because the claimant should have had a standby provision to cover if the child was unable to go to school and no one was able to look after her. That is the counsel of perfection. It would be bordering on the perverse for the Employment Tribunal in this case to find that the claimant should have a childminder on standby if his child was ill and no one was able to look after her. Employment Tribunals should consider whether, if he had sought a childminder, what the chances were of one being available. What childminder would take a child with a sickness bug on notice of a few hours? It was submitted that there was no chance of that happening.

31. The question in the statute was whether time off was necessary. In this case it was necessary because there was no one else available. The case of **RBS v Harrison** deals with the concept of “necessary” and requires it to be given its normal meaning. The facts in this case are that there was no one but the claimant available to look after his child. Mr Kohanzad objected at this point and said that the claimant’s wife was available. Mr McHugh continued by saying that the claimant said he had to take time off because no one else was available. Mr Kohanzad again interjected to say that the respondent’s case did not include a concession that no one else was available; quite the opposite. We noted the respondent’s position.

32. Mr McHugh continued by submitting that the Tribunal could be satisfied that, having tried his wife and mother in law, the claimant requested 7 February 2018 off because he felt there was nobody else to care for the child. There was no evidence that there would have been. His agreed witness statement was that he was the only person who could look after the child in the circumstances. The question was therefore whether it was within the natural meaning of the word "necessary" for the claimant to take the day off work. The claimant says yes. The history of days off are irrelevant. The only issue is the request made on 6 February 2018.

33. Mr McHugh then moved to the question of section 57B(1)(b). The claimant has to establish that his is entitled to time off and there has been an unreasonable refusal of request for leave. The case of **Reilly-Williams v Argos Ltd [2003] UKEAT 811/02/2905** is authority for the proposition that the test applied is not a range of reasonable responses test. The Tribunal must look at the individual circumstances and decide what was reasonable in a particular case, rather than by reference to what range of reasonable responses an employer may have considered permitting. The case of **Qua v John Ford Morrison Solicitors [2003] IRLR 184** suggests that a Tribunal cannot look at the impact of the granting of a request on the respondent's business. In **Qua**, the EAT specifically set out that the legislation contemplated a reasonable period of time off for an employee to deal with a child who has fallen ill unexpectedly and thus, the section is dealing with something unforeseen.

34. It was further submitted that the EAT guidance in **RBS v Harrison** is relevant in considering whether time off is necessary for the purposes of the act. In that case it was stated that: -

"If an employee has not taken appropriate steps to make alternative arrangements and has had sufficient time in which to do so, the Tribunal is unlikely to find as a fact that it was necessary for him or her to take time off. If the time which has passed between the learning of the risk and the risk becoming

fact is very short, then it would be easier for the employee to establish that it was necessary for him to take time off."

35. Mr McHugh submitted that it was suggested by the respondent that "alternative arrangements" could be the availability of annual leave. If that was correct, then section 57A would never apply if a claimant had annual leave available. The claimant did not want to take annual leave because he had a holiday planned.

36. There was then a discussion between Counsel about the meaning of what Mr McHugh had just said. Mr McHugh confirmed that he did not seek to go behind what the respondent's refusal letter had said. The decision taken by the respondent was that time off was not necessary because the claimant was able to take leave. That is an incorrect interpretation of **Qua** and the statute. There must have been an unreasonable refusal to allow the claimant to exercise his section 57A rights.

37. On the issue of detriment, Mr McHugh started with section 47C of the Employment Rights Act 1996, which refers to a right of an employee not to be subjected to any detriment by an act or deliberate failure to act by his employer done for a prescribed reason. Prescribed reasons include requesting time off under section 57A. This is not a case of a dismissal because of a protected act.

38. The claimant has to show the detriment related to the totality of the circumstances. The reason relied upon may be a reason for detriment but no necessarily the sole reason. It is akin to the test for discrimination arising from disability. Mr Kohanzad intervened to submit that there are lots of authorities on section 47C detriment for whistleblowing such as **Fecitt v NHS Manchester [2011] EWCA Civ** 1190, in which, at paragraph 48, Elias LJ stated that detriment is a material influence and more than a trivial influence. Mr McHugh agreed with this and confirmed that the detriment had to be more than a trivial reason, but not the sole reason. The Tribunal should therefore ask itself whether there has been a detriment and, would a person in the claimant's circumstances find this was an unreasonable refusal to grant dependency leave and being forced to take annual leave.

39. The reason relates to the assertion to the right time off under section 57A, if the refusal is unreasonable, it must relate to section 57A because the request for time off relates to detriment. It is, at least, more than a trivial reason.

40. In summary, the claimant was entitled to time off under section 57A(1)(d). Time off was refused when time off was requested; his right was unreasonably refused and because of the refusal, he was subjected to detriments and both claims are well-founded.

Respondent's Response

41. Mr Kohanzad submitted that, as a point of law, Mr McHugh had said that this rule had to be related to the act. The statute says that it has to be done for a prescribed reason. That is akin to section 47B, which says that matters are "done on the ground". The case of **Fecitt** was authority for the proposition that the test in section 47B is a "reason why" test per Lord Nicholls.

42. The fact that someone disagrees with someone else is not the same as them not agreeing with them. It is a wider latitude if you say, "I don't agree" than if you say, "I disagree with you". On the construction of section 57A(1)(e), it is possible to construct the statute as saying that the law makers did not mention illness deliberately and used the word illness in other parts of the section. It could not have been the intention of the drafters to cover the circumstances in sub paragraph (e) elsewhere.

Decision on Liability

43. We considered the evidence and submissions of counsel carefully. On the whole, we preferred submissions made by Mr McHugh to those made by Mr Kohanzad.

44. Firstly, we interpret the words of sections 57A and 57B using the common English usage of the words concerned. We therefore find that the requirements of section 57A(1) only requires an employee to take reasonable time off. That is the limit of

the reasonableness test in section 57A(1). The second part of the test is the requirement that the action taken by the employee is necessary.

45. We find that in interpreting section 57A(1)(d), the phrase "arrangements for the care" include the arrangements made for a dependent to attend school. We find that because schools have a pastoral function, have a duty of care to students, provide services that are much wider than just education and are required to undertake very stringent safeguarding requirements. We can make no other determination than to find that sending a child to school is the provision and arrangements for the care of a dependent.

46. On the facts agreed, the need to remove the child from school on 6 February 2018 would have engaged section 57A(1)(b), but the school's refusal to take the child back whilst she was still suffering from sickness and diarrhoea was an unexpected disruption of the arrangements for the care of the child, which takes the case into subsection (d).

47. As I have already indicated, the jurisprudence and the findings of this panel are that the time off taken by the claimant was reasonable, so we then move on to the question of whether his action was necessary.

48. We agree with Mr McHugh's submission that Mr Kohanzad argument that a parent in the claimant's situation, who had a wife and a mother in law who were able to take care of the child on most occasions, with himself as a back stop was neither an arrangement nor sufficient, was the counsel of perfection. We find as an industrial jury that no childminder in our experience would have taken a child with sickness and diarrhoea on one day's notice when the child was excluded from school because of her illness. We therefore find that, because of the unavailability of the child's mother and her grandmother, it was necessary for the claimant to look after the child. There was no other alternative. This scenario is exactly what the provisions of section 57A were made for.

49. The respondent's refusal to allow dependency leave was unreasonable. The reason given by the respondent for the refusal was misconceived. It cited the case of **Qua**, but misapplied that case and ignored the guidance contained in **RBS v**

Harrison, which we find to be the relevant authority for the circumstances that are agreed in this case.

50. We find that section 57A(1)(d) was engaged and that the claimant sought time off for dependency leave which fell within the scope of section 57A(1)(d).

51. The amount of time off he took was a reasonable amount of time in order to take necessary action for the reasons we have set out above and he was therefore entitled to dependency leave. We find that the claimant was subjected to a detriment for requesting his dependency leave. In making this finding, we concur with the submissions of Mr McHugh on the issue of detriment.

Decision on Remedy

52. We then heard evidence on remedy. Mr McHugh submitted that remedy is an award for injury to feelings and that an award in the lower band of Vento was appropriate. The Schedule of Loss had suggested the sum of £1,000, which is a matter for the Tribunal. The claimant was distressed at being told that his application for leave was refused.

53. Mr Kohanzad submitted that the act committed by the respondent in this case was of a different quality to an act of discrimination carried out by an employer. This was an administrative decision carried out by an employer in good faith. The employer will sometimes get it wrong. The employee whose employer gets decisions wrong will be upset. The Vento guidelines for discrimination are meant to mirror the provisions for compensation for personal injury. It is an administrative decision and the question must be asked how upset the claimant was. He may be upset, but this claim is akin to a personal injury claim, so an amount of between £200 and £400 was submitted as appropriate. Mr McHugh reminded us that the lower band of Vento is £900 to £8,600.

54. We considered the submissions on remedy carefully. We had found that the claimant's reaction to being refused dependency leave did result in a detriment for him and we accepted Mr McHugh's argument on the detriment point over those of Mr Kohanzad.

55. On the amount, however, we start from the position that any award of compensation has to be just and equitable. We considered that in this case a just and equitable amount was less than the bottom band of Vento. We considered the evidence on the effect of the decision on the claimant and felt that the injury to him was not the same as an injury to feelings of the victim of an act of discrimination that came at the lower end of the Vento scale. We therefore felt that the just and equitable amount of compensation that was relative to the decision in this case was £500.

Employment Judge Shore
Date 28 November 2018

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number(s): **2501316/2018**

Name of case(s): **Mr A Thompson** v **Parker Hannifin Manufacturing Limited**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: **29 November 2018**

"the calculation day" is: **30 November 2018**

"the stipulated rate of interest" is: **8%**

MISS K FEATHERSTONE

For the Employment Tribunal Office

INTEREST ON TRIBUNAL AWARDS

GUIDANCE NOTE

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at

www.gov.uk/government/collections/employment-tribunal-forms

If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

2. The Employment Tribunals (Interest) Order 1990 provides for interest to be paid on employment tribunal awards (excluding sums representing costs or expenses) if they remain wholly or partly unpaid more than 14 days after the date on which the Tribunal's judgment is recorded as having been sent to the parties, which is known as "the relevant decision day".

3. The date from which interest starts to accrue is the day immediately following the relevant decision day and is called "the calculation day". The dates of both the relevant decision day and the calculation day that apply in your case are recorded on the Notice attached to the judgment. If you have received a judgment and subsequently request reasons (see 'The Judgment' booklet) the date of the relevant judgment day will remain unchanged.

4. "Interest" means simple interest accruing from day to day on such part of the sum of money awarded by the tribunal for the time being remaining unpaid. Interest does not accrue on deductions such as Tax and/or National Insurance Contributions that are to be paid to the appropriate authorities. Neither does interest accrue on any sums which the Secretary of State has claimed in a recoupment notice (see 'The Judgment' booklet).

5. Where the sum awarded is varied upon a review of the judgment by the Employment Tribunal or upon appeal to the Employment Appeal Tribunal or a higher appellate court, then interest will accrue in the same way (from "the calculation day"), but on the award as varied by the higher court and not on the sum originally awarded by the Tribunal.

6. 'The Judgment' booklet explains how employment tribunal awards are enforced. The interest element of an award is enforced in the same way.