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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: S/4112749/2018

Held in Glasgow on 10 October 2018

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Employment Judge: Paul McMahon

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Mr D Cannon

**Claimant
In Person**

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Allma Construction Ltd

**Respondent
Represented by:-
Mr J Reilly –
Consultant**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The judgment of the Tribunal is that:-

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- (1) The respondent is ordered to pay the claimant the gross sum of **£680.55 (SIX HUNDRED AND EIGHTY POUNDS AND FIFTY FIVE PENCE)** by way of damages for breach of contract for failure to give contractual notice of termination of employment.
- (2) The claimant's claim for unpaid wages in respect of overtime is dismissed.

E.T. Z4 (WR)

(3) The claimant's claim for accrued and unpaid holiday pay is dismissed.

(4) The respondent shall be at liberty to deduct from the above sums prior to making payment to the claimant such amounts of Income Tax and Employee National Insurance Contributions (if any) as it may be required by law to deduct from a payment of that amount made to the claimant, provided that if it does so, the respondent shall duly remit such sums so deducted to Her Majesty's Revenue and Customs (HMRC), and provide to the claimant written evidence of that fact, the amount of such deductions and of the sums deducted having been remitted to HMRC, payment of the balance to the claimant shall satisfy the requirements of this judgment.

REASONS

Introduction

1 The claimant's claims are for breach of contract in respect of failure to give,
15 or pay in lieu of, contractual notice, unauthorised deduction from wages in respect of payment for overtime, and for payment in respect of accrued but untaken holiday. All the claims are defended by the respondent. There is no claim for unpaid wages relating a system or practice of paying wages in arrears.

20 2 The final hearing took place on 10 October 2018. The claimant was unrepresented. The respondent was represented by Mr J. Reilly. The claimant gave evidence on his own behalf. For the respondent, evidence was led from Mr Gerald Rea, who is employed by the respondent as a Contracts Manager, Mr John Barr, who is employed by the respondent as a Foreman/Site
25 Supervisor and Ms Eleanor Nelson, who is employed by the respondent as a Payroll Manager. The respondent lodged a set of documents numbered 1 to 12. The claimant did not lodge any documents. The claimant and Mr Reilly made brief closing submissions.

The issues

3 The issues to be determined by the Tribunal are as follows:

- 5 (i) Had there been a breach of contract entitling the claimant to damages in respect of the respondent not giving the claimant notice or paying in lieu notice on termination of the claimant's employment.
- (ii) Had there been an unlawful deduction from the claimant's wages in respect of the respondent not paying the claimant for overtime hours that he had worked in the final week of his employment with the respondent.
- 10 (iii) Had the claimant taken and been paid for fewer days annual leave in the relevant holiday year than had accrued as at the date of termination of the claimant's employment.

Findings in fact

4 The Tribunal considered the following relevant facts to be admitted or proved:

- 15 a. The claimant commenced a period of employment with the respondent on 3 February 2017. He was employed as a Plant/Machine Operator under a contract of employment, a copy of which was produced at page 24 of the respondent's set of documents. The length of notice required to terminate the claimant's contract of employment was one
- 20 week.
- b. The claimant's employment with the respondent terminated on 12 April 2018. At approximately 11.30am or thereabouts on 12 April 2018 the respondent's Contracts Manager, Mr Gerald Rea, approached the claimant on the respondent's site at Gartcosh and told him that his
- 25 employment was being terminated that day. The claimant was not given notice of termination of his employment but Mr Rea did tell the claimant that the respondent would make a payment of one week's pay in lieu of notice to the claimant, together with any other payments the claimant was entitled to, the following week. Mr Rea further

informed the claimant that if he left the site early that day the respondent would not make the payment of one week's pay in lieu of notice. Mr John Barr, who is employed by the respondent as a Foreman/Site Supervisor, was also present when Mr Rea spoke to the claimant.

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c. The claimant's only response to being informed of these matters by Mr Rea was to tell Mr Rea that he should not worry about him as he would find other work quickly.

d. Immediately after the conversation with Mr Rea on 12 April 2018 the claimant worked with Mr Barr to complete the task he had been working on. After the claimant had completed this task, and without any further discussion with the respondent, the claimant left the respondent's site at approximately 2pm or thereabouts and did not return.

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e. The claimant's normal hours of work were 39 hours per week. The claimant was paid at an hourly rate of £17.45 and his gross normal weekly pay was £680.55. The claimant was entitled to be paid overtime for any hours he worked over and above 39 hours per week at an hourly rate of £17.45. The claimant worked 40 hours in the final week of his employment (including one hour of overtime). The claimant was paid for the 40 hours he worked in the final week of his employment, a total of £698 gross.

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f. The respondent's holiday year ran from 1 January to 31 December. The claimant was entitled to 29 days paid holiday in each holiday year. As at the termination of the claimant's employment he had accrued 8.1 days holiday entitlement and had taken 10 days holiday; 5 days during the New Year shut down in January and 5 days during the Easter shutdown in March/April.

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g. The claimant's losses in respect of the one week notice period were his normal weekly wages of £680.55 gross.

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Observations on the evidence

5 There was no dispute that the period of notice to terminate the claimant's
contract of employment was one week and there was no evidence led to
suggest that there was an express contractual provision entitling the
5 respondent to make payment in lieu of notice.

6 There was a dispute between the claimant's evidence on the one hand and
Mr Rea's and Mr Barr's evidence on the other in relation to elements of what
Mr Rea said to the claimant when he spoke to him on the morning of 12 April
2018. There was no dispute as to Mr Rea's evidence that he told the claimant
10 that his employment was being terminated that day, that the claimant was not
given notice of termination of his employment but Mr Rea did tell the claimant
that the respondent would make a payment of one week's pay in lieu of notice
to the claimant together with any other payments the claimant was entitled to
the following week. However, Mr Rea's and Mr Barr's evidence was that Mr
15 Rea also specifically told the claimant that the respondent would not pay the
one week's pay in lieu of notice if the claimant did not stay until the end of his
shift that day. The claimant's evidence was that Mr Rea had told him that he
could finish up immediately and that he did not need to stay until the end of
his shift. The claimant further denied that Mr Rea told him that the respondent
20 would not pay the one week's pay in lieu of notice if the claimant did not stay
until the end of his shift. The Tribunal preferred Mr Rea's and Mr Barr's
evidence in this respect. Mr Rea and Mr Barr corroborated each other's
evidence. In addition, the Tribunal also heard oral evidence from Mr Rea, and
was referred to documentary evidence, in particular at page 31 of the
25 respondent's set of documents, to the effect that Mr Rea advised the
respondent's payroll department on 13 April 2018 that the claimant had
"walked off site" on 12 April 2018. The Tribunal considered that this evidence
was consistent with Mr Rea having told the claimant that he required to work
until the end of his shift and was inconsistent with Mr Rea having told the
30 claimant that he could leave immediately.

7 There was no material factual dispute between the claimant and Mr Rea in
relation to the claimant's response to what Mr Rea told him during their
conversation on 12 April 2018, i.e. that Mr Rea should not worry about him as
he would find other work quickly. Mr Barr's evidence was that he did not hear
5 the claimant's response.

8 Nor was there any material factual dispute between the claimant's and Mr
Barr's evidence in relation to the claimant's actions thereafter i.e., that
immediately after the conversation with Mr Rea on 12 April 2018 the claimant
worked with Mr Barr to complete the task he had been working on and that
10 after doing so, and without any further discussion with the respondent, the
claimant left the respondent's site at approximately 2pm or thereabouts and
did not return.

9 The claimant gave evidence that his losses in respect of the one week notice
period were his normal weekly wages of £680.55 gross. This evidence was
15 not challenged by the respondent and there was no evidence led alleging that
the claimant had failed to act reasonably in order to mitigate his losses.

10 In relation to whether the claimant had worked overtime in the final week of
his employment that he was not paid for, the claimant said in his own evidence
that he thought he had worked 42 hours in his final week of employment but
20 was only paid for 40 hours. However, when asked, he was not able to specify
when and on what dates these additional hours were worked. Mr Barr and Mr
Rea gave evidence that the copy of the respondent's weekly allocation sheet,
which was produced at page 31 of the respondent's set of documents,
showed the hours the claimant worked each day in the final week of his
25 employment and this was a total of 40 hours. Ms Nelson, the respondent's
Payroll Manager, also gave evidence in this respect. Ms Nelson gave
evidence that the said copy of the respondent's weekly allocation sheet
showed the hours she was told on 13 April 2018 the claimant had worked
each day in the final week of his employment and this was a total of 40 hours.
30 The Tribunal also heard evidence from Ms Nelson that a copy of the
claimant's pay slip in respect of the final week of his employment, which was

produced at page 32 of the respondent's set of documents, showed that the claimant had been paid for 40 hours work in the final week of his employment. This evidence was not challenged by the claimant.

11 In relation to whether the claimant had taken and been paid for fewer holidays
5 in the relevant holiday year than had accrued as at the date of termination of
his employment, the only evidence the Tribunal heard from the claimant in
this respect was that ACAS had advised him that he had accrued holidays as
he worked throughout the year but that he did not know what the respondent's
10 holiday year was and whether and how many holidays he had taken. On cross
examination the claimant also accepted that he took holidays during the
respondent's shut down periods at Christmas/New Year in winter and at the
"Glasgow Fair" in summer and that he was paid for any holidays that he took.
The claimant said he could not remember whether or not he took any holidays
15 at Easter. The Tribunal heard detailed evidence from Ms Nelson, with
reference to copies of various payslips and related documents in the
respondent's set of documents, that the respondent's holiday year ran from 1
January to 31 December, that the claimant was entitled to 29 days paid
holiday in each holiday year, that as at the termination of the claimant's
20 employment he had accrued 8.1 days holiday entitlement and that he had
taken 10 days holiday in the current holiday year; 5 days during the New Year
shut down in January 2018 and 5 days during the Easter shutdown in
March/April 2018. This evidence was not challenged by the claimant.

Relevant law

Breach of contract (Notice)

25 12 The Employment Tribunal has jurisdiction to hear breach of contract claims to
a maximum of £25,000. This includes claims in respect of failure to pay
notice. Section 86 of the Employment Rights Act 1996 (the "ERA") sets out
the position with regard to the rights of an employer and employee to a
minimum period of notice of termination of employment.

13 Section 86(1) of the ERA provides that the notice required to be given by an
employer to terminate the contract of employment of a person who has been
continuously employed for one month or more is not less than one week's
notice if his period of continuous employment is less than two years. The
5 effect of this provision is to incorporate the statutory terms into the contract of
employment.

14 Where an employer, without the agreement of the employee, dismisses the
employee without contractual notice and tenders a payment in lieu of proper
notice, the employer is in repudiatory breach of contract in circumstances
10 where there is no express contractual right for the employer to make a
payment in lieu of notice (**Delany v Staples [1992] IRLR 191, HL; Morrish v
NTL Group Ltd [2007] CSIH 56**).

15 Such a repudiatory breach of contract on the part of the employer entitles,
and requires, the employee to accept the breach to bring the contract of
employment to an end (**Boyo v Lambeth London Borough Council (1995)
15 IRLR 50; Société Générale, London Branch v Geys [2013] IRLR 122, SC**).

16 Although acceptance of the employer's repudiatory breach is a legal
requirement to bring the contract of employment to an end, the court should
easily infer that the employee has accepted the employer's repudiation of the
20 contract (**Gunton v Richmond-upon-Thames BC [1980] ICR 755, CA**).

17 The principle of mitigation of loss provides that it is the duty of a dismissed
employee to act reasonably in order to mitigate his loss (*A G Bracey Ltd v
Iles*[1973] IRLR 210). However, it is for the employer to prove that the
employee has failed to mitigate (**Bessenden Bessenden Properties Ltd v
25 Corness [1974] IRLR 338**).

Unauthorised deduction from wages (Overtime)

18 The ERA at Section 13 provides for the right of an employee not to suffer
unauthorised deductions from wages. Section 14 sets out the provisions in
respect of excepted deductions and Section 16 sets out the provisions in
30 respect of excepted payments. Section 13(3) states:

5 ‘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.’

Holiday pay

19 The Working Time Regulations 1998 (‘the WTR’) provide that every worker is entitled to annual leave. Regulations 13 and 13A entitle workers to minimum
10 levels of annual leave. When a contract of employment is terminated, for whatever reason, the worker is entitled to payment for any accrued but untaken annual leave. Regulation 14 sets out how compensation in respect of payment of accrued but untaken leave is calculated. Regulation 16(1)
15 provides that a worker is entitled to be paid at the rate of a week’s pay in respect of each week of annual leave to which he or she is entitled under Regulations 13 or 13A. A week’s pay is calculated substantially in accordance with sections 221-224 of the ERA.

Claimant’s submissions

20 The claimant made very brief oral submissions and said merely that he was
20 working for his family and would just like to be paid for what he is entitled to.

Respondent’s submissions

21 Mr Reilly made brief oral submissions on behalf of the respondent. In summary his submissions were as follows:

Breach of contract (Notice)

25 22 The evidence from Mr Rea was that the claimant’s employment was terminated on 12 April 2012 but that he had clearly told the claimant that if he worked until the end of his shift that day he would be paid a week’s notice pay in lieu. Mr Barr corroborated that evidence.

23 Had the claimant worked until the end of his shift on 12 April 2012 he would have received a week's pay in lieu of notice on 19 April 2018.

24 The claimant did not work until the end of his shift and that was a breach of contract on the part of the claimant. The respondent was entitled to withhold
5 the pay in lieu of notice in light of the claimant's breach of contract.

Unauthorised deduction from wages (Overtime)

25 In respect of overtime, Ms Nelson took the Tribunal through the payslips and allocated time sheet and the respondent's position is that there was no overtime done that the claimant did not receive the appropriate payment for.
10 That was supported by Ms Nelson's evidence. The claimant left the site early on the final day of his employment. Ms Nelson made the point that there was no additional rate for overtime, it was paid at the normal rate. The respondent's position is that the hours the claimant worked were paid in full.

26 In respect of outstanding payments in arrears, it was established that the
15 claimant claims notice pay, not arrears of pay.

Holiday pay

27 Mrs Nelson took the Tribunal through the relevant figures and documents and her evidence was not challenged. The Tribunal is invited to find that the claimant is not entitled to any outstanding holiday pay.

20 28 The respondent's representative confirmed that the respondent was no longer seeking expenses against the claimant in respect of these proceedings.

Discussion and decision

Breach of contract (Notice)

29 The Tribunal has to decide whether there been a breach of contract entitling
25 the claimant to damages in respect of the respondent not giving the claimant notice or paying in lieu notice on termination of the claimant's employment.

30 The claimant was contractually entitled to receive one week's notice of termination of his employment. There was no evidence, and it was not contended on behalf of the respondent, that there was an express contractual right for the respondent to make a payment in lieu of notice.

5 31 Therefore, in accordance with the authorities referred to under the "Relevant law" section above, in particular *Delany v Staples* [1992] IRLR 191, HL and *Morrish v NTL Group Ltd* [2007] CSIH 56, by terminating the claimant's employment on 12 April 2018 without notice and instead advising the claimant that he would receive a payment in lieu of one week's notice the following week on condition that he stayed at work until the end of his shift, the respondent was in repudiatory breach of the claimant's contract of employment.

15 32 In light of the guidance provided in the case of *Gunton v Richmond-upon-Thames BC* [1980] ICR 755, CA, that whilst acceptance of the employer's repudiatory breach is a legal requirement to bring the contract of employment to an end, the court should easily infer that the employee has accepted the employer's repudiation of the contract, the claimant's response to the respondent's breach as set out in the findings in fact above culminating in the claimant leaving the respondent's site at approximately 2pm or thereabouts on 12 April 2018 and not returning amounted to the claimant acting reasonably quickly and unambiguously in accepting the respondent's repudiation, thereby bringing the contract of employment to an end and discharging the claimant from any further performance.

25 33 Accordingly, by leaving the respondent's site before the end of his shift on the final day of his employment the claimant was not himself acting in breach of contract thereby entitling the respondent to withhold payment in lieu of notice, as submitted on behalf of the respondent.

30 34 In the circumstances that there was no evidence, and it was not contended on behalf of the respondent, that the claimant had failed to act reasonably in order to mitigate his losses, the claimant is entitled to damages in respect of the respondent's breach of contract for failure to give the claimant one week's

notice of termination of his employment in the gross sum of £680.55, being the claimant's loss of one week's normal weekly wages in the notice period.

Unauthorised deduction from wages (Overtime)

35 The Tribunal had to decide whether there had been an unlawful deduction
5 from the claimant's wages in respect of the respondent not paying the claimant for overtime hours that he had worked in the final week of his employment with the respondent.

36 The Tribunal was satisfied on the evidence that the claimant worked and was
10 paid for 40 hours work in the final week of his employment with the respondent and accordingly that the claimant had not suffered any unauthorised deduction from wages in respect of overtime hours that he had worked in the final week of his employment with the respondent and his claim in this respect should be dismissed.

Holiday pay

15 37 The Tribunal had to decide whether the claimant had taken and been paid for fewer days annual leave in the relevant holiday year than had accrued as at the date of termination of the claimant's employment.

38 The Tribunal was satisfied on the evidence that, as at the date of termination
20 of the claimant's employment with the respondent, the claimant had accrued 8.1 days paid annual leave and had taken 10 days paid annual leave in the relevant holiday year and as such the claimant had not been paid for fewer days annual leave in the relevant holiday year than had accrued as at the date of termination of his employment and accordingly the claimant's claim in this respect should be dismissed.

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Employment Judge: P McMahon
Date of Judgment: 12 November 2018
Entered in register: 14 November 2018
and copied to parties

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