



EMPLOYMENT TRIBUNALS

Claimant: Mr W J Walker

Respondent: Simpsons Logistics Limited

Heard at: North Shields **On:** 12 April, 2018

Before: Employment Judge Nicol (sitting alone)

Representation

Claimant: Miss S Walker, daughter

Respondent: did not appear

REASONS

1 At the end of the hearing, the Tribunal gave its Judgment and Reasons for the Judgment. As is noted below, the respondent had not appeared or offered a reason for non-attendance. The respondent requested that the Tribunal should set out its Reasons in writing in a letter dated 8 May, 2018, dispatched on 9 May, 2018. If the request was received by the Tribunal, it was mislaid, and it was not until 24 May, 2018, that the matter was referred to the Employment Judge, who asked questions to establish the nature of the original request and when it was sent.

2 The Tribunal is now satisfied that the request may have been made within the prescribed time limit and it is therefore appropriate that the Reasons should be provided in writing. The Tribunal noted that the respondent did not ask for the judgment to be reconsidered or give any grounds on which the Tribunal might consider reconsidering its judgment on its own initiative.

3 Whilst the wording and order may differ from the announced version, this is with the benefit of more preparation time and is not the result of further deliberations by the Tribunal.

4 The respondent did not appear at the hearing. On an examination of the Tribunal's file, it was clear that the respondent had failed, either directly or through a representative, to respond to correspondence from the Tribunal. The Tribunal was aware of the contents of all documents submitted to it and the contents of correspondence sent by the respondent to the claimant and/or his representative. Having considered all of the circumstances, the Tribunal found that it was appropriate to proceed in the respondent's absence.

5 This is a complaint by William John Walker, the claimant, against Simpsons Logistics Limited, the respondent, arising out of his employment with the respondent as a cleaner/handyman. The claimant's employment with the respondent commenced on 7 September, 2009, and ended on 30 November, 2017, a period of eight complete years.

6 The claimant alleges that he was unfairly dismissed, did not receive notice pay and/or a payment in lieu of notice, did not receive the holiday pay to which he was entitled during and on the termination of his employment, did not receive all of the wages to which he was entitled during his employment and did not receive a written statement of his terms and conditions of employment.

7 In its response to the claimant's complaints, the respondent accepts that the claimant was employed by it. Whilst stating that the claimant's employment commenced on 20 September, 2010, it admits that it ended on 30 November, 2017. It further admits that the claimant was dismissed and contends that the dismissal was for 'a potentially fair reason...and that the respondent acted fairly and reasonably in treating this as the reason for dismissal' and '...was within the range of reasonable responses available...and a potentially fair reason...'. However, the actual reason is not stated. Further, the respondent failed to give any indication of having followed a procedure, whether appropriate or not. The respondent states that it paid the claimant all of the holiday pay to which he was entitled but does not give any details. The respondent contends that the claimant was not entitled to notice pay but does not say why. Finally, the respondent denies all of the claimant's complaints.

8 The Tribunal heard evidence from the claimant and from Samantha Walker, his daughter, on his behalf. The witnesses gave their evidence in chief by oral statements and answered questions from the Tribunal. The Tribunal had before it a bundle of documents prepared by the claimant, marked 'Exhibit C1'. The bundle includes two letters from the respondent that appear to set out the respondent's position and are likely to have been the basis for any statements that the respondent might have submitted to the Tribunal. If the respondent did not adopt the contents of the letters but put forward alternative matters, they are likely to undermine, the respondent's credibility.

9 From the evidence that it heard and the documents that it saw, the Tribunal finds the following facts.

10 The respondent is a transport company and the claimant was employed as a cleaner/handyman. He undertook various duties of a manual nature, as required. These included cleaning offices and other facilities. He was born on 17 April, 1950, and did not appear to be in the best of health. However, he stated that he was fit to work and was seeking alternative employment. He had had heart and chest problems but had not received any notes from his doctor to suggest that he was unfit for work. He had hardly had a day off for illness and had even worked when he had pneumonia. Originally, the claimant worked twenty hours over five days but this was changed to twenty hours over four days, that is a nominal five hours per day worked.

11 The respondent accused the claimant of abusing his breaks by, among other things, spending longer than appropriate in the canteen. However, he said that when he went into the canteen, he had to clean it, including the microwaves, and the toilets.

This took time. He did various odd jobs but was not provided with tools. He also changed defective light bulbs. Sometimes, his wife would come in to assist him if he had a lot of work to do but she was not paid to do this. At other times, he would go back at night to make sure everything was spotless. He never had any complaints about the standard of his work. He provided his own cleaning materials but was not paid for them.

12 The claimant was told that the respondent did not want to find him dead whilst at work but the claimant did not understand what was meant by this. His knees can be a problem but he was not aware of any reason that the respondent had to get rid of him.

13 The claimant was last paid on 25 August, 2017, although the agreed date of termination was 30 November, 2017. He was paid a month in arrears so that he was not paid for four months. The respondent has not indicated why he should not be paid for those months as the claimant says that he was willing to work but was not allowed to by the respondent.

14 His leave year was from April to March and he was not entitled to carry leave over from one leave year to the next. So far as the Tribunal was aware, the claimant was entitled to the statutory minimum of 5.6 weeks paid holiday in each leave year. Although the respondent states in one of its letters that the claimant took three bank holidays as holiday, he actually took four in the then current leave year. The respondent also states that the claimant used all of his paid holiday in the period to July, 2017, but admits that it cannot produce records to confirm this. The claimant denies taking any paid leave, apart from the bank holidays. The claimant was unable to take leave during the last four months of his employment as he was suspended.

15 The claimant was not given any notice of his dismissal and did not receive any pay in lieu of notice. Precisely how the claimant's employment ended is not clear but the date of termination is agreed between the parties. There is nothing from either side to suggest that any type of procedure was adopted by the respondent or that the claimant was informed that his continued employment was at risk, other than the fact that he was suspended.

16 The claimant did not have a copy of his contract of employment but acknowledged that he had signed one. He did not recall receiving a copy.

17 The respondent accepts that the claimant was employed to clean 210,000 square feet of warehousing, external areas, two toilets and the drivers' rest room. Also, to undertake other general site requirements. Its warehouse manager was not always able to confirm the claimant's location whilst working and says that this led to having issues with the claimant. The respondent says that the claimant needs breaks because of his knees.

18 The respondent says that on 9 August, 2017, the claimant was advised to have his knees examined and to see his doctor to have it confirmed that he was fit to work. It would appear that the claimant was, in effect, suspended without pay but the respondent did not follow this up in any way. The claimant states that he did see a doctor who told him that it was for the respondent to establish whether or not the claimant met its requirements as to medical fitness as it knew his working conditions. The respondent failed to refer the claimant to an occupational health practitioner.

19 The claimant wrote to the respondent on 28 August, 2017, seeking clarification of various points concerning his employment. The respondent replied on 30 August, 2018, when the claimant's letter was received, but did not suggest that the claimant's employment had been terminated. The claimant wrote to the respondent again on 25 September.

20 A P45 was issued to the claimant dated 27 September, 2017, but showing the leaving date as 30 September, 2017. However, this document is not conclusive as to the date of termination of employment in the absence of any other evidence.

21 On 22 November, 2017, the claimant's representative wrote to the respondent seeking clarification of the claimant's employment status. The respondent replied in a letter dated 28 November, 2017. Again, the respondent does not state that it has terminated the claimant's employment or accepted a repudiation of his contract of employment. It refers to the state of the claimant's health and concerns over his timekeeping.

22 These proceedings were commenced on 20 December, 2017, after the claimant had received an ACAS early conciliation certificate. The claimant stated that his employment terminated on 30 November, 2017. Through a representative, the respondent submitted its response. In an annex to the response form, the respondent stated that the claimant's employment ended on 30 November, 2018 and that he was dismissed. It does not set out the circumstances of the dismissal or the ground(s). It is particularly stated that the claimant was not entitled to notice pay.

23 Briefly, the claimant contends that he was unfairly dismissed by the respondent because of the way in which he was suspended and then had his employment terminated without notice. Further, he contends that he did not receive any notice, his wages for the last four months of employment and the holiday pay to which he was entitled on the termination of his employment. Finally, he contends that he did not receive written particulars of his employment. The respondent denies all of the allegations but accepts that the claimant was dismissed, stating that this was for a fair but undisclosed reason.

24 The Tribunal had regard, in particular, to

24.1 Sections 1, 2, 4, 11, 13, 23, 86, 87, 94, 95, 97, 111, 112, 113, 119, 123, 124 and 124A of the Employment Rights Act, 1996

24.2 the Working Time Regulations, 1998

24.3 Section 207A of the Trade Union and Labour Relations Act, 1992.

25 The respondent has conceded that the claimant was dismissed on 30 November, 2017, but not put forward any reason for the dismissal. From the information before the Tribunal, there appear to be two grounds on which the respondent might have sought to rely – conduct and capability. However, these are not actually put forward by the respondent. The respondent has not suggested that it ever took or considered taking disciplinary action against the claimant. The claimant's medical condition may have been of concern to the respondent but it did not take any action itself, other than suspending the claimant. There is nothing to suggest that any

type of procedure was followed. Had a proper or any procedure been followed, there is not any evidence to show that the claimant would still have been dismissed. Having regard to all of the circumstances, the Tribunal finds that the claimant was unfairly dismissed by the respondent.

26 The Tribunal does not find on the basis of the evidence before it that the claimant caused and/or contributed to his dismissal by his conduct or otherwise.

27 Even if the respondent did not dismiss the claimant, by suspending the claimant without pay for several months, it is probable that the respondent fundamentally breached the claimant's contract of employment so that he was entitled to treat his contract of employment as having been repudiated by the respondent. Obviously, this is without seeing the contract of employment but, in any event, suspending the claimant without pay and then doing nothing about it could be construed as a breach of the implied term of trust and confidence.

28 The respondent denies that the claimant was entitled to notice pay. It does not suggest that this is because an appropriate payment was made. There is not any evidence before the Tribunal to suggest that the claimant was dismissed for a reason that would entitle the respondent to dismiss the claimant summarily. Even if the respondent contends that the claimant was dismissed because of concerns over his timekeeping, this was not something that the respondent had pursued through disciplinary action. The Tribunal was satisfied that, if established, it would be unreasonable to treat this as gross misconduct in the circumstances of this case. Having regard to all of the circumstances, the Tribunal finds that the claimant's complaint that he was dismissed without notice and/or a payment in lieu of notice is well founded.

29 Although the respondent states that the claimant received all of the wages to which he was entitled, the Tribunal accepted the claimant's evidence that he was not paid for the months of August, September, October and November, 2017. The claimant's complaint that he suffered unlawful deductions from his wages is therefore well founded.

30 The claimant's leave year ran from April to March in any year. The relevant period is 1 April, 2017, to 30 November, 2017, the date of dismissal, which is two thirds of the leave year. The claimant admits that he took holidays on four bank holidays in this period but denies taking any other paid holiday. The respondent does not have any records to confirm or dispute this. On the balance of probability, the claimant's complaint that he did not receive all of the holiday pay to which he was entitled on the termination of his employment is well founded.

31 The claimant accepted that he had signed a contract of employment which set out his particulars of employment. Although he could not recall receiving a copy, the Tribunal did not consider that on this point his evidence was reliable as he may well have forgotten something that occurred sometime before this hearing. Having regard to all of the circumstances, the Tribunal finds that the claimant's complaint that he did not receive a written statement of particulars of employment is not well founded and is dismissed.

32 The claimant served a schedule of loss on the respondent to which the respondent has not replied. This includes a claim under Section 207A of the Trade Union and Labour Relations Act, 1992. The claims to which these proceedings relate concern matters to which a relevant Code of Practice relating to dismissal applies. The Tribunal finds that the respondent has failed to comply with that Code of Practice and that failure was unreasonable. In effect, the respondent has suspended the claimant and then just left matters without taking any action until the claimant's contract of employment was terminated. In these circumstances, the Tribunal finds that this is a very serious failure by the respondent so that it is just and reasonable in all the circumstances to increase the awards to the claimant and that increase should be by twenty five per cent.

33 The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations, 1996, do not apply in this case as the claimant has not received any relevant benefits.

34 The claimant did not seek reinstatement or reengagement as the appropriate remedy for being unfairly dismissed. He only sought compensation.

35 The claimant was employed by the respondent for eight complete years, during all of which he was over the age of forty one years. He was paid at the rate of £150 per week or £7.50 per hour.

36 In respect of the complaint that the claimant was unfairly dismissed, the Tribunal makes a basic award of

8 x 1.5 x 150	<u>£1800.00</u>
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Together with a compensatory award in respect of the period 27 January, 2018, to 30 November, 2018,

in respect of the period 27 January, 2018 to 12 April, 2018 (11 weeks)

11 x 150	£1650.00
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in respect of the period 13 April, 2018, to 30 November, 2018 (33 weeks)

33 x 150	£4950.00
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loss of statutory rights	<u>£150.00</u>
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	<u>£6750.00</u>
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increased by 25%	£8437.50
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subject to the statutory cap	<u>£7800.00</u>
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37 The claimant was entitled to eight weeks' notice. In respect of the claimant's complaint that he did not receive notice and/or a payment in lieu of notice, in respect of the period of eight weeks from 30 November, 2017, the Tribunal awards

8 x 150	£1200.00
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increased by twenty five per cent £1500.00

38 The Tribunal found that the claimant did not receive wages for the period 1 August, 2017, to 30 November, 2017 (18 weeks). In respect of the claimant's complaint that he suffered unlawful deductions from his wages, the Tribunal awards

18 x 150 £2700.00

increased by twenty five per cent £3375.00

39 The claimant was entitled to 5.6 weeks paid holiday per year, that is 112 hours. He was dismissed two thirds of the way through the leave year. The claimant having taken four days (20 hours) paid holiday, the Tribunal finds that the claimant was entitled to be paid holiday pay for 54.67 hours being holiday entitlement that he had not used out of a total entitlement of 74.67 (2/3 x 112) hours during the period 1 April, 2017, to 30 November, 2017. In respect of the claimant's complaint that he did not receive all of the holiday pay to which he was entitled on the termination of his employment, the Tribunal awards compensation in the sum of

54.67 x 7.50 £410.03

Increased by 25% £512.54

40 In respect of these sums the claimant shall account to Her Majesty's Revenue and Customs for any income tax and/or National Insurance Contributions that may be due.

41 It should be noted that the above corrects errors in the figures announced during the hearing.

Employment Judge Nicol

Date 18 June, 2018

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