



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr C K Tomkin

**Respondent:** Shaws Timber Limited

**HELD AT:** Leeds

**ON:** 12 to 14 March 2018

**BEFORE:** Employment Judge Cox

**Members:** Ms H Brown

Ms P Wolstencroft

## REPRESENTATION:

**Claimant:** Mr Neckles, trade union officer

**Respondent:** Mr Jenkins, counsel

**JUDGMENT** having been sent to the parties on 16 March 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

1. Mr Tomkin brought a claim to the Tribunal against his former employer, Shaws Timber Limited (“the Company”), alleging unfair dismissal, race and age discrimination and unauthorised deduction from wages. He withdrew his claim of race discrimination during the course of the Hearing and it was dismissed.
2. The Company sells wood and wood products that are assembled on its premises. Mr Tomkin worked as an assembly worker, which involved cutting wood to length and assembling products to fulfil customer orders.
3. At the Hearing, the Tribunal heard oral evidence from Mr Tomkin. On behalf of the Company, the Tribunal heard oral evidence from: Mr Andrew Lister, Production Manager, who carried out the disciplinary investigation that led to Mr Tomkin’s dismissal; Mr Stephen Mullany, a Director of the Company, who gave evidence to Mr Lister about what he had seen Mr Tomkin do; Mr Paul Haigh, Production Manager, who dealt with Mr Tomkin’s disciplinary hearing; and Mr Chris Woodhead, the other Director of the Company, who dealt with Mr

Tomkins's appeal against dismissal. On the basis of that evidence and the documents to which the witnesses referred it, the Tribunal made the following findings on Mr Tomkin's claim.

#### **Unauthorised deductions**

4. On discussion with the parties, it emerged that Mr Tomkin's allegation that the Company had made unauthorised deductions from his wages turned on whether a sum described as a "bonus" that he was paid each week should be taken into account when deciding whether he was paid the national minimum wage. If it should, then he accepted that he was paid what was "properly payable" to him for the purposes of Section 13(3) of the Employment Rights Act 1996 (the ERA) and no deductions had been made.
5. The basic principal under Regulation 9(1)(a) of the National Minimum Wage Regulations 2015 is that payments that are made by the employer to the worker in a particular pay reference period (which in Mr Tomkin's case was a week) are taken into account in deciding whether the national minimum wage rate has been met for that period. On the face of it, that includes all payments to the worker, whether described as basic pay or as a bonus. Mr Tomkin argued, however, that the bonus he was paid was excluded by Regulation 10(k) of the Regulations, which excludes from a worker's remuneration any payments "paid by the employer to the worker attributable to a particular aspect of the working arrangements or to working or personal circumstances that are not consolidated into the worker's standard pay unless the payments are attributable to the performance of the worker in carrying out the work".
6. The Tribunal heard evidence from Mr Tomkin and Mr Woodhead on the nature of the weekly bonus payments. The Tribunal found Mr Tomkin's evidence unreliable in that it was inconsistent and unsupported by the documentary evidence. He said initially that the bonus payment was based on a productivity target of producing a particular number of units in a particular time, as set out on his worksheet. Later in his evidence, however, he accepted that he was paid the bonus even if he did not meet that target. At one point in his evidence he said that the maximum bonus he ever received was £2 per hour but it could be as low as £1.50 an hour. That was not supported by the wage slips that were produced, which showed that the bonus was always at least £2 an hour and sometimes more than that.
7. The Tribunal preferred the evidence of Mr Woodhead, which was clear, unequivocal and supported by the documentation. On the basis of that evidence, the Tribunal found that Mr Tomkin was invariably paid an increment of £2 per hour on top of his basic wage which, although described as a "bonus", was not linked in any way to productivity or performance. The Tribunal also found that, as this payment was effectively part of Mr Tomkin's standard pay, it was not covered by Regulation 10(k).
8. In addition, if the Company's managers or supervisors assessed that Mr Tomkin had been working well in a particular week, he was paid a further hourly increment. The majority of the Tribunal accepted that this performance-related element of the increment could be viewed as a "payment attributable to a particular aspect of the working arrangements" for the purposes of Regulation 10(k). The minority member of the Tribunal (Employment Judge Cox) did not consider that the wording of Regulation 10(k) was intended to cover a

performance-related bonus of this kind. The Tribunal unanimously accepted, however, that this increment was not excluded by Regulation 10(k) because Regulation 10(k) provides that payments that “are attributable to the performance of the worker in carrying out the work” fall outside the exclusion. Mr Tomkin argued that these words relate only to payments attributable “to working or personal circumstances that are not consolidated into the worker’s standard pay” but the Tribunal saw no basis for limiting their application in that way.

9. In any event, it was accepted by the parties that even if only the fixed £2 element of Mr Tomkin’s “bonus” payments was properly to be taken into account, he had been paid the national minimum wage. His claim of unauthorised deductions therefore failed and was dismissed.

### **Unfair dismissal**

10. The Company said that the reason for Mr Tomkin’s dismissal related to his conduct, namely, that it believed he had stolen wood from the Company. That was a potentially fair reason for his dismissal (Section 98(2)(b) ERA). The Tribunal therefore had to decide whether that was in fact the reason for his dismissal and, if so, whether the Company acted reasonably in all the circumstances (including the Company’s size and administrative resources) in treating that as a sufficient reason for dismissing him (Section 98(4) ERA). The Company is relatively small, with only around 60 employees and no in-house human resources function.
11. The issue for the Tribunal was not whether Mr Tomkin actually stolen the wood, but rather whether the Company had a genuine belief that he had, based on reasonable grounds after a reasonable investigation (British Home Stores Ltd v Burchell [1978] IRLR 379). In determining the question of fairness, the Tribunal’s role was not to decide whether it would have dismissed Mr Tomkin had it been in the Company’s shoes, but rather whether the Company’s actions fell within the range of possible reasonable responses that a reasonable employer might have adopted (Post Office v Foley [2000] IRLR 827).
12. The Tribunal was satisfied that the decision to dismiss Mr Tomkin was taken by Mr Haigh. The Tribunal accepts that Mr Haigh discussed his decision with Mr Mullany but we also accept both men’s evidence, which was clear and straightforward, that it was Mr Haigh who made the final decision. The reason that Mr Haigh decided to dismiss Mr Tomkin was that he believed that Mr Tomkin had stolen wood from the Company on 13 May 2017. (The letter of dismissal also refers to another incident on the 6 May 2017, but the Tribunal accepted Mr Haigh’s evidence that, because he had no evidence in relation to 6 May other than from an anonymous informant, he did not base his decision on what had happened on that day. The letter was drafted for him by the Company’s legal adviser and, though he had signed it, he accepted that it was inaccurate.)
13. The Tribunal was also satisfied that Mr Haigh’s belief that Mr Tomkin had been guilty of that misconduct was based on reasonable grounds after a reasonable investigation. There was CCTV evidence that showed Mr Tomkin removing over 20 lengths of wood of around 1 metre long from the premises, and Mr Tomkin admitted at his disciplinary hearing that he had done so. He told Mr Haigh that he did not believe that it was a problem for him to take the wood because it was scrap. Mr Haigh did not believe him. Although Mr Haigh accepted that some small or defective pieces of wood that ended up in the bin were genuinely scrap with no

value, the lengths of wood involved in Mr Tomkin's case were too long to amount to scrap. Mr Haigh considered that Mr Tomkin, as an experienced employee, would know that lengths of wood of that dimension would have a value to the Company.

14. In his evidence to the Tribunal, Mr Tomkin said that he had had a conversation with Mr Haigh a fortnight before the incident in which Mr Haigh had authorised him to take wood from the bin provided nobody saw him doing it. Mr Haigh denied in evidence that he had ever had that conversation and the Tribunal preferred his evidence. It was not credible that a manager would sanction the surreptitious removal of wood in that way and, if he had authorised the removal of wood, Mr Tomkin would surely have raised that at his disciplinary hearing, and he did not do so. In any event, even if that conversation had taken place, the wood involved in Mr Tomkin's case was not from the bin, which was for small scraps only.
15. The Tribunal also accepted that the investigation that Mr Lister carried out, although brief, was reasonable in all the circumstances. The individuals who had witnessed the event were asked to give statements and these were available to Mr Tomkin at the disciplinary hearing.
16. Given that the Tribunal accepted that Mr Haigh had a genuine belief that Mr Tomkin had stolen wood from the Company and that he had based that belief on reasonable grounds after a reasonable investigation, the next issue for the Tribunal was whether Mr Haigh's decision to dismiss Mr Tomkin, rather than impose some lesser disciplinary sanction, was within the band of possible reasonable responses in the circumstances.
17. Mr Tomkin had worked for the Company for 34 years and was viewed as a good employee. He had apologised for taking the wood and had returned it at the time when challenged by Mr Mullany. The Tribunal had sympathy for his situation. It nevertheless accepted that Mr Haigh's decision to dismiss Mr Tomkin was within the band of possible reasonable responses. Theft of Company property is included as gross misconduct in the Company's disciplinary rules but the Tribunal would have accepted that it amounted to gross misconduct even if the rules had not expressly stated so. The Company has a "zero tolerance" policy to the theft of wood and the Tribunal accepted that that policy was justified in the circumstances of this business. The Company could face a loss of stock at a serious expense to the business if it did not take a firm line in relation to instances of theft. Mr Haigh took into account Mr Tomkin's length and quality of service, but still decided that, as he put it, he "couldn't let it go".
18. Mr Woodhead considered Mr Tomkin's appeal on the basis of reviewing the decision of Mr Haigh. The Tribunal was satisfied that the appeal was conducted thoroughly and fairly. The decision to dismiss Mr Tomkin was confirmed.
19. For completeness, the Tribunal records its response to various arguments made by Mr Tomkin as to why his dismissal was unfair.
20. Mr Tomkin alleged that no investigation was conducted. The Tribunal accepted that there were no minuted interviews with the individuals, but they did give statements and Mr Lister discussed these briefly with the individuals in the course of him gathering them in. This was not a complicated case. The investigation was adequate.

21. Mr Tomkin said it was unfair that the witnesses' statements were not put to him for his comments at the investigation stage. The Tribunal does not accept that this made the procedure unfair. Mr Lister spoke to Mr Tomkin to get his version of events and Mr Tomkin had a full opportunity to give his comments on the other witness statements at the disciplinary hearing. In his evidence to the Tribunal he confirmed that he had had a full opportunity at the disciplinary hearing to put his side of the case.
22. Mr Tomkin said it was unfair that Mr Mullany, who was a witness to the incident, also appointed Mr Lister as the investigating officer. The Tribunal could not identify any unfairness in that. Mr Mullany took the decision because he was a Director of the Company and because, as a witness of the misconduct himself, he could not also be the investigating officer. There was only one other Director in the business, Mr Woodhead, and he could not be involved in the investigation because he needed to be available to deal with an open mind with any appeal that Mr Tomkin might make against the decision to dismiss him. There was no evidence to suggest that in appointing Mr Lister to be the investigating officer Mr Mullany in any way tried to influence the way in which he conducted the investigation.
23. Mr Tomkins argued that the fact that Mr Lister suspended him and was also responsible for the investigation made the procedure unfair, but the Tribunal could identify no breach of the rules of natural justice in that.
24. As Mr Tomkin argued at his appeal hearing, he thought his dismissal was unfair because other people were removing wood from the premises but only Mr Tomkin was dismissed for doing so. The Tribunal did not accept that that made the decision to dismiss Mr Tomkin unfair, because even if other people within the business were removing wood without authorisation, there was no evidence before the Tribunal that the Company's management were aware of that. All the witnesses that the Tribunal heard from denied any knowledge that it was happening and at his appeal hearing Mr Tomkin was not prepared to state who else had been guilty. In summary, the Tribunal did not accept that the fact that the Company had not sanctioned others made Mr Tomkin's dismissal unfair when the Company had evidence about what Mr Tomkin had done but no evidence in relation to anybody else.
25. Mr Tomkin said that Mr Woodhead's conduct of the appeal amounted effectively to "rubber-stamping" Mr Haigh's decision. As already mentioned, however, the Tribunal was satisfied that Mr Woodhead's conduct of the appeal was reasonable and thorough.
26. In summary, the Tribunal concluded that Mr Haigh had a genuine belief that Mr Tomkin had been guilty of theft of wood from the Company and based that belief on reasonable grounds after a reasonable investigation. The sanction of dismissal was within the band of reasonable responses in all the circumstances. Mr Tomkin's claim of unfair dismissal therefore failed and was dismissed.

### **Age discrimination**

27. Mr Tomkin alleged that Mr Haigh's decision to dismiss him had been based on or influenced by the fact that Mr Tomkin was over state pension age at the relevant time. In relation to this allegation Mr Tomkin relied on a conversation between himself and Mr Haigh in February 2016.

28. The only evidence the Tribunal heard on the background to that conversation came from Mr Haigh. His evidence was not challenged by Mr Tomkin and the Tribunal accepted it. Mr Tomkin had given the Company six months' notice to the Company of when he was going to be reaching the state pension age of 65 but then had a conversation with Mr Haigh in which he asked whether it would be possible for him to stay on beyond state pension age.
29. During the conversation, Mr Haigh did ask Mr Tomkin why he wanted to work on and Mr Tomkin explained why. Mr Haigh then told Mr Tomkin that he would need to check with the directors whether it was ok for him to do so. Mr Tomkin's evidence was that on four further occasions Mr Haigh repeated the question "why do you want to stay on?" and that he looked disappointed when Mr Tomkin repeated that he did want to stay on. The Tribunal preferred Mr Haigh's evidence, which was that he did not repeatedly ask this question. Mr Haigh's evidence, which unsurprisingly Mr Tomkin did not contest, was that Mr Tomkin was a very good and able employee. As Mr Haigh put it in his evidence, "you couldn't wish for a better worker". He did not want Mr Tomkin to retire. He was pleased that he wanted to work on beyond state pension age. In those circumstances, the Tribunal did not find it credible that he would express any sort of resistance or disappointment in Mr Tomkin's desire to work on.
30. There was nothing in this conversation from which the Tribunal could infer that, over 15 months later, Mr Haigh's decision to dismiss Mr Tomkin was affected in any way by the fact that he was over state pension age, in circumstances where Mr Haigh had a genuine and reasonable belief that Mr Tomkin had committed an act of gross misconduct.
31. Mr Tomkin's age discrimination claim therefore also failed and was dismissed.

Employment Judge Cox

10<sup>th</sup> April 2018