EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	AND	**Respondent**
Mr G Charles		Boro Leisure Limited c/o Nuneaton Borough FC

RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham **ON** 15 April 2019
14 May 2019 (Judge only)

EMPLOYMENT JUDGE Dimbylow

Representation
For the claimant: Mr R Barker, Solicitor
For the respondent: Mr A Etheridge, Lay Representative & Club Secretary

JUDGMENT

1. I declare that the claimant's claim for damages for breach of contract over the failure by the respondent to give him notice or make a payment in lieu of notice is well-founded and succeeds. I order the respondent to pay damages to the claimant in the sum of £500.00 (gross).

2. I declare that the respondent made unauthorised deductions from the claimant's wages. The claimant's claim is well-founded and succeeds. I order the respondent to pay compensation to the claimant in the sum of £6,160.71 (gross).

REASONS

1.1 The claim. This is a claim by Mr Gary Charles (the claimant) against his former employer Boro Leisure Limited c/o Nuneaton Borough FC (the respondent). The claim form was presented on 8 October 2018, following early conciliation through ACAS, the dates on the certificate being 7 and 10 September 2018. In the claim form the claimant complained of 2 things: (1) unlawful deduction from his wages, and (2) damages for breach of contract over the

respondent's failure to give him notice or payment in lieu thereof. The tribunal issued notice of hearing to the parties on 15 October 2018 for an original date of 31 January 2019, with a time estimate of 2 hours, before an Employment Judge sitting alone. When the claim form was served upon the respondent it was told that if it wished to defend the claim then a response must be received by 12 November 2018. Unfortunately, no response was received by then. However, shortly afterwards, Mr Etheridge contacted the tribunal to say that the respondent had not received the claim form; and thereafter he submitted a response form with an explanation for the delay on 14 December 2018. Employment Judge Woffenden granted the respondent's application to accept the response form out of time. The original hearing date did not take place owing to a lack of judicial resources, and the parties were notified the previous day that it would have to be relisted. By notice dated 6 March 2019 the hearing was relisted by the tribunal on 15 April 2019 at 9:45am, with a 2-hour time estimate again.

1.2 We were able to commence the case relatively on time at 10.10am. However, it was apparent that we would struggle to complete the case in the 2 hours given the fact that there had not been an exchange of witness statements and the respondent was considering calling 3 witnesses who were present. I canvassed with the parties whether they would like to have the case relisted with a longer time estimate, but they preferred to have the case dealt with on the day, rather than have to come back and incur further cost and expense. I agreed with that proposal; but on the basis that we were able to agree a timetable for the hearing, and we adopted such a timetable. I had another case to deal with after theirs; but on the information initially available to me I thought I would be able to finish the case in the time allocated. Unfortunately, we were somewhat overtaken by events in that the fire alarm in the building sounded at 11:20am and everybody had to be evacuated. From previous experience I knew that it would take something in the order of one and half or 2 hours to get back into the building again. At that point I had taken all of the evidence but not the submissions. We quickly discussed the best way forward and it was agreed that both parties would provide written submissions and I would give a reserved judgement and reasons, in order to save them having to return at a later date with the attendant costs occasioned by such an arrangement. This was just, fair and proportionate. In accordance with the order that I made, both parties submitted their written submissions.

2. The issues. These were helpfully largely agreed between the parties at the start of the hearing, and I summarise them here for ease of reference:

1 The breach of contract claim

(i) The claimant alleges that he was dismissed on 15 June 2018 without notice or payment in lieu thereof. There was no written contract of employment and the claimant asserted that he was entitled to one week's notice under statute,

having commenced work for the respondent on 20 March 2018 (this date being agreed). Subject to liability, the respondent accepted the length of notice applicable.

(ii) The respondent's case is that the contract ended by agreement at the end of the football season on 28 April 2018; but in the alternative, the claimant agreed to work thereafter without any wages.

(iii) Was the contract of employment terminated, if so when, and was the claimant entitled to the sum of £500 in respect of the respondent's failure to give the requisite one week's notice of termination of employment?

2 The wages claim

(iv) The Claimant claimed that he was entitled to be paid for the period from 20 March 2018 until 28 April 2018 at the rate of £625 per week, and for the period from 29 April 2018 until 15 June 2018 he was entitled to be paid at the rate of £500 per week, such reduction being an agreed variation of the contractual wages.

(v) The respondent's case is that the claimant was entitled to payment for the period from 20 March 2018 to 28 April 2018 in the sum of £2,732.14. It resisted the claim for the period from 29 April 2018 to 15 June 2018 in its entirety.

(vi) Has the claimant established that the respondent made unlawful deductions from his wages, and if so how much?

3. The law relating to the breach of contract claim. This is to be found in the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994. I give a short summary of it. This requires the claimant to demonstrate that he was an employee, that the contract of employment has ended, the claim was presented in time, it arose out of or was outstanding on the termination of the contract, there has been a breach of contract by the respondent (such as the failure to pay money in lieu of notice) and that he has suffered a loss as a result of the breach.

4. The law relating to the wages claim. This is to be found sections 13-27 Employment Rights Act 1996 (ERA). Again, I summarise it. The burden of proof is upon the claimant to establish a number of facts. Is he a worker, is the claim in respect of wages, was it presented in time, has the respondent made any deductions, and if so was the deduction authorised by statutory provision or relevant written contractual provision or agreed to in writing by the claimant before the event giving rise to the deduction? If there was no such provision or

agreement, and it was not an exempt deduction the claim will succeed, and I am required to make a declaration. If the claimant demonstrated he has sustained financial loss then I shall order payment of compensation.

5. The evidence. I received oral evidence from 2 witnesses. The claimant gave evidence in his own cause. For the respondent I heard from Mr James Andrew Ginnelly, the present owner of it.

I also received a number of documents which I marked as exhibits as follows:

C1 Claimant's witness statement (5 pages)
C2 Bundle of documents-agreed (126 pages)
C3 Claimant's closing submissions document (5 pages)

R1 email correspondence dated 29 January 2019 (2 pages)
R2 Respondent's wages schedule (1 page)
R3 Bundle of contract documents (8 pages)
R4 Respondent's closing submissions document (3 pages)

6. The tribunal's findings of fact**.** I make my findings of fact on the basis of the material before me taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. I have resolved such conflicts of evidence as arose on the balance of probabilities. I have taken into account my assessment of the credibility of witnesses and the consistency of their evidence with the surrounding facts.

7. The claimant was born on 13 April 1970 and is now 49 years of age. He is a former professional footballer and played for: Nottingham Forest, Derby County, Aston Villa and Benfica. His playing career lasted 15 years and he won 2 full England caps and 8 for the England under 21 team. After retiring from playing the claimant developed a career in football coaching and recruitment. This brought him work at Sunderland, Ipswich Town, Lincoln City and Burnley. Presently, the claimant is Director of Football at Nottingham University. In addition to his continuing interest in football, he holds a diploma in counselling and has set up 2 organisations to provide advice and support to sportspeople who are experiencing wide-ranging problems. Through his organisations he was trying to place a young football player with various clubs including the respondent's club Nuneaton Borough FC (NBFC). During this process, he met Mr Lee Thorn who was the then owner of NBFC. They struck up a friendship. On 20 March 2018 the then NBFC manager left to take up a post at Stevenage FC. There was a conversation between the claimant and Mr Thorn at that time, when the claimant was Assistant Manager at Lincoln City. The claimant is an "A" licensed coach. There was an agreement reached between the 2 men that the claimant would take over as Football Manager at NBFC commencing on 20 March 2018 on the same terms as the previous manager, that is on a salary of

£625.00 per week. The claimant was in charge of the team when it played Walsall in the Birmingham Senior Cup on that date.

8. The claimant's appointment as Manager was announced on NBFC's website on 29 March 2018. In bold letters (p.38 of the bundle) the respondent said this: "Former England international Gary Charles is stepping in to management as he takes charge of Nuneaton Town on a permanent basis." There followed a quotation from Mr Thorn: "It was always the plan to have him involved at Nuneaton from next season, so when the position of Manager opened up it was an easy decision." Although there was no written contract of employment some of the alleged oral terms were confirmed here.

9. The respondent employs some 25 to 28 people at its address in Liberty Way, Nuneaton. I am not required to take into account the size and administrative resources of the respondent in this case, as I would be if it was a claim for unfair dismissal. The club was in financial difficulty before the claimant became an employee. That continued whilst he was an employee and he was not paid on time from the start. He then had to chase his payments that were due. The claimant received 2 payments, the 1st being an electronic transfer of £250 on 27 April 2018 (from Mr Thorn's partner-p.53), and £500 in cash on 28 April 2018, the date of the last game of the season, which sum was handed to him by Mr F Fry, the then Director of Operations. After the last game of the season, the NBFC website continued with business as usual, with a photograph showing the claimant presenting the Manager's Player of the Season award. Once the season had finished the claimant's workload was somewhat less, and Mr Thorn asked the claimant to accept a reduction in his salary to £500 per week. The claimant agreed to this proposal and the contract was varied.

10. Subsequently, the claimant was engaged in text messages with Mr Thorn, and emails with other officers of the club and elsewhere concerning potential signings and pre-season friendlies. Arrangements were being made for the claimant to attend the National League North managers' pre-season meeting.

11. On 15 June 2018 the claimant found out through social media that NBFC had appointed a new manager, Mr Nicky Eaden (46-48). He had previously been associated with NBFC as a caretaker manager, but now he was appointed as: "first team manager." This news came as a shock to the claimant. The next day, NBFC issued a statement (p.50) under the headline: "Club provide clarity on Management situation…" It went on to say: "Gary never had a contract and was working for the club on an informal basis to guide them through to the end of the season. We believed that the situation was clear and regret that it has led to such confusion. We'd like to thank Gary for his time and wish him all of the best for the future."

12. The claimant regarded this information as his immediate notice of dismissal on 15 June 2018. He accepted it, as he was entitled to do, and was not given any notice of it other than that.

13. In the response form Mr Etheridge set out the respondent's position as follows: "I believe there was a verbal agreement between the Chairman and Mr Charles that would have seen the claimant guide the football club through to the end of the season (April the 28th, 2018)." Later he stated: "I am unaware of any stipulation that Mr Charles would receive any severance payment and have seen nothing in the claim to support his belief that he is entitled to one week notice." It was accepted that the claimant had received 2 payments totalling £750.00. It was denied that any other money was owed. These are the primary facts.

14. The submissions. As both parties have put them in writing there is no need for me to recite them here in any detail. Stated shortly, both parties relied on the respective positions they had adopted during the hearing. There was nothing particularly surprising in the claimant's submissions, and they were an accurate analysis. Mr Etheridge in his submissions accepted that the respondent owed £2,732.14, reflecting the work done to the end of the season on 28 April 2018. Mr Etheridge introduced some evidence, which was hearsay, in his submissions about what Mr Thorn told him concerning the contractual arrangements. This was not evidence before me during the hearing. Mr Etheridge could have given evidence but decided not to do so. He asked me to regard the evidence given by Mr Ginnelly that non-league football contracts, both for players and management, were such that they were not paid throughout the summer, only for the period of the playing season. Of course, custom and practice were not referred to in the response form, and this issue only arose on the day of the hearing during the evidence. Furthermore, Mr Etheridge submitted that I should be wary of the claimant's supporting statements in the bundle as they were made by former employees both of whom left NBFC because of unpaid wages, and "many people have an axe to grind with Mr Thorn, unfortunately, NBFC has been left to pick up the pieces." He rounded off by stating that there was a "bewildering amount of debt" left by Mr Thorn in his wake. He stated almost all of the creditors have been happy to work with NBFC except for the claimant who has shown: "no willingness to be flexible with his figure…" This was not a helpful comment, given the fact the respondent did not pay the claimant monies it accepted were due to him.

15. My conclusions and reasons. I now apply the law to the facts. I find and conclude that the claimant was employed from 20 March 2018 on a permanent basis with a view to him finishing the season in which he was appointed and working into the next season without any break. It is a plain fact that he carried out his role as Manager after 28 April 2018 up to the point where he was dismissed on 15 June 2018. It is regrettable that there was nothing put in writing to confirm the arrangement; but the claimant has demonstrated on the balance of probabilities the terms upon which he relies, particularly the duration of the

contract and salary. His case is supported by the documentation in the bundle. What he said was also corroborated in the evidence of Mr Mayne.

16. Mr Ginnelly had much experience of non-league football over some 30 years or more. He advanced the notion that players and managers in non-league worked voluntarily during the summer, knowing they would not be paid after the last game, and this arrangement came about: “for the love of football.” He had done that for 30 years himself. He became the Manager of NBFC in December 2018 and became the owner on 28 February 2019. Although this line of argument would have come as a surprise to the claimant during the hearing and there may be arguments about whether it could be advanced at that stage of the case, nevertheless I go on to deal with it. Custom and practice has a part to play in the law of contract, and terms may be implied into employment contracts if they are regularly adopted in a particular trade or industry. Often, it will be assumed that the parties to the contract were aware of the custom and agreed that it should be part of their contract, avoiding the necessity to have it recorded in writing. The historical requirement for implying terms under this arrangement is that the custom in question must be: reasonable, notorious and certain. It must be fair, generally established and well-known. Unfortunately for the respondent, it failed to demonstrate this custom on the facts of the case before me applied to the contractual relationship. The contractual document produced by Mr Ginnelly at the hearing was that of a player and not a manager. I have already found that there were specific contractual terms which included payment after the season ended at the rate of £500 per week, and which would last until the new season. A modern player or manager would normally have their pay protected under the protection of wages provisions to be found in the ERA, which require most provisions for deductions from pay to be agreed in writing in advance in accordance with section 14 (4). I reject this defence; it is not well-founded and fails.

17. Since I have found the terms of the contract between the parties are those which were put forward by the claimant, I find and conclude that he has established on the balance of probabilities that he has sustained unlawful deductions from his wages. Furthermore, he has established that he was entitled to statutory notice of one week, and that he was not given such notice, nor did he receive payment in lieu thereof. Accordingly, I turn to deal with the issue of remedy.

18. The remedy. The financial remedy for the claim for unlawful deduction from wages is that I order the respondent to pay the claimant compensation in the sum of £2,732.14 (a calculation agreed by the respondent) for the period from 20 March 2017 to 28 April 2018, together with the further sum of £3,428.57 (£500 ÷7 x48) for the period from 29 April 2018 to 15 June 2018, making a total of £6,160.71 (gross).

19. The remedy for the claim for damages for breach of contract over notice is that I order the respondent to pay the claimant compensation in the sum of £500.00 (gross).

Signed by on 15 May 2019
Employment Judge Dimbylow