



EMPLOYMENT TRIBUNALS

Claimant: Mr Cole William Gibson

Respondent: Harrison Groundworks Limited

RECORD OF A FULL HEARING

Heard at: Carlisle Magistrates Court **On:** 19 August 2019

Before: Employment Judge Hoey

Appearances

For the claimant: Miss Holt (Non-legally qualified representative)

For the respondent: Not in attendance nor represented

JUDGEMENT

The Tribunal finds the following:

1. The respondent's address is changed to Unit 7, Cooper Way, Parkhouse, Carlisle, CA3 0JG
2. The claimant was unfairly dismissed in terms of section 98 of the Employment Rights Act 1996 and is entitled to compensation comprising (a) a basic award of £410.06 and (b) a compensatory award of £14,241. For the purposes of regulation 4 of the Employment Protection (Recoupment of Benefits) Regulations 1996, which apply to the unfair dismissal award, the Tribunal states:

The total unfair dismissal monetary award is £14,215.76

The prescribed element is £7,654.64 (28 weeks' pay)

The period to which the prescribed element is attributable is 4 February 2019 to 19 August 2019 (28 weeks)

Excess of total monetary award over prescribed element: £6,561.12.

3. The claimant is entitled to 4 week's pay, the respondent having failed to issue a written statement of particulars contrary to section 1 of the Employment Rights Act 1996, and the respondent is ordered to pay the claimant the sum of £1093.52 (4 x £273.38).

4. The respondent was in fundamental breach of the claimant's contract of employment and he is entitled to damages for breach of contract, namely his notice pay which equates to 3 week's pay in the sum £820.14 (gross), but the Tribunal makes no separate award for compensation for breach of contract. Compensation for that period is comprised within the award for unfair dismissal.
5. The claimant suffered an unlawful deduction from his wages, contrary to section 13 of the Employment Rights Act 1996, in the gross sum of £390 and the respondent is ordered to repay this to the claimant.
6. The claimant is entitled to accrued holiday pay in the gross sum of £693.56 in terms of the claimant's contract of employment (and in terms of the Working Time Regulations 1998) which the respondent is ordered to pay to the claimant.
7. The claims for breach of contract (in respect of damages which led to a mobile phone penalty being incurred) and failure to provide itemised payslips are dismissed upon their withdrawal by the claimant.
8. The claim for failure to return property owned by the claimant is withdrawn, as the Tribunal has no jurisdiction to determine this.

REASONS

Introduction

1. This case called as final hearing to determine liability and remedy in respect of a claim form lodged by the claimant on 11 April 2019. The claimant was in attendance and represented by a friend. The respondent had not lodged a response to the claim. A rule 21 judgment had not been issued against the respondent and the Hearing had been fixed to determine what claims, if any, were to be upheld, and what sums, if any were to be awarded. The respondent was given notification of the hearing but was not represented nor in attendance.
2. The Hearing began by my explaining the overriding objective, namely that the Tribunal must deal with the matters arising justly and fairly and of the need to hear evidence in relation to each of the claims.
3. Having considered matters the claimant decided to withdraw the claims for breach of contract and the failure to provide itemised pay statements, which claims are dismissed. The Tribunal had no jurisdiction to consider the claim for return of property.
4. The Tribunal was presented with a bundle of documents and heard evidence from the claimant.
5. The Tribunal was advised that the respondent's address had recently changed to Unit 7, Cooper Way, Parkhouse, Carlisle, CA3 0JG and so the respondent's address is accordingly updated.

Issues to be determined

6. The claimant explained that the claims being progressed were for unfair dismissal, unlawful deduction of wages, failure to pay notice pay, holiday pay and a failure to issue a written statement. The issues to be determined were therefore:
7. Was the claimant unfairly dismissed – he argued he was dismissed by text message for absence despite being ill on the day in question and having notified the employer of same. He argued there had never been any performance issues raised before and he would have remained in post for at least another year. The first issue is whether that dismissal was unfair. The next issue is what, if, compensation should be awarded for any unfair dismissal.
8. The second issue is to determine whether the claimant suffered a shortfall in his wages in the net sum of £330.92 (gross sum of £390) representing 3 salary shortfall payments, namely an unlawful deduction from his salary.
9. Thirdly the claimant claimed he was due to be paid 3 week's notice pay (having been in post for over 3 complete years).
10. He also claimed compensation for the respondent's failure to issue a written statement of particulars in terms of section 1 of the Employment Rights Act 1996?
11. Finally, was the claimant entitled to 102.75 hours accrued holidays (which the respondent had not disputed (and said was due), but the respondent had not paid this to the claimant.

Findings in fact

12. The Tribunal makes the following findings in fact from the evidence presented both orally and in writing, which it does so on the balance of probabilities, namely, considering whether there was more than 50% chance of the fact being established.
13. The claimant was employed by the respondent from 1 September 2015 until his dismissal on 17 December 2018. He was an employee.
14. He was employed as a groundworks construction worker which work he carried out until his dismissal.
15. No issues had been raised about the claimant's performance during his time with the respondent.
16. The claimant was dismissed on 17 December 2018 by text message which text was sent by the respondent (and received by the claimant) on 17 December 2018 and stated that [the claimant's] "P45 [was] in [the] post".
17. The claimant believes he was dismissed because he failed to attend work that weekend immediately before the text message. He was absent from work and

unable to attend work and had advised his employer of same on 17 December 2018 immediately before the dismissal email from the respondent.

18. The claimant was absent from work because of work related bullying and harassment and had been unable to advise the respondent of this until 17 December 2018.
19. The claimant considered himself dismissed by that text message as did the respondent.
20. On 19 December 2018 there was a text exchange between the claimant and the respondent whereby the respondent sought return of property from the claimant which was duly implemented by the claimant.
21. On 14 January 2019 the respondent emailed the claimant suggesting that it had been proposing to convene a hearing as a result of alleged misconduct and/or performance issues in connection with the claimant and confirmed that his employment had ended in any event.
22. The claimant denies there was any wrongdoing by him prior to his dismissal and at no point had any formal issues been raised with him in connection with his performance or conduct. I find that there was no misconduct by or on behalf of the claimant from the evidence I heard.
23. The claimant would have remained in the respondent's employment for at least another year following his dismissal.
24. The claimant was paid £6.75 an hour. The claimant worked 40.5 hours each week but some weeks work more if travelling was needed. His gross weekly pay was therefore 40.5 x £6.75 which amounts to £273.38.
25. The claimant obtained job seeker's allowance in the sum of £58.10 per week from 4 February 2019 to today's date.
26. There was no written statement of particulars or contract of employment issued to the claimant by the respondent required in terms of section 1 of the Employment Rights Act 1996.
27. Following his dismissal the claimant took steps to find another job. He sent a number of job applications and realised the absence of a qualification in reading and writing was an issue and so he decided to embark upon studies in this regard whilst applying to join the military. He was unable to find alternative work despite his best endeavours but he continued to look for such roles.
28. The claimant was not paid any notice pay. He was due 3 week's notice pay in terms of section 86 of the Employment Rights Act 1996.
29. On 2 occasions the sums paid to the claimant by the respondent by way of wages were less than the sums properly payable to him, namely on 7 December 2018 he was underpaid by £250 and on 21 December 2018 he was

underpaid by £80.92 such that the total net underpayment was £330.92 with the gross sum of underpayment being £390.

30. The claimant was told by the respondent that as at the date of his dismissal he had accrued 187.75 holidays and that as he had taken 95 hours, he was due 102.75 hours. The respondent had not paid the claimant for that entitlement, which amounts to 102.75 x £6.75, namely £693.56.

Law

Unfair dismissal

31. In terms of section 98 of the Employment Rights Act 1996:

32. "In determining whether the dismissal of an employee is fair or unfair, it is for the employer to show: -

- (a) the reason (or if more than one the principal reason for the dismissal); and
- (b) that it is either a reason falling within subsection 2 or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."

33. Potentially fair reasons for dismissal include conduct or capability.

34. Section 98(4) of the Employment Rights Act 1996 states:

35. "Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer): -

- (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and
- (b) shall be determined in accordance with equity and the substantial merits of the case."

36. It is for the employer to show that there was a potentially fair reason to dismiss and the Tribunal must then decide whether the statutory wording is satisfied to assess whether the dismissal was fair or not.

37. A successful claimant is entitled to a basic award (section 119) (which is calculated in a similar way to a redundancy payment). Section 123(1) provides for a compensatory award which is such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer. The Tribunal needs to assess how long the employment would have continued and ensure any compensation is

just and equitable. A Tribunal should also consider whether the claimant contributed to the dismissal, to any extent, any reduce the award accordingly. The award should be such amount that is just and equitable. A compensatory award is capped at a maximum of 52 week's gross pay (or £86,444 if less).

38. If a claimant has received certain benefits, including Job Seeker's Allowance (as in this case), the Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 apply. This means that the respondent must retain a portion of the sum due until the relevant Government department has issued a notice setting out what the claimant is to be paid and what is to be refunded to the Government.

Unlawful deductions

39. In terms of section 13 of the Employment Rights Act 1996, it is unlawful to pay to the employee, by way of wages, a sum less than that which is properly payable in terms of the contract of employment. The Tribunal is able to make a declaration as to what the unlawful deduction was and order the respondent to pay to the claimant said deduction.

Failure to provide a written statement of particulars

40. In terms of section 38 of the Employment Act 2002, if an employer has failed to issue a written statement of particulars, it is open to the Tribunal to make an award of 2 or 4 week's pay.

Notice pay

41. Under section 86 of the Employment Rights Act 1996, an employee is entitled to be given a minimum period of notice to terminate the contract (unless the employer was entitled to terminate the contract without notice, such as in cases of gross misconduct). For the claimant, given he has 3 complete years of employment, he is entitled to 3 week's notice. Failure to pay said notice when due would amount to a breach of contract.

Holiday pay

42. Under the Working Time Regulations 1998 a worker is entitled to 5.6 week's holiday each year. Upon termination of the employment relationship, a worker is entitled to a sum representing what, if any, accrued holidays remain outstanding. It is possible for the parties to agree a sum in respect of holiday entitlement (provided such entitlement is not less than the statutory minimum). A Tribunal can award a sum for accrued holiday entitlement that has been untaken as at the end of employment.

Decision and reasons

43. I shall deal with each claim in turn.

Unfair dismissal

44. With regard to the claim for unfair dismissal, the claimant was dismissed without any procedure being followed. He was dismissed by text message. He was dismissed without any justification and in breach of the ACAS Code of Practice on Disciplinary and Grievance matters.
45. There was no potentially fair reason to dismiss the claimant and no procedure was followed. The dismissal was unfair. I accepted the claimant's evidence that there was no misconduct nor justification for the claimant's dismissal.
46. The claimant was therefore unfairly dismissed in terms of section 98 of the Employment Rights Act 1996.
47. He is entitled to a basic award of £410.06 (calculated as follows: 40.5 hours (weekly hours) x £6.75 (hourly pay) x 1.5 (0.5 weeks per complete year of employment)).
48. He is also entitled to a compensatory award. As I have found that the claimant has taken all reasonable steps to obtain alternative employment and income but without success and as I have found that his losses will continue for at least another 12 months (since on the balance of probabilities he would have remained in post for another 12 months at least) and given the cap on the compensatory award is 52 week's gross pay, I find that it is just and equitable to award the claimant losses in respect of 52 week's gross pay in the sum of £14,215.76 (52 x £273.38). That sum covers losses to today's date and future loss.
49. I do not consider that the claimant contributed to his dismissal to any extent.
50. The claimant's actual losses which flow from the dismissal exceed the statutory maximum. His compensatory award is restricted to 52 week's gross pay. It is just and equitable to make this award having regard to the losses sustained by the claimant flowing from the dismissal as a result of the respondent's actions.
51. As the claimant was in receipt of job seeker's allowance, the Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 apply to the unfair dismissal award. The following sums apply:
- i. Monetary award grand total: £14,215.76
 - ii. Prescribed element: £7,654.64 (28 week's pay)
 - iii. Period to which prescribed element is attributable: 4 February 2019 to 19 August 2019 (28 weeks)
 - iv. Excess of total monetary award over prescribed element: £6,561.12.
52. The relevant government department will serve a notice on the respondent stating how much is due to be repaid in respect of jobseeker's allowance. In the meantime, the respondent should only pay to the claimant the amount by which the total monetary award exceeds the prescribed element in terms of the unfair

dismissal award. The balance will be payable when the respondent receives the said notice.

Failure to issue a written statement of particulars

53. The claimant was not issued with a written statement of particulars or a written contract of employment.

54. I find that it just and equitable to award the claimant 4 week's pay in respect of that failure in the sum of £1093.52. The failure to provide this resulted in the claimant encountering difficulties in understanding the terms of his employment. An award of 4 week's pay is just in this case.

Failure to pay notice pay

55. The claimant was entitled to 3 week's notice. He was not guilty of misconduct that entitled the respondent to summarily terminate his employment. He is therefore entitled to compensation in the sum of £820.14 representing his notice period. As the unfair dismissal compensatory award covers the notice period, the claimant is not awarded a separate for his notice pay.

Unlawful deduction from the claimant's wages

56. The claimant suffered an unlawful deduction of wages from his salary in the gross sum of £390 and the respondent is ordered to repay this amount. This was the underpayment due to the claimant and no legitimate reason exists for the sum not having been paid. It is an unlawful deduction.

Accrued holiday entitlement

57. Finally, the claimant is due accrued holidays. The respondent accepted he had accrued 187.75 holidays. He had taken 95 hours and so the claimant is due 102.75 hours worth of holidays. No payment had been made for this amount which I find is due to the claimant. The claimant is therefore due to be paid and the respondent shall pay $102.75 \times £6.75$ which is the gross sum of £693.56.

Employment Judge Hoey

Dated: 20 August 2019

17 September 2019

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FOR THE TRIBUNAL OFFICE

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number(s): **2404678/2019**

Name of case(s): **Mr CW Gibson** v **Harrison Groundworks 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: **17 September 2019**

"the calculation day" is: **18 September 2019**

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

MRS L WHITE
For the Employment Tribunal Office

EMPLOYMENT TRIBUNALS

To: **DWP**

NOTIFICATION OF RECOUPMENT

Employment Protection (Recoupment of Benefits) Regulations 1996

As required by Regulation 5(1) of the above Regulations, I notify you on behalf of the Secretary of the Tribunals of the following Employment Tribunal Award:

Claimant's details	Respondent's details
Name: Mr CW Gibson	Name: Harrison Groundworks Limited
Address 1 Oak Terrace	Address 11 Woodville Park Cockermouth
Abbeytown Wigton Cumbria CA7 4SA	Cumbria CA13 0GL
Telephone No.	Telephone No.
Date of Birth: 14/10/1999	
National Insurance No.	

DETAILS OF AWARD

(a) Monetary award	£14,215.76
(b) Amount of the prescribed element	£7,654.64
(c) Dates of the period to which the prescribed element is attributable	4 February 2019 – 19 August 2019
(d) Amount by which the monetary award exceeds the prescribed element	£6,561.12

Signed	Clerk to the tribunals
Name L White	Dated 17 September 2019

