EMPLOYMENT TRIBUNALS

Claimant: **Mr T Czapski**

Respondent: **(R1) Bamptom Packaging Limited**
(R2) Secretary of State for Business, Energy and Industrial Strategy

Heard at: **Nottingham** **On:** **Thursday 26 September 2019**

Before: **Employment Judge Clark (sitting alone)**

Representation
Claimant: **In Person**
Respondents: **(R1) Mr A Brown (Managing Director)**
(R2) Written submissions received

JUDGMENT having been sent to the parties on 28 September 2019 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:

JUDGMENT

1. The claim for a statutory redundancy payment succeeds. The first Respondent is liable to pay the Claimant a statutory redundancy payment in the sum of £6,107.40.

2. The claims for payment of holiday pay accrued but untaken at the date of termination and unlawful deduction from wages succeed in the total sum of £3547.12. The amount owing has been paid by the first Respondent and no further sums are due.

REASONS

Claims and Issues

1. There are three claims before the Tribunal. The claims for accrued holiday pay and unlawful deduction from wages are resolved and I have not needed to deal with that save in respect of one potential matter.

2. The claim for unpaid wages has been agreed on the basis of when the respondent says the claimant's employment ended. It appeared potentially to be the case that there was a further period to consider. I have considered that below but concluded no further award was due. The amounts the parties have

agreed and paid are therefore correct. The thrust of the remaining claim is in respect of the claimant's entitlement to a redundancy payment.

The Factual Background

3. In this case, the black letter law of redundancy meets, head on, the human reality of an earning a living. It shows how the pressures of earning a modest wage in employment is sometimes matched by the pressures of earning a profit and keeping a business afloat. I accept everything Mr Brown has said about the circumstances the Respondent's business was in from 2007 and, to some extent that continues today. I also accept, although he doesn't quite put it in these terms, that what he did in relation to his employees in October 2018 was with the laudable aim and intention of securing the long-term future of the business and thereby maintaining long term employment for his employees. Nothing in my decision should be interpreted as reflecting a view that Mr Brown acted in an underhand way or for anything other than the right reasons. But the fact remains, the claimant was at all times entitled to his basic employment rights.

4. The respondent has been through a difficult few years. In or around 2017, Mr Brown inherited the company from his late father. It was in a difficult financial position. It entered a Company Voluntary Arrangement with its creditors which continues today. 30 employees were made redundant. No sooner had that crisis began to settle than the next one arose. In the second half of 2018, the respondent's main customer stopped its orders. That accounted for somewhere between 60 and 80% of its turnover.

5. The Mr Brown implemented a plan to keep the business afloat. Staff with short service were made redundant. There were five skilled and longer serving members of staff that the respondent would need in the future. The claimant was one of them. They were called to a meeting on 19 October 2018. The result was that all five were temporarily laid off without pay for a period of 4 weeks.

6. There was some suggestion that there was agreement to that course and that the claimant in fact took 12 weeks unpaid holiday. I cannot accept that there was an agreement to vary the contract in those terms. That was not advanced in the Respondent's case, the alleged terms of the variation are not before me and it is not referred to in Mr Brown's evidence in chief. It is also inconsistent with the later payment of wages owed.

7. At end of that 4 week period there was then a further period of four weeks when the five employees were laid off without pay again. Throughout this time, I accept that the employer was working, and hoping, for an upturn in orders. The lay off was seen as a means to reduce its costs in the short term whilst retaining access to its skilled labour force. However, it may not be surprising that only one of those 5 would eventually return to the employer.

8. On 21 November 2018 the claimant wrote to his employer requesting a copy of his contract of employment. I have it before me. It does not provide any term entitling the employer to lay the employee off temporarily without pay. Mr Brown accepted that. The contract confirms there are no collective agreements, thus I can rule out any other collateral agreement relating to lay off that may have contractual force. The nature of the employment was that Mr Czapski was paid a weekly wage of £313.20 gross (269.76 net) each week.

9. On the face of it, therefore, the period layoff without pay amounted to a fundamental breach of the express term of the contract to pay wages. At any time during the period of layoff, the claimant could have accepted the employer's repudiatory breach and resign and claim "constructive" unfair dismissal.

10. By letter dated 23rd of November 2018, Mr Czapski was given written notice of termination on grounds of redundancy. That notice would expire on 8 February 2019. The period of notice would continue as one of lay off without pay. In that letter, the respondent made clear it was working to find new work and if it secured new would it was its "intention to withdraw the notice of redundancy". This letter confirmed the claimant's entitlement to a redundancy payment in the sum of £6107.40

11. Mr Czapski appealed against the decision and not being paid. He understood there was no contractual right to lay him off without pay. Mr Brown replied agreeing and suggesting that because of that, there was no right to the claimant issuing a notice of intention to claim a redundancy payment under s.147 of the Employment Rights Act 1996. In my view, this point had lost focus on the real issue. The layoff was a unilateral act in breach of contract by the respondent.

12. The claimant was invited to a meeting on 11 January 2019. He did not attend but he did attend the workplace on 21 January at which he and Mr Brown had a discussion. Happily, the orders had now improved and Mr Brown was able to make an offer to him to return to work. The offer was on terms that he return immediately but that the respondent could not afford to pay him the back pay on his wages in one go. The offer was for instalments over the next three months.

13. I find the claimant's treatment over previous 2 months was uppermost in his mind. He was concerned there was no respect for him as a worker. He had not been paid, he felt there had been no apology for that and now the employer was dictating how and when he would get the back pay that he was owed and he still had to wait another 3 months to get his pay. In the context of the company's recent history, it is not surprising that there were concerns this might not actually happen. The claimant did state that he was prepared to work for the respondent but he would not return to work until he received his back pay. He explained to me how he needed the back pay in his bank in order to restore the necessary trust in the company before returning to work for it.

14. Mr Czapski may have been looking at the situation selfishly, and without regard to the pressures Mr Brown was under, but in this context, he was entitled to and I am required to have regard to the situation from his point of view.

15. During his lay off, the claimant has had to borrow money and rely on emergency state benefits. I explored with him whether there had been any additional costs or charges to him as a result of not being paid for three months. He confirmed there were not.

16. The respondent's offer was confirmed in writing. The claimant declined. The respondent treated the employment as ending on 21 January 2019.

17. I have seen two sets of payslips both running from 1 November 2018. One set shows the wages the claimant was entitled to and would have earned. The other shows the earnings as nil. I find one was applied at the time. The

other has been a reconstruction of what the claimant was entitled to now that the sums have been paid.

18. It follows that between 19 October 2018 and the end of the employment relationship Mr Czapski was entitled to have been paid his wages but was not.

19. The notice of redundancy was validly given.

The law

20. As a simple matter of contract, the claimant was entitled to be paid his contractual wage throughout the time the contract subsisted and he was otherwise ready and able to attend for work to perform his part of the bargain.

21. An employment contract, such as this, is an executory contract containing a term for either party to terminate it. The giving of notice to terminate is, therefore, not an act external to the contract but the performance of a contractual term within it. Unless that term reserves some power to rescind notice once given, which is unusual and in this case not present, once given notice of termination cannot be withdrawn unilaterally. Likewise, in the absence of any particular provision to this effect, it is no part of such a contract for the other party to have to "accept" or to "refuse" notice of termination.

22. That proposition of common law can sometimes *appear* to have a different practical outcome in the contact of termination on grounds of redundancy. The reason is because of the statutory law of redundancy which is found in a number of complicated provisions which overlay the common law of contract. I will try to simplify their effect.

23. Faced with a redundancy situation, an employer may terminate the contract of employment for that reason. Having done so, it may then find it is in a position to offer the affected employees alternative employment. An employee who refuses a suitable alternative offer, and does so unreasonably, will still be dismissed by reason of redundancy at the end of their original notice of termination, but will lose the right to receive the statutory redundancy payment. The question in this case is therefore not whether the employer could withdraw its notice, it could not, but whether the offer it put to the claimant on 21 January 2019 was an offer of suitable alternative employment and whether Mr Czapski's refusal was unreasonable.

24. The question of whether a particular employee reasonably, or unreasonably, refuses an offer of suitable employment is not a wholly objective assessment. Any question of reasonableness has within it some degree of objective assessment of all the relevant circumstances but this particular objective test requires me to look at the reasonableness from the Claimant's perspective.

Discussion and Conclusions

25. There is no question in this case that the nature of the "alternative" employment offered was suitable because it was the very same job that the Claimant was employed to do and there is nothing in the evidence I have seen to suggest the terms of that employment would have been any different to that which they were previously. The only question is whether the surrounding circumstances mean Mr Czapski's refusal of it was an unreasonable refusal.

26. The question of reasonableness is not binary. The mere fact that it may have been reasonable to have accepted Mr Brown's offer does not mean that the refusal was necessarily unreasonable. I need to consider the surrounding circumstances. The factors that weigh heavily in answering whether Mr Czapski's refusal was unreasonable are these.

27. Firstly, the timing of the offer. I make no criticism, once again, of Mr Brown. He was working hard to keep the business going and restore the claimant's employment. His offer happens when it happens. But it remains the case it happens late in the twelve weeks' notice, in fact about ten weeks into it and about three months since Mr Czapski's wages had stopped being paid. That paints a very powerful backdrop to his decision. The non-payment of wages is a serious and fundamental breach even though, once again, I understand why Mr Brown felt it necessary to do this. Nonetheless, it was a breach of the contract of employment. At any time after 19 October Mr Czapski could have resigned and, with a degree of likelihood close to certainty, he could have successfully claimed to have been constructive dismissed. His compensatory award may have been substantially curtailed by the surrounding circumstances, but he would have been entitled to either a redundancy or a basic award to the same amount. It was in my judgment perfectly proper and reasonable for him to have regard to the recent history of his employment when making his own assessment as to whether to accept the offer of new employment. That recent history goes back over the previous two years. As I have mentioned, the company was in a period of recovery and restructure and it was still in the CVA. It was still far from being out of the woods and, to illustrate that, the Respondent was not in a position to pay the wages that it accepted were then owed to the Claimant save by way of instalments over the coming three months or so.

28. Mr Czapski was entitled to weigh up the risks and to place them within the context as he saw it. That context included his view that his employer was not respecting him as a long-standing employee and, on that basis, whilst he would have continued had his wages been paid I cannot say that all of those factors make his decision not to accept the offer an unreasonable one.

29. It follows, therefore, that the Claimant has not unreasonably refused the offer of renewal of his employment and, as a result, the notice of termination of employment by reason of redundancy took its course and concluded with his termination on 8 February 2019. There is no dispute that the statutory formula entitles the Claimant to a redundancy payment at that date in the sum of £6,107.40 and that is my judgment.

30. Before leaving the chronology, I have given consideration to what effect this decision has on the wages payment. The wages claim has subsequently been paid to Mr Czapski but only up to the date Mr Brown regarded as him leaving his employment; that is 21 January 2019 and not to 8 February 2019. My initial view was that that appeared to demonstrate a continuing unlawful deduction from wages for the remaining 18 days. On reflection, that is not the conclusion I have reached. I have decided within these facts there is a distinction to be drawn between the proposed renewal and the existing contract of employment that Mr Czapski had with the respondent, albeit then under notice to terminate on 8 February, and therefore the ongoing obligations each party had under that contract for the employer to pay wages but also, for him to work. That existing contract needs to be set in contrast to the future offer of renewal that the employer was making and that Mr Czapski was refusing. The distinction has

effect in this way. For as long as the ***existing*** contract was in force, Mr Brown was obliged to pay the Claimant and the Claimant was obliged to do work that was there for him to do. There was work to be done after 21 January and the claimant was making clear he was not going to perform it. In any claim for unauthorised deduction from wages, the first question is what was properly due. If there was work to be done and the employee refuses to turn up to do it, there is nothing properly due under the contract. I reach the conclusion therefore that in those remaining 18 days after 21 January 2019, there has not been an unauthorised deduction from wages and therefore so much of the remaining claim as there might have been fails. I record however, that everything up to 21 January has now already been paid by the Respondent.

31. Finally, the facts left open an alternative possibility that there was a resignation on 21 January in response to the employer's repudiatory breach. I have not reached that conclusion and need not explore this further. I do observe, however, that practical financial effect for the claimant would be the same.

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Employment Judge Clark

Date: 10 October 2019

REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE