



EMPLOYMENT TRIBUNALS

Claimant: Mr C Manuel
Respondent: Fix-A-Chip (Tyneside) Limited

Heard at: North Shields **On:** 3 October 2019
Before: Employment Judge Deeley

Representation

Claimant: Mr Manuel (in person)
Respondent: Mr A Fisher (Respondent's employee)

JUDGMENT having been sent to the parties on 16 October 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:

REASONS

INTRODUCTION

1. Mr Ian Brown (the Respondent's sole director) requested a 'full transcript' of this hearing by email dated 10 October 2019. Tribunal proceedings are not recorded and no transcript of proceedings is available. However, the Tribunal has treated Mr Brown's email as a request for written reasons.

Background

2. The Claimant was employed by the Respondent from 3 July 2017 until his dismissal without notice on 23 May 2019 as an assistant at the Respondent's vehicle body shop. The bulk of the Respondent's business involves fixing dents, scuffs and scratches to cars, alongside services such as alloy wheel refurbishment and minor accident repairs.
3. Mr Ian Brown is the sole director of the Respondent and also works within the business. Apart from Mr Brown, the Respondent's staff at the time of the Claimant's employment also included Mr Andrew Fisher and one other employee (Ritchie). Mr Brown's partner is the mother of the Claimant's girlfriend and Mr Fisher stated that Mr Brown offered the Claimant a job because of their family connections.

Tribunal proceedings

4. The notice of hearing was sent to the parties in June 2019. Mr Manuel attended the hearing in person today. Mr Fisher attended the hearing in Mr Brown's absence on holiday. Shortly before the hearing date, the Respondent wrote to the Tribunal stating that Mr Brown was on holiday on the hearing date. However, the Respondent did not apply to postpone the hearing.

5. The parties provided a brief file of documents which I considered during their evidence. The Claimant and Mr Fisher provided witness statements and gave evidence during the hearing. Mr Brown provided a witness statement but did not attend the hearing and could not be cross-examined on his evidence.
6. During the hearing, I noted that neither party had provided any information relating to the Claimant's claim for holiday pay. I adjourned the hearing and requested both parties to obtain information regarding:
 - 6.1 the Claimant's accrued holiday entitlement; and
 - 6.2 the dates on which the Claimant had taken holiday.
7. Mr Fisher informed me that the Respondent did not keep records of any employees' holiday entitlement.

CLAIMS AND ISSUES

Claims

8. The Claimant's claims were as follows:
 - 8.1 a claim of ordinary unfair dismissal under sections 94 and 98 of the Act;
 - 8.2 a claim of breach of contract (wrongful dismissal), which is a claim for breach of contract under s3 of the Employment Tribunals Act (and subject to the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994);
 - 8.3 a claim of unlawful deduction from wages (holiday pay) under Part II of the Employment Rights Act 1996 (the **ERA**); and
 - 8.4 a claim for failure to provide itemised pay statements under section 8 of the ERA.

Issues

9. The issues for the Tribunal to determine were as follows:

Unfair dismissal

10. Did the Claimant have two years' continuous employment required to bring a claim of ordinary unfair dismissal under s108 of the ERA?
11. If so, did the Respondent have a potentially fair reason for the Claimant's dismissal (namely conduct) under s98 of the ERA?
12. If so, did the Respondent act reasonably in all of the circumstances in treating this reason as sufficient to dismiss the Claimant?
13. If so, did the Respondent follow a fair procedure in dismissing the Claimant for that reason?

Wrongful dismissal

14. Did the Respondent dismiss the Claimant in breach of contract by dismissing him without notice, for the purposes of section 3 of the Employment Tribunals Act 1996, subject to Regulation 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994?
15. If so, what period of notice should the Claimant have received, taking into account the statutory minimum notice requirements of s86 of the ERA?

Unlawful deductions from wages (holiday pay)

16. What were the terms of the Claimant's holiday arrangements with the Respondent?
17. Did the Claimant take his holiday entitlement during each holiday year in which the Claimant was employed?
18. If the Claimant did not take his holiday entitlement:
- 18.1 what was the reason that the Claimant did not take his holiday entitlement; and
- 18.2 was the Claimant entitled to any pay in lieu of holiday when his employment terminated?
19. If so, should the calculation of the Claimant's pay in lieu of holiday include any non-voluntary, regular overtime?
20. If so, what sums are payable to the Claimant?

Failure to provide written particulars

21. Has the Claimant succeeded in any claims that fall within Schedule 5 to the EA (i.e. unauthorised deductions from wages or breach of Regulation 30 of the Working Time Regulations 1998)?
22. If so, what sum should be awarded to the Claimant? (NB the Respondent conceded that it has not provided the Claimant with any written particulars of employment as at the date of the hearing of this claim.) In particular:
- 22.1 are there exceptional circumstances that would make it not just and equitable to award two weeks' pay; and
- 22.2 is it just and equitable to award four weeks' pay?

Failure to provide itemised pay statements

23. What particulars ought to have been included or referred to in pay statements for the Claimant so as to comply with Part I of the ERA? (NB the Respondent conceded that they had not provided the Claimant with any payslips during his employment, except for the period from 6 July to 12 October 2018.)

RELEVANT LAW

24. The relevant statutory provisions are contained within the provisions of the legislation referred to in the issues listed above.

Holiday pay

25. The Claimant's claim raises three key legal questions regarding his holiday entitlement and pay:
- 25.1 What was the Claimant's leave year?
- 25.2 Can the Claimant claim for pay in lieu of holiday accrued but not taken for all or part of his employment?
- 25.3 If so, on what basis should such holiday pay be calculated?

a) Holiday pay – leave year

26. Regulation 13(3) of the Working Time Regulations 1998 (**WTR**) states:

“(3) A worker's leave year, for the purposes of this regulation, begins:

- (a) on such date during the calendar year as may be provided for in a relevant agreement; or*
- (b) where there are no provisions of a relevant agreement which apply - ...*

...(ii) if the worker's employment begins after 1st October 1998, on the date on which the employment begins and each subsequent anniversary of that date."

b) Holiday pay – carry forward

27. The caselaw regarding the refusal to permit a worker to take holiday is relevant to this claim. Regulation 13(9) of the WTR states:

"(9) Leave to which a worker is entitled under this regulation may be taken in instalments, but –

(a) It may only be taken in the leave year in respect of which it is due..."

28. The ECJ decided in the cases of *King v The Sash Window Workshop Ltd* (C-214/16, [2018] IRLR 142) and *Max-Planck-Gesellschaft zur Forderung der Wissen-schaftern e. V. v Shimizu* (C0684-16, [2019], 1 CMLR 1233) that:

28.1 it is not necessary for a worker to take their holiday in order to claim holiday pay; and

28.2 the right to carry forward their holiday continues indefinitely until the employment ends, in the case where a worker has either:

28.2.1 been prevented by their employer from taking holiday; or

28.2.2 the employer has failed to take reasonable steps to facilitate the worker to take their holiday and reminded them the risk of forfeiting their holiday if they did not take it in the holiday year.

29. The EAT gave effect to the ECJ's decisions on carrying forwards holiday that could not be taken due to sickness absence in the cases of *Sood Enterprises Ltd v Healy* ([2013] IRLR 865) and *Plumb v Duncan Print Group Ltd* ([2015] IRLR 711. In *Plumb*, the EAT held that the wording of Regulation 13 of the WTR should be modified as follows in relation to the four weeks' holiday that a worker is entitled to under the European Working Time Directive (the EAT's amendments underlined):

"(9) Leave to which a worker is entitled under this regulation may be taken in instalments but, (a) it may only be taken in the leave year in respect of which it is due, save that it may be taken within 18 months of the end of that year where the worker was unable or unwilling to take it because he was on sick leave and, as a consequence did not exercise his right to annual leave..."

30. The EAT in *Plumb* referred to an 18 month time limit on the carry forward of accrued holiday. However, I note that the ECJ's decision in *King* does not impose any time limit on the carry forward of accrued holiday where a worker has been prevented from taking their holiday by their employer.

c) Holiday pay - calculation

31. In addition, the caselaw regarding the calculation of holiday pay is relevant to this claim. Regulation 16(1) of the WTR states:

"(1) A worker is entitled to be paid in respect of any period of annual leave to which he is entitled under regulation 13 [and regulation 13A], at the rate of a week's pay in respect of each week of leave."

32. The decision of the ECJ in *British Airways pc v Williams* (C-155/10, [2011] IRLR 948) has been followed by several authorities stating that a week's pay, for the purposes of holiday pay, must reflect the worker's 'normal remuneration'.

33. Several cases have considered the interpretation of this provision which have held that pay is not limited to an employee's pay for their basic working hours but can include other payments, such as regular or frequent overtime. For example, in the EAT's decision of *Dudley Metropolitan Borough Council v Willetts* ([2017] IRLR 870), the EAT held that regular voluntary overtime and standby payments should be included in the calculation of holiday pay. *Willetts* was later approved by the Court of Appeal in *East of England Ambulance Service NHS Trust v Flowers* [2019] EWCA Civ 947.
34. There is a question as to how frequently overtime must be worked, in order to be classed as 'regular'. In *Willetts*, payments relating to a standby rota requiring each individual to be on standby for one week in every four were held to be part of each individual's 'normal pay'.

FINDINGS OF FACT

Contract terms

35. I find that the Claimant was employed by the Respondent from 3 July 2017 until his dismissal without notice on 23 May 2019. It is not disputed that the Respondent failed to provide the Claimant with a written statement of particulars or any form of contract of employment. The Claimant requested a contract of employment and payslips in or around late September or early October 2018 because he needed these as evidence for the estate agents from whom he wished to rent a flat. Mr Brown did not provide the Claimant with either a contract or payslips, despite the Claimant's request. The Claimant then contacted Mr Brown's accountants. Mr Brown's accountants sent a draft contract of employment to the Claimant, but Mr Brown did not provide a contract to the Claimant. Mr Brown did provide the Claimant with 3 months' payslips from 6 July to 12 October 2018.
36. Mr Fisher gave evidence that no one else at the Respondent had a written statement of employment particulars or any other written contract of employment. Mr Fisher said that the other employees received their payslips by email, but that the Claimant had failed to provide an email address and was not provided with any payslips (other than as set out above).
37. Mr Fisher said that the Respondent's accountants produced hard copy payslips every month for all employees and sent these to Mr Brown's home address. I asked Mr Fisher if it would be possible for the accountants and/or Mr Brown to produce the payslips and he confirmed that this could be done within 28 days of the hearing.

Contract terms

38. I find that the following terms of contract applied, based on the evidence of the Claimant and of Mr Brown in addition to the Claimant's payslips for the 3 months from 6 July to 12 October 2018:
- 38.1 the Claimant's hourly pay rate during his employment was £7.38 per hour;
- 38.2 the Claimant's normal working hours were 40 hours per week, Monday to Friday, with any overtime to be paid at the same rate as his normal hourly pay;
- 38.3 the Claimant had a contractual entitlement to 28 days' holiday per annum (inclusive of any public or bank holidays); and
- 38.4 there were no other agreed terms between the Claimant and the Respondent relating to:
- 38.4.1 the Claimant's holiday year;

- 38.4.2 the rate at which the Claimant accrued holiday; or
- 38.4.3 any provisions regarding the carry over of holiday or payment in lieu of holiday.
39. It is common ground that the Claimant frequently worked 6 hours' overtime on a Saturday. For example, the payslips that the Claimant received from 6 July to 12 October 2018 show that the Claimant worked 46 hours per week on ten occasions during that 14 week period.
40. In relation to notice, I find that the Claimant was entitled to statutory minimum notice of one week from his employer to terminate his employment. The Claimant stated in his evidence that he believed it would be reasonable for him to receive a longer notice period. However, he was unable to provide details of any discussions between him and Mr Brown where notice periods were discussed or any other evidence suggesting that he was entitled to a longer notice period than the statutory minimum period. In reaching this finding, I have also taken into account the short length of the Claimant's service with the Respondent and the nature of his role and seniority within the Respondent's business.

Events leading to the Claimant's dismissal

41. Mr Fisher commented that the Claimant was good at his job, but both he and the Claimant agreed that there were several occasions when the Claimant did not attend work at short notice. It is common ground that this caused difficulties for the Respondent, because the Respondent had a lot of customers' vehicles to deal with and the turnaround times were short.
42. The Claimant and Mr Fisher agreed that the Claimant normally spoke to Mr Brown or another member of the Respondent's staff to inform them if he would not be attending work on the morning of the day in question. The Claimant gave evidence (which was not challenged) that he would normally agree with Mr Brown that he would take holiday to cover his absence.
43. It is common ground that the key events leading to the Claimant's dismissal were:
- 43.1 the Claimant did not attend work on 22 May 2019 because he was suffering from back pain. The Claimant did not contact Mr Brown or any other member of the Respondent's staff on that day;
- 43.2 Mr Fisher tried to contact the Claimant directly and via the Claimant's girlfriend. However, the Claimant did not respond;
- 43.3 the Claimant was absent again on 23 May 2019. Again, he did not contact Mr Brown or any other member of the Respondent's staff that morning;
- 43.4 Mr Brown tried to call the Claimant and sent him a Facebook message. The Claimant replied to the Facebook message but did not pick up Mr Brown's call.
- 43.5 Mr Brown was angry that the Claimant had not contacted him or anyone else at the Respondent. Mr Brown then sent the Claimant a Facebook message dismissing the Claimant;
- 43.6 Mr Brown then tried to call the Claimant again. The Claimant did not answer his phone and did not respond to this message;
- 43.7 the Claimant had no further direct contact with Mr Brown regarding the termination of his employment after the morning of 23 May 2019.

44. I also accept Mr Fisher's evidence that if the Claimant had contacted Mr Brown, then Mr Brown would probably have changed his mind and given the Claimant his job back.

Holiday pay

45. I accept the Claimant's evidence that he requested holiday from Mr Brown on several occasions throughout his employment, but that Mr Brown refused to approve holiday bookings. I also accept that the Respondent failed to take any steps to:

- 45.1 facilitate the Claimant to take his holiday; and/or
- 45.2 remind the Claimant of the risk of forfeiting his holiday if he did not take it within the holiday year.

46. The Claimant accepted that he took bank holidays, in addition to:

- 46.1 the days that he took as holiday to ensure that he got paid during what would otherwise be characterised as sickness absence; and
- 46.2 a single week that he took from 5 to 10 October 2018.

47. Mr Fisher was unable to provide any direct evidence on this point. However, Mr Fisher did say that business was very busy and that no one else took any holiday. I also note that Mr Brown's statement did not contain any evidence regarding the Claimant's holiday.

48. I find that the parties did not have any agreed terms regarding the Claimant's holiday year, carry over or any arrangements regarding pay in lieu of holiday. I note that the draft contract provided by the Respondent's accountants did contain terms relating to holiday, but it is common ground that this contract was never provided to the Claimant by the Respondent.

49. I find that the Claimant accrued a total of 52 days' holiday (inclusive of bank holidays) during his employment with the Respondent, based on an annual holiday entitlement of 28 days per year.

50. I accept the Claimant's evidence that he took the holiday set out below during his employment (including bank holidays). Mr Fisher was unable to provide any evidence as to the dates when the Claimant took holiday during his employment, despite having spoken with the Respondent's accountants during the morning adjournment of the hearing of this claim.

| Year | Holiday dates | Bank holiday? | Number of days' holiday taken |
|-------------|-----------------|---------------|-------------------------------|
| 2017 | 03/08/17 | No | 1 |
| | 28/8/17 | Yes | 1 |
| | 16/10/17 | No | 1 |
| | 31/10/17 | No | 1 |
| | 6 and 7/12/17 | No | 2 |
| | 25 and 26/12/17 | Yes | 2 |
| 2018 | 1/1/18 | Yes | 1 |
| | 12/02/18 | No | 1 |
| | 19/03/18 | No | 1 |
| | 30/3/18 | Yes | 1 |

| | | | |
|--|-----------------|-----|----------------|
| | 2/4/18 | Yes | 1 |
| | 7/5/18 | Yes | 1 |
| | 28/5/18 | Yes | 1 |
| | 09/07/18 | No | 1 |
| | 27/8/18 | Yes | 1 |
| | 5-10/11/18 | No | 5 |
| | 06/12/18 | No | 1 |
| | 25 and 26/12/18 | Yes | 1 |
| 2019 | 1/1/19 | Yes | 1 |
| | 02/02/19 | No | 1 |
| | 19/4/19 | Yes | 1 |
| | 22/4/19 | Yes | 1 |
| | 6/5/19 | Yes | 1 |
| TOTAL HOLIDAY TAKEN DURING EMPLOYMENT | | | 29 days |

51. I find that the Claimant had accrued but not taken 23 days' holiday during his employment with the Respondent.

Written particulars of employment and payslips

52. The Respondent has conceded that no written particulars of employment were provided to the Claimant.

53. In addition, the Respondent has conceded that no payslips were provided to the Claimant, other than at his request for the period from 6 July to 12 October 2018.

REASONS

Unfair dismissal

54. I find that the Claimant did not have the two years' continuous service as at the date of his dismissal required to bring a claim for unfair dismissal. The Claimant's claim for unfair dismissal therefore fails.

Wrongful dismissal

55. The Respondent is only entitled to dismiss the Claimant without notice if he commits gross misconduct or a fundamental breach of contract. I find that the Claimant was wrongfully dismissed for the following key reasons:

- 55.1 the Respondent had not treated any of the Claimant's previous absences as a disciplinary offence; and
- 55.2 the Respondent had not provided the Claimant with any warnings as to how any future absences may be treated.
- 55.3 in the circumstances, I find that the Claimant expected that he would be permitted to take holiday to cover his absence, as had been the Respondent's practice in the past.

56. I also note that Mr Fisher's evidence that if the Claimant had contacted Mr Brown, it is likely that Mr Brown would have given the Claimant his job back. I therefore find that the Claimant's conduct did not amount to a fundamental breach of his contract of employment with the Respondent.

57. I find that the Claimant should have been provided with one week's statutory notice of dismissal.

Holiday pay

58. I have found that the Claimant and the Respondent did not have any agreed terms regarding the Claimant's holiday, other than that he would receive 28 days' holiday per year (inclusive of any bank holidays).

59. I find that the Claimant's holiday year commenced on 3 July each year, in accordance with Regulation 13(3) of the WTR.

60. I find that the Claimant had accrued but not taken 23 days' holiday in total for the holiday years that he worked for the Respondent:

60.1 3 July 2017 – 2 July 2018: 13 days' holiday accrued but not taken, out of a total of 28 days' holiday;

60.2 3 July 2018 – 23 May 2019: 10 days' holiday accrued but not taken, out of a total of 24 days' holiday.

61. I find that modifications could be made to the wording of the WTR, similar to those made by the EAT in *Plumb*, to give effect to the decisions of the ECJ on the carry over of holiday pay in circumstances not relating to sickness absence. The underlined words are the words that the EAT inserted into Regulation 13 (9) of the WTR, with my modifications to the EAT's wording in *Plumb* highlighted in bold:

*“(9) Leave to which a worker is entitled under this regulation may be taken in instalments but, (a) it may only be taken in the leave year in respect of which it is due, save that it may be taken within 18 months of the end of that year where the worker was unable or unwilling to take it because **he was on sick leave his employer has prevented him from taking it** and, as a consequence did not exercise his right to annual leave...”*

62. I note that the ECJ's decision in *King* did not impose any time limit on the carry forward of accrued holiday where a worker has been prevented from taking their holiday by their employer. However, the Claimant's employment in fact ended less than 18 months after the end of his 2017/2018 holiday year so this point does not affect my decision.

63. I find that the Claimant's overtime was sufficiently regular to be included in the calculation of holiday pay under Regulation 16(1) of the WTR. The Claimant's weekly base pay was £295.20, based on a working week of 40 hours per week. However, he in fact earned £339.48 per week on a regular basis, including 6 hours' overtime.

64. I have therefore awarded the Claimant £1561.61 gross in respect of under-payments of holiday pay.

Written statement of particulars

65. Mr Fisher conceded on behalf of the Respondent that it failed to provide the Claimant with a written statement of particulars.

66. I award the Claimant two weeks' pay in relation to this failure because:

66.1 there are no exceptional circumstances making it not just and equitable to make this award; and

66.2 I have decided that it would not be just and equitable to increase this award to 4 weeks' pay.

In reaching my decision, I have considered factors including the size and nature of the Respondent's business.

Itemised pay statements

67. Mr Fisher conceded on behalf of the Respondent that it failed to provide the Claimant with any payslips, save for the period from 6 July to 12 October 2018.

68. I have stayed this part of the claim, subject to the Case Management orders issued separately to the Judgment in this claim.

Employment Judge Deeley

2 December 2019

JUDGMENT SENT TO THE PARTIES ON

3 December 2019

Miss K Featherstone

FOR EMPLOYMENT TRIBUNALS

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