



# THE EMPLOYMENT TRIBUNALS

**Claimant** Mr M Love

**1<sup>st</sup> Respondent** Rowburn Construction  
**2<sup>nd</sup> Respondent** Rowburn Construction Limited

**Heard at** North Shields Hearing Centre **On** 20 January 2020

**Before** Employment Judge Langridge

## Representation

**Claimant** Ms Ranjit O'Mahony, Solicitor (not in attendance)  
**Respondent** No appearance

## JUDGMENT

1. The second respondent is added as a party to the proceedings pursuant to Rule 34 of the Employment Tribunal Rules of Procedure 2013.
2. The claimant was not dismissed by the respondents pursuant to section 95(1)(c) Employment Rights Act 1996.
3. The claimant was laid off by the respondents within the meaning of section 147 Employment Rights Act 1996.
4. The claimant is eligible for a redundancy payment in accordance with section 148 Employment Rights Act 1996 and his entitlement amounts to £1,575.00.
5. The respondents made unlawful deductions from the claimant's wages in the period between 26 April 2019 and 12 June 2019 in the gross sum of £3,822.00.
6. The respondents failed to pay the claimant his accrued holiday pay amounting to ten days' gross pay totalling £1,092.00.

7. The claimant is entitled to four weeks' pay pursuant to section 38 Employment Act 2002, totalling £2,100.00.
8. The claimant's claim for notice pay is dismissed.

## REASONS

### Introduction

1. These claims arose from the closure of the claimant's place of work. The claimant claimed that his employer committed a repudiatory breach of contract when it laid him off on 26 April 2019 without any contractual right to do so, and as a result he was constructively dismissed. In the alternative the claimant claimed a redundancy payment under the layoff provisions in Chapter III Employment Rights Act 1996 ('the 1996 Act'). The application to the Tribunal did not identify any effective date of termination.
2. In addition to the above claims, the claimant sought payment for two weeks' annual leave accrued during his employment, payment of wages not paid from April 2019 until his job came to an end, and pay in respect of his notice period. Finally, a claim was made for an award under section 38 Employment Act 2002 in light of the fact that the claimant had not received written particulars of employment at any time during his employment.
3. The claim was initially brought against the first respondent only, who did not respond to the claim, neither filing a response indicating an intention to defend it, nor communicating with the Tribunal in any way. Attempts were made to identify an alternative address for the first respondent, but the claimant was unable to provide one. The Tribunal conducted a company search which indicated that the business operated as a limited company under company number 10922907 with a registered office at 7 Hay Street, Sunderland, Tyne and Wear SR5 1BG. That is the address stated on the claimant's application to the Tribunal and the address at which the Tribunal sought unsuccessfully to reach the first respondent.
4. Having reviewed the file the Tribunal ordered that the second respondent be added as a party to the claims by way of amendment, to include the limited company which appears to have been the claimant's employer. In the absence of the parties the Tribunal felt it was in the interests of justice to retain the first respondent as a party to the claims. A further company search carried out by the Tribunal on 23 December 2019 indicated that although there is an active proposal to strike off the second respondent, that process has been suspended following receipt of an objection.
5. At the request of the claimant's representative, the hearing of this claim was dealt with on the papers and without the need for the claimant or his representative to attend. A small bundle of documents and witness statements was provided on the claimant's behalf.

Issues and relevant law

6. The claimant's primary claim was that he had been constructively unfairly dismissed within the meaning of section 95(1)(c) of the 1996 Act. He said his employer had no contractual right to lay him off and when it did so on 26 April 2019, it committed a repudiatory breach of contract. The claimant said he resigned on 18 June 2019 with notice, and in his application to the Tribunal he indicated that he was due pay in respect of his notice period.
7. The claimant's alternative claim was that he had been laid off pursuant to section 147 of the 1996 Act and gave notice in accordance with section 150.
8. Section 147(1) of the Act provides as follows:
  - (1) *For the purposes of this Part an employee shall be taken to be laid off for a week if—*
    - (a) *he is employed under a contract on terms and conditions such that his remuneration under the contract depends on his being provided by the employer with work of the kind which he is employed to do, but*
    - (b) *he is not entitled to any remuneration under the contract in respect of the week because the employer does not provide such work for him.*
9. Under section 148 the employee would be eligible for a redundancy payment by reason of being laid off, if he gives notice of intention to claim a redundancy payment and does so at a time when he has been laid off for four or more consecutive weeks ending not more than four weeks before the notice is served.
10. Section 150 sets out conditions which must be met for an employee to be entitled to a redundancy payment by reason of being laid off. He must terminate his contract by giving such period of notice as is required. In the absence of any express contractual notice in this case, the amount of notice 'required' for the purposes of section 150(2)(b) is one week, the statutory minimum notice under section 86 of the 1996 Act. Timing of the notice has to be in accordance with section 150(3). In this case, the claimant had to give notice of termination before the end of a period of four weeks from his notice of entitlement to a redundancy payment, allowing for any counter notice from the employer.
11. Those are the claims arising from the termination of the claimant's employment. In addition the claimant sought an award in respect of his arrears of wages from 26 April 2019 until his termination date, as unlawful deductions contrary to section 13 of the 1996 Act. Also relying on section 13, or alternatively the Working Time Regulations 1998, the claimant sought payment of holiday pay in respect of the two weeks' holiday he had accrued but for which he was not paid by the time his employment ended.
12. The claimant said his witness statement that he obtained new employment on 12 June 2019 and had fully mitigated his loss. As a result, he did not pursue any claim in respect of notice pay.

13. The final claim was for an award under section 38 Employment Act 2002 in that the respondents had not, at the time of the proceedings were brought, provided a written statement of employment particulars in accordance with section 1 of the 1996 Act. The claimant asked the Tribunal to exercise its discretion to award four weeks' pay rather than the minimum of two weeks. For the purposes of that claim the amount of a week's pay is capped in accordance with section 38(6) of the 1996 Act, the maximum amount at the relevant time being £525.00.

Findings of fact

14. The claimant was employed as a construction pointer with the second respondent, alternatively the first respondent, from 1 February 2017 until 25 June 2019, when his notice to terminate his employment expired. At no time was the claimant issued with written particulars of the main terms of his employment or any written contract.
15. During his employment some terms were agreed orally or were implied by custom and practice between the claimant and the respondents, and included terms that the respondents would:
- Provide the claimant with work for around 39 hours each week;
  - Pay the claimant for at least 39 hours each week at the gross hourly rate of £14.00, equating to £546.00 per week;
  - Provide the claimant with paid annual leave totalling 24 days plus 8 statutory or bank holidays between January and December;
  - Pay the claimant's wages every two weeks.
16. No term was agreed which entitled the respondents to lay off the claimant without work or pay. On 26 April 2019 the claimant was told that he was being laid off and received no wages or holiday pay after that date. The respondents did not embark on a redundancy consultation exercise, nor at any time did they take steps to terminate the claimant's employment. The claimant initially accepted the position, then on 9 June 2019 he emailed the respondents formally giving notice of his request for a redundancy payment. At that time the claimant had been laid off without work or pay for six consecutive weeks. The respondents did not reply to the email and no counter notice was served.
17. On 12 June 2019 the claimant started a new job earning a higher wage than he had earned with the respondents. On 18 June he told the respondents in writing that he wished to terminate his contract. He did so in the following terms:
- "I am writing to you to terminate my employment by giving proper notice and wish to claim for a redundancy payment under section 150 of the Employment Rights Act 1996."
18. The claimant did not identify a termination date, but by stating that he was giving "proper notice" it was clear to the respondents that this meant he was giving one

week's notice to terminate his contract on 25 June 2019. The Tribunal finds that that was the termination date.

19. In February and March 2019 the claimant had been paid in accordance with his contractual terms. By the time his employment ended, he had taken only two days' leave and was entitled to ten days' accrued but unpaid leave equating to two weeks' pay.

### Conclusions

20. The Tribunal finds that the respondents committed a repudiatory breach of contract by withdrawing work and pay from the claimant on 26 April 2019. However, the claimant accepted the position and by his conduct he waived the breach because he did not resign until 18 June, over seven weeks later. He did not resign in response to the repudiatory breach but only after beginning his new job on 12 June.
21. Since the claimant was not dismissed within the meaning of section 95(1)(c) of the 1996 Act, he is not entitled to any basic award.
22. The undisputed evidence in this case shows that the claimant was laid off in accordance with section 147(1) of the 1996 Act, in that no work was provided by the respondents, and he was not entitled to pay during that period. Under section 148 the claimant is eligible for a redundancy payment because he gave notice in writing to the respondents on 9 June 2019 indicating his intention to claim a redundancy payment in respect of the layoff. He had been laid off for six consecutive weeks immediately before serving his notice.
23. Furthermore, the Tribunal is satisfied that the claimant complied with section 150 of the 1996 Act, by virtue of giving notice to terminate his contract in his email dated 18 June 2019. The Tribunal considered whether the absence of an explicit termination date in the email was sufficient to constitute effective notice, but was satisfied that the email contained enough information from which the termination date could be ascertained. As the claimant was under no express contractual duty as to notice, section 86 of the 1996 Act required him to give at least one week's notice and this was done.
24. The claimant is therefore entitled to a redundancy payment, having completed two years' continuous service and being 45 years old when his employment ended. The Tribunal accepts that the claimant's calculation of £1,575.00 is correct.
25. Turning to the claim in respect of unpaid wages, the Tribunal accepts that the claimant was not paid from 26 April 2019 when he was laid off, and that he suffered unlawful deductions to his pay contrary to section 13 of the 1996 Act over a seven week period. The claimant sought his wages only until 12 June 2019 when he started his new job. Although the claimant claimed a week's net pay of £439.38, the Tribunal makes the award by reference to the gross weekly pay of £546.00 which over seven weeks amounts to £3,822.00. This is because

any payment of those wages would be subject to statutory deductions for tax and national insurance.

26. The Tribunal further accepts the claimant's claim for ten days' holiday pay, which he calculated by reference to two weeks' net pay. The Tribunal awards this sum on the basis of a week's gross pay of £546.00. Over two weeks this amounts to £1,092.00. Any payment of accrued holiday pay would also be subject to statutory deductions.
27. At the time these proceedings began, the respondents had not provided the claimant with a written statement of the main terms and conditions of his employment in accordance with section 1 of the 1996 Act, and the Tribunal is satisfied that an award of four weeks' pay should be made under section 38 Employment Act 2002. The Tribunal makes an award of £2,100.00 being four weeks' pay at the statutory rate of £525.00 per week.

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**EMPLOYMENT JUDGE LANGRIDGE**

**JUDGMENT SIGNED BY EMPLOYMENT  
JUDGE ON**

21 February 2020

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