



# EMPLOYMENT TRIBUNALS

**Claimant**

Mr Z Rafique

**Respondent**

(1) Hertford Food Limited  
(2) Mr Haseeb Bari

v

**Heard at:** Watford

**On:** 17 October 2019

**Before:** Employment Judge Loy

**Appearances**

**For the Claimant:**

Mr Peter O'Brien, solicitor

**For 1<sup>st</sup> and 2<sup>nd</sup> Respondent:**

Mr Haseeb Bari (director of the first respondent and in person)

## RESERVED JUDGMENT ON REMEDY

1. The reserved judgment of the Tribunal on remedy is that the first respondent is ordered to pay the following amounts to the claimant:  
  
£2,285.01 in respect of unpaid holiday pay; and  
  
£510.00 as a Basic Award for unfair dismissal.  
  
The total award is £2,795.01.
2. The total award of £2,795.01 shall be paid to the claimant within 14 days of the date of this judgment in accordance with Rule 66 of Schedule 1 of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

## REASONS

**Background**

1. Between August 2015 and 2 September 2018, the claimant was employed as a Kitchen Assistant in the St Alban's Papa John's Pizza store. Papa John's operates a franchisee business model. Between August 2015 and March 2018, the claimant was employed by the previous franchisee of the St Alban's Papa John's store. In March 2018, Mr Bari's company, the first respondent, took over the operation of the St Alban's Papa John's

franchise. Mr Bari is the second respondent and he is a director of the first respondent. He was known to the claimant before he took over the franchise. This was because between October and December 2017 Mr Bari had managed the St Alban's store on behalf of the previous franchisee. The claimant remained employed at the St Alban's store after the first respondent took over the franchise until his employment was terminated by the first respondent with effect from 2 September 2018.

2. On 7 November 2018, Acas was notified under the early conciliation procedure in respect of both the prospective first and second respondent. On 7 December 2018, certificates were issued in respect of both the prospective respondents. On 7 January 2019, the claim form was presented against both the first and second respondent. The claim form asserted three claims: automatic unfair dismissal; failure to pay statutory notice and failure to pay accrued but untaken holiday pay upon termination of employment.

#### **Failure to present a response form and rule 21 judgment**

3. At no stage did either the first or second respondent enter a response form, whether within the prescribed period of 28 days or at all. As a result, on 25 April 2019 Employment Judge Henry entered a rule 21 judgment against both the first and second respondents. The effect of that judgment was to determine liability in favour of the claimant in respect of all three claims set out in the claim form. By a letter dated 30 March 2019, the first and second respondent had already been notified under rule 21(3) that they would be allowed to take part in the remedy hearing only to the extent permitted by the Employment Judge conducting that hearing.

#### **Claims and Issues**

4. Liability was determined in the claimant's favour under rule 21 in respect of three claims:
  - 4.1 the claim that the claimant was automatically unfairly dismissed because his dismissal was on the grounds that he asserted his statutory right not to suffer an unlawful deduction from wages under sections 104 (1) (b), 104 (4) and 13 of the Employment Rights Act 1996 ("the ERA") ;
  - 4.2 the claim that the claimant did not receive the notice to which he was entitled under section 86 of the ERA; and
  - 4.3 the claim for accrued but untaken holiday pay upon termination of employment under regulation 14 of the Working Time Regulations 1998 ("the WTR")
5. Mr O'Brien accepted that the correct respondent to all three claims is the first respondent since it was the company, and not Mr Bari personally, who was the claimant's employer.

6. Mr O'Brien told the tribunal that the claimant had managed to secure additional work from a secondary employer (Greggs) immediately after his dismissal by the first respondent. The financial effect of obtaining that additional work was to fully offset the financial loss that the claimant might otherwise have suffered as a result of having been (1) unfairly dismissed; and (2) not having received the statutory notice to which he was entitled. On this basis Mr O'Brien waived the claimant's right to compensation based on loss of earnings in respect of unfair dismissal and statutory notice. Mr O'Brien did not expressly waive the claimant's entitlement to a Basic Award for unfair dismissal. Since the Basic Award is not determined by reference to financial loss the Tribunal proceeded on the basis that the Basic Award should be assessed as well as the claim for unpaid holiday pay on termination.

**Procedure, documents, and evidence heard**

7. The tribunal permitted Mr Bari to give evidence and to make submissions on remedy.
8. The tribunal then heard evidence from the claimant and from Mr Bari. No other witnesses were called. The claimant produced a written statement dated 17 October 2019, a copy of his bank statement from February 2019 and his P45. They were all accepted into evidence.

**Fact-Findings**

9. There was no material dispute between the parties about what had happened.
10. The claimant was not provided with any written confirmation of his terms of employment by either franchisee.
11. The tribunal accepted the claimant's unchallenged evidence that:
  - 11.1 he had been continuously employed for 3 years before his dismissal;
  - 11.2 he worked on average 30 hours per week;
  - 11.3 his average pay assessed over a 52 week period was £170 (gross) per week;
  - 11.4 he received only 2 weeks' holiday pay during his 3 years of employment;
  - 11.5 he was paid in February 2019 (some 6 months after his dismissal) the sum of £230.99 as "holiday pay";
  - 11.6 he was not told at any time during his employment by either franchisee that he had an entitlement to paid holiday;
  - 11.7 he was not encouraged at any time by either franchisee to take any paid annual leave.

12. The only matter that Mr Bari contested was the first respondent's responsibility for the claimant's overall period of continuous employment. He pointed out that he had only become responsible for the claimant's employment in March 2018 when he took over the Papa John's St Alban's franchise. The tribunal referred Mr Bari to paragraph 2 of box 8.2 of the Claim Form. The claimant says there that when the first respondent took over the St Alban's Papa John's franchise from the previous franchisee, the St Albans store continued without interruption to trade as Papa John's Pizza from the same premises. It was the same business in different hands.
13. Mr Bari was not aware of the effect of the Transfer of Undertakings (Protection of Employment) Regulations 2006, so the tribunal spent time explaining the position to him. In particular, that under those regulations contracts of employment of all the employees of the previous franchisee would automatically have transferred to the first respondent as the incoming franchisee. It was explained to Mr Bari that upon such a transfer of businesses the period of continuous employment is preserved and that any outstanding liabilities (including unpaid but accrued holiday pay) would then transfer to the incoming franchisee. Put simply, the claimant's rights were preserved by law and became enforceable against Mr Bari's company when the franchise changed hands.
14. The tribunal asked Mr Bari about what he had said to the claimant about his entitlement to paid annual leave during the time that he was the claimant's manager and employer. Mr Bari said that he was unaware that the claimant had an entitlement to paid holiday. It followed both that (1) Mr Bari had not told the claimant he had an entitlement to paid holiday and (2) he had not encouraged the claimant to take paid holiday. The limited paid holiday that the claimant took during his employment had been at the claimant's own initiative.
15. Accordingly, the claimant was not told in any shape or form during his employment that he had an entitlement to paid annual leave and no steps were taken to encourage or to enable him to take it.

### **The law**

#### **The right to paid annual leave**

16. Regulation 13 and 13A of the WTR provide all workers with a right to 5.6 weeks' paid holiday a year up to a maximum of 28 days.
17. Regulation 14 of the WTR provides for a worker to receive a payment on termination of employment for unused but accrued holiday pay on termination of employment.

#### **Carry over of annual leave where paid leave is not offered by the employer**

18. Ordinarily, there are limitations under the WTR on the amount of untaken paid holiday leave that can be carried forward from one holiday year to

another. However, special considerations apply where a worker has not been offered paid leave by an employer since the worker has effectively been prevented from taking his entitlement to paid holiday. These rules are different and more generous than those which apply where sickness has prevented the worker from taking paid holiday in a particular year.

19. The situation where a worker is not offered paid annual leave was considered by the European Court of Justice in **King v Sash Window Workshop Ltd: C-214/16 [2018] IRLR 142**. Mr King was not given paid annual leave by his employer. An issue arose after his employment ended as to how much he was entitled to receive for untaken but accrued holiday pay. This included leave to which he had been entitled under the WTR over his several years of employment, but which he had not had the opportunity to take. After **King** the position is that if an employer refuses to allow a worker to take all of his or her leave entitlement during a particular year, the right to take and be paid for the untaken leave is carried forward year on year as a matter of European and domestic law. Any domestic legislative provisions to the contrary effect are overridden. This is because the ECJ considered that the Working Time Directive does not allow for national legislation to restrict a claim by a worker for carrying forward untaken holiday entitlement from one leave year to the next if the employer has prevented the worker from taking paid holiday leave in the first place. There is no time limit on this right to carry forward holiday or on the right to be paid for it on termination of employment. In coming to this conclusion in **King** the ECJ relied not only on its own case law on the Working Time Directive but also on the right to an effective remedy in article 47 of the Charter of Fundamental Rights.
20. This also means that time limits on a claim for holiday pay going back a number of years do not apply to claims based on an accumulation of unpaid holiday entitlement where an employer has prevented the worker from taking that leave. In particular, the 2-year limit on back claiming for unpaid leave under the Deduction from Wages (Limitation) Regulations 2014 does not apply to these types of claim. This is because after **King** the claim for untaken holiday pay only crystallises on the termination of employment. The only relevant tribunal time limit is therefore that a claim must be brought within 3 months of the termination of the claimant's employment.
21. The position in cases where paid leave is prevented by the employer was further considered by the ECJ in **Kreuziger v Land Berlin: C-619/16 [2019] CMLR 34**. In this case the ECJ held that *"the employer is in particular required...to ensure, specifically and transparently, that the worker is actually given the opportunity to take the paid annual leave to which he is entitled, by encouraging him, formally if need be, to do so, while informing him, accurately and in good time so as to ensure that that leave is still capable of procuring for the person concerned the rest and relaxation to which it is supposed to contribute, that, if he does not take it,*

*it will be lost at the end of the reference period or authorised carry-over period, or upon termination of the employment relationship where the termination occurs during such a period”.*

22. **Kreuziger** also stated that the burden of proof is on the employer to show that these proactive steps had been taken and emphasised that the worker was to be regarded as the weaker party in the employment relationship.

### **The Basic Award for Unfair Dismissal**

23. Section 112 (4) of the ERA provides that where the Tribunal does not make an order for reinstatement or re-engagement the tribunal shall make an award of compensation for unfair dismissal calculated in accordance with sections 118 to 126 of the ERA. The award shall consist of a Basic Award and a Compensatory Award. For the reasons referred to already, only the Basic award is to be assessed in this case. This will be done in accordance with the calculation set out in section 119 of the ERA.

### **Conclusions**

#### **Accrued untaken holiday pay on termination**

24. It was common ground between the claimant and Mr Bari that the claimant was not offered any paid annual leave by his employer. This is therefore a case where the principles established in **King** and **Kreuziger** apply. Accordingly, the claimant's untaken annual leave carried forward from each of his holiday years to the next and his entitlement to compensation on termination of employment under regulation 14 WTR is to be calculated on that basis.
25. The claimant was accordingly entitled to 3 years' accrued holiday pay on termination or employment less both
- 25.1 the payment of £340 he received for two weeks' paid holiday during his employment; and
- 25.2 the payment of £230.99 he received in February 2019 in lieu of untaken accrued leave.
26. In monetary terms this is  $3 \times (£170 \times 5.6) = £2,856$  less the two payments set out above which total £570.99. This produces an underpayment of £2,285.01.

#### **Basic Award for unfair dismissal**

27. The claimant commenced employment on a date unknown in August 2105. The claimant's effective date of termination was 2 September 2018. He had therefore been employed for 3 complete years at the effective date of termination. He was aged 26 at the effective date of termination.
28. Applying section 119 of the ERA this produces a Basic Award of  $3 \times £170 = £510.00$

Employment Judge Loy

Date: ...14 May 2020.....

Sent to the parties on: .....

.....01.06.2020.....

For the Tribunal Office