



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4100196/2019

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Held in Glasgow on 12 April 2019

Employment Judge: David Hoey (Sitting alone)

10 **Mr G Burns**

**Claimant
Represented by:-
Mr M Dempsey –
Advocate**

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Cupid Cakes (In Liquidation)

**First Respondent
Not Present and
Not Represented**

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The Secretary of State for the Department of Business

**Second Respondent
Not Present and
Not Represented**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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1. The Tribunal declares that the claimant was dismissed by reason of redundancy and the second respondent shall pay to the claimant (1) the balance of a redundancy payment due to him of **One Thousand three hundred and fifty five Pounds (£1,355)** and (2) **Two thousand and ninety six Pounds (£2,096)** in respect of outstanding statutory notice due to the claimant.

2. The first respondent is ordered to pay the claimant the gross sum of **Nine Hundred and Thirty Seven Pounds and Fifty Pence (£937.50)** less such deductions required by law in respect of accrued holiday entitlement.

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REASONS

E.T. Z4 (WR)

1 This case called for a Final Hearing. Only the claimant was represented (by
Mr Dempsey, Advocate). Neither respondent was represented.

2 The Hearing began by identifying the issues that required to be determined.

3 Mr Dempsey explained that the claimant was pursuing claims against both
5 respondents. The claimant was seeking a redundancy payment, notice pay,
a payment in respect of accrued holidays and unpaid wages.

4 The claimant had lodged a bundle of productions and he gave oral evidence.

5 Following conclusion of the evidence there was insufficient time to hear full
submissions and written submissions were requested. These were provided
10 by Mr Dempsey and sent to both respondents. The liquidator of the second
respondent replied to those submissions challenging the start date of the
claimant's employment. I asked that evidence be provided to support the
assertion to which the claimant was able to comment.

6 I find the following facts proven on the balance of probabilities which findings
15 relate to the issues that require to be determined by the Tribunal.

Findings in fact

7 The claimant was employed by the first respondent from 16 September 2011
until 14 September 2018.

8 On his last day of employment he earned £375 (net) a week for working 40
20 hours. His gross weekly pay is £466.

9 The claimant was occasionally given payslips which did not accord with the
wages he was actually paid. The wage slips stated the claimant was paid
£195 (gross) a week.

10 The claimant was initially paid by transferring a sum into his bank account
25 (£285) and by him being given a cash supplement (£165) which gave a total
of £450, which included £75 for his wife's wages.

11 From around May 2018 the claimant received £450 into his bank account
each week which covered his and his wife's wages.

- 12 The claimant believed that his net pay was £375 and that the respondent had
accounted for tax (such that the sum he was receiving was the net sum). The
claimant did not check the position with HMRC. It is not known whether tax
was in fact accounted for in respect of the sums paid to the claimant by way
5 of wages.
- 13 By letter dated 27 July 2018 the claimant was invited to a disciplinary hearing.
The hearing was to be heard by a consultant whose decision would be
accepted by the first respondent.
- 14 The claimant attended the hearing on 22 August 2018 and presented his
10 response. No decision was communicated to the claimant following the
hearing until the claimant learned of the outcome on 1 October 2018.
- 15 The first respondent ceased to trade on 14 September 2018 and a liquidator
was appointed on 1 October 2018. The relevant date for the purposes of the
Employment Rights Act 1996 insolvency provisions is accordingly 1 October
15 2018.
- 16 The claimant was dismissed by the first respondent on 14 September 2018
by reason of redundancy.
- 17 The claimant met the insolvency practitioner on 1 October 2018 who advised
the claimant that she understood the first respondent had dismissed the
20 claimant. The claimant was provided with a copy of an outcome letter dated
5 September 2018. The claimant had not seen the letter (nor known of its
contents) until 1 October 2018. That letter purported to dismiss the claimant
with his final day of employment being 7 September 2018. The letter also
stated the claimant's final salary would be paid on 14 September 2018. No
25 salary was paid to the claimant then. The letter also stated the claimant would
receive his P45 and be paid in lieu of holidays. Neither event happened.
- 18 The claimant was aged 54 as at the date of his dismissal and had 6 complete
years' service.

19 The claimant received the sum of £2,839 by way of a redundancy payment from the Redundancy Payments Service. He also received the sum of £700 in respect of notice pay from the Secretary of State.

20 The claimant had accrued 12.5 days of untaken holiday as at the date of his
5 dismissal. He had no written contract of employment and this holiday entitlement arises under the Working Time Regulations 1998.

The Law

Illegality

21 It is a principle of Scots law that a court or tribunal will not enforce an illegal
10 contract. The principle has developed over time and is grounded in public policy which means that the principle changes. Illegality can arise not just by the existence of the contract itself being illegal but also in the way in which the contract is performed. Thus a contract which is legally entered into can be performed in an illegal manner. This commonly involves situations where tax
15 fraud is involved.

22 Where illegality arises in the performance of an otherwise legal contract, a Tribunal would require to dismiss the claim where the claimant knew of the illegality, the claimant participated in the illegality and the illegal performance was sufficient to render the contract illegal.

20 23 For this principle to be engaged therefore the claimant needs to know of the illegality. There must therefore be some misrepresentation of the facts. If the claimant knew what was happening it is irrelevant that the claimant did not know it was unlawful. The claimant does need to know of the facts giving rise to the illegality.

25 24 There are a number of cases in this area from which these principles have emerged, including *Patel v Mirza* 2017 AC 467 (which deals with the doctrine in a different context), *Enfield Technical Services v Payne* 2008 ICR 1423 and *Hall v Woolston Hall Leisure* 2001 ICR 99.

Communication of dismissal

25 It is now clear that dismissal of an employee is not effective until the dismissal
has been communicated to the employee – Gisda Cyf v Barrett 2010 ICR
1475.

5 26 Section 98 of the Employment Rights Act 1996 confirms that an employee
has the right not to be unfairly dismissed. This arises where there is either no
potentially fair reason for dismissal or where a fair procedure has not been
followed.

10 27 If a claimant has been unfairly dismissed, compensation can be awarded. A
basic award can be ordered (in terms of Section 119 of the 1996 Act) and a
compensatory award can also be awarded (which would be such sum as is
just and equitable in all the circumstances under section 123 of the 1996 Act).

Redundancy

15 28 An employee who is dismissed as redundant is entitled to a redundancy
payment. Redundancy is defined in Section 139 of the 1996 Act. The
calculation of a redundancy payment is set out at Section 162 of the 1996 Act
(and mirrors the calculation of a basic award by and large).

Notice pay

20 29 In terms of section 86 of the 1996 Act an employee is entitled to one week's
notice per complete year of employment up to a maximum of 12 weeks' notice
(which is due following 12 or more complete years) when the employer
terminates the employment (when notice is required).

Holidays

25 30 Under Regulation 13 and 13A of the Working Time Regulations 1998 all
workers are entitled to 5.6 weeks holiday a year. Workers are entitled to be
paid holidays that have accrued (but untaken) upon the final year of
employment.

Insolvency situations

31 Under section 166 of the Employment Rights Act 1996 certain payments can
be claimed from the Secretary of State. In summary where an employer is
insolvent (as defined) employees can seek payment of sums from the
5 Secretary of State for certain debts owed to them, including a redundancy
payment. Section 170 allows an employee to raise a Tribunal claim to refer
any question as to the liability or sum.

32 Part XII of the 1996 Act deals with entitlement arising in respect of insolvent
employer (as defined) Section 184 sets out the particular debts to which the
10 section applies which includes up to 8 weeks arrears of pay, statutory notice
pay, up to 6 weeks holiday pay and a basic award. There are caps on the
amount (which do not apply in this case).

33 Section 188 allows an employee to raise a claim in the Tribunal for a
declaration of entitlement to such sums or to seek a declaration as to the
15 correct amount of any such payment.

Submissions

34 Counsel for the Claimant submitted detailed submissions in relation to the
issues before the Tribunal. I do not intend to repeat these within this
Judgment given they are on the file. I shall summarise them. These were
20 copied to both respondents and no response was received.

35 In short the claimant contends that there was no evidence of any illegality
before the Tribunal. There was no evidence that tax was not paid. In any event
the claimant argues that the tests relating to illegality have not been satisfied.
Reference is made to Patel (2017) supra. It is submitted that the claimant did
25 not know of any illegality and in any event did not participate in it. Finally it is
submitted that it is not proportionate to dismiss the claim for this reason.

36 The claimant then argues that on the facts he did not know he had been
dismissed as the decision (of the consultant) had not been communicated to
him and in any event was not made by the employer. Further the claimant
30 was dismissed as redundant prior to the point he learned of his dismissal.

37 In relation to the sums due the claimant seeks awards against both respondents but notes that caution is needed to avoid duplication. It is conceded that as the first respondent is insolvent any payments would be paid by the second respondent.

5 38 The claimant seeks the following sums from the first respondent:

39 He seeks a basic award/redundancy payment of £6,714. As the claimant was 54 at the time of dismissal with (it is claimed) 14 years' complete service and earned a gross weekly wage of £466 he would be entitled to £9,553 less the £2,839 already paid by the second respondent. The claimant disputes the
10 start date suggested by the liquidator (who had provided information from the payroll records). The claimant gave oral evidence that supported his position.

40 It is submitted that there is little chance of a compensatory award given the evidence that the claimant is likely to be have been dismissed in any event. A 100% reduction could be made to this award.

15 41 He also seeks 12 weeks' notice pay in the sum of £4,500 less £700 paid by the second respondent leaving £3,800.

42 Finally the claimant seeks 12.5 days' holiday pay from the first respondent. As his net weekly wage is £375 over 5 working days the claimant seeks 12.5 x £75 giving £937.50.

20 43 In relation to the second respondent the claimant argues that a basic award/redundancy payment is covered by section 166(2)(a). He also seeks 12 weeks' notice pay.

44 In terms of section 184(1)(c) of the 1996 Act the claimant notes that holiday pay is defined as accrued holiday pay "under the employee's contract of
25 employment". In the absence of any express contractual right to holiday, it is noted that there may be no right to payment from the second respondent in this regard. No further sums are sought.

Decision and discussion

45 I have considered the submissions presented by the claimant's counsel
together with each of the authorities referred to. The first issue that arises in
this case is whether or not the Tribunal's ability to deal with the matter is
5 affected by reason of any illegality in the way the contract has been
performed. I have concluded that there is no such bar in all the circumstances.
The claimant was paid a net sum. He raised with the first respondent the tax
position and was told that this would be "sorted". He made no effort to check
the position with HMRC but was entitled to take his employer at face value.
10 The claimant should check that proper tax and other deductions were made
from the sums in question, given the uncertainty. The contract was not
therefore tainted with illegality.

46 The next issue I need to determine is the claimant's start date. The claimant
maintains that he started on 1 April 2004. He provided oral evidence to this
15 effect. There was no other evidence supporting his position. The first
respondent had suggested the claimant had significantly less service during
a disciplinary meeting which again the claimant challenged. The liquidator had
checked the company's payroll records which showed that the claimant
started on 16 September 2011. I prefer the evidence from payroll the liquidator
20 had obtained. That is an independent record of the official position in relation
to the claimant's start date and shows when the claimant's position
commenced as a matter of record.

47 I accept the claimant's evidence that he did not learn of his employer's
consultant's decision to dismiss him until after he had been dismissed by
25 reason of redundancy. The claimant was clear that he only learned of the
existence of the letter when he attended the creditors' meeting. The letter had
not been implemented and he had not been dismissed as a matter of fact.
The insolvency situation that arose resulted in his employment ending by
reason of redundancy prior to receipt of this letter

48 I am satisfied that the claimant was dismissed by reason of redundancy. There was no procedure leading up to the dismissal. He was dismissed when the respondent ceased to trade on 14 September 2018. The dismissal was unfair.

5 49 The claimant is entitled to a redundancy payment. That is calculated in the same way as a basic award. I accept the claimant's submissions in this regard. I accept the figures provided by the claimant as accurate both in terms of the hours worked and the amount he has paid by the first respondent. He is therefore entitled to a redundancy payment in the sum of $9 (6 \times 1.5) \times £466$ which amounts to £4,194 less the sum already paid of £2,839 leaving the outstanding sum of £1,355.

50 It is not just and equitable to award the claimant anything by way of a compensatory award given the financial situation of the first respondent. A 100% deduction is appropriate.

15 51 The claimant is entitled to 6 weeks' notice in terms of section 86(1)(c) of the 1996 Act which amounts to £2,796 less £700 already paid leaving the sum due of £2,096.

52 The claimant is also due 12.5 days accrued annual leave. I accept the claimant's calculations of a day's pay. A weekly net wage of £375.00 over 5 working days gives a daily rate of £75.00. Thus, the total holiday pay due is £937.50 (gross).

In summary

53 I am satisfied that the first respondent is insolvent for the purposes of section 166 and 183 of the 1996 Act. A special resolution to voluntarily wind up the company was passed with respect to the company. I am also satisfied that the other conditions set out in sections 166 and Part XII have been satisfied so as to entitle the claimant to seek payment from the second respondent. The claimant was dismissed by reason of redundancy and his entitlement to the sums set out in this Judgment apply.

54 For the purposes of section 170 of the 1996 Act the claimant is entitled to be paid a redundancy payment of £4,194 less the £2,839 already paid, leaving an outstanding sum of £1,355. That is the sum the first respondent ought to have paid the claimant in terms of section 168(2).

5 55 For the purposes of 188 I declare that the second respondent shall make a payment to the claimant of £2,096 in respect of outstanding statutory notice (£2,796 less £700 paid).

56 The claimant's entitlement by way of accrued holidays was established by reference to the Working Time Regulations 1998 and not by reference to any contractual entitlement. As counsel for the claimant points out section 184(3) only allows holiday pay that arises under the claimant's contract of employment to be claimed from the second respondent. That is not the case in this matter. The claimant seeks payment not under his contract but under the 1998 Regulations. His holiday pay is not something I order the second respondent to pay.

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57 The claimant seeks an order against the first respondent, despite being in liquidation.

58 The first respondent is liable for the sums due in respect of accrued holiday entitlement, which amounts to £937.50 (gross).

59 I avoid duplication and therefore find the first respondent liable for accrued holiday pay and the second respondent liable for the balance of notice pay and the redundancy payment.

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Employment Judge:

David Hoey

Date of Judgement:

22 May 2019

Entered in Register,

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Copied to Parties:

31 May 2019

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