EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103304/2019

Held in Glasgow on 12 November 2019

Employment Judge J Young

Mr T Siddall	**Claimant** **In Person**
Falkirk Car Carriers Limited	**Respondent** **Represented by:** **Ms Y Guild -** **Lay Representative**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is:-

(1) that the claimant was not unfairly dismissed by alleging that the respondent had infringed a relevant statutory right of his namely the right to holiday pay conferred by the Working Time Regulations 1998; and

(2) that the respondent shall pay to the claimant the sum of **One hundred and twenty eight pounds and two pence (£128.02)** under deduction of tax and National Insurance being the balance of the amount of pay due to him in respect of holidays accrued but untaken at date of termination of his employment.

REASONS

1. In this case, the claimant presented a claim to the employment tribunal against the respondent claiming that he was due holiday pay and had been unfairly dismissed because he had alleged that the respondent had infringed a relevant statutory right of his namely an entitlement to holiday pay. The respondent admitted that the claimant had queried his holiday pay but all sums due had now been paid. They also admitted that they had dismissed

the claimant but denied this was due to his claim for holiday pay. They stated that the reason for dismissal was due to the damage that he had caused to vehicles he had driven in his short period of employment.

2. In those circumstances, the issues for the tribunal were:-

(i) Whether the principal reason for the dismissal of the claimant was his allegation that the respondent had not paid him his correct holiday pay; or whether dismissal was due to the damage he had caused to vehicles.

(ii) If the claimant's claim was upheld, what compensation was due to him.

(iii) In any event was holiday pay due to the claimant at termination of his employment; and if so was there an amount still due.

Documentation

3. The respondent produced an Inventory of Productions with documents numbered 1-11.3. (R1-11.3) In the course of the hearing, there was produced an exchange of email messages in respect of vehicle registration number WV14WCM (numbered R12). The claimant produced three documents being:

(i) Email from him to Glasgow tribunal office dated 1 July 2019 with financial information on earnings and average weekly wage (C1);

(ii) Copy text message further to appeal hearing (C2);

(iii) Summary of diary entries in respect of hours worked by the claimant for the respondent over the period 1 September 2018 – 17 November 2018 (C3).

4. Reference was made to e mail messages kept on mobile phones by the parties in the course of the hearing and a print of e mail exchange between claimant and respondent of 26/27 October 2018 was made available after the hearing.

The Hearing

5. At the hearing, I heard evidence from the claimant and Yvonne Guild a Director of the respondent who also represented the respondent. From the relevant evidence led, admissions made and documents produced, I was able to make findings in fact on the issues.

Findings in fact

6. The respondent conducts the business of the collection and delivery of new and used cars from and to dealers across the UK. An average of 15 drivers and 4 office staff are employed The office staff comprises a transport manager; planner; administrative clerk and supervisor. Yvonne Guild as a director oversees the running of the company; searches for new customers and manages existing customers.

7. The claimant holds a Class 1 driver's license and was employed as a driver by the respondent in the period between 22 July and 21 November 2018. He would drive a transporter collecting and delivering cars across the UK.

8. The claimant was employed on a 'basic 40 hour week' with an entitlement to 28 days holiday in the course of the holiday year (which ran from 22 July 2018).

9. Initially the claimant's hourly rate ran at the rate of £10 per hour up to 40 hours in a week and for any hours beyond that at the rate of £15 per hour. Breaks would be paid at the rate of £10 per hour. As from 1 November 2018, the claimant's rate of pay ran at £12 per hour for the first 40 hours and then at £18 per hour for hours above 40. From 1 November 2018, no pay was received in respect of breaks.

10. The respondent was not able to predict in advance the locations that would require the collection or delivery of vehicles. They required to operate 5/6 transporter trucks in Scotland with 8 or so travelling to England on collection/deliveries. The respondent's drivers could not rely on either being engaged on trips wholly within Scotland or to England. The role of driver involved a mixture of longer distance (to England) or local deliveries (within

Scotland). Deliveries within Scotland or England could entail an overnight stay.

11. The normal rota for the claimant was that he would arrive at the respondent's depot at Grangemouth at 7am and at that point "would get his lines for deliveries". On occasion, his transporter would be loaded before he arrived and if not he would then proceed to load the transporter with the relevant cars for delivery. He would carry seven vehicles at most in the one transporter. Normally Mr Robert McDonald as the supervisor would advise of the deliveries to be made.

12. His role as driver required him to carry "proof of delivery sheets" (POD). Those sheets would contain information on any damage to a vehicle. The vehicle may leave the respondent's depot with some damage which would be noted on the POD. On arrival, the POD would be checked by the customer and signed as a check on any damage on the vehicle. In the event damage was caused in the course of transport or delivery, then usually there would be a discussion with the respondent's supervisor before the damage was noted on the POD.

13. Once deliveries were complete the claimant would receive further instruction from the respondent as to any collections which required to be made.

14. From time to time, a changeover may take place at a convenient location with the claimant receiving a full trailer with vehicles for delivery.

15. The claimant would complete his timesheets to certify time worked. Those completed timesheets and PODs would be handed into the respondent's office on a Monday morning. The claimant's pay would then be calculated on the basis of that information.

Request for holiday pay

16. The claimant in conversation with other drivers ascertained that holiday pay was paid by the respondent on basic pay only. He considered that such a calculation was not accurate and that holiday pay should be based on 'average pay'. He raised this issue with Yvonne Guild in a car journey from England around the beginning of October 2018. Ms Guild had been in the habit of making payment of holiday pay at basic rate but indicated to the claimant if that was now wrong, then she would make appropriate adjustment.

17. The claimant took a holiday around 26 October 2018 and drew out a 'mini statement' from a Bank cash machine. He did not consider that he had received his correct pay. At that point, he did not think any credit had been made for holiday pay but later realised a credit had been made but not representing 'average weekly pay' which would include overtime.

18. He then sent an email to Yvonne Guild complaining about his pay. That email was sent at 8.55pm on 26 October 2018 and headed "Illegal deduction of wages and holiday pay". The essence of the email (shown on mobile phone and later produced) was to the effect that the claimant had checked his account and he did not appear to have been paid for the week ending 20 October 2018. It was stated that he had worked approximately 66 hours and that he was due expenses of about £80 and money for 'four nights'. He stated this was an "illegal deduction". He had also noted an extra £400 which he assumed was for holiday pay but pointed out he did not believe that was calculated appropriately.

19. Ms Guild's interpretation of this email was that the principal matter of concern was about the week's pay as an "illegal deduction". She decided that she would like to speak to the claimant about this and responded on 27 October stating that the claimant was "required to attend at meeting with myself and Mark, to be held at the office on Monday 29 October 2018 at 11am." The claimant was also advised that he should not be in the yard until 10am as there were no vehicles. The respondents were awaiting cars coming into the depot.

20. On Monday, discussion took place between the claimant and Ms Guild who advised that the wages were always paid in arrears and there may have been a misunderstanding by the claimant as to why he had not received the wages he thought he would receive in that week. The pay he had received was for the week ending 13 October and the pay for the following week would now be due. The claimant pointed out that holiday pay had been paid at basic rate when he considered that it should be paid on average earnings and Ms Guild indicated that she would be looking into that matter. She was aware that various cases were taking place which changed the holiday pay regime.

Events subsequent to discussion of 29 October 2018

21. After the discussion, the claimant noted that the transporter that he usually used was 'away' and he was put on a 'two car carrier with local runs to Glasgow'. He delivered those cars and phoned the office around 3.30 – 4.30pm to be told that there was no other delivery for him and he should return to the yard. He then required to return to his home in Arbroath that night.

22. On Tuesday morning, he checked into the depot at 7am and he was again put on "local traffic". He saw the supervisor in the yard that night when he returned and asked when he was 'getting his truck back'. The supervisor advised that he 'did not know'. The claimant returned to Arbroath that evening.

23. On Wednesday 31 October 2018 at 7am, the supervisor asked the claimant if he had his 'night out gear' and 'sent him down the road' i.e. to make deliveries in England. The claimant returned on Saturday 3 November 2018 around 5.20pm. Thus, he was engaged in long distance deliveries over Wednesday/Saturday.

24. The following week commencing Monday 5 November 2018, he was again working on local deliveries/collections for Monday and Tuesday but went on long distance trips Wednesday 7 November through to 4.40pm on Friday 9 November 2018.

25. This pattern was repeated on the following week commencing 12 November 2018 when he performed local deliveries Monday and Tuesday and then went

on long distance deliveries Wednesday through to 1.30pm on Saturday 17 November 2018.

26. That night, he had problems with his car and he was unable to get it fixed for the Monday morning. He telephoned the respondent to advise and was told that he should simply phone them when he was able to return and 'no worries'. He phoned on Monday 19 November to be advised that matters were covered for that day and he should return when his car was fixed. On the Tuesday, he was also told that all cars were covered but that he should come in at 10am on Wednesday 21 November 2018. At that time, he reported to the office and was told that Yvonne Guild wished to speak to him.

27. At that time, Ms Guild advised that the respondents required to 'let him go' because of the damage that had been caused to vehicles when he had been engaged in deliveries. There was also an issue of a missing POD which had concerned the respondent. At that meeting, there was discussed a summary of the occasions upon which damage had been caused to vehicles and the cost to the respondent of that damage (R10 of respondent productions). His employment was terminated at that time. The claimant was paid to 28 November 2018.

28. The claimant's position was initially that he had not been put on "local deliveries" until the week commencing 29 October 2018. This was to his prejudice as working hours are shorter if he is engaged on "local trips" rather than the long-distance deliveries/collections and that affected his wages. However, he later admitted that in the week beginning 1 October 2018, he had been on local deliveries for two days in that week as well as in the week of 16 August 2018. There may also have been "another couple of weeks" when he was on local work.

29. The respondent's position on the work required of the claimant subsequent to 29 October 2019 was that there was nothing unusual about him being asked to perform local deliveries for part of the week. They could not predict deliveries and collections or where these might be necessary. These work arrangements were part of normal rota requirements.

Appeal against dismissal

30. The claimant appealed against his dismissal in an email of 22 November 2018 (R11). He stated that following the meeting on 21 November 2018 and after 'legal consultation', he did not consider it correct that the real reason for his dismissal was damage to vehicles but it was because he had 'brought up the subject of holiday pay entitlement'. He narrated his rota for the weeks following the request for holiday pay and believed this was due to his complaint on pay being made.

31. An appeal was arranged for 4 December 2018. At that time, Yvonne Guild and Robert McDonald attended. The claimant indicated that he considered the reason for dismissal was because of his claim for holiday pay.

32. In respect of the document outlining damage to vehicles when he was engaged on delivery he disputed responsibility for damage to a Range Rover and a Mercedes A Class but did accept responsibility for damage to four other vehicles. He maintained that he had completed a POD for a Mitsubishi Outlander but the respondent had no trace of that POD for that vehicle. They had been making enquiries with British Car Options on that issue for some time.

33. On 10 December 2018, the respondent wrote to the claimant (R9) indicating that given the amount of damage caused in the five month period for which he had been employed and failure to complete the required paperwork (the POD), the appeal was unsuccessful and the decision to terminate the employment would stand. It was explained that just prior to the hearing on 4 December 2018, an email had been sent to the claimant confirming he would be paid outstanding holiday pay on average working hours.

Damage to vehicles

34. In respect of the schedule of damage (R10), the claimant advised that he accepted responsibility for:-

(i) damage to the 'Tyre on Transit' and 'Bumper on Golf' and that the costs of repair would be approximately £460 plus VAT in respect of these matters.

(ii) damage to a Ford Custom Van in September 2018 with the cost of repair being approximately £1,000 plus VAT.

(iii) damage to a Mercedes truck in October 2018 when he had run into a lamppost. The cost of repair was put at approximately £8,133 plus VAT.

35. In respect of other items listed he did not accept:-

(i) damage to a Range Rover (repair cost approx.. £172 plus VAT);
(ii) damage to Mercedes A class (repair cost approx. £195 plus VAT;
(iii) damage Mitsubishi Outlander in November 2018; and
(iv) that he had not completed a POD for that delivery to British Car Auction. His position was that he had completed a POD for that vehicle and had handed that in with his other paperwork as normal. The respondent's position was that they could find no POD for that vehicle after extensive enquiry. Email exchanges between the respondent and British Car Auction and photographs of the car in question between 7 and 20 November 2018 were produced (R12) That exchange notes that no POD for the vehicle could be traced and the respondent required to pay for the cost of the damage to the Mitsibushi being £762 plus VAT.

Holiday Pay

36. On 7 December 2018, the net sum of £297.33 was paid to the claimant by way of holiday pay (the gross amount being £349.91). The claimant did not dispute that amount of pay in respect of the holiday taken by him. His dispute concerned pay for the period to termination of employment. It was accepted that he was due to be paid for 6 days holidays accrued but untaken to date of termination.

37. The respondent paid around 28 October 2019 the net sum of £649.01 to the claimant by way of their calculation of outstanding holiday pay (R4). This represented "6 days at £20.43 which amounted to £980.64" and 'holiday pay underpaid week 30" of £20.84 making the gross amount due £1001.48. After deduction of tax and national insurance, the net amount paid amounted to £649.01.

38. The claimant's position was that before tax, he should have been paid £1129.50. He calculated this amount of gross pay from his hours worked in terms of his diary entries (C3). That summary sheet contained his hours of work each week and the appropriate hourly rate calculation bringing out a total sum due of £1129.50 gross.

Alternative employment

39. The claimant found alternative employment as a driver two days after he had been dismissed. He was paid cash for a short period as he was temporary and then became full time as from 10 December 2018. He was paid at the rate of £10.50 per hour and earned approximately £540/550 per week net, on an average of £600 gross per week. His average net weekly pay with the respondent until dismissal ran at the rate of £912. He admitted that he had not been honest in disclosing that he commenced employment two days after leaving the respondent and that the start date within his ET1 claim form was misstated.

Conclusions

40. The right to make a claim of unfair dismissal does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than two years ending with the date of termination of the employment. There are exceptions to this general rule. One of these exceptions is where the principal reason for the dismissal of an employee is that he has alleged his/her employer has infringed a right of his which is a relevant statutory right (section 104 of the Employment Rights Act 1996). A 'relevant statutory right' includes any right conferred on an individual by the Working Time Regulations 1998 which would include the right to claim holiday pay (section 104(4)(d)).

41. The issue for the tribunal was whether or not the principal reason for the dismissal of the claimant was because he had claimed that his holiday pay entitlement should be calculated on the average weekly wage rather than on basic pay.

42. On consideration of the evidence, the conclusion is that the principal reason for dismissal was not because the appellant had made a claim for holiday pay based on average weekly earnings. That conclusion is based on the following:-

(a) It is the case that there has been a good deal of litigation on the issue of the correct calculation of holiday pay. For some considerable time, the basis of the calculation of the appropriate amount of holiday pay was based on 'basic pay' which would exclude issues such as commission and overtime. In those circumstances, it was credible that the respondent would require to take advice on the issue of the correct calculation of holiday pay given the shifting case law on the matter. The inference that the respondent would be so riled by queries on holiday pay as to lead to dismissal would have more weight had there had not been this change in the basis of calculation.

(b) From the email of 26 October 2018, from the claimant to the respondent, the emphasis is certainly on the lack of pay being credited to the claimant's bank account being the "illegal deduction" rather than holiday pay. Certainly, both these matters were raised but a fair reading of the email would indicate that the complaint of "illegal deduction" was more concerned with the apparent lack of pay than with holiday pay. The issue in respect of pay seemed to revolve around the correct payment week. I did not consider that the reason why the respondent sought a meeting with the claimant was over the issue of holiday pay (which was to be clarified) but rather his assertion that he had not been paid the correct wages.

(c) The events subsequent to that meeting of 29 October 2018 could be categorised as normal roster for a driver in the employment of the

respondent. The inference was sought that the claimant had been punished for raising the issue of holiday pay by not getting long distance trips but requiring to perform local deliveries which would affect his pay. However, I accepted the evidence that locations and routes differed from week to week and it was not always the case that a driver could be on a long-distance delivery/collection roster. In any event, it did seem that in the weeks following, the claimant was on long distance routes for a good part of the week.

(d) The respondent's position was not that the claimant was dismissed for making enquiry about holiday pay but that he bore responsibility for damage to vehicles. The claimant admitted that he had some responsibility in this connection. He did not concede that all the damage that was claimed was caused by him but it did appear that there were incidents which had cost the respondent in repairs. There did appear to be a particular incident involving British Car Auctions and the loss of the POD for that vehicle which caused a good deal of communication between the respondent and that company to ascertain responsibility. At the end of the day, the damage to that particular vehicle was repaired by the respondent who could not establish just how the damage had occurred due to the fact that they could not recover the POD.

(e) It was only after that matter involving British Car Auction had been concluded that the respondent met with the claimant to advise that they were requiring to terminate his employment given the damage caused to vehicles and the loss of that particular POD which was unexplained. There had been a good deal of activity by the respondent in trying to locate that document in the records. Whether that loss could be blamed on the claimant was perhaps a moot point but it was the respondent's belief that he had not completed the proper paperwork correctly in respect of that matter. In any event that matter and the damage to other vehicles was quite separate from any issue of holiday pay. The timing

of matters being that dismissal came just after conclusion of the issue with British Car Auctions favoured the respondent.

43. In those circumstances, it could not be said that the respondent had as a principal reason for dismissal the complaint on holiday pay. Albeit there was a delay in the respondent resolving the issue of holiday pay I accept that dismissal came about because of the damage to vehicles and (rightly or wrongly) because the respondent believed the claimant had not completed paperwork leading to them requiring to meet repair costs on the Mitsibushi vehicle. In the circumstances therefor, I could not say that the principal reason for dismissal related to the claimant alleging that a statutory right of his had been infringed and so that claim fails.

Holiday pay

44. The respondent produced a calculation of holiday pay (R5). This appears to be information taken from 'Brightpay' and considered gross wages over a particular period. Ms Guild had no information as to how this information was obtained other than that it was presented to her by the payroll operators. No wage slips were produced to back up the information. The claimant had identified in his calculation the hours worked over the 12 week period prior to dismissal and there was no challenge to that information. He then calculated gross pay against the hours worked and this totalled a gross amount of £1129.50 against the respondent's gross amount of £1001.48, a difference of £128.02. This is not a great difference. I preferred the approach taken by the claimant to the calculation of the amount of holiday pay due at termination being backed by the evidence of hours worked. I had no payslip evidence from the respondent to back their calculation. I did not consider the calculation at R5 assisted being simply figures adduced rather than backed by the payslips.

45. Accordingly, I award of the gross sum of £128.02 being the difference between calculation of the claimant and that of the respondent. That amount would require to be paid under the deduction of tax and National Insurance contributions at the rate appropriate for the claimant at termination.

Employment Judge:	J Young
Date of Judgement:	11 December 2019
Entered in Register,	
Copied to Parties:	12 December 2019