



## EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103330/2020

5

Held via Cloud Video Platform (CVP) on 30 October 2020

Employment Judge J Young

10 Mr T Vizoviczki

Claimant  
Represented by:  
Mr S Wilson -  
Solicitor

15 Tapa Capulus & Pistrino Limited

Respondent  
No appearance and  
No representation

### JUDGMENT OF THE EMPLOYMENT TRIBUNAL

20 The judgment of the Employment Tribunal is that:

- (1) the claimant was unfairly (constructively) dismissed in terms of section 98 of the Employment Rights Act 1996 and orders that the respondent shall pay to the claimant a monetary award of **£5,798.73 (Five Thousand, Seven Hundred and Ninety Eight Pounds and Seventy Three Pence)**;
- 25 (2) the respondent was in breach of contract to the claimant in not making payment of all wages due to him and the respondent is ordered to pay to the claimant the sum of **£5,594.89 (Five Thousand, Five Hundred and Ninety Four Pounds and Eighty Nine Pence)** in respect of that contractual claim; and
- 30 (3) the claim for holiday pay due at date of termination of employment is dismissed.

### REASONS

1. The claimant presented a claim to the employment tribunal on 12 June 2020 claiming that he had been unfairly (constructively) dismissed and was due  
35 sums by way of unlawful deduction from wages; and holiday pay. He named

the respondent as Tapas Capulus & Pis Tapa or Tapa Organic Ltd at 21 Whitehill Street, Glasgow, G31 2LH.

2. On 15 June 2020, the notice of claim was intimated to the named respondent and advised that a response should be received by 13 July 2020. No  
5 response was obtained from the respondent. Arrangements were then made for a final hearing on the claim to be conducted by CVP. On 4 August 2020, a notice of hearing was issued to the claimant and respondent intimating the date of the final hearing. No contact was made by the respondent.
3. At the hearing, there was produced for the claimant an Inventory of  
10 Documents paginated 1-60. The claimant gave evidence with the assistance of an interpreter familiar with the Hungarian language. It was advised that the claimant would not be proceeding with his claim for holiday pay. It was also explained that enquiry with Companies House had identified that the  
15 respondent should be named as Tapa Capulus & Pistrino Limited, being the company who operated the business when the employment of the claimant came to an end.
4. In terms of rule 34 of schedule 1 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013, the tribunal may add in a person  
20 as a party by way of substitution or otherwise if it appears that there are issues between that person and any of the existing parties falling within the jurisdiction of the tribunal which is in the interests of justice to have determined in the proceedings; and may remove any party apparently wrongly included. I considered that the issues lay between the claimant and Tapa Capulus & Pistrino Limited and so substituted them as the respondent.
- 25 5. From the documents produced and evidence led, I was able to make findings in fact on the issues.

### **Findings in fact**

6. The claimant whose date of birth is 14 April 1977 was employed as a baker by the respondent who conducted the business of restaurant and coffee

house. He had continuous employment in the period from 5 February 2008 to 29 March 2020.

7. He received a written statement of terms on 6 February 2013 (53-54) which indicated that he should provide three weeks notice of termination of the employment. Wage slips identified that in the period of employment, his gross pay ran at the rate of £1791.67 per month giving a net pay of £1470.84 per month. Deductions included contributions to pension. At termination of employment, his gross weekly pay computed to £413.31 giving him a net pay of £349.38 per week.
8. In or around February 2018, the business was taken over and the responsible director of the company with whom the claimant communicated and took instruction was Sabir Bandai.
9. Until November 2018, the claimant experienced no difficulty in receipt of wages. In December 2018, his wage was paid in two instalments and thereafter payment became erratic with a shortfall in the wages being paid to him. Wages were paid to the claimant's bank account with TSB and under reference to TSB bank statements in the period 21 December 2018 – 20 August 2020 (21-50 and 55-59), he was able to identify the shortfall which had occurred.
10. He had prepared a spreadsheet giving a wage breakdown (17-20) which identified the shortfall in wages over the period January 2019 – March 2020. The amounts identified as shortfall could be correlated with the TSB bank statements to vouch accuracy.
11. The shortfall in wages in 2019 amounted to £4072.37 and in 2020, £222.52 making a total shortfall of £6294.89.
12. In this period, the claimant spoke monthly to Mr & Mrs Bandai to request payment of arrears. He was told that they would seek to make up the shortfall but they had paid 'what could be done at the moment'. The complaint from the claimant became more frequent and on those occasions, he was told that the respondent would do what it could to resolve matters.

13. However, around October/November 2019, he decided that he would require to leave the employment of the respondent and seek alternative employment. This he did and made application to supermarkets and other private bakeries before obtaining employment with Morrisons to commence work from 4 April 5 2020. He indicated that after 'months of trying to resolve the wage issue', he required to find another job and terminate his employment.
14. His weekly wage in his new employment was better than that received with the respondent.
15. He intimated resignation by email on 5 March 2020 (60) indicating resignation 10 following the 'current uncertain circumstances of business at Tapa'. He gave three weeks notice and indicated that he had 'enjoyed working here'.
16. He did not know whether the pension contribution deduction had been paid. He did not consider that likely given that there had been a shortfall in payment of wages to him. Subsequent to termination of employment, a payment of 15 £500 was made to him by the respondent on 29 June 2020 and a further £200 payment made to him on 4 August 2020. No wage slip or other information was provided in relation to those payments which were made to his bank account (56 and 59). After deduction of those amounts the total shortfall in wages amounted to £5594.89.

20 **Submission for the claimant**

17. Reference was made to the spreadsheet produced showing shortfall in wage payments (17 – 20). Taking into account the payments of £700 received in June/August 2020, the amount due in respect of the claim for breach of contract was £5594.89.
- 25 18. It was submitted that the circumstances were sufficient to determine that there had been an unfair (constructive) dismissal of the claimant. There had been a significant breach of contract by the employer in the underpayment of wages. That was repudiatory of the contract.
19. Two issues were apparent, namely:

(i) whether there had been any undue delay in action taken by the claimant; and

(ii) that there was no specific reference in the letter of resignation as to underpayment of wages.

5 20. On delay, the authorities provided that this was a matter of fact for the tribunal alone. Under reference to **Cow v Surrey & Berkshire Newspapers Limited [2003] UKEAT 0716/02/0703**, it was considered that delay should be considered in the whole context of a case and the whole period during which the complaint being made should be in mind. What was reasonable came to  
10 an assessment of the period of time during which, from the perspective of the employer, the applicant could be considering his/her position. In the surrounding facts and circumstances here, it could not be said that the employer was under the impression that the claimant had accepted the breach of contract as he continued to complain about the shortfall.

15 21. As regards the reason for resignation, reference was made to **Weathersfield Limited t/a Van & Truck Rentals v Sargent 1999 ICR 425, CA**. The reason (or lack of reason) given by the employee is merely one piece of evidence for the tribunal to consider when reaching a conclusion as to the true reason for the employee's resignation. In this case, the reason for resignation was  
20 clearly because of the lack of payment.

22. A finding of unfair constructive dismissal should be made as there was reference in the letter of resignation to the uncertain circumstances of the business which was clearly a reference to shortages in pay.

23. In those circumstances, a finding of constructive unfair dismissal could be  
25 made and that entitled the claimant to compensation. The basic award was calculated within the schedule of loss which had been prepared (16). There was no future loss of wages but an award should be made in respect of loss of pension contribution by way of compensation.

## Conclusions

### *Claim for wages*

24. Article 3 of the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 provides that proceedings may be brought before an Employment Tribunal in respect of a claim of an employee for the recovery of contractual sums due and the claim is outstanding on the termination of the employee's employment. Non payment of wages is a breach of contract.
25. That article gives the employment tribunal jurisdiction in this case. The claim was brought within the appropriate time limit of three months from date of termination of the employment.
26. The wage slips produced demonstrate the sums due to the claimant by way of wages. The bank statements demonstrate that there was a shortfall in payments over a period of time between February 2019 and March 2020. Taking into account the payments made in June and August 2020, it is accurate to state that the balance owed to the claimant at the date of the tribunal amounted to £5594.89 and that is a sum awarded in respect of the contractual claim

### *Unfair (constructive) dismissal*

27. Section 95 (1) (c) of the Employment Rights Act 1996 (ERA) states that there is a dismissal when the employee terminates the contract, with or without notice, in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct. This form of dismissal is commonly referred to as 'constructive dismissal'.
28. The leading case is **Western Excavating (ECC) Limited v Sharp 1978 ICR 221** where the Court of Appeal ruled that for an employer's conduct to give rise to a constructive dismissal, it must involve a repudiatory breach of contract. The case established that in order to claim constructive dismissal, it must be shown that:-

- there was a fundamental breach of contract on the part of the employer;
- the employer's breach caused the employee to resign; and
- the employee did not delay too long before resigning thus affirming the contract and losing the right to claim constructive dismissal;

5

29. In relation to the first of those matters, it is clear that non payment or part payment of wages is a fundamental breach of contract on the employer's part. It is an essential part of the wage/work bargain and it goes to the root of the contract. In this case, it has been demonstrated there was a failure to make full payment of wages over a period of time and thus there was a significant breach going to the root of the contract of employment.

10

30. Further, whether the employee left employment in response to the employer's breach of contract is essentially a question of fact. It is not strictly necessary for the employee to inform the employer as to why he or she is resigning – **Weathersfield Limited t/a Van & Truck Rentals v Sargent**. The reason (or lack of reason) given by the employee is merely one piece of evidence for the tribunal to consider when reaching a conclusion as to the true reason for the employee's resignation.

15

31. In this case, it was clear that the reason for the resignation was continued shortfall in payment of wages. The claimant had made representation about that matter over a period. The position got no better and he decided to leave. The letter of resignation does not specifically refer to shortfall in payment but does refer to the uncertain nature of the respondent business which alludes to the difficulties he was experiencing in relation to wage payment. I would consider therefore that the reason for resignation was concerned with the payment of wages. Otherwise, it appears the claimant was content with his position and would have continued.

20

25

32. The main question was whether he had delayed too long or whether he was taken to have affirmed the contract and thereby lost the right to claim constructive dismissal. Were there just one shortfall in payment which

30

commenced March 2019 and resignation did not come about until a year later then it may be said that the claimant had affirmed the contract. However, in this case, there was continuing shortfall and that lasted through to the end of 2019 and then again in January and March 2020. While the claimant put up  
5 with the position for a while, he was entitled to consider that there had been a significant breach of the contract each time there was a shortfall in payment. There was a shortfall in payment of £478.84 in January and a further £280.84 in March 2020. Those occasions alone would entitle him to have resigned as being significant breaches of the contract. On that analysis, there was no  
10 delay.

33. In any event, delay is an indication that the employee has affirmed the contract rather than treating the breach as being one for which he could resign. It could not be said in this case that the employee had affirmed the contract in that he made continued complaint about the part payment of  
15 wages over the period. The issue is one of conduct, not simply the passage of time. What matters is whether in all the circumstances, the employee's conduct has shown an intention to continue in employment rather than resigning from a job which is a serious matter with potentially significant consequences. In this case, the employee took time to find alternative  
20 employment. I could not consider that he had affirmed the contract.

34. In any event as indicated, I considered that he would be entitled to resign as a consequence of the last part payment made of wages being a significant underpayment at the end of January 2020 of that month's wage of £470.84. In resigning at the beginning of March, it was not an undue delay.

35. In all the circumstances therefore, the claim of unfair constructive dismissal succeeds.  
25

### *Remedy*

36. Where a tribunal finds that a complaint of unfair dismissal is well founded, then one remedy is compensation which is sought in this case.



37. Awards of compensation fall under two main heads being (i) a basic award under s118 (1)(a) of ERA normally calculated in the same way as a redundancy payment and a compensatory award under section 118 (1)(b) of ERA intended to compensate the employee for financial loss suffered as a result of the unfair dismissal. There is no formula for calculating a compensatory award other than what the tribunal consider 'just and equitable'.
38. So far as basic award is concerned in this case, given the claimant's twelve years of employment, he is entitled to  $12.5 \times \text{£}413.31 = \text{£}5166.37$ .
39. Insofar as compensatory award is concerned, the claimant immediately commenced further employment after resignation and there is no future wage loss. From the schedule of loss, it is noted that a loss of compensation for pension contributions in the period April 2019 – March 2020 amounts to £626.36. While there are figures for loss of pension from April 2017 – April 2019, I did not consider that it would be appropriate to award loss of pension contribution in that respect as there was no evidence that these contributions in that period were not paid. However, given the shortfall in wages occurred over the period April 2019 – March 2020, it would be 'just and equitable' to award the sum of £632.36 as compensation for loss of pension rights.
40. That makes the total monetary award by way of compensation for unfair dismissal £5798.73 which is the sum awarded.

25 Employment Judge: J Young  
Date of Judgment: 29<sup>th</sup> November 2020  
Entered in Register: 9<sup>th</sup> December 2020  
Copied to parties