# EMPLOYMENT TRIBUNALS

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| Claimant: | Mr C Pickering |
| Respondent: | B Taylor and Sons Limited |
| Heard at: | Nottingham – hybrid |
| On: | Wednesday 10 March and Thursday 11 March 2021<br>Reserve decision on 23 March 2021. |
| Before: | Employment Judge Victoria Butler (sitting alone) |

Representatives

| | |
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| Claimant: | In person |
| Respondent: | Mr T Symonds, in-house non-legal representative |

***Covid-19 statement:***

***This was a hybrid hearing – the Claimant attended in person at the Tribunal and the Respondent attended remotely by Cloud Video Platform. The parties did not object to the case being heard on this basis. It was not practicable to hold a fully face-to-face hearing because of the Covid-19 pandemic***

# RESERVED JUDGMENT

1. The Claimant's claim that he was unfairly dismissed is well-founded and succeeds.

2. The Respondent is ordered to pay the Claimant a basic award in the amount of £4,035 and a compensatory award in the amount of £7,204.49

3. By consent, the Respondent will pay the Claimant £63.50 in respect of an overnight allowance and five hours' pay.

4. By consent, the Respondent will pay the Claimant £331.29 in respect of three days' holiday pay outstanding on the termination of his employment.

5. The Claimant's claim for holiday pay (the difference between pay at basic rate and on average hours) is out of time and the Tribunal does not have jurisdiction to hear it.

# REASONS

## Background

1. The Claimant presented his claim to the Tribunal on 19 October 2020 following a period of early conciliation between 19 August 2020 and 19 September 2020. His claim was initially rejected because the name of the prospective Respondent on the early conciliation certificate was not the same as the name of the Respondent on the claim form. It was subsequently accepted on 16 November 2020 and the Respondent submitted its defence on 28 November 2020.

*Unfair dismissal*

2. The Claimant claims constructive unfair dismissal and failure to pay holiday pay. In summary, the Claimant was employed as a lorry driver. His case is that after a period of furlough in 2020, he was placed on a contract that required him to offload glass from his vehicle by hand, causing him difficulties because of age-related back pain. His requests to be taken off the contract were refused and by 23 July 2020, he could no longer physically cope with the work. He phoned Mr Alan Taylor (Managing Director) that evening and asked again to be taken off the contract but was told to '*just get on with it'* and *'if you don't like it you know what you can do'*. In light of Mr Taylor's response, he felt he had no choice but to resign.

3. The Respondent's case is that the Claimant requested an increase to his rate of pay on numerous occasions and made a further request to Mr Taylor on the evening of 23 July 2020. Mr Taylor declined to offer more money and the Claimant resigned in response. It denies that the Claimant ever raised issues about back pain.

*Holiday pay*

4. The Claimant's pay for holiday pay is as follows: the Respondent paid his holiday pay on his basic weekly pay, whereas he says it should be based on his average weekly hours, which exceeded this. The Respondent concedes that the Claimant is correct, but argues that his claim is out of time (more below).

## The issues

5. Neither party is professionally represented so the issues were not agreed in advance. However, the issues I am required to decide are:

    6.1 Was the Claimant dismissed? Did the Respondent breach the so-called '*trust and confidence term'* by without reasonable and proper cause, conducting itself in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence between it and the Claimant by refusing to take him off the Clayton Glass contract?

6.2 Did the Claimant resign in response to the Respondent's conduct?

6.3 Did the Claimant affirm the contract of employment before resigning?

6.4 If the Claimant was dismissed: what was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA"); and, if so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the Respondent in all respects act within the so-called '*band of reasonable responses"*?

**The hearing**

6. On 2 March 2021, Mr Robinson, the Claimant's lay representative, made an application to postpone the hearing because his wife was in hospital and he was too upset to represent the Claimant. The Respondent objected to the application and it was refused. However, Mr Robinson was advised that he was at liberty to renew the application on the first day of the hearing. Mr Robinson did not attend the hearing and, therefore, the Claimant represented himself.

7. The case was heard on 10 and 11 March 2021. The Claimant attended the Tribunal in person and the Respondent joined via cloud video platform ("CVP").

*Compliance with case management orders*

8. Unfortunately, neither the Claimant or his representative had complied with the orders of the Tribunal in respect of disclosure and the provision of witness statements. At the hearing, the Claimant was convinced that he had provided a witness statement to Mr Robinson. Accordingly, I asked the Claimant to telephone him to ascertain where it was. Mr Robinson seemed to think that he had emailed a statement to ACAS but did not have any record of doing the same. There was confusion and understandable frustration on the Claimant's part, but it became clear that there was no statement for use at the hearing.

9. The Claimant describes the events leading to his resignation in his claim form. I asked him how much further information he wanted to provide by way of witness evidence, and he said that there was nothing. I proposed that the Claimant use his ET1 as his witness statement and both parties were happy to proceed on this basis.

10. Therefore, given that both parties were in attendance, there was no barrier to proceeding. I advised the Respondent that if new information did come to light during the Claimant's evidence, it would have opportunity to consider its position and make appropriate representations.

11. The Claimant had not had sight of the Respondent's witness statements or documents and I adjourned to allow him to have copies and read the same.

*Concessions*

12. During the hearing, it became apparent that the Claimant was not paid his overnight allowance on 23 July 2020, or for five hours work on 24 July 2020. The Claimant has not presented a claim for unauthorised deductions from wages, but the Respondent consented to an application to amend to include it. Accordingly, it agreed that the Claimant was owed £18.50 for the overnight allowance and £45 for five hours work.

13. In respect of the holiday pay claim, the Respondent conceded firstly, that the Claimant was due three days' holiday pay outstanding at the effective date of termination and, secondly, that holiday pay should be based on his average hours which were 61.37 per week (albeit maintained that the Claimant's substantive holiday pay claim was out of time).

14. It also became apparent during the hearing that there were relevant documents missing and I asked the Respondent to provide the following in an adjournment over lunch on day two:

    - Any documents relevant to the Claimant's induction to demonstrate that he had been trained on the correct process to follow if there was no-one to assist him off-loading;

    - The manifest sheet from Clayton Glass ("CG") demonstrating that CG advises the Respondent what each delivery entails and the method of off-loading required; and

    - The driver records for the Claimant's vehicle on 24 July 2020.

15. The Respondent was unable to provide any documents confirming that the Claimant had been trained on off-loading procedures. Mr Symonds complained that he had been given insufficient time to search for the documents and my request was unfair. I disagreed for the following reasons:

    i. It has always been clear that the Claimant was complaining about off-loading and it was the Respondent's case that a driver was never expected to unload exceptionally heavy or bulky items by themselves – this was not new evidence; and

    ii. Mr Woodward also states that this forms part of the drivers' training at paragraph 26 of witness statement so this was clearly relevant evidence that the Respondent was obliged to produce by way of disclosure.

16. Accordingly, the Respondent was on notice that these were relevant documents and the onus was on it to provide them in advance of the hearing. In any event, the documents (or lack of) made no difference to my findings.

**The evidence**

17. I heard evidence from the Claimant and for the Respondent I heard evidence from:

    - Mr Alan Taylor, Managing Director;
    - Mr Glenn Woodward, Traffic Desk manager;
    - Claire pilgrim, Accounts Administrator

    *The Claimant*

18. I found the Claimant's evidence to be entirely truthful and consistent. I was satisfied that his account of events leading up to his resignation was a true reflection of the difficulties he faced and the reason for his resignation. Even under cross examination, his evidence did not falter.

    *Mr Taylor*

19. I found Mr Taylor's evidence to be unreliable. By way of example, at paragraph 13 of his witness statement he confirms that he personally checks drivers' timesheets himself to ensure that they are correct and all hours have been recorded accurately. However, under cross examination, he said it was the wages department that check timesheets, not him. He subsequently reverted to the position in his statement.

20. More troublingly, Mr Taylor raised an entirely new factual matter that was not contained within the Respondent's defence to the claim or any of the witness statements. He alleged that during the telephone conversation on 23 July 2020, the Claimant was aggrieved that he had been allocated deliveries on the Friday which would prevent him from finishing early at lunchtime hence his resignation. Mr Taylor went as far to say that it was "*awful for the office*" if the Claimant did not finish early on a Friday.

21. I queried why this had not been raised at any point prior to today, given that it was, if true, crucial evidence as to why the Claimant may have resigned. Mr Taylor subsequently retracted the allegation. However, these two examples severely undermined his credibility. I noted that he also became extremely agitated under cross examination, thereby displaying the behaviours suggested by the Claimant in his evidence.

    *Mr Woodward*

22. Turning to Mr Woodward's evidence, his witness statement lacked important detail. By way of example, Mr Woodward was adamant that no driver would ever be expected to off-load glass in the absence of a forklift truck or moffett. If a driver arrived at a delivery site and there was no-one to assist with off-loading, the driver was required to telephone the office so assistance could be provided. If no assistance could be provided, the driver was expected to drive the load to an alternative point where assistance could be offered. However, he was unable to point to any guidance or health and safety policy to demonstrate that this was briefed to drivers and put in practice.

23. Concerningly, Mr Woodward also failed to mention two pieces of crucial evidence in his witness statement. Firstly, in oral evidence he said that on 23 July 2020, Mr Gregg (also a Traffic Desk Manager on the alternative shift) telephoned him at home following a conversation with the Claimant. Mr Gregg told him that the Claimant '*was mouthing off'* and being aggressive about being sent to Blackburn because he would not be back on time on Friday for an early finish and that he was '*quitting*' as a result.

24. Secondly, Mr Woodward gave oral evidence that the Claimant told him personally on 24 July 2020 that he was resigning because he could not finish early that day and did not mention pay as a reason for leaving. Her fails to mention this in his witness statement at all and when I asked why, he said it was a '*mistake*'.

25. It is puzzling that both Mr Taylor and Mr Woodward gave oral evidence that the Claimant resigned because he could not finish early on a Friday which is entirely inconsistent with the Respondent's defence as pleaded from the outset. Whilst Mr Taylor subsequently backtracked and said the reason for his resignation was pay-related, Mr Woodward clarified that this was what the Claimant had told both him and Mr Gregg.

26. Given that entirely new evidence was advanced at the hearing that was in direct contradiction to the Respondent's case, where there was a conflict, I prefer the evidence of the Claimant which was consistent throughout.

*Ms Pilgrim*

27. Ms Pilgrim's evidence was brief and limited to matters of pay. She was entirely truthful and helpful in resolving matters relating to the Claimant's pay and I thank her for this.

**The facts**

*Background*

28. The Respondent is a transport company based in Huthwaite which transports a diverse range of goods throughout the United Kingdom. It employs over 200 members of staff and has a fleet of over 300 vehicles. It has circa 150 drivers at any one time who are split into two classes of heavy goods drivers – those who drive articulated vehicles and those who drive rigid vehicles. The drivers are allocated work dependent on which type of vehicle they drive.

29. The Respondent has two Traffic Desk Managers, Mr Woodward and Mr Gregg, who allocate collections and deliveries to the drivers throughout the week. Where they can, they will accommodate drivers' preferred routes, but this is not always possible and the needs of the customers come first.

30. The Respondent has a formal grievance procedure, but in reality, if a driver has a concern, they raise it with their direct line manager. If the line manager cannot resolve the concern, it is dealt with by Mr Taylor, Managing Director.

*The Claimant's employment*

31. The Claimant commenced employment with the Respondent in 2005. He left for a brief period in early 2015 and returned a few months later in July 2015. He was a class 2 HGV rigid driver and was what the Respondent describes as a "*tramper*" i.e. he was out most of the week in his vehicle undertaking collections and deliveries and would not necessarily return to the Respondent's base during that time.

32. A contract of employment was prepared for the Claimant, but this was never issued to him. He did not have a formal induction on his return in July 2015.

33. The Claimant worked on average 61.37 hours a week. Prior to March 2020, the Claimant had no complaints with his work. On one occasion he enquired whether it would whether it would be possible to increase his rate of pay but was told no and he did not raise the matter again.

34. The Claimant was 64 years of age when he resigned.

*Events leading to the Claimant's dismissal*

35. On 27 March 2020, the Claimant was placed on furlough consequent of the Covid-19 pandemic. The Respondent's operations were scaled back because some customers were no longer operative, whilst others had drastically reduced their transport requirements.

*36.* The Claimant was furloughed for approximately eight weeks until 20 May 2020. On his return, he was placed on a different contract undertaking collections and deliveries for a client, Clayton Glass ("CG"). His hours of work changed slightly on this contract which did not concern him.

*37.* As background, when CG requests collections/deliveries, it advises the Respondent where its customers are located; the number of units of glass per collection/delivery; the number of stillages (wooden frames used to transport the glass); and, the method of offloading.

38. There are three methods of offloading: 1) by forklift truck which is provided by CG at site or at its customer's site; 2) by moffet whereby the driver uses a forklift attached to their vehicle; and 3) handball, whereby the driver will pass the units by hand to the customer. Some vehicles also have a tail lift.

39. The Claimant's vehicle did not have a moffett or a tail lift and he was often required to offload his vehicle by hand without mechanical assistance causing him considerable back pain.

40. The Claimant had asked Mr Woodward, Mr Andy Gibb and Mr Taylor if he could be removed from the contract, explaining the reason why, but his requests were refused. The Respondent had alternative work available that the Claimant could have done but failed to explore this with him.

41. On 23 July 2020, the Claimant was in the Stoke area when Mr Gibb asked him to drive to CG's site in Blackburn to collect more glass. The Claimant had been struggling with the pain of offloading single-handedly and got to the point where he could no longer physically cope. In his desperation, he telephoned Mr Taylor and asked if he could be removed from the contract, again explaining the difficulties and pain he was experiencing.

42. Mr Taylor was annoyed that the Claimant had phoned him in the evening at home and told the Claimant to '*get on'* with his work and if he did not like it '*you know what you can do'*. Mr Taylor refused to remove him from the contract, despite there being alternative work that he could have undertaken.

43. The Claimant was physically unable to continue with the work on the CG contract, his requests to be moved to a different contract had been ignored and, given Mr Taylor's response, he felt that he had no choice but to resign and advised Mr Taylor of the same during the call.

44. However, to assist the Respondent, the Claimant continued to collect the glass from Blackburn and returned it to the Respondent's depot the following day at around 10am so another driver could take over the deliveries. The Claimant handed his keys and fuel card to Mr Woodward and explained that he was resigning because working on the CG contract causing him pain and he could not continue any more. Mr Woodward accepted the Claimant's resignation without attempting to resolve his concerns. The Claimant's effective date of termination was 24 July 2020.

45. The Claimant was not paid his night allowance for 23 July 2020, nor for five hours' work on 24 July 2020.

*Annual leave*

46. The Claimant took the following periods of annual leave during his last two years of employment:

- 23 August 2019
- 30 August 2019
- 13 September 2019
- 25 October 2019
- 31 October 2019
- 6 December 2019
- 13 December 2019
- 3 January 2020
- 10 January 2020
- 17 January 2020

- 13 March 2020
- 20 March 2020

**The law**

***Constructive unfair dismissal***

47. Section 95(1)(c) provides that an employee is dismissed by his employer if:

> *"the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."*

48. In order to claim constructive dismissal an employee must establish:

i. that there was an actual or anticipatory breach of contract by the employer which is a fundamental or repudiatory breach, i.e. one that goes to the root of the contract to be sufficiently serious so as to justify the employee's resignation;

ii. the employee must resign in response to the breach (or the last breach in a series of events which was the last straw), rather than for some other reason; and

iii. the employee must not delay too long in resigning in response to the employer's breach, otherwise the employee may be considered as having affirmed the contract and the right to accept the employer's breach would be lost (Western Excavating (ECC) Ltd v Sharp 1978 ICR 221).

49. All contracts of employment contain an implied term that an employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee - Malik v BCCI [1997] IRLR 462. A breach of this term will inevitably be a fundamental breach of contract - Morrow v Safeway Stores plc [2002] IRLR 9.

***Unauthorised deductions from wages***

50. Section 13 Employment Rights Act 1996 ("ERA") provides:

> "(1) *An employer shall not make a deduction from wages of a worker employed by him unless—*
>
> > *(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or*

*(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.*

*(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—*

*(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or*

*(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.*

*(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.*

51. Section 23 ERA provides:

"(*1) A worker may present a complaint to an employment Tribunal—*
*…….*
*(2) Subject to subsection (4), an employment Tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—*

*(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or*

*(b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.*

*(3) Where a complaint is brought under this section in respect of—*

*(a) a series of deductions or payments, or*

*(b) a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,*

*the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.*

*(4) Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.*

*(4A) An employment tribunal is not (despite subsections (3) and (4)) to consider so much of a complaint brought under this section as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint"*

52. A Tribunal will generally not have jurisdiction to hear such a claim if there is a gap of more than three months between one series of deductions and the next - Bear Scotland v Fulton [2015] IRLR 15.

53. An employee cannot claim a series of deductions spanning a period of more than two years - Deduction from Wages (Limitation) Regulations 2014.

**Submissions**

*Respondent*

54. The Respondent submitted that there was no fundamental breach of either an express or implied term of the Claimant's contract on its part entitling him to resign and claim constructive dismissal.

55. The Respondent provided the Claimant with a safe system of work. The Claimant had not raised his concerns with the Respondent (despite it having a grievance procedure), nor had he suffered any injury or taken time off work. No other driver had any difficulty with the contract, so it was not unreasonable for the Respondent to ask the Claimant to do the work.

56. In respect of the new evidence raised by Mr Taylor and Mr Woodward regarding the Claimant's desire to finish early on a Friday, this was not the reason for the Claimant's resignation and this conversation happened after the Claimant had already resigned (NB: this was a submission and not given in evidence).

57. If the Claimant was dismissed, he was fairly dismissed for failure to follow a reasonable management instruction – therefore, for some other substantial reason.

58. In respect of holiday pay, the Respondent concedes that the Claimant was due three days' outstanding holiday pay on termination and that it should be paid on his average weekly hours, rather than his basic contractual hours. In respect of the claim for the difference between holiday pay at basic versus average weekly hours, the claim is out of time as there has been a break of more than three months between the last period of holiday taken on 20 March 2020 and the Claimant contacting ACAS on 17 August 2020.

59. Further, it was reasonably practicable for the Claimant to issue his claim in time and, therefore, time should not be extended to allow him to present it out of time.

*Claimant*

60. The Claimant submitted that he had repeatedly asked Mr Gregg, Mr Woodward and Mr Taylor to take him off the CG contract but they all refused. He carried on for as long as he could manage before calling Mr Taylor on the evening of 23 July 2020 to ask again but was told to '*get on with it* and "*if you don't like it you know what you can do'*.

61. The Claimant also submitted that his evidence was honest and true and the Respondent had changed its evidence at the hearing.

62. In respect of his holiday pay claim, he said he honestly did not know about the time limit, but even if he had and submitted a claim whilst he was still employed, he would have been dismissed so would not have done so.

**Conclusions**

*Unfair dismissal*

63. The Claimant's case is that the Respondent breached the implied term of trust and confidence by refusing to remove him from work that caused him pain.

64. The Respondent gave oral evidence that under no circumstances should the Claimant have been offloading glass without assistance. However, I note that in the defence it states *"there were times when drivers unloaded their vehicles by hand, but at all times within the statutory framework as laid down for handling such materials. A driver was not expected to unload any exceptionally heavy, or bulky load by themselves".*

65. Mr Taylor states in his witness statement: "*…we have strict health and safety procedures relating to lifting and handling and the weight a driver could safely lift themselves …."* (paragraph 21).

66. The Respondent acknowledges that drivers will at times be required to lift and handle goods themselves in the written documents, but in oral evidence it suggested that the Claimant would never be required to offload without assistance.

67. However, the Claimant's evidence was entirely credible, and I am satisfied that he was in practice required to offload glass from his vehicle by hand, often singlehandedly, thereby causing him pain. I am also satisfied that he asked Mr Taylor, Mr Gibb and Mr Woodward to be put onto a different contract, but all three refused his reasonable requests. The Claimant continued to work in unsatisfactory conditions which were affecting his physical health until he could take no more. In his desperation, he phoned Mr Taylor on 23 July 2020 and

asked to be taken off the contract but was told to '*get on with it'* and '*if you don't like it you know what you can do'*. In light of Mr Taylor's response, his inability to physically do the work any longer and in the knowledge that the Respondent would not give him alternative duties, the Claimant felt that he no choice but to resign. In his view, the Respondent was not providing him with a safe system of work.

68. The Respondent has health and safety procedures in place, but that is not the fundamental point here. The point is that it had a long-standing employee who was physically struggling with his duties because of his age and health. Even if the Claimant was lifting glass within acceptable limits, on learning that he was struggling, a reasonable employer would investigate the situation at the very least and engage with the employee to establish measures to alleviate the problem. However, in this case, the Respondent simply told the Claimant to '*get on with it'*.

69. I am satisfied that the Respondent's refusal to remove the Claimant from the CG contract and offer him alternative duties amounted to a breach of the implied term of trust and confidence. If any employee complains that their work is causing them physical pain, it is incumbent on them to attempt to alleviate the problem. By simply telling the Claimant to '*get on with it'* without further enquiry the Respondent conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between it and the Claimant without proper cause.

70. I am satisfied that the Respondent's refusal to take the Claimant off the CG contract was the reason for his dismissal and not the reasons advanced by the Respondent – i.e. that the Claimant wanted more money or to finish early on Fridays. As above, I found the Claimant's evidence to be truthful whereas the Respondent's was inconsistent at best and absent any reliable evidence to support either of its assertions as to the Claimant's reason for resigning.

71. I am also satisfied that the Claimant did not affirm the contract and accept his evidence that he tried to cope with the work for as long as he could but got to the point where he could cope no longer with the pain it was causing him. He made a further attempt at asking Mr Taylor if he could be given alternative work but, on being told that he should '*get on with it'* and '*if you don't like it you know what you can do*' he felt he had not choice but to resign in response. Accordingly, I am satisfied that he was dismissed.

72. The Respondent submits that if the Claimant was dismissed, his dismissal was fair for some other substantial reason, namely failure to follow a reasonable management instruction by continuing with his work on the CG contract. I reject this submission in its entirety. It is not reasonable to instruct the Claimant to carry out work that was causing him physical pain, more so given its refusal to engage with him about alternative duties which is could have done given its size and administrative resources. It follows therefore, that the Respondent's actions fell outside the band of reasonable responses and his dismissal was unfair.

73. Accordingly, the Claimant's clam of unfair dismissal is well-founded and succeeds.

*Holiday pay (difference between pay at basic rate and average hours)*

74. I am satisfied that the Claimant's claim for outstanding holiday is out of time. His last period of annual leave was 20 March 2020 and he contacted ACAS on 19 August 2020, more than three months after expiry of the primary time limit contained in section 23 ERA.

75. I have considered whether it was reasonably practicable to present the claim in time and I am satisfied that it was. The Claimant asserts that if he had submitted a claim whilst employed by the Respondent, he would have been dismissed. This appears to be a sweeping assumption rather than based on evidence. Further, the Claimant would have recourse to the Tribunal if he were dismissed. As such, I do not accept that this was good reason for not presenting the claim in time, therefore it was reasonably practicable for the Claimant to have done so. Given that the primary time limit to contact ACAS expired on 19 June 2020 and the Claimant did not do so until 19 August 2020, he did not present his claim is such further period that I consider reasonable.

76. Accordingly, I do not have jurisdiction to hear this element of the claim.

# REMEDY

77. The Claimant gave evidence on his attempts to mitigate his loss and the Respondent had the opportunity to cross-examine him.

78. The Claimant confirmed that it had taken him three months to find further employment after resigning from the Respondent and claims loss of earnings for this period. He did not claim any benefits during this time because he assumed that he would secure alternative work quickly and it would, therefore, be '*a hassle'*. In the meantime, he lived off his savings.

79. The Claimant attempted to secure new employment but found himself unemployed in the height of the Covid-19 pandemic when driving work, which is usually readily available, was limited. The Respondent itself had furloughed some of its drivers thereby demonstrating the pressure the industry faced nationwide.

80. The Respondent did not produce any evidence to counter the Claimant's evidence or demonstrate that he could have secured employment any sooner.

81. As above, I accept the Claimant's evidence as truthful and I am, therefore, satisfied that he has attempted to mitigate his loss.

82. Accordingly, the Respondent is ordered to pay the Claimant the following amounts:

| | |
|---|---|
| Basic award: (gross weekly pay based on last 12 weeks of employment = £631.67) | £4,035 |
| Compensatory award: (net weekly pay based on last 12 weeks of employment - £515.73) | |
| Loss of statutory rights: | £500 |
| Loss of earnings: | |
| 13 weeks x 515.73 | £6,704.49 |
| **Total:** | **£11,239.49** |

Employment Judge Victoria Butler

Date: 14 May 2021

JUDGMENT SENT TO THE PARTIES ON

18 May 2021

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FOR THE TRIBUNAL OFFICE

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