



EMPLOYMENT TRIBUNALS (SCOTLAND)

5

Case No: 4111726/2019

Held in Edinburgh on 19 May 2021

10

Employment Judge Jones

15

Miss L Gordon

**Claimant
Represented by:
Mr Sylvester, partner**

20

Livi Express

**1st Respondent
Represented by:
Mr Khan, solicitor**

25

Mr H Alcur

**2nd Respondent
Represented by:
Mr Khan, solicitor**

30

Mr H Omal

**3rd Respondent
Represented by:
Mr Khan, solicitor**

35

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

It is the judgment of the Tribunal that:

40

- The respondent having conceded that it failed to pay the claimant accrued holiday pay to which she was entitled on termination of her employment is ordered to pay to the claimant the sum of £4,256.00.

- 5 • The claimant was constructively and unfairly dismissed and the respondent is ordered to pay to the claimant a basic award of £1,900, compensation for loss of statutory rights of £500 and compensation for loss of earnings of £5,961.28.

- 10 • The respondent failed to provide the claimant with a statement of terms and conditions of employment in compliance with section 1 Employment Rights Act 1996 and the respondent is ordered to pay to the claimant the sum of £1,520.

- 15 • The Tribunal makes a declaration that the respondent failed to provide the claimant with itemised payslips in breach of section 8 Employment Rights Act 1996.

REASONS

Introduction

- 20 1. The claimant presented a claim to the Tribunal making a number of complaints. A number of those complaints were subsequently withdrawn. The claims remaining before the Tribunal for determination at this final hearing were:
- 25 - Unfair dismissal. In that respect the respondent said that the claimant did not have sufficient service to allow the Tribunal jurisdiction to consider a claim of unfair dismissal. In any event, the respondent said that the claimant had resigned and had not been dismissed.

 - 30 - Holiday pay. At the conclusion of the hearing the respondent conceded that the claimant was entitled to be paid holiday pay for the last two years of her employment with the respondent on termination of her employment, which amounted to £4,256.00 gross.

- Failure of the respondent to provide itemised payslips to the claimant. This was admitted by the respondent but a question arose as to whether the claimant was entitled to any compensation for this breach of section 8 Employment Rights Act 1996, and
- 5 - Failure to provide a written statement of terms and conditions in terms of section 1 Employment Rights Act 1996. Again, this was admitted by the respondent, but a question arose as to whether the claimant was entitled to any compensation as a result.
- 10 - Wrongful dismissal in that the claimant was not paid notice pay on termination of her employment.

2. At the commencement of the hearing, the respondent conceded that no tax or
15 national insurance had been deducted from the claimant's wages during the period of her employment or remitted to HMRC. The respondent sought to argue that the contract was therefore illegal at common law and indicated that it would argue that the claimant was complicit in that illegal contract in that at least she knew that no tax and national insurance had been paid to HMRC on
20 her behalf. The respondent indicated that it would argue that the claimant could not rely on that contract to seek a remedy from the Tribunal in relation to any of her claims. This was not an argument which had been foreshadowed in the respondent's response and appeared only to have been raised when the claimant's agent brought this to the attention of Tribunal in
25 correspondence.

3. The Tribunal heard evidence from the claimant and her partner Mr Sylvester, who had also worked for the respondent. In addition, the Tribunal heard from Mr Alcu, who was one of the respondents and Ms Steel who works for the
30 respondent. A letter from a clinical psychologist was produced in relation to Mr Alcu who had suffered a stroke last year. The letter set out the impact his condition might have on how he gave evidence and the Tribunal took this into account when considering the evidence heard from him. In addition, the respondent lodged a bundle of productions and during the course of the

proceedings, the claimant lodged copies of text messages to which no objection was taken by the respondent.

Findings in fact

5

4. Having listened to the evidence and considered the documents produced and submissions of the parties, the Tribunal made the following findings in fact.

10

5. The claimant commenced working at Livi Express, which is a take-away fish and chip shop in January 2014. She worked as a shop assistant serving customers.

6. Livi Express is the trading name of what at the time was a partnership between Mr Alcu and Mr Omal.

15

7. When the claimant started work for the respondents, she initially worked between two and four shifts a week. Shifts were usually from 3pm until 12midnight.

20

8. The claimant worked six or seven shifts a week from October 2017.

9. At the commencement of her employment, the claimant filled in a new starter form with her details.

25

10. The claimant was never issued with any paperwork in relation to her employment and was never issued with statement of terms and conditions of employment.

30

11. The claimant did not ever take any annual leave during her period of employment. The respondent did not ever inform the claimant that she was entitled to take annual leave. If the claimant wanted to take a day off, she had to try and arrange for cover for that shift, otherwise she would not be permitted to take that day off. On one occasion the claimant was not permitted to take time off to attend a funeral because she could not arrange cover for her shift.

35

12. The claimant was paid £60 per shift Sunday to Thursday and £70 on a Friday and Saturday. The claimant was paid in cash on a weekly basis. The claimant did not ever receive a payslip.
- 5 13. For the first few years of the claimant's employment, she worked set days. In recent years, a rota was posted every week showing what shifts the claimant and other staff were working.
- 10 14. The claimant worked continuously for the respondent from January 2014 until 16 August 2019 when she resigned. The claimant did not work for the respondent again.
- 15 15. The claimant made enquiries of the respondent during her employment, particularly from January 2019 about why she did not receive payslips and her enquiries were ignored.
- 20 16. In the week before 16th August 2019, the claimant caught Mr Alcu looking at text messages on her personal phone. The claimant had not given Mr Alcu permission to look at her phone or read her messages. When challenged by the claimant, Mr Alcu said words to the effect of "this is how you find things out".
- 25 17. On 16th August, the claimant's colleague Ms Wardrobe walked out of her shift after she was upbraided by Mr Alcu for giving a customer free pickles. This took place around 4.30pm.
- 30 18. The claimant was also working on 16th August. Mr Alcu was angry at the departure of Ms Wardrobe as this was a Friday and a busy day for the shop. During the course of her shift that evening, Mr Alcu shouted at the claimant words to the effect of "shut up or you will be next to get the sack" and "Get to fuck". This was said by Mr Alcu after the claimant had told him to stop speaking to her in an aggressive manner.

19. The claimant was paid in cash at around 9pm that evening as was usual practice and left the shop and did not return to complete her shift. The claimant did not work for the respondent after 16th August.
- 5 20. Mr Alcu sent a text message intended for the claimant's partner Mr Sylvester on 27th August 2019 which said. "This carry on has to stop!!! If you didn't start this carry on Lisa was getting her job back! You need to stop your stupid carry on stop harassing me and my shop!"
- 10 21. The claimant commenced alternative work on 19th September 2019 where she is paid £9.42 per hour and works 16 hours per week.

Observations on the evidence

- 15 22. The Tribunal found the claimant to be a credible and reliable witness. The Tribunal also found Mr Sylvester to be generally credible and reliable although he did at times say that he couldn't remember particular events, or that he wasn't there so didn't know about events in cross examination, when the Tribunal was of the view that he did in fact remember those events.
- 20 However, this did not have a material bearing on the findings in fact which the Tribunal found to have been established.
23. The Tribunal did not find Mr Alcu either credible or reliable. It appeared to the Tribunal that Mr Alcu had in mind the particular evidence he was going to
- 25 give the Tribunal in advance which he believed would be of most assistance to his case, rather than tell the truth. In particular Mr Alcu's evidence regarding the continuity of service of the claimant was wholly unreliable. He also sought to raise matters which were of no significance to the issues to be determined and had not been raised in cross examination of the claimant.
- 30 The Tribunal formed the view that Mr Alcu wished to give evidence which might paint the claimant in a negative light before the Tribunal.
24. Mr Alcu also said that he had had a conversation with the claimant in October 2017 about whether she wanted to be 'on or off the books'. Despite the
- 35 efforts of Mr Khan to encourage Mr Alcu to reconsider his evidence about the

date on which this conversation took place, Mr Alcu maintained that the conversation took place in October 2017. The Tribunal did not accept Mr Alcu's evidence in this regard. It appeared to the Tribunal that Mr Alcu had in mind that the respondent was seeking to argue that the claimant's continuous service only commenced in October 2017, although it was admitted that the claimant had worked for a number of years before. The Tribunal did not accept that any such conversation ever took place. In any event, it would have made no sense whatsoever for Mr Alcu to ask the claimant whether she wanted to be 'on or off the books' three and half years after he started paying her.

25. Mr Alcu gave evidence that he always asked staff whether they wanted to be 'on or off the books', and the Tribunal did not accept this evidence either. Rather, the Tribunal concluded that Mr Alcu and his business partner simply did not ever raise the question of tax and national insurance with the claimant and other staff and it was their normal practice not to deduct tax and national insurance from the wages of the claimant and other staff.

26. The Tribunal found Ms Steel's evidence to be of limited significance. Ms Steel gave evidence about a conversation that she said she had with Ms Wardrobe about the claimant and Ms Wardrobe agreeing to walk out of their shift and cause maximum inconvenience to the respondents. In the first instance, it was not at all clear to the Tribunal why Ms Wardrobe had not been called by the respondent to give evidence, particularly given that she remained in their employment. However, the Tribunal found the suggestion that Ms Steel had been told what would happen on 16th August before that date incredible. Ms Steel also seemed to suggest that she had been working on the night of 16th August, although that was not put to the claimant and therefore the Tribunal found Ms Steel's evidence to be of limited value.

30

Issues to determine

- Did the claimant have sufficient continuous service to claim unfair dismissal?

- Did the claimant resign or was she dismissed? If she resigned, was she entitled to resign and claim constructive dismissal?
- 5 • Was the contract under which the claimant was employed illegal at common law, and if so, was the claimant entitled to rely on it in order to pursue her claims?
- If the claimant was unfairly dismissed, either constructively or otherwise,
10 what if any compensation should be she be awarded?
- Should the claimant be awarded any compensation for the respondent's admitted failure to provide her with a statement of terms and conditions of employment?
15
- Should the claimant be awarded any compensation for the respondent's admitted failure to provide her with itemised payslips during her employment?
- 20 • Was the claimant wrongfully dismissed?

25

Relevant law**Unfair dismissal**

- 30 27. An employee who wishes to claim unfair dismissal must first show that he or she has been dismissed within the meaning of section 95 of the Employment Rights Act 1996 (ERA).

28. For present purposes the relevant provisions of section 95 state that an employee will be treated as dismissed if:

- his or her contract of employment is terminated by the employer with or without notice — S.95(1)(a), or
- he or she has been constructively dismissed — S.95(1)(c).

29. A constructive dismissal occurs when an employee resigns, with or without notice, because of a repudiatory breach of contract by an employer. In order to claim constructive dismissal, an employee must establish that:

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

30. In addition, an Employment Tribunal will only have jurisdiction to consider a claim of unfair dismissal if the claimant has two years' continuous service at the point at which her employment is terminated, either by resignation or dismissal (section 108 (1) ERA).

31. Section 1 ERA requires that an employee should be provided with a written statement of particulars within two months of commencement of employment. A claim may be brought by a claimant in terms of section 11 of ERA where it is alleged that an employer has not complied with the requirements of section 1. Moreover, section 38 Employment Act 2002 states that a tribunal must award compensation to a worker where, on a successful claim being made under any of the tribunal jurisdictions listed in Schedule 5, it becomes evident that the employer was in breach of its duty to provide full and accurate written particulars under S.1 ERA — Ss.38(1)–(3). This includes a claim of unfair dismissal.

32. Where a tribunal finds that there has been a breach of the requirements of section 1 ERA, it must award the 'minimum amount' of two weeks' pay (subject to exceptional circumstances which would make an award or

increase unjust or inequitable), and may, if it considers it just and equitable in the circumstances, award the 'higher amount' of four weeks' pay — S.38(2)-(5).

5 33. Section 8 (1) ERA provides that a worker has 'the right to be given by his employer, at or before the time at which any payment of wages or salary is made, a written itemised pay statement. Section 8(4) provides that if
10 unnotified deductions were made from the worker's pay during the period of thirteen weeks immediately preceding the date of the application for the reference (whether or not the deductions were made in breach of the contract of employment), the tribunal may order the employer to pay a sum not exceeding the aggregate of the unnotified deductions so made.

15 34. The Working Time Regulations make provisions for annual leave and payment during periods of annual leave. In addition, under Reg 14(1) and (2) a worker is entitled to a payment in lieu of accrued holiday pay where her employment is terminated during the course of the leave year, and on the termination date, the proportion of statutory annual leave he or she has taken under Regs 13 and 13A is less than the proportion of the leave
20 year that has expired.

25 35. Where a worker is entitled to a payment in lieu of holiday entitlement, Reg 14(3) provides that the sum due shall be determined either by the terms of a relevant agreement or by reference to a statutory formula set out in Reg 14(3)(b).

Submissions

30 36. Brief submissions were made on behalf of the claimant to the effect that both the claimant and Mr Sylvester had been as honest and accurate in their evidence as they could be. Mr Sylvester indicated that it had been difficult to present their case when the respondent had not provided them with any

documentation during their employment and when the respondents had the benefit of professional representation.

5 37. The primary argument on behalf of the respondent was that of illegality. The Tribunal had brought the case of Patel v Mirza UKSC 2016 42 to the respondent's attention during the course of the proceedings. The respondent accepted that as a result of this case, a Tribunal was obliged to take a more balanced view on whether to consider a claimant's claim if they had been working under an illegal contract. Reference was also made to *Okedina v Chikale [2019] IRLR 905*. It was nonetheless submitted that the claimant should not be allowed to profit from her wrongdoing. It was suggested that the claimant had conspired with the respondent by being engaged under a contract of employment which she knew to be illegal. It was suggested that the illegality was at her request. In the alternative, it was suggested that at least she knew that the contract was illegal.

10

15

38. In relation to the issue of continuous service, it was accepted that Mr Alcu had been somewhat confused in his evidence. In any event, it was said that the claimant had not started working full time until October 2017 and had breaks in her employment prior to then, albeit no specification of the breaks the claimant was said to have taken was given, or had been put to the claimant in cross examination.

20

39. While the respondent's initial submission in relation to the issue of holiday pay was that the claimant had neither asked nor been offered annual leave, the respondent then conceded that the claimant was entitled to be paid in lieu of two years' accrued annual leave. However, the respondent submitted that no further compensation should be awarded to the claimant for the having been denied the opportunity to take annual leave during her employment.

25

30 40. Turning to the question of the claimant's claim of unfair dismissal, it was reiterated that the respondent denied having dismissed the claimant. The Tribunal was invited to prefer the evidence of Mr Alcu that he had not made the comments alleged by the claimant. It was said that the claimant had failed

to establish any breach of contract and therefore had not got over the first hurdle of demonstrating that she had been constructively dismissed. The respondent's position was that the claimant had walked off shift and then had returned to work for the respondent for a period of around 10 days before leaving because she had a row with another member of staff.

41. If the Tribunal found that the claimant had been unfairly dismissed, then it was submitted that she had contributed to her dismissal and that therefore any compensation which was to be awarded should be reduced by 70%.

42. It was also said that if the Tribunal found that the claimant had been dismissed the Tribunal should find that the dismissal was for gross misconduct and therefore no notice pay was due to the claimant. There was no specification however as to what that gross misconduct entailed.

Discussion and decision

43. Prior to issuing this judgment and after the conclusion of the hearing, the Tribunal invited the claimant to comment on whether she was seeking payment for accrued holiday pay beyond a two year period. The claimant's schedule of loss had only sought to recover payment in lieu of two years' annual leave and also an additional payment for having failed to allow the claimant to take leave. The Tribunal noted that the schedule had been drafted by the agent who was then acting for the claimant. It was not clear on what basis the period of accrued annual leave was limited to two years.

44. The Tribunal had not been addressed on this matter and the Tribunal was of the view that it was in keeping with the overriding objective to give the claimant an opportunity to clarify her position. However, no substantive response was received within the timescale specified and therefore the Tribunal concluded that the claimant was only seeking to recover payment of holiday pay for the last two years of her employment, which the respondent had conceded was payable to her in any event.

45. The Tribunal first considered the question of illegality of the claimant's contract of employment. Common law illegality is described in Okedina (above at p906) as arising "where the formation, purpose or performance of the contract involves conduct that is illegal or contrary to public policy and where to deny enforcement to one or other party is an appropriate response to that conduct. The proper approach is based on an assessment of what the public interest requires in a particular case, having regard to a range of factors. The touchstone for the availability of the defence in employment cases is that the employee has knowingly participated in the illegal performance of the contract – so-called 'knowledge plus participation'. In the present case, the tribunal found that the claimant did not knowingly participate in any illegal performance of her contract and so the illegality did not render the contract unenforceable."
46. Having considered the submissions on behalf of the respondent, I am of the view that the illegality defence fails. In particular, as a matter of fact, I do not accept that there was a discussion with the claimant either at the commencement of her employment or during her employment about whether she should be 'on or off the books'. I accepted the claimant's evidence that she just thought that tax and national insurance was deducted at source and she was paid what she was entitled to be paid. I took into account that the claimant did not appear to be a highly educated person and had only had one previous job which was also working in a chip shop. I accepted that the claimant began to have suspicions about the appropriateness of the way she was being paid, when her partner started questioning her about why she didn't receive payslips. The Tribunal accepted the claimant's evidence that she did not cope with confrontation and did not want to 'rock the boat'. Therefore, while the claimant may have had suspicions in the latter part of her employment that the respondent was not accounting for tax and national insurance on her behalf to HMRC, I do not accept that this amounts to the claimant having conspired to form an illegal contract. While she may not have taken active steps to address the matter, the Tribunal was mindful that she had legitimate concerns about whether this would have resulted in the claimant's dismissal and consequent loss of income.

47. While the Tribunal has taken into account the importance of public policy and in particular that appropriate tax and national insurance is accounted for to HMRC, it was mindful that the claimant's employer did not only fail to take any steps to comply with its obligations in this regard, it appeared to have a complete disregard for its obligations as an employer at all.
48. For instance, the respondent did not take any steps to ensure that the claimant was able to take the annual leave to which she was entitled during her employment. The claimant worked for the respondent for five and a half years and did not have one day's annual leave for which she was paid. Latterly she was working six and seven days a week from 3.30pm until midnight. It was clear that the respondent had a cavalier approach to its obligations as an employer. Mr Alcu said that the claimant was a good worker and conscientious, which is of no surprise given that she was willing to work for that length of time without being entitled to any annual leave. For instance, the claimant gave unchallenged evidence that she was refused time off to attend her partner's mother's funeral because her shift could not be covered.
49. Moreover, the respondent did not provide the claimant with any documentation in relation to her employment, she was not provided with a statement of terms and conditions of employment and was never provided with a payslip during the whole period of her employment. This was not therefore a case where an employee simply must have known that tax and national insurance was not being deducted from their wages. While it is accepted that the claimant had suspicions, the Tribunal concluded that that this should not deprive the claimant of her statutory rights in relation to her dismissal.
50. Therefore, when the Tribunal considered the conduct of both parties, together with issues of public policy, the Tribunal was of the view that the respondent's argument of illegality should not succeed.
51. Turning then to the question of the claimant's dismissal, the Tribunal was of the view that the claimant was not dismissed. The Tribunal was of the view

that the words of Mr Alcu were ambiguous in that while the claimant might have concluded that telling her to 'get to fuck' was intended to be a dismissal, the Tribunal accepted that Mr Alcu was unlikely to dismiss the claimant on a shift where he was already a short staffed.

5

52. However, the Tribunal was satisfied that the claimant was entitled to treat herself as constructively dismissed. The Tribunal accepted the claimant's evidence that she did not return to her shift 'because of everything'. In particular, the Tribunal found that the respondent had been in breach of the claimant's contract of employment by:

10

- reading messages on her personal mobile phone without her consent
- responding when challenged about this by saying 'This is how you find things out'
- acting in a threatening and aggressive manner towards the claimant by saying

15

- o 'shut up or you'll be next for the sack' and 'get to fuck'.

53. The Tribunal then went on to consider whether the claimant had resigned in response to these breaches of contract. It had no hesitation in concluding that she had. Further, the Tribunal was satisfied that the claimant had not delayed in resigning by not returning to her shift after she had been paid on 16th August.

20

54. The Tribunal also concluded that the claimant's dismissal was unfair in all these circumstances.

25

55. The Tribunal did not accept as credible the respondent's submission that the claimant had returned to work after 16th August and then left again 10 days or so later. That was not consistent with the terms of the text message referred to above sent by Mr Alcu to Mr Sylvester. In any event, the Tribunal preferred the claimant's evidence on this point to that of the respondent. The Tribunal took into account that reference had been made to rotas being produced by

30

the respondent to make clear what shifts were being worked by what member of staff. It seemed to the Tribunal that if the claimant had in fact returned to work, the respondent would have produced rotas with her name on them.

5 56. The Tribunal concluded that there was no evidence whatsoever to point to the claimant having contributed to her dismissal in any way.

57. The claimant was therefore entitled to a basic award. Her average weekly pay was £380 and she had worked for the respondent for five years.
10 Therefore, her basic award is therefore £1900. The claimant is entitled to compensation for loss of statutory rights and the Tribunal awards her £500 in that regard.

58. The claimant was out of work for four weeks, and the Tribunal awards her
15 compensation of £1520 as loss of earnings for that period.

59. The claimant is now working 16 hours a week. No evidence was given by her in relation to any attempts to obtain additional work in order to secure a similar level of income as she received from the respondent. She has a
20 weekly income of £150.72 gross, which means that she has a weekly loss of £229.28.

60. Although the respondent did not question the claimant on her efforts to mitigate her losses, the Tribunal was concerned that the claimant did not give
25 any evidence about whether she had made any efforts to obtain additional hours in her current role or an alternative additional job. In those circumstances, the Tribunal concluded that it would be just and equitable to award the claimant 26 weeks' losses which would amount to the net sum of £5,961.28.

30 61. The Tribunal did not think it appropriate to apply any uplift to that award.

62. The Tribunal considered it appropriate to award the claimant the maximum sum of four weeks' pay in respect of the respondent's failure to provide her
35 with terms and conditions of employment. In so doing, the Tribunal took into account the length of the claimant's service, that had terms and conditions

being issued, the claimant may have become aware that she was entitled to annual leave and that no effort whatsoever was made by the respondent to put the arrangements of the claimant's employment in writing. Therefore, the Tribunal awards the claimant the sum of £1,520 in this regard.

5

63. The Tribunal makes a declaration that the respondent failed to provide the claimant with itemised payslips in breach of section 8 ERA. However, no compensation is awarded in this regard.

10 64. The respondent conceded belatedly that the claimant was entitled to be paid in lieu of the annual leave to which she had been entitled in the last two years of her employment.

15 65. There was no basis on which the Tribunal could award what seem to be suggested as 'injury to feelings' for having failed to arrange for the claimant to take annual leave during her employment.

20 66. Finally, as the Tribunal found that the claimant resigned and was not dismissed, her claim of wrongful dismissal fails.

67. Therefore, the respondent is ordered to pay the claimant:

	Holiday pay	£4256
25	Basic award	£1900
	Loss of statutory rights	£500
	Compensation for loss of earnings	£5961.28
	Compensation for failure to provide a statement of terms and conditions	£1520
30	Total	£14,137.28

35 Employment Judge: Amanda Jones
Date of Judgment: 25 June 2021
Entered in register: 29 June 2021
and copied to parties