Case number: 2603171/2020

EMPLOYMENT TRIBUNALS

BETWEEN:

Claimant	And	**Respondent**
Mr C Holland		Gardner Douglas Sports Cars Limited

AT A FINAL HEARING

Held: At Lincoln **On**: 10 March 2021

Before: Employment Judge R Clark (Sitting alone)

REPRESENTATION
For the Claimant: Mr Holland in person
For the Respondent: Mr Brien of Counsel

Judgment and reasons having been given orally at the hearing, these written reasons are provided on application under rule 62 of the 2013 rules.

REASONS

1. Preliminary matters

1.1 I refused the claimant's application to postpone this final hearing. It was said to be for the purpose of providing time to make a further application to amend the claim to add a claim for automatic unfair dismissal. It is a repeat of an application made yesterday which was refused. That alone is ground to refuse it today in the absence of any material change of circumstances. In any event I can say that the merits do not justify the order sought.

1.2 Firstly, so far as Mr Holland argues that his claim was always was a claim for unfair dismissal, it was not. There is an unambiguous box on the ET1 claim form which can be ticked to indicate a claim of unfair dismissal. It states: 'I was unfairly dismissed (including constructive dismissal)'. That box was not ticked in this claim. Other boxes were ticked which indicate that Mr Holland was in a position to understand what sort of claim he thought he was bringing at the time he completed the claim form and he did tick claims for holiday pay, arrears of pay and other payments. When one reads box 8.2, the narrative is wholly consistent with those claims and not unfair dismissal. Secondly, a claim of ordinary unfair dismissal faces the problem of Mr Holland's lack of qualifying service. He was employed for

around 15 months. It is now said that this is actually a claim for automatic unfair dismissal being connected with his child-care. The only reference to termination in the claim arises at the end of the claim form saying that he had apparently fitted a brake shoes backwards. There is nothing to indicate that that is anything more than the context of the circumstances that he brings his other claims for and certainly doesn't even intimate any suggestion of automatic unfairness, indeed the concluding remarks of "this is where we are" seem to be expressing a sort of shrug of the shoulders as to that state of affairs.

1.3 Consequently, permission to amend would be required. A further difficulty is then one of time limits which have to be considered in any application to amend. Time would be measured from the date of the amendment and, even if as at today I was seized of sufficient information in the application to consider it, it seems doomed to fail. Such a claim falls to be considered against the time limit of 3 months from the effective date of termination or, where it was not reasonably practicable to present it in time, such further period as was reasonable. This claim was presented within time for what would be the effective date of termination. The question then is why it was reasonably practicable to present this claim, but not the one he now seeks to advanced, especially where the principal argument was that the original claim did include unfair dismissal. There is nothing in the surrounding circumstances that are going to at any stretch be able to persuade a Tribunal that it was not reasonably practicable to express even in the most generalised terms the fact that there was some form of link between his dismissal and some other state of affairs sufficient to make it an automatic unfair dismissal. For that reason, if not as a matter of case management limitations in a repeated application, the application would in any event be refused.

2. Issues

2.1 The issues in the claim were clarified at the outset. There appeared to be 6 potential claims set out in the ET1. Only two remain before the Tribunal after the following matters were discussed.

2.2 The first two claims to fall away were in respect of pension contributions. That related to an error in the payslip that didn't record deductions for pensions but was rectified. Beyond that, to the extent that there are any failings in respect of the engagement with the auto enrolment with the pension scheme (the NEST pension scheme) and the payments into the relevant pension account, they are matters which fall outside the jurisdiction of the Employment Tribunal.

2.3 There were then two claims related to an entitlement to a pay rise. The first was put as a pay rise of £1.00 per hour after 3 months service. That was conditional on the probation period but it became apparent that, in fact, there was no dispute that the Respondent had actually increased Mr Holland's pay after about one month. On exploring that it emerged that Mr Holland thought he might have incorrectly set out his case and somewhere in his complaints against the employer, he really wanted to say that there was a further pay rise of a further £1.00 per hour which was delayed. Whether or not that is the case that is not a claim

that was set out before the tribunal. The second issue around pay rises was in respect of an alleged agreed increase to £12.50 per hour with effect from March 2020. It became clear that the issue was not that it was not paid, but that it does not appear on the March payslip. On closer examination it became clear that payslips were issued on or around the first of each month in respect of the previous month's earnings and one can immediately see, on looking at the payslip dated 1 April 2020, that the rate of pay is shown as £12.50 per hour which clearly explains why the March payslip doesn't state that hourly rate as it related to February before the pay rise took effect. The result is there was no basis to maintain any claim on which I could adjudicate.

2.4 The two remaining issues for me to determine are these: -

a) Whether the claimant was entitled to be placed on furlough leave receiving 80% of normal pay, or the SSP that he was paid for one, or two, weeks at the early stages of the national response to Covid.

b) Whether the claimant has been subjected to unlawful deduction from wages in respect of holiday pay. In particular, the payments for holiday taken, whether holiday was improperly taken out of the Claimant's holiday entitlement during periods of furlough and a deduction made in the final payslip for what is said to be leave taken in excess of the Claimant's then pro-rata entitlement.

3. Issue 1 - Furlough v Sick Pay

3.1 I found there to be a great deal of confusion in Mr Holland's recollection as to how long he was actually off. His best recollection of what it "*would have"* been was based on the time of an email sent concerning the relevant advice at the time. That doesn't alter the question as to what time was actually taken off and it seems to me that the surrounding evidence of wages are the better evidence. They are not, by any means, conclusive but they are at least consistent and suggests that the Claimant was absent for one week. I reach that conclusion because it is also what Mr Holland put in his ET1, although it can be added to a growing list of issues in his ET1 that he now says he might have muddled or confused. It seems to be the case that he was at work the week before the week commencing 23 March and everybody agrees he was in work for a few days before the furlough of all staff was implemented on 1 April, that's the Wednesday of the following week. This confirms to me that one week is more likely than not.

3.2 Whatever the proper basis of calculating the pay for that week, it is a week falling in March which would have been paid in the April pay run and reflected in the April payslip. Time starts to run from the date of the alleged deduction on 1 April. Before dealing with the consequences of that, it did at one stage seem to be argued that the deduction may have occurred in the May payslip but that was only because of there being uncertainty as to whether the Claimant was off for a second week commencing 30 March. I am satisfied that is not the case, but even if it was, the time would then start from 1 May and time limits remain an issue. The time limit for bringing a complaint about a deduction from wages in respect of

events on or ending on 1 May expired on 31 July. The Claimant did commence early conciliation on 14 July until 17 July, so he at least commenced early conciliation in time (based on a May start) and the relevant time limit that would mean the ET1 would have had to be presented by 17 August 2020. In fact, it was presented out of time on 24 August 2020. That is the best case. I am satisfied time actually started from 1 April and expired on 30 June and early conciliation was therefore started late. Either way, this is a jurisdiction for extensions of time fall to be considered against the test of whether it was not reasonably practicable to present the claim in time.

3.3 Whilst there are some issues in the wider circumstances of this case that might raise some confusion, it is common ground that there was discussion about the form of payment, that is on what would or would not be paid, during those two days of return to work on 30 and 31 March. There is no explanation before me as to why, thereafter, a claim was not presented in time. The potential issue of the form of the payslips isn't relevant to knowledge of the facts of the underlying matter because the Claimant was told in clear terms as to what the base of the payment would be. If there was to be a claim, there was sufficient then to understand the nature of what the Claimant was saying he was otherwise properly entitled to during that week. That is not least because he seems to have done as much of the running in undertaking research about the circumstances of what was at the time a brand new, and previously unheard of, scheme called the Coronavirus Job Retention Scheme ("CJRS"). Despite my criticisms elsewhere of some of the employer's systems, I have to say it does appear to have taken proper steps to take advice on what it needed to do from its accountant and employers' advisory body and indeed ACAS. The fact that everybody was feeling their way through this scheme does not alter the time limits of the basis to extend time. I don't have evidence before me to properly reach a conclusion that it was not reasonably practicable for Mr Holland to present a claim within time and that therefore brings an end to that claim.

3.4 Even if I did have jurisdiction, this is a claim that I have concluded would not succeed but I make no criticism of Mr Holland for bringing it. Prior to the weeks we were talking about, the CJRS was unheard of. This is a case where I haven't actually seen any written furlough agreement and it seems to me that what was happening was everyone's understanding was that the Coronavirus Job Retention Scheme had direct effect on employment rights. It doesn't. As a matter of law, it was no more than a scheme as between employer and HMRC as the tax collecting organisation by which the employer's outgoing employment costs would be reimbursed provided that an employer complied with the furlough provisions in the CJRS. That scheme for reimbursement did not entitle an employee to be furloughed, nor did it compel an employer to furlough its employees. There would have to have been agreement. There isn't an agreement in this case.

3.5 The highest that can be said is that in the course of the various sources of advice, which at the time were updating almost daily, someone called Andy Burrows seemed to indicate that the advice has drifted towards furloughing when previously the advice had been

that to furlough would have been a fraud on the revenue because there was still work to be done.

3.6 The fact that the Claimant was self-isolating is potentially relevant, as opposed to his contention that the underlying issue of child-care provision was the cause of his absence. It is relevant for the reason that the sudden need arising in one's domestic circumstances and requiring an employee to be absent from work due to child-care commitments may well engage certain rights entitling them to be absent from their duties for a period of time. There doesn't seem to be any issue in this case that he was provided with the time off that was necessary, the issue is about payment.

3.7 The difference in the two routes is this. The right to time off for domestic circumstances is unpaid and there is nothing in the furlough scheme that would necessarily compel the employer, certainly at that stage, to furlough an employee. There were legitimate reasons in those early stages of the furlough scheme for Mr Holland to be concerned about his absence and his potential contact with somebody who may themselves have had contact with somebody displaying symptoms of Coronavirus did not automatically engage furlough. On further advice being taken, the employer found a legitimate way to make some payments to the Claimant. That was by way of SSP. There may be issues arising about whether the qualifying days under the SSP regulations were applicable at that time or not. Those are matters which, again, I am afraid to say that fall within the jurisdiction of the First Tier Tribunal so far as entitlement to SSP is concerned. The bottom line is that it isn't for me to assess the *entitlement* to SSP, the issue for me is to determine whether there was an agreement for the Claimant to be absent on furlough in respect of which he would be paid 80% of his normal wages, at that stage there wasn't such agreement. In conclusion it follows that even if the Claim was brought in time, the circumstances are such that I would have to dismiss the claim.

4. The Holiday Pay Issues

4.1 There are some basic facts concerning holiday that are not in dispute. The holiday year runs from January to December. The Claimant was entitled to 28 days per annum. The normal pay for calculating his holiday would not fluctuate, it being based on set hours at a set hourly rate. In the final leave year, that hourly rate was originally £11.00 per hour in January but in March rose to £12.50 per hour. The hours of work were originally 40 but I find were reduced from January to 37.5. Whatever the rights and wrongs of how that variation came about, that is the state of affairs that existed from January, and it is not for me to unpick. The Claimant always worked a 5-day week, 7.5 hours notionally each day from January 2020. It is common ground the employment ended on the 30 June, which is exactly 6 months of the leave year. The pro rata entitlement is therefore 14 days. There is a relevant agreement for the recovery of over taken leave.

4.2 I then turn to the actual holiday taken. The issue really arises in respect of factory shutdowns and set leave days, including bank holidays, when the workplace will be closed. I find the employer requires its staff to take annual leave on those dates. I am satisfied it

publishes those dates each year. For the year 2020, I find there was such a notice published to staff and made clear to Mr Holland. I have seen at least one occasion when that has happened, there may have been other oral discussions.

4.3 The Claimant's principal case is that he didn't ask for or agree to this compulsory leave and therefore it has still accrued and remained outstanding at his termination. It is a perfectly proper argument to run but it is one I don't accept for two reasons: The first is that the 3 days accepted as having been taken in January are themselves dates set by the employer which were taken and paid as part of the very same system of predetermined notice of set closure dates. The second is that statutory annual leave (which all of this is) can in any event be prescribed to be taken by the employer. It must merely give adequate notice as set down in the Working Time Regulations 1998. In broad terms, that is at least an equal period of notice as the duration of the leave to be taken. So that if a day is compelled to be taken, the employer it must give the employee at least one day's notice of that fact and if it is a week, it must give one week's notice and so on.

4.4 I am satisfied that the notice of set leave dates published for 2020 included the 2 bank holidays in April, 2 bank holidays in May and the first 9 days of a summer shutdown to be taken during the end of May and beginning of June, that is the 1, 2 and 3 June. I am satisfied that the January holiday dates were in fact taken and that is not in dispute. The April and May dates were taken in the sense that these were set days that the employer compelled staff to take and it otherwise, albeit belatedly, sought to reconcile what was by then the furlough payment to reflect the fact that the employee should get full pay for holiday for holiday taken during period of furlough leave. This was, again, one of those developing areas of understanding in respect of the scope of the agreements under the CJRS and what it means to be on furlough that everybody was finding their way through in the Spring of 2020.

4.5 Whilst the holiday for April and May wasn't in fact calculated until late May and then paid in June, I am satisfied that, belated as it was, its late payment is explained by virtue of the developing understanding. An amount due was, however, paid.

4.6 It is right to say that that summer shutdown included the first 3 days of June which the Claimant also would, on the face of it, have been entitled to. However, the decision was taken during June to terminate the Claimant's employment and by the time that the June pay would have been calculated and prepared in July, it was already known that he had in fact already been paid for and received and taken more than the 14 days which he was, by then, pro rata entitled to. So, whilst I am satisfied 16 days were taken as paid leave and they were entitled to be taken, at least at the time at which they were taken. I need to then deal with the consequences of payment.

4.7 To account for that overtaken leave, the employer made a deduction of £165 being the full rate at £11 per hour for two days.

4.8 The domestic legislation entitles an employer to compel an employee to take leave. There are circumstances when it may be that leave cannot properly be taken for the purpose

that it is taken but I am not satisfied that the fact of being on furlough, or even in circumstances where other members of the household including small children may be at home and making their own demands on the claimant, is itself necessarily circumstances which would stop something which is otherwise a Summer holiday or a Bank Holiday from meeting the necessary requirements of annual leave so far it is understood at a European level.

4.9 The issue of payment boils down to this: Save for the 3 days in January, all the holiday was taken at a time when the Claimant was otherwise on furlough leave. There was no written agreement for furlough leave and I infer the verbal agreement from the circumstances of this case and that the terms are therefore drawn on the CJRS scheme. In other words, the employer and employee did not agree furlough on any terms other than what they understood that to be. Principally, that was the payment of 80% of normal wages. In the circumstances of how that scheme applied the Claimant, him not being employed in the February 12 months earlier, his normal pay was subject to the alternative means of calculation based on an average for so much of the previous year as the employee worked. There is no issue before me suggesting any error in the 80% calculation arrived at in the sum of £1798.93 gross, and £1439.14 net. I can see from April onwards that payment was paid to the Claimant in respect of his normal wages for April, May and June.

4.10 I have not been taken to any documents, but my recollection is that the circumstances surrounding annual leave during furlough was a later clarification within the developing guidance concerning furlough and the associated Treasury directions. That clarified that an individual could take annual leave during furlough. It follows that within some limited exceptions arising from European jurisprudence that are not applicable here, an employer could compel annual leave during furlough as it could at any other time. Absent any explicit agreement to the contrary, pay for that leave during a period of furlough had to be paid at the employee's normal pay. I differ from the Respondent's accountants on the correct calculation of that "normal pay" and do not accept their approach. They say that the normal pay is then simply a case of uplifting the 80% (the figure by then already derived for the purposes of how much to pay during furlough) to return it to 100% and to pay ***that*** for the relevant period of leave. In my judgement, pay for annual leave taken, even during furlough, is to be calculated in the same way that pay for annual leave is to be calculated at any other time and in any other circumstances. That is principally by reference to the calculation of a normal week's pay under the Employment Rights Act 1996 and the associated provisions in the Working Time Regulations 1998. In brief, the relevant week's pay is calculated at the start of each period of leave and then that is what is payable for the period in question pro-rata. There is little change in how that calculation unfolds in this case, the only change of significance is that from March, the contractual pay had increased from £11.00 to £12.50 per hour yet because of the method of calculating furlough pay, none of that was being accounted for. That is the correct approach for furlough pay but it does not represent normal pay for subsequent periods of leave. I am, however, in agreement with the Respondent's accountants that whatever the figure is that is then due to the Claimant, the figure that is in fact paid as part of furlough goes

to defray the amount of pay due. It is still wages being paid to the employee the only difference is the employer was in a position to recover that much of it from the HMRC under the terms of the CJRS, so the 80% that is in fact paid goes to defray annual leave as does any top up paid. Whether it satisfies the amount due is a different matter.

4.11 I turn then to the arithmetic. Starting with what is due, it is common ground that there were 3 days leave taken in January, at which time the normal rate equated to £11.00 per hour, 7.5 days in each case, resulting in £247.50 due and £247.50 paid in February.

4.12 In April, there were 2 bank holidays, but the normal pay had by this time increased to £12.50 per hour. That calculation results in a figure of £187.50 for those 2 days. In May there were 11 further days taken which should have been paid at £12.50 giving an entitlement to £1031.25. There were then 3 further days taken in June but for the reasons given, those were not paid or even notionally paid albeit that the Claimant did in fact continue to get furlough throughout the entirety of that final period of employment. To have paid it would have simply added another 3 days which would ultimately have been clawed back in any final adjustment of overtaken leave (there would have then been 5 and not 2 days overtaken). So, the total for those 16 days actually taken and paid by my calculation at the relevant week's pay at the start of each period of annual leave, the total annual leave payment for that year comes to £1466.25.

4.13 Against that figure I have to set off what the employer actual did pay. February's pay paid the entirety of the January leave so there is the full £247.50 paid there and nothing outstanding. April wasn't paid in April for reasons I've given about the delay in the understanding of how leave was to be calculated and April and May were dealt with together to reconcile the 2 months' worth of annual leave and paid in the June pay.

4.14 I now need to do my best to explain as clearly as I can a complicated concept of how the payments have been arrived at because there are two elements to them. There is the fact that those days leave need to be credited with some element of the furlough payment and then secondly, they need to be credited with the sum of £150.88 which was arrived at as the top up actually paid for annual leave. The way the Respondent's accountants have done this is to divide the total figure of furlough wages paid by the number of calendar days in the month. It seems to me that produces too little a figure for each day taken for the purpose of annual leave, there has to be a consistency of approach in these calculations to offset one against the other; one working time entitlement against what was actually paid. It seems to me that the proper approach is to look to the working days in each month that those payments could be attributed to in order to give some equality and consistency against the number of days that could potentially have been taken as annual leave. That is, nobody in Mr Holland's circumstances booked annual leave on a Saturday or a Sunday. Consequently, in April there were 22 working days dividing the pro rata 80% furlough payment that was in fact paid by 22 gives a daily rate of £65.42. For two days, £130.84 needs to be credited against that leave entitlement. Similarly, in May there were 21 working days which gives a daily

equivalent of £68.53. For the 11 days taken in May there is a sum of £753.83 attributed to leave during furlough. In addition to that there is the actual top up payment of £150.88.

4.15 The reason I have come to the conclusion that the accountants are short in that figure is because they have not had any thought, and I don't mean this critically, to what the correct payment ought to have been for the annual leave being taken outside the implications of furlough leave. What they have done is simply to uplift the 80% furlough by the missing 20% and then to have divided that in itself by, for example, 31 days instead of the 21 days so it has produced too low a figure on too low a starting figure. It is for that reason that even when credit is given for the figure actually paid, and the slightly increased daily rate to account for the furlough payment that I've applied, the total amount of payments actually paid for annual leave which has to be set off the amount of annual leave payment that was due, comes to £1283.05.

4.16 That is made up of £247.50, £130.84, £753.83, and then the top up paid at the time of £150.88. So, the amount paid to the Claimant for annual leave during 2020 against that which is due is £183.20 short. (£1466.25 - £1283.05)

4.17 That initial part of the claim would, in isolation, mean the claim for unlawful deduction from wages succeeded as the Claimant has been paid less than that which he was properly due in a series of deductions. They are insufficiently compensated by the way the furlough scheme has been calculated. But that's not the end of the matter because we then get to the position that he was then subject to a deduction of £165.00 and the arithmetic needs to be revisited in view of the implications of how that deduction came about.

4.18 As I indicated during the course of the hearing, it is not clear how the 2 days by which the claimant had overtaken his entitlement has been calculated to arrive at £165. It would appear it is based on the old hourly rate of £11.00 per hour rather than the £12.50 per hour which applied at the time. It does seem to me that the Respondent was entitled to recover for overpayment in principal but it raises a question as to the treatment of that overpayment when the Claimant was otherwise on furlough at the time and the reason for its significance is because it has the result potentially of putting an employee in Mr Holland's circumstances who takes annual leave, in a worse position financially than somebody who does not take annual leave. The consequences of employees being put in that dilemma have been well rehearsed in the high authorities of European jurisprudence which informs how the domestic courts should interpret the entitlement to annual leave. In other words, there should be nothing which puts a bar on an employee from taking annual leave. In short, the claimant has been deducted what the employer regarded as the FULL rate of a day's annual leave when 80% of it was recoverable for furlough leave.

4.19 I accept the evidence is the employer hadn't decided to dismiss the claimant at the time the leave was taken in May so it should not have reduced the May payment in the way that it then did for the June leave when it obviously did have knowledge of its decision to dismiss. But it gives rise to the question as how I should look back over the history of what

has happened to work out which of these notional payments for annual leave Mr Holland should be required to refund as a result of, in the end, taking 2 more days than he was pro rata entitled to. The way the employer has arrived at this figure can only mean that it has looked back to the first days taken as leave in January at which point Mr Holland's normal pay was £11 per hour and at which time he had his full entitlement to 28 days. It must have decided that it will claw back those days, and not the more logical later two days taken after the pro-rata entitlement had expired. There is no relevant agreement to govern this process. That approach seems to me to be unjust in its result and wrong in principle.

4.20 It might be possible to reconcile this if there was some further reconciliation with money paid in respect of any wages claim made to HMRC for recovery from HMRC of the outgoings. The concern I have is that, if I am correct that the payment of £165.00 is effectively drawn out of the January holiday paid in February, the effect is that the claw back is happening at a time that the employer will still receive its 80% refund for some of that additional time taken as annual leave in May. That is another reason why this result seems to me to be wrong.

4.21 The correct and just approach seems to me to be this. Instead of the 11 days actually taken in May, only 9 days were actually due to the Claimant when viewed retrospectively from the actual date of termination. That requires me to revisit the arithmetic of the total payments due during the year as set out above. His total entitlement to annual leave would then arrive at a figure of £1278.75. The figures actually paid by the Respondent of £1283.05 result in a figure which is £4.30 more than he would have been entitled to and it seems to me that the result of that is that there is a marginal overpayment of holiday that the employer is entitled to recover. That means therefore that there has been an unauthorised deduction from wages in respect of the final wage slip in the difference between £165.00 that was deducted and the £4.30 that was entitled to be deducted. There is a gross shortfall then of £160.70 which is payable to the employee.

4.22 That is a necessarily complicated analysis. The arithmetic is complex enough to start with and it has been made doubly so in the circumstances of furlough and compounded further in the circumstances of a unique situation which I accept everybody was feeling their way through and trying to do the best they could to interpret the new and changing guidance.

4.23 I do record my final observations that there have been points in this evidence where tensions have shone through between Claimant and Miss Patel in the emails, contemporaneous documents which, frankly, don't put either in the best of lights. But I am satisfied that there was nothing in what the employer was doing by way of making these payments and the way it went about making these payments that was in anyway disingenuous or not otherwise sincerely trying to do the right thing by the regulations as they were understood to have applied at the time.

4.24 In conclusion, the claim succeeds in part in the sum of £160.70 gross. For the reasons I have given, all other claims are dismissed.

EMPLOYMENT JUDGE R Clark

DATE 8 August 2021

JUDGMENT SENT TO THE PARTIES ON

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AND ENTERED IN THE REGISTER

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FOR SECRETARY OF THE TRIBUNALS