# EMPLOYMENT TRIBUNALS

**Claimant:** Mr J Brown

**Respondents:** Approved Cars Ltd

**Heard at:** Croydon (by cloud video platform) **On:** 20 July 2021

**Before:** Employment Judge Nash

**Appearances**
For the claimant: In person
For the respondent: Mr Clement, director

# JUDGMENT

1. The decision made on 2 March 2021 to reject the response is revoked.

2. The response is accepted.

3. The claim of unfair dismissal is dismissed upon withdrawal.

4. The claimant was wrongfully dismissed on 9 June 2020.

5. The respondent shall pay the claimant one month's notice pay, being £2,411.72. This sum is awarded net of statutory deductions.

6. The respondent made unauthorised deductions from the claimant's wages at 80% of his wages from 1 May 2020 to 9 June 2020 in the sum of £3,285.52. This sum is awarded gross of statutory deductions.

7. The respondent failed to provide a statement of terms and conditions compliant with s1 Employment Rights Act 1996.

8. Under s38 Employment Act 2002, it is just and equitable to increase the award to the claimant by the higher amount of four weeks' pay, being £2,152.

9. Accordingly, the total payable by the respondent to the claimant under this judgment is £7,849.24

# REASONS

1) Following ACAS early conciliation from 14 August to 7 September 2020, the claimant presented his claim to the Tribunal on 5 October 2020.

The Reconsideration Application – rejection of response

2) The respondent presented its response out of time. The response was due on 30 November 2020. The response was submitted on 21 January 2021 with no covering letter or application to extend time. The response was duly rejected by the Employment Tribunal under Rule 18 on 2 March 2021.

3) The respondent applied for a reconsideration of this decision under Rule 19 on 11 March 2021. Although the respondent chased this, no action was taken by the Tribunal. Accordingly, the reconsideration application fell to be considered at this hearing.

4) The respondent applied for a reconsideration on the following grounds. The respondent's business is car sales and a body-shop. It gave evidence that its car salesroom shut down in March 2020 when the Country went into lockdown due to Covid.

5) Post was received at the car salesroom, rather than the body shop. No arrangements were made to deal with incoming post whilst the sales room was closed. No post was expected; for instance, correspondence from HMRC went to the director's house.

6) The respondent first sent its admin staff into the car salesroom in January 2021 and discovered the ET1 and a notice of claim from the Employment Tribunal.

7) The tribunal accepted that from this point in January 2021, the respondent acted with due haste. Once it became aware of the claim, it put in its response. Once the response was rejected, it acted promptly to apply, in effect, for this to be reconsidered. The respondent chased the Employment Tribunal when it heard nothing about its application.

8) The claimant objected to the reconsideration of the decision to reject the response. He submitted that the respondent had had an opportunity to respond to the claim and should not, in effect, be given another bite at the cherry.

9) The Tribunal considered firstly under Rule 72(1) of the employment Tribunal Rules of Procedure 2013 whether there was no reasonable prospect of the

original decision being varied or revoked. The Tribunal concluded that there was a reasonable prospect and accordingly, the tribunal reconsidered the decision to reject the response.

10) The Tribunal concluded, having heard from both parties, that it was in the interest of justice to revoke the decision to reject the response and to take the decision again. The reasons for this were as follows.

11) Firstly, the prejudice to the respondent of refusing to reconsider the decision would be considerable in that it would be materially disadvantaged in these proceedings. Further, the Tribunal accepted the respondent's evidence as to why the response was submitted late which it found plausible. It took into account the well-publicised difficulties caused to businesses by Covid and lockdown. In contrast, whilst there would be some prejudice to the claimant in reconsidering the decision, he would still be able to present and argue his case.

12) Accordingly, the decision to reject was revoked and the decision made again. The tribunal decided to accept the response for essentially the same reasons as it had agreed to vary the decision.

The Hearing

13) In respect of witnesses, the Tribunal heard from the claimant himself. For the respondent, it heard from:-

Mr J Clement, its director; and
Mr P Crawford, its aftersales manager and the claimant's line-manager.

14) The Tribunal had sight of an agreed bundle.

15) The hearing was originally listed for 10am. All parties and the Tribunal attended via Cloud Video Platform and all parties were able to communicate effectively. However, although he could be seen, the respondent's professional representative was unable to be heard.

16) The Tribunal expended considerable time in seeking to communicate with the respondent's representative so that he could take part in the hearing.

17) The hearing was firstly postponed for an hour to permit the respondent's representative to resolve his communication difficulties. However, after one hour, it transpired that he was unable to do that, and it was still not possible to hear him. The Tribunal postponed the hearing for a second time to give the respondent's representative further time to resolve his communication difficulties. However, by 12pm the respondent's representative was still unable to participate in the hearing.

18) The Tribunal considered how to proceed. It noted that the parties were on notice that the hearing would be by video and the tribunal's standard instructions as to the cloud video platform had been sent to both parties. Further, the material events in this claim dated back to March - June 2020. The case had already been subject to delay due to the effects of Covid 19 on the employment tribunals.

19) The Tribunal applied the overriding objective. It took into account the need to avoid delay, and the fact that the claimant was unrepresented. The Mr Clements was the director of the respondent, and an articulate man who was used to taking significant decisions. Taking these factors into account the tribunal decided to proceed with the hearing in the absence of the respondent's representative.

## The Claims

20) The claims before the Tribunal were as follows:-

(i) So-called ordinary unfair dismissal under Section 98 of the Employment Rights Act 1996. It was agreed that the claimant did not have the necessary two years continuous service and accordingly, the Tribunal had no jurisdiction. The claim was therefore dismissed upon withdrawal.

(ii) The remaining claims before the Tribunal were for

a. wrongful dismissal, as a breach of contract; and

b. Section 13 Employment Rights Act 1996 - unauthorised deductions from wages.

## The Issues

21) With the parties, the Tribunal agreed the issues were as follows:-

(i) How did the claimant's employment come to an end? Was he dismissed as he contended or did he resign as the respondent contended?

(ii) When did the claimant's employment terminate? Was it on 1 May; or when he attended the workshop on 9 June; or at the end of a three-month furlough period; or when he obtained alternative employment in January 2021?

(iii) What were the claimant's terms and conditions as to pay when he was employed by the respondent from April 2020? Was he entitled to 80% of his pay or 100% of his pay?

(iv) It was agreed that the claimant's notice period was one month. It was further agreed that he was paid notice. If he was dismissed, he was therefore entitled to notice. The issue for the Tribunal was whether any notice pay was payable at 80% or 100% percent of his normal salary.

(v) Did the respondent provide the claimant with a statement of his terms and conditions compliant with Section 1 of the Employment Rights Act 1996? This, it was agreed, turned on whether or not the written contract in the bundle was received by the claimant.

## The Facts

22) The claimant started work for the respondent as a MOT tester on 1 April 2019.

23) The parties agreed that the respondent gave the claimant a letter of dismissal (due to national COVID lockdown) on either 19 or 23 March 2020. The letter stated that the respondent was unable to continue the claimant's employment with immediate effect because it was scaling down its business.

24) The claimant stated that he was told by Mr Crawford that he could come back after Covid had settled down, but Mr Crawford said that he had given the claimant no such indication.

25) On 19 March 2020 the claimant was employed and on the respondent's PAYE system and, accordingly, the claimant was eligible for the Government's Coronavirus Job Retention Scheme, commonly known as furlough. The claimant contacted the respondent about, in effect, being re-employed and put on furlough. That is, he asked the respondent to make an application to the Coronavirus Job Retention Scheme for 80% of his pay which the respondent would pay to the claimant.

26) There was some discussion and texts between the claimant, Mr Clement and Mr Crawford. All parties agreed that the claimant was re-employed and put on furlough for the month of his normal salary. There was no evidence before the tribunal that the parties addressed their minds to whether the claimant was employed on a fresh contract or whether he had been re-employed on his original contract with his continuity preserved. It appeared on the balance of probabilities more likely that the claimant was re-employed on his original contract of employment because there was no agreement or discussion to the contrary. In effect therefore the dismissal was revoked when the claimant continued in employment. The tribunal accepted that there was no agreement that the claimant would be paid between 19 March and the beginning of April. This was indicated by the claimant not claiming wages for this period

27) The claimant was paid one-month's salary at 80% taking him up to 30 April 2020. This payment was received in early May.

28) The claimant's evidence was that he understood at the time that he would receive three-months' furlough pay from the respondent; the original scheme announced by the Chancellor at the beginning of lockdown was for 3 months furlough, although it was later extended. The respondent's case was that the parties had agreed that he would only receive one-month furlough pay.

29) Both parties agreed that there was no conversation between the parties about this, only texts. These texts were brief and did not address the point. The most relevant text was from the respondent saying, 'it's being put through'. The respondent said that after the claimant went on furlough, it heard nothing further from him, and it therefore believed that the agreement was to furlough him for one month only.

30) The Tribunal could find no other relevant evidence as to what either party thought they had agreed about furlough. The Tribunal accepted the respondent's evidence that this was a confusing time as the country was going into lockdown and things were extremely uncertain. The Tribunal accepted that the respondent in common with a number of businesses made decisions in haste.

31) The Tribunal did not find that there was any agreement between the parties that the claimant would be furloughed for one month only. It was agreed that there was no conversation and there was no reference in the text messages to any such agreement.

32) The claimant had received his April furlough pay in early May, as he expected. He expected to receive his furlough pay for the month of May on about 6 June. This money was not received. He then came into the respondent's workshop unannounced on 9 June. He met with Mr Clements.

33) The claimant said that Mr Clements told him the respondent would look at putting him back onto furlough. However, Mr Clements denied saying this. The tribunal preferred Mr Clements's account as there was no apparent reason why the respondent, who had failed to pay the claimant for May, would tell the claimant that it might put him back on furlough. The claimant told the tribunal that by the end of this meeting he understood that Mr Clements no longer wanted him in the business and that he would no longer be working for the respondent. However, Mr Clements did not dismiss him expressly.

34) In early July, the claimant did not receive any furlough pay for the month of June. On 9 July 2020 the claimant sent the respondent a message stating that he understood that he would get a third payment and could the

respondent follow-up the two missing payments? The respondent did not reply.

35) There was a dispute between the parties as to when and if the claimant was provided with a P45. The respondent contended that it had generated a P45 on or around 27 April 2020 – which was the date of termination on the respondent's case. It sent this P45 to the claimant. It did not know why it had not retained a copy. The claimant denied having received any such P45. The respondent said that its accountant later generated a replacement P45 which automatically populated the creation date -15 July 2021. This P45 with a termination date of 27 April 2020 and a generation date of 15 July 2021 was in the bundle.

36) The Tribunal found that no P45 was generated for the claimant in April 2020 and the only P45 generated was that in the bundle dated 15 July 2021. It made this finding for the following reasons. That there was no reason why, if a P45 had been generated in April 2020, it was not in the bundle. A P45 is an important document and there are consequences from HMRC and possible liability for employers if such documents are mislaid. The claimant stated in terms that he did not receive a P45.

<u>The claimant's written contract</u>

37) The claimant's evidence was that he asked many times for a written contract of employment because he had had a written contract at his previous job. He said that the respondent kept telling him that it would provide a written contract but never did so.

38) In contrast, the respondent's evidence was that it had provided the claimant with the contract of employment in the bundle dated 8 April 2020. This contract was not signed by either party.

39) The Tribunal considered the evidence and determined, on the balance of probabilities, it was more likely that the claimant was not provided with this contract for the following reasons.

40) Firstly, on the respondent's case, it was not its practice to provide written contracts for its staff. Secondly, the Tribunal had not accepted the respondent's evidence that it had generated a P45 for the claimant in April 2020. Thirdly, the tribunal concluded based on the evidence in the bundle and the oral evidence of Mr Clements and Mr Crawford, that the respondent was not in the habit of recording matters in writing in general. Finally, the contract was unsigned.

## The Law

41) The law in respect of unauthorised deduction from wages is found at Section 13 of the Employment Rights Act 1996 as follows:-

> (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.
>
> …
>
> (7)This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting "wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer.

42) The law in respect of wrongful dismissal is that the burden of establishing a breach of contract is upon the party who relies on the breach. In this case it was the claimant who relied on the breach of contract; he contended that he was dismissed and, accordingly, entitled to notice.

## Submissions

43) Both parties made very brief oral submissions.

## Applying the Law to the Facts

44) The Tribunal firstly considered when and how the claimant's employment terminated. On the facts, there was no express dismissal or resignation. The respondent's case was in effect that there had been an agreement to extend the claimant's contract by one month for April and then the employment came to an end by agreement. However, the tribunal had found that there was no such agreement. In the absence of an agreement that the claimant's employment terminated at the end of April, the tribunal considered when and how the employment had in fact terminated.

45) There was no contention by either party that the claimant had resigned at any point. It was not in dispute that the claimant's contract had terminated. Accordingly, the tribunal considered if and when the claimant had been dismissed.

46) The respondent paid the claimant for April 2020 at the beginning of May. The Tribunal accepted the claimant's evidence that he expected to be paid for the month of May in early June because there was no agreement to the contrary and the original furlough scheme was for three months. There were no grounds to conclude that the claimant's contract terminated during May, when he was expecting to be paid for that month and when the respondent had not communicated any decision to terminate him.

47) In the view of the tribunal the first time that the claimant's contract could have terminated was when he attended the respondent on 9 June, shortly after he found he had not been paid for the month of May.

48) As there was no express dismissal on 9 June, the Tribunal firstly considered whether there were ambiguous words amounting to a dismissal. The Tribunal directed itself in line with the Employment Appeal Tribunal case of *Chapman v Letheby & Christopher Limited 1981 [IRLR 440 EAT].* According to the Employment Appeal Tribunal, in respect of ambiguous words, the Tribunal's task, *'should not be a technical one but should reflect what an ordinary, reasonable employee would understand by the words used'*. Further, ambiguous words '*must be construed in light of the facts known to the employee at the date he [is in receipt of the ambiguous word]'.* Further, the Tribunal reminded itself that according to the usual principles of construction of commercial contracts, any ambiguity should be construed against the party seeking to rely on it. In this case, that was the claimant who contended that he was dismissed.

49) The claimant accepted that it had been effectively communicated to him and that he understood that there was no future for him in the respondent's business from 9 July 2020. By that date he knew that his employment was

at an end. The Tribunal took into account the context of the meeting on 9 June. Whilst the claimant had been paid his April salary in May, he had not received his salary for the month of May on 6 June as he had expected. There was no suggestion that the respondent agreed to pay the claimant this money on 9 June or that it viewed itself as under a duty to pay this money.

50) It was clear from the evidence of the claimant and the respondent's witnesses that it was the decision of the respondent that the claimant be exited from the business. It was not the decision of the claimant who wanted to continue in employment. The tribunal accordingly found that there were ambiguous words on 9 June, and what the respondent said in context amounted to a dismissal. Accordingly, the claimant was dismissed.

51) Further, and for the avoidance of doubt, if the ambiguous words used by the respondent on 9 June did not, in context, amount to a dismissal, the tribunal would find that the respondent's conduct on 9 June did amount to a dismissal. By failing to pay the claimant for the month of May and making it clear on 9 June to the claimant that he had no future in the business, the respondent dismissed the claimant by conduct.

52) Accordingly, the Tribunal found that the respondent dismissed the claimant in the meeting on 9 June.

53) It was not disputed that the claimant was not paid notice and there was no suggestion that the claimant was in fundamental breach of his contract permitting the respondent to dismiss without notice. The tribunal therefore found that the respondent had breached the claimant's contract by failing to pay one month's notice.

54) The issue was whether that notice should be paid at 80% or at 100% of the claimant's salary. There was no suggestion from either party that there was any express agreement that the claimant's notice would be paid at 80%. The Tribunal heard no evidence that this had been discussed or mentioned. The Tribunal could not find any grounds to infer an agreement that notice would only be paid at 80%. In the absence of any such agreement, the Tribunal found that the claimant was entitled to notice pay at 100% of his normal salary.

55) The final issue for the Tribunal was whether the award should be increased under Section 38 Employment Act 2002 because the respondent had failed to provide the claimant with a statement of terms of employment compliant with Section 1 Employment Rights Act 1996.

56) The Tribunal found that, as there were no exceptional circumstances, the issue was whether the award should be increased by the lower amount of two weeks' pay or the higher amount of four weeks' pay.

57) The Tribunal determined that the award should be increased by four weeks' pay, the higher amount, for the following reasons.

58) The legislation provides that the lower amount, is, absent exceptional circumstances, awarded for a single breach of Section 1, that is a failure to record one matter in Section 1, such as holiday pay. In this case the breach was complete in that the claimant was provided with no written contract at all. Further, there would have been some advantage to the claimant to have a written contract during lockdown, the furlough process and his dismissal.

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Employment Judge Nash
Date: 25 August 2021