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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100363/2021

Hearing in chambers in Glasgow on 16 September 2021

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Employment Judge D Hoey

Mr M Venckus

Claimant

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Ultimate Car Wash Ltd

Respondent

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The respondent shall pay to the claimant the following sums:

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(1) Holiday pay in the gross sum of £184.62 (less statutory deductions) pursuant to regulations 13, 14, 16 and 30 of the Working Time Regulations 1998;

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(2) Damages in respect of the failure to pay notice pay in the sum of £461.54 pursuant to section 86 of the Employment Rights Act 1996 and the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994;

(3) Compensation in respect of his unfair dismissal for the following:

- a. A basic award in the sum of £461.54; and
- b. A compensatory award in the sum of £2,034.03

5 **(4) The recoupment regulations apply to the unfair dismissal award. The prescribed element is £1,734.03. The prescribed period is from 24 November 2019 until 16 September 2021. The total unfair dismissal award is £2,495.57. The balance is £761.54.**

10 **(5) The sum of £461.54 in respect of the failure to provide the claimant with a written statement of his particulars of employment pursuant to section 38, Employment Act 2002.**

REASONS

1. The claimant had raised claims for holiday pay, notice pay and unfair dismissal by claim form accepted on 23 January 2021. No response form had
15 been lodged and a liability judgment had been issued stating that remedy would be determined at a separate hearing.
2. In letter of 8 June 2021 the claimant was advised that a remedy hearing would be held. He did not attend that hearing and the claims were dismissed. He successfully sought reconsideration of that decision and the claimant was
20 asked to set out in writing what, precisely, he was seeking. He did so. The sums he sought were copied to the respondent, who was given an opportunity to comment. No comment was received by the respondent.
3. The Tribunal is able to make the following findings in fact from the information presented to it, which was not contested by the respondent.

25 **Facts**

4. The claimant was employed by the respondent from 4 October 2018 until 24 November 2020 as car washer. He was not issued with any written statement of particulars with regard to his role.

5. He was paid £1,000 gross per month which amounted to £867 net per month. His gross weekly pay was therefore £230.77 and net weekly pay was £200.08.
6. The claimant took no holidays in the final year of his employment. As his holiday year started on 4 October, on the date of termination (24 November 2020) he had accrued 52 / 365 which was 14.2% of his annual holidays, namely 0.8 weeks holidays. He had not been paid (or taken) his holiday entitlement for 2020.
7. As a matter of law he was entitled to 2 week's notice. He did not receive any notice or notice pay in respect of the termination of his employment.
8. The claimant was aged 20 at the date of his dismissal, 24 November 2020.
9. He applied for various jobs and it took him 2 months to find alternative employment at a comparable rate. Other than universal credit the claimant received no income during the 2 month period when he was without work.

15 **Law**

Holiday pay

10. A worker is entitled to 5.6 weeks' paid annual leave in each leave year (inclusive of bank holidays). This is the effect of regulations 13 (1) and 13A of the Working Time Regulations 1998 (WTR). The worker's leave year begins on the day in which he commences employment, unless there is an agreement between employer and employee to the contrary.
11. By regulation 14, a worker is entitled on termination of employment to payment for accrued but unused holiday in his final leave year. Where there is no agreement between employer and employee to the contrary, regulation 14 provides a formula for calculation of the entitlement when termination occurs part way through a leave year.
12. The formula is "(A x B) – C Where: A is the period of statutory leave to which the worker would have been entitled for the whole of the leave year in which employment ends, calculated in accordance with regulations 13 and 13A. B

is the proportion of the worker's leave year which expired before the termination date, expressed as a fraction. C is the period of leave taken by the worker between the start of the leave year and the termination date.”

5 13. Regulation 15A sets out the rules by which a worker accrues holiday in the first year of employment, but those accrual rules do not affect the calculation using the formula in regulation 14.

10 14. The way in which statutory holiday pay is calculated is set out in sections 221 to 229 ERA and depends on whether or not the worker has ‘normal working hours’. Where the worker does not have normal working hours, his holiday pay is calculated as an average of all remuneration earned in the previous 52 weeks, or the number of complete weeks the worker has been employed if less than 52.

15 15. The Working Time (Coronavirus) (Amendment) Regulations 2020, SI 2020/365, were made and brought into force with immediate effect on 27 March 2020. They amend reg 13(9) of the Working Time Regulations to permit the carry over of annual leave (but not additional annual leave) in the circumstances set out in new regs 13(10) and 13(11). Reg 13(10) provides that leave may be carried over where it was 'not reasonably practicable' for a worker to take some or all of his annual leave in the correct leave year as a result of the effects of coronavirus (including on the worker, the employer or the wider economy or society) and reg 13(11) provides that the period of carry forward is the two leave years immediately following the leave year in respect of which the leave was due.

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Notice pay

30 16. Under section 86 of the Employment Rights Act 1996, an employee is entitled to be given a minimum period of notice to terminate the contract (unless the employer was entitled to terminate the contract without notice, such as in cases of gross misconduct).

17. For the claimant, given he has 2 complete years of employment, he is entitled to 2 week's statutory notice. Failure to pay said notice when due would amount to a breach of contract in respect of which an award could be made.

5 18. The Tribunal has jurisdiction to award damages in respect of breach of contract, up to a maximum of £25,000 in terms of the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994.

Unfair dismissal

19. In order to claim unfair dismissal, an employee requires to have 2 year's service: section 108 Employment Rights Act 1996.

10 20. In terms of section 98 of the Employment Rights Act 1996:

"In determining whether the dismissal of an employee is fair or unfair, it is for the employer to show: -

- 15 (a) the reason (or if more than one, the principal reason) for the dismissal;
and
(b) that it is either a reason falling within subsection 2 or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."

20 21. Potentially fair reasons for dismissal include conduct, capability and redundancy.

22. Section 98(4) of the Employment Rights Act 1996 states:

"Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer): -

- 25 a. depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and

b. shall be determined in accordance with equity and the substantial merits of the case.”

23. It is for the employer to show that there was a potentially fair reason to dismiss and the Tribunal must then decide whether the statutory wording is satisfied
5 to assess whether the dismissal was fair or not. If the employer fails to show that there was a potentially fair reason, the dismissal is unfair.
24. A successful claimant is entitled to a basic award (section 119), which is calculated in a similar way to a redundancy payment.
25. Section 123(1) provides for a compensatory award which is such amount as
10 the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer. The Tribunal needs to assess how long the employment would have continued and ensure any compensation is just and equitable. A Tribunal
15 should also consider whether the claimant contributed to the dismissal, to any extent, any reduce the award accordingly.
26. Ultimately the compensatory award should be such amount that is just and equitable.
27. A compensatory award is capped at a maximum of 52 week’s gross pay (or
20 £86,444 if less).
28. If a claimant has received certain benefits, including Job Seeker’s Allowance and Universal Credit (as in this case), the Employment Protection (Recoupment of Jobseeker’s Allowance and Income Support) Regulations 1996 apply. This means that the respondent must retain a portion of the sum
25 due until the relevant Government department has issued a notice setting out what the claimant is to be paid and what is to be refunded to the Government.

Failure to provide written statement

29. Under section 38 of the Employment Act 2002 where an Employment Tribunal, in respect of certain proceedings, either finds in favour of an

25 employee and makes no award or makes an award and in either case the employer was in breach of a duty to provide a written statement of particulars under section 1 of the ERA then the Employment Tribunal must make or increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, make or increase the award by the
5 30 higher amount. The minimum amount is two weeks' pay. The higher amount is four weeks' pay.

Decision and reasons

30. I shall deal with each claim in turn.

10 **Holiday pay**

31. The claimant is seeking 2 year's worth of accrued holidays as he had not taken holidays during the last 2 years. The law sets out how accrued holidays are calculated when an employee leaves their employment, as set out above. It is not possible to seek payment for holidays in respect of a previous holiday
15 year unless the worker was unable to take the leave for particular reasons. These reasons do not apply in this case and the claimant is only legally entitled to accrued holidays for the holiday year in which his employment terminated and only those holidays that have accrued during the part of the holiday year that the claimant had worked.

20 32. As his holiday year started on 4 October (in the absence of any agreement as to another date), on the date of termination (24 November 2020) he had accrued 52 days / 365 which was 14.2% of his annual holidays, namely 0.8 weeks holidays. He had not been paid (or taken) his holiday entitlement for 2020.

25 33. The claimant is therefore entitled to be paid 0.8 week's holiday pay, which is 0.8 x £230.77 which is £184.62, less any statutory deductions that require to be deducted.

Notice pay

34. The claimant's employment subsisted for over 2 years. He is therefore entitled to 2 week's notice. The respondent is due to pay the claimant 2 week's notice pay, which is 2 x £230.77, namely £461.54.

5 35. The gross sum is awarded given the impact of the taxation regime upon the award.

Unfair dismissal

10 36. From the information before the Tribunal there was no fair reason shown for the claimant's dismissal. There was no procedure that led to his dismissal. His summary dismissal was unfair. The respondent did not enter a response to defend the claim nor provide any evidence to support a finding that the dismissal was for a fair reason. There was no suggestion of any process being followed that could support a finding of a fair dismissal. From the information before the Tribunal, the claimant was unfairly dismissed.

15 37. The claimant is therefore entitled to a basic award in the sum of 2 week's pay, namely 2 x £230.77 which amounts to £461.54.

20 38. A compensatory award must be such sum that is just and equitable so far as flowing from the dismissal. Any award must be just and equitable ensuring that the claimant does not receive more by way of compensation than he would have received had he not been unfairly dismissed. The object of the compensatory award is to compensate the claimant for financial losses as if he had not been unfairly dismissed. It is not designed to punish the employer for wrongdoing.

25 39. I have considered the position carefully. Awarding compensation is naturally speculative and I must consider the information that is before me. It is important also to be mindful of the economic reality. The claimant took 2 months to secure alternative and comparable work and it is just to award him 2 months' net pay. As a week's net pay is £200.08 2 month's pay is therefore £200.08 x 52 divided by 12 x 2 which is, namely £1734.03.

40. I also award the sum of £300 in respect of the loss of statutory rights.

41. The total compensatory award is therefore £2,034.03.

42. The recoupment regulations apply to this award given the claimant was in receipt of relevant benefits.

43. The prescribed element is £1,734.03. The prescribed period is from 24
5 November 2019 (the date of dismissal) until 16 September 2021 (the later of the end point of his losses or today's date).

44. The total unfair dismissal award is £2,495.57. The balance is £761.54.

Failure to provide a written statement

45. Finally as the claimant had not received a written statement I award the
10 claimant 2 week's pay, which is 2 x £230.77, namely £461.54. I do not consider it just to award 4 week's pay.

Summary

46. In summary the respondent shall pay to the claimant:-

15 (1) Holiday pay in the gross sum of **£184.62** (less statutory deductions) pursuant to regulations 13, 14, 16 and 30 of the Working Time Regulations 1998;

(2) Damages in respect of the failure to pay notice pay in the sum of
20 **£461.54** pursuant to section 86 of the Employment Rights Act and the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994;

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a. A basic award in the sum of **£461.54**; and

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25 (4) The recoupment regulations apply to the unfair dismissal award. The prescribed element is £1,734.03. The prescribed period is from 24

November 2019 until 16 September 2021. The total unfair dismissal award is £2,495.57. The balance is £761.54.

- (5) The sum of **£461.54** in respect of the failure to provide the claimant with a written statement of his particulars of employment pursuant to section 38, Employment Act 2002.

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Employment Judge D Hoey

10 **Date of Judgement 16 September 2021**

Date sent to parties 16 September 2021