



THE EMPLOYMENT TRIBUNALS

Claimant: Mr B Twentyman & Others

Respondent: AM Fabrication (Northern) Limited (In Administration)

Heard at: Newcastle upon Tyne Hearing Centre (by CVP)

On: Monday 22nd November 2021

Before: Employment Judge Martin

Representation:

Claimants: Mr B Twentyman (1) - In Person
Mr D Howe (2) - Mr N Guss (Solicitor)
Mr G Trueman (3) - His father Mr N Trueman
Mr L Shield (4) - In Person
Mr D Potter (5) - Ms R Griffiths (Legal Executive)

Respondent: No attendance or representation

This hearing was conducted by way of Cloud Video Platform (CVP) due to the ongoing Coronavirus pandemic. The parties agreed to the hearing being conducted by way of CVP.

RESERVED JUDGMENT

The judgment of this tribunal is as follows:-

First claimant – Mr B Twentyman

1. The claimant's complaint of unfair dismissal is well-founded. The claimant is awarded the sum of £15,785.00.
2. The claimant's complaint of breach of contract (notice pay) is also well-founded and the claimant is awarded the sum of £5,376.00.

Second claimant – Mr D Howe

1. The claimant's complaint of unfair dismissal is well-founded and the claimant is awarded the sum of £17,784.64.

2. The claimant's complaint of breach of contract (notice pay) is well-founded and the claimant is awarded the sum of £5,765.76.
3. The claimant's complaint of unlawful deduction from wages is also well-founded and the claimant is awarded the total sum of £6,730.44.

Third claimant – Mr G Trueman

1. The claimant's complaint of unfair dismissal is well-founded and the claimant is awarded the sum of £12,809.68.
2. The claimant's complaint of unlawful deduction from wages is also well-founded and the claimant is awarded the total sum of £6,630.32.

Fourth claimant – Mr L Shield

1. The claimant's complaint of unfair dismissal is well-founded and the claimant is awarded the sum of £10,559.06.
2. The claimant's complaint of unlawful deduction from wages is also well-founded and the claimant is awarded the total sum of £5,572.48.

Fifth claimant – Mr D Potter

1. The claimant's complaint of unfair dismissal is well-founded and the claimant is awarded the sum of £7,427.38.
2. The claimant's complaint of unlawful deduction from wages is also well-founded and the claimant is awarded the total sum of £5, 244.87.

REASONS

1. All of the claimants (apart from Mr G Trueman) gave evidence on their own behalf. Mr N Trueman gave evidence on behalf of his son, Mr G Trueman, and the other claimants (excluding Mr Potter).
2. The tribunal was provided with a bundle of documents marked Appendix 1.
3. The law which the tribunal considered as set out in the written submissions made by two of the claimant's representatives. In particular the tribunal considered:

Section 98 (1) Employment Rights Act 1996 "In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show--

(a) the reason (or, if more than one, the principal reason) for the dismissal."

Section 98 (2) ERA 1996 "A reason falls within this subsection if it-

- (b) relates to the conduct of the employee;
- (c) is that the employee was redundant.”

Section 98 (4) ERA 1996 “...the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)--

- (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.”

Section 95 (1) ERA 1996 “...an employee is dismissed by his employer if

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

Section 13 (1) ERA 1996 “An employer shall not make a deduction from wages of an employee employed by him unless

- (a) the deduction is required or authorised to be made by virtue of a statutory provision or 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.

Section 13 (3) ERA 1996 “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, 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.”

Article 3 of the Employment Tribunals Extension of Jurisdiction Order 1994 “Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum if the claim arises or is outstanding on the termination of the employee's employment”.

The case of **British Home Stores Limited v Burchell 1978 IRLR 379** where the EAT held that in cases of misconduct the employer must be able to show that it had a genuine belief the employee had committed an act of misconduct which was based on reasonable grounds and they had followed a reasonable investigation.

The case of **Western Excavating ECC Limited v Sharp 1978 IRLR** where Lord Denning held that “If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows the employer no

longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."

4. The respondent company went into administration on 14th July 2021. The administrators have consented to the proceedings continuing. Prior to the respondent going into administration, the respondent had filed a response to proceedings and had been in correspondence with the tribunal which has been taken into account in this judgment.
5. The respondent was in financial difficulties for some time before it went into administration. Mr M Trueman is the former founder of the respondent company. All of the claimants (with the possible exception of Mr Potter) have been working for the respondent for a long time; and were employed whilst Mr M Trueman was still running the business. Mr G Trueman is his son and Mr L Shield is his son's friend. Mr M Trueman left the company, which was taken over by the respondent in 2016.
6. In August 2019 the respondent continued to take pension contributions from the claimants (excluding it appears Mr Twentyman, who is not pursuing complaints in that regard), but failed to pay those monies into their pensions funds, as is noted from the various payslips and pension documentation produced by all of the claimants, which are in the bundle before the tribunal. At the same time, it appears that the respondent also failed to pay in their own employer contributions into the claimants' pension funds (excluding Mr Twentyman who again is not pursuing a complaint in that regard).
7. All of the claimants worked considerable overtime, as is noted on their payslips in the bundle before this tribunal.
8. All of the claimants were put on furlough when the Coronavirus pandemic occurred. It is not clear whether Mr Twentyman did go on furlough, as he again is not pursuing a claim in that regard.
9. The claimants were all paid furlough payments from April 2020.
10. The Coronavirus scheme, an extract which is in the bundle, provides that employees are entitled to their average wages which would include overtime. However the respondent only paid the claimants wages based on their basic rate of pay.
11. All of the claimants (except Mr Twentyman) say they were not paid the correct rate of pay for their furlough. Mr Potter says he was not paid the correct rate of pay, but also he complains that all his furlough payments were paid late. That situation continued until September 2020.
13. In September 2020 claimants, Mr Howe, Mr Shield and Mr G Trueman were all taken off furlough and asked to do a job in Slough. It appears that Mr Twentyman was already doing that job.

14. The usual arrangement when employees were asked to work away from home is that they would be able to claim and would be paid twelve hours pay less a half an hour for lunch. Mr M Trueman who was the founder of the company said that he and his co-founder put this practice in place when the company was set up and they continued to operate that arrangement from 2001. All of the claimants said in evidence that the same arrangement remained in place. They said that they all claimed their payments under that arrangement in the same way since they had commenced their employment. All of the claimants said in evidence that the arrangements had never been changed by the respondent company after they took over in 2016.
15. It appears that the previous arrangement had been in place for the week before the claimants commenced on the Slough project as Mr Weightman was paid for twelve hours as is noted in his payslip which is attached to Mr G Truman's witness statement.
16. All of the claimants who were working on the Slough job, which was all of the claimants in this action apart from Mr Potter, all claimed as was the usual custom and practice for twelve hours for each day, even though they were not required to work those twelve hours a couple of the days.
17. On 9th October 2021, all of those claimants (excluding Mr Potter) were suspended for suspected fraud for claiming additional hours and were issued with a letter of suspension.
18. On 11th October 2021, all of the claimants (excluding Mr Potter) were sent a handbook setting out their terms and conditions of employment and a letter of dismissal in which they were summarily dismissed for gross misconduct for claiming additional hours.
19. None of the claimants were invited to a meeting to discuss those allegations nor were they given any opportunity to put forward their response to those allegations. No right of appeal was offered to them, although all of them sought to exercise their right of appeal but were not allowed to do so.
20. In the handbook sent to all of those claimants it refers to gross misconduct and examples are cited to include fraud and dishonesty. All of those claimants said in evidence that they had never seen any handbook prior to it being sent to them with their letter of dismissal.
21. All of the claimants said that the arrangements that had always been in place from 2001 had never been changed since the respondent took over the business.
22. All of the claimants (excluding Mr Potter) were dismissed with effect from 12th October 2021.
23. On 11th October 2021, Mr Potter the other claimant resigned from his employment. He resigned on the basis that he was not receiving his furlough payments in time and that they were incorrect and because he was having

pension deductions deducted from his pay but which were not being paid into his pension scheme. His letter of resignation referred to the way he was being treated, referring to those matters as is noted in the letter of resignation at page 261 of the bundle.

24. This tribunal finds that that the reason for the dismissal of the four claimants Mr Twentyman, Mr Howe, Mr G Trueman and Mr Shields was for conduct and not for redundancy. Conduct can be a fair reason for dismissal.
25. This tribunal does not consider that the respondent acted reasonably in dismissing any of those claimants for that reason, as the respondent did not have reasonable grounds to believe that the claimants had committed an act of gross misconduct because they had not undertaken any, never mind a reasonable, investigation into the matter. If they had done so, they would have understood the reason for the claimants making those claims.
26. Further, the tribunal does not consider that the respondent followed a fair procedure. There was no meeting with any of the claimants and no opportunity given to them to put their case. Further, they were given no right of appeal. Indeed when they exercised a right of appeal they were effectively refused it.
27. The tribunal accepts the evidence of Mr Trueman senior and all of the claimants that the practice in place was that they were entitled to claim for the 12 hours, excluding half an hour lunch, while they were working away, which they did. The tribunal finds that there had been no change to that arrangement which had been in place for 2001. The tribunal therefore consider that those claimants' dismissal was unfair both substantially and procedurally.
28. The tribunal considers that the respondent's failure to pay furlough payments in time and at the correct amount amounted to a breach of contract. The tribunal also consider that deducting pension contributions from employees and failing to pay them into the pension fund is also a breach of contract. These are breaches of both the express term in the contract of employment to pay wages and the implied term of trust and confidence. One of the basic provisions of any contract of employment is that an employee works and is entitled to be paid for the work he has performed. Deductions should not be made from wages unless there is a proper provision to enable an employer to do so. In this case there was a provision entitling the respondent to deduct those wages, but, although they actually deducted for that reason, they did not then pay the deductions over to the pension fund.
29. This tribunal considers that there was a fundamental breach of contract on the part of the respondent and Mr Potter was entitled to resign in response to those breaches. We accept his evidence that he did resign in response to those breaches of contract. The tribunal does not consider that he affirmed the contract in the meantime, as these were ongoing breaches of contract.
30. Accordingly Mr Potter's claim for unfair dismissal is also well-founded.

31. The tribunal has set out below how the various complaints have been calculated as follows:-

31.1 **Mr Twentyman.** - The claimant's complaint of unfair dismissal is well-founded and the claimant is awarded the sum of £15,785.00 calculated as follows:-

Basic award $1.5 \times 15 \times 538 = £12105$

Compensatory award:-

9th January to 14th July - 26.5 weeks at £120.00 - £3180.

Loss of statutory rights - £500

Subtotal: - Compensatory Award £3680

Total Award for compensation on unfair dismissal £15,785.00

31.2 The claimant's complaint of breach of contract (notice pay) is also well-founded. The claimant is awarded the sum of 12 weeks x £448 = £5376.

32.1 **Mr Howe** - The claimant complaint of unfair dismissal is well-founded. He is awarded the sum of £19,784.64 calculated as follows:

Basic award $£480.48 \times 25.5 = £12,252.24$

Compensatory award (excluding period of notice pay)

9th January – 24th February - 8 weeks at £480.80 - £3846.40

22nd April – 14th July 11.86 weeks at £100.00 a week (when the claimant had obtained alternative employment at a lower rate of pay) - £1186.

Loss of statutory rights £500.00

Subtotal – Compensatory Award - £5532.4

Total award for compensation for unfair dismissal £17,784.64

32.2 The claimant's complaint of breach of contract (notice pay) is well-founded and the claimant is awarded the sum of £5765.76 calculated as follows:

$£480.48 \times 12$

32.3 The claimant's complaint of unlawful deduction from wages is well founded.

(i) In respect of pension contributions deducted and not paid since September 2020 - £837.04 employee contributions and £502.28 employer contributions making a total of £1339.32

(ii) In respect of furlough payments the claimant should have been paid £576.92 a month, but was in fact only paid for £384.38 per month from April 2020 being a difference of £192.54 and is therefore entitled to £5391.12.

The total award for deduction from wages amounts to the sum of £6730.44.

- 33.1 **Mr G Trueman** - The claimant's complaint of unfair dismissal is well-founded and he is awarded compensation calculated as follows:

Basic award 8 years (including a number of years when he was under 21 when he was entitled to half a year) £538 = £4304.

Compensatory award

6 weeks a £1334.28 - £8005.68

Loss of statutory rights £500.00

Subtotal - Compensatory Award - £8505.68.

Total award for compensation for unfair dismissal - £12809.68.

- 33.2 The claimant's complaint of unlawful deduction from wages is also well-founded. The claimant is awarded the total sum of £6630.32 calculated as follows:-

(i) In respect of pension deductions - employee deductions of £24.55 were deducted and employer deductions £14.73 were not made over a 62 week period amounting to £2435.36.

(ii) In respect of furlough payments - he says he was short £599.28 a month since April 2020 amounting 7 months which equals £4194.96.

- 34.1 **Mr Shield** - The claimant's complaint of unfair dismissal is well-founded and he is awarded the total sum of £10,559.06 calculated as follows:

Basic award 6 years (which include a number of half years when he was aged under 21) at £538 = £3228.

Compensatory award

6 weeks

12th October – November 2021 - £6831.06

Loss of statutory rights - £500.00

Subtotal Compensatory Award £7331.06

Total award on compensation on unfair dismissal £10,559.06

- 34.2 The claimant's complaint of unlawful deduction from wages is well-founded. He is awarded the total sum of £5,572.48 calculated as follows:

(i) In respect of pension contributions the employee contributions were £18.87 and the employer contributions which should have been made were £11.32 over a 74 week period amounting to £2234.06

(ii) In respect of his furlough payments he says he was underpaid he is awarded the sum of £3338.42.

- 35.1 **Mr Potter** - The claimant's complaint of unfair dismissal is well-founded and is awarded the total sum of £7427.38 calculated as follows:

Basic award 1.5 x 7 x 397.41 = £4172.81

Compensatory award

3 weeks – October – November @ £341.51

2 weeks - January – February @ £341.51

2 weeks - April @ £341.51

Totalling 7 weeks at £341.51 - £2390.57

April 2021 – 14th July - 13 weeks @ £28.00 the difference between his new employment and previous employment = £364.00

Loss of statutory rights = £500.00

Total compensatory award = £3254.57

Total award on compensation for unfair dismissal = £7427.38

29.11 The claimant's complaint of unlawful deduction from wages is also well-founded and he is awarded the total sum of £5244.87 calculated as follows:

- (i) In respect of pension contributions he is claiming for employee deductions of £905.26 (£14.72 per week) and employer deductions of 5% in the sum of £1281.23 amounting to a total of £2186.49.
- (ii) In respect of furlough payments the is claiming he difference between his wages from April 2020 which should have been paid based on his previous pay amounting to a total of £3058.38

EMPLOYMENT JUDGE MARTIN

**JUDGMENT SIGNED BY EMPLOYMENT
JUDGE ON
15 December 2021**

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