EMPLOYMENT TRIBUNALS

Claimant: Mr D Cooper

Respondent: Belle Vue (Manchester) Limited

HEARD AT: Manchester **On:** 27 September 2021

BEFORE: Employment Judge Batten (sitting alone)

REPRESENTATION:

Claimant: In person
Respondent: M Mitchell, contracts manager

JUDGMENT having been sent to the parties on 28 September 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. By a claim form received by the Tribunal on 21 January 2020, the claimant presented complaints alleging unfair dismissal, unpaid wages, holiday pay due at the termination of his employment and breach of contract in respect of notice pay. In the claim form, the claimant also claimed damages for emotional stress and mental health, and for costs and a sum as compensation for the alleged mis-handling of his auto-enrolment pension.

2. On 26 February 2020, the respondent submitted a response to the claim setting out the amounts paid to the claimant which were in dispute. On 6 April 2020, the complaint of unfair dismissal was struck out for lack of 2 years' qualifying service.

Background and evidence

3. The claim had been listed for final hearing on 7 October 2020 and again on 12 April 2021. On each occasion, the hearing had to be converted to deal with case management because the parties had not been ready for a final hearing largely due to non-compliance with case management orders. This led to the Judge explaining what was required to prepare the claim for hearing and

necessitated the making of further case management orders on each occasion.

4. At the case management hearings, it was explained to the claimant that the Employment Tribunal had no jurisdiction to award compensation for the alleged mis-handling of his auto-enrolment pension nor could the Tribunal award damages for any emotional stress or mental health arising from complaints about unpaid wages, notice pay or holiday pay.

5. At the commencement of this hearing, the respondent presented a bundle of documents consisting of 64 pages including the claim and response forms. The claimant brought copies of a diary which he had written for the purpose of this hearing.

6. Neither party produced any written witness statement(s) and did not call any witnesses to give evidence. The respondent told the Tribunal that it was relying on the documents in the bundle alone. The claimant said that he had further documents in his car. He left the hearing to go to his car and returned with a large box of sundry documents which were not in any order, which had not been given to the respondent and which the claimant asked me to read and consider. As this was in breach of the numerous case management orders for disclosure of documents, I declined to consider the claimant's box of further documents.

Issues to be determined

7. The Tribunal discussed the complaints and issues with the parties. It was agreed that the issues to be determined by the Tribunal at this hearing were as follows:

    a. Whether the claimant's employment ended when he resigned or was dismissed. If the claimant's employment ended because he was dismissed, whether that dismissal was in breach of contract and, if it was in breach of contract, what notice/pay in lieu of notice is due to the claimant;

    b. Whether the claimant had accrued outstanding unpaid holiday entitlement at the termination of employment and, if so, what if any holiday pay is due to him?

    c. Whether the respondent had failed to pay the claimant all wages due to him and, if not, what wages are outstanding and owing;

Findings of fact

8. The Tribunal made its findings of fact on the basis of the material before it taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. The Tribunal resolved conflicts of evidence on the balance of probabilities. The findings of fact relevant to the issues to be determined are as follows.

9. The claimant started working for the respondent on 30 October 2017 as a school bus driver on a term-time only basis, working 30 hours per week, for 38 weeks of the year. He was paid at a rate of £9.25 per hour until January 2019 when the rate was increased to £9.45 per hour. The claimant was issued with written terms of employment which provide that "Overtime will be paid at your normal rate of pay for the hours worked." The claimant's pay was annualised, which means that the sum of his pay for 38 weeks of work plus holidays was calculated as an annual amount and paid over 52 weeks of the year. This meant that the claimant received the same basic amount of pay each month even though on certain months he may have worked more hours than his basic pay covered whilst for certain periods, for example school holidays, he did not work at all, or worked for less hours than his basic pay covered.

10. The respondent has a computerised clocking on/off system to record hours worked. Payslips are accompanied by a printout of the recorded weekly hours worked.

11. The claimant took cash payments for bus tickets which he sold on route. The respondent has a computerised system to record the monies collected on each bus. The claimant was bound to hand over all the cash he collected to the respondent because the proceeds from ticket sales belong to Transport for Greater Manchester and not to the respondent.

12. On 4 September 2019, the respondent dismissed the claimant for gross misconduct after a disciplinary hearing. He was not paid notice pay but was paid for outstanding accrued untaken holiday entitlement. The claimant appealed his dismissal successfully and was reinstated on 4 October 2019. However, the claimant decided not to return to work and resigned his employment on 7 October 2019. The claimant had by then got himself another job, with a higher rate of pay, which he started on 9 September 2019.

The applicable law

13. A concise statement of the applicable law is as follows.

Breach of Contract - Notice Pay

14. Section 86 of the Employment Rights Act 1996 provides that an employer is required to give minimum notice to an employee to terminate his or her contract of employment. The minimum period of notice required, where the employee has been continuously employed for one month or more, is one week's notice for each completed year of service up to a maximum of 12 weeks' notice. However, an employer is entitled to terminate the contract of an employee without notice in circumstances of gross misconduct.

Unauthorised deductions from wages

15. A worker is entitled to be paid for work done under his or her contract of employment. The Employment Rights Act 1996, Part II, provides that a failure to pay wages owing constitutes an unauthorised deduction from wages.

16. Wages are defined in section 27 of the Employment Rights Act 1996. Section 27(1) (a) provides that:

"wages includes any fee, bonus, commission, holiday pay or other emolument referable to his employment whether payable under his contract or otherwise."

17. The Employment Rights Act 1996, section 13, governs circumstances in which an employer can make deductions from an employee's wages. Section 13 provides that an employer:

"shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or relevant provision of the worker's contract or the worker has previously signified in writing his agreement or consent to the making of the deduction"

Holiday Pay

18. The Working Time Regulations 1998, Regulations 13 and 13A, provide that every full-time worker is entitled to a minimum of 5.6 weeks' paid holiday entitlement in each holiday year. Part-time workers and those who do not work throughout a 52-week year are entitled to a pro-rata amount of the minimum holiday entitlement.

19. Regulation 14 of the Working Time Regulations 1998 provides that a worker is entitled to payment for untaken holidays pro-rata the leave year or the portion of the leave year in their final year of employment, and they are entitled to that payment at termination of employment. The non-payment of holiday pay can also be an unauthorised deduction from wages.

Conclusions

20. The Tribunal has applied its relevant findings of fact and the applicable law to determine the issues in the following way.

Notice pay

21. The claimant accepted that he had resigned from the respondent in October 2019 and that he did not give notice nor did he work during a period of notice. In those circumstances, the Tribunal considered that the respondent was not in breach of contract, and the claimant is not entitled to notice pay.

Holiday pay

22. The Tribunal explained to the claimant how the annual leave provisions of the Working Time Regulations 1998 applies to term-time only contracts where an employee is contracted to and works for less than the full 52 weeks of the year. In effect, the full year's leave entitlement of 5.6 weeks is calculated proportionate to the number of weeks that are worked during the year. The claimant was contracted to work for 38 weeks per annum. This meant that, on a pro-rata calculation basis, the claimant was entitled to 20 days' statutory holiday entitlement.

23. The claimant accepted that he, in fact, had the benefit of 20 days' holiday per annum with the respondent. He then told the Tribunal that his complaint was that he "just thought 20 days holiday was not enough". That is not a complaint

that the Tribunal can adjudicate upon within the provisions of the Working Time Regulations 1998 and the Tribunal has no jurisdiction to award the claimant a greater amount of holiday than that provided by his contract of employment. There was also no evidence that the claimant had raised this matter with the respondent before these proceedings, whether through a grievance about his holiday entitlement, or by seeking to negotiate for a greater amount of holiday with the respondent which has no recognised trade union nor applicable collective agreements.

Unpaid wages

24. In the claim form (ET1), section 8.1, the claimant has listed dates and amounts of wages which he says are "short" amounts. There is a gap in the list of dates of over a year, between 5 August 2018 and 5 July 2019, where the claimant does not assert any underpayment of wages. That gap breaks the series of deductions, such that the claimant's complaint about wages paid on 5 August 2018 or earlier are out of time and cannot be considered, the claimant having given no reason for his failure to present a complaint about those historic payments in accordance with the time limits in section 23 of the Employment Rights Act 1996.

25. In respect of his complaint about unpaid wages which are in time, the claimant brought no proper evidence of these claims, in terms of documents or witness statements, either in compliance with the Case Management Orders or at all. There have been 2 previous case management hearings, the first before Employment Judge McDonald on 7 October 2020, and secondly before Employment Judge Phil Allen on 12 April 2021. Because of the claimant's failure to comply with such orders he had been subject to a strike out warning issued on 3 March 2021. This Tribunal was satisfied that both Employment Judge McDonald and Employment Judge Allen had explained to the claimant what was required to prepare his case for hearing and the evidence that he would need to bring.

26. The claimant said that one of his complaints was that he did not get a higher rate of pay for working overtime. The Tribunal referred the claimant to his contract of employment which provides that "Overtime will be paid at your normal rate of pay for the hours worked". The claimant said that he did not agree with this and that he should nevertheless be paid at a higher rate. There was no evidence that the claimant had raised this or any other matter concerning his pay with the respondent before these proceedings, whether informally or through a grievance process. The respondent has no recognised trade union nor applicable collective agreements which might otherwise provide for higher overtime rates of pay.

27. The claimant's evidence about underpayment of wages amounted to handwritten 'diaries' that he said he had compiled for this hearing but had not shown to the respondent until today. These 'diaries' were not linked to the claimant's payslips or rotas in any meaningful way. In any event, the claimant contended that his payslips and rotas were wrong or unreliable without explaining how or bringing any evidence to support that contention. The claimant was, in effect, expecting the Tribunal to go over almost 2 years of paperwork, to check it to see whether he had in fact been underpaid. The

claimant was told that this was not the purpose of the Tribunal hearing, listed for 3 hours, and that he was expected to identify what wages he believed had been unpaid or underpaid, and in relation to what dates of work and/or dates of payment. It was apparent that the claimant had little idea of whether or when he had in fact been underpaid, if at all. In those circumstances, the Tribunal was satisfied that the claimant has not discharged the burden of proof in respect of his complaint about unpaid wages as he has not shown the basis for this complaint. This complaint therefore also fails.

Further matters

28. When the burden of proof was explained to the claimant by the Tribunal, he proceeded to talk over the Tribunal and to ignore what I was trying to explain to him. I found the claimant very difficult to deal with; he did not always listen to what was being said to him and was, at times, discourteous to myself and to the respondent's personnel.

29. At the end of the hearing, the claimant declared that he wanted to take matters to another hearing and he asked for a further hearing to be listed. The Tribunal is satisfied that a further hearing would serve no purpose, given that this is now the third hearing at which the claimant has been asked to present his case and following a number of efforts to assist him in that regard. Despite everything afforded to the claimant, including additional time and the extension of case management deadlines, the claimant has come to the Tribunal today unprepared and without apparent regard for the case management orders or deadlines. The Tribunal must have regard to the overriding objective and the Tribunal's duties to both parties, as much to the respondent as to the claimant. The respondent has, by now, been put to considerable expense in attending the Tribunal in person, on 3 occasions.

30. Further, at the end of this hearing, the claimant approached the bench and asked me, as an Employment Judge, for legal advice about another case that he is pursuing with a delivery company for which he currently works. I had to tell the claimant, in no uncertain terms, that I could not provide him with legal advice about that or any other matter.

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Employment Judge Batten
Date: 14 January 2022

REASONS SENT TO THE PARTIES ON
18 January 2022

FOR THE TRIBUNAL OFFICE

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