



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4101606/2022

Hearing held by CVP on 6 June 2022

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Employment Judge McFatridge

Mr Keith M Halfpenny

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**Claimant
In person**

Sood Enterprises Ltd

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**Respondent
Represented by:
Mr R Sood,
Director**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the respondent was in breach of contract with the claimant by failing to pay him the appropriate notice pay. The respondent shall pay to the claimant the sum of Nine Hundred and Seventy Nine Pounds Twenty Pence (£979.20) in respect of unpaid notice pay.

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REASONS

1. The claimant submitted a claim to the Tribunal in which he claimed that he had not been paid the notice pay to which he was due. The respondent submitted a response in which they denied the claim. It was common ground between the parties that the claimant had been incapable of work

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E.T. Z4 (WR)

5 due to his sickness and absent as a result thereof. The claimant's position was that he was due to be paid notice pay at his normal weekly rate of pay. The respondent's position was that since the claimant's contractual notice period was at least one week more than the notice required under statute by section 86(1) the provisions of section 87(4) applied and the claimant was not entitled to be paid at his normal rate during his period of notice and that since his right to sick pay had been exhausted he was not entitled to any payment at all during the period of notice. At the hearing the claimant gave evidence on his own behalf. Mr Sood who represented the respondent cross examined the claimant but declined to give any evidence on his own behalf and did not lead evidence from any other witnesses. The parties lodged a number of documents which will be referred to where appropriate below. Unfortunately, although each party lodged a core bundle which was numbered other documents were referred to which were not numbered and I have sought to identify the documents as best as I can from their date and content in the judgment below. On 15 the basis of the evidence and the productions I found the following essential facts relating to the case to be proved or agreed.

Findings in fact

20 2. The claimant was employed by the respondent on or about 25 March 2018. He was employed as Assistant Manager at one of the respondent's filling stations at Colinsburgh. The respondent operates a number of filling stations and has a substantial number of staff. The claimant was provided with a statement of main terms of employment which was signed by the claimant and by the manager of the filling station, Christine Anderson on 25 16 June 2018. The document was lodged as document 4 of the claimant's bundle. The statement of terms and conditions states under Notice

30 "After one month's service you are required to give the company two weeks' notice to terminate your employment.

You are entitled to receive the following periods of notice from the company:

Over one month but under three years' continuous service two weeks

Over three years' continuous service one week for each complete year of service to a maximum of 12 weeks after 12 years.

By mutual agreement these notice periods may be waived.

The company has a right to terminate your employment without notice or payment in lieu of notice in the event that you commit a fundamental breach of contract.

5 At the absolute discretion of the company payment in lieu of working notice may be made.”

This statement contains a declaration stating

10 “I acknowledge receipt of this Statement and confirm that I have read the Statement and the Employee Handbook which set out the principal rules, policies and procedures relating to my employment.

For the purposes of the application of statutory holiday entitlement under the Working Time Regulations I agree that the holiday section of this Statement will be held to be a ‘relevant agreement’.”

15 As noted above this document was signed by the claimant and by a representative of management.

3. On or about 27 March 2018 immediately after the claimant’s initial induction by Ms Anderson (and before the Statement of Terms and Conditions was signed) the claimant was asked by Ms Anderson to sign a document acknowledging receipt of various company policies. This document was lodged and was signed by the claimant on 27 March. The claimant was not shown any of the documents in question nor was he given copies or told anything more about them. The instruction which he received from Ms Anderson that he required to sign these documents in case the company had a health and safety visit and they required to demonstrate that employees had seen the documents. The claimant did not see anything untoward in this and simply signed. He did not at any point complain about this either to Ms Anderson or the respondent’s management nor did he raise any kind of grievance.

4. In or about July 2020 the claimant went off sick and commenced what transpired to be a long-term absence which continued up to the termination of his employment. The claimant remained incapable of work up to the date of termination of his employment.

5. Up to the point of going off sick as part of his duties the claimant had regularly cleaned out the cupboard behind the till. Whilst doing this he did not notice any copy of the Staff Handbook in that cupboard. The claimant never had occasion to refer to the Staff Handbook.
- 5 6. It was the respondent's position that the Staff Handbook was changed in or about January 2019. The respondent took no steps to bring these changes to the attention of the claimant and the claimant was entirely unaware that any changes had been made.
7. As noted above the claimant went off sick in July 2020. The claimant felt that the respondent had been fairly supportive of him during his absence and appreciated what they had done for him. This included organising an occupational health report which was lodged.
- 10 8. In or about November 2021 the claimant met with Mr Raman Sood in order to discuss his continued employment. It was a face-to-face meeting which took place in the Colinsburgh garage. The claimant's dismissal on grounds of continuing ill health was discussed. There was a discussion regarding notice pay. The claimant advised that he had been told by Acas that he was entitled to be paid full pay during his notice pay. Mr Sood responded to the effect that "Acas did not know everything." The claimant believed that he would have a fight on his hands to get his notice pay but simply left it at that.
- 15 20 9. The respondent wrote to the claimant on 29 November 2021 formally dismissing him. It confirmed that the claimant is to be dismissed and the letter goes on to state
25 "At the meeting you sought clarification as to your severance payments, I can confirm that you are owed four working weeks of accrued holiday being the maximum that can be carried forward whilst on long term sick leave. Your statutory sick pay was exhausted some time earlier in the year. The Staff Handbook dated January 2019 which is currently held on the premises for all staff to access states that
30 *'Termination of Employment*
BY YOU

If you wish to resign, you should do so in writing giving such notice as is specified in your Statement of Main Terms of Employment.

BY THE COMPANY

5 *Staff are entitled to a minimum of one weeks' notice from the company. The statutory minimum period of notice from the company is that after two years of service staff are entitled to one additional week's notice for each completed year of service up to a maximum of twelve weeks after twelve years' service.'*

10 Since the notice period offered exceeds the statutory minimum you are not due to be paid any sums in respect of your notice period. Therefore, as you have completed three years of service you are due 6 weeks of notice which results in your dismissal date being on the 10th of January 2022, this payment will be made by the 28th of January 2022."

15 10. Immediately after receiving this letter the claimant attended the Colinsburgh garage and asked the manager, Ms Anderson, if he could see the Staff Handbook. Her response to him was that it was in the cupboard behind the till "where it has always been". The claimant went into the cupboard himself and found the contract in a blue envelope. He had not
20 ever noticed this document there during the period he had worked at the garage. The claimant looked at the document and saw that the notice period was in accordance with what Mr Sood had put in his letter of 29 November but he was disturbed to see that this appeared to be a later addition since it was in italics and not in the same font as the remaining
25 parts of the document.

11. The claimant felt that the period of notice stated was extremely ambiguous, in any event the change to his contract had not been mentioned to him beforehand nor had he ever agreed to it.

30 12. Subsequently after the claimant had raised his suspicions with Mr Raman Sood the respondent provided an additional copy of the handbook which showed the paragraph relating to notice not in italics but in a faded format as if it was a black and white copy of coloured print. This was lodged by the claimant. Finally the respondent also lodged a copy of the handbook

which showed the paragraph relating to notice in the same font and unfaded typeface as the rest of the document.

13. By an Order of the Tribunal dated 2 March 2022 the respondent was ordered to produce the properties box for the document in order to establish when the document had been changed and provide information as to the computer on which the changes had been made. The respondent failed to comply with this order.

Observations on the evidence

14. The claimant gave evidence on his own behalf. I generally found him to be a credible and reliable witness. He responded in a measured fashion to cross examination. He indicated that it was his view that the respondent had deliberately changed the content of the Staff Handbook in order to avoid having to pay him notice pay. He accepted that he could not prove who had done this. He referred to the changes of font causing him grave suspicion. In any event, he was quite clear as to the core aspect of his claim which was to the effect that he had signed a Statement of Terms and Conditions which stated that the notice period he was entitled to was essentially statutory notice. He was completely unaware that the respondent were going to be saying anything different until he received his termination letter on 29 November. I entirely accepted his evidence that he had not seen the Staff Handbook at any time prior to termination of his employment. I also accepted his evidence that the document was not kept in the cupboard behind the till during the period he worked at the garage and that he had not seen it there.

15. Mr Sood made it clear in cross examination that he disagreed with the claimant's evidence on various points but did not seek to give evidence himself. Had he done so I would have asked him why the respondent had not complied with the order made by the Tribunal but given that he was not giving evidence I did not consider it appropriate to do so.

Issues

16. The sole issue to be determined by the Tribunal was whether the respondent were able to rely on section 87(4) of the Employment Rights Act 1996. This states

5 “This section does not apply in relation to a notice given by the employer or the employee if the notice to be given by the employer to terminate the contract must be at least one week more than the notice required by section 86(1).”

10 The claimant’s position was that as at the date of termination contractual notice was that set out in his Statement of Terms and Conditions which he had signed which was essentially statutory notice. The respondent’s position was that in or about January 2019 they had altered the Staff Handbook so as to improve the period of notice given to all employees. Their position as set out in correspondence prior to the Tribunal was that
15 given that they were improving the terms for staff there had been no need to consult or bring this specifically to the attention of employees. They bore to rely on the fact that the claimant had signed a document in which he confirmed he was aware of the location of the Staff Handbook at the time of his induction in 2018.

20 **Discussion and decision**

17. As noted above I found the claimant to be a credible and reliable witness. The sole issue I required to determine was whether the contract between the parties provided for statutory notice or whether it provided for notice which was at least one week longer than statutory notice.

25 18. It is trite law that a contract is an agreement between two parties. It follows that the claimant could not possibly agree to any variation of the contract between himself and the respondent if he was unaware of it. I was entirely satisfied that the claimant was unaware that the respondent were seeking to make any changes to his notice period until after his employment was
30 terminated.

19. I had some considerable doubts as to whether the respondent had indeed properly changed the terms of the Staff Handbook. Whilst I had my

suspicions it was not necessary for me to make any kind of formal finding in order to dispose of this action and I will not do so. Suffice to say that if the respondent are seeking in future to vary the contract of an employee they may do well to seek professional advice and seek to advise employees that this is what they are doing. Simply changing the terms of a Staff Handbook even if it happened the way the respondent say it did is hardly ever likely to be sufficient. In addition, I should say that I considered the terms of the new clause which they have inserted into the handbook to be ambiguous and it is not at all clear that it has the meaning attributed to it by the respondent. Logically if they are correct in saying that an employee is entitled to one week's notice in addition to statutory notice for each year of service then this would mean that the maximum of 12 weeks' pay would be achieved after six years' service rather than 12 years as is stated. The paragraph is internally inconsistent.

20. The claimant provided a Schedule of Loss setting out his pay and it was common ground that he had three years' service. The claimant was therefore entitled to three weeks' notice pay. Section 90 of the Employment Rights Act 1996 provides that he is entitled to this even if unfit to work because of sickness or injury. The respondent is not entitled to take advantage of the exemption provided in section 87(4). The claimant is therefore entitled to be paid notice pay of three weeks' pay at the rate of £326.40 per week amounting to £979.20.

Employment Judge:
Date of Judgment:
Date sent to parties:

I McFatridge
23 June 2022
23 June 2022