



# EMPLOYMENT TRIBUNALS

**Claimant:** (1) Mr N Gilliatt  
(2) Mr A Ewan

**Respondent:** ATAG Cables and Tapes Limited  
(in creditors voluntary liquidation)

**Heard at:** Nottingham

**On:** 27 & 28 July 2022

**Before:** Employment Judge Cansick

## Representation

Claimant: (1) In person  
(2) In person

Respondent: Mr A Graham, Director

# RESERVED JUDGMENT

1. The first claimant's claim for unauthorised deduction of wages is upheld by agreement of the respondent. By agreement of the first claimant and the respondent, the respondent is ordered to pay the claimant the gross sum of £90.60, in respect of the amount unlawfully deducted.
2. The claimants' claims for statutory redundancy payments are not well-founded and are dismissed.

# REASONS

## Preliminary Matters

### *Unauthorised Deduction of Wages*

1. The first claimant, Mr Nigel Gilliatt, made a claim for unauthorised deduction of wages. This was in regard to him not being paid for the 1 June 2021, the date of termination of employment. It was agreed between the first claimant and the respondent that this would have been paid on 31 July 2021. This

meant the claim was in time. It was further agreed by the parties that the gross pay for this day was £90.60. It was agreed that the respondent would pay the first claimant this amount.

### *Case Management Orders*

2. At the Preliminary Hearing, on 26 April 2022, case management orders were made for a file of documents to be agreed between the parties. The respondent was ordered to prepare an indexed file of those documents and send the file to the claimant by 23 May 2022. The respondent was further ordered to bring a copy of the file to the hearing for use of the tribunal. Such a file had not been agreed and prepared.
3. In addition, I did not have before me what could clearly be recognised as witness statements. Instead, I had from the first claimant letters addressed to the respondent as detailed below:
  - (i) A seven page letter with ten pages of attachments, dated 4 March 2022.
  - (ii) A seven page letter with four pages of attachments, dated 11 March 2022.
  - (iii) A seven page letter, dated 4 June 2022.
4. From the second claimant, Mr Andrew Ewan, I had before me a two page, undated letter, addressed “to whom this may concern”.
5. Also, before me I had a one page witness statement from Mr Martin Osterman, dated 10<sup>th</sup> May 2022, and an undated one page letter from Mr Stephen Burrows.
6. From the respondent I had before me the following:
  - (i) An 18 page document titled “Notes and Evidence about the above claim”, with 82 pages of attachments divided into 17 appendices.
  - (ii) A three page response to the first claimant’s 4 June 2022 letter, with three appendices in three pages of attachments, dated 1 July 2022.
  - (iii) A two page response to the second claimant’s undated letter, with four appendices in four pages of attachments, dated 1 July 2022.
  - (iv) A one page response to the witness statement of Mr Osterman, with five appendices in five pages, dated 1 July 2022.
  - (v) A one page response to the undated letter of Mr Burrows, dated 1 July 2022.
  - (vi) A one page letter addressed “Your Honour”, with one appendix of one page, dated 1 July 2022.
7. All of the 1 July 2022 documents from the respondent had been placed in a bundle along with the documents to which they responded.
8. At the start of the hearing I explained to all parties my concerns that the case management orders had not been complied with. I asked for submissions whether we could continue today. All parties were of the view that they wanted to continue and adopt as evidence the documents they had

submitted. I considered that as all parties were litigants in person, and as the issue was narrow, that it was in the interests of justice to proceed.

### *Witnesses*

9. The respondent stated that he intended to call evidence from three witnesses in attendance. The witnesses were Mr Lee Clucas, Mr Dennis Wilson and Mr Peter Mchowan. Although there were no formal statements from the proposed witnesses there were documents from them in the respondent's appendices. I expressed concerns that formal statements had not been submitted for these witnesses. Both claimants also wanted the witnesses to give evidence. I decided as all parties agreed that it was in the interests of justice to allow the witnesses to give evidence. Although documents were submitted by the claimants for Mr Osterman and Mr Burrows, they were not in attendance and there was no proposal made by the claimants for them to give evidence.

### **Claims and Issues**

10. Each claimant has presented a claim for a statutory redundancy payment.
11. At the start of the hearing, I confirmed with the parties the following were the issues for each claimant.
  - (i) Has the claimant been continuously employed for a period of not less than two years ending with the date of termination of employment?
  - (ii) If so, was the claimant dismissed by the respondent?
  - (iii) Was redundancy the reason the claimant was dismissed? If the claimant was dismissed, it will be presumed that this was by reason of redundancy, unless the respondent proves otherwise (Employment Rights Act 1996, section 163(2)).
  - (iv) If redundancy was the reason, is the claimant entitled to a redundancy payment and if so how much.
12. The respondent confirmed at the hearing it was accepted that both claimants had been employed for a period of not less than two years. The respondent considered there had not been a dismissal but instead that the claimants had both resigned by agreeing with the respondent to terminate their contracts in a mutual termination of contract agreement. The respondent asserted the reason for the resignation were the actions of the claimants' of gross misconduct in stealing copper.
13. The claimants' cases were that they were dismissed, having been left with no choice but to sign the mutual termination of contract letters. The claimants argued that the dismissal for gross misconduct was a sham so that they did not have to be paid redundancy. The theft of copper was not denied but instead it was argued that action was only taken to avoid redundancy payments.

## Procedure, Documents and Evidence

14. Both claimants gave evidence, adopting documents detailed above (paragraphs 3 and 4), and were questioned by the respondent. Mr Andrew Graham, the Director of the respondent, also gave evidence, adopting the documents detailed above (paragraph 6). He was questioned by both claimants. The respondent chose not to call the other witnesses and was advised that without them giving evidence little weight could be placed on documents from those witnesses in the appendices to the documents.

## Findings of Fact

15. Both claimants worked for the respondent as Process Operators. Both claimants had sixteen years of service.

16. The respondent purchased Nottingham Cables Limited, a cable manufacturer, in November 2019. The previous owner of Nottingham Cables Limited, Mr Burrows, was retained as a consultant and was to manage the day to day operations of the respondent's business.

17. The four employees, at the time of the sale of Nottingham Cables Limited, were transferred to the respondent's business.

18. One of the employees, Mr Ian Strickland, who ran the extruder machine, left employment almost immediately after the respondent took over. This left three employees who were the claimants and Mr Osterman.

19. The first claimant mainly ran the taping process and the second claimant undertook bunching. Mr Osterman worked in both bunching and taping.

20. The departure of Mr Strickland meant the company was no longer able to make cables and therefore became a bunching and taping facility only.

21. Trackers on a company vehicle identified that Mr Burrows had twice visited a local scrapyard in July 2020. This ultimately led to an internal investigation by the respondent, into whether copper wire was being removed from the company premises. Both claimants were interviewed as part of the investigation. It was considered by the respondent that there were substantial discrepancies between the amount of copper coming in and going out of the factory.

22. On 12 August 2020, Mr Burrows admitted to the respondent that copper was being removed. He stated it was in small amounts and had been normal for many years. The proceeds were shared among the workforce. The respondent decided to allow Mr Burrows to continue working, but it was made clear to him that as the manager it was his responsibility to ensure that the theft of copper ended.

23. I do not find that there is evidence as asserted by the first claimant that Mr Graham received money for the sale of copper. The first claimant did not himself see such and no direct evidence was given of such taking place. Mr Graham denied receiving such money and this is accepted.

24. Since February 2021, a camera had been fitted in the factory for insurance purposes.
25. Before May 2021, Mr Dennis Wilson and Mr John Briggs had been contracted by the respondent to work on improving processes, and carrying out maintenance on machines, in the factory.
26. In May 2021, it was reported to the respondent by Mr Wilson that several 25kg bags of copper had been found hidden behind a machine.
27. The respondent watched video from the cameras that has been fitted in the factory. The video showed seven bags of copper being found behind a machine. The video showed earlier that day the first claimant and second claimant, through a mechanism they had set up, removing copper from a reel and placing it in bags. The claimants could later be seen, along with Mr Burrows, removing and loading the bags into Mr Burrows' car.
28. On 1 June 2021, both claimants were invited for a meeting. They were both told by the respondent that they could either enter a "mutual termination agreement" or be dismissed for gross misconduct with the matter referred to the police. Both claimants eventually signed the "mutual termination agreement" that day.
29. The third employee, Mr Osterman, was also invited to the meeting. He had resigned previously but had not given notice in writing. Although there was no evidence of him being involved in the May incident he also signed a "mutual termination agreement". Mr Burrows was also invited to the meeting and his consultancy was terminated.
30. Following the termination of the claimants' contracts, on the 1 June 2021, Mr Wilson proposed that the respondent subcontracted the only contract they had left to Cable and Taping UK Limited. Mr Wilson is the Director of that company. The respondent took up the proposal. Without doing so, the respondent would not have been able to complete the contract. Both the claimants and Mr Burrows undertook work with Cable and Taping UK Limited on this contract. The second claimant began such work on 7 June 2021 and left on 10 June 2021. The first claimant continued until the contract ended, which was before the respondent went into Creditors Voluntary Liquidation.
31. In October 2021, the respondent entered Creditors Voluntary Liquidation.

## **Law**

32. Section 135 Employment Rights Act 1996 requires an employer to pay a redundancy payment to an employee who is dismissed by reason of redundancy.
33. Section 163(2) Employment Rights Act 1996 creates, on a claim for a statutory redundancy payment, a presumption that an employee who had been dismissed had been dismissed for redundancy unless the contrary is proved.

34. In Martin v Glynwed Distribution Ltd 1983 ICR 511, CA, Sir John Donaldson MR sated: 'Whatever the respective actions of the employer and employee at the time when the contract of employment is terminated, at the end of the day the question always remains the same, "Who really terminated the contract of employment". If the answer is the employer, there was a dismissal.'

## Conclusions

*Has the claimant been continuously employed for a period of not less than two years ending with the date of termination of employment?*

35. Both claimants had, at the time of dismissal, 16 years of service. No issue was taken by the respondent on this.

*Was the claimant dismissed by the respondent?*

36. I find that the claimants' were dismissed by the respondent. It was clearly the actions of the respondent, giving the claimants no feasible alternative than to resign, that terminated the contract. In the alternative they would have been reported to the police along with being dismissed.

*Was redundancy the reason the claimant was dismissed? If the claimant was dismissed, it will be presumed that this was by reason of redundancy, unless the respondent proves otherwise (Employment Rights Act 1996, section 163(2)).*

37. The respondent has proven that the reason for dismissal was not redundancy (Employment Rights Act 1996, section 163(2)). The respondent had investigated theft of copper in 2020 and there was clear evidence of theft of copper by the claimants in May 2021. The reason for the dismissals was therefore misconduct.

38. I do not find that the dismissals were contrived to avoid redundancy payments. The claimants would have been aware from their interviews, in the 2020 investigation, that theft of copper was not acceptable to the respondent. Yet, theft of copper took place in May 2021. The contracting out to Cable and Taping UK Limited followed from the dismissal of the claimants. The respondent no longer had a workforce to complete the contract. It was not until October 2021 that the respondent went into Creditors Voluntary Liquidation; several months after the dismissal of the claimants.

---

**Employment Judge Cansick**

Date: 27 October 2022