



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

Mrs E Boden

v

Mr B W Taylor t/a Wendy's Deli and Coffee

**Heard:** via Cloud Video Platform in the Midlands (East) Region

**On:** 23 November 2022

**Before:** Employment Judge Ayre sitting alone

**Representatives:**

**Claimant:** In person

**Respondent:** Did not attend and was not represented

## JUDGMENT

1. The respondent breached the claimant's contract of employment by not giving her one week's notice of termination of her employment or paying her in lieu of notice. The claimant is entitled to one week's pay by way of damages for breach of contract.
2. The respondent made an unlawful deduction from the claimant's wages by not paying her for 4 days and 1 hour that she worked prior to the termination of her employment, and also by not paying her 4.5 days' holiday pay to which she was entitled on the termination of her employment.
3. The respondent is ordered to pay the total sum of **£1,035.50** to the claimant, less such deductions for tax and national insurance contributions as the respondent may be required by law to make.

## REASONS

## **Background**

1. The claimant was employed by the respondent as a delivery driver / sales person from 6 July 2021 to 1 June 2022.
2. On 30 June 2022 the claimant issued proceedings in the Employment Tribunal, following a period of early conciliation that started on 6 June 2022 and ended on 30 June 2022. Her claim was for 8 days' unpaid wages, for days worked in the weeks commencing 23 and 30 May 2022, and for one week's pay in lieu of notice. The claimant put the value of her claim at £988 in total.
3. The respondent filed a response to the claim indicating that it intended to defend the claim. In its response, the respondent stated that:
  - a. The claimant only worked four days (not 5) in the week commencing 23 May 2022 as she was off sick on Friday 27 May;
  - b. The claimant was paid for those 4 days on 3 June 2022;
  - c. The claimant did not complete a time sheet for the 3 days worked in the week commencing 30 May 2022.
  - d. The claimant was paid for 8 hours on Monday 30 May, 8 hours on Tuesday 31 May, and 7 hours on Wednesday 1 June 2022. This payment was made to her on 15 July 2022.

## **The Proceedings**

4. The case was listed for a final hearing today. The hearing was due to take place in person in Lincoln, because the respondent had indicated on the ET3 form that he was unable to participate in a video hearing.
5. On the morning of the hearing the respondent wrote to the Tribunal stating that he had ceased trading and would not be attending the hearing.
6. The hearing was therefore converted to a hearing via Cloud Video Platform, as the claimant is able to participate in a video hearing.
7. The claimant attended the hearing and gave evidence under oath. The respondent did not attend. Both parties had submitted documents to the Tribunal in advance of the hearing and I have considered those documents.

## **The Issues**

8. The issues that fell to be considered therefore were as follows:

- a. Did the respondent breach the claimant's contract of employment by not giving her any notice of termination or paying her in lieu of notice? The claimant claimed to be entitled to one week's notice.
- b. Did the respondent make an unlawful deduction from the claimant's wages by:
  - i. Not paying her for all of the hours that she worked prior to the termination of her employment; and
  - ii. Not paying her for accrued but untaken holiday pay on termination of her employment?

9. The claimant did not mention the question of holidays in the claim form. She was unable to explain why she had not mentioned holiday pay when completing the form, but she did mention holiday pay in the written statement that she sent to the Tribunal on 5 August 2022.

10. To the extent that an application to amend the claim is required to allow the claimant to pursue a complaint for holiday pay, I grant that application. I treat the application to amend as having been made on 5 August. It was made on time, within three months of the date of termination of the claimant's employment.

11. The claimant is a litigant in person. The balance of injustice and prejudice favours allowing the amendment. It is not a substantial one, as the outstanding holiday pay claimed by the claimant is just 2.5 days.

### **Findings of Fact**

12. The claimant was employed by the respondent from 6 July 2021 to 1 June 2022 when she was dismissed with immediate effect.

13. The claimant worked 40 hours a week (8 hours a day) and was paid £9.50 an hour. Her normal hours of work were from 7 am to 3.30pm Monday to Friday, with 30 minutes unpaid break each day. The claimant was expected to complete a time sheet at the end of her shift each Friday, recording the hours that she worked that week.

14. The claimant's role involved driving one of the respondent's vans and delivering food to customers. On 26 April 2022 the claimant was involved in an accident when driving the respondent's van. The hatch on the van had come open whilst the claimant was driving.

15. The claimant was not able to report the accident on the day it happened because when she returned to the respondent's premises at the end of her shift the respondent was not there. The following day the respondent told the claimant that he knew about the accident and asked her how it had happened. The claimant told him and showed him the van.

- 16.** Some time later (between the date of the accident and the date the claimant was dismissed) the respondent asked his partner to show the claimant how to close the hatch properly. When the respondent's partner closed the hatch it sprang open again, indicating that there was a fault with the hatch.
- 17.** The respondent was therefore aware of the accident from at least 27 April 2022 onwards, and despite discussing it with the claimant on two occasions, did not give any indication that the claimant had done anything wrong.
- 18.** In late May 2022 the claimant was offered another job with North Lincs and Goole hospital. The hospital contacted the respondent for a reference for the claimant. The respondent said that he needed signed permission from the claimant before he would supply a reference.
- 19.** On 31 May 2022 the claimant gave the respondent signed permission to provide a reference. The next day, 1 June 2022, the respondent called the claimant into the café at approximately 3pm. He told her that he was dismissing her with immediate effect because the accident in the van meant that he could no longer trust her to drive the van.
- 20.** The claimant had been driving the van for approximately five weeks since the accident, and since the respondent had become aware of her involvement in the accident. It is not clear to me why the respondent suddenly decided on 1 June that he could no longer trust the claimant and needed to dismiss her with immediate effect.
- 21.** The claimant was asked to leave immediately on 1 June and left at approximately 3.30pm or shortly before. She was not given notice of termination of her employment and did not receive any payment in lieu of notice. She was not able to complete a timesheet for the last week that she worked because she was asked to leave the premises immediately.
- 22.** In the week before she was dismissed, namely the week commencing 23 May 2022, the claimant worked four days (Monday to Thursday) and called in sick on the Friday. She subsequently asked the respondent if she could take Friday as holiday so that she would be paid for that day and the respondent agreed.
- 23.** On 3 June 2022 the respondent paid the claimant £304 gross and £269.14 net by way of 32 hours' holiday pay. This pay covered four days in the week commencing 23 May 2022. It was holiday pay rather than normal pay. The claimant should have been paid four days' normal pay and one day's holiday pay for that week.
- 24.** In the final week of her employment the claimant worked 3 eight hour days, a total of 24 hours. On 15 July 2022 she was paid for 23 hours. She was therefore underpaid by one hour (£9.50 gross) in the final week of her employment.
- 25.** The claimant's holiday year ran from January to December. She accrued 11.5 days' holiday prior to the termination of her employment.

She took 5 days holiday and was paid for an additional 4 days' holiday on 3 June 2022. She was therefore paid for 9 days' holiday in 2022, out of a total holiday entitlement of 11.5 days. The claimant's hourly rate of pay was £9.50 and her daily rate of pay was £76 (8 x £9.50) gross. Her gross weekly pay was £380.

**26.** The claimant was also allowed by the respondent to carry forward two days' untaken holiday from the 2021 holiday year.

## **The Law**

**27.** Article 3 of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 provides that:

*“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 (other than a claim for damages, or for a sum due, in respect of personal injuries) if –*

- (a) The claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;*
- (b) The claim is not one to which article 5 applies; and*
- (c) The claim arises or is outstanding on the termination of the employee's employment.*

**28.** This provision gives employment tribunals the power to hear claims for damages for breach of a contract of employment or any other contract connected with employment.

**29.** Section 13 of the Employment Rights Act 1996 states that:

*“(1) An employer shall not make a deduction from wages of a worker employed by him unless –*

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

*(3) 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 (after deductions) 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.”*

**30.** Section 23 of the Employment Rights Act 1996 (“**the ERA**”) gives workers the right to bring complaints of unlawful deduction from wages to the Employment Tribunal.

**31.** Section 86 of the ERA sets out the rights of employees to minimum periods of notice and provides that employees who have been

continuously employed for more than one month, but less than two years are entitled to not less than one week's notice of termination.

32. Section 86(6) states that the right to notice "*does not affect any right of either party to a contract of employment to treat the contract as terminable without notice by reason of the conduct of the other party.*"

### **Conclusions**

33. The claimant was entitled to a statutory notice period of one week. She was dismissed on 1 June 2022 without notice or payment in lieu of notice.

34. The actions of the claimant did not amount to gross misconduct entitling the respondent to dismiss her without notice. The accident on 26 April was just that, an accident. The respondent was aware of the accident from the 27 April 2022 and took no disciplinary action until 1 June 2022. He trusted the claimant to drive the van until 1 June.

35. The conduct of the claimant when she had the accident did not entitle the respondent to treat the contract of employment as terminable without notice. The claimant is therefore entitled to one week's salary by way of compensation for breach of contract / notice pay.

36. The respondent is therefore ordered to pay the claimant a week's pay of £380 gross in lieu of her notice period.

37. The claimant was entitled to be paid four days' pay for week commencing 23 May – a total of 32 hours, and an additional hour's pay for the week commencing 30 May. The respondent made an unlawful deduction from the claimant's wages in the sum of £313.50 (33 x £9.50) gross.

38. In addition, the claimant was entitled to 2.5 days' accrued holiday for the 2022 holiday year, and 2 days' holiday carried over from the 2021 holiday year. The claimant was therefore entitled to 4.5 days' holiday pay on the termination of her employment – a total of £342. By failing to pay this holiday pay the respondent made an unlawful deduction from the claimant's wages in the sum of £342 gross (4.5 days x £76 a day).

39. The claimant is therefore entitled to the following sums:

- a. Damages for breach of contract (notice pay): £380
- b. Unpaid wages: £313.50; and
- c. Holiday pay: £342.

40. This comes to a total of £1,035.50. The respondent is ordered to pay £1,035.50 to the claimant, less such deductions for tax and national insurance contributions as the respondent is required by law to make.

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Employment Judge Ayre

23 November 2022

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JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE