



# EMPLOYMENT TRIBUNALS

**Claimant:**  
**Mr S Collins**

**Respondent:**  
**Bicks Chicks  
Ltd**

**Heard at:**                   **Wales CVP**                   **On: Friday 9<sup>th</sup> December 2022**

**Before:**                   **Employment Judge A Frazer**

**Representation:**  
Claimant:  
In person

Respondent:  
Not in  
attendance

## JUDGMENT AND REASONS

### JUDGMENT

1. The Claimant's claims for unfair dismissal and wrongful dismissal are well founded and shall succeed.
2. There shall be a reduction to the Claimant's basic and compensatory awards on the basis of contributory fault by 75%.
3. The Claimant's claims for a redundancy payment, holiday pay and unpaid wages are not well founded and do stand dismissed.
4. The Respondent failed to provide the Claimant with a statement of employment particulars contrary to s.1 Employment Rights Act 1996.

5. The Respondent failed to provide the Claimant with itemised pay slips contrary to s.8 Employment Rights Act 1996.
6. The Respondent is ordered to pay to the Claimant compensation in the sum of **£2, 202.37** which comprises the following:

|   |                   |
|---|-------------------|
| Unfair dismissal                              | £1, 458.21        |
| s.1 failure to provide employment particulars | £. 200.47         |
| Balance of notice pay                         | <u>£. 543.69</u>  |
| <b>TOTAL</b>                                  | <b>£2, 202.37</b> |

7. There is no recoupment.

## REASONS

1. This is the hearing of claim no 1600123/ 2022. The Claimant made an ACAS notification on 12<sup>th</sup> January 2022 and the certificate was issued on 28<sup>th</sup> January 2022. The claim form was presented on 30<sup>th</sup> January 2022.
2. At box 8 of his ET1 the Claimant claimed unfair dismissal, a redundancy payment, wrongful dismissal, holiday pay, arrears of pay and other payments. The Claimant claims that he was not issued with a s.1 statement of employment particulars and that he was not provided with payslips from his employer.
3. The Respondent did not attend the hearing by 1000. Therefore, I asked my clerk to phone the Respondent to ask where they were. My clerk reported back that upon saying that he was from the employment tribunal and querying the Respondent's whereabouts the person on the other end of the phone put the phone down. The clerk phoned up again and the same thing happened.
4. I had regard to the notice of hearing dated 3<sup>rd</sup> August 2022. The notice was sent to the Respondent at its last known business address.
5. I noted that I had received a number of documents from the Respondent which it asked the tribunal to take into account: these were sent yesterday. These documents were as follows: Response SC v BM; Simon Collins dismissal letter; Simon Collins income and staff confirmation. There was also a document entitled 'Incident INC5456328'.
6. I had a bundle of documents from the Claimant, a witness statement, an addendum statement, a statement of current income. From the Respondent I had a letter from Chris Bickley dated 6<sup>th</sup> December 2022, a witness statement

from Terry Davies dated 29<sup>th</sup> September 2021 and a letter entitled 'Bicks Chicks response to Claimant Simon Collins' dated 30<sup>th</sup> September 2021.

7. I decided whether I could proceed and I decided that I could. The Respondent would have been aware of the hearing but had not attended despite the notice of hearing having been sent to both parties on 3<sup>rd</sup> August 2022. At that stage I had no other indication of why the Respondent was not in attendance.
8. Part way through the hearing and once the Claimant had started to give his evidence an email from the Respondent that had been sent to the tribunal at 0908 this morning was brought to my attention by the administrative staff. This was to the effect that Mr Bickley of the Respondent had emailed the tribunal many times about a link to upload his statement but that he had not had any feedback from the tribunal. He wished to adjourn the hearing. I considered this application anew. I raised it with Mr Collins who objected to the request for an adjournment. I determined that I would not accede to the request. I had Mr Bickley's documents that were sent to the tribunal yesterday yet he did not attend the hearing this morning. The request for adjournment was made last minute on the morning of the hearing and he not do it in attendance. When one of the administrative staff attempted to contact the Respondent this morning someone put the phone down on him twice. If Mr Bickley had truly wanted to represent his interests he ought to have attended the hearing in person and made representations including for adjournment but he did not. I did not find that it was in the interests of justice in a claim of this nature to adjourn the case, which would warrant further delay to both parties.
9. I heard evidence from Mr Collins on oath. I also heard evidence from Mrs Collins on the discrete point as to what hours the Claimant was doing from 18<sup>th</sup> December 2021 and when her twins were able to take up their nursery places so as to allow the Claimant to return to work full time.
10. I heard representations from the Claimant in closing. I took into account the Respondent's witness statements and documents but because neither Mr Bickley nor Mr Davies were not present to be cross-examined, I was not able to attach as much weight to their statements as had otherwise been the case.
11. The issues that I had to consider were as follows:

*Unfair dismissal*

- 11.1 Whether the Respondent had a genuine belief based on reasonable grounds after having conducted as much investigation into the case as was reasonable in the circumstances. Whether the decision to dismiss and the procedure fell within the band of reasonable responses.
- 11.2 Whether there should be any reduction for contributory fault on the basis of the Claimant having attended work without having adhered to the Government's guidelines on self-isolation.

- 11.3 Whether there should be an ACAS uplift and how much on any award for the Respondent's failure to follow a procedure.

*Unlawful Deductions from Wages*

12. Whether there should be payment for unpaid wages.

*Redundancy*

13. The Claimant confirmed that as this was an unfair dismissal based on conduct he would not be entitled to a redundancy payment. I have dismissed this claim.

*Wrongful dismissal (notice)*

14. Whether the Claimant was guilty of gross misconduct.

*s.1 Failure to provide employment particulars*

15. Whether the Claimant received a statement of employment particulars from the Respondent.

*s.8 A failure to provide payslips*

16. Whether the Claimant received payslips from the Respondent.

*Holiday pay*

17. The Claimant confirmed that there was no claim for accrued but untaken holiday pay at the date of termination of employment and so this claim has been dismissed.

**Findings of Fact**

18. The Claimant was employed by the Respondent as a butcher between 1<sup>st</sup> November 2009 and 4<sup>th</sup> January 2022 when his employment was terminated summarily. The Claimant was mainly involved in the preparation of meats for onward distribution to both commercial and domestic customers, in particular the preparation of packages of burgers and sausages in response to customer orders.
19. The Claimant was employed on reduced hours for most of 2021 as he had twins under the age of 3. He worked part time so that he could exercise childcare responsibilities. His hours were 600 to 1130 Monday to Saturday but he was quite often in from 0500 because he was required for overtime. He produced whatsapp messages which showed the requirement from the Respondent to attend at 0500 in May and June 2021.

20. From 13<sup>th</sup> December 2021 Mr Collins' children were attending nursery on extended hours as they were due to be 3 on 18<sup>th</sup> December 2021 and were able to benefit from attending for free between 0900 and 1500. The Claimant says that the Respondent had asked him frequently when he was to return to work full time. He says that he returned on 18<sup>th</sup> December. I find that this is plausible on the basis that it was around this point in time when his twins attended nursery and he was able to increase his hours. From 18<sup>th</sup> December 2021 his hours increased from 0600 to 1130 to 0600 to 1400. This period of the year was a busy period for the Respondent as it was Christmas.
21. At the time of the events the country was still under the grip of the COVID pandemic. At that time the government guidance was that if someone was infected they should remain in self isolation for at least 7 days.
22. Christmas day fell on a Saturday in 2021 and Boxing Day was the Sunday. Therefore there were bank holidays on Monday 27<sup>th</sup> December and on Tuesday 28<sup>th</sup> December 2021. The next working day for the Claimant fell on Wednesday 29<sup>th</sup> December 2021.
23. The Claimant says that the Respondent had not emailed or sent employees any communications about what would happen if they came into work having tested positive for COVID or not having observed the period of self-isolation. He said that he was not aware of the company's COVID risk assessment procedures. He said that there was nothing posted up on a notice board or that was visible to him at work which would bring his attention to the need to observe any process for circumstances when employees had COVID. He said that he was just aware that the Respondent carried out forehead temperature tests.
24. On 25<sup>th</sup> December 2021 the Claimant tested positive for COVID. He said that he then tested on 26<sup>th</sup> December but that the tests were negative. He said that in relation to the tests he did not have 100 per cent confidence in the tests as to whether he was doing them right but he trusted the result as he did not have any symptoms on 26<sup>th</sup> December. He said that the closest PCR testing unit was in Telford which was far away so he did not get a PCR test done.
25. On 29<sup>th</sup> December after he finished work the Claimant attended the chemist to buy COVID testing kits. His eldest daughter had been suffering from COVID and had been testing every day.
26. The Claimant came in to work on 29<sup>th</sup> December. On that day after work he had some whatsapp correspondence with Andrew Bickley, Director. He said *'was in today, feel like shit and Jorja tested positive, haven't done my tests yet'* to which Andrew Bickley replied *'when you doing test? Doesn't look good when you've already asked for the time off'* to which the Claimant said *'knew you'd think that that's why I went in today after testing positive Christmas day'*. Andrew Bickley then said *'well why didn't you say that you had????' 'If I knew we were gonna be short staffed as if I told u rethink [sic] I was swinging the lead'*. The response from Andrew was *'all you had to do was say you'd tested*

*positive and show us results?? Looks worse now the fact you've asked for time off came in and say you've got COVID'.*

27. On 30<sup>th</sup> December 2021 the Claimant texted Terry Davies with three positive COVID tests. On that occasion he acknowledged that he was going to leave the Respondent short-staffed but felt he should 'steer clear' until the virus had gone. In response to this Mr Davies suggested that he come in at 1am and work until the lads came in to do batches of sausages and burgers. There is text message correspondence to this effect in the bundle.
28. The dismissal letter sent to the Claimant refers to his absence on 28<sup>th</sup> December but it was agreed that the date which was the subject of the disciplinary issue was 29<sup>th</sup> December when the Claimant came in. The letter was dated 11<sup>th</sup> January 2021 but should read 22. The allegation was that the Claimant did not report the positive test done on 25<sup>th</sup> December and that he had worked on 29<sup>th</sup> putting other members of staff at risk. The Respondent also said 'We have also requested you send a copy of the PCR test taken to confirm you had COVID and at the time the procedure was to self-isolate'.
29. The Claimant says that he had informed Mr Terry Davies of his COVID tests on 25<sup>th</sup> and 26<sup>th</sup> when he returned on 29<sup>th</sup> December. He said that he had not mentioned to Andrew Bickley that he had tested negative on Boxing Day but that on 29<sup>th</sup> December everyone at work knew that he had tested negative on the Boxing Day.
30. The Claimant says that when he came into work on 4<sup>th</sup> January 2022 he was in the cutting room when Chris Bickley popped his head through the hatch to say he wanted to have a word with the Claimant. The Claimant says that he was not given the right to have a companion present. He said that Mr Terry Davies was present. He said that he was shown the printout of the whatsapp conversation that he had with Andrew Bickley and was dismissed on the spot. He said this lasted less than a minute.

## **Submissions**

31. The Claimant submitted that the Respondent had failed to adhere to any disciplinary procedure. Terry had never instructed him to remain home and by contrast had suggested that he came in during the night after learning of his test result on 30<sup>th</sup>. The Respondent was hypocritical by claiming to be adhering to the law. Therefore it would be unfair to reduce any award for contributory fault. The Claimant submitted that he had no contract, no payslips, no P60 and no P45. He had shown that he was on full time hours as he had sent in a video of himself. He had shown that he had worked Saturdays by way of texts in the bundle.

## **The Law**

32. Under s.98(2)(b) ERA 1996 conduct is a potentially fair reason for dismissal. Under s.98(4) ERA 1996 where an employer has made out a potentially fair

reason it is for the tribunal to decide whether the dismissal is fair or unfair and depends on whether in the circumstances including the size and administrative resources of the employer, the employer had acted reasonably or unreasonably in treating it as a sufficient reason for dismissal and that this should be determined according to the equity and substantive merits of the case.

33. **BHS v Burchell [1978] ICR 303** applies in cases of conduct dismissals. The employer must have a genuine belief based on reasonable grounds after having conducted as much investigation into the case as is reasonable in the circumstances.
34. I remind myself that it is not for me to substitute my own judgment when determining whether the dismissal or the procedure engaged was within the band of reasonable responses.
35. I am to have regard to the ACAS Code of Practice on Disciplinary Procedures in assessing whether or not an employer has acted reasonably. This can be taken into account both in terms of assessing reasonableness at the liability stage and in determining whether any award of compensation should be uplifted.

## **Conclusions**

36. The agreed facts in this case are that the Claimant came into work 4 days after having tested positive for COVID. He tested negative on 26<sup>th</sup> December. He then tested positive again and did not return to work. He was dismissed for coming into work on 29<sup>th</sup> December because it was said that he put other members of staff at risk.
37. The Respondent has established a potentially fair reason namely conduct. However it failed to follow any procedure. The Claimant was not given advance warning of any meeting. The Respondent did not inform the Claimant of the basis of the disciplinary and give him a chance to put his case. The Claimant was not given the opportunity to appeal. Therefore although I find that the Respondent is a small employer it did not follow the basic tenets of good industrial relations practice.
38. I also find that the Respondent did not follow an adequate investigation in that the Claimant was not asked for his version of events. Therefore, the Respondent did not properly establish the facts and the decision to dismiss was not open to it as it did not conduct the process fairly. Therefore the dismissal is unfair.
39. There has been difficulty establishing a week's pay for the Claimant on the basis that he was not in receipt of payslips but I accept on balance that he was paid £400 from 18<sup>th</sup> December and that he returned full time having heard his evidence about the changes to his childcare situation. I had difficulty establishing his pay from the deposits in his bank statements as the payments

were composite and it was not clear what hours these related to and could have included overtime.

40. The payments to HMRC from the Respondent only went up to September 2021 which was at the time that the Claimant accepts that he was on reduced hours.
41. I have considered whether to reduce both his compensatory and basic awards on the basis of ss.123(6) ERA 1996 and 122(2) ERA 1996 respectively. I do reduce the award in line with these sections. The Claimant tested positive on 25<sup>th</sup> December yet came into work on 29<sup>th</sup> December in breach of the Government's self-isolation guidelines, which were that those testing positive should remain in isolation for 7 days. Against this background however I have taken into account the evidence that there was some pressure to come into work on 30<sup>th</sup> December from Mr Davies when he knew the Claimant had tested positive because of staff shortages. The suggestion had been made by Mr Davies that he should come in at 1am. This was after the date to which the disciplinary related. I find that ultimately, it was the Claimant's responsibility to observe the government guidelines. The Claimant contributed to his dismissal by 75% because he although he tested negative on 26<sup>th</sup> he failed to observe the guidelines on self- isolation and came into a public place only 4 days after having tested positive. He accepts that he did not have confidence in the tests. Furthermore, there was no PCR result.
42. The Claimant made claims for unpaid wages in relation to dates in December 26<sup>th</sup>, 27<sup>th</sup> and 28<sup>th</sup> December. There was evidence of a deposit paid into the Claimant's bank account of. £1, 000 on 6<sup>th</sup> January but no evidence as to what dates and times of work this related to. It was impossible to establish whether this deposit included pay for these dates.
43. The Claimant confirmed that he did not have a claim for accrued but untaken holiday at the date of termination.
44. As for the Claimant's notice I could not say that the Claimant was guilty of gross misconduct but I did consider that he was guilty of very serious misconduct which may have warranted a final written warning. The Claimant mitigated his loss in his notice period. The balance of money owing is £543.69.
45. I made no award under s.8 ERA 1996.
46. Therefore the award I make is as follows.

### **Basic award**

Claimant's date of birth at termination was 42.

A week's pay at £400.95



12 years at 1 week's pay

£4, 800 basic award.

(Reduce by 75 per cent)

Basic award to **£1, 200**

**Compensatory award**

The claimant bettered his income with the Respondent mitigating his loss on 17<sup>th</sup> January 2022.

Therefore the period of loss is from 4<sup>th</sup> January to 17<sup>th</sup> January which is 13 days.

**£801.90**

*Increase by 20 per cent ACAS Code*

So add £230.95

= £1032.85

(Reduce by 75 per cent)

**= £258.21**

***s.1 fine***

I find that the Claimant was not provided with any employment particulars and make an award of two weeks' pay.

400.95 x 2 less contributory fault reduction

0.75 x reduction under s.123(6)

**= 200.47**

**Total Award**

Basic award **1200**

Compensatory award **258.21**

**200.47** s.1 ERA 1996

Balance of notice                    **£543.69**

Total award:                         **£2, 202.37**

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Employment Judge A Frazer  
Dated: 13<sup>th</sup> December 2022

JUDGMENT REASONS SENT TO THE PARTIES ON 16 December 2022

FOR THE SECRETARY TO EMPLOYMENT TRIBUNALS Mr N Roche