



EMPLOYMENT TRIBUNALS

Claimant: Mr G Burgar

Respondent: Newstreet Motorcycles Limited

Heard at: Croydon

On: 12 December 2022

Before: Employment Judge Barker

Representatives

For the claimant: Mr Johnson, non-practising solicitor

For the respondent: In person, (Mr R Ticehurst, director)

RESERVED JUDGMENT

The claimant's claims succeed. The respondent must pay to the claimant the sum of £2764.13 subject to deductions for tax and National Insurance, and £263.55 gross with no further deductions made. These sums are comprised as follows:

1. The claimant's claim for damages for breach of contract succeeds. The respondent must pay to the claimant the sum of 1 month's wages, £2,333.33, subject to deductions for tax and National Insurance.
2. The claimant's claim for unpaid annual leave succeeds. The respondent must pay to the claimant the sum of 4 days pay, which is £430.80, subject to deductions for tax and National Insurance.
3. The respondent did not comply with the requirement to provide the claimant with a workplace pension. The respondent is to compensate the claimant for contributions to a workplace pension that they should have made at the statutory minimum rate of the claimant's salary for the duration of his employment plus notice period, which is £326.40 and is not subject to deductions for tax or National Insurance.
4. If sums are paid within 14 days of the date this judgment is sent to the parties, no interest is payable.

REASONS

1. The claimant claims damages for breach of contract of one month's pay payable on termination of his employment and for the payment of accrued but untaken holiday pay, and for compensation for the respondent's failure to provide him with a workplace pension.
2. At the outset of the hearing, the Tribunal discussed with the parties the issues that it would need to decide. These were:
 - a. The terms of the claimant's contract with the respondent (if any) regarding notice pay, holiday and pension.
 - b. Did the claimant waive his right to notice or refuse to work his notice period?
 - c. If not, did the respondent have any other reason to not pay the claimant for his period of notice, such as a serious breach of contract by the claimant?
 - d. What annual leave had the claimant accrued at the end of his employment?
 - e. What annual leave had the claimant taken at the end of his employment?
 - f. Can the claimant add a claim for a failure to provide a workplace pension to his claim?
 - g. Was the respondent obliged to provide a workplace pension for the claimant and did it fail to do so?
 - h. Can the claimant claim interest on any award of damages made against the respondent?
3. It was clear from the conversation that the Tribunal had with the respondent at the start of the hearing that the respondent had not taken steps to consider whether the claimant's claim had any merit. This was despite Mr Johnson having sent a detailed letter to the respondent early on in the proceedings outlining why the claimant believed that the respondent owed him money. The respondent's first question to the Tribunal was that he did not know what he was having to "defend". He made reference to Mr Johnson having made numerous "financial demands" and "threats" to him including in relation to having to pay costs.
4. Mr Johnson is a retired solicitor who is a member of the claimant's family. Although he is not appearing as a professional representative it is apparent that he is aware of his professional duty to the Tribunal and to the respondent as an unrepresented party. Having read his letter to the respondent, I do not accept that it was threatening to the respondent. It puts forward the claimant's case and his reasons for believing that the respondent owes him money.
5. Mr Johnson explained that when he was first approached by the claimant for help, he was not aware that Employment Tribunal proceedings had already been started. He sent the respondent a County Court small claims pre-action letter, as is required as part of the pre-action protocol. He accepts that this letter covers the same

financial claims as these proceedings. County court claims involve a consideration of costs in the way that Tribunal proceedings do not, and I accept that it was proper for Mr Johnson to have sent the pre-action letter he sent even though he now accepts it was not necessary and that it was sent due to miscommunication.

The Claimant's Application to add a claim for unpaid pension

6. Mr Johnson told the Tribunal that the issue of the claimant's workplace pension was first mentioned to the respondent in July 2022. The claimant applies to add this issue to his claim in this Tribunal. It is the respondent's case that he has "looked into" the issue of a workplace pension only recently, but it was also his case that he discussed workplace pensions at the claimant's interview and informed him that the business could not afford to offer him a pension, so he considers that the claimant took the job knowing that one would not be made available. That this is still the respondent's submissions on the point suggests that Mr Ticehurst has not looked into the issue of a workplace pension, as otherwise he would be aware from the information available on the gov.uk website that he has a legal obligation to provide his staff with a workplace pension and make contributions into it.
7. The respondent also said, correctly, that the claimant is late in adding this complaint to his claim. The Tribunal's discretion to add this complaint to his claim is set out in the question "was it not reasonably practicable for the claimant to bring this claim in time"? I accept that the claimant did not know that he was entitled to complain about the lack of a workplace pension. I accept that as soon as he discovered this, his representative notified the respondent that this would be raised as an issue in this claim. I also accept Mr Johnson's point which is that the claimant is not too late to bring the claim for unpaid pension contributions in the County Court, and indeed has issued proceedings in the County Court already for the reasons set out above.
8. Considering the factors in *Selkent Bus Company Limited v Moore* [1996] ICR 836 and *Vaughan v Modality Partnership* UKEAT/0147/20/BA, I allow the claimant's amendment. The balance of prejudice leans in favour of allowing the claimant to add the complaint; the respondent has been given notice for some time that the claimant intends to argue this point and the issue is straightforward for the Tribunal to consider. It is not in the interests of justice for the parties to have to pursue this claim separately in the County Court when this Tribunal has jurisdiction to consider it. I accept that the claimant did not believe that he was entitled to a pension until Mr Johnson discussed the issue with him, and the respondent was notified straight away. Deciding the issue in this proceeding is possible without the respondent needing to provide anything more than oral evidence from Mr Ticehurst, which I have considered.

The respondent's concerns about the fairness of the hearing

9. At the start of the hearing, the respondent raised concerns about what he thought was the unfairness of Mr Johnson representing the claimant, in that he told the Tribunal that Mr Johnson and the claimant had been "bombarding" the respondent with letters and threats and that the respondent was at a disadvantage because the claimant was represented by a solicitor. Taking each of these issues in turn, and

having heard from Mr Johnson on the former point, I find as follows (and told Mr Ticehurst this at the start and end of the hearing itself).

10. Firstly, the Employment Tribunal regularly conducts hearings where one or both of the parties are not legally represented. The Tribunal was established to allow parties to resolve their disputes without the need to instruct a lawyer. I began the hearing by explaining to the respondent what issues and questions the Tribunal would be considering and sought their input. I note that Mr Ticehurst did not wait to listen to this, but interrupted me soon after I had started my explanation to complain about the claimant and Mr Johnson's conduct. I offered to explain the legal tests that the Tribunal would be considering but Mr Ticehurst declined the offer. I consider the legal issues in this claim to be straightforward – in effect I have to decide what the claimant's contractual entitlement was and whether anything happened during his employment or immediately afterwards to affect that entitlement. I told the parties this during the hearing.
11. Although Mr Johnson is a retired solicitor, he was not an employment specialist lawyer. However, he has clearly familiarised himself with the legal issues relevant to the claimant's claims, and for that the Tribunal is grateful. However, the respondent could have also looked on a number of publicly accessible websites such as www.gov.uk or the website of the Citizens Advice Bureau to become more familiar with the claimant's complaints, and this did not happen.
12. Mr Johnson told the Tribunal the occasions on which he had contacted the respondent about the claimant's complaints. I find that Mr Johnson's contact was no more than was necessary and certainly did not amount to a bombardment. Mr Johnson has explained the miscommunication over the County Court proceedings and has accepted that, as matters are being heard in this Tribunal, there can be no further hearings on the same issues anywhere else.
13. During the hearing, the claimant and Mr Ticehurst gave evidence under oath. It was explained to Mr Ticehurst that, having seen the claimant's written statements, this was his opportunity to ask him any questions on any points that he disagreed with. Mr Ticehurst was hesitant about doing so, and therefore I offered to Mr Ticehurst that I would ask the claimant the questions that I thought would be helpful and that if he wished, he could ask any remaining questions he wanted afterwards. Mr Ticehurst accepted my offer and I asked the claimant a series of questions about his written evidence and where it contradicted that of the respondent. Afterwards, Mr Ticehurst declined the offer of asking the claimant any more questions.
14. At the end of the hearing, Mr Ticehurst said he wished to ask a question. He asked whether, taking "article 6 of the Human Rights Act" into consideration, this matter could be "escalated" into a criminal case. When asked on what grounds he thought this was appropriate, his answer was that "*only in a criminal court can a fair trial be garnered*" and that criminal proceedings were, in his view, necessary to give the matter the consideration it needed. It was explained to him that the Employment Tribunal was the correct jurisdiction for workplace disputes to be resolved and I reminded him of the steps I had taken, set out above, to ensure that he understood what was being considered and to assist him in presenting his case.

15. He told the Tribunal that he considered that a criminal trial was necessary because of *"the effects it's had on my health"* and that the claimant's claim had caused him and his partner *"months of hell"*. He complained again about Mr Johnson's conduct. Mr Johnson's submission, which I accepted, was that he had sent three emails to Mr Ticehurst since the start of his time representing the claimant along with a bundle of documents and a set of submissions to the Tribunal. This is absolutely proportionate. As noted above, it would appear that the respondent has failed to consider whether the claimant's claims had any merit, in other words, they failed to consider whether in fact, they might have done something wrong. Had they done so, they may have considered the claimant's actions less objectionable and they could have taken the opportunity, possibly with the help of ACAS, to resolve the matter sooner.
16. The claimant is entitled to ask the Tribunal to resolve his dispute with his former employer and has done so in a manner that was reasonable. I find that the hearing was also conducted, as far as was possible in the circumstances, in an open and accessible manner and efforts were made to ensure the respondent could participate fully and that there were no issues affecting a fair hearing that were within the Tribunal's control.

Findings of Fact

17. The claimant was employed by the respondent as a senior motorcycle mechanic at the respondent's garage from 4 January 2022 until his dismissal on 30 May 2022. A certain percentage, said by Mr Ticehurst to be small, of the respondent's work was in carrying out MOT testing. I accept that the claimant is an experienced motorcycle mechanic. The respondent is a small employer and aside from Mr Ticehurst, who is a director of the respondent, employed only another mechanic ("Tillo") part-time alongside the claimant, who was full-time. Mr Ticehurst's partner Ms Langley also works in the business and is a co-director.

The terms of the claimant's employment

18. The claimant was employed after an interview with Mr Ticehurst. It was Mr Ticehurst's evidence that the interview was long, detailed and thorough and covered all of the obligations and responsibilities of each person. It was the claimant's evidence that in fact he was not given a contract until after he started work. He was given one contract during his probationary period and another one after he "passed" his probationary period, but that the only difference between the first and second contract was that the salary increased somewhat. All other terms were the same. I accept his evidence in that regard.
19. His evidence regarding the pension was that this was not discussed at interview, by his recollection. Mr Ticehurst's evidence was that the pension was discussed and that the claimant was told none would be available and that the claimant *"took the job on that basis"*. I find that even if Mr Ticehurst's evidence is correct, it is not possible for an employer to simply refuse to provide a pension as Mr Ticehurst describes. It is a mandatory requirement that an employer do so, and that they make

contributions to it on the employee's behalf. The claimant was not at state retirement age during his employment and earned over the minimum threshold for payment and so the employer was obliged to provide him with one.

20. The terms of the claimant's contract as to his holiday entitlement were also not compliant with the statutory minimum. Full time employees such as the claimant are entitled to a minimum of 28 days annual leave (being 8 statutory bank holidays and a further 20 days leave) under the Working Time Regulations 1998. Therefore, the claimant was entitled, whatever the terms of his contract, to the higher allowance of 28 days per year.
21. In terms of the claimant's entitlement to notice, the contract states that he is entitled to be given a month's notice by the respondent. The contract does not allow for payment in lieu of notice.
22. It is the respondent's case that as the claimant did not sign the contract, the contract terms have no effect and he is only entitled to the statutory minimum of a week's notice under the Employment Rights Act 1996. I accept that neither party signed the contract that the claimant was provided with. However, this does not affect the contract's validity in the circumstances. Each party understood that the contract contained the claimant's terms and conditions and neither party sought to change those terms and conditions, save that the claimant was given a pay rise at the end of his probation period. The claimant accepted the terms by working subject to them, the terms having been written by the respondent. The claimant's entitlement to notice from the respondent in the event of his dismissal was therefore one month, as written in the contract.

The claimant's dismissal

23. I find that the claimant and Mr Ticehurst, towards the end of his employment, got into an ongoing disagreement about MOT testing and vehicle assessment. Both party has given evidence about the circumstances of the argument and how it began, but it is not necessary for me to make findings of fact about this. The only issues that are relevant are the following: there was a disagreement between them and I find that there was no element of gross misconduct about the claimant's conduct in this regard. Mr Ticehurst's evidence was somewhat inconsistent on this and although he accepted that the claimant did not commit any acts of misconduct, at another point in his evidence he referred to the claimant being caught "red handed" having inaccurately assessed work that needed doing on a vehicle. I do not accept his evidence in this regard. Both Mr Ticehurst and the claimant agree that there was a meeting two weeks before the claimant's dismissal which was an attempt to clear the air, which proved unsuccessful. It is also accepted by the respondent that the claimant was at work on Friday 27 May.
24. Early in the morning on Monday 30 May 2022, before the showroom was open, the claimant and Mr Ticehurst both gave evidence that Mr Ticehurst approached the claimant and asked him to come into the office. Both men say that the claimant was given no notice of this meeting. The claimant's evidence, which I accept, was that as he followed Mr Ticehurst along the corridor, he could tell by his mannerisms and

how he told him to come into the office that the matter was something serious and that Mr Ticehurst was both very angry and very upset. The claimant therefore said to Mr Ticehurst

“Are you letting me go?”

25. His evidence was that Mr Ticehurst said “yes”. Mr Ticehurst’s evidence under oath was that the meeting on 30 May took *“one minute in total”*. It was put to him by Mr Johnson that the claimant asked, two or three times as they walked from the showroom to the office “you’re sacking me, aren’t you?” or words to that effect, and Mr Ticehurst accepted that he had answered “yes” to that question.
26. I therefore find that on 30 May, with no prior warning, the claimant was summoned to a meeting by Mr Ticehurst and that before the meeting had properly begun, Mr Ticehurst confirmed to the claimant that he was being dismissed. I also accept the claimant’s evidence (and taking the respondent’s staffing chart into account) that Tillo never normally worked on a Monday but that day had been asked to work by Mr Ticehurst, indicating that Mr Ticehurst intended to dismiss the claimant before the working day started and send him home and that Tillo had been asked to work to cover the claimant’s workload.
27. I also accept the claimant’s evidence that Mr Ticehurst was very angry and abrupt with the claimant during their brief meeting and that there was a short, awkward silence after Mr Ticehurst confirmed the claimant was being dismissed. Ms Langley was also in the office and the claimant’s evidence, which I accept, was that the three people stood awkwardly in silence for a moment. The claimant’s evidence, which I accept, was that he went to leave the room and Mr Ticehurst shouted *“Keys!”* after him as he left, indicating that the claimant should return his set of keys to the premises.
28. I do not accept Mr Ticehurst’s evidence that he had intended to spend an hour or so having *“a civilised conversation”* with the claimant where they had *“plenty of time to resolve the situation”*. This directly contradicts Mr Ticehurst’s own evidence that when the claimant asked him upfront if he was being sacked, he answered “yes”. It would entirely undermine an intention to openly discuss and resolve matters in an hour-long meeting to start that meeting by agreeing that the claimant was going to be dismissed. If that had been Mr Ticehurst’s intention, the answer to the claimant’s question would have been something equivocal and open-ended.
29. I also accept that Mr Ticehurst demanded that the claimant return the keys to the workshop before the claimant left the room. I find that the claimant understood this to mean that he was not to return to the workplace. Indeed, the claimant then came back into the office to ask Ms Langley to make sure that his tools, which were valuable, be kept safe until he could return to collect them, which he said might take *“2 or 3 weeks”* as the claimant did not have immediate access to a van.
30. The respondent does not dispute that the claimant said he would come back for his tools in two or three weeks. I accept that Ms Langley told the claimant that she would make sure the tools were kept safe in the meantime. Neither she nor Mr

Ticehurst took this opportunity to tell the claimant that he should attend work and that he could collect his tools at the end of his notice period.

31. The claimant left work and did not return. The respondent did not contact him at all during the notice period and when he requested his notice pay, refused to pay it.

The claimant's holiday entitlement

32. The claimant's evidence, which I accept, was that until shortly before his dismissal, he had a good working relationship with the respondent. He commuted to work by motorbike and when the weather was very poor, he and the respondent agreed that he did not need to attend work if he notified them early enough. He also told the Tribunal that he had some medical appointments that meant that he had missed a part of the working day on a small number of occasions. He had offered to not be paid for the days and hours when he did not attend work for either medical or weather-related reasons, but the respondent paid him anyway, which he expressed his gratitude for. I accepted his evidence in that regard.
33. The respondent provided the Tribunal with a document that purported to be the annual leave record for the business. In it is recorded 4 days leave during the claimant's employment, to coincide with the Easter break, plus three bank holidays from January to May. Also recorded are the small number of occasions when, as set out above, the claimant did not attend work for other reasons. The respondent now says that the claimant took each of these times of non-attendance as "holiday" such that the amount of holiday entitlement that they owe him is much reduced.
34. I find that there was no agreement between the claimant and the respondent at the time that the claimant should take this additional time off as holiday. I accept the claimant's evidence that he offered to take it as unpaid leave, but the respondent chose to pay him nonetheless. This is the appropriate way to deal with such situations, particularly in the case of time off for medical appointments and it fits in with the claimant's evidence that he got on with the respondent's staff for most of the time he worked there, particularly Ms Langley.
35. I find that it is only once this litigation had started that the respondent now seeks to argue that the claimant took this time off as annual leave. This is regrettable. I find that the claimant took four days holiday during his employment with the respondent plus three bank holidays. His entitlement was 28 days for the year. None of the days when he was in late or left early, or did not attend due to bad weather, are to be counted as days taken as holiday. That was not the agreement that the claimant and the respondent reached about those days during his employment.

The Law

36. Where a contract of employment provides for a period of notice, that notice can only be shortened in two ways. Firstly, if the claimant commits a breach of contract so serious that the contract is terminated and the claimant has no right to enforce

the other terms of his contract, including that relating to notice. Secondly, the claimant and the respondent can both agree to waive the requirement to notice.

37. Annual leave under the Working Time Regulations 1998 provides for 28 days annual leave entitlement for a full-time worker. Where annual leave is accrued but untaken on the termination of employment, a worker is entitled to be paid in lieu for that holiday. Where a worker's contract is terminated part-way through a leave year, the holiday accrued is pro-rated to the part of the year worked. In the first year of employment, the holiday year starts on the first day of the worker's engagement. Where a contract of employment provides for less than the statutory minimum holiday entitlement, a term providing the statutory minimum is to be read into the contract.
38. Under the Pensions Act 2008, every employer in the UK must put certain staff into a workplace pension scheme and contribute towards it, ('automatic enrolment') once they employ at least one person. The staff who must be put into a workplace pension scheme are those under state pension age and those who earn more than £833 a month. The employer must contribute to the pension of those employees at a rate of 3% per month for sums earned between £6,240 and £50,270 per year. An employer can delay 'assessing' staff for up to three months. This is known as 'postponement', but does not change the date the employer's obligations start, but simply postpones the day they assess employees' age and earnings.
39. An employee cannot "agree" not to ask for a workplace pension. It is a statutory requirement in the same way that the right to be paid, or the right to take paid holiday, is a statutory requirement and a term to that effect is implied into an employee's contract of employment.

Application of the law to the facts found

40. The claimant was dismissed by Mr Ticehurst on 30 May 2022. By asking the claimant to return his keys immediately after he told him of his dismissal, and thereby restricting the claimant's access to the workplace, Mr Ticehurst dismissed the claimant with immediate effect. At no point after that and for the rest of what would have been the claimant's notice period, did the respondent ask the claimant to come into work. I do not accept that the claimant walked out and refused to work, or that Mr Ticehurst tried to have a conversation with him. Mr Ticehurst did not attempt to have a discussion with the claimant but made it expressly clear that the claimant was not expected to return to work and was being instantly dismissed.
41. The respondent has not provided any evidence that it was entitled, by the claimant's conduct, to refuse to pay him for his period of notice. There was no credible evidence of any gross misconduct on the part of the claimant. The respondent may waive the claimant's requirement to come to work during his notice period, but they are still obliged to pay him for the money he would have earned during what would have been his notice period.
42. The claimant's salary as of 30 May 2022 was £2,333.33 gross per month or £28,000 per year. He was paid up to and including 31 May 2022. He did not take

annual leave on 27, 30 or 31 May as was alleged by the respondent. He worked on 27 May, arrived for work on 30 May but was effectively sent home, and 31 May was the first day of his month's notice period, which expired on 30 June 2022. He is entitled to recover a month's pay of £2333.33 gross, subject to deductions for tax and National Insurance, to put him in the position he would have been in had he been properly paid for June 2022 as the respondent is in breach of contract by providing him with no notice where summary dismissal is not justifiable.

43. The claimant's annual leave entitlement was 28 days in 12 months. He worked from 4 January to 30 May 2022 (21 weeks) and therefore accrued 21/52 of his holiday entitlement, which is 11 days. He took 4 days leave and 3 bank holidays, which is 7 days. He is entitled to be paid 4 days remaining leave. As he did not work during his notice period, he has not accrued further holiday during that time. He is to be paid 4 days at a daily gross rate of pay of £107.70 (based on a weekly wage of £538.46 and a five day working week), which is £430.80 gross.
44. The respondent was obliged to pay into the claimant's workplace pension for the duration of his employment. Even if the respondent's case is taken at its highest (in that the respondent says the terms of the job offer were that no pension was to be provided), this has no effect as the respondent's duty to provide a pension is mandatory.
45. The respondent should have made contributions of 3% for the 5 months of the claimant's employment, plus for what would have been his 1 month notice period. The claimant is entitled to recover any financial benefits that he would have been paid during his notice period. Minimum contribution levels are, as of April 2019, calculated on the basis of pensionable pay between £6,240 and a maximum of £50,270 per year. For the claimant the respondent should have made contributions of £54.40 per month, which over the 6 month period is £326.40. Information on employer pension schemes and calculation of contributions is available on the website of the Pensions Regulator, www.thepensionsregulator.co.uk
46. The claimant is not entitled to interest on any of the sums due. Interest in the Employment Tribunal is only payable on awards for discrimination, or on other awards that remain unpaid within 14 days of the judgment being sent to the parties.

Employment Judge Barker

Date 21 December 2022