



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr P Turay

**Respondents:** (1) 6CatsUK Limited (in liquidation)  
(2) Secretary of State for Business Energy  
and Industrial Strategy

**Heard at:** East London Hearing Centre (via CVP)

**On:** 2 February 2023

**Before:** Employment Judge Reid

**Representation**

Claimant: Did not attend  
Respondents: Did not attend

## JUDGMENT

**The judgment of the Tribunal is that:-**

1. The claim against the Second Respondent is dismissed because it is not a correct respondent to this claim.
2. The Claimant's claim for unpaid wages is dismissed because he was not entitled to be paid wages for the period claimed.
3. The Claimant is entitled to a statutory redundancy payment from the First Respondent of **£4,842** calculated by reference to his age and length of service and capped weekly pay as follows:

$\text{£}538 \text{ (capped gross weekly pay)} \times 1.5 \text{ (service all over age 41)} \times 6 \text{ (number of years service)} = \text{£}4,842.$

4. The Claimant was unfairly dismissed by the First Respondent. He is not entitled to a basic award if paid his statutory redundancy payment. His compensatory award is **£200** (loss of statutory rights).
5. The Claimant is entitled to notice pay of **£4,980.78** (gross) calculated as follows:

$6 \text{ years service} \times \text{£}830.13 \text{ (uncapped gross weekly pay)} = \text{£}4,980.78 \text{ (gross)}$

6. The Claimant is entitled to holiday pay of **£1,826.22** (gross) calculated as follows:

£831.13 (uncapped weekly pay) divide by 5 = £166.02 x 11 accrued days =  
£1,826.22 (gross).

*Note to the Claimant:*

*You have won some of your claims, but this does not automatically mean you will get the money you are owed; this is because your employer is in liquidation. Now that you have this judgment you can apply to the liquidator to see if you can be paid some or all of what you are owed as part of the liquidation process.*

*A copy of the liquidator's email to the Tribunal dated 13<sup>th</sup> December 2022 explaining the situation is enclosed for your information (document 93 on the Tribunal file).*

## REASONS

### Background and claims

1 The Claimant presented his claim form on 20<sup>th</sup> July 2020. He had contacted ACAS on 4<sup>th</sup> June 2020 and his ACAS certificate was issued on 10<sup>th</sup> June 2020.

2 The Claimant was employed by the First Respondent under a contract entered into apparently in 2014 (given the start date in clause 2.1) when the First Respondent was called CXC Contracting Limited. It then changed its name on 1<sup>st</sup> January 2017 to its current name. The correct respondent was identified in my previous judgment dated 9<sup>th</sup> June 2022. The First Respondent went into creditors' voluntary liquidation on 26<sup>th</sup> April 2021.

3 The agency Athona was previously also a respondent but the Claimant withdrew his claim against Athona at the previous hearing on 9<sup>th</sup> June 2022.

4 Despite advice at the preliminary hearing in August 2021 to make an application to the Secretary of State (Redundancy Payments Service) the Claimant did not do this. He had a difficult bereavement in December 2021 when he lost his wife. The final hearing was listed for 9<sup>th</sup> June 2022 but did not go ahead because the Claimant wanted to progress his RPS claim and the Secretary of State needed to be joined as a party to his claim. He tried to make that application but says he encountered difficulties with the process and the next final hearing on 6<sup>th</sup> October 2022 was also postponed, this time to enable the Claimant to take legal advice. In the meantime, the Second Respondent filed its response to the effect that firstly the Claimant had not made a claim to it and secondly that even if he had there were limitations to the amounts claimed the Second Respondent would meet in any event. It was clarified in that postponed final hearing in October 2022 that the Claimant's employment had not terminated on 24<sup>th</sup> April 2020 as per Q5 of his claim form but on 31<sup>st</sup> August 2020 having been given 6 weeks' notice.

5 The Claimant brought claims for:

- 5.1 Unfair dismissal
- 5.2 Notice pay (6 weeks)
- 5.3 Statutory redundancy payment
- 5.4 Holiday pay from the 2019/2020 holiday year and the 2020/2021 holiday year
- 5.5 Unpaid wages for the period 4<sup>th</sup> April 2020 to 24<sup>th</sup> April 2020 and furlough pay for thereafter on the basis he claimed he should have been furloughed.

6 The progress of this claim has been hampered by the lack of input from the First Respondent after it presented its response in October 2020 which did not really address the issues in the claim but only entered the debate as regards the Claimant's claim that he should have been furloughed (which is not a legal claim in itself, though relevant to the background and potentially relevant to a fair dismissal). It was also hampered by the gap between the August 2021 preliminary hearing and the first final hearing in June 2022 because the nettle of who was the right respondent company (key, given its liquidation) was not grasped, compounded by the Claimant not applying to the Redundancy Payments Service as advised. The claim has also been hampered by the Claimant not having had advice at an early stage of what to claim, from who and how and by his lack of understanding that the First Respondent's liquidation means that he may not get what he claims is owed to him.

7 The Claimant did not attend the final CVP hearing listed for today. He was telephoned by the clerk to check if there were connection problems, but he did not pick up or call the clerk back when she left her number. No emails had been received from him explaining any reason for non-attendance today. I accordingly proceeded in the absence of the parties under Rule 47 of the Tribunal Rules 2013 taking into account the long history of this claim, the previous postponements of the final hearing and the fact that I had an electronic bundle from the previous (postponed) September 2022 final hearing (214 pages), a witness statement the Claimant had written in July 2021 and an updated schedule of loss he had provided on 8<sup>th</sup> December 2022. He had not provided any further documents (apart from the schedule of loss) or a supplementary bundle following the orders dated 10<sup>th</sup> October 2022. I decided not to exercise the power to dismiss the Claimant's claim for non-attendance taking into account the overriding objective in Rule 2, because I considered it important given the history of his claim that he and the other parties had a reasoned decision on the actual claim and I had sufficient information to be able to do that.

8 In the absence of the Claimant I had no information that the Claimant about whether he had now taken legal advice affecting the way he put his claims (part of the reason for the previous postponement being his request to postpone so that he could take advice). I also had no information as to whether he had by now made an application to the RPS, the latest information on the file from the Second Respondent on 19<sup>th</sup> December 2022 being that he had not done so, so that it should not be a respondent to this claim. I therefore proceeded on the basis that the Claimant has not made a claim to the Redundancy Payments Service (RPS).

9 Page numbers in the bundle referred to are the electronic page numbers because the actual pages were not paginated.

10 I set out the relevant law first so that the Claimant can understand the legal framework in which I have to decide his claims.

## **Relevant law**

### Payments by Secretary of State from the National Insurance Fund (RPS)

11 s182-188 Employment Rights Act sets out the law as to when an employee or worker can make a claim from the Secretary of State, the Second Respondent. The Second Respondent can only become a respondent to a Tribunal claim where the employee/worker has made a claim for the relevant payment to the Second Respondent.

### Unpaid wages

12 s13 Employment Rights Act 1996 says that an employer cannot make an unauthorised deduction from an employee's/worker's wages (and that includes not paying any wages at all). In order to be entitled to the wages they must be 'properly payable' which means that there must have been work done which the employer has required the employee/worker to do.

### Statutory redundancy payment

13 s135 Employment Rights Act 1996 says that an employee is entitled to a redundancy payment if they are dismissed by reason of redundancy. s139 defines what is a redundancy and it includes where the requirements of the business for employees to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish.

14 S162 Employment Rights Act 1996 sets out how to calculate a statutory redundancy payment, namely by reference to age, length of service and weekly gross pay.

15 Where an employee does not have normal working hours the way a week's pay is calculated is to average out the weekly pay over the previous 12 weeks (s224 Employment Rights Act 1996). If some or all of those 12 weeks include a week in which there was no pay, it is necessary to go back further so that there are 12 weeks which were paid from which the average can be calculated.

16 The weekly pay figure which is used is capped (s227); when the Claimant's employment terminated, the relevant weekly gross cap was £538.

### Unfair dismissal

17 Redundancy is a fair reason for dismissal (s98(2) Employment Rights Act 1996). However, the dismissal itself can still be unfair for example if a fair redundancy procedure

is not followed.

18 The basic award for unfair dismissal is calculated under s119 Employment Rights Act 1996 in the same way as a statutory redundancy payment – see above. A week's pay for an employee without normal working hours is also capped and calculated in the same way – see above. There is no entitlement to receive both a statutory redundancy payment and a basic award – if awarded one, that cancels out the other.

19 The compensatory award for unfair dismissal under s123 Employment Rights Act 1996 is such amount as the Tribunal thinks just and equitable in all the circumstances having regard to the loss sustained by the Claimant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

20 As well as looking at direct financial losses, as part of the compensatory award the Tribunal can also include a payment for loss of statutory rights to reflect the fact that the employee will need to 'start again' at a new employer and has lost his/her previous period of continuous employment.

21 When considering the compensatory award for unfair dismissal what is called a *Polkey* deduction to compensation can be made; this involves an assessment of the percentage chance that the employee would have been dismissed in any event, or dismissed after a particular period to allow for a fair procedure. The compensatory award can be reduced to take this into account.

#### Notice pay

22 A contract of employment can set out the notice period the employee is entitled to. That notice must be at least as the minimum notice set out in s86 Employment Rights Act which is a week per complete year of service up to a maximum of 12 weeks. If notice is given but the employee is not paid in that period, where an employee does not have normal working hours, how to work out a week's pay for those weeks is the same as the method set out above. The weekly amount is not however capped under s227 Employment Rights Act 1996.

#### Holiday pay

23 Under Regulation 14 Working Time Regulations 1998 a worker/employee is entitled at the end of employment to be paid for accrued but untaken holiday pay in the holiday year in which the employment ended.

24 Where there is such an entitlement, unless how the amount of accrued holiday pay is calculated is set out in the contract, the amount is a week's pay (Regulation 16), calculated as a daily rate to that number of accrued days. Where there are no normal working hours, a week's pay is calculated as set out above. The weekly amount is not however capped under s227 Employment Rights Act 1996.

## **Findings of Fact and Reasons**

Second Respondent not a respondent to this claim

25 The Claimant has not made an application to the RPS. The Second Respondent can only be a party to a claim if he has made an application. The claim against the Second Respondent is therefore dismissed because it has no legal liability to the Claimant.

Wages claim

26 The Claimant was employed by the First Respondent (page 102, undated 2014 contract) but had been assigned to a posting at Valentines High School by Athona Limited (he was a Science teacher) under the terms of an agency worker arrangement (page 112) which arrangement had been in place since November 2019 (page 116). The placement at Valentines High School had been intended to run from 6<sup>th</sup> January 2020 to 24<sup>th</sup> April 2020 (assignment confirmation, page 130) but was terminated early by the school on 20<sup>th</sup> March 2020.

27 The Claimant was entitled to be paid for the hours worked when on assignment (contract clause 5.1). Athona was entitled to terminate the assignment at any time (Athona terms clause 9).

28 Valentines High School closed on 20<sup>th</sup> March 2020 when the assignment under the contract was terminated. However, the school agreed to continue to pay the Claimant until what would have been the start of the Easter holidays (4<sup>th</sup> April 2020, page 167). The Claimant's case was that he had nonetheless done some work in the period after 4<sup>th</sup> April 2020 which meant he should be paid. He firstly claimed pay up until what would have been the end of the assignment (24<sup>th</sup> April 2020) because he said he had continued to work. He secondly claimed that he should have been furloughed by the First Respondent (or by Athona) for April, May and June 2020.

29 The Claimant said he had provided an 'online service' for students with other members of staff until late April/early May and marked some test papers with others in the Science team. In an email to the Tribunal dated 25<sup>th</sup> July 2021 he attached what he says are 7 test papers he marked for students. These documents required access permission presumably because they are protected students' test papers with restricted access. The Claimant would not in any event either then or now be able to provide the Tribunal with such access because he had left the school. He has not produced any other evidence of being asked to do this work or in fact doing it and his account at para 7 of his witness statement is very brief referring to the test papers and unspecified as to date/activity of online learning. The school itself confirmed on 14<sup>th</sup> December 2020 (page 187) that he had had no contact with the Head of Science after 20<sup>th</sup> March 2020 and having checked his IT activity found one student email he had replied to on 29<sup>th</sup> April 2020. He did not mention still actually working after 4<sup>th</sup> April 2020 when querying his final payment on 28<sup>th</sup> May 2020 (page 155). I do not find therefore continuing to do any work after 20<sup>th</sup> March 2020 to have been something the Claimant was asked to do ie remain available for online help during the Easter holidays. If he did do anything it was to send one email.

30 I therefore find that the Claimant was not working as claimed until late April/early May and is not therefore owed any wages because he was still working after when his pay stopped on 4<sup>th</sup> April 2020. If he did any work between 20<sup>th</sup> March 2020 (when the school

closed) and 4<sup>th</sup> April 2020 he was in fact paid for it because the school continued his pay up until the date of the end of term.

31 As regards what seems to have been the Claimant's principal complaint at the time namely not being furloughed (as a way to maintain his pay), the Claimant's case was that he should have been furloughed because he says that is what Athona promised. The Claimant needs to understand that there was no legal right for an employee to insist that his/her employer must furlough him. Whether or not to do so was a matter for the employer. In any event Athona was not his employer.

32 Athona explained that it could not furlough the Claimant because he was not their PAYE worker (page 179 , email dated 2<sup>nd</sup> June 2020); that was correct he was not, he was employed by the First Respondent. The First Respondent looked into furloughing staff but concluded (undated letter page 189) that as it could not cover all employee costs that way it could not afford to do so and that it could not furlough staff working in the public sector because that was contrary to government guidelines, though it said it was attempting via its trade body to lobby for change to cover 'umbrella workers'.

33 The Claimant therefore had no legal right to be furloughed by the First Respondent as a way to ensure his earnings continued after 4<sup>th</sup> April 2020.

34 The Claimant is therefore not owed any wages after 4<sup>th</sup> April 2020 on the basis that he should have been furloughed.

#### Redundancy payment, unfair dismissal and notice claim

35 The Claimant's period of continuous employment started on 23<sup>rd</sup> January 2014 (contract clause 2.1). His employment ended on 31<sup>st</sup> August 2020 (page 184). He was given 6 weeks notice but was not paid during those 6 weeks. No redundancy procedure was gone through but he was told that he was being given notice because the First Respondent was no longer offering UK 'umbrella' services to UK contractors and was going to focus on other areas. I find that the Claimant's position was redundant because the First Respondent was ceasing to carry out the part of the business in which the Claimant was employed and as a result the Respondent's requirement to have employees to carry out the kind of work the Claimant did had ceased or was expected to cease. He is therefore entitled to a statutory redundancy payment.

36 The First Respondent did not hold any meetings or discussions with the Claimant about his redundancy but simply gave him notice by email. Even if the outcome was inevitable at that stage because there was no alternative work for him or ways to avoid redundancy, a basic consultation procedure including a right of appeal should reasonably have been undertaken. His dismissal was therefore unfair on procedural grounds. The Claimant claimed that instead of being dismissed he could have been furloughed; while a failure to consider furlough as an alternative to dismissal is a relevant factor, I have found that his dismissal was unfair in any event, because of the lack of a fair procedure. In addition, I find in any event (see above) that the First Respondent did consider furlough but made the reasonable decision that it could not furlough the Claimant.

37 I also find (taking into account the First Respondent in its entirety went into

creditors' voluntary liquidation around a year later, on 26<sup>th</sup> April 2021 ie it was no longer just that part of its business which was affected but subsequently the whole business, showing a downward trajectory) that even if a fair redundancy procedure had been undertaken the Claimant's employment would only have been extended by a further two weeks, that being the period a fair consultation period would have taken to complete. In those two weeks he was not assigned so has no loss of earnings attributable to the dismissal by the First Respondent.

38 The Claimant was given notice on 17<sup>th</sup> July 2020 to expire on 31<sup>st</sup> August 2020 (page 184). He says he was not paid during this around 6 week period. Under his contract (clause 11.3) he was entitled to statutory minimum notice. Based on a start date of 23<sup>rd</sup> January 2014 he was therefore entitled to 6 weeks' notice, which notice was given but for which he was not paid.

39 The Claimant had no normal working hours (contract clause 7.1) (although he had minimum hours per year of 336 hours). His employment terminated on 31<sup>st</sup> August 2020 and he was not paid in the 12 weeks prior to that date, not being on assignment in that period. The last 12 week period in which he was paid was the period up to his last payment date of 4<sup>th</sup> April 2020. His last 3 weeks payslips showed gross weekly salary of 855.21 on 22<sup>nd</sup> March 2020 and 29<sup>th</sup> March 2020 and £779.99 on 12<sup>th</sup> April 2020 (presumably covering the final week when he was paid up to 4<sup>th</sup> April 2020). I was not provided with any payslips prior to this date so could not go back any further. The average gross weekly pay in the relevant 12 weeks before the calculation date on the information before me is therefore £830.13 (assuming the missing 9 weeks prior to the payslips provided showed a similar level of pay) which is capped at £538 per week where relevant (relevant cap as at August 2020). It is this capped figure for a week's pay to which the Claimant is entitled to have his claim for a statutory redundancy payment/ basic award for unfair dismissal assessed. The uncapped figure of £830.13 applies to his claims for notice pay and holiday pay.

40 All of the Claimant's service was aged over 41. The Claimant's statutory redundancy payment is therefore  $£538 \times 1.5 \times 6 = £4,842$ .

41 As regards his unfair dismissal claim, the Claimant is not entitled to the basic award for unfair dismissal because it is covered by his statutory redundancy payment and the payment is not made twice. As regards the compensatory award for unfair dismissal the Claimant has no loss of earnings attributable to the First Respondent because the Claimant was not on assignment when he was dismissed (and had not been since April 2020) and had no right to be furloughed, so he did not lose earnings because he was dismissed (in any event that would be limited to two weeks as explained above). He is however entitled to an award for loss of statutory rights as part of the compensatory award for unfair dismissal which I assess at £200.

42 The Claimant's notice pay is therefore  $6 \times £830.13 = £4,980.78$ .

#### Holiday pay claim

43 There were conflicting holiday years. The Claimant's contract (clause 8.1) said it ran from the date he started at the First Respondent (23<sup>rd</sup> January). The Athona terms (page 122) defined the Leave Year as running from the start of the assignment (6<sup>th</sup>



January in the case of that assignment). The two payslips dated 29<sup>th</sup> March 2020 and 12<sup>th</sup> April 2020 however suggested that the holiday year might in fact run 1<sup>st</sup> April to 31<sup>st</sup> March because the accrued holiday appeared to be in effect reset between these two payslips suggesting the end of one holiday year and the start of the next.

44 The Claimant was made a payment of holiday pay of £391.37 on 30<sup>th</sup> April 2020 (witness statement para 11). The payslips dated 29<sup>th</sup> March 2020 and 12<sup>th</sup> April 2020 showed holiday having accrued of £312.12 and £120.70 which would give a total payment of £432.82. Given the Claimant says he got no other payslip for that payment and has not explained what the payment was for if it is not for these two accrued payments, I find that it is likely that these accrued amounts on the payslips were the payment actually made on 30<sup>th</sup> April 2020 (subject to a deduction, likely for tax or National Insurance of £41.45). I therefore find that he was paid his holiday pay up until the assignment (and his pay) terminated, in the absence of any further explanation or information from the Claimant despite being given the opportunity to do so (para 10 case management summary 10<sup>th</sup> October 2022); in his updated December 2022 schedule of loss he does not provide this clarification or any further information about what he is claiming even in basic terms as to what holiday he says he took that holiday year and what was accrued but untaken.

45 As regards the period between 5<sup>th</sup> April 2020 and 31<sup>st</sup> August 2020 (which after 21<sup>st</sup> April 2020 falls within the 12 months prior to the date of liquidation) the Claimant remained employed and therefore continued to accrue holiday ie over a period of 21 weeks. Based on holiday entitlement of 28 days (contract clause 8.1) and based on an April-March holiday year he was therefore entitled to 11 accrued days holiday for the part of the 2020/2021 holiday year he remained in employment ( $21/52 \times 28 = 11$ ). Given he was not actually working in that period and had no normal working hours, in the absence of a calculation method in the contract, he is entitled to a week's pay for those days, in the way calculated above (but not subject to the weekly cap). This amounts to £831.13 divide by 5 = £166.02 x 11 days = £1,826.22 (gross).

**Employment Judge Reid**  
**Date: 3 February 2023**