



## EMPLOYMENT TRIBUNALS

**Claimant:** Mr A Carberry

**Respondent:** Hazel Grove DIY Centre Limited

**HELD AT:** Manchester

**ON:** 26 September & 12  
October 2022 (by  
CVP)

**BEFORE:** Employment Judge Ficklin

### REPRESENTATION:

**Claimant:** In person

**Respondent:** Mr Michael Budd, Director

### JUDGMENT ON A RECONSIDERATION

The Claimant's application for a reconsideration of the compensatory award is refused because there is no reasonable prospect of the decision being varied or revoked.

### REASONS

#### Background

1. In a claim form received on 7 April 2021 following ACAS early conciliation the claimant, who was employed from 8 September 2017 until he was dismissed on 26 January 2021 brought complaints of unpaid redundancy payment, unfair dismissal, breach of contract (notice pay) and unlawful deduction from wages (holiday pay). He withdrew his claim of unpaid redundancy payment on 7 September 2021.
2. I gave judgment on 12 October 2022 that the claimant's claims for unfair dismissal, breach of contract (notice pay) and unlawful deduction from wages (holiday pay) were well-founded.
3. I heard evidence from the claimant on his own behalf. For the respondent I heard from Mr Michael Budd, the current director, and Mr Andrew Curry, the former director from whom Mr Budd purchased the business.
4. The documentary evidence included witness statements, the claimant's payslips, tax information, communications between the parties and the claimant's geolocation coordinates for particular days in January 2021.

#### Issues

5. Issues for unfair dismissal:
  - a. What was the substance of the Claimant's oral contract with the Respondent?
  - b. Was the Claimant dismissed upon the sale of the business to Mr Budd?
  - c. Can the respondent prove the sole or principal reason for the dismissal?
  - d. Was that reason one of the potentially fair reasons in sections 98(1) and (2) of the Employment Rights Act 1996?
  - e. Did the respondent act reasonably or unreasonably in treating that reason as sufficient to dismiss the claimant?
6. Issues for breach of contract ie wrongful dismissal / notice pay:
  - a. Was the claimant dismissed?
  - b. What was the claimant's notice period?
  - c. Was the claimant paid for that notice period?
7. Issue for holiday pay:
  - a. Did the respondent fail to pay the claimant for annual leave the claimant had accrued but not taken when their employment ended?

### **Findings of fact**

8. I find the relevant findings of fact on the balance of probabilities.
9. I find that the substance of the claimant's contract of employment with the respondent was that he was a salaried employee working 24 hours over the same three days every week.
10. The claimant occasionally worked more than his standard hours, and was paid by the former director Mr Curry in cash for the extra hours. Except for a few weeks during the COVID pandemic, the claimant did not work fewer than his standard 24 hours during his employment.
11. I find that Mr Budd told the claimant that his hours and days would change when he took over the business on 26 January 2021, on the erroneous understanding that the claimant was on a zero-hours contract. Mr Budd did not contact the claimant for work at his usual hours and days, or at all. I accept that on that day the claimant was told that his work pattern would not continue, and that he was not contractually entitled to any hours at all. He was not offered redundancy. I find that the claimant was dismissed as of 26 January 2021.

### **Law**

12. Section 94(1) of the Employment Rights Act 1996 ("the 1996 Act") provides that an employee has the right not to be unfairly dismissed by her employer. Section 98(1) of the 1996 Act provides that in determining whether the dismissal is fair or unfair, it is for the employer to show the reasons for the dismissal, and that it is a reason falling within section 98 (2) of the 1996 Act. Section 98(2) states that fair reasons include the employee's conduct, his capability or qualifications to do the job, redundancy, or that the employment could not continue without contravention of a duty or restriction under an enactment.

13. Section 98(4) provides that where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the respondent's undertaking) the employer acted unreasonably or reasonably in treating it as a sufficient reason, and this shall be determined in accordance with equity and the substantial merits of the case.

### Conclusion

14. I find that the claimant was dismissed on 26 January 2021. This is because I accept that on that day he was told that his work pattern would not continue, and that he was not contractually entitled to any hours at all. He was not offered redundancy. None of the reasons for dismissal in the 1996 Act were made out by the respondent.

15. The claimant's claims are well-founded. The claimant is entitled to an award and compensation for unfair dismissal, breach of contract (notice pay) and unlawful deduction from wages (holiday pay).

### Remedy

16. For Unfair Dismissal, the claimant was awarded three weeks gross pay for three years' employment (3 weeks x gross pay £192: £576), plus four weeks' net loss of earnings (4 weeks x net pay £189: £756), plus £400 for loss of statutory employment rights.

17. Regarding the loss of earnings, the claimant brought no evidence at all of attempt to mitigate his losses. On that basis it is just and equitable to award four weeks compensation only.

18. For breach of contract (notice pay) the claimant's notice period based on his length of employment was three weeks. The claimant was awarded three weeks' gross pay (3 weeks x gross pay £192: £576).

19. I found that the claimant had not taken any holiday in the year before dismissal, and so was due 5.6 weeks' holiday at his gross pay (5.6 weeks x gross pay £192: £1075.20).

20. Section 38 of the Employment Act 2002 mandates that I award a minimum 2 weeks' gross pay to the claimant for the lack of a written statement of particulars. That award can be as high as four weeks, but I decline to award four weeks as it is a small business. (2 weeks x gross pay £192: £384)

21. I award the claimant a total of £3767.20 (£576+£756+£400+£576+£1075.20+£384)

22. The claimant sought reconsideration of the remedy portion of my judgment on the basis that I found no evidence that he had mitigated his loss of earnings. His email referred to various arguments and evidence that he had indeed

mitigated his losses. He did not present any of that information or evidence at the hearing.

23. Paragraph 7 of the Case Management Order sent to the parties on 28 March 2022 states, "The parties must be prepared to deal with all issues including remedy if it arises." The claimant had been duly informed that the full hearing would deal with all aspects of remedy. It is not the tribunal's role to advise parties on evidence they should bring or how to present their case. There is no reasonable prospect that the claimant's compensatory award will be varied based on evidence he did not rely on at the hearing.

Employment Judge Ficklin  
7 March 2023

JUDGMENT & REASONS SENT TO THE PARTIES ON  
9 March 2023

FOR THE SECRETARY OF THE TRIBUNALS