



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Kalkan

**Respondent:** TFC Holdings London Limited

**Heard at:** Watford Tribunal

**On:** 28-30 September 2022

**Before:** Employment Judge Cowen

## Representation

Claimant: Mr Kalkan (in person)

Respondent: Miss Barlay (counsel)

**JUDGMENT** having been handed down in an oral judgment on 30 September 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, on 5 October 2022, the following reasons are provided:

## REASONS

1. There having been no case management PH in this case, it fell to be considered at the start of the hearing what the claims were and the issues to be decided. These were discussed with the parties and concluded as follows:-
  - 1.1. Constructive Unfair Dismissal
    - 1.1.1. Whether the Respondent did something to fundamentally breach the Claimant's contract.
    - 1.1.2. If so, did the Claimant resign in response to it,
    - 1.1.3. If so, did he do so within a reasonable time.
  - 1.2. Notice Pay
    - 1.2.1. What notice pay was the Claimant entitled to
    - 1.2.2. Did the Respondent fail to pay the Claimant the notice pay he was entitled to.
  - 1.3. Holiday Pay
    - 1.3.1. Was the Claimant entitled to 11 days holiday pay
    - 1.3.2. How much was he paid
  - 1.4. Pay statements

- 1.4.1. Did the Respondent provide the Claimant with pay statements which complied with the statutory requirements in s.8 Employment Rights Act 1996 ('ERA')
- 1.5. Health & Safety Detriment s.44 ERA
  - 1.5.1. Did the Respondent refuse to let the Claimant work from home, despite knowing that he was vulnerable as a result of a heart condition in late 2020.
  - 1.5.2. Did the Claimant tell the Respondent that he believed there to be a risk to H&S
  - 1.5.3. Was there a serious and imminent risk
  - 1.5.4. Did the Claimant suffer a detriment as a result
2. The issue in relation to s.44ERA cannot be considered by an Employment Judge sitting alone. It will therefore be listed to be considered by a full Tribunal.
3. The parties provided a joint bundle which was referred to throughout. The Claimant gave evidence as did Mr Ucur on behalf of the Respondent.

## **Facts**

3. The Claimant started working for the Respondent in June 2016, having had a previous period of work for the same Respondent. His statement of terms and conditions indicated that he would be paid the national minimum wage ('NMW') per hour for the hours worked between 10-54 hours per week.
4. The Claimant undertook work as the Process Manager; the head of a team of four people. The Respondent was purchasing and fitting out a number of shops as supermarkets around London. Some of these also involved the construction of flats above the shop, as well as the fitting out of the shop itself. The Respondent also has a wholesale division, supplying other retailers.
5. The Claimant's terms and conditions said that upon termination by either side, where the Claimant had more than 1 year of service, the employee would be entitled to 1 week of wages for each complete year of employment, up to a maximum of 12 years.
6. According to the terms and conditions, the holiday year ran from January to December and the Claimant was entitled to 28 days leave per year. The normal practice was that any unused holiday was bought back at the end of the year, but as a result of Covid, the Claimant was allowed to roll over holiday into 2021. No evidence of any record of pro-rata holiday entitlement to the date of dismissal nor holiday taken, was produced to the Tribunal. The Claimant asserted that it was agreed in a meeting held on 6 or 11 May 2021 that he was entitled to 11 days of holiday pay. The Respondent did not contradict this, but said it had been paid. There was no evidence of this

payment either.

7. The Claimant was provided with payslips each fortnight. The Claimant said that this was only 50% of his pay as the remainder was paid in cash. Mr Ucur denied this, but did not know details of payments as he said he left this to HR and payroll. He said that he discouraged payments to suppliers in cash as there had been previous problems with staff stealing money. He was not aware of the detail of the Claimant's payments.
8. Some relevant background to the situation which arose is required. The company had a property at Montagu Road which they wished to develop, but were awaiting planning permission. They wanted the property to be used, in the interim, in order to avoid having to pay rates on the property. The Claimant's wife was involved with a charity who needed premises and the Claimant suggested that the Respondent rent the property to the charity. The terms on which this happened are not clear and not necessary for this case, save to say that a dispute arose between the Respondent and the charity over unpaid rent.
9. The Claimant was paid in accordance with the number of hours he worked each week. Timesheets were filled in and sent to the Respondent each week by the Claimant, to account for his time. This meant that his pay varied every fortnight when he was paid. Payslips were supplied for the amounts paid by BACS. I have seen no evidence of payments in cash to the Claimant, as he asserts occurred. However, there was discussion at the meeting on 11 May 2021 which referred to the fact that the Claimant's part time hours were recorded on payroll. The Claimant's undisputed evidence was that he worked 52.5 hours per week over 6 days.
10. In 2020 the Claimant required a stent to be placed in his artery due to heart problems. He travelled to Turkey for this operation and his employer was aware that he took time off work for this purpose. He became anxious about catching Covid as a result of his perceived vulnerability.
11. In April 2021 the Claimant's pay was withheld entirely. The Respondent owed him £1500 net for the fortnight preceding. The Claimant asked Mrs Ozge Leven for the reason why he had not been paid, but did not receive any written response. On 23 April 2021 he wrote to Mr Deniz Akkaya, HR Consultant, asking him for written reasons for the withholding of pay. The Claimant had been told by Mrs Nil Diken from the HR team that Mr Ucur had given the order not to pay him, as a result of the dispute over the rent owed by the charity to the Respondent.
12. The Claimant immediately withdrew his labour and did not return to work. He repeatedly told members of the HR team that he felt that a red line had been crossed and that he would not be returning to work. The Claimant was under the impression that if he resigned from his position, he would lose

his employment rights and therefore did not want to use the word 'resigned'.

13. No response was given to the Claimant's email, but a meeting was arranged for 6 May 2021. Mr Akkay and Mr Varlik the Respondent's general manager attended the Claimant's home to discuss with him compensation for the mistake which the Claimant says occurred. On the 6 May, Mr Akkaya told the Claimant there would be an investigation. He also discussed with the Claimant the amount owed by the charity to the Respondent, which was disputed.
14. Mr Varlik offered the Claimant the opportunity to return to work, or the opportunity to reach a settlement. A negotiation to reach a settlement occurred.
15. On 7 May Mr Arraya emailed the Claimant to say that if there was a miscalculation then it can be fixed. On 10 May a further email explained that the investigation showed a 'systemical glitch and misunderstanding' and that the Claimant had been paid for the missing weeks.
16. The next day a further meeting was held at the Claimant's house where a settlement was discussed further.
17. On 28 May the Claimant wrote to the HR email address of the Respondent; he said that by reducing his wages by 100% he was 'fired' without warning. He also asserted that he was only on payroll for part time earnings, which was a benefit to the Respondent. He asserted that he will make a claim to the Tribunal for constructive dismissal.
18. On 8 June the Respondent wrote to the Claimant, who had not returned to work, to ask whether he wanted to rescind his resignation. The Respondent offered to hold a grievance meeting on 15 June with Mr Akkaya. The email said that the Claimant could change his mind, otherwise he would be paid all the money owing to him.
19. On 9 June the Claimant replied to say that he had not resigned and that he would not explain himself again.
20. On 28 June the Respondent wrote to the Claimant saying that he was required to attend a disciplinary hearing on 30 June to explain his absence. On 2 July the Respondent wrote again to say that as he did not attend the meeting, it had been re-arranged for 5 July.
21. On 6 July the Respondent wrote a final time to the Claimant to say that the meeting had occurred on 5 July and the Claimant had not attended and therefore he was dismissed for failing to attend work and a reasonable management request (to return to work). The letter indicated that the Claimant was entitled to 4 weeks' notice and asserted that his employment ended on 3 August 2021.

## THE LAW

### 22. “S.95 Circumstances in which an employee is dismissed.

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) [...]1, only if)—.....

c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.”

23. Western Excavating v Sharp [1978] ICR 221, CA set out the test for constructive dismissal, which involves consideration of whether there is a fundamental breach of contract by the employer, whether the employee resigns in response and whether they delay too long before doing so, thereby affirming the contract.

24. Whether the breach is fundamental is a question of fact and degree for the Tribunal. A term such as payment is payment is one of the key elements of any employment contract.

25. In order for there to be constructive dismissal there must be a link between the breach of contract by the employer and the employee's resignation. It is for the Tribunal to decide whether, on the facts, that link exists.

26. The claim of wrongful dismissal requires a different test by the Tribunal to that of unfair dismissal. Wrongful dismissal is a common law claim of breach of contract. Hence the Tribunal must consider the terms of the contract and whether the actions of the employer have been in line with the contract. Where a dismissal has occurred without payment of contractual notice ('summary dismissal'), the Tribunal must consider whether the Claimant's actions were sufficient to warrant a breach of contract to allow the employer to end the contract summarily.

27. Holiday pay is a further issue of contractual entitlement, beyond the statutory minimum. At the termination of a contract, the employee is entitled to pay for any accrued but untaken holiday. The terms of the scheme can be found in the contract. The application of them requires evidence that the contract has not been adhered to.

28. S.8 ERA sets out the law on itemised pay statements

“1) A worker has the right to be given by his employer, at or before the time at which any payment of wages or salary is made to him, a written itemised pay statement.

(2) The statement shall contain particulars of—

(a) the gross amount of the wages or salary,

- (b) the amounts of any variable, and (subject to [section 9](#)) any fixed, deductions from that gross amount and the purposes for which they are made,
- (c) the net amount of wages or salary payable, [...]
- (d) where different parts of the net amount are paid in different ways, the amount and method of payment of each part-payment [, and]
- (e) where the amount of wages or salary varies by reference to time worked, the total number of hours worked in respect of the variable amount of wages or salary either as—
  - (i) a single aggregate figure, or
  - (ii) separate figures for different types of work or different rates of pay.”

## DECISION

### 29. Constructive Dismissal

Having entered into a contract of employment, the Respondent is obliged to pay the Claimant for the work he carries out in accordance with the pay terms stipulated in the contract, unless there is a prior agreement in writing, which allows the Respondent to make specific deductions. By failing to pay the Claimant for the work he carried out in April 2021, the Respondent was in breach of contract. The agreement to be paid is a fundamental term of any employment contract, as it is a significant commitment by an employer in an employment relationship. The failure to adhere to the obligation is therefore a fundamental breach of contract, for which the Claimant would be entitled to resign and claim constructive dismissal.

30. The issue in this case is whether the Claimant did in fact resign, or whether by engaging in meetings with managers/HR consultants on behalf of the Respondent he acquiesced and continued to consider himself bound to the contract of employment.

31. I note that the Claimant did not work for the Respondent after 22 April 2021. He had withdrawn his labour due to the failure to pay him. Attending at work and providing oneself to carry out the instructions of an employer is the most fundamental aspect of the contract from the employees side. The Claimant removed himself as a response to the failure to pay. There is no evidence to suggest that he did so for any other reason. He told Mr Akkaya that it was a 'red line' which had been crossed. He also told him that he did not intend to return when they met on 6 May.

32. The evidence therefore shows that the Claimant's response to the fundamental breach was to treat the employment relationship as terminated. He told the Respondent that he did not want to use the word 'resigned' as he felt this had

significance with regard to employment rights. That is an understandable mistake on the part of a lay person. By withdrawing his labour, the Claimant did resign from his employment.

33. He did so due to the failure to pay his salary. Other issues had come between the Claimant and Respondent by that time, in relation to the use of Montagu Road by the Claimant's wife's charity. But that was not the reason why the Claimant withdrew his labour. He did so because he felt that the Respondent had wrongly withheld his salary.

34. His response to the non-payment was immediate and was made clear to the HR consultant acting on behalf of the Respondent. The Claimant's participation in further meetings did not amount to acquiescence of the breach. He participated in order to try to obtain the money he considered he was owed. I consider that this does amount to a constructive dismissal.

35. The fact that the Respondent paid the amount owing and asked the Claimant to return, does not make their initial actions less than a fundamental breach. It is the Claimant's right to accept the breach and end the contract.

36. The actions taken by the Respondent after the breach to attempt to resolve the matter and return the Claimant to work, or to settle with him, do not negate the breach, nor the resignation. By the time the Respondent purported to dismiss the Claimant for failure to return to work, he was no longer an employee.

37. Notice pay

The Claimant was dismissed without notice on 22 April by way of his acceptance of the breach of contract by the Respondent.

38. His contract entitles him to 4 weeks notice. The Claimant's contract was breached by the Respondent's failure to pay his salary. There was therefore no contract remaining for the Claimant to breach. There can be no justifiable reason for the Respondent to assert that the Claimant has breached his contract. He is therefore entitled to his notice pay.

39. Holiday pay

I have seen no evidence of the amount which was paid, nor the amount which the Claimant suggests ought to have been paid in relation to holiday pay. The Claimant asserted that the Respondent accepted that he was owed 11 days, but I have not seen evidence of this in the transcript of the meeting. On the basis that the Claimant has the burden of proof to prove the claim he seeks, I find that he has not met that burden and this claim is dismissed.

Pay statements and Remedy

40. Before I can award damages, I need to consider what the Claimant's basic gross and net pay were per week. The Claimant says that he was paid half of his earnings as cash and therefore they were not recorded and the Respondent did not pay tax and NI on those earnings. Equally this means that the Claimant did not pay the appropriate tax on half his income. However, as he received the net equivalent, he did not gain, nor lose from the arrangement.
41. The only evidence I have of such an arrangement is reference to it during the meetings between the Claimant and HR representatives of the company. The Claimant's evidence was that he worked 52.5 hours per week. His contract says he is entitled to NMW, If he received £722.86 net for two weeks (105 hours) he would be paid £6.80 per hour – this is less than NMW.  
The contract also refers to being paid 'cash as set out in the payslips'.
42. I therefore accept that the Claimant was paid the sum of £722.86 per week, net. (£918.50 per week gross and gross annual pay of £47,762.
43. I therefore also accept that the Claimant's payslips did not reflect the true amount he was paid and therefore do not conform to S. 8 ERA. I award 2x £722.86 for failure to provide accurate information on payslips = £1,445.72
44. In respect of unfair dismissal, I calculate damages on the basis that the Claimant was aged 42 years at the date of his dismissal and had completed 4 years work with the Respondent.  
Basic award  $2 \times 1.5 = 3 + 2 = 5 \times 544$  ( cap) = £2720
45. I award a loss of statutory rights as £400
46. In respect of compensatory award between 22/4/21 and 13/8/21;  
The Claimant ought to have been paid  $16 \times 722.86 = £11,565.76$ . He received £3140.34 according to payslips – but as I have found this represents only half of his payment, I therefore find he received £6280.68. He therefore had a loss of £ 5,285.08
47. Between 13/8/21 and 28/9/22 is 59 weeks. The loss of earnings in that period is;  
 $£722.86 \times 59$  weeks = £42,648.74
48. I have seen no evidence of the Claimant's attempts to mitigate his losses. He tells me that he has applied to a number of supermarkets and was given an interview by Co-op but was unsuccessful. The Claimant has been unemployed for over a year now and it cannot be reasonable for him to continue such a narrow search in terms of employer. I will allow a further 8 weeks in which the Claimant ought to find employment of a similar value  
 $8 \times 722.86 = £5,782.88$
49. No award is made for loss of pension as this has not been set out by the Claimant



**Notice Pay**

50. The Claimant was entitled to 4 weeks notice pay. This amounts to  $4 \times 722.86 = \text{£}2,891.4$

**Statutory Cap**

51. I must take into account the maximum award and the cap which is placed on damages for unfair dismissal; the current maximum compensatory award is 1 year gross pay; here that is  $\text{£}47,762$

52. A final calculation to include grossing up and cap must be made as follows:

i) Unfair Dismissal  $\text{£}50,482$

ii) Failure to provide payslips  $\text{£}1445.72$

iii) Notice  $\text{£}2891.44$

The total sum payable in compensation for all the claims is  $\text{£}54,819.16$

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Employment Judge Cowen

Date: 9 March 2023

JUDGMENT SENT TO THE PARTIES ON

10 March 2023

For the Tribunal office