

Case Number: 3314849/2021



EMPLOYMENT TRIBUNALS

Claimant

Mr. A Fairclough

AND

Respondent

Mr. P Wiffin

T/A Live and Let Live

HEARD AT: Cambridge Tribunal
(hybrid)

ON: 12 December 2022

BEFORE: Employment Judge Douse (Sitting alone)

Representation

For Claimant: Mrs. K MacLennan, lay representative

For Respondent: In person

RESERVED LIABILITY JUDGMENT

1. The Claimant's claim that he was unfairly dismissed is not well-founded and accordingly fails;
2. The Claimant's claim for a redundancy payment/notice pay is well-founded and succeeds;
3. The Claimant's claim for unauthorised deductions from wages partially succeeds;
4. The Claimant's claim for payment in lieu of untaken holiday partially succeeds

REASONS

Claims and Issues

1. The Claimant, by way of a claim form presented on 29 August 2021, brought complaints of:
 - a. Ordinary unfair dismissal
 - b. Redundancy payment/notice pay
 - c. Unlawful deductions from wages, related to failure to pay National Minimum Wage, from 26 July 2003 until termination of employment
 - d. Payment in lieu of untaken holiday 26 July 2003 until termination of employment

2. As neither party was legally represented, I determined that the issues to be determined by me were

Unfair Dismissal

- 2.1 Did the respondent have a potentially fair reason for dismissing the claimant? The respondent relies on 'redundancy' as being the potentially fair reason for the claimant's dismissal, pursuant to s. 98(2)(b) ERA 1996.
- 2.2 If so, was the respondent's decision to dismiss the claimant reasonable in all of the circumstances of the case, pursuant to s. 98(4) ERA 1996?

Unauthorised deductions

2.3 Did the respondent make unauthorised deductions from the claimant's wages in accordance with ERA section 13, and if so how much was deducted?

Unpaid annual leave - Working Time Regulations

2.4 When the claimant's employment came to an end, was s/he paid all of the compensation s/he was entitled to under regulation 14 of the Working Time Regulations 1998?

3. In his ET3, the Respondent disputed the leaving date, and claims for minimum wage and holiday pay over 17 years [24].

Procedure, documents and evidence heard

4. The case was listed for a 1-day hybrid hearing – it was listed to be heard via CVP, but the Respondent requested to attend in person.
5. There was an electronic bundle, totaling 43 numbered pages (46 electronically including blank pages), provided by the Claimant. My attention was taken to a number of these documents as part of me hearing evidence - I refer to this bundle by reference to the relevant page number within [].
6. I was also provided with a letter dated 20 September 2022, from an organisation called P3, which I numbered page 44.
7. I heard from the Claimant on his own behalf and from Mr Peter Wiffen for the Respondent. The Claimant gave evidence by way of a written witness statement that I read in advance of him giving oral evidence. His sister, Mrs MacLennan, also provided a written witness statement.
8. Mr Wiffen had not provided a written witness statement, so I asked him some questions in place of this. Both witnesses were cross-examined.
9. The Respondent had seen the documents provided by the Claimant but had not brought copies to the Tribunal, so there was an adjournment for these to be printed and provided to him.
10. At the start of the hearing, it was confirmed on the Claimant's behalf that although he accepts a genuine redundancy situation existed, and no alternative reason for dismissal was put forward. However, he maintained that the dismissal was procedurally unfair because no process was followed.
11. The Respondent acknowledged to me that some money may be due, but not the figures stated by the Claimant.

Facts

General

12. The Claimant was employed by the Respondent from 26 July 2003, latterly as a Public House Manager. He was contracted for 31 hours per week for remuneration of £9,540 per annum, payable weekly [34].
13. In his witness statement the Claimant stated that he worked on average a total of 43.5 hours per week, comprising of the following:

Monday

11am – 3pm – 4 hours

Tuesday

11am – 3pm – 4 hours

5.30-11.30pm - 6 hours

Thursday

5.30pm – 11.30pm - 6 hours

Friday

11am – 3pm – 4 hours

6pm- 11.30pm - 5.5 hours

Saturday

11am – 3pm – 4 hours

6pm – 11.30pm - 5.5 hours

Sunday

11.30am – 3.30pm - 4 hours

14. The Claimant said that he needed to do preparation for 30 minutes before the pub opened, including: drip trays; table and chairs; cellar; toilets; going to the shop to buy papers in the morning, and cleaning the beer lines.
15. The Respondent denied that the Claimant had to do 30 minutes of additional work before each morning shift, but accepted that the hours increased beyond the 31 hours in the contract, with no increase in wages, following the death of his partner in February 2011. However, he did not accept the hours to be as the Claimant stated. He gave evidence that the Claimant worked:
 - a. From 11.30am - 3pm on weekdays and Saturdays (3.5 hours)
 - b. From 12pm – 3.30pm on Sundays (3.5 hours)
 - c. Evenings as stated by the Claimant
16. On the Respondent's account, this amounts to 40 hours per week.
17. No written records were provided by either party of hours worked by the Claimant.
18. The Claimant's position changed during the course of his oral evidence, in that he acknowledged he didn't work additional hours from the outset, but had done for at least the last 10 years. That is consistent with the change reported by the Respondent in 2011.
19. In the minimum wage calculations provided by the Claimant [43] there is reference to 40 hours per week, not the 43.5 he claims in his witness statement.
20. Given the change in the Claimant's evidence and the inconsistency of this position compared with the documentation within the bundle, I find that the Respondent's evidence is more reliable in relation to this point.
21. I find, on the balance of probabilities, that from February 2011 the Claimant worked 40 hours per week.
22. The Claimant was required to live on the premises [34], and was provided accommodation for free.

23. Although the contract stated weekly pay, the Claimant was often paid a monthly amount of £795 in cash.
24. In February 2011, at the same time as the increase in hours, the Respondent notified the Claimant that the accommodation would no longer be free, and instead would be subsidised/discounted. From that point, the Claimant was paid £500 each month, with the remainder - £295 - attributed to accommodation costs.
25. The Respondent says that in recognition of the changes, he paid the Claimant a lump sum of £1500 in January 2013. No record of this payment was provided to me.
26. Taking judicial notice, on 23 March 2020 the UK entered into a national lockdown as a result of the Covid-19 pandemic. Hospitality venues were closed as a result.
27. The government introduced a furlough scheme whereby they paid 80% of an employee's wages, up to a cap.
28. The Claimant was placed on furlough in March 2020 and was paid 80% of £795 - £636 - per month.
29. The Respondent started to provide a takeaway service, which he operated himself.
30. As restrictions changed, allowing some venues to reopen with conditions, the Respondent determined that this would not be economically viable for his, as the size of the pub and the need for social distancing meant only 10 –12 people could be accommodated.
31. In May 2020, the Respondent warned the Claimant that he could only afford to pay the rent for a little while longer. He says he wanted to give him the option to find a "plan B".
32. The Respondent checked with the Claimant regularly about him finding alternative work, but it was hard for the Claimant to find something in the hospitality industry because of the situation.
33. The Respondent applied for a 'bounceback loan' in the hope that he could reopen, but when more restrictions were announced he used the loan for other expenses.
34. The government furlough scheme was due to end in October 2020, so the Respondent informed the Claimant that he couldn't carry on employing him. However, not long later it was announced that the scheme would continue/restart, and the Claimant asked to be put back on furlough. The Respondent consulted with his accountant, and agreed to the request, but told the Claimant he would still need to find an alternative.

Termination

35. The Claimant and Respondent met again in February 2021, where the Respondent repeated the difficulties he was having and confirmed that the Claimant's employment would have to end and he would have to move out of the accommodation.

36. Neither party was able to recall the specific date. However, a letter from P3 – the organisation approached by the Claimant’s sister to assist him – refers to being approached on 19 February 2021 [44].
37. In her witness statement Mrs MacLennan says that prior to contacting P3 her concerns related to furlough money not being paid on time, and that the Respondent became hostile when asked for payment, and that the charity then took his case on and provided help in relation to his housing situation.
38. P3 also state that the Claimant felt unable to pursue any action until he was no longer living at the accommodation.
39. The contract refers to written notice of four weeks if the employee wishes to terminate, and just vague reference to “a similar period of notice” if the employer wishes to terminate for any reason other than misconduct.
40. When asked in cross-examination why he said he wasn’t aware of the letter before 6 April 2021 when he had requested it, the Claimant said he wanted something in writing. He also said that he wanted something to say his employment was ending and to show that he was being made redundant, and that he was hoping to get something to prove that he wasn’t intentionally homeless.
41. The Claimant confirmed to me that at the February 2011 meeting he was told that he was being made redundant. He agreed that he would leave, but said that this couldn’t be until April as that is when his sister could come to help him.
42. Given the above findings, I also find as a matter of fact that the Claimant was informed of the termination of this employment on 19 February 2021.
43. The Respondent drafted a letter confirming termination of employment on 1 March 2021. This was not given to the Claimant until 6 April 2021, in the presence of his sister.
44. On 6 April 2021, Mrs MacLennan attended the property to help the Claimant move out. He left the accommodation on that date.
45. The Claimant continued to be paid furlough until 6 April 2021. This is the last payment received from the Respondent.
46. The Claimant was not paid any amount that was specifically referred to as notice pay or a redundancy payment.

Wages

47. The Claimant’s annual salary of £9,540 equated to £183.46 per week.
48. Prior to 2011, when working 31 hours per week, the Claimant was therefore being paid £5.92 per hour.
49. Following the increase to 40 hours per week in February 2011, the Claimant was therefore being paid £4.59 per hour, not taking into account any amount offset against accommodation.
50. From March until 6 April 2021 the Claimant was paid £636 per month in furlough.

Holiday pay

51. The Claimant's contract provided for 28 days leave per holiday year, running from April each year [34].
52. The contract also specified that holiday could not be carried over into the next leave year.
53. A letter drafted by CAB on the Claimant's behalf, dated 22 June 2021, states:

"Throughout my employment, I was only ever allowed to take 20 days' holiday per leave year...I was prevented from taking my full statutory holiday entitlement every year due to your requirements, and therefore I am owed 8 days of holiday (£570.24) for 17 year2" [19].

54. The Claimant's witness statement refers to only being able to take 24 days holiday per year. He confirmed in his oral evidence that 24 was the correct number, as he would take 2 separate periods of 12 days roughly in January and again in August.
55. When I asked about any additional days, the Claimant recalled that he had previously taken another day for a wedding.
56. Neither party had kept any record of holidays requested or taken.
57. The Respondent denied only allowing the Claimant to take 24 days per year. His evidence was that outside of December and trade shows, the Claimant could just ask to take leave. His position was that any untaken leave was a matter of choice.
58. The Claimant's evidence was that he found it difficult to get leave he wanted because of the restrictions out in place by the Respondent, and that he was hard to communicate with generally.

Law

59. Section 98 Employment Rights Act 1996

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

...

(c) is that the employee was redundant, or

...

(4) [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 reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

60. Section 13 Employment Rights Act 1996

Right not to suffer unauthorised deductions.

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

61. Deduction from Wages (Limitation) Regulations 2014

Amendment to the Employment Rights Act 1996

In section 23 of the Employment Rights Act 1996¹ (protection of wages: complaints to employment tribunals) after subsection (4) insert—

“(4A) An employment tribunal is not (despite subsections (3) and (4)) to consider so much of a complaint brought under this section as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint.

(4B) Subsection (4A) does not apply so far as a complaint relates to a deduction from wages that are of a kind mentioned in section 27(1)(b) to (j).”

62. Regulation 14 Working Time Regulations

Compensation related to entitlement to leave

(1) [Paragraphs (1) to (4) of this regulation apply where—]

(a) a worker's employment is terminated during the course of his leave year, and

(b) on the date on which the termination takes effect ("the termination date"), the proportion he has taken of the leave to which he is entitled in the leave year under [regulation 13] [and regulation 13A] differs from the proportion of the leave year which has expired.

(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).

(3) The payment due under paragraph (2) shall be—

(a) such sum as may be provided for for the purposes of this regulation in a relevant agreement, or

(b) where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula—

$$(A \times B) - C$$

A is the period of leave to which the worker is entitled under [regulation 13] [and regulation 13A];

B is the proportion of the worker's leave year which expired before the termination date, and

C is the period of leave taken by the worker between the start of the leave year and the termination date.

(4) A relevant agreement may provide that, where the proportion of leave taken by the worker exceeds the proportion of the leave year which has expired, he shall compensate his employer, whether by a payment, by undertaking additional work or otherwise.

[(5) Where a worker's employment is terminated and on the termination date the worker remains entitled to leave in respect of any previous leave year which carried forward under regulation 13(10) and (11), the employer shall make the worker a payment in lieu of leave equal to the sum due under regulation 16 for the period of untaken leave.]

Conclusions

63. I applied the relevant legal tests to the findings of fact that I have made, to reach my conclusions on the issues for determination. I have set my conclusions out in the same order as the list of issues.
64. In general, I did not find Mr Fairclough to be an entirely reliable witness. This was primarily because, in response to questioning his answers sometimes differed to what he had said in his witness statement, other documents, or what he had answered in relation to previous questions. The result of this is that, where the burden was on the Claimant to persuade me of facts on the balance of probabilities he failed to do so. The details of this are included in relation to the specific complaints below.

Termination

65. The Claimant's position at the start of the hearing was as outlined in the letter drafted for him by CAB – that he was not aware of the March letter until 6 April 2021, and applying 12 weeks' notice considered his termination date to be 29 June 2021.
66. However, in response to my questions, the Claimant accepted that Mr Wiffen told him in the February meeting that he was being made redundant.
67. Furthermore, the Claimant had requested that Mr Wiffen draft the letter, albeit for the purposes of assisting an application for housing assistance.
68. I therefore cannot accept that the Claimant only became aware his employment was ending once he saw the letter on 6 April 2021.
69. Although it would have been best if written confirmation had been provided to the Claimant immediately after the meeting, the Claimant can have been under no illusion that his employment would be terminating. Mr Wiffen did draft the letter on 1 March 2021, and whilst it is unfortunate that this wasn't provided to the Claimant prior to 6 April 2021, it does not impact on the Claimant's knowledge.
70. The Claimant's notice period started on 19 February 2021. I do not consider the fact that the Claimant remained in the accommodation after this date to have any bearing on the termination date.
71. Having found the termination date as 19 February 2021, the Claimant had until 18 May 2021 bring a claim or contact ACAS to commence conciliation. As conciliation started on 1 July 2021, on the face of it the claim was out of time.
72. I therefore had to consider whether it was reasonably practicable for the Claimant to have presented his claim in time, and if tin was not whether it was presented within a further reasonable timeframe.
73. The Claimant can be under no illusion that he was aware on 19 February 2021 that his employment was being terminated, and he relayed this to his sister who then engaged P3. He was clearly able to access assistance from that point.

74. However, I do accept that until he received written details of that he would not have been aware of a potential claim. For example, the letter he requested may have included reference to payment in lieu of notice or a redundancy payment, which may have satisfied the Claimant. It was only at that point that he could know that there was potentially no payment coming.
75. I also take into account that the issue of accommodation connected to his employment may have made the Claimant feel vulnerable.
76. In all the circumstances, I am just persuaded that it was not reasonably practicable to bring the claim in time, and that it was presented within a reasonable period after the time limit expired.

Unfair dismissal

77. The Claimant accepted that he was dismissed by reason of redundancy. It was clear to him, and to me, that closure of the business was the sole reason for the termination of his employment.
78. In relation to procedural fairness:
- 78.1 This is not a situation where selection criteria would be relevant – the business was closing and the Claimant was the only employee.
- 78.2 The Claimant was warned on multiple occasions about the fate of the business, and more formal consultation would not have altered this
- 78.3 There was no alternative work available, as the business was closing completely.
79. In the circumstances, taking account of the size and administrative resources of the company, the Respondent acted reasonably in dismissing the Claimant for reason of redundancy.
80. The claim for unfair dismissal fails and is dismissed.

Redundancy payment/notice pay

81. Having worked for the Respondent for 17 years at the time of termination, the Claimant is entitled to 12 weeks gross pay as statutory redundancy/in lieu of statutory notice.
82. The Claimant's notice period started on 19 February 2021.
83. The Claimant received his last payment from the Respondent up until 6 April 2021. Any amounts received for the period 19 February to 6 April 2021 are to be deducted from the final amount.

Wages

84. The conclusions I made in relation to time limits above, apply equally for this claim.
85. As I am prevented as a matter of law from considering claims related to wages claimed to be deducted more than 2 years before the claim is presented, the Claimant's wages claims from 26 July 2003 until 28 August 2019 are therefore dismissed.
86. In relation to the claims for deductions from 29 August 2019 until termination, the Claimant was entitled to receive the National Minimum Wage (NMW). Any wages paid to the Claimant during that period that amount to less than NMW, once any accommodation offset is taken into account, are unlawful deductions.
87. The Claimant is entitled to payment of the difference between what he was paid, and the NMW at the relevant time (once any accommodation offset is taken into account), for the period 29 August 2019 until 19 February 2021.

Holiday pay

88. The conclusions I made in relation to time limits above, apply equally for this claim.
89. As I am prevented as a matter of law from considering claims related to payment in lieu of untaken holidays more than 2 years before the claim is presented, the Claimant's claims for holiday pay from 26 July 2003 until 28 August 2019 are therefore dismissed.
90. Due to the inconsistencies in the Claimant's evidence, I conclude on the balance of probabilities that he was not prevented by the Respondent from taking his full 28-day entitlement from 29 August 2019.
91. As the Claimant was furloughed from March 2020, until termination, he would not have been able to take his annual leave entitlement for the holiday year starting April 2020, and is entitled to payment in lieu of accrued and untaken leave at the point of termination.
92. As the Claimant's employment was terminated on 19 February 2021, any claim related to payment in lieu of holiday for the holiday year starting April 2021 fails and is dismissed.

Remedy

93. A separate judgment setting out detailed calculations for remedy will be sent to the parties.

Employment Judge K Douse

Dated: ...13 March 2023.....

Sent to the parties on: 14 March 2023

For the Tribunal Office