



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr A Arulpragasam

**Respondent:** Leinster Motor Engineering Ltd

**Heard at:** London South (VR)  
2022  
chambers)

**On:** 1,2,30 November  
& 21 December 2022 (in

**Before:** Employment Judge Gianferrari

## Representation

Claimant: Mr KW Parera, Harding Mitchell Solicitors

Respondent: Ms G Kennedy-Curnow, Peninsula Business Services

# RESERVED JUDGMENT

The Judgment of the Tribunal is as follows: -

1. The complaint of unlawful deduction from wages in respect of furlough payments of the employer's contribution of 20% from June to October 2020 is not well founded and is dismissed.
2. The complaint of unlawful deduction from wages from November 2020 to 10 September 2021 is not well founded and is dismissed.
3. The complaints in respect of holiday pay for dates before 10 May 2019 are struck out on the basis of no reasonable prospect of success.
4. The complaint in respect of holiday pay between 10 May 2019- April 2020 is not well founded and is dismissed.
5. The complaint in respect of holiday pay between April 2020- 10 May 2021 is well founded. The respondent made an unauthorised deduction from the claimant's pay by failing to pay holiday pay and is ordered to pay the claimant the gross sum of £1,838.95.
6. The respondent failed in its duty to provide the claimant with a written statement of the main terms of employment complying with section 1/section 4 Employment Rights Act 1996. Pursuant to section 38 of the

Employment Act 2002 the above award is increased by the sum of £1021.64, being two weeks' gross pay.

7. The complaint of unlawful deduction from wages in respect of non-payment of the hourly minimum wage is not well founded and dismissed.
8. The complaint of unfair dismissal under Part X Employment Act 1996 is not well founded and is dismissed.
9. The complaint of breach of contract in relation to notice pay is not well founded and is dismissed.
10. The application to amend the particulars to include complaints for underpayments of wages for (i) £38,235 for years ending April 2014 and April 2015; (ii) for £8,928 between January and April 2019 and (iii) for £2,008 between October 2018 and May 2019; is refused.
11. The complaint of unlawful deduction from wages in respect loss of pension rights is not well founded and is dismissed.
12. The respondent is ordered to pay the claimant a total of £2,860.59.

## **REASONS**

### **Introduction**

1. The respondent Leinster Motor Engineering Limited is a garage providing motor repairs and servicing in the London area. The respondent employed the claimant as a motor technician on 9 March 2013 until he was dismissed on 10 September 2021.

### **Issues to be determined**

2. The claimant initially brought three separate sets of claims against the respondent: -
  - A. Case Number: 2300981/202, presented on 12 March 2021 for-
    - 1) Unlawful deduction from wages in respect of furlough payments of the employer's contribution of 20% from June to October 2020.
    - 2) Unlawful deduction from wages from November 2020 to 10 September 2021.
  - B. Case Number: 2301723/2021, presented on 10 May 2021 for-
    - 1) Non- payment of holiday pay from the start of his employment (March 2013- March 2020).
    - 2) Failure to provide written statement of particulars of employment.
    - 3) Unlawful deduction from wages for non-payment of the hourly minimum wage.

- C. Case Number 2305653/2021, presented on 26 November 2021 for-
- 1) Unfair dismissal and notice pay.
3. There was no case management hearing and the matter was listed for Final Hearing on 1 & 2 November 2022.
4. During the preparation of the hearing bundles the claimant included an Amended Schedule of Loss adding three claims for underpayment of wages and an unlawful deduction from wages claim for loss of pension rights, as follows:-
- D. 1) (i) for £38,235 for years ending April 2014 and April 2015; (ii) for £8,928 between January and April 2019 and (ii) for £2,008 between October 2018 and May 2019.
- 2) Unlawful deduction from wages for unquantified pension rights.
5. On 3 October 2022 the respondent submitted an application to strike out the majority of the claimants claims and on 28 October 2022 the claimant submitted written objections to this application and requested they be heard at the start of the hearing.
6. On 1 November 2022 the hearing commenced with the swearing in of Mr Razik, Sinhalese interpreter, to assist Mr Arulpragasam throughout the proceedings.
7. I requested the parties clarify the issues and Mr Perera confirmed that they were as outlined in the claimant's statement and comprised those claims identified as A, B, C & D above. Ms Kennedy- Curnow agreed with these heads of claim save for those that were subject to the strike out application to follow.

### **Application to strike out**

8. The respondent sought to strike out claims for furlough pay, holiday pay, unlawful deduction from wages and unfair dismissal. Under **Rule 37 (1) of the Employment Tribunal Rules of Procedure** a claim can be struck out on the following grounds: -
- 1) **That it is scandalous, vexatious or has no reasonable prospect of success (R37 (1)(a).**
  - 2) **That the manner in which the proceedings have been conducted by or on behalf of the claimant has been scandalous, unreasonable or vexatious (R37(1)(b).**
9. This sets a high bar, and great care must be taken as the evidence had not been tested at this stage. However, the following claims were struck out:-
10. Holiday pay claims before 10 May 2019. The claimant claimed holiday pay from the commencement of his employment in 2013, the respondent submitted that the period that could be claimed is limited to two years. I considered **s23(4A) of the Employment Rights Act 1996** which states,

*“An Employment Tribunal is not ...to consider so much of a complaint brought under this section as relates to a deduction of 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.”*

11. I considered the cases of **Smith v Pimlico Plumbers Limited [2022] EWCA Civ 70** as directed by the respondent and **King v Sash Window Workshop Ltd and King v Sash Window Workshop [2018] 2 CMLR 10, [2018] ICR 693** an ECR judgment, as directed by the claimant.
12. I was satisfied that the two-year backstop applied in accordance with the law and that the period the holiday claim applied to should be two years from the date that the holiday claims were brought, 10 May 2019-10 May 2020 and that claims before that date be struck out as having no reasonable prospect of success under R37(1)(a).
13. Reconsideration application. On the 2 November 2022, Mr Perera applied for reconsideration of my oral judgment to restrict the holiday pay claim to two years. Mr Perera referred to the applicability of the EU Exit Arrangements in continuing to ensure EU rights continuing to be recognised in domestic law after exit. Mr Perera invited reconsideration of **King v Sash Window Workshop ( Press Release No 126/17 dated 29 November 2017 of the Court of Justice of the European Union)** which states, *“A worker must be able to carry over and accumulate unexercised rights to paid annual leave when an employer does not put that worker in a position in which he is able to exercise his right to paid annual leave .....EU law precludes national provisions or practices that prevent a worker from carrying over and, where appropriate, accumulating, until termination of his employment relationship, paid annual leave rights not exercised in respect of several consecutive reference periods because his employer refused to remunerate that leave.”*
14. The case advanced by Mr Perera on behalf of the claimant in the instant case is that he was not paid holiday pay that was due to him. The case in **King v Sash Window Workshop** was different in that it concerned the denial of the right to annual leave. The Court of Appeal in **Smith v Pimlico Plumbers Limited [2022] EWCA Civ 70** said that the right to take leave and be paid for it were indivisible, however this was not a case where either had been denied. In my opinion the instant case was therefore distinguishable as the right to holiday pay was not denied rather the case was that the payments were deficient.
15. In accordance with **s23(4A) of the Employment Rights Act 1996** the two year backstop applied and it was correct to confine the holiday pay claims to 10 May 2019 -10 May 2021. My original decision was upheld and the pre-2019 claims remained struck out.

### **Application to amend**

16. Application to amend the ET1 to include underpayment of wages. The claimant submitted that claims for underpayments of wages 1) for £38,235 for years ending April 2014 and April 2015; (2) for £8,928 between January

and April 2019 and (3) for £2,008 between October 2018 and May 2019; be heard, citing the prejudicial behaviour that the claimant alleged against the respondent, that would be heard in evidence in other claims. The claimant argued that they had not sought an earlier amendment to the ET1 as they had hoped to resolve this amicably with the respondent. The respondent argued that at no time in the submission of three ET1's had the matters been pleaded and should be struck out.

17. I initially considered the principle of an amendment to allow all three underpayment of wages claims and depending on my finding would then consider the three claims individually. The core test in considering applications to amend is to balance the injustice and hardship of allowing or refusing the application confirmed in **Vaughan v Modality Partnership UKEAT/0147/20/BA**.

18. In doing so I considered the test set out in **Selkent Bus Company Limited v Moore [1996] ICR 836** inviting consideration of: -

- 1) the nature of the amendment
- 2) the applicability of time limits
- 3) the timing and manner of the application.

19. I determined that the nature of the amendment was not a minor one but substantive to introduce new causes of action and the consequent expansion of the case. This represented a significant new claim with new factual evidence, additional witnesses to be called in respect of issues pertaining to a five-year period.

20. The tribunal time limits had been surpassed. The timing was late, and notwithstanding that the claimant had written to the respondent on 7 February 2022 referencing these matters; had been added to the final bundle shortly before the final hearing. There had been three ET1's submitted without reference to these matters. Time limits are set for good reason, to ensure the fairness of proceedings for both parties.

21. I considered the test set out in **Vaughan v Modality Partnership UKEAT/0147/20/BA** and the balance of the forensic prejudice encountered in amending the claim. The failure to adhere to the tribunal time limits was a significant issue that the claimant had not overcome. The claimant had opportunity to have amended at earlier stages in the proceedings and had not done so. It would have been unjust to allow the amendment at this late stage.

22. Because of this I did not go on to consider the individual merits of the three underpayments and the application to amend the ET1 was refused.

23. The disputed claims for furlough pay, holiday pay, unlawful deduction from wages and unfair dismissal were not struck out as I needed to hear the evidence before any final determination could be made.

24. That concluded the first day of the hearing.

25. In respect of the unlawful deduction from wages in respect of pension rights, no representations were made by the claimant to amend the claim and therefore they were not considered within this application. The claimant did refer to this deduction in his final submissions, stating that they should automatically flow from a successful awarding of unfair dismissal and are dealt with further below.

## **Evidence**

26. The hearing took place on 1, 2 and 30 November 2022 when I heard evidence from Mr A Arulpragasam, claimant; Mr S Jeyabraba, respondent; Mr S Sivakumar, respondent's witness, Mr P Karuppaiyah, respondent's witness

27. Both applicants and witnesses gave oral evidence having confirmed the contents of their statements as correct and the evidence as elicited in cross examination by the respective legal representatives is recorded below.

28. The parties provided to the court an agreed hearing bundle of 241 pages, supplementary bundle of 7 pages and written witness statements of Mr A Arulpragasam, Mr S Jeyabraba, Mr S Sivakumar and Mr P Karuppaiyah

## **Submissions**

29. Ms Kennedy-Curnow presented written submissions of 8 pages and 55 paragraphs. The tribunal will not attempt to summarise but incorporates them by reference.

30. Mr Perera provided oral submissions asserting the claimant's entitlement to requested furlough pay, holiday pay, wages from November 2020, provision of written particulars, unfair dismissal, notice pay and pension rights. Post hearing Mr Perera provided supplementary written submissions, and which confirmed some agreement with the respondent in respect of figures in respect of some financial elements.

## **Law**

31. Unlawful deductions from wages: -

### **Section 13(1) Employment Rights Act 1996 (ERA)**

**“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.”**

32. Holiday Pay

Holiday pay in this matter, falls within the definition of wages **Section 27(1)(a) Employment Rights Act** and the claims for unpaid holiday pay are therefore considered as unlawful deductions from wages.

33. Failure to provide written statement of particulars of employment.

**S38 Employment Act 2002**

34. Unfair Dismissal by way of conduct

35.:

**Section 98 ERA**

**“(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 –**

**(a) Relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do;**

**(b) Relates to the conduct of the employee;**

**(c) Is that the employee was redundant; or**

**(d) Is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.**

**(3) In subsection (2)(a) -**

**(a) ‘Capability’, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality; and**

**(b) ‘Qualifications’, in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.”**

## Findings of fact

36. Having considered the evidence, I made the following findings of fact. Where a conflict of evidence arose, I resolved the same on the balance of probabilities. I have considered my assessment of the credibility of the witnesses and the consistency of their evidence with the surrounding facts.
37. The findings of fact relevant to those issues which have to be determined are as follows: -
38. The claimant was employed as a motor technician from 9 March 2013 until he was dismissed on 10 September 2021.
39. The claimant was a skilled motor technician which include work on electric motors and systems.
40. The respondent operates as a small business.
41. Both parties accept that the claimant was entitled to 25 days holiday pay per year as he worked 4 ½ days a week.
42. Mr Jeyabraba recorded staff leave in a daily diary and on a board in the garage. This is supported by the evidence of Mr Jeyabraba and the witness Mr Sivakumar. The diaries were disposed of at the end of the year and consequently there was no digital, recoverable record of holidays taken.
43. Following a conference call with all staff on 31 March 2020 a decision was made to furlough staff which was confirmed by letter dated 1 April 2020(P83). This was intended as a temporary measure to pay staff full pay.
44. There was no way of knowing how long this furlough payment period would last as it was subject to the government reacting to the covid situation.
45. That all staff were asked to return to work on 1/06/20 except for the claimant as accepted by both parties in their evidence.
46. The claimant has one kidney and suffers from asthma. This is evidenced by his ET1 at (P13) referring to these conditions as his basis for expecting furlough payments to continue and his own evidence.
47. That from the 1/06/20 the claimant was claiming furlough on the basis of his medical conditions and the claimant would be asked to attend only to do urgent work. I note the claimant's evidence is that he received this instruction from Mr Vithana whom he describes as the respondent's accountant though the respondent disputes this stating he is a friend who helps out. I accept the evidence of the respondent on this point who states that he has a company accountant and Mr Vithana doesn't play an active part in the business.
48. There were communications between Mr Vithana and the claimant as referred to in the bundle however there are no responses from Mr Vithana



that suggests he has an active role in the business (P171). There is a video recording dated 21/12/21, and transcript of it (P165) of the claimant speaking in English to a man named John and the respondent and whilst there is reference to “money” I find no specific reference to the claims in issue and I am not assisted by it.

49. The claimant alleges that the letter 01/08/20 is a forgery, having been prepared by Mr Vithana and he was tricked into signing it by being informed it was for his furlough pay when he attended the garage to present his letter requesting payment for outstanding monies on 29/10/20. The respondent states that this letter was prepared by his wife on behalf of the claimant whilst signed it in front of them. I treat this issue with care and do not find on the balance of probabilities that the letter is a forgery and I prefer the evidence of the respondent.
50. The claimant attended work for four days in July 2020. This is accepted by both parties and supported by evidence of MOT examinations that took place on 7 & 8 July 2020 (P204-205). The claimant refers to an image of him wearing an MOT testers uniform (P163) but states this is for another date though concedes that there is no date stamp to confirm when this is. There is no CCTV from the garage to assist this point further as it was automatically deleted after six months.
51. The holiday period relevant to this tribunal was defined by the striking out of claims before 10 May 2019. The holiday period to be considered was 10 May 2019 to 10 May 2021.
52. The claimant went on holiday to Sri Lanka and was paid for 26 days holiday in the year April 2019-April 2020 as accepted by the claimant in his evidence.
53. The respondent accepted in his ET3 and in evidence that no written particulars of employment were provided to the claimant.
54. That the claimant attended at the garage on 29 October 2020 provided a letter of the same date, stating that he worked 23 days from June to October 2020 and was owed full pay for this period. He also stated he was in ill health but would consider coming back to work if paid.
55. That the claimant did not attend work from 1 November 2020 and has claimed state benefits since that date.

## **Conclusions**

56. In evaluating the evidence and applying the law to the findings of fact I concluded the following: -

### **Case Number: 2300981/202, presented on 12 March 2021 for-**

- 1) Unlawful deduction from wages in respect of furlough payments of the employer's contribution of 20% from June to October 2020.
- 2) Unlawful deduction of wages from November 2020 to 10 September 2021.

57. Unlawful deduction from wages in respect of furlough payments of the employer's contribution of 20% from June to October 2020. The claimant was placed on furlough on 1/04/20 along with other staff members when there was no work available. The claimant did not return to work in June 2020 when other staff members did and remained on furlough on the basis of his health conditions. The claimant did not provide medical certificates when requested by the respondent to support his claim.
58. The furlough scheme was not fixed in duration nor predictable as it responded to a global emergency. The respondent submits that staff were notified in May that they would be paid 80% of wages due to changes in government contributions. The respondent received 80% of his wages £1741.02 Net, from June to October 2020.
59. The respondent as a small business in a pandemic was entitled to operate the furlough scheme within government guidelines and not be confined to payment of 100% wages throughout an indeterminate period and therefore entitled to depart from the letter of 01/04/20 (P83).
60. I find that the claimant has been paid what he was entitled to during this period. I do not find that the claimant acted in a fraudulent manner. I note that he gave conflicting evidence in the hearing stating that he did not rely on his medical condition but this in turn is contrary to how he commenced his claim, namely on the basis that he was in ill health (P13) and there is evidence that he has health issues in the form of one kidney and asthma. The claimant accepted that he agreed to stay at home for a period of six months and only attend work if urgent need.
61. On this basis and not unreasonably he was entitled to furlough payments subject to providing requested medical evidence. However, I accept the respondent's position that this reduced by necessity to 80% of wages and do not order payment of the remaining 20%.
62. Unlawful deduction from wages from 10 May 2020 – 10 September 2021. It was accepted by the claimant in evidence that he has not worked for the respondent since November 2020 and he stated that he had been in receipt of state benefit from that date. The respondent accepts that he has not paid the claimant during this period.
63. There is no evidence that the claimant consented to his wages being deducted or that there was a statutory provision relied upon. There is evidence within the communications between the parties that the claimant would be prepared to come back to work and equally that the respondent would have him back to work. However, these were conditional and on the basis of the payment of monies that the claimant believed were due to him and on the basis of medical information that the respondent required to submit.
64. The claimant gave very clear evidence to the tribunal that he would not work, as he saw it, for nothing and this evidences an unwillingness to return to work on this basis. The claimant confirmed that he has claimed benefit throughout this period. I find that the claimant had no authority to remain

absent during this period and do not find that he should be paid the monies claimed for an unlawful deduction of wages.

**Case Number: 2301723/2021, presented on 10 May 2021 for-**

- 1) Non- payment of holiday pay from the start of his employment (March 2013- March 2020).
- 2) Failure to provide written statement of particulars of employment.
- 3) Unlawful deduction from wages in respect of non-payment of the hourly minimum wage

65. Holiday Pay. The holiday pay claim was defined by strike out application to between 10 May 2019 – 10 May 2021. It was accepted that the claimant worked part time and was entitled to 25 days holiday per year including bank holidays. The claimant accepted in evidence the respondent's contention that his holiday in Sri Lanka had resulted in his taking 26 days holiday for the year ending April 2020.

66. In relation to the holiday period ending April 2020 the claimant's position is that he took no leave during this time and is entitled to 18 days holiday pay, that being 25 days less 7 bank holidays. The respondent submits that the claimant is owed holiday in this period and I determine that he is owed the 18 days requested.

67. I note that there is holiday entitlement up to the defined period of 10 May 2020 but take in to account the claimant's previous overpayment of one day and this is to be taken into account here.

68. The holiday pay owed to the claimant, utilising the figures provided and agreed by the parties for weekly gross pay at £510.82; daily pay is £102.16 (GROSS) x 18 = £1,838.95

69. Failure to provide written statements of particulars. The respondent accepts that the claimant was not given any written employment documentation. As there has been a relevant substantive finding in relation to holiday pay, I therefore make an award as of 2 weeks gross pay. Utilising figures agreed by the parties for weekly pay this is £510.82 (GROSS) x 2 = £1,021.64.

70. Unlawful deduction from wages in respect of non-payment of the hourly minimum wage. No evidence was presented in evidence of any failure to pay the pay the minimum wage and it was not mentioned in the claimant's representatives' submissions.

**Case Number 2305653/2021, presented on 26 November 2021 for-**

- 1) Unfair dismissal and notice pay
- 2) Unlawful deduction from wages in respect of loss of pension rights

71. Unfair dismissal and notice pay. The burden of proof lies with the respondent, and it is his submission that the claimant was fairly dismissed due to his conduct. There is no dispute that the claimant was dismissed on 10 September 2021 and the evidence before the tribunal is that the

claimant accepts that he did not work for the respondent after 1 November 2020.

72. There is clear evidence of correspondence between the parties and there is a dispute. However, I find that there is no evidence of the exercising of a grievance process in the first instance by the claimant though I accept that is because there appears to be no such formal mechanism in the business.
73. It is reasonable to expect that an employer seeks to resolve an issue with his employee in clear and transparent terms and that is not evidenced here.
74. There is no evidence of a formal investigation of issues though there is evidence of calls, messages and written requests. The claimant alleges that there was another controlling element within the business, Mr Vithana, whom he was in contact with, seemingly over and above that with Mr Jeyabraba.
75. However, as I have indicated previously, I do not accept that Mr Vithana was a controlling individual for these purposes. I take into account the small size of the respondent's business and the evidence of poor administrative controls (holiday diary) and the respondent accepts that he could've conducted matters between himself and the claimant better.
76. The respondent relies on the claimant's conduct in that he absented himself without authorisation from the business and his was made clear in correspondence that he was to return to work. I accept that the claimant did indicate a willingness to return but this was caveated by his clear indication that he would not less he was paid sums he claimed he was owed.
77. The evidence from the claimant was very clear on this point and irrespective of his perceived reasons behind his not returning to work, he absented himself without authorisation, for a lengthy period of time and this legitimised his potential for dismissal.
78. This conduct is a potentially fair reason to dismiss. The claimant was a valued employee with particular specialisms in relation to electronic cars and I accept that the respondent wished him to return to work. Consequently, I accept that the claimant not returning to work pressured a small business and ultimately his job could not be held open indefinitely.
79. In my view it is well within the range of responses for an employer to dismiss in these circumstances for the claimant's unauthorised, substantial absence and I do not find that Mr Arulpragasam was unfairly dismissed.
80. Unlawful deduction from wages in respect of loss of pension rights. As stated above no representations were made by the claimant to amend the claim, no evidence was adduced to qualify and quantify the claim. The claimant in final submissions stated that they should automatically flow

**Case No: 2300981/2021; 2301723/2021 & 2305653/2021**

from a successful awarding of unfair dismissal and as no such award is made this head of claim is dismissed.

81. May I sincerely apologise to the parties in this matter for the delay in delivering this judgement which unfortunately is down to pressure of work.

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Employment Judge **Gianferrari**

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Date **28 March 2023**

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR EMPLOYMENT TRIBUNALS