EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mr A Chinn	**v**	AC Precision Engineering Ltd

Heard at: Reading **On:** 1 & 2 February 2023

Before: Employment Judge Anstis (sitting alone)

Appearances:
For the Claimant: In person
For the Respondent: Mr E McFarlane (consultant)

WRITTEN REASONS

A. INTRODUCTION

1. These are the written reasons for the tribunal's judgment of 2 February 2023, promulgated on 9 March 2023. They are prepared on the request of the respondent, made on 13 March 2023. That request was referred to me on 28 March 2023.

2. The claimant in this case was never given a written contract of employment or statement of particulars of employment by the respondent. Many of the difficulties he complains of could have been avoided if he was given a written contract of employment or statement of particulars of employment.

B. THE CLAIMS

3. The claimant's claims are of constructive unfair dismissal and unlawful deductions from wages (that is for sick pay, failure to pay a bonus and for holiday pay due on termination of employment).

4. The parties agree that the claims in relation to unfair dismissal and holiday pay are brought within time, but the claims in relation to sick pay and failure to pay a bonus are brought outside the standard time limit.

Wages – sick pay

5. I will first address the claims of unlawful deductions from wages, noting that they are brought only as claims of unlawful deductions from wages, and not claims of breach of contract.

6. Looking first at sick pay, it is the claimant's case that he was entitled to be paid full company sick pay. In closing submissions he limited this to four weeks of full company sick pay, a limit he considered to be reasonable.

7. He has no written contract of employment or statement of particulars of employment. The only written document which sets out anything in relation to sick pay is the respondent's company handbook. Its status is disputed. It says "*most employees have a right to statutory sick pay*" and does not mention any full company sick pay.

8. In saying that he is entitled to full pay when sick, the claimant draws on a number of concepts. The first is that it goes with his status as a white collar, salaried employee. It is agreed that he was not hourly paid or eligible for overtime. It is also agreed that he regularly worked more than his set hours. He says that his status as "staff" entitles him to sick pay. The second is that his entitlement comes from custom and practice. He had previously been paid in full for two periods of a couple of days absence. The third is reliance on a printout from the ACAS website which says, in effect, that if there is discretionary sick pay this should be set out in a written contract or statement of terms.

9. While the claimant seemed to think it was obvious that his status as "staff" meant he was entitled to full sick pay I am not aware of any such entitlement that would go with such a designation. This might, at most, be an aspect of custom and practice – that in his particular industry such a term was accepted as the norm and so obvious that it did not need to be spoken of. For a term to be implied by custom and practice, it must be "reasonable, certain and notorious" – notorious in the sense of being well-known. The difficulty for the claimant is that there is no evidence that this was common or well-known as a term in his industry, and even if it was it is not a certain term.

10. In particular, the claimant was only in closing submissions able to identify what the limits of such sick pay would be, and only then by picking a limit he considered to be reasonable. That is not how custom and practice works. If there is a limit, it is set by the custom and practice, and not by an assessment of reasonableness. This is not a term that I will imply through custom and practice. As for the ACAS printout, if this was intended to say that the absence of any reference in a written contract to discretionary sick pay meant that the individual was entitled to full sick pay, it is simply not correct. The claimant also referred to Mears v Safecar Security [1982] IRLR 183, but I do not think that this adds anything to the analysis above.

11. It is not in dispute that the claimant was absent from work due to sickness on the days in question, and it is not suggested by him that the respondent improperly failed to pay SSP to him (and if it was, this is not a matter within the jurisdiction of the tribunal). In those circumstances I do not consider that there was anything improper in the respondent's failure to pay him full sick pay, nor that there has been an unlawful deduction from his wages in respect of sick pay.

12. There are also time issues with this claim, which are dealt with below.

Wages - bonus

13. On the question of the bonus, a quarterly bonus of £3,000 is referred to in a letter from the respondent. There is no reference to what the bonus is for, but it appears to be distinct from his "salary" which is also referred to in the same letter. It is agreed that this bonus was to be paid (if at all) at the end of a calendar quarter. The payments that are in dispute are those that would have fallen due for payment on 31 December and 31 March.

14. The claimant accepted that this bonus was distinct from salary. It would not always be paid. His position was that its payment was dependent on his performance, not the company's performance, and that there was never anything wrong with his performance. He also suggested that there was nothing wrong with the company's performance, though he accepts that his knowledge of this was limited to matters of turnover, not profit.

15. The first point made by the respondent is that (as with the sick pay claim) the claim is out of time. If there were deductions, the last deduction was on 31 March 2021. Early conciliation ran from 31 May to 8 July 2021 and the claim was submitted on 8 October 2021. It is therefore very clearly out of time, with the only questions that remain being whether it was reasonably practicable for it to have been brought in time and, if not, whether it was brought within a reasonable time thereafter.

16. The claimant has put forward no basis on which I could properly extend the time limit. At one point he emphasised that he had initially approached ACAS much earlier. This does not help and only makes things worse for him, since he was clearly aware of the possibility of a claim at an early stage. Correspondence from him suggests he was taking legal advice while still employed, and he had no explanation for the late submission of his claim other than that it was in the hands of his solicitors. In those circumstances I cannot find that it was not reasonably practicable for him to bring his claim in time, and the claim that the failure to pay bonus and sick pay was an unlawful deduction from wages must be dismissed on the basis that I do not have jurisdiction to hear it. He says the sick pay claim is only three or four days late, but that still means it is outside the time limit.

17. Both the claims of failure to pay bonus and sick pay are brought outside the time limits and I do not extend time. Both claims are dismissed.

18. Beyond that, neither of them were breaches of a contractual term. I have previously dealt with sick pay on that point, and the difficulty on this with the bonus is that if it was dependent on the claimant's performance (as he says) there is no indication as to what any performance measures were to be. It cannot amount to a contractual term as there is no certainty on what that term is.

Wages – holiday pay

19. There remains the claim for holiday pay. It was the claimant's case that he had worked short some days but always on the basis that he had agreed with Mr Cunnington that he would later make up the time. It is not in dispute that he regularly worked longer hours than were required by his contract. In his evidence, Mr Cunnington accepted that there was this agreement. However, it was also his position that he then notified the person who recorded the holidays that the claimant was working short days. They were recorded as holiday, but despite the agreement he had with the claimant Mr Cunnington did not then take steps to credit that holiday when the claimant made the time up. He said that this was too complicated or difficult. I do not see how that could be at all fair to the claimant. He had an agreement with Mr Cunnington to make up the time, but no-one was crediting him for that.

20. Mrs Cunnington produced an account of the respondent's holiday records. I do not doubt that she was working directly and accurately from those records, but those records were not accurate because they did not ever give the claimant credit for making up any lost time. Given that, I consider that the claimant's calculations are the better ones and he is right in saying that he was due 55 hours holiday pay on the termination of his employment. This is a claim that was brought within time. 55 hours at £35/hour is £1,925. This is an unlawful deduction from wages and must be paid by the respondent to him.

Constructive unfair dismissal

21. I need to look now at the allegations of constructive dismissal. Helpfully these are itemised from (a) to (k) in what is said to be a last straw constructive dismissal case.

22. The first item that is said to be or go towards a breach of contract is the respondent employing a production manager against the claimant's advice. This was in March 2020 and therefore more than a year before the claimant's resignation. This was against the claimant's advice, but I don't see anything wrong with that or any breach of contract. The respondent was perfectly entitled to bring in a production manager if they wanted to. Even if this had been a breach of contract or was said to contribute to a breach of contract I simply don't see how the claimant can rely on it, given that it happened such a long period of time before his actual resignation. He must have waived any entitlement to resign in response to this.

23. The next alleged breach of contract or contribution to the breach of contract is in September 2020, with the respondent dismissing the claimant's son. I do not see anything in that which amounts to or contributes to a breach of the claimant's contract of employment. It may have been an unwise business decision made by Mr Cunnington, and it may be that there were better options if the respondent was faced with the need to make redundancies, but there is nothing in this that amounts to a breach of the claimant's contract. It seems to me remarkable that the claimant is framing this as a ploy to help drive him out of the company at this point in September 2020. At that time he did not have two years' service and could have been dismissed on very short notice by the

respondent. We can see from the way they dealt with dismissal of his son that they were not shy about making dismissals if they felt they were needed. The dismissal of his son is not a breach of the claimant's contract and I see no ploy to drive the claimant out of the respondent in that.

24. There is then the question of what has been termed a "lockout" the following day. I accept that I was entirely down to the bad reaction that the claimant's son had had to his dismissal. I can imagine that the claimant himself wasn't very happy with that either. It seems to come out of the blue and is one of a number of points where I can say that the respondent did not follow HR best practice, but this precautionary lockout seems to have been at most a fleeting incident. Relationships were rebuilt. The parties were reconciled, and I don't see anything that contributed to the claimant's eventual resignation.

25. We then have (d), (e) and (f), which are essentially about the non-payment of the bonus on 31 December. It is clear that the claimant had his own personal financial difficulties and was reliant on getting paid that bonus. I also accept that at this point in time, the respondent itself had its own financial difficulties. Whatever the situation as regards turnover there were very clear difficulties as regards profit or cash flow. The reason why the respondent did not pay the bonus is what they say it is: they felt they could not afford it. The claimant had no entitlement to what was essentially a discretionary bonus. The respondent was within its rights to withhold it. The claimant got upset about that and he chased for it in January and February, and that then seems to have prompted some conversation with Mr Cunnington about how he could raise money. I don't see anything in this that amounts to a breach of contract.

26. There is then something I've already touched on, and that is Mrs Cunnington telling the claimant that he had only about 1.8 hours' worth of holiday left. I have found that she was wrong about that, but the fact that an employer was wrong about something does not amount to constructive dismissal and does not necessarily add to constructive dismissal. She was honestly working from the holiday records and it was not her fault in the holiday records were inaccurate.

27. We know that the claimant raised a grievance, but there's no direct criticism of the handling of that grievance by the respondent.

28. We then move on to (h) which is talk of the claimant and Mr Cunnington sharing an office. Everybody seems to agree that this was something that had always been talked about on and off right from the very start of the claimant's employment. I don't see anything wrong in this being raised at this point.

29. I don't know the rights and wrongs of whether there was an accusation that the claimant was using his mobile phone too much, but if there was, that seems to me to be a trivial matter that doesn't go to make up a breach of contract.

30. It is clear that things became increasingly difficult between the claimant and respondent towards the end of May. Feelings ran high. The claimant says at point (i) that he was accused of missing a request for quotation from the customer on purpose, without any reasonable grounds. It is clear from what I've heard that it was the claimant's responsibility to get the quotation done on time and no matter how well-meaning he might have been about that he did miss that on this occasion. I don't see anything wrong with him being challenged by Mr Cunnington on that.

31. There is then the deduction from sick pay. I have already found that that was something that the respondent was entitled to do because there was no contractual entitlement to sick pay.

32. We then come to what is said to be the last straw. That is an email that was sent on 28 May asking the claimant to reply by 6 o'clock. The claimant says that he received this at 6:39pm after the deadline. I have seen the email itself and it suggests that it was sent at 11 o'clock. By that point in time there was at least one day that the claimant had had off sick, for which he had provided no medical explanation. Some people might see what the respondent did as being a little heavy-handed, but they did send the email in good time for 6 o'clock and I don't see that that in itself was a breach of contract.

33. There is a final point raised by Mr McFarlane, which is that the claimant's resignation was not about how he was treated by the respondent. It was about the fact that he had got another job. I can see why Mr McFarlane would want to argue that, but on the evidence I have heard the claimant did not have that job to go to at the time he resigned.

34. I have assessed along the way that (a)-(k) do not themselves amounts to breaches of contract. I have to step back and see whether taken as a whole they can be said to amount to a breach of contract. They do not. I do not see in this a breach of the duty of trust and confidence by the respondent. I see bad working relationships. I see the claimant being upset about the failure to pay his expected bonus. I see also the claimant finding it difficult to continue to work with the respondent and perhaps thinking there were better deals out there for him. The fact that he was able to find another job within a week also is certainly a testament to his ability, and as I understand it he is now earning much more than he was with the respondent. But this is not a constructive dismissal. There was no constructive unfair dismissal.

Section 38 Employment Act 2002

35. I raised with Mr McFarlane the point that I made at the start of this decision, which is the fact that the claimant had no written contract of employment or statement of particulars. I regard that as being a serious failing and one that has contributed to the difficulties that the claimant and respondent have had here. It may be too much to say that we wouldn't be here today if the claimant had had a written contract of employment or written particulars of

employment, but there would certainly have been far fewer issues for us to work through.

36. I was concerned whether it was proper for me to raise the question of section 38 of my own motion. It didn't appear on the claimant's schedule of loss or in his claim. Mr McFarlane suggested that it was not proper for me to raise this of my own motion where it hadn't been raised previously by the claimant or his solicitors.

37. Mr McFarlane can draw some support from the commentary on this section in Harvey on Industrial Relations and Employment Law where it is said that although the language of the section is mandatory - that is, the tribunal must make an award - this only applies once the claimant has raised the issue in the claim. The case of Levy v 34 & Co (UKEAT/0033/20) is cited in support of that. I have had a look at the Levy case and do not think that the reference to this in Harvey is entirely accurate. The significance of Levy is better described in the headnote or introductory paragraph to the decision. There it says an employment tribunal did not err by not considering an uplift under section 38 where the respondent did not have notice of the application and where the facts would not have justified the uplift.

38. It seems to me that the key point is that the respondent has notification of this argument and has the opportunity to respond to it. In raising it of my own motion in circumstances where there has never been any dispute that there was no contract or particulars of employment, and giving Mr McFarlane the opportunity to reply in his closing submissions I consider that I have been fair and I have followed the statutory obligation that I must consider the making of an uplift in these circumstances

39. On the question of whether the uplift should be two weeks' pay or four weeks' pay I have decided that it should be four weeks' pay. I have taken into account what Mr McFarlane says about this being a small business. It is, but it is also long established and it has been employing people for a considerable period of time: 10-20 people, depending on what particular time we are talking about. I must give effect to the requirement to provide a written statement of particulars, particularly in circumstances where the lack of written particulars of employment has substantially contributed to the dispute. I will make an uplift. The amount of a week's pay is capped at £544. Four times £544 is £2,176. This is to be added to the amount of holiday pay awarded, giving a total of £4,101.00 payable by the respondent to the claimant.

Employment Judge Anstis

Date: 31 March 2023

Sent to the parties on: 3 April 2023

For the Tribunal Office