



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4100302/2023**

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**Held in chambers in Glasgow on 2 May 2023**

**Employment Judge D Hoey**

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**Mr B Golusik**

**Second Claimant**

**JH Transport Limited**

**Respondent**

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# **JUDGMENT**

## **Rule 21 of the Employment Tribunal Rules of Procedure 2013**

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The judgment of the Employment Tribunal is that

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1. The second claimant was unfairly dismissed. He is entitled to be paid a basic award of **THREE THOUSAND NINE HUNDRED AND NINETY SEVEN POUNDS** (£3,997) and a compensatory award of **SEVENTEEN THOUSAND THREE HUNDRED AND FORTY NINE POUNDS AND EIGHTY SEVEN PENCE** (£17,349.87). The total award is therefore **TWENTY ONE THOUSAND THREE HUNDRED AND FORTY SIX POUNDS AND EIGHTY SEVEN PENCE** (£21,346.87). The recoupment rules do not apply to this award.

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2. The respondent shall pay to the second claimant notice pay in the gross sum of **THREE THOUSAND NINE HUNDRED AND SIXTY POUNDS** (£3,960) (less such sums required to be deducted by law).

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3. The respondent shall pay to the second claimant holiday pay in the gross sum of **TWO HUNDRED AND SEVENTEEN POUNDS AND THIRTY PENCE** (£217.30) (less any such deductions required by law).

4. The respondent failed to pay the second claimant in respect of 2 week's pay. The respondent shall pay to the claimant the gross sum of **ONE THOUSAND TWO HUNDRED AND SIXTY POUNDS AND FORTY SIX PENCE** (£1,260.46) less such deductions required by law.
- 5 5. The remaining claims are dismissed.

## REASONS

1. The second claimant had raised a number of claims. The respondent had not defended the claims. While there was a proposal to strike the respondent from the companies house register that process had been paused. There was no suggestion of any ongoing insolvency proceedings.
2. A case management preliminary hearing had been fixed to progress the claims. The respondent chose not to attend or be represented at that hearing and the claims proceeded as undefended.
3. Following the case management preliminary hearing the Tribunal issued a Note to the second claimant and respondent setting out in clear terms what sums the claimant sought and why. The Note was served on the respondent to allow any comment, which failing it was possible that a judgment may be issued without the need for a hearing in the absence of any defence to the claims. No response was received from the respondent to that Note.
4. In the absence of any response to the Note it is possible to issue a judgment from the information available.

### Facts

5. From the material before the Tribunal it is possible to make the following findings.
6. The respondent ceased to pay wages to the second claimant and ceased all contact. No procedure was followed and the respondent failed to engage with the second claimant at all.

7. The second claimant had been dismissed as a result of the respondent failing to pay him and failing to make any further contact. The claimant treated himself as dismissed (and the respondent did not defend the claim where the claimant asserted he had been dismissed). The failure to provide him with work, pay him wages or engage with him had amounted to a dismissal.
8. There was no process or attempt to engage with the claimant prior to the respondent's decision to cease to provide him with work or pay him wages as required in terms of his contract. The failure to pay wages and provide work was a fundamental breach of contract.
9. The second claimant's weekly gross pay was £811.61. He had 6 full years of service when he was dismissed.
10. Past loss is £620.23 x 14 weeks which results in loss of £8,823.22 less £480 received in respect of ad hoc work. Past loss is therefore £8,343.33.
11. The second claimant is likely to secure a comparable income within 12 weeks.
12. The second claimant had not made any application for statutory benefits.
13. The claimant was not paid anything in respect of his notice pay and at the date of dismissal the respondent had not paid the second claimant for 2 weeks that the second claimant had worked.
14. The claimant had accrued 0.82 weeks holiday pay by the date of dismissal (in respect of which payment had not been made).

## Law

15. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996. An unfair dismissal claim can be pursued only if the employee has been dismissed as defined by Section 95. Section 95(1)(c) which provides that an employee is dismissed by his employer if: "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."

16. The principles behind such a “constructive dismissal” were set out by the Court of Appeal in **Western Excavating (ECC) Limited v Sharp** [1978] IRLR 27. The statutory language incorporates the law of contract, which means that the employee is entitled to treat himself as constructively dismissed only if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.
17. The term of the contract upon which the claimant relied in this case was the express term relating to payment of wages. Failure to pay wages can amount to breach of an express term that would entitle the employee to resign.
18. In order for the employee to be able to claim constructive dismissal, four conditions must be met:
- a. There must be a breach of contract by the employer.
  - b. That breach must be sufficiently important to justify the employee resigning, (or the last in a series of incidents which justify his leaving).
  - c. He must leave in response to the breach and not for some other, unconnected reason. The breach should be a reason in the sense of played a part in the resignation (but does not need to be the principal cause – **Wright v North Ayrshire Council** [2014] IRLR 4).
  - d. The claimant must not delay too long in terminating the contract in response to the employer's breach, otherwise he may be deemed to have waived the breach and agreed to vary the contract, called affirmation.
19. If the employee leaves in circumstances where these conditions are not met, he will be held to have resigned and there will be no dismissal.
20. A dismissal also arises where the employer ends the contract of employment.

21. A successful claimant is entitled to a basic award (section 119), which is calculated in a similar way to a redundancy payment.

5 22. Section 123(1) provides for a compensatory award which is such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer. The Tribunal needs to assess how long the employment would have continued and ensure any compensation is just and equitable. A Tribunal  
10 should also consider whether the claimant contributed to the dismissal, to any extent, any reduce the award accordingly.

15 23. Ultimately the compensatory award should be such amount that is just and equitable.

24. If a claimant has received certain benefits, including Job Seeker's Allowance (as in this case), the Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 apply. This means that the respondent must retain a portion of the sum due until the relevant Government  
20 department has issued a notice setting out what the claimant is to be paid and what is to be refunded to the Government.

### **Unpaid wages**

25 25. A worker who receives less than the sum properly due in terms of his contract is entitled to a declaration and an award of the sum representing the sum to which he was contractually entitled (section 13, Employment Rights Act 1996).

### **Holiday pay**

30 26. A worker is entitled to 5.6 weeks' paid annual leave in each leave year (inclusive of bank holidays). This is the effect of regulations 13 (1) and 13A of the Working Time Regulations 1998 (WTR). The worker's leave year begins

on the day in which he commences employment, unless there is an agreement between employer and employee to the contrary.

- 5 27. By regulation 14, a worker is entitled on termination of employment to payment for accrued but unused holiday in his final leave year. Where there is no agreement between employer and employee to the contrary, regulation 14 provides a formula for calculation of the entitlement when termination occurs part way through a leave year.
- 10 28. The formula is “(A x B) – C Where: A is the period of statutory leave to which the worker would have been entitled for the whole of the leave year in which employment ends, calculated in accordance with regulations 13 and 13A. B is the proportion of the worker's leave year which expired before the termination date, expressed as a fraction. C is the period of leave taken by  
15 the worker between the start of the leave year and the termination date.”
29. Regulation 15A sets out the rules by which a worker accrues holiday in the first year of employment, but those accrual rules do not affect the calculation using the formula in regulation 14.
- 20 30. The way in which statutory holiday pay is calculated is set out in sections 221 to 229 of the Employment Rights Act 1996 and depends on whether or not the worker has ‘normal working hours’. Where the worker does not have normal working hours, his holiday pay is calculated as an average of all  
25 remuneration earned in the previous 52 weeks, or the number of complete weeks the worker has been employed if less than 52.

### Decision and discussion

31. The second claimant set out that he had been **dismissed** and was seeking compensation. The respondent had not defended that claim and there was no  
30 basis to challenge the claimant’s assertion that the failure to provide him with further work, pay him wages or engage with him had amounted to a dismissal.

32. The second claimant's dismissal was unfair, there being no process or attempt to engage with the second claimant. The failure to pay wages and provide work was a fundamental breach of contract. The second claimant was therefore dismissed and the dismissal was unfair.
- 5 33. The second claimant is entitled to compensation for his unfair dismissal.
34. The second claimant's gross weekly pay was £811.61. He had 6 full years of service when he was dismissed. The statutory cap on a week's pay was £571 as at the date of dismissal and this is the cap on the amount of a week's pay for the purposes of a basic award. The basic award (which is comparable to  
10 a redundancy payment) is therefore 7 x £571, namely £3,997. The multiplier is 7 given the claimant's age as at the date of dismissal (since for every year the claimant was 41 or over 1.5 week's pay is due). The claimant had erroneously not applied the statutory cap and his calculation of £4869.66 was incorrect.
- 15 35. Past loss is £620.23 x 14 weeks which results in loss of £8,823.22 less £480 received in respect of ad hoc work. Past loss is therefore £8,343.33.
36. Other losses include 14 weeks of pension loss at £29.77 per week x 14 giving pension loss of £416.78.
37. The second claimant is also entitled to expenses incurred in seeking  
20 alternative employment flowing from the dismissal which amount to £50.
38. The second claimant is likely to secure a comparable income within 12 weeks and so future loss amounts to 12 weeks loss of £669.98 (comprising net wage loss of £630.23 pension £29.77 and job seeking expenses of £10) yielding future loss of £8,039.76
- 25 39. The second claimant is also entitled to £500 in respect of loss of statutory rights.
40. As the second claimant is seeking compensation for unfair dismissal, if the claimant had claimed relevant statutory benefits the recoupment rules would

apply but the claimant did not advise the Tribunal that he had applied for any such benefits and accordingly the Regulations do not apply.

41. The second claimant is also entitled to **notice pay** which is 6 week's pay, namely £630.23 x 6 which is £3,781.38 plus loss of pension 6 x £29.77 which is £178.62.
42. **Holiday pay** to which the second claimant was entitled was 0.82 weeks which amounts to £217.30.
43. Finally the second claimant was **not paid 2 weeks** (which sums had not been compensated elsewhere). He is accordingly due 2 x £630.23 which gives £1,260.46 in respect of unpaid wages.
44. The second claimant confirmed this was all he was seeking and there were no other sums due and so the other claims are dismissed. The respondent is ordered to pay the second claimant the above sums.

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**Employment Judge: D Hoey**  
**Date of Judgment: 18 May 2023**  
**Entered in register: 18 May 2023**  
**and copied to parties**

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