EMPLOYMENT TRIBUNALS

Claimant: **Mr A Chalkowski**
Respondent: **Bidvest Noonan (UK) Limited**

AT A HEARING

Heard at: **Leeds by CVP video link** **On: 10th May 2022**
Before: **Employment Judge Lancaster**

Representation
Claimant: Mrs M Inkin, solicitor
Respondent: Ms G Rezaie, counsel

RESERVED JUDGMENT

1. The claim for non-payment of accrued holiday pay is dismissed upon withdrawal.

2. The complaint of automatically unfair dismissal under section 104 of the Employment Rights Act 1996. is not well-founded.

3. The Claimant was constructively unfairly dismissed under section 95 (1) (c) and 98 of the Employment Rights Act 1996.

4. Remedy for unfair dismissal is adjourned to a date to be fixed, if not agreed.

REASONS

1. This case was listed for 1 day. The Claimant gave evidence from Poland through an interpreter, Ms Marta Sarvjahani, and Mr Paul Gainford gave evidence for the Respondent. I considered a 229 page agreed bundle of documents. Because closing submissions were not completed until 5.50pm the decision was reserved, with written reasons therefore now given.

2. The claim in respect of holiday pay had been withdrawn in writing on 9th May 2023, and was therefore dismissed by consent.

3. Subject to the removal of that part of the claim there was an agreed list of issues. That is now reproduced in its unamended form in the endnote to this decision[i].

4. The key issue arising in this case is therefore "Was there a repudiatory breach by the employer of an express or implied term of the employment contract?

> The Claimant alleges that this was the Respondent's failure to pay the correct hourly rate for Bank Holiday and overtime and the correct hours worked."

5. Although the Claimant had a number of issues with his manager Mr Tilley, including an incorrect belief that he was personally responsible for the incorrectly entered information in respect to pay calculations, these are primarily about health and safety concerns that are not relevant to this case. I am not, therefore concerned with the main substance of the grievance hearing or the appeal, but only with the issues regarding pay.

Law

6. Section 95 of the Employment Rights Act provides:

"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) only if)—

(a)the contract under which he is employed is terminated by the employer (whether with or without notice),

(b)he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or

(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."

7. Section 98 of the Employment Rights Act 1996 provides:

"General.

(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.

(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."

8. A constructive dismissal, although likely to be so, is not necessarily also unfair under section 98 (4) if the Respondent can show reason for the commission of fundamental breach is nonetheless a potentially fair reason, and the Respondent acted reasonably in all the circumstances. In this case the Respondent would seek to argue that, if which it denies there was any fundamental breach, the "glitch" in the systems was some other substantially fair reason for not making proper payments, and that "its actions were a reasonable response in all the circumstances "(paragraph 30 of the ET1).

9. As this is a claim of constructive dismissal under section 95 (1) (c, the employee must establish that:
   a) there was a fundamental breach of contract on the part of the employer that repudiated the contract of employment
   b) the employer's breach caused the employee to resign, and

c) the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

10. I remind myself therefore following the leading case of *Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, CA*, '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, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed.' Per Lord Denning MR.

11. The general rule is that the employer's motive for the conduct causing the employee to resign is irrelevant. It makes no difference to the issue of whether or not there has been a fundamental breach that the employer did not intend to end the contract. Even where an employer's intention, objectively assessed, may be relevant as was exceptionally held in the case to which the Respondent has referred, *Tullett Prebon plc and ors v BGC Brokers LP and ors 2011 IRLR 420, CA*, whether or not a breach is fundamental is still a question of fact in all the circumstances

12. A key factor for the tribunal to take into account is the effect that the breach has on the employee concerned. It is rightly acknowledged by the Respondent that for an employee on minimum wage any failure to make proper payment, which is an essential term of any contract of employment, is not to be considered "de minimis" However, in *Adams v Charles Zub Associates Ltd 1978 IRLR 551, EAT*, on which the Respondent relies the EAT upheld an employment tribunal's finding that the employer's failure to pay a senior employee's salary on the due date did not amount to a fundamental breach.

13. In *Bournemouth University Higher Education Corporation v Buckland 2010 ICR 908,* CA, the Court of Appeal ruled that the range of reasonable responses test is not relevant to the question of whether an employer has committed a repudiatory breach of contract entitling the employee to claim constructive dismissal. This case also held that it was not possible for the employer to remedy a repudiatory breach of contract so as to preclude acceptance by the employee.

14. The employer's actions may have the cumulative effect of fundamentally breaching the contract. The Court of Appeal in *Lewis v Motorworld Garages Ltd 1986 ICR 157, CA,* held that a course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a 'last straw' incident even though that incident by itself does not amount to a breach of contract. In *Omilaju v Waltham Forest London Borough Council 2005 ICR 481, CA,* Lord Justice Dyson considered that the last straw does not have to be of the same character as the earlier acts in the series, but it must not be a wholly innocuous act contribute something to the breach.

15. It is sufficient that the fundamental breach, if established is a reason for the resignation. As held in *Meikle v Nottinghamshire County Council 2005 ICR 1, CA,* once an employer's repudiation of the contract has been established, it is for the tribunal to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end. The fact that the employee also objected to

other actions (or inactions) by the employer that did not amount to a breach of contract did not vitiate the acceptance of the repudiation. It is enough that the employee resigned in response — at least in part — to the employer's fundamental breach of contract.

16. The Claimant has referred me to *Chindove v William Morrison Supermarkets plc EAT 0201/13*, where Mr Justice Langstaff, then President of the EAT, warned against looking at the mere passage of time in isolation when determining whether an employee has lost the right to resign and claim constructive dismissal. What matters is whether, in all the circumstances, the employee's conduct has shown an intention to continue in employment rather than resign. The employee's own situation, Langstaff P continued, should be considered as part of the circumstances.

17. The Claimant also relies (albeit citing the Court of Appeal decision rather than the EAT) I on *Munchkins Restaurant Ltd and anor v Karmazyn and ors EAT 0359/09*, a claim of sexual harassment and constructive dismissal where Mr Justice Langstaff further held that there was no contradiction in the tribunal's finding that the claimants had suffered intolerable behaviour yet remained in employment. The tribunal had specifically made the point that the claimants were migrant workers with no certainty of employment if they left their jobs and that they were constrained by financial and, in some cases, parental pressures and were constrained by social circumstances.

18. Section 104 of the Employment Rights Act 1996 provides, so far as is relevant:

"Assertion of statutory right.

(1)An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee—

(a)brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or

(b)alleged that the employer had infringed a right of his which is a relevant statutory right.

(2)It is immaterial for the purposes of subsection (1)—

(a)whether or not the employee has the right, or

(b)whether or not the right has been infringed;

but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.

(3)It is sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.

(4)The following are relevant statutory rights for the purposes of this section—

(a)any right conferred by this Act for which the remedy for its infringement is by way of a complaint or reference to an Employment Tribunal."

19. This does not mean however that if the alleged fundamental breach is itself also a breach of a relevant statutory right, in this case the right not to suffer unauthorised deductions from wages under Part II of the Act, the conditions of this section are met. In order for a constructive dismissal to be automatically unfair in these circumstances, the employer must have committed the fundamental breach, that is made the unauthorised deduction, *because* the employee had earlier asserted an infringement of that statutory right.

Facts

20. The material facts, principally as appearing from the documents, are therefore:

21. The Claimant transferred to the Respondent's employment on 1st December 2021.

22. The Claimant was paid fortnightly in arrears.

23. There were difficulties in migrating the employee information from the transferor to the transferee's pay roll accounting system. Some of these were errors in the inputted details or stemmed from a change in operating procedures, some were more complex technical issues.

24. Due to a fault in the way in which the system had been set up the queries raised by the Claimant using the Respondent' s online portal were not initially directed to the proper person, his line manager Mr Ian Tilley. This problem was subsequently only identified at the grievance meeting with Mr Gainford on 14th March 2022. However the Claimant and Mr Tilley did meet on 26th January 2022, following the separate email complaint raised on 23rd January 2022.

25. The first payslip the Claimant received through the Respondents payroll, which was in fact shortly before the date of transfer was incorrect because his job description and therefore his rate of pay was incorrectly recorded. This was evidently amended at once, because the correct basic rate of pay is then shown on subsequent payslips from December 2021 onwards.

26. The payslip dated 12th December 2021 showed that the Claimant had been paid for fewer hours than he had actually worked, a shortfall of £70.14. The most likely explanation at this point in time is, I find, that the Claimant had not correctly clocked in or out under teh new operating procedures, so that his hours were not fully logged onto the system. As the Claimant subsequently acknowledged this was, however, put right within two weeks.

27. On the payslip dated 26th December 2021 the Claimant reported a further under recording of his hours, a shortfall of £71.07. this too was corrected within two weeks.

28. On the payslip dated 23rd January 2022 the Claimant identified an error in the hourly overtime rate which was paid at £9.23 and not £12.34, a shortfall of £23.64.

29. An identical shortfall of £23.64 was similarly identified in February 2022 (the date of the pay slip in question is however unclear, as the Claimant refers variously to 6th 12th or 20th February).

30. This matter of the overtime payments totalling £47.26 had been resolved by 28th February 2022, and the Claimant said then that he "considered it closed".

31. On the payslip dated 6th March 2022the Claimant identified that he had been underpaid by 0.8 hours, a shortfall of £7.38. He complained on 9th March 2022, and the matter was immediately rectified by the issuing of a "ticket". This 0.8 hours is shown as having been paid on 20th March 2022.

32. On the payslip dated 20th March 2022 the Claimant further identified, however, that his hours had been under recorded by 1.1 hours, a shortfall of £10.46. This was further clarified to relate to a deduction of 6 minutes from each shift. This extra time had apparently been added to the working hours under the previous employer, so as to add an extra ½ hour's pay taking the paid weekly hours, inclusive of any breaks, from 37 ½ to 38, but was not now recognised by the payroll system, so that the hours appeared to have been cut back to 37 ½. Mr Gainford on being informed of this error, which applied to all TUPE'd staff, immediately on 4th April 2022 authorised an addition to the Claimant's pay for the following Thursday. He also on 5th April 2022 asked payroll to look into this problem. In the grievance outcome letter, also on 4th April, Mr Gainford had confirmed -as already indicated at the hearing on 14th March 2022 - that payroll would address the general concerns relating to correct pay rates and recording of hours worked.

33. On the payslip dated 7th Aril 2022 the Claimant identified an alleged shortfall of £4.05, but his calculation included again the £10.46 outstanding.

34. On the payslip dated 21st April 2022 the Claimant identified a shortfall of £113.18 again carrying forward the previous deficit of £4.05. On the 1st May payslip the back payment for 12.56 hours owed was, however, shown at a higher figure of £119.32 – which is the sum claimed to be the underpayment in the ET1

35. He also on 21st April 2022 raised a specific complaint that he had not been paid the additional £1.12 per hour for working on a bank holiday.

36. On 4th May 2022 the Claimant asserted that there was a further shortfall of £18.01, but for which seems no calculation was provided.

37. On 10th May 2023 the Claimant reported that the correction to record the additional 6 minutes per shift had still not been satisfactorily addressed, so that he had to reclaim the 2 additional ½ hours per week each time he received a pay slip, and that the original pay therefore fell below the minimum wage rate, which had risen to £9.50 per hour on 1st April 2022. As the Claimant's basic rate was at this time only the same as the national minimum wage, this assertion was necessarily correct.

38. On 10th May 2022 Mr Gainford chased up with Payroll what the current position was on rectifying the under recording of ½ hour per week, was informed that

despite earlier reassurances it would likely now be solved by the end of the month and informed the Claimant accordingly, whilst at the same time instructing his line manager to continue making manual corrections to ensure correct payments.

39. On 11th May 2023 the Claimant reported again that the incorrect bank holiday rates were recorded on the system, and that for TUPE'd staff the enhanced rates also applied to both the Tuesdays after Easter Monday and Spring Bank Holiday.

40. From 12th May 2022 Mr Gainford agreed the authorisation for the correction of the Claimant's Bank Holiday rates and this was formally notified to payroll on 24th May 2022. The Claimant was not expressly informed of this resolution.

41. On the payslip dated 15th May 2022 the Claimant identified a further shortfall of £23.98

42. He promptly contacted Mr Gainford by email on Wednesday 18th May 20232 and said "my salary is badly again".

43. His calculation was that he should have been paid for 76 hours at basic rate, £9.50; for an uplift of 7.6 x £1.12, and; for I hour at overtime rate, £12.34. That is a total of £748.85. He stated that he had in fact been paid only £718.87. He was in fact paid £737.87 gross but as this included 2 "hours owed" at £9.50, the pay for this period is indeed £718.87. That is stated to be owed for 6 hours bank holiday at £10.35, 1 ½ hours at that same "basic rate" and 67 ½ hours at the "basic rate" of £9.50.

44. In an exchange of emails on 15th and 16th May 2022, following the Claimant's attempts to escalate his continued discontent at the rejection of his grievance against Mr Tilley, by taking the matter to board members and by making his complaint public, Mr Phillips the CEO arranged to meet him informally whilst warning that his actions may be seen as bringing the company int disrepute. In particular in an exchange on 16th May 2022 Mr Phillips posed the question: "With regard to your line "I don't care about this job anymore. It is not worth risking your life for the minimum wage." Please can you also confirm if this means you are leaving the business?". The Claimant did not reply directly, but did in fact attend the arranged meeting.

45. At that meeting with Mr Phillips on Monday 23rd May 2023, the principal matter for discussion was clearly the Claimant's continued sense of grievance against Mr Tilley, but he accepts that following this discussion he understood that that process had been finally concluded. Incidentally it was, however, also agreed that the claimed shortfall of £23.98 should be paid, and that he should be compensated for 12 hours of his time spent in pursuing his pay complaints.

46. That same day Mr Philips notified Mr Gainford of this agreement and instructed him to action the payment. In that same email he also gave directions for provision of addiitonal PPE to be arranged and for payment of 12 hours at overtime rate to compensate the Claimant for his time in chasing up incorrect payments. He did not, however, also refer to a further 1 hours pay to recompense the Claimant for the time spent with him at the meeting on 23rd May.

47. On balance, because it is not referenced in this contemporaneous document from Mr Phillips, I do not accept the Claimant's evidence that this further payment was also expressly agreed on 23rd May. Although the meeting was held at noon, outside of the Claimant's normal working hours, the exchange of correspondence shows that it was an informal meeting at mutually agreed time, and that the Respondent had been willing to authorise the Claimant leaving work early on his previous shift to compensate for his attendance. I consider that it is more probable that the Claimant on 1st June 2022 has unilaterally included this addiitonal claim in the same way that he had added preparation time to his earlier complaints about underpayment (on 9th March and 7th and 15th April 2022), without it in fact having yet been agreed. The Claimant emailed Mr Phillips very shortly after the meeting, at 14.08 where, by reference to their discussion, he requested payment only for 12 hours overtime. In the schedule of payments owed dated 7th June, the Claimant also separates his claim for payment for the 23rd May from the 12 hours subject to a specific "agreement with Mr David Phillips". I also note that at paragraph 19 of the Claim Form (ET1) it refers only to the 12 extra hours overtime having been agreed, and not a further hour for attendance at the meeting.

48. Mr Gainford replied to Mr Phillips on Thursday 26th May 2023 and confirmed that he had given instructions to add the additional payments, which would go through pay roll "next Thursday" that would have been on the face of it 2nd June 2022, but given that the payroll was run fortnightly may refer to the following week 9th June for the next pay date of 12th June 2022.. Whenever it was intended to be rectified The Claimant was not, however notified of any further delay in making the payments.

49. The next pay date after the agreement with Mr Phillips was in fact Sunday 29th May 2022. The payslip of that date showed 89 ½ hours at £9.50, an adjustment of 15 x £0.27 and 1 hour at £12.34. The total gross was therefore £866.64.

50. On Tuesday 31st May 2022, the Claimant tendered his resignation on 2 weeks' notice, giving as the reason "the repeated underpayment" and stating that "unfortunately I do not see any hope for a solution to this problem".

51. On Wednesday 1st June 2022 The Claimant emailed Mr Gainsford and set out his calculation that his pay had been short by £40.36. This was on the basis that he was in fact owed 78 hours at basic rate, £9.50, plus the £23.98 outstanding from 15th May and the 12 hours compensatory overtime agreed by Mr Philips plus a further 1 hour to cover the 23rd May. That total sum was £906.40. In actual fact because the Claimant had included a bad figure in his calculation the shortfall was only £39.76 and this was corrected by him in a subsequent email dated Tuesday 7th June 2022. (The Claimant also appears to have been under a misconception that he had wrongly claimed for 15 hours overtime and not 12 in his original calculation, but this is not material.)

52. By the time, 7th June, when the Claimant sent his amended calculation, he had been notified by pay roll that he would be receiving an additional payment of £30.88, and this was duly paid on Sunday 12th June 2022, described as 3.25 hours owed at £9.50. This meant that the outstanding shortfall claimed was now reduced to £8.88.

53. Mr Gainford replied immediately by email on 7th June and told the Claimant that he would put through an additional payment of 1 hour which would "cover the missing amount". Because it is not claimed that any payments are in fact still outstanding, I work on the assumption that this was duly done, although the final payslip in the bundle, dated 26th June 2022, only records £478.80 holiday pay.

54. None of the payslips transparently show how the £23.98 shortfall or any agreed compensatory overtime was ever in fact reflected in the Claimant's salary.

55. The Claimant was invited to reconsider his resignation but confirmed to Mr Phillips on 9th June 2022 that: "I'm afraid my decision is final – the issues have not been resolved by the company at all despite the meetings. Even my last wage was paid to me incorrectly. For this reason I no longer trust the company and I do not see myself working for Bidvest Noonan again."

56. The Claimant was signed of work for two weeks from 30th May 2022 with stress and depression. His employment terminated at the end of the notice period on 14th June 2022. Within about a week after that the Claimant returned to Poland. He packed three bags, but left his other belongings behind. He then lived with his mother in her flat, because although he still had his own flat in Poland that was being refurbished. On 1st July 2022he was able to secure employment through a relative.

Conclusions

57. Firstly, I am fully satisfied on the evidence that the Claimant resigned for the reason stated in his letter of 31st May 2022, that is because of the continuing problems with obtaining his correct pay. It was not, as the Respondent, argues, that he simply wished to return to Poland to live and work nor for any other reason apart from that expressly stated.

58. The immediate trigger for the resignation was therefore, I find, the failure to have corrected all outstanding shortfalls in pay as at the 29th May 2022 pay date.

59. The alleged total underpayment of £39.76 on that date was not, however, in itself a breach of contract. To calculate that deficiency the Claimant relies upon both the claimed payment for 23rd May and the 12 hours compensatory overtime. He was not contractually entitled to be paid for attending the meeting on 23rd May 2202 and Mr Phillips had not ever agreed to pay his compensation for his time. Nor was he contractually entitled to be paid for the 12 hours preparation time as if it were work done in the actual course of his employment. Whilst Mr Phillips' agreement to pay this as compensation did create a legal right to the money, there was no stipulation that it would in fact be included within his very next pay slip.

60. Even if not itself a breach of contract, it cannot however be said that this was a wholly innocuous act. In the context of all that had gone before the repeated failure yet to have made good all sums owing, and without any explanation as to when matter would in fact be finally resolved, was certainly capable of contributing to any breach of contract or of re-activating any earlier breach that had no already been conclusively waved.

61. The obligation on an employer to pay for work done at the appropriate rate and on the due date goes to the very heart of the employment contract. Failure to do so will also constitute an unauthorised deduction from wages under section 13 (3) of the Employment Rights Act 1996

62. This is not simply a case where the transmission to the employee of the properly calculated pay was permissibly delayed due to external circumstances.

63. I accept that, subjectively, Mr Gainford and also Mr Phillips were seeking to act properly toward the Claimant in addressing the issue over his pay.

64. However, for a low-paid worker such as the Claimant the persistent carrying over of a rolling shortfall in wages over a six month period, even though the amount still outstanding at the point of resignation was only £23.98 is, objectively, a fundamental and repudiatory breach of contract. I note that even £23.98 is 3.3 % of the gross due in that pay period, which is not insignificant.

65. The failure to pay the admitted shortfall of £23.98 identified as outstanding on 15th May 2023 is a subsisting breach of contract which had not clearly been rectified.

66. Although all earlier shortfalls had by this stage been made up, rectification of a fundamental breach does not without actual waiver prevent an employee from relying upon it. And in any event the mere acceptance of those monies does not also amount to any acquiescence by the Claimant in the failure properly to have calculated those sums at the point when they should have fallen due.

67. Triggered by the further perceived irregularity as at 29th May 2022, the Claimant was entitled to resign in response to the repeated failure to have paid for work done at the appropriate rate and on the due dates, and that I find is precisely what he did. It was perfectly reasonable for the Claimant to have concluded that he no longer trusted the company to resolve his pay issues, so that he could no longer continue working for them.

68. This is not an undue delay. Resignation is almost always a drastic step for an employee to take. That is particularly so when the situation is, as did in fact happen in this case, that when faced with the financial implications of unemployment and the unlikelihood of readily securing alternative employment because of his limited language skill, the Claimant felt compelled to return to Poland. I am satisfied that he reasonably only took this decision when he had finally exhausted his patience with the Respondent.

69. Had the sole reason for the shortfall been the difficulties been the delays in correcting the payroll software so that it would recognise the additional 6 minutes per shift, I might have held that this was some other substantial reason for the delayed payment, but in any event this would not excuse the further apparent failure - at least on 10th May 2022 -to have proactively made the necessary manual correction in good time before the payroll ran once the system problem had been identified.

70. In these circumstances the Claimant has established that he was constructively dismissed, and the Respondent has failed to show a potentially fair reason for the breach of contract which led to the resignation, so that the dismissal is unfair.

71. In cross-examination the Claimant accepted however that he was not alleging that the reason for the breach was in fact because he had alleged an infringement of his statutory right not to suffer unauthorised deductions. Indeed on the evidence it is clear that when the alleged infringements were drawn to the Respondent's attention they did not therefore repeat the deductions, but rather sought to rectify the position. The dismissal is not also automatically unfair.

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EMPLOYMENT JUDGE LANCASTER

DATE: 26th May 2023

IN THE LEEDS CENTRAL EMPLOYMENT TRIBUNAL **Case No. 1803580/2022**

B E T W E E N

MR A CHALKOWSKI

Claimant

- and -

BIDVEST NOONAN (UK) LIMITED

Respondent

AGREED LIST OF ISSUES

Claims

1. The Claimant has brought claims for:

   (a) Constructive unfair dismissal:

      (i) Ordinary constructive unfair dismissal pursuant to sections 95(1)(c) and 98 of the Employment Rights Act 1996 ("**ERA**"); and/or

      (ii) Automatic unfair dismissal for assertion of a statutory right pursuant to section 104(4) ERA and section 13 ERA.

   (b) Owed holiday pay (Reg. 13(9)(b) WTR 1998).

Agreed facts

2. The Claimant was at all material times employed by the Respondent as a Shunter refuelling and refilling buses, and doing some cleaning, from 12 July 2006 at First Halifax bus depot.

3. The Claimant was originally employed by First West Yorkshire Ltd. In 2016, his employment was transferred to Cordant Cleaning Ltd. The Claimant's employment was then transferred to the Respondent with effect from 1 December 2021 pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006.

4. The Claimant submitted his resignation on 31 May 2022 and provided 2 weeks' notice, which he worked.

5. The Claimant's employment was terminated on 14 June 2022.

Constructive unfair dismissal (s.95(1)(c) and 98 ERA) and automatic unfair constructive dismissal for assertion of a statutory right (s.104 ERA)

6. Was there a repudiatory breach by the employer of an express or implied term of the employment contract?

   (a) The Claimant alleges that this was the Respondent’s failure to pay the correct hourly rate for Bank Holiday and overtime and the correct hours worked.

7. Did the Claimant resign in response to the repudiatory breach by the Respondent? The Claimant resigned on 31 May 2022, with notice. It is the Respondent's case that the Claimant voluntarily resigned.

8. If so, did the Claimant terminate his employment in circumstance in which he was entitled to do so by reason of the Respondent's breach?

9. Was the Claimant's dismissal because he asserted a statutory right?

   (a) It is the Claimant's case that he alleged that the Respondent had infringed the Claimant's right not to suffer unlawful deductions (s.13 ERA).

10. If the Claimant resigned in response to a course of conduct, or a 'last straw' act, did any of the events in which the Claimant relies upon equate to an innocuous act, even if the Claimant genuinely but mistakenly interprets the act as a breach of his employment contract?

11. Did the Claimant affirm the contract?

   (a) It is the Respondent's position that employee continued to attend his shifts.

   (b) It is also the Respondent's position that the period of delay between the employee learning of the breach and tendering his resignation affirms the contract.

12. Was the Respondent's conduct reasonable in all the circumstances?

13. If the Tribunal finds that there was a dismissal; was this for a potentially fair reason in accordance with section 98 (1) & (2) of the Employment Rights Act?

14. If so, was the dismissal fair or unfair in accordance with section 98(4)?

Owed holiday pay (Reg. 13(9)(b) WTR 1998)

15. Is the Claimant entitled to any outstanding accrued but untaken holiday pay?

   (a) It is the Claimant's case that he is entitled to 11.82 hours (to be confirmed).

   (b) It is the Respondent's case that all outstanding holiday pay was provided to the Claimant in his final payslip dated 26 June 2022.

16. What, if any, holiday pay is the Claimant owed?

Remedy

17. If the Claimant's claims are upheld, in whole or in part, what remedy is the Claimant entitled to?

18. If the Claimant is entitled to a financial award of compensation:

   (a) What actual financial losses has the Claimant suffered? In particular, if the Claimant had not been dismissed, how long would he have remained in employment with the Respondent?

   (b) Is the Claimant entitled to a basic award?

   (c) Should any future losses be awarded?

   (d) Has the Claimant mitigated his losses?

   (e) Should any uplifts or reductions be applied to any compensation?

   (f) Should any deductions or reductions be applied to any compensation? In particular:

(i) Should the compensatory award be reduced in accordance with *Polkey v AE Dayton Serviced Ltd* [1998] ICR 42 i.e. to reflect the possibility that the Claimant would still have been fairly dismissed either at the time of dismissal or later?

(ii) Would it be just and equitable to reduce the amount of the Claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to section 122(2) ERA; and if so, to what extent?

(iii) Did the Claimant, either by blameworthy or culpable actions, cause or contribute to their dismissal to any extend; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to section 123(6) ERA?