



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Numbers: 8000280/2023 & 8000302/2023

Held remotely via Cloud Video Platform (CVP) in Glasgow on 23 August 2023

5 Employment Judge C McManus

Mr G McEvoy

Claimant
In Person

10 McCallum Foods Ltd

Respondent
No appearance and
No representation

15 **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The decision of the Employment Tribunal is:

1. Under Rule 34 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, McCallum Foods Ltd T/A German Doner Kebab is substituted for the name of the respondent in both case number
20 8000280/2023 and case number 8000302/2023.
2. The claims registered under case number 8000280/2023 and case number 8000302/2023 are consolidated (combined).
3. The claimant's dismissal was an unfair dismissal.
4. The claimant is awarded a total award of **£13,444.20 (THIRTEEN
25 THOUSAND, FOUR HUNDRED AND FORTY FOUR POUNDS AND TWENTY PENCE)** in respect of this unfair dismissal, being comprised of a basic award of £2,419.20 and a compensatory award of £11.025.
5. The respondent has made an unauthorised deduction from wages contrary to Section 13 of the Employment Rights Act 1996 in terms of accrued but unpaid
30 holidays and the respondent is ordered to pay to the claimant the sum of

£472.12 (FOUR HUNDRED AND SEVENTY TWO POUNDS AND TWELVE PENCE) in this respect.

6. The claimant's claim for breach of contract is successful and the respondent is ordered to pay to the claimant the sum of **£2,304 (TWO THOUSAND, THREE HUNDRED AND FOUR POUNDS)** in respect of his entitlement to 4 weeks' pay (gross pay £576 x 4). This amount may be subject to appropriate tax and NI deductions, which may be made by the respondent prior to making this payment to the claimant, on vouching by the respondent of the extent of the deductions made.
7. The claimant is not entitled to a redundancy payment and his claim for a redundancy payment from the respondent is dismissed.
8. The claimant's claim for unlawful discrimination on the grounds of his race is withdrawn and dismissed.
9. The claimant's claim for unlawful discrimination on the grounds of his religion or belief is withdrawn and dismissed.

REASONS

Introduction

1. The claimant separately lodged three ET1 claim forms with the Employment Tribunal, allocated case numbers 8000280/2023, 8000281/2023 and 8000302/2023.
2. The ET1 claim forms for case numbers 8000280/2023 and 8000281/2023 were both submitted to the Employment Tribunal on 15 June 2023.
3. The ET1 with pre-registration case number 8000281/2023 was rejected as the names of the respondent did not match the ACAS certificate.
4. In the ET1 claim form registered under 8000280/202, The name of the respondent given at box 2.1 of that ET1 in case number 8000280/2023 was

'German diner kabab//MC Callum foods//dale glendinning manger". At box 2.2 it was stated:

"German Doner Kebab, 56, Renfield Street, Glasgow, Scotland G2 1NF"

5. In the ET1 claim form registered under 8000280/2023, the claimant ticked
5 boxes at section 8.1 indicating that he was bringing claims for:

- Unfair dismissal
- Discrimination on the grounds of race
- Redundancy payment
- Notice pay
- 10 • Holiday pay
- Arrears of pay
- Other payments

6. At box 8.2 of that ET1, the claimant stated (spelling etc. unchanged):

15 *"Not paid me my hoilday pay 53 hours at 13 phone give me 200 pound said pay me at 3pm then 9pm then at 4 he wasn't paying me IV documents here. To say he owes me.so we had a phone call and then he suspended me for no reason as IV statement here ect . then he said he didn't receive a sick line IV documents here again then did the meeting himself when he can't do that and sacked me because he said I didn't turn up when I have had a doctor sick
20 line in for work stress for 4 months still not received rest my pay ect "*

7. A letter was sent by the Employment Tribunal to the claimant on 21 June 2023. In that letter the claimant was informed that a Legal Officer had decided that part of the claim, regarding German diner kabab and dale glendinning manger could not be accepted because the claimant had not complied with
25 the requirement to contact ACAS before instituting relevant proceedings. The claim under case number 8000280/2023 was part-rejected, proceeding against MC Callum foods only.

8. In that letter to the claimant on 21 June 2023, it was also noted that it appeared that a duplicate claim had been submitted by the claimant (case number 8000281/2023). The claimant was informed that the ET1 registered under case number 8000281/2023 was rejected as the names of the respondent does not match the ACAS certificate.

9. Separate correspondence was also sent to the claimant from the Employment Tribunal on 21 June 2023, informing that the claim under case number 8000280/2023 was acknowledged. On that same date, Notice of the claim registered under case number 8000280/2023 and Notice of a Case Management Preliminary Hearing (a 'CMPH') for that case, to be held by telephone conference call on 9 August was sent to:

MC Callum foods

German Doner Kebab

56 Renfield Street

15 *Glasgow*

G2 1NF

10. No ET3 response was submitted to the Tribunal for 8000280/2023. The claimant replied by email to the Tribunal on 21 June 2023 stating '*one of the names is wrong it's German doner kabab*'.

20 11. The ET1 claim form registered under 8000302/2023 was received by the Employment Tribunal on 23 June 2023. The name of the respondent given at box 2.1 of that ET1 in case number 8000280/2023 was 'German doner kabab'. At box 2.2 it was stated:

25 *"German Doner Kebab, 56, Renfield Street, 52/56 Renfield Street, Glasgow, Scotland G2 1NF"*

12. In the ET1 claim form registered under 8000302/2023, the claimant ticked boxes at section 8.1 indicating that he was bringing claims for:

- Unfair dismissal

- Discrimination on the grounds of religion or belief

13. At box 8.2 of the ET1 claim form registered under 8000302/2023, the claimant stated (spelling etc. unchanged):

5 *“The manger on shift didn't like me dale glendinning because I was Irish and kept making remarks about why I spoke. I got payed off because off lies. Made by a manger and not giving the chance two appeal it I had sick line in for work stress management said they didn't receive it but have said in email and recite that they did all lies from management IV evidence off everything that proves manger lieing.. manger sent statement out from staff saying I was aggressive*

10 *two him over phone and staff said I was every statement from staff don't say that so it's all lies IV evidence two prove it ...this manager was taken in to cut wage bill so he didn't pay may wages and then sacked me..so it a breach off contract as my contract is with German doner kabab*

14. On 29 June 2023, correspondence was issued from the Tribunal informing the claimant that the claim under case number 8000302/2023 was acknowledged and would proceed to a CMPH via telephone on 23 August 2023. On that same date, Notice of the claim registered under case number 8000302/2023 and Notice the CMPH for that case, on 23 August was sent to:

German doner kabab

20 *German Doner Kebab*

56 Renfield Street

52/56 Renfield Street

Glasgow

G2 1NF

25 15. No ET3 response was received in respect of case number 8000302/2023. On 7 August 2023 the claimant was informed by the Tribunal that there had been no ET3 response received from the respondent in case number 8000302/2023 and that the CMPH arranged to take place via telephone would

be converted to a Final Hearing, to be held via video (CVP). Case management orders for that Final Hearing were issued with that letter. A copy of the correspondence was sent to the respondent in case number 8000302/2023, as per the ET1.

- 5 16. The claimant submitted a completed Agenda form in respect of case number 8000302/2023, with copies of some documentary evidence.
17. The CMPH in case number 8000280/2023 was held via telephone by EJ MacLean on 9 August 2023. The Note issued after that CMPH summarised what was discussed. During that CMPH the claimant brought to EJ
10 MacLean's attention that he had also lodged the claim registered under case number 8000302/2023. After discussion, noting that a Final Hearing had been scheduled for claim registered under case number 8000302/2023, against German Doner Kebab, and having regard to the overriding objective, it was decided that the Final Hearing scheduled to take place via video
15 ('CVP') on 23 August 2023, would be for consideration of the claim registered under case number 8000280/2023 and the similar proceedings under case number 8000302/2023, although the claims were not formally conjoined. Notice of this Final Hearing was issued to the respondent in both claims.

Evidence

- 20 18. There were some preliminary case management discussions at this Final Hearing. Although case management orders had been issued, including in respect of documentary evidence, no Bundle was submitted. The claimant confirmed that he wished to rely of the digital copies of documents sent with his Agenda form. The claimant confirmed withdrawal of the claims under the
25 Equality Act 2010.
19. There was discussion on the identity of the respondent in the claims. There are various names and addresses in the documentary evidence which the claimant relies on, as follows (as produced - not in chronological order):
- 1) 'Record of Conversation' (statement) dated 02/06/23, on paper
30 branded 'German Doner Kebab', with a footnote stating:

“Franchised Operated Business T/A German Doner Kebab

2 Byres Road,

Glasgow

G11 5JY”

5 2) Further ‘Record of Conversation’ (statement) dated 02/06/23, on paper branded ‘German Doner Kebab’, with the same footnote as (1).

3) Undated letter ‘To whom it may concern’ on what appears to be GDK German Doner Kebab’ branded paper, with the address for ‘German Doner Kebab’ given as 52 – 56 Renfield Street, Glasgow, G2 1NF, stating:

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“I can confirm that Gerrard McEvoy is Currently Employed at McCallum Foods LTD Trading As German Doner Kebab.

Gerard is Currently Employed as an Overnight Kitchen Cleaner and works 48 hours Per Week as per his contract at £13 Per Hour, His Gross monthly wage would total £2496.

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Should you require any more information please do not hesitate to ask.”

4) Undated letter ‘To whom it may concern’ on what appears to be ‘Doner Kebab, German Doner Kebab’ branded paper, with the address for ‘German Doner Kebab’ given as 52 – 56 Renfield Street, Glasgow, G2 1NF, stating:

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“I am writing this letter to confirm that Gerry Mcevoy is currently employed Full time with LMR Property LTD trading as German Doner Kebab.

I can confirm that Gerry works 40+ hours per week at £13 per hour, On average he earns £2020 Gross pay Per Month.”

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A name and contact email address and phone number was given for the Area Manager.

- 5) A 'Statement of Terms and conditions of employment' for the claimant's employment commencing on 25 February 2019, issued by 'Fountain Restaurants Ltd (T/A German Doner Kebab), with the address given as '52-56 Renfield Street, G2 1NF'.
- 5 6) A photograph of a whiteboard with writing re. holidays.
- 7) A letter dated 08/06/2023, on paper branded 'German Doner Kebab', to the claimant, headed 'Rescheduled disciplinary meeting' with the same footnote as (1).
- 8) A letter dated 10/06/2023, on paper branded 'German Doner Kebab',
10 to the claimant, headed 'The outcome of your disciplinary meeting' with the same footnote as (1).
- 9) A photograph of a German Doner Kebab branded business card for Dale Glendinning.
- 10) Screenshot of messages between the claimant and Dale Glendinning
15 stating 'Property T/A GDK (German Doner Kebab).
- 11) Copy SSP form re the claimant dated 06/06/23.
- 12) A letter dated 03/06/2023, on paper branded 'German Doner Kebab', to the claimant, headed 'Confirming suspension and continuing investigation', with the same footnote as (1).
- 20 13) Undated letter on paper branded 'German Doner Kebab', to the claimant, headed 'disciplinary meeting, with the same footnote as (1).

Identity of respondent

20. The claimant's position was that the correct identity of the respondent is 'McCallum Foods Ltd T/A German Doner Kebab'.
- 25 21. On consideration of the documentary evidence relied upon by the claimant, as set out above, I was satisfied that the correct identity of the respondent was McCallum Foods Ltd T/A German Doner Kebab'. I was satisfied that that respondent had had proper notice of the claims, served at an address where

they carry out business. For these reasons, I decided to apply Rule 34 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, ('the Tribunal Rules') and substitute McCallum Foods Ltd T/A German Doner Kebab for the name of the respondent in both case number
5 8000280/2023 and case number 8000302/2023.

Issues for determination

22. At this Final Hearing I determined the following issues:

- a. Was the claimant's dismissal an unfair dismissal in terms of section 98 of the Employment Rights Act 1996 ('the ERA')?
- 10 b. If so, what amount is the claimant entitled to in respect of an unfair dismissal basic award and compensatory award?
- c. Is the claimant entitled to any uplift to such award(s), in respect of the respondent's failure to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures and section 123 of the ERA?
- 15 d. Is the claimant owed any sums from the respondent in respect of accrued but unpaid wages, including in respect of accrued but unpaid holidays?
- e. Is the claimant owed any sums from the respondent in respect of unpaid notice pay?
- 20 f. Is the claimant entitled to a redundancy payment from the respondent?

Findings in fact

23. I made findings in respect of facts which were material to the issues for determination by this Tribunal.

24. The claimant worked as a nightshift cleaner in a takeaway food shop operated
25 by the respondent, or its' predecessor, at 52 – 56 Renfield Street, Glasgow. The claimant's employment there began on 25 February 2019 and ended when the claimant was dismissed on 10 June 2023. When the claimant commenced working there, he was working 40 hours a week. That later

increased to 48 hours a week. The claimant earned £13 an hour, with a gross monthly pay of £2496, net (take home) monthly pay of £2200.

25. On 2 June 2023 the claimant had a dispute with the manager of the takeaway shop in respect of holiday pay. The claimant was due payment in respect of
5 6 days holiday taken in May, as was noted on a whiteboard in the takeaway premises. While working on his shift on 1 June, the claimant had a phone call with the manager (Dale Glendinning). The claimant was seeking payment of 6 days holiday pay. Dale Glendinning's position was that the claimant was not entitled to the full amount, only £255.88. The claimant became angry and
10 shouted at Dale Glendinning that he was owed holiday pay. The claimant's position was that he was owed for 6 days holiday, being (56 hours @ £13 per hour) £723 gross. The claimant said that he would not return to work until he got his 6 days holiday pay. Dale Glendinning directed that the claimant be paid holiday pay of £255.88. This was paid to the claimant in cash. The
15 claimant left the premises and did not return.

26. On 3 June 203 the claimant was sent a letter from Dale Glendinning headed 'Confirming suspension and continuing investigation'. In that letter it was stated "*We are currently investigating allegations of threatening behaviour*". No information was given in respect of who would be carrying out this
20 investigation inviting him to a disciplinary meeting.

27. The claimant was then sent an undated letter from Dale Glendinning inviting him to a disciplinary meeting on 7 June at the Renfield Street premises. It was stated that it was alleged that on 2 June 2023 the claimant '*exerted bullying behaviour while in a place of work*'. That letter informed that the allegations
25 could lead to the claimant being dismissed for gross misconduct. It stated that the claimant had a right to be accompanied at the meeting by a trade union representative or workplace colleague. It stated that '*I enclose Remit of Mignon Ried's investigation, with notes.*' It stated that if the claimant failed to attend the disciplinary meeting without good reason a decision may be made
30 in his absence.

28. The claimant was sent with that letter copies of statements which had been taken from other employees. The statements confirmed that the claimant had shouted to Dale Glendinning on the phone about him being entitled to holiday pay. The statements do not say that the claimant's behaviour was threatening or bullying
29. On 6 June 2023, the claimant completed and sent a self- certification sickness form to Dale Glendinning. He stated the reason for his absence as '*stress caused by management in work*'. The start date for the 7 day self certification was stated as 2 June 2023. the digital copy of that certificate to Dale Glendinning, stating "*Thank you! Not be able two make it cos off work stress related.*" On 8 June Dale Glendinning sent a text message to the claimant "*Thank you for reaching out. I will pass your Self Certificate to our accounts team.*"
30. On 8 June the claimant received a letter from Dale Glendinning inviting him to a rescheduled disciplinary meeting on 10 June. That letter stated that the claimant was required to attend the meeting and if he failed to attend without good reason a decision would be taken in his absence. The claimant did not further contact Dale Glendinning and did not attend the disciplinary meeting.
31. On 10 June the claimant was sent a letter from Dale Glendinning informing him that a decision had been taken in his absence. In that letter it was stated that the purpose of the meeting had been to offer him the opportunity to give a satisfactory explanation for the behaviour which was alleged to be bullying behaviour in the workplace. The claimant was informed that as no explanation of the allegations had been received, and there was no explanation for the claimant's failure to attend the disciplinary hearing on 10 June, Dale Glendinning's decision was to dismiss the claimant for gross misconduct, without notice or pay in lieu of notice. That letter gave no information in respect of any procedure for the claimant to appeal that decision.
32. The claimant had no income following his dismissal. He was unable to meet his bills and became homeless. He applied for a number of jobs and obtained

a job working 20 hours a week, as a cleaner. His take home pay from that job is £800 a month. He began that job in August 2023.

Relevant law

Unfair Dismissal

- 5 33. The law relating to unfair dismissal is set out in the Employment Rights Act 1996 ('the ERA'), in particular Section 98 with regard to the fairness of the dismissal and Sections 118 – 122 with regard to compensation. Section 98(1) states: -

10 *'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*
15 *substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

34. Section 98(2) sets out that 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,*
- 20 (b) *relates to the conduct of the employee, [(ba) is retirement 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*
25 *employer) of a duty or restriction imposed by or under an enactment.*

35. Where the dismissal is said to be by reason of the employee's conduct, consideration requires to be made of the three stage test set out in *British*

Home Stores -v- Burchell 1980 ICR 303, i.e. that in order for an employer to rely on misconduct as the reason for the dismissal there are three questions which the Tribunal must answer in the affirmative, namely, as at the time of the dismissal:-

- 5 i. Did the respondent believe that the claimant was guilty of the misconduct alleged?
- ii. If so, were there reasonable grounds for that belief?
- iii. At the time it formed that belief, had it carried out as much investigation into the matter as was reasonable in the circumstances?

10 36. What has to be assessed is whether the employer acted reasonably in treating the misconduct that he believed to have taken place as a reason for dismissal. Tribunals must not substitute their own view for the view of the employer (*Sainsbury's Supermarkets Ltd -v- Hitt [2003] IRLR 23* and *London Ambulance Service NHS Trust -v- Small [2009] IRLR 563*) and must not
15 consider an employer to have acted unreasonably merely because the Tribunal would not have acted in the same way. Following *Iceland Frozen Foods Ltd -v- Jones 1983 ICR 17* the Tribunal should consider the 'band of reasonable responses' to a situation and consider whether the respondent's decision to dismiss, including any procedure prior to the dismissal, falls within
20 the band of reasonable responses for an employer to make. The importance of the band of reasonable responses was emphasised in *Post Office -v- Foley [2000] IRLR 827*.

25 37. Section 98(4) of the ERA sets out that where the employer has fulfilled the requirements of subsection 98(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
30 dismissing the employee, and

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

This determination includes a consideration of the procedure carried out prior to the dismissal and an assessment as to whether or not that procedure was fair.

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38. Where the Tribunal makes a finding of unfair dismissal (or where that is conceded) it can order reinstatement or in the alternative award compensation, made up of a basic award and a compensatory award.

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39. The basic award is calculated as set out in the ERA Section 119, with reference to the employee's number of complete years of service with the employer, their gross weekly wage and the appropriate amount with reference to the employee's age. Section 227 sets out the maximum amount of a week's pay to be used in this calculation. There is a statutory cap on the amount of weekly pay which can be used in this calculation.

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40. The basic award may be reduced in circumstances where the Tribunal considers that such a reduction would be just and equitable, in light of the claimant's conduct (ERA Section 122 (2)).

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41. The compensatory award can also be reduced. In terms of the ERA Section 123(1) the compensatory award 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. Section 123(6) of the Employment Rights Act 1996 states that:

25

'Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable.'

30

42. There are circumstances where an 'uplift' may be applied to an unfair dismissal compensatory award, where there has been unreasonable failure to follow the ACAS Code of Practice (section 207A (2) of the Trade Union and

Labour Relations (Consolidation) Act 1992 ('TULR(C)A')). This is known as 'the ACAS uplift'. Section 207A(2) TULR(C) A provides that:

'If, in any proceedings to which this section applies, it appears to the employment tribunal that – (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies, (b) the employer has failed to comply with that Code in relation to that matter, and (c) the failure was unreasonable, the Employment Tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more so than 25 per cent.'

10 43. The application of the ACAS uplift was considered by LJ Brandon in the Court of Appeal authority *Nelson v BBC (No.2) 1980 ICR 110, CA*:

"An award of contribution to a successful complainant can only be reduced on the ground that he contributed to his dismissal by his own conduct if the conduct on his part relied on for this purpose was culpable or blameworthy. This conclusion can be arrived at in various ways. First, it can be said that the epithet "culpable" or "blameworthy" should be implied before the word "action". Or secondly it can be said that the expression "caused or contributed" impliedly incorporates the concept of culpability or blameworthiness. Or thirdly it can be said that, in any case, it could never be just or equitable to reduce a successful complainant's compensation unless the conduct on his part was relied on as contributory was culpable or blameworthy. For my part, I prefer the third way of arriving at the conclusion to either the first or second and would approach the application of paragraph 19(3) on that basis.

It is necessary, however, to consider what is included in the concept of culpability or blameworthiness in this connection. The concept does not, in my view, necessarily involve any conduct of the complainant amounting to a breach of contract or a tort. It includes, no doubt, conduct of that kind. But it also includes conduct which, while not amounting to a breach of contract or a tort, is nevertheless perverse or foolish, or, if I may use a colloquialism, bloody-minded. It may also include action which, though not meriting any of those more pejorative epithets, is nevertheless unreasonable in all the

circumstances. I should not, however, go as far as to say that all unreasonable conduct is necessarily culpable or blameworthy; it must depend on the degree of unreasonableness involved.

It follows from what I've said that it was necessary for the industrial tribunal in this case, in order to justify the reduction of Mr Nelson's compensation which they made, to make three findings as follows. First, a finding that there was conduct of Mr Nelson in connection with his unfair dismissal which was culpable or blameworthy in the sense which I have explained. Secondly, that the unfair dismissal was caused or contributed to some extent by that conduct. Thirdly that it was just and equitable, having regard to the first and economic findings, to reduce the assessment of Mr Nelson's loss by 60 per cent."

44. Section 124A of the ERA provides that where an award of compensation for unfair dismissal falls to be reduced or increased under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 (effect of failure to comply with Code: adjustment of awards), or increased under section 38 of that Act (failure to give written statement of employment particulars), the adjustment shall be in the amount awarded under section 118(1)(b) and shall be applied immediately before any reduction under section 123(6) or (7).

Failure to pay wages

45. The Employment Rights Act 1996 ('the ERA') at section 13 provides for the right of an employee not to suffer unauthorised deductions. Section 14 sets out the provisions in respect of excepted deductions and section 16 sets out the provisions in respect of excepted payments. Section 13(3) states:

'Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.'

Redundancy Pay

46. The right to a redundancy payment is set out in the Employment Rights Act ('ERA') Section 135. The right to a redundancy payment is in circumstances
5 where the employment is terminated by reason of redundancy. The definition of a redundancy situation is in section 139 of the ERA.

Notice Pay

47. The rights in respect of a minimum period of notice of termination of employment
10 are set out at Part IX of the ERA.

Holiday pay

48. The Working Time Regulations 1998 ('the WTR') provide that every worker is entitled to annual leave. Regulations 13 and 13A entitle workers to minimum levels of annual leave. Regulations 14 sets out how compensation in respect
15 of payment of accrued but untaken leave is calculated. Regulation 16(1) provides that a worker is entitled to be paid at the rate of a week's pay in respect of each week of annual leave to which he or she is entitled under Regulations 13 or 13A. A week's pay is calculated substantially in accordance with sections 221-224 of the ERA.

20 *Failure to Give Notice or Payment in Lieu of Notice*

49. The Employment Tribunal has jurisdiction to hear breach of contract claims to a maximum of £25,000. This includes claims in respect of failure to pay notice. Section 86 of the ERA sets out the position with regard to the rights
25 of an employer and employee to a minimum period of notice of termination of employment. Section 86(1) sets out that the notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more is not less than one week's notice if his period of continuous employment is less than two years.

Overriding Objectives

50. This case was dealt with in terms of the Tribunal's overriding objective as set out in Rule 2 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ('The Procedure Rules'), being:

5 *"The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly.*

Dealing with a case fairly and justly includes, so far as practicable -

(a) *ensuring that the parties are on an equal footing;*

(b) *dealing with cases in ways which are proportionate to the complexity and importance of the issues;*

10 (c) *avoiding unnecessary formality and seeking flexibility in the proceedings;*

(d) *avoiding delay, so far as compatible with proper consideration of the issues; and*

(e) *saving expense.*

15 *A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."*

Comments on evidence

20 51. I found the claimant to be a generally credible witness. I took into account the documentary evidence which had been provided. I took into account that the respondent had submitted no response to the claims, had made no communication with the Employment Tribunal office and did not attend the Final Hearing. I took into account that some of the documentary evidence
25 was undated and what was produced in respect for the respondent's investigation was only statements, with no 'Remit'. I found that the documentary evidence produced by the claimant was consistent with and supported the claimant's position in his oral evidence.

Decision*Unfair Dismissal*

52. In unfair dismissal claims it is for the respondent to prove that the dismissal was a fair dismissal. No defence has been made to the claimant's claim of unfair dismissal. I considered the evidence before me. I was careful to consider the circumstances and not to substitute my own view for the view of the employer. I considered the following to be particularly significant:
- The witness statements provide evidence of the claimant shouting to Dale Glendinning in respect of his position that he was owed 6 days holiday pay.
 - The statements do not record those individuals' positions in respect of any specific allegations of threatening or bullying behaviour by the claimant.
 - The letters to the claimant do not set out detail of what behaviour by the claimant was considered to be initially threatening, or then bullying behaviour. The letters do not detail what is alleged to have been done by the claimant.
 - The claimant's evidence is that he did shout at his manager, and that he shouted because he was not being paid his due holiday money.
 - The claimant's oral evidence was that he denied any bullying or threatening behaviour.
 - There is no explanation why the allegation changed from threatening behaviour to bullying behaviour.
 - There is no evidence of any contact from the respondent to the claimant to investigate the position in the claimant's sickness self certificate that the reason for his absence was '*stress caused by management in work*'.

- The letters to the claimant were from the manager who the claimant admits he shouted at, and who was at the centre of the alleged failure to pay holiday pay.
- The decision to dismiss was taken by the manager who was at the centre of the claimant's behaviour.

5

53. On the basis of the evidence before me, the statements taken in the investigation did not provide grounds for a belief that the claimant's behaviour was bullying behaviour. The decision was made by the manager with whom the claimant had the dispute. The reference to an 'accounts team', and to 'our Renfield Street branch' suggests a sizeable operation, where someone who was not involved in the dispute with the claimant could have corresponded with the claimant and made the decision at the disciplinary hearing.

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54. I took into account that the claimant could have provided a written account of his position in respect of what had happened in his dispute with Dale Glendinning, and did not. I took into account that the claimant had not provided any medical evidence to support his position that he was unfit to attend a meeting because of 'workplace stress', and that his self certified absence had expired before the date of the re-arranged disciplinary meeting, without any further communication from the claimant to the respondent. The start date for the 7 day self certification was stated as 2 June 2023, so expired on 8 June. I took into account that the respondent had taken some steps in investigation and to make arrangements for a disciplinary hearing prior to the dismissal. I took into account that the claimant had been notified of his right to be accompanied at the disciplinary hearing and that if he did not attend that a decision may be made in his absence. I also took into account that the claimant had not been offered a right of appeal of his dismissal.

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55. In all the circumstances, I decided that the claimant's dismissal was an unfair dismissal because the respondent did not have reasonable grounds to believe that the claimant had carried out bullying behaviour. I considered the 'band of reasonable responses' to the situation and whether the decision to dismiss,

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including the procedure prior to the dismissal, falls within the band of reasonable responses for an employer to make. In circumstances where the statements taken do not support allegations of bullying or of threatening behaviour, where the claimant was given no detail of what he was alleged to have done in respect of the allegations of bullying or of threatening behaviour where no steps were taken to investigate the claimant's position that he was absent because of work related stress and where the decision to dismiss was taken by the manager at the centre of the reasons for the claimant's behaviour and where an appeal was not offered, the claimant's dismissal was an unfair dismissal. The claimant is entitled to an unfair dismissal award calculated with regards to a factor related to his age (DOB 26/2/77), his number of complete years of service with the respondent (4) and his gross weekly wage of £576 ($\text{£}2496 \times 12 / 52$). The claimant's basic award for unfair dismissal is $(1 \times 4 \times \text{£}576)$ £2,304.

56. The claimant has suffered wage loss as a result of his unfair dismissal. His compensatory award is calculated from the date of dismissal as (2 months x £2300) £4600, plus loss from starting his part time job of ($\text{£}2300 - \text{£}800$) £1,500. The compensatory award includes additional loss of $(6 \times \text{£}1,500)$ £9,000, to reflect wage loss, including future wage loss, from the period when the claimant began his part time job.

57. In all the circumstances I do not consider it to be just and equitable to reduce any award in respect for contributory conduct. The claimant was shouting because he was seeking payment of holiday pay which he was entitled to. The statements do not support a position that the claimant's conduct contributed to his dismissal to the extent that a reduction should be applied.

58. In all the circumstances, taking into account the extent to which the respondent sought to comply with a disciplinary procedure, an uplift of 5% is applied to both the basic and compensatory awards, to reflect that no appeal was offered. The uplift to the basic award is (5% of £2,304) £115.20. The uplift to the compensatory award is (5% of $(\text{£}1,500 + \text{£}9,000)$) £525.

59. The claimant is entitled to a total basic award of (£2,304 + £115.20) £2,419.20 and a total compensatory award of (£11,025).

Redundancy Pay

5 60. The reasons for the claimant's dismissal was not redundancy. There was no evidence before me that the circumstances were that there was a redundancy situation effecting the claimant in terms of the statutory definition of redundancy. The claimant is not entitled to a statutory redundancy pay.

Holiday pay

10 61. I was satisfied that the claimant is entitled to the sum of £472.12 from the respondent, being the balance due to him in respect of 6 days accrued but unpaid holidays (56 hours x £13 = £723) and taking into account the sum paid to him in respect of these holidays (£723 - £255.88). The respondent may be entitled to make further tax and NI deductions in respect of that holiday
15 payment.

Breach of Contract / Notice Pay

62. The claimant was dismissed without notice or pay in lieu of notice. His statutory entitlement is to one week's pay for each complete year of
20 employment. In these circumstances, the claimant's claim for breach of contract is successful and claimant is entitled to 4 weeks' notice pay. On the basis of gross weekly pay of (£2496 x 12 / 52) £576, the entitlement is to 4 weeks' pay. That is a gross payment of (gross pay £576 x 4). £2,304. That gross amount may be subject to appropriate tax and NI deductions.

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Employment Judge: C McManus
Date of Judgment: 4 October 2023
Entered in register: 9 October 2023

5 and copied to parties