



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102888/2022

5

Held via Cloud Video Platform (CVP) in Glasgow on 3 October 2022

Employment Judge D Hoey

10 **Mr P McCann**

**Claimant
In Person**

15 **Ness Tec Ltd**

**Respondent
Not present and
Not represented**

20

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The claimant was unfairly dismissed and is awarded a basic award of £1,142 (ONE THOUSAND ONE HUNDRED AND FORTY TWO POUNDS) together with a compensatory award of £2,497.33 (TWO THOUSAND FOUR HUNDRED AND NINETY SEVEN POUNDS AND THIRTY THREE PENCE).
25 The recoupment provisions do not apply.
2. The claimant is awarded the gross sum of £11,705.50 (ELEVEN THOUSAND SEVEN HUNDRED AND FIVE POUNDS AND FIFTY PENCE) in respect of unpaid wages, with such statutory deductions to be made as required by law.
3. The claimant is also awarded the gross sum of £935.50 (NINE HUNDRED
30 AND THIRTY FIVE POUNDS AND FIFTY PENCE) by way of holiday pay, such sum to be subject to such deductions as required by law.
4. Each of the other claims is dismissed.

REASONS

1. The claimant claimed unfair dismissal, unpaid wages and holiday pay in a claim form presented on 24 May 2022, with early conciliation having commenced on 5 May 2022 and a certificate issued on 10 May 2022.
5 Although the claimant had also ticked the box for notice pay, other payments and a redundancy payment, these were not claims that were being progressed.
2. The claim was not defended. Companies House website notes that there was an active proposal to strike off the respondent from the register. The claimant
10 would write to Companies House to ensure they are aware of the claims being made and the company is not struck off.
3. At the start of the hearing the claimant confirmed that he was claiming unfair dismissal, the respondent having failed to pay him salary for a number of months. He had taken advice and claimed unfair dismissal. While he had initially
15 sought a redundancy payment, notice pay and other payments, it was clear that his claim was for unfair dismissal, unpaid wages and holiday pay only, and the other claims were accordingly dismissed.

Facts

4. The claimant gave evidence and the following facts were established.
- 20 5. The claimant was employed by the respondent as operations manager from 1 November 2019 until 22 April 2022.
6. As a result of having not been paid for a number of months (since 30 January 2022) the claimant resigned. He could not longer sustain not being paid and the uncertainty of the situation.
- 25 7. His employment had commenced on 1 November 2019 and ended on 22 April 2022. He was 55 at that date.
8. His weekly net pay was £484 and weekly gross pay £571. The claimant's losses ended on 22 June 2022 when he secured alternative employment.

9. As at the date of his employment ending he had taken no annual leave and had accrued 11.5 days worth of annual leave.
10. The claimant had received no wages (or award in respect of wages) from 30 January 2022 until the end of his employment on 22 April 2022. He incurred costs of £50 in seeking alternative employment, principally travel costs.

Law

Constructive unfair dismissal

11. 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.”
12. 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.
13. 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.
14. 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.
15. 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.
16. A successful claimant is entitled to a basic award (section 119), which is calculated in a similar way to a redundancy payment.
17. 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 should also consider whether the claimant contributed to the dismissal, to any extent, any reduce the award accordingly.
18. Ultimately the compensatory award should be such amount that is just and equitable.
19. 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 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

20. 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).

5 **Holiday pay**

21. 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
10 agreement between employer and employee to the contrary.

22. 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
15 occurs part way through a leave year.

23. 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
20 termination date, expressed as a fraction. C is the period of leave taken by the worker between the start of the leave year and the termination date."

24. 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.

25 25. 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 remuneration earned in the previous 52 weeks, or the number of complete
30 weeks the worker has been employed if less than 52.

Discussion and decision*Unfair dismissal*

26. The Tribunal was satisfied that the claimant had been constructively unfairly dismissed. The respondent had failed to pay the claimant the sums due under his contract for a number of months. The respondent was in fundamental breach of his contract. The claimant was entitled to resign and treat the employment as at an end. He waited a reasonable period and then decided that he could not continue to remain employed and resigned as a direct consequence of the fundamental breach of his contract, the failure to pay the sums he was contractually due. The claimant was unfairly dismissed.

27. He was entitled to a basic award calculated at £571 x 2 which is £1,142.

28. His compensatory award is such sums as is just and equitable flowing from the dismissal. He was dismissed on 22 April 2022. His losses ended on 22 June 2022. His compensatory award comprises 1 month's net pay (£2,097.33) together with loss of statutory rights (£350) and £50 in respect of costs incurred in securing alternative employment. As no benefits were claimed the recoupment provisions do not apply.

Unpaid wages

29. The claimant had not been paid his wages in respect of the period from 30 January 2022 until 22 June 2022 (20.5 weeks). He is awarded the sum of 20.5 x £571 which is £11,705.50 in respect of unpaid wages, that being the sum due to the claimant. The award is made gross, with such statutory deductions to be made as required by law.

Holiday pay

30. The claimant was due to be paid in lieu of 11.5 days holiday when his employment ended. A day's pay is £571 x 12 divided by 365 which is £81.35. He is accordingly awarded 11.5 x £81.35 which is £935.50 by way of holiday pay.

5

Employment Judge: D Hoey

Date of Judgement: 3 October 2023

Date sent to Parties: 3 October 2023