



EMPLOYMENT TRIBUNALS

Claimant: Ms Ruth Kissock

Respondent: Bread Basket Sandwich Station

HELD AT: Manchester (CVP)

ON: 14 March & 19 May
2022 (in chambers)

BEFORE: Employment Judge Ficklin

REPRESENTATION:

Claimant: In person

Respondent: Mr Amen Bassi (Director)

The JUDGMENT of the Tribunal is:

1. The claim of unfair dismissal is well-founded. The claimant was unfairly dismissed.
2. The claimant's claim for wrongful dismissal is well-founded.
3. The claimant is awarded £0 for both the basic award and compensatory award.
4. The claimant's claim for unpaid wages is well-founded. The claimant is awarded £510.12 in unpaid wages.
5. The claimant's claim for unpaid holiday pay is well-founded. The claimant is awarded £872.00 in holiday pay.
6. The claimant's claim for unpaid notice pay is well-founded. The claimant is awarded £348.80 in notice pay.
7. The subtotal of £1730.92 is increased by 10% because the respondent unreasonably failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures. This adds £173.10, for a total of 1904.01.
8. The claimant is awarded two weeks' pay (40 hours x £8.72 hourly pay x 2 weeks = £697.60) under Section 38 (3)(a)-(b) of the Employment Act 2002 due to the respondent's failure to provide a written contract of employment.

9. The claimant originally also claimed other unpaid wages in the form of a tax refund of £630.00. That part of the claim was not proceeded with and is dismissed on withdrawal.
10. The claimant is awarded a total of £2601.61.

REASONS

Preamble

1. In a claim form received on 17 June 2021, following ACAS Early Conciliation, the claimant, has brought complaints of unfair dismissal, holiday pay, notice pay and other unpaid wages in the form of a tax refund.
2. The claimant confirmed that she received the unpaid wages in the form of a tax refund on 3 March 2022. That part of the claim was not proceeded with and was dismissed on withdrawal.

Evidence

3. I heard evidence from the claimant on her own behalf. I did not hear from the respondent. Mr Bassi joined the hearing by telephone after the hearing had started, just before lunch. Arrangements were made effectively to re-start the hearing after lunch for Mr Bassi's benefit. After lunch I was informed he had called the Tribunal and said he would not return, with no explanation.
4. There were no witness statements. I treated the claim form as the claimant's witness statement and the response form as the Respondent's statement. I find the claimant credible for the reasons stated below.

Agreed issues

5. The issues for liability are as follows:
6. Was the claimant an employee or self-employed?
7. Can the claimant prove that there was a dismissal?
 - 7.1 Was the reason or principal reason for dismissal that the claimant exercised her statutory right to receive pay in the form of the tax rebate from the respondent? If so, the claimant will be regarded as unfairly dismissed.
8. What was the claimant's notice period?
 - 8.1 Was the claimant paid for that notice period?
 - 8.2 If not, can the respondent prove that the claimant was guilty of gross misconduct which meant that the respondent was entitled to dismiss without notice?
9. Did the respondent fail to pay the claimant for annual leave the claimant had accrued but not taken when their employment ended?

Facts

10. There was no bundle. I relied on the ET1, ET3 and the claimant's oral evidence. I have made the following findings of the relevant facts having resolved conflicts in the evidence on the balance of probabilities.

11. The respondent was a sandwich shop in Oswaldtwistle that has ceased trading. The shop was formally owned by Ms Maria Macken. Mr Bassi is described as a director. I find that the claimant was employed there as a delivery driver between 9 December 2020 and 20 May 2021.

12. The claimant never received a written contract of employment. The claimant gave evidence that she started at the respondent's business as a driver on what was purported to be a self-employed basis from 9 December 2020 to 22 March 2021. The claimant said that she was only earning about £6 per hour on the 'self-employed' basis, because she was paid the hourly minimum wage of £8.72 but had to subtract the fuel cost of using her own car for the deliveries. She requested that she be made a formal employee to ameliorate this.

13. The claimant said that from 22 March 2021 she became 'employed' for 25 hours per week at £8.72 per hour and 'self-employed' in the same capacity for any hours she did over the first 25. She said in evidence that when she went "on the books" she was able to hand in her fuel receipts "for them to claim on tax". She did not consider herself to be 'self-employed' from December 2020, she considered herself to have been employed but receiving cash in hand. The claimant received two payslips during the course of her employment there, dated 19 March 2021 and 26 March 2021.

14. The claimant kept a diary of the hours she worked every week from mid-March 2021, the point at which her status was purported to become that of an employee. According to this diary, which dates between 22 March 2021 and 16 May 2021, she worked between 24 hours and 47.25 hours per week for a total of 316 hours, an average of 39.5 hours per week.

15. The claimant claims that she was owed 64 hours' wages at the time of dismissal. This consisted of 15 hours for work between 2-8 May 2021; 39.5 hours between 10-16 May 2021 and about four hours between 16-21 May 2021. Her gross pay is £8.72; she claims she is owed £510.12 in withheld wages. She also claims accrued holiday pay for 2021, and notice pay.

16. The respondent agrees that she is owed £127.20 in holiday pay but no more. The respondent calculates this as one week's holiday pay of £218.13 minus £90.87 in overpaid wages.

17. It is not clear whether the respondent deducted tax or national insurance from the claimant's wages at any point.

18. I find that the claimant was employed for about 40 hours per week. Her hours could vary. There is no distinction in any way between the claimant's job when described as 'employed', and the job when described as 'self-employed'. The reference to the claimant being 'self-employed' was, I find, aimed at minimising the

respondent's costs and responsibilities to an employee. The claimant said, and I accept, that she was paid in cash during her entire employment and 'self-employment'. The claimant was not 'self-employed'; this was merely a way for the respondent to justify paying her in cash and to avoid tax, national insurance, etc.

19. I reach this conclusion because I accept that the claimant's working conditions from December 2020 included that she was required to work regularly and was not able to decide whether or not to accept the work in a given shift; she was clearly expected to do a certain number of hours; there is no indication she could have sent someone else to do the work for her; the respondent was responsible for her workload and supervision.

20. The characteristics of self-employment, on the other hand, were not present. The claimant did not have to bid for the delivery work, she was expected to work shifts. She was paid for hours worked, ie she did not submit invoices. She carried out the work under the respondent's supervision.

21. The claimant said that she did not know what her holiday entitlement was because she never received a written contract. If she was 'self-employed', then she would not be entitled to a holiday allowance or notice pay. It does not matter that the claimant's contract was not written down. I accept from the claimant's evidence that she was expected to work particular shifts as the respondent required.

22. The claimant had a grievance with the respondent because in March 2021 she claimed a tax refund and was informed that £630 would be paid to her by way of her employer. She raised this with the respondent, and expected to receive the payment from them within a matter of weeks.

23. The tax refund was not forthcoming. The claimant says that there was increasing conflict with the respondent because she kept asking about the payment. The claimant believed at that time that the respondent had received the payment from HMRC and was withholding it from her. In fact, this was not true and the Respondent received the tax rebate on 14 July 2021, and paid it to her on 3 March 2022. On 20 May 2021 the claimant texted Ms Macken, stating that she would report the respondent to the tax office if the payment was not forthcoming.

24. The claimant says that Mr Bassi rang her in response to her text and dismissed her. She said she asked him explicitly if she was being dismissed and he agreed that she was. The ET3 denies that the claimant was dismissed during the conversation. I prefer the claimant's evidence on this point and find that the claimant was dismissed on 20 May 2021.

25. I do accept that Mr Bassi rang her back later the same day and invited her to return to work the next day. The claimant declined. The claimant had in the interim arranged another job, but denies telling the respondent that she had already found another job in that conversation, as the respondent asserted in the ET3. The claimant said that the respondent likely learned that she had a job from her ET1. I find that whether she did or did not is not relevant since she had been dismissed in the earlier conversation that day. I do not accept that, as the respondent asserts, she quit because she had already found another job.

26. I accept the claimant's claim in oral evidence and in the ET1 that the respondent did not engage with her or ACAS about the claim at all. There were no procedures or investigations at the time of her dismissal. The respondent's failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures was unreasonable.

27. The claimant also claimed that she suffered from anxiety and depression brought on by the situation. In her ET1 she says that she was stressed because the respondent had often changed her working hours or days without notice. She says this resulted in lost wages and "not knowing whether I had a job or not for the last 3 months of my employment".

Law

28. Section 94(1) of the Employment Rights Act 1996 ("the ERA 1996") provides that "an employee has the right not to be unfairly dismissed by his employer". This case pertains to an assertion of a statutory right, in this case the right not to have wages deducted without authorisation. According to s. 104 of the ERA 1996, a dismissal is unfair if the main reason for the dismissal is because the employee alleged that the employer infringed the employee's "relevant statutory right". It does not matter whether the employee actually has the right, or whether the employer has actually infringed it. The employee's belief in the right, and the belief that the employer infringed it, is enough.

29. Other relevant sections of the ERA 1996 include:

1 Statement of initial employment particulars.

(1) Where a worker begins employment with an employer, the employer shall give to the worker a written statement of particulars of employment.

...

13 Right not to suffer unauthorised deductions.

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

...

27 Meaning of "wages" etc.

(1) In this Part "wages", in relation to a worker, means any sums payable to the worker in connection with his employment, including—

(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise,

...

104 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,

...

108 Qualifying period of employment.

- (1) Section 94 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than two years ending with the effective date of termination.
- (2) If an employee is dismissed by reason of any such requirement or recommendation as is referred to in section 64(2), subsection (1) has effect in relation to that dismissal as if for the words “two years” there were substituted the words “one month”.
- (3) Subsection (1) does not apply if—

...

- (g) subsection (1) of section 104 (read with subsections (2) and (3) of that section) applies,.

30. The Employment Act 2002 (“the EA 2002”) materially states:

38 Failure to give statement of employment particulars etc.

- (1) This section applies to proceedings before an employment tribunal relating to a claim by a worker under any of the jurisdictions listed in Schedule 5.

...

- (3) If in the case of proceedings to which this section applies—
- (a) the employment tribunal makes an award to the worker in respect of the claim to which the proceedings relate, and
 - (b) when the proceedings were begun the employer was in breach of his duty to the worker under section 1(1) or 4(1) of the Employment Rights Act 1996 or (in the case of a claim by an worker) under section 41B or 41C of that Act,

the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.

(4) In subsections (2) and (3)—

(a) references to the minimum amount are to an amount equal to two weeks' pay, and

(b) references to the higher amount are to an amount equal to four weeks' pay.

31. The Working Time Regulations 1998 materially state:

Entitlement to annual leave

13.—(1) Subject to paragraph (5), a worker is entitled to four weeks' annual leave in each leave year.

2)

(3) A worker's leave year, for the purposes of this regulation, begins—

(a) on such date during the calendar year as may be provided for in a relevant agreement; or

(b) where there are no provisions of a relevant agreement which apply—

...

(ii) if the worker's employment begins after 1st October 1998, on the date on which that employment begins and each subsequent anniversary of that date.

Entitlement to additional annual leave

13A.—(1) Subject to regulation 26A and paragraphs (3) and (5), a worker is entitled in each leave year to a period of additional leave determined in accordance with paragraph (2).

(2) The period of additional leave to which a worker is entitled under paragraph (1) is—

(...)

(e) in any leave year beginning on or after 1st April 2009, 1.6 weeks.

(3) The aggregate entitlement provided for in paragraph (2) and regulation 13(1) is subject to a maximum of 28 days.

(4) A worker's leave year begins for the purposes of this regulation on the same date as the worker's leave year begins for the purposes of regulation 13.

Compensation related to entitlement to leave

14.—(1) Paragraphs (1) to (4) of this regulation apply where—

(a) a worker's employment is terminated during the course of his leave year, and

(b) on the date on which the termination takes effect ("the termination date"), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13 and regulation 13A differs from the proportion of the leave year which has expired.

(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).

(3) The payment due under paragraph (2) shall be—

(a) such sum as may be provided for for the purposes of this regulation in a relevant agreement, or

(b) where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula—

$$(A \times B) - C$$

where—A is the period of leave to which the worker is entitled under regulation 13 and regulation 13A;

B is the proportion of the worker's leave year which expired before the termination date, and

C is the period of leave taken by the worker between the start of the leave year and the termination date.

(4) A relevant agreement may provide that, where the proportion of leave taken by the worker exceeds the proportion of the leave year which has expired, he shall compensate his employer, whether by a payment, by undertaking additional work or otherwise.

(5) Where a worker's employment is terminated and on the termination date the worker remains entitled to leave in respect of any previous leave year which carried forward under regulation 13(10) and (11), the employer shall make the worker a payment in lieu of leave equal to the sum due under regulation 16 for the period of untaken leave.

32. There is no power to make an award for injury to health in an unfair dismissal claim.

Conclusion

33. There are various statutory rights listed in s. 104(4) ERA 1996 to which the section applies. Being paid a tax refund is not a statutory right *per se*, however a statutory right also includes "any rights conferred by [the ERA 1996] for this the remedy...is by way of a complaint...to an employment tribunal." An unauthorised deduction of wages may be complained about to an employment tribunal.

34. My reading of s. 104 is that the employee must believe that she has one of the particular rights set out in s. 104(4). The claimant clearly considered the tax refund to constitute withheld wages, and I find that this assertion was made in good faith. I find that it does not matter that the claimant knew that the respondent had not received the rebate at the time that she lodged the ET1. She did not know that at the time she was dismissed, which is the relevant time for these purposes. I find that the claimant's belief in her entitlement to be paid her tax rebate falls under an assertion of a statutory right for these purposes.

35. As per s. 108 of the ERA 1996, there is no necessary duration of employment for an unfair dismissal claim based on assertion of a statutory right. The claimant was dismissed upon raising a grievance with the respondent. I find that the principal reason

for dismissal that the claimant exercised her statutory right to receive pay in the form of the tax rebate from the respondent. The claimant was unfairly dismissed.

36. The basic award for unfair dismissal is calculated the same way as statutory redundancy. The claimant worked for the respondent for less than one year so there is no basic award.

37. The compensatory award is calculated on past and future loss. The claimant started work at a new job with a higher rate of pay on 24 May 2021, effectively immediately. As that is the case there is no identifiable loss to the claimant that can be compensated.

38. I accept the claimant's evidence about the unpaid wages and find that the respondent owes the claimant £510.12 in gross unpaid wages.

39. I have found that the claimant was an employee. She had worked for the respondent for less than a year and did not have a written contract. In those circumstances, her leave year started on the first day of her employment, which I find to be 9 December 2020. I calculate that in the five months' of effectively full-time employment the claimant had accrued about 100 hours holiday, based on 5.6 weeks' holiday per year. At her gross wages of £8.72, this comes to £872.

40. Due to the claimant's length of employment with the respondent, her notice period is one week. At her normal 40 hours and gross wages of £8.72, this comes to £348.80.

41. I made no award for harm to health as there is no power to do so.

42. The compensatory award comes to £1730.92.

43. I have found that the respondent's failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures was unreasonable. I increase the claimant's compensatory award by 10% to reflect this. This adds £173.10, and brings the award to £1904.01.

44. I have made an award to the claimant, and when these proceedings began, the respondent had not provided the claimant with a written statement of the particulars of her employment, ie an employment contract. Section 38 (3)(a)-(b) of the Employment Act 2002 states that in these circumstances I must increase the award by two weeks' pay, or four weeks' pay if I think it is just and equitable to do so. I take into account that the respondent is a small business. I am obligated to award the claimant two weeks' pay. At her normal 40 hours per week and gross wages of £8.72, this comes to £697.60.

45. £1904.01 plus £697.60 is a total award to the claimant of £2,601.61 gross of tax and national insurance.

Case No. 2407617/2021

Employment Judge Ficklin
19 May 2022

JUDGEMENT & REASONS SENT TO THE PARTIES ON
28 November 2023

FOR THE SECRETARY OF THE TRIBUNALS



NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990 ARTICLE 12

Case number: **2407617/2021**

Name of case: **Mrs R Kissock** v **Bread Basket Sandwich Station**

Interest is payable when an Employment Tribunal makes an award or determination requiring one party to proceedings to pay a sum of money to another party, apart from sums representing costs or expenses.

No interest is payable if the sum is paid in full within 14 days after the date the Tribunal sent the written record of the decision to the parties. The date the Tribunal sent the written record of the decision to the parties is called **the relevant decision day**.

Interest starts to accrue from the day immediately after the relevant decision day. That is called **the calculation day**.

The rate of interest payable is the rate specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as **the stipulated rate of interest**.

The Secretary of the Tribunal is required to give you notice of **the relevant decision day**, **the calculation day**, and **the stipulated rate of interest** in your case. They are as follows:

the relevant decision day in this case is: 28 November 2023

the calculation day in this case is: 29 November 2023

the stipulated rate of interest is: **8% per annum**.

Mr S Artingstall
For the Employment Tribunal Office

GUIDANCE NOTE

1. There is more information about Tribunal judgments here, which you should read with this guidance note:
www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

If you do not have access to the internet, you can ask for a paper copy by telephoning the Tribunal office dealing with the claim.

2. The payment of interest on Employment Tribunal awards is governed by The Employment Tribunals (Interest) Order 1990. Interest is payable on Employment Tribunal awards if they remain wholly or partly unpaid more than 14 days after the **relevant decision day**. Sums in the award that represent costs or expenses are excluded. Interest starts to accrue from the day immediately after the **relevant decision day**, which is called **the calculation day**.
3. The date of the **relevant decision day** in your case is set out in the Notice. If the judgment is paid in full by that date, no interest will be payable. If the judgment is not paid in full by that date, interest will start to accrue from the next day.
4. Requesting written reasons after you have received a written judgment does **not** change the date of the **relevant decision day**.
5. Interest will be calculated as simple interest accruing from day to day on any part of the sum of money awarded by the Tribunal that remains unpaid.
6. If the person paying the Tribunal award is required to pay part of it to a public authority by way of tax or National Insurance, no interest is payable on that part.
7. If the Secretary of State has claimed any part of the sum awarded by the Tribunal in a recoupment notice, no interest is payable on that part.
8. If the sum awarded is varied, either because the Tribunal reconsiders its own judgment, or following an appeal to the Employment Appeal Tribunal or a higher court, interest will still be payable from **the calculation day** but it will be payable on the new sum not the sum originally awarded.
9. The online information explains how Employment Tribunal awards are enforced. The interest element of an award is enforced in the same way.