EMPLOYMENT TRIBUNALS

Claimant: Mr S Aiyegbusi

Respondent: Oak Tree (Construction Design & Management) Limited

Heard at: Liverpool **On:** 30 & 31 January 2025

Before: Employment Judge Buzzard

REPRESENTATION:

Claimant: Mr A Ijaola (Consultant)

Respondent: Mr B Hendley (Consultant)

JUDGMENT having been sent to the parties on **12 February 2025** and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The Claims Pursued

1.1. The claimant makes three claims:

1.1.1. A claim of unfair dismissal;

1.1.2. A claim that he was not paid for his notice period of 7 weeks; and

1.1.3. A claim that deductions were made from his pay.

2. Unfair Dismissal Claim Issues & Law

2.1. The claimant argues that his dismissal was automatically unfair, on the basis that it was in response to him giving a statement to the health and safety

executive regarding an accident in the workplace. There is no dispute that the claimant did this, and that it would amount to a public interest disclosure.

2.2. The respondent's position is that the claimant's dismissal was a redundancy.

2.3. The respondent's representative accepted in submissions, in the light of the evidence that had been presented by the respondent witnesses, that the claimant's dismissal could not be argued to be fair. The respondent's case at its highest is that the claimant was given no notice of the first meeting to discuss potential redundancy, and that the decision to make the claimant redundant had been made in advance of that meeting.

2.4. The respondent accordingly did not dispute that the claimant was unfairly dismissed. Noting that, the only issue for the Tribunal to determine related to remedy.

2.5. The respondent invites the Tribunal to make a reduction to the compensation awarded in relation to the unfair dismissal claim following the principles in **Polkey v AE Dayton Services** [1988] HL and pursuant to Section 123(1) of the Employment Rights Act.

2.6. This provides that the Tribunal should reduce the claimant's compensation where it is found that the claimant's dismissal was unfair solely for a procedural reason, and further that there was a chance that the claimant would have been dismissed in any event had a fair procedure been followed.

2.7. The task for the Tribunal is to then try to quantify the chance that the claimant would have been fairly dismissed if a fair procedure followed and then to make a reduction to the award proportionate to that quantification. There is inevitably speculation involved in this quantification. Higher courts have been clear that we must not shirk this task because of that, provided we have evidence and facts to base our assessment on.

2.8. The respondent argued that the claimant's redundancy was inevitable, and a fair process would only have resulted in a short delay of that inevitable redundancy. In submissions the parties both indicated that a two-week period of consultation would probably have been needed for a fair consultation to have taken place.

2.9. The claimant's representative conceded in submissions that evidence had not been placed before the Tribunal which could form a basis upon which the Tribunal could conclude that any suggestions as alternatives to redundancy which the claimant could have made would have made any difference.

2.10. Accordingly, the sole issue to be determined is whether the claimant would inevitably have been fairly dismissed for the reason of redundancy if a fair

process had been followed. The respondent has the burden of proof for this issue.

3. Notice Pay Claim Issues & Law

3.1. There is no dispute that the claimant was entitled to 7 weeks' notice. There is no dispute that the claimant was not paid 7 weeks' notice pay.

3.2. The respondent states that the claimant failed to attend work after being given notice of redundancy and did not submit any sickness certification, either self-certification or medical certification. On this basis the respondent states that the claimant is not entitled to be paid for his notice period.

3.3. The claimant argues that when he was told that he was being made redundant he was told he was not to return to site and work his notice, but should use the next seven weeks to try look for work instead.

3.4. Accordingly, the sole issue to be determine in the claimant's notice pay claim is whether or not he was informed he was not required (or potentially as the claimant suggests, permitted) to work during his notice period. If he was told he did not have to attend work (or was barred from attending work), he would be entitled to payment for that period. If he was told to attend work and failed to do so without any valid reason for absence, he would not have been entitled to be paid for that period.

3.5. This is a question of fact for the Employment Tribunal to determine. In determining this factual dispute, it is noted that the respondent has the burden of proof to show that the claimant was absent without leave during his notice period.

4. Deductions from Pay Claim Issues & Law

4.1. This claim related to expenses.

4.2. The parties were agreed that the claimant had started to use his own van to travel to and from work, and also for driving when work activities needed this, some time in or around 2022. When this started, it is common ground that the claimant began to be paid a milage allowance for the miles driven in his own van. Prior to this, the claimant had been provided with a van by the respondent and no mileage allowance was paid.

4.3. It is agreed between the parties that a deduction was made from the total miles driven each day in recognition of the fact that some of the miles driven were commuting to and from work. This appears to be on the usual basis, i.e.

employees are paid expenses for driving for work, but not for driving to and from a usual place of work. There is no dispute that the respondent actually made a deduction of 20 miles per day on this basis.

4.4. The respondent's position is that this was a genuine error, and the deduction should have been 20 miles each way per day, i.e. 20 miles to work and 20 miles home, giving a total of 40 miles deduction per day. The respondent's position is that the recovery of this erroneous overpayment from the claimant's final pay was not an unlawful deduction from the claimant's wages.

4.5. There was no dispute that the approximate daily commuting distance for the claimant was just over 20 miles each way each day.

4.6. The claimant argues that the agreement was to deduct only 20 miles per day, and there was no error. The claimant claims that the respondent sought to retrospectively change the agreement reached and then made a deduction from his pay that was unlawful.

4.7. Under s13 Employment Rights Act 1996 ("ERA") it is generally unlawful to make a deduction from an employee's wages without statutory authority (for example tax and NI) or prior written consent from the employee. There are some exceptions to this general position, and the relevant one in this case is found in s14, the relevant parts of which state:

> ***14 Excepted deductions.***
>
> *(1) Section 13 does not apply to a deduction from a worker's wages made by his employer where the purpose of the deduction is the reimbursement of the employer in respect of—*
>
> *(b) an overpayment in respect of expenses incurred by the worker in carrying out his employment,*
>
> *made (for any reason) by the employer to the work.*

4.8. Accordingly, whether the deduction was unlawful is determined by whether it was made with the purpose of reimbursing an overpayment of expenses, where that overpayment was made for any reason, as the respondent argues. That is therefore the sole issue to be determined in this claim.

5. The Evidence Heard

5.1. Witness evidence was heard as follows:

5.1.1. The claimant gave evidence on his own behalf.

5.1.2. For the respondent three witnesses gave evidence. They were Mrs Southern, the Finance Manager, Mr Sadiq, the Managing Director and Mr Patel, the Construction Manager.

5.1.3. All witnesses had prepared written statements of their evidence which had been exchanged in advance. All witnesses were cross examined at the hearing.

5.2. In addition to witness evidence the Tribunal were provided with a bundle of relevant documents. The parties referred to parts of this during the hearing.

5.3. The Tribunal were also provided with written submissions by both parties. Both representatives made limited additional oral submissions.

6. Unfair Dismissal Claim Discussion and Findings

6.1. The claimant presented no evidence that there was any connection between his dismissal and the fact he had spoken to the Heath and Safety Executive, or that he had made a personal injury claim against the respondent, other than an assertion that it was what he believed.

6.2. The respondent witnesses clearly set out in some detail the financial position that the respondent company had faced in the second half of 2023. The claimant was informed the decision had been made to make him redundant at a meeting on 20 November 2023. The claimant did not have any advance warning of this. The respondent's witnesses made frank admissions that the decision to make the claimant redundant had been made a few days before this meeting.

6.3. Mr Saddiq, the Managing Director described the identification of a £350,000 shortfall in funds needed to pay contractors. This had resulted in the respondent requesting "*additional funding from Lloyds in October 2023 when it was identified the business was quickly running out of operational capital*". Mr Sadiq went on to set out that when additional funding was provided, it was on the basis that Lloyds would hold all proceeds from the sale of completed sites until loans had been repaid. Mr Sadiq described how the respondent sought to have this condition reconsidered, as it was "*reliant on the funds from sales to provide the capital to cover liabilities and overheads*". Mr Sadiq's evidence was that the position was "*catastrophic for the business*". Mr Sadiq set out in his evidence the steps the respondent had taken in response to this financial situation, which included making roles redundant, selling land, downsizing offices and agreeing payment plans with contractors "*who have essentially been working for free for the past 6 months"*.

6.4. Mrs Southern, the finance manager, gave evidence about the financial position of the company. This included reference to a report and email sent by her to the owner of the respondent and to Mr Sadiq. She described the situation as *"dire"* and explained that as of 3 November 2023 the respondent needed *"an additional £600k funds from somewhere to cover overheads and interest."*

6.5. There was no challenge in the claimant's evidence or in cross examination of the respondent's witnesses to this picture of significant financial problems.

6.6. The respondent witnesses gave evidence that staff were made redundant as and when the respondent concluded the business could progress sites to completion without that individual.

6.7. The claimant suggested that there were two contractors who could have been removed from site rather than making him redundant. The position of the respondent was that this would not be viable, as there was a contract in place with the company that provided the contractors that would be breached by such a step. In addition, the respondent's witnesses' evidence was that the claimant's particular skills were in parts of the construction process that had concluded on the respondent's active sites.

6.8. The evidence presented by the respondent about the financial position of the company is found to be compelling and persuasive. It was not materially disputed. The evidence presented by the respondent that many staff were being made redundant in an attempt to save the company is found to be compelling and persuasive. It was not materially disputed.

6.9. Given the above findings, there is no reasonable basis upon which it could be inferred that the reason the claimant was dismissed was for any reason other than the financial situation. It is a logical and persuasive explanation. The fact that the claimant had spoken to the Health and Safety Executive and / or that he had made a personal injury claim is not a sufficient basis to permit inferences to be drawn that would override the compelling and persuasive explanation of the reason for the claimant's dismissal given by the respondent.

6.10. Accordingly, having found that the claimant's dismissal was not in any way related to the fact that he had made disclosures to the Health and Safety Executive or pursued a personal injury claim against the respondent, the claimant's automatic unfair dismissal claim cannot succeed.

6.11. There is no doubt that the claimant's dismissal was in any event unfair. The respondent did not follow any fair process before dismissal. This was accepted in submissions.

6.12. The respondent's evidence about the ongoing redundancies and the financial position of the company is still relevant. The respondent submitted that the claimant's dismissal was inevitable, even if there had been a process followed. During submissions the claimant's representative was asked to remind the Tribunal of the evidence before the hearing which would support a contention that a fair consultation and process could have made any difference to the outcome. The claimant's representative conceded that was not what the claimant was arguing and what was actually argued that a fair process would have taken slightly longer. The result of this is that the claimant would have been an employee during the period of that process and would therefore have been entitled to have been paid for that time. It was suggested by the claimant's representative that two weeks is a fair estimate of the time a fair process would have added.

6.13. The respondent's representative in submissions agreed that two weeks was a realistic estimate of how long a fair process would have taken.

6.14. Based on the above it was found that the claimant's dismissal would have occurred regardless of any process, albeit it would have occurred two weeks later.

6.15. For the above reasons the claimant's claim of unfair dismissal succeeded. The parties were agreed that the claimant's weekly pay was £601.85. The parties were also agreed that the claimant had been paid £481.36 as statutory sick pay for the 22 days following the meeting at which he was informed he was redundant. The claimant does not suggest that he was ill and no certification (medical or otherwise) was provided to that effect. It is not clear why the claimant was paid statutory sick pay for these days, but there was no basis put forward to explain why the claimant was entitled to such payment. The respondent's evidence was that this was an error, an explanation which is accepted in the absence of any evidence to explain why the claimant would have been entitled to sick pay. Accordingly, the claimant is awarded compensation of two weeks' pay less the amount paid to him as statutory sick pay, a total of £722.34.

6.16. The claimant was paid a statutory redundancy payment, and accordingly is not entitled to a basic award.

7. Notice Pay Claim Discussion and Findings

7.1. The claimant's evidence is that he was first informed he was being made redundant at a meeting on 20 November 2023 for which he had not advance warning. The meeting was attended by Mr Patel, Mr Sadiq and the claimant.

7.2. The claimant's evidence is that at that meeting he was told he could not return to site and should use his notice period to seek new employment. The claimant under cross examination stated he was told he was not permitted to return to site, at all.

7.3. The respondent disputes the claimant's recollection of this meeting. The respondent's witnesses both stated that the claimant was informed he was being made redundant and was handed a letter confirming this. The claimant was told that if he needed time of to attend interviews or similar that would not be a problem. They denied that the claimant was told that he either should not or could not return to site ever, although he was told he did not need to go to site that day.

7.4. The letter that was handed to the claimant was in the bundle of evidence. It is dated 16 November 2023, which is consistent with the respondent's concession that the decision to dismiss the claimant was made in advance of the meeting on the 20 November 2023.

7.5. The claimant accepted that he was given the letter and that he had read the letter. The letter states:

> *"We will require you to work your notice. During your notice period, you are entitled to take a reasonable amount of paid time off work to look for alternative employment and attend job interviews."*

7.6. This contradicts what the claimant states he was told at the meeting and is entirely consistent with what the respondent's witnesses stated was said at the meeting.

7.7. There does not appear to be a logical explanation of why a company making staff redundant to try to survive a dire financial situation would compel an employee to take weeks of paid leave prior to termination of employment.

7.8. On balance, considering the available evidence, the account of the meeting put forward by the respondent is found to be the most likely to be accurate. It is consistent with what was documented at the time and does not appear illogical. Accordingly, it is found that the claimant was informed he was required to work his notice period.

7.9. There is no dispute that the claimant failed to attend work again. There is no suggestion that there was any other valid reason for the claimant to not attend work again. Accordingly, it is found that the claimant is not entitled to payment for his notice period because he was absent from work without leave or explanation for the entire period. For this reason, the claimant's claim for his notice pay fails and is dismissed.

8. Unlawful Deduction Claim Discussion and Findings

8.1. The claimant's claim relates to a deduction made from his final pay only. This deduction was made by the respondent. The respondent states it was made to recover an overpayment of expenses. If correct that would be lawful. The claimant claims there was no overpayment of expenses, and as such the deduction was unlawful.

8.2. Whether there was, or was not, and overpayment of expenses turns on a single factual dispute. Was the claimant entitled to mileage expenses less 20 miles per day to represent his commute or less 40 miles per day to represent his commute.

8.3. The claimant's evidence was that when he started to use his own van in 2022 there was an oral agreement reached that deductions for his commute would be a total of 20 miles per day. The claimant stated in evidence that this agreement was reached with the then Managing Director, Mr Mosscrop. The submissions made on behalf of the claimant suggest that the agreement was made with the former owner of the respondent, Mr Nazri. Mr Nazri passed away in 2019, some years before the claimant started to use his own van on a daily basis and mileage expenses were agreed with the claimant. Accordingly, the reference to Mr Nazri in written submissions is found to be in error.

8.4. Mr Mosscrop resigned from the respondent in or around April 2023. Mr Mosscrop did not appear at this hearing was a witness.

8.5. The respondent relied on a contemporaneous email, sent by Mr Mosscrop to Mrs Southern, the Financial Director, on 4 February 2022. This was in the bundle of documents. In this email it is stated that agreement had been reached with the claimant about mileage expenses as follows:

> *"I have spoken to [the claimant] and [the claimant] will also now claim mileage in his own van less 20 miles each way for travel to and from home rather than submit purchased fuel receipts.*"

8.6. This email records that the agreement reached was that a total of 40 miles each day would be deducted from allowed mileage expenses, which is what the respondent states the correct position is.

8.7. The parties are agreed that the claimant was paid mileage expenses with only 20 miles each day deducted for over a year. This was stated by Mrs Southern to have been because she had trusted the site manager to have ensured the correct deductions had been made.

8.8. The hearing bundle included a number of sheets that the claimant had filled in to record his daily mileage. The sheets record a deduction from each daily total of 20 miles. The sheets are in the form of a pre-printed table, with a column heading stating that a 20 mile deduction should be made.

8.9. Mrs Southern stated that this was not the official mileage form. This was not specifically disputed by the claimant. The claimant stated he was given the form by the site manager to complete. This was not disputed by the respondent. The evidence suggests that the form was created by the site manager.

8.10. There was no dispute that the claimant's daily to commute to his normal place of work was just over 20 miles each way. Accordingly, a deduction of 20 miles each way is more consistent with the deduction being to represent the claimant's commute than a deduction of 10 miles each way.

8.11. The respondent's witnesses made passing reference to the fact that a deduction of 20 miles each way was applied to other staff who were paid mileage for using their own vehicle for work. This was not challenged in cross examination or by evidence produced to the contrary by the claimant.

8.12. On balance it is found that the correct expense entitlement was mileage less a deduction of 40 miles per day to represent the claimant's commute. It is not likely that the respondent would have agreed to a more favourable expenses arrangement for the claimant than it had done for any other staff. The fact that the claimant was paid mileage less 20 miles per day does not assist. The fact that an error has continued for a long time does not in any way preclude it from being an error.

8.13. The claimant has not been able to point to anything in writing to confirm the agreement he claims was reached, and relies on recollection of a discussion in early 2022. There is a written report of what was agreed in that discussion that was generated contemporaneously. That is consistent with the respondent's position. A deduction of 20 miles each way appears to correlate much better with the actual commuting distance the claimant was undertaking than 10 miles each way.

8.14. On balance the above suggests that the agreement reached was to deduct 20 miles each way, not 20 miles each day. It is found that the agreement was to treat the claimant like other staff, deducting amounts comparable to his commute of 20 miles each way.

8.15. On this basis it is found that the payment of expenses with only a deduction of 20 miles each day, rather than each way, was an error. The deduction of monies to recover overpayments caused by that error is therefore a deduction

to recover an overpayment of expenses and as such it is an exception to the right not to have a deduction made from wages.

8.16. For all the above reasons the claimant's claim that the deduction made from the claimant's final pay was unlawful fails and is dismissed.

Employment Judge Buzzard

28 February 2025

Judgment sent to the parties on:

7 April 2025

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For the Tribunal