Claim Number: 1301919/2017

EMPLOYMENT TRIBUNALS

Claimant | Respondent

Mr P Eboye **v** **Farsight UK Security Services Ltd**

FINAL MERITS HEARING

Heard at: **Birmingham** On: **6 December 2017**

Before: **Employment Judge Perry (sitting alone)**

Appearances
For the Claimant: **Mr I Little (solicitor)**
For the Respondent: **No appearance**

JUDGMENT

It is the judgment of the Tribunal that:-

The claimant's complaint that he was constructively and unfairly dismissed by the respondent on 6 February 2017 is well founded. When dismissing the respondent failed to follow the ACAS Code of Practice. The award for unfair dismissal below shall be increased by 25%. I award the sum of £3,429.33 calculated as follows as compensation for unfair dismissal to be paid by the respondent to the claimant:-

Basic Award	
(7.5 weeks at £216.00 gross/wk)	£1,620.00
Compensatory Award	
Loss of earnings	
(from 13/3/17 to 31/3/17 (3 wks) @ 207.82 net /wk)	£623.46
Loss of statutory rights	£500.00
Sub-Total	£2,743.46
Uplift 25%	£685.87
TOTAL	£3,429.33

The claimant was dismissed in breach of contract on 6 February 2017. The respondent is ordered to pay £1,039.10 (net) as damages to the claimant.

It is declared that the respondent has made an unlawful deduction from the claimant's wages pursuant to Part II of the Employment Rights Act 1996. The respondent is ordered to pay £288.00 (gross) to the claimant in respect of the unlawful deduction.

It is declared that the respondent has failed to compensate the claimant in relation to the claimant's entitlement to holiday leave that had accrued as at the termination of the claimant's employment pursuant to the Working Time Regulations 1998 (SI 1998/1833). The respondent is ordered to pay £108.00 (gross) to the claimant in respect of the accrued leave entitlement.

The Employment Protection (Recoupment of Jobseekers Allowance & Income Support) Regulations 1996 do not apply.

REASONS

This is a claim that was presented on 4 July 2017 and includes complaints of unfair dismissal, unlawful deductions from wages, breach of contract and holiday pay. The claimant conciliated via ACAS between 4 May and 4 June 2017. On presentation, the claim was accepted and listed for a two day final merits hearing, of which today was one.

The tribunal attempted to serve the papers on the respondent but on 17 August 2017 they were returned marked addressee gone away. The claimant's representatives provided an alternative address for service and the papers were re-served. Rightly or wrongly, the respondent was given a further 28 days to present a response.

No response having been received within that period on 22 November Employment Judge Camp directed that a response had not been received pursuant to rule 21 and that the respondent was only entitled to participate in any hearing to the extent permitted by an Employment Judge. He converted the final merits hearing to a three-hour to address remedy.

Also on 22 November 2017, the respondent wrote to the tribunal to indicate that they had replied referring to an earlier email of 11 October stating that the claimant had "quit" and attached the service documents. The earlier email referred to some screenshots where the respondent suggested the claimant had resigned. That email was referred to Employment Judge Woffenden on 29 November who directed the tribunal staff to write to the respondent to draw its attention to the notes to the claim form and accompanying documentation which stated that if they wish to resist the claim it must use the prescribed form, the deadline for doing so had passed and no response had been received.

I am satisfied based on the email received from the respondents on 22 November the papers had been served upon them. Further having considered the tribunal's file I find the respondent has not made any further applications.

The claimant did not appear before me today. He was represented by Mr Little. I had before me a bundle of 57 pages, skeleton and chronology. The claimant did not prepare a witness statement. Mr Little told me that was on the basis that the claimant was not here, he had found alternative work and did not wish to risk losing it and it was considered that providing a witness statement would probably add little weight to the evidence before me. I therefore proceeded based upon the documents before me, which included a copy of the claimant's contract and the claim form.

I find that the claimant was told by text message by the respondent on 13 January 2017 that he was removed from one of the sites at which it provided services. The claim form relays the claimant sought to clarify with the respondent what the position was with regards to his employment and he received no further notifications from them.

I have been provided with a timesheet [42] which shows that in early January 2017 the claimant had worked 40 hours. On 6 February 2017, there was an exchange of text messages between the claimant and "Chris" of the respondent [45-46] where the claimant stated that he had not received his salary. The respondent's response was to ask him to confirm the date that he resigned. The claimant persisted in the exchange of texts by asking for his salary to be paid into his bank. The response repeated the request that he confirm when he had resigned.

Mr Little suggests that the respondent by doing so was placing the claimant under duress, namely the suggestion was that he would not be paid until he had provided a resignation.

The claimant in response confirmed his resignation date was 13 January as a response to that exchange of texts. That exchange of texts was also forwarded by the respondent in its email to the tribunal of 22 November 2017.

I find based on the evidence before me only the claimant only indicated that he resigned as a response to the respondent's requests that he confirm the date of his resignation which in turn were a response for him to be paid and that the claimant did so to ensure that he was paid the sums he was rightfully due. Accordingly, I find that he did not resign at the time that the exchange of text state that he did, 13 January, but that he did so on 6 February. As to the reason why he resigned I find that by 6 February the claimant had not been paid his pay for the month of January, and his normal pay date had passed. The exchange of texts confirm that was so and the respondent did not seek in that exchange of texts to suggest otherwise. The respondent not having paid the claimant his pay for work done I find the respondent was in fundamental breach of contract, and the claimant was entitled to resign and treat that as a fundamental breach of contract.

The contract that is before me [35-41] states the claimant's continuous employment commenced on 1 July 2011. Accordingly, I find he had more than two continuous years' service and no potentially fair reason for dismissal having been given by the respondent, the burden being upon it to do so I find the claimant was unfairly dismissed on 6 February 2017, the date of that exchange of texts [45].

The claimant was aged 52 at the date of the termination and therefore the multiplier for the basic award was 7.5 weeks (£1,620.00). I make a loss of rights award of £500. The claimant found alternative work in April. Based on the papers before me he is paid at least as much as in his role with the respondent. Offsetting the five weeks' notice from the claimant's losses from the date of his dismissal, that means that he lost three week's pay until he found a new job, namely 13 to 31 March 2017. Accordingly, I award three weeks net pay as compensation (£623.46).

The respondent failed to follow any procedure with regards to the claimant's dismissal. I found the respondent failed to engage with the claimant despite his requests by text to do so. I find that failure was unreasonable. I find the respondent then sought to procure from him a resignation before addressing his entitlement to pay. In those circumstances, I consider it is just and equitable to award the maximum 25% uplift. That equates to £685.87 (25% of £2,743.46).

Mr Little confirmed the claimant did not claim benefits. I find the Recoupment Regulations do not apply.

Wages. I find that the wages the claimant was due were some 40 hours based on the timesheet before me [42]. The hourly rate of pay within his contract (dated 6 June 2015) was £6.70 per hour (clause 7.1) [37]. That was the national minimum wage appertaining at the time. The national minimum wage in January 2017 when the work was done 's contract was £7.20 per hour. The 40 hours pay due therefore equate to £288.00 gross.

Holiday Pay. the claimant's contract also provides that he is entitled to 28 days holiday year each holiday year and the respondent's holiday year was January to December [37]. The Working Time Regulations provide for 5.6 weeks holiday per year in aggregate. A holiday entitlement of 28 days holiday per year is normally based on a 5-day working week. Clause 5.1 provides that his working hours were 30 per week [36]. Assuming a five-day working week for consistency of calculation that would mean he was required to work six hours a day for the purposes of the holiday pay calculation. I calculate 6 hours a day at £7.20 per hour equates to a daily rate of £43.20.

Clause 9.5 of the contract [38] states that holiday is calculated based on complete months accrued. The claimant states that he has had no holiday in January in his claim form. I

therefore find that rounded up to the nearest half day as the Working Time Regulations require he is entitled to 2.5 days holiday. That equates to £108.00.

Notice. I found above the respondent was in fundamental breach of contract and the claimant was therefore entitled to resign and claim notice pay. I relay the claimant's start of his continuous employment above (1 July 2011). He was therefore employed 5 complete years and thus entitled to 5 weeks' notice. Based upon his contractual 30 working hours per week I calculate that his net rate of pay would is £207.82 a total for the notice of £1,039.10.

Employment Judge Perry

06 December 2017