



Reserved judgment

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Respondent

AND

Mr J Rajczewski

Kiely Brothers Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham

ON 19 October 2018

EMPLOYMENT JUDGE Richardson

Representation

For the Claimant: in person

For the Respondent: no appearance

JUDGMENT

The judgment of the Tribunal is that

- (1) The claimant was entitled to be paid by the respondent statutory notice of three weeks.
- (2) The claimant was entitled to 6 days holiday pay under S13 and 13A Working Time Regulations 1998.
- (3) The respondent failed to provide written particulars of employment under S1 Employment Rights Act 1996.
- (4) The respondent failed to provide itemized pay slips under S8 Employment Rights Act 1996.
- (5) The claimant's claims of unfair dismissal, breach of contract and unpaid holiday pay are well founded.
- (6) The respondent is ordered to pay the claimant the sum of **£18,035.25**.

REASONS

Background and Issues

1. The claimant was employed by the respondent company as an HGV mechanic commencing on 17th April 2014 until the effective date of termination on 30th November 2018. The claimant's date of birth is 23rd October 1980..

2. On checking the tribunal file I am satisfied that the respondent was served with the ET1 form at its registered address and failed to file a response to the claimant's claim. The respondent was also correctly served by post with the notice of hearing but failed to attend the hearing. The hearing commenced in the respondent's absence.

Evidence

3. I was provided with copies of the claimant P45, P60s for the last three years, bank statement and a schedule of loss. I heard evidence from the claimant whom I found to be a credible witness.

Findings of Fact

4. I make my findings of fact on the balance of probabilities on the basis of the material before me taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. My findings of fact relevant to the issues which have been determined are as follows.
5. The claimant worked for the respondent company for nearly four years. His brother also worked at the same place. The claimant's work required him to work away from home from time to time. This sometimes occurred over an extended period, for example March – September 2017 which is the respondent's busy season for road work contracts when they employ 80-100 Polish employees as labourers and drivers. The claimant was working away during this period 7 days a week.
6. The claimant was never given an employment contract by the respondent. He normally worked six days a week and was paid £150 per day net pay for six days a week, totalling a net pay of £900 per week. He has never received a pay slip from the respondent. The claimant was entitled to 28 days holiday a year including bank holidays. He was paid weekly in arrears by bank transfer on Fridays.
7. On 30th November 2017 the claimant approached the Transport Manger and the Workshop Manager in the office to request information about why his brother, a work colleague, had been given a written warning because his brother did not know the reason. The warning had been given without prior consultation or the reason for it.
8. Management had instructed the claimant in the past to assist non-English speaking Polish employees. The claimant believed that he was performing this role on this occasion.

9. The managers were hostile and spoke to the claimant in a derogatory manner. They said they could do what they wanted. They failed to give any other explanation. The claimant was upset and angry. He asked if they would be prepared to give him a written reference. The managers asked him why and he replied that he would probably be seeking alternative employment in the future. He then returned to his work place.
10. About 10 – 20 minutes later he was called to the managers' office where he was required to hand in his work mobile phone, keys and fuel card and was told to leave the premises. He was told to return the next day to collect his tool box.
11. The claimant was shocked. He left the site. He phoned the Transport Manager the following day to ask about his notice pay. The Transport Manager put down the phone. Subsequent attempts by the claimant to speak to his manager by telephone were unsuccessful because the manager refused to take the claimant's calls.
12. In early December 2017 the claimant received his wages up to and including 30th November 2017. He received his P45 about two weeks later.
13. The claimant checked his holiday entitlement. He had taken paid holiday leaving him with a remaining holiday entitlement on 30th November 2017 of 6 days.
14. Following the summary termination of his employment the claimant registered as a class 1 driver with an agency for one week. He then worked for two months for Weir Waste Management as a driver. After two months the claimant commenced working for Conley as an HGV mechanic and earns £120 net per day £30 less per day than he earned with the respondent.
15. The claimant intended to leave the respondent within six months as he did not wish to work away from his family for extended periods.

Law

16. The law in this case is to be found in sections 98(1), (2) and (4) of the Employment Rights Act 1996 which state:

“(1) 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 substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it —

(b) relates to the conduct of the employee...

(4) Where the employer has fulfilled the requirements of subsection (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 dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case"

17. The provisions on notice are found at s86 Employment Rights Act 1996

18. The provisions on holiday pay are found at Regulations 13 and 13A Working Time Regulations 1998.

19. The tribunal also considered the ACAS Code of Practice on disciplinary and grievance procedures when reaching its conclusions.

Conclusions

20. The respondent dismissed the claimant on 30th November 2017 without notice and in breach of the ACAS Code of Practice on Disciplinary and Grievance procedures. The respondent has failed to show a potentially fair reason to dismiss the claimant and has also failed to show a fair dismissal procedure.

21. The respondent failed to provide the claimant with a statement of particulars of employment in breach of Section 1 Employment Rights Act 1996. The respondent failed to provide the claimant with itemized pay slips during the course of his employment in breach of S8 Employment Rights Act 1996.

22. The claimant was therefore unable to provide me with an accurate breakdown of gross sums being claimed. In the circumstances the gross figures on annex A are approximated using an income tax calculator. It is

for the for the claimant to account to HMRC for tax in relation to the compensatory award.

23. I make the following declarations:
- a. The claimant was unfairly dismissed on 30th November 2017.
 - b. The respondent failed to pay the claimant his statutory notice of three weeks.
 - c. The respondent failed to pay the claimant his entitlement to holiday pay of six days on termination of employment.
 - d. The claimant is entitled to the basic award and compensatory award, the calculations for which are set out on the attached appendix.
 - e. The respondent failed to provide written particulars of employment under S1 Employment Rights Act 1996.
 - f. The respondent failed to provide itemized pay slips under S8 Employment Rights Act 1996.
24. The claimant commenced work immediately following termination of employment by the respondent. His past lost is therefore restricted to the difference in the pay he was earning with the respondent and the pay he earned with other employers commencing on 4th December 2017 for a period of six months (ie. 26 weeks less 3 weeks' statutory notice) until 31st May 2018.
25. The calculations are estimated because payslips were not provided by the respondent to the claimant to show what gross and net payments were made and what tax and NIC was deducted.

Employment Judge Richardson

1st November 2018

APPENDIX TO JUDGMENT

Basic award

Claimant's date of birth 23/11/1980

He is 37 years of age

The claimant's salary at the EDT was £900 per week (net)

Statutory minimum salary £508 (gross)

Commencement of employment 17/4/2014

Effective Date of Termination 30/11/2017

Continuous service 3 years

Age factor x 1

Basic award 3 x 1 x £508 =	£	£ 1524.00
<i>Compensatory award</i>		
£900 net pay per week equates to approximately gross earnings of £1286 per week.		
£720 net pay per week equates to approximately Gross earnings of £983 per week		
The wages difference between £1286 and £ 983 gross per Week is £303 per week		
Past loss is 23 weeks 26 th December 2017 – 31 st May 2018		
23 weeks x £303 gross pay shortfall per week	6969.00	
<i>Notice pay</i>		
3 weeks 4 th December – 25 th December at £1286 net per week	3858.00	
<i>Loss of Statutory Rights</i>	350.00	
<i>S38 Employment Act 2002</i>		
Failure to provide particulars of employment Contrary to S1 Employment Rights Act 1996		
4 weeks pay at £508	<u>2032.00</u>	
Sub total	13,209.00	
<i>Uplift of 25% under S207A Trade Union & Labour Relations (Consolidation) Act 1992 (ACAS uplift)</i>		
	<u>3302.25</u>	
TOTAL	£16,511.25	
<u>Grand total</u>		£18,035.25