



EMPLOYMENT TRIBUNALS

Claimant: Mr W Piasecki
Respondent: PS Contract Furniture Ltd
HELD AT: Manchester **ON:** 19 July 2018
20 August 2018 (In Chambers)
BEFORE: Employment Judge Barker

REPRESENTATION:

Claimant: In person, assisted by Miss Krasuska, interpreter.
Respondent: Ms Halsall, consultant, assisted by Miss Stadnik, interpreter.

JUDGMENT

The judgment of the Tribunal is as follows:

1. The claimant's claim for automatic unfair dismissal for asserting a statutory right fails and is dismissed.
2. The claimant is not entitled to notice monies. He committed an act of gross misconduct and was summarily dismissed.
3. The claimant's claim for unlawful deduction from wages contrary to section 13 of the Employment Rights Act 1996 succeeds. The claimant did not agree to the reduction in the rate of his hourly pay from £10.00 to £9.00 per hour from 12 October 2017. He is therefore entitled to recover an underpayment of £507.50 caused by this unauthorised deduction.
4. The respondent failed to provide full employment particulars as required by section 1 of the Employment Rights Act 1996 in that the claimant's contract of employment contains no particulars relating to pay as required at Section 1(4)(a) and (b). The claimant is therefore entitled to compensation as set out in s38 of the Employment Act 2002 of the minimum amount of £978 which is 2 weeks' pay at the statutory maximum for a week's pay at that time.
5. The claimant is entitled to £528 as compensation for unpaid holiday pay.

6. This Tribunal has no jurisdiction to consider the claimant's claim for statutory sick pay, which should be referred to HMRC for adjudication. The claimant is not entitled to contractual sick pay.

REASONS

Issues for the Tribunal to decide

1. The parties attended a hearing on 19 July 2018. Mr Poleszk, managing director of the respondent and Mr Tlalka, sales director, gave evidence for the respondent. The claimant gave evidence on his own account. At the hearing each party was assisted by a Polish interpreter and the Tribunal is grateful for the assistance of those interpreters. Mr Piasecki had previously been assisted by a legal representative who had prepared his ET1 claim form and his witness statement. That representative was not available to assist him at this hearing. At the outset of the proceedings the Tribunal confirmed the issues that the claimant wished the Tribunal to decide which were as follows:

(a) Automatic unfair dismissal. Due to the claimant having raised a grievance about a lower rate of pay in a letter dated 14 December 2017, the claimant asserts that the raising of this issue plus the issue of unpaid holiday pay was the cause of his dismissal, for asserting a statutory right. The respondent will say that the claimant was dismissed for dishonesty for submitting what they allege are false medical certificates from a Polish doctor and for misrepresenting to the respondent the dates when he intended to travel to Poland for Christmas, when asked by them on 15 December 2017. On that day, the claimant assured the respondent that he would be attending work from 18 to 22 December inclusive and be travelling to Poland thereafter. The claimant in fact travelled to Poland on Sunday 17th December 2017 and did not attend work thereafter.

(b) Unlawful deductions from wages. The respondent imposed a £1.00 per hour reduction in the rate of pay of all staff at a meeting on 12 October 2017. It is the respondent's case that the claimant accepted the variation in this rate of pay. The claimant's case is that he did not.

(c) Failure to provide written particulars of employment. The claimant says the respondent has failed to supply him with full written particulars of employment as required by Section 1 of the Employment Rights Act 1996.

(d) The claimant claims outstanding notice monies. Initially the respondent appeared to accept that notice pay was owed to the claimant but at the outset of the hearing the claimant's representative applied to amend the response form to remove this concession, which application was granted by the Tribunal.

(e) The claimant claims unpaid annual leave entitlement. The claimant's contract of employment records that this is 28 days plus 8 statutory Bank Holidays. The respondent told the Tribunal that the claimant's contract was

incorrect and that in fact the claimant was only entitled to 28 days inclusive of statutory Bank Holidays. The respondent accepts that there has been some shortfall in the claimant's annual leave entitlement but the parties disagree over the amount of that shortfall.

(f) The claimant claims unpaid sick pay. The claimant's contract of employment provides for a contractual sick pay entitlement of 30 days' full pay. Again the respondent argues that the claimant's contract is incorrect and that members of staff were only entitled to statutory sick pay and that in any event the claimant is not entitled to sick pay at all due to the submission of false misleading doctor's notes.

(g) There is also a dispute over the date of the claimant's dismissal. The respondent asserts that the claimant was dismissed on either 11 January 2018 or the 15 January 2018. The claimant asserts that he was notified on receipt of his P45 in February which states that his leaving date was 2 February 2018.

2. At the outset of the hearing, the respondent's representative applied to strike out the claimant's claim of automatic unfair dismissal. This was on the basis that the claimant's claim form and supporting documentation allege that he was dismissed for contacting ACAS about the dispute over wages and holiday pay on 25 January 2018. The respondent's representative stated that this was wholly impossible, given that the claimant was dismissed before 25 January 2018. The Tribunal refused the respondent's application to strike out the claimant's automatic unfair dismissal claim on that basis that until the effective date of termination had been determined on the basis of findings of fact by the Tribunal that application was premature.

3. Given the claimant's lack of assistance from a representative, the Tribunal provided the claimant with the opportunity to ask questions on legal or procedural issues during the hearing. In spite of the Tribunal's assistance, when the hearing resumed after the lunch break, the claimant made an application to adjourn the hearing to obtain legal assistance to allow him to prepare better to cross-examine the respondent's witnesses. He believed that he would not be able to ask appropriate questions on his own. He also told the Tribunal that he was tired because he had had to travel from Bedford to Manchester for the hearing.

4. The Tribunal told the claimant that he had had notification of the hearing date for some time and that the balance of prejudice to the respondent in adjourning the hearing and the costs involved in doing so would have to be considered in considering his application to adjourn. The claimant was reminded that the Tribunal had explained the law that would be applied to his complaints at the outset and had taken time to ensure that the claimant understood the issues that he wanted the Tribunal to decide.

5. It was also suggested to Mr Piasecki that he may wish to put the questions that he had prepared over the lunch break to the respondent's witnesses and allow questions from the judge to draw out any evidence on matters in dispute between the parties that would assist the Tribunal. If any questions from the claimant failed to address relevant issues, questions could be asked by the judge. On that basis Mr

Piasecki agreed to withdraw his application to adjourn the hearing and questions were put to the respondent's witnesses on that basis.

Findings of Fact

6. The Tribunal notes that, in assessing the credibility of the evidence presented by both parties, there were contradictions and inconsistencies in the oral accounts presented under oath by both parties. The claimant's case changed from the evidence in his claim form and witness statement to the evidence he gave on the witness stand. Likewise, Mr Poleszk, the respondent's managing director, was also at times an inconsistent witness, whose evidence on the same topic varied over the course of his period giving evidence. The credibility and consistency of the witnesses has been taken into account in the findings of fact that have been made.

Reduction in the claimant's hourly rate of pay

7. The claimant began work for the respondent on 20 March 2017. He worked as an upholsterer for the respondent, whose act as sub-contractors for Carlick Contract Furniture, polishing tables, chairs and providing upholstery. Mr Poleszk told the Tribunal that Carlick Contract Furniture is the respondent's main client and its business is reliant on the work they provide.

8. The respondent received a complaint from Carlick as to the quality of the work that had been provided to them. Mr Poleszk told the Tribunal that a threat was made that Carlick would provide the respondent with no further work and that they had refused to pay for work already done. Carlick also imposed a fine on the respondent.

9. Mr Poleszk told the Tribunal that this placed the respondent in a precarious financial position and therefore he convened a meeting of staff on 12 October at which he informed them that due to this problem with their main client, the workforce would have to choose between three outcomes; firstly, accepting a £1.00 reduction in the hourly rate of pay for all staff, secondly that the company would go into liquidation or thirdly that members of staff would be made redundant. It is the respondent's case that all members of staff, save for 2 employees who resigned shortly after, were happy with the introduction of a reduction in the hourly rate of pay and accepted this change. The claimant was paid at a new hourly rate of pay of £9.00 per hour from 20 October 2017 as demonstrated by the claimant's pay slips which were before the Tribunal in evidence.

10. The claimant told the Tribunal that he attended the meeting on the 12 October and was given a document purporting to be a variation in the terms of his contract which was signed by the respondent but that he refused to sign and return this document. The claimant told the Tribunal that the change was imposed on him whether he agreed to it or not.

11. Mr Poleszk told the Tribunal that he understood that the claimant was unhappy with his reduction in pay but that no formal complaint was made by the claimant until the respondent received a letter dated 14 December 2017 in which the claimant raised a grievance in relation to this issue.

12. The claimant's grievance letter dated 14 December 2017, the facts contained in which are not disputed by the respondent, refers to previous communication in which the claimant expressed his disapproval of the changes. The respondent told the Tribunal that the claimant attended a grievance meeting which addressed his complaint about his wages on 15 December 2017. At that meeting, the claimant was told by Mr Tlalka that he had used up all of his annual leave entitlement, save for that reserved for the respondent's compulsory shutdown.

13. However, the Tribunal finds that the meeting of 15 December cannot have addressed the formal grievance contained in the claimant's letter, because the letter itself was not posted until 15 December and therefore would not have arrived at the respondent's workplace until Monday 18 December on the balance of probabilities. In any event the notes of the meeting of the 15 December do not address the variation in the hourly rate of pay, but refer to the claimant's attendance at work over the Christmas period and issues regarding his holiday entitlement and clocking-in and clocking-out of work.

The claimant's contractual terms as to holiday pay

14. The claimant's contract of employment which was before the Tribunal in evidence purports to give the claimant 28 days annual leave plus 8 statutory bank holidays.

15. The respondent told the claimant that their annual leave year starts on 6 April. Therefore, by 15 December the claimant had worked for 8 months of the respondent's annual leave year. From the evidence before the Tribunal in the form of the respondent's work records, the claimant had taken 14 days annual leave in the period prior to the Christmas shutdown. The claimant initially told the Tribunal that he believed he had taken 12 days he then subsequently told the Tribunal that he had no recollection of when that was and in fact whether that was the case. On the balance of probabilities and using the evidence provided by the respondent I conclude that the claimant had used 14 days annual leave entitlement by 15 December.

16. The respondent seeks to dispute the claimant's contractual holiday entitlement of 28 days plus 8 days bank holidays by telling the Tribunal that the person who had drafted the contract of employment was subsequently dismissed for fraud it remains that the parties had agreed and had evidenced in contractual form that the claimant was entitled to 28 days plus 8 days statutory bank holidays.

17. No formal variation to those contractual terms had ever been affected by the respondent. The claimant was asked when giving evidence whether he knew what his annual holiday entitlement was. His evidence was inconsistent and unclear, however when Mr Poleszk told the claimant, in answer to his question, that it was agreed between them that the contract was incorrect and the claimant was only entitled to the statutory minimum, the claimant agreed to this. Taking all the evidence before the Tribunal into account, I find that the parties agreed that the claimant was entitled to the statutory minimum holiday entitlement of 20 days plus 8 public holidays and not the increased amount in the contract. As set out above, he had only taken 14 of these by 15 December 2017.

18. The claimant accepts that the respondent subsequently made a one-off payment for holiday pay of £144.00 to the claimant.

The claimant's attendance at work during Christmas and New Year

19. It is accepted by the respondent that around the end of November 2017, the claimant complained of back pain. The parties disagree as to whether the claimant left work early at the end of November on account of his back pain.

20. Mr Poleszk told that Tribunal that he himself suffered from severe back pain and did not consider that the claimant presented with symptoms as severe as his were. He and Mr Tlalka told the Tribunal that the claimant appeared to continue working in a normal manner at a normal pace and that they therefore assumed that he was managing his symptoms adequately and that they were not severe. The claimant told the Tribunal that he had not left work early due to his back pain in November or early December and that he coped with the discomfort by using heat patches and painkillers.

21. Towards the end of December 2017, the respondent was preparing for its annual Christmas shutdown which was to take place from close of business on Friday 22 December 2017 to Wednesday 3 January 2018. All employees were required to take annual leave over that period.

22. At a meeting which has previously been referred to as a grievance meeting and which took place on 15 December 2017, the claimant was asked directly by Mr Tlalka whether he would be attending work between 18 December and 22 December because there had been rumours amongst other employees that he was preparing to go to Poland that weekend and would not attend work the week before the Christmas shutdown.

23. It was accepted by both parties that at the meeting on 15 December the claimant told Mr Tlalka that he had no intention of travelling to Poland before 22 December and that he would attend work the following week as usual. The claimant told the Tribunal, which evidence is accepted, that there was a dispute during that meeting over his remaining holiday entitlement. He said that he told Mr Tlalka that he had only taken 12 days annual leave that year, but that Mr Tlalka had told him that he had taken all of the annual leave to which he was entitled. This dispute over annual leave was one of the issues then raised by the claimant in his grievance letter of 14 December 2017.

24. The claimant told the Tribunal that he had no intention of travelling to Poland before 22 December, but that over the weekend of 16 and 17 December, the opportunity had arisen for him to share a lift with to Poland and he had taken it. He told the Tribunal that the reason for doing so was to enable him to obtain treatment for the severe back pain he was suffering from a Polish doctor, as he had not been able to register with a GP in England.

25. It was put to Mr Piasecki by the respondent that it was not logical to drive for more than 20 hours to Poland to obtain treatment for back pain, since even if he was not registered with a GP he could have obtained treatment at Accident and Emergency or at an out-of-hours clinic in the UK. Mr Piasecki said that his

justification for doing so was that his English was poor and so he was not able to attend A&E or a clinic. When asked in cross-examination how he had endured the long drive, he said that he had been able to lie down on the back seat of the car.

26. The claimant contacted the respondent on Monday 18 December to notify them of his sickness absence. He did not inform them that he had travelled to Poland. He was asked to submit a sick note and a doctor's note to confirm his absence, which he agreed to do.

27. The claimant obtained a doctor's note from a private clinic in Poland, which was posted to the respondent but did not arrive at the respondent's premises until early January 2018.

28. The respondent's witnesses told the Tribunal that they did not accept that the note provided was genuine. Mr Poleszk told the Tribunal that the doctor's clinic was over 60 miles away from where the claimant was staying over Christmas. The respondent made various submissions in oral evidence as to the credibility of the particular doctor used by the claimant, alleging that the sick note was not reliable and that the doctor in question had a reputation for producing false sick notes. The claimant told the Tribunal that he had used this particular doctor because he was a specialist in treating his particular condition. The two sicknotes provided were before the Tribunal in evidence and are entirely in Polish.

29. In any event, both Mr Poleszk and Mr Tlalka did not accept that the claimant was genuinely ill when he was said to be off work sick. Mr Poleszk in particular refused to accept that the claimant was suffering from debilitating back pain, given that he had been able to endure a long drive to Poland. Both he and Mr Tlalka told the Tribunal that various other employees had told them that Mr Piasecki had been preparing to travel to Poland prior to 22 December for some time, and that he had packed up his belongings and was vacating his flat in England. The Tribunal notes that this anecdotal evidence was not supported by witnesses appearing to verify it and the evidence was given less weight accordingly.

The respondent's decision to dismiss the claimant

30. The respondent's reaction to discovering in early January 2018 that the claimant had travelled to Poland on 17 December and then travelled a further 60 miles to seek treatment for his back pain was to disbelieve this was the real reason for his absence and also to disbelieve the medical evidence presented by the sicknote. They wrote to the claimant in a letter dated 3 January to his home address in Lancashire assuming the claimant had returned home after the Christmas period and invited him to a disciplinary investigation meeting to be held on 10 January 2018.

31. The claimant told the Tribunal that he only discovered the existence of the letter when his flatmate informed him that a letter had arrived for him. He told his flatmate to open it and learned of its contents and then contacted the respondent on 9 January telling them that his doctor had told him that he was unable to return to the UK and so he would not be attending the disciplinary meeting.

32. The disciplinary meeting went ahead in the claimant's absence on 10 January and the decision was taken by Mr Poleszk to dismiss the claimant for dishonesty. Mr Poleszk told the Tribunal that he did not accept that the claimant was genuinely ill. He told the Tribunal that such was the severity of his own back pain there was no way that he would have been able to work or travel 21 hours in a car to Poland.

33. He told the Tribunal that he took into account his employees' information that the claimant had been preparing to travel to Poland the weekend of 16 and 17 December for some time and that he therefore concluded that the claimant had never intended to come to work from 18 to 22 December. Therefore, when he told Mr Tlalka on 15 December that he would attend work, he had been lying.

34. The claimant's case before the Tribunal is that Mr Poleszk dismissed him after receiving his grievance letter dated 14 December 2017, for asserting his rights concerning his wages and his holiday pay. Mr Poleszk told the Tribunal when giving evidence that he dismissed the claimant for being dishonest, for telling Mr Tlalka that he would attend work when he had no intention of doing so.

35. On the balance of probabilities, the Tribunal accepts that the reason for the claimant's dismissal was his perceived dishonesty, not any complaint that he made about non-payment of wages or holiday pay. Mr Poleszk's evidence under cross-examination was credible. The Tribunal accepts that he believed in the claimant's dishonesty in relation to his sickness absence and his reasons for travelling to Poland.

36. Although the Tribunal notes that Mr Poleszk made an assumption as to the severity of the claimant's symptoms, it is nevertheless reasonable of the respondent to assume that there was little logic in an individual with back pain who was unable to attend work travelling for 21 hours and then a further 60 miles to obtain medical treatment when he could have attended an emergency clinic in the UK. The respondent dismissed the claimant for dishonesty and not for the contents of the letter of 14 December 2017 which asserted his statutory rights.

37. On the balance of probabilities the Tribunal concludes that the claimant travelled to Poland on 17 December because it was convenient for him to do so and because he wished to start his Christmas holidays early. He then purported to be absent because of sickness because he understood from Mr Tlalka that he had exhausted his annual leave entitlement and would have been otherwise unable to travel to Poland until the following weekend. The Tribunal finds on the balance of probabilities that the claimant committed an act of gross misconduct in this regard.

The claimant's entitlement to sick pay

38. It is the respondent's case that the claimant is not entitled to sick pay from 18 December onwards. Although the claimant's motivation for travelling to Poland was for the purpose of extending his holiday entitlement and not primarily to seek medical treatment, once in Poland a medical professional appears to have assessed him as being unfit to work and unfit to travel. The claimant did not return to the UK until March 2018.

39. As with the claimant's contractual terms on holiday the claimant's written contract contains very generous terms as to sick pay. Mr Poleszk told the Tribunal and the claimant did not dispute that the terms of this contract did not reflect the reality of the terms agreed by the parties. In any event, even if the contractual terms were valid and enforceable, the respondent asserts that there was reliable evidence, in the form of the claimant's 21-hour car journey to Poland and his lack of prior sickness absence with back pain that his absence from 18 December was not genuine. Furthermore, the respondent told the Tribunal that the sick note submitted by the claimant was not genuine.

The date of the claimant's dismissal

40. The parties disagree as to the claimant's effective date of termination of employment. The letter to the claimant containing notice of his dismissal is dated 10 January 2018.

41. The Tribunal was shown by a Post Office proof of posting slip which shows it to have been posted to the claimant on 15 January 2018 by guaranteed next day delivery. It would therefore have arrived at his home address in Lancashire on 16 January 2018.

42. The claimant told the Tribunal that he discovered that a letter had arrived for him at his home address in Lancashire on 20 January 2018. He emailed the respondent on 29 January 2018 and asked for a copy of that letter to be emailed to him because he was not in the UK. The respondent did not respond to his email. The claimant knew that his disciplinary had taken place in his absence on 10 January 2018 and it is therefore reasonable to assume that the claimant knew or ought to have known that the letter that was waiting for him in Lancashire was connected with the outcome of that disciplinary hearing.

43. The claimant had shown himself capable of asking his flatmate to notify him of the contents of previous letters and had done so in relation to the letter dated 3 January 2018. I find that the only way in which he would have known of the existence of the letter at his address in Lancashire is if his flatmate had told him that it was there. He therefore had the opportunity to ask his flatmate to open it and read it out to him and a reasonable time period in which he would have done so meant that he had a reasonable opportunity to read it by 22 January 2018.

44. Given that the effective date of termination has been fixed at 22 January 2018 the shortfall in the claimant's wages and holiday entitlement will be calculated on that basis.

The Law

45. Section 1 of the Employment Rights Act 2002 states that every employee has the right to a written statement of particulars of employment. If an employer fails to provide such a written statement in accordance with these terms, an employee is entitled to compensation of between two and four weeks' pay as set out in Section 38 of the Employment Act 2002. The amount of a "week's pay" is set at the statutory maximum in s227 of the Employment Rights Act 1996.

46. An employee is entitled to protection from unlawful deductions from his wages in accordance with section 13 of the Employment Rights Act 1996.

47. The Working Time Regulations 1998 guarantee a worker the right to a statutory minimum amount of paid annual leave, which is currently four weeks plus 8 public holidays.

48. *Stringer and others v HM Revenue and Customs C-520/06, ECJ* states that a worker on sick leave continues to accrue annual leave entitlement during his period of sickness absence.

49. *Newcastle-upon-Tyne Hospitals NHS Foundation Trust v Heywood* 2018 ICR 882 SC and *Gisda Cyf & Barratt* [2010] UKSC 41 together state that both statutory and contractual notices of termination of employment sent by post do not take effect until the employee has read the letter of termination or has had a reasonable opportunity of doing so.

50. Section 108 of the Employment Rights Act 1996 requires that employees have two years continuous service before they are able to make a claim for unfair dismissal. Various exceptions to this rule can be found elsewhere in the Employment Rights Act. The claimant here relies on s104, where a claimant without the requisite service can make a claim for unfair dismissal for having asserted a statutory right. Such a claim will be well-founded only if the claimant can show on the balance of probabilities that the sole or principal reason for the dismissal was that he asserted his statutory rights.

51. Section 86 of the Employment Rights Act 1996 states that an employee is entitled to notice of the termination of their contract of employment, but s86(6) states that this entitlement does not affect the right of either party to treat the contract as terminable without notice by reason of the conduct of the other party.

52. The case of *Abrall & Others and Nottingham County Council & another* 2018 IRLR 628 CA states that silence alone does not amount to consent to a variation in an employee's contract imposed by the employer. Where a change was wholly to a claimant's disadvantage and where the change was not put to employees as something to which their agreement was required, the fact that a claimant makes no continuing objection does not act to bar the claimant from objecting a short period of time later.

Application of the law to the facts found

Unlawful deduction from wages

53. It is the respondent's case that by working for 2 months without raising a formal objection the claimant had accepted the variation in the terms of his contract was therefore not entitled to recover the difference in pay imposed on him from the 20 October onwards.

54. It is the claimant's case that he never accepted the variation in the rate of pay, that in accordance with Mr Poleszk's evidence he made his displeasure known to

him in his manner and demeanour with him and that he did then raise a formal grievance in this regard.

55. Applying *Abrall & Others* and *Nottingham County Council & another* 2018 IRLR 628 CA, the claimant did not sign to indicate his agreement where required, but the change still took effect. He was therefore not required to give his agreement for the change to take effect. The change was wholly to his disadvantage and although he made no formal objection, the respondent did note that he made his displeasure known on an ongoing basis. He then formally objected two months later, which is a relatively short period of time thereafter, particularly taking into account the nature and effect of the contractual variation, being to a fundamental term of the contract.

56. Therefore, on the balance of probabilities I find that the claimant has registered an adequate objection to the variation in his rate of pay. He did not acquiesce in the change such as to have accepted it by his silence and that formal grievance being raised 2 months after the change is sufficient to register his objection and rejection of the variation in the rate of pay. The claimant is therefore entitled to recover the shortfall deduction in his wages of £1.00 per hour from 20 October 2017 onwards.

57. From the claimant's pay slips that were in evidence before the Tribunal, he worked the following hours in the relevant period:

- (a) 67 hours in the pay period week 29, pay date 20th October 2017,
- (b) 53 hours in week 30, pay date 27th October 2017,
- (c) 57 hours in pay period week 31, pay date 3rd November 2017,
- (d) 54.5 hours in pay period week 32, pay dated 10th November 2017,
- (e) 51 hours in pay period week 33, pay date 17th November 2017,
- (f) 49.5 hours in pay period week 34, pay date 24th November 2017,
- (g) 38 hours in pay period week 35, pay dated 1st December 2017,
- (h) 46.5 hours in pay period week 36, pay date 8th December 2017,
- (i) 45.5 hours in pay period week 37, pay date 15th December 2017 and
- (j) 45.5 hours in pay period 38, pay date 22nd December 2017.

58. Total hours worked by the claimant in this period were 507.5. He is entitled to be compensated £1.00 for each of those hours worked which is a total gross sum of £507.50.

The date of termination of the claimant's contract

59. In accordance with the principles established in the cases of *Gisda Cyf* and *Heywood* I conclude that the effective date of termination of the claimant's contract of employment was 22 January 2018, which is the date on which he would have had a reasonable opportunity to discover the contents of the letter through his flatmate.

Unfair dismissal and entitlement to notice monies

60. As set out above, the claimant has committed an act of gross misconduct by claiming to be unfit for work when on the balance of probabilities he was fit to do so. He therefore is not entitled to recover his notice monies, having been summarily dismissed.

61. The claimant's claim for automatic unfair dismissal also fails in that he is not established that the cause of the dismissal was his assertion of his statutory rights, but rather the Tribunal accepts that he was dismissed due to the respondent's belief that he had been dishonest in telling them that he would attend work on 18-22 December but then did not do so. They further believed that he had falsely claimed to be unfit for work, which belief also contributed to the decision to dismiss.

Entitlement to sick pay

62. Statutory sick pay can only be paid when the employee is genuinely ill and incapacitated from doing any work that he is employed to do or could reasonably be expected to do (Social Security Contributions and Benefits Act 1992, s 151(4)). If statutory sick pay or its amount is disputed, disputes are adjudicated by Her Majesty's Revenue and Customs (HMRC), not the Employment Tribunal. This Tribunal therefore has no jurisdiction to consider the claimant's complaint of non-payment of statutory sick pay.

63. A dispute as to any entitlement the claimant may have to sick pay under the terms of his contract can be dealt with by this Tribunal.

64. The claimant's evidence as to his entitlement to sick pay was not clear. He appeared initially to rely on the terms of his written contract, but when challenged by the respondent appeared to concede that the terms of his written contract did not reflect the reality of what was agreed between the parties and the respondent's usual business practice. The respondent's evidence was consistently and emphatically that the written terms of the contract did not reflect what was agreed between the parties or the reality of the respondent's usual business practice.

65. On the balance of probabilities and having carefully weighed up the evidence before the Tribunal, including the written contract, I conclude that the terms of the claimant's contract do not entitle him to the generous contractual sick pay set out within it. As with the issue of the claimant's entitlement to holiday pay, I find that the respondent did not wish and did not have the financial resources to provide its employees with generous contractual entitlements over that which was required by statute. Mr Polescz and Mr Tlalka were consistent and credible witnesses in this regard, whereas Mr Piasecki was not.

66. In conclusion therefore, the claimant has no entitlement to contractual sick pay. As to his entitlement to statutory sick pay, this dispute must be referred to HMRC for adjudication and cannot be dealt with by this Tribunal.

Entitlement to holiday pay and the claimant's entitlement to wages from 18 December 2017 to 22 January 2018

67. The claimant claims that he was absent due to illness from 18 December 2017 until he was dismissed. The claimant claims entitlement to sick pay from 18 December 2017 until the date of his dismissal, which is not within the jurisdiction of this Tribunal to determine. He also claims unpaid holiday pay under the provisions of the Working Time Regulations 1998, whereby the claimant is entitled to 20 days holiday plus 8 public holidays per year.

68. The respondent's holiday year begins on 6 April. The claimant was dismissed on 22 January 2018. At the date of his dismissal, he been employed for 41 weeks and 4 days, so 41.6 weeks of the respondent's holiday year and had accrued 22.4 days leave entitlement. He had taken 14 days of this, leaving 8.4 days which equates to 1 week and 3.4 days. He is to recover this at his contractual rate of pay of £10 per hour which is £80 per day or £400 per week gross pay for a 5 day week.

Was the claimant's statement of terms of employment adequate?

69. The respondent failed to provide full employment particulars as required by section 1 of the Employment Rights Act 1996 in that the claimant's contract of employment contains no particulars relating to pay as required at Section 1(4)(a) and (b). The claimant is therefore entitled to compensation as set out in s38 of the Employment Act 2002 of the minimum amount of 2 weeks' pay. This amount is to be limited to the maximum amount of a week's pay under s227 of the Employment Rights Act, which at the claimant's effective date of termination was £489.00 per week. The claimant is therefore entitled to recover £978.00 in this regard

Remedy

70. The claimant has suffered unlawful deductions from wages at the rate of £1.00 per hour from 20 October 2017 until his pay day which was the 22 December 2017. The claimant worked a total of 507.5 hours during that period and is therefore to be paid £507.50 by the respondent as compensation for unlawful deductions that have been made from his wages.

71. The claimant is entitled to recover £528 for unpaid annual leave. He has not been paid for 8.4 days of annual leave which equates to 1 week and 3.4 days. He is to recover this at his contractual rate of pay of £10 per hour which is £80 per day or £400 per week gross pay for a 5 day week. This equates to £672. He was paid £144 in lieu of unpaid holiday pay on 21 December 2017 which is deducted from his entitlement of £672 to leave an outstanding sum due from the respondent of £528.

72. The claimant is entitled to recover £978 for the respondent's failure to provide a full statement of employment particulars.

Employment Judge Barker

Date: 20 September 2018
JUDGMENT SENT TO THE PARTIES ON

26 September 2018
FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.



NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number(s): **2405313/2018**

Name of **Mr W Piasecki** v **PS Contract Furniture Ltd**
case(s):

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: **26 September 2018**

"the calculation day" is **27 September 2018**

"the stipulated rate of interest" is: **8%**

MR S ROOKE
For the Employment Tribunal Office

INTEREST ON TRIBUNAL AWARDS

GUIDANCE NOTE

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at www.gov.uk/government/collections/employment-tribunal-forms

If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

2. The Employment Tribunals (Interest) Order 1990 provides for interest to be paid on employment tribunal awards (excluding sums representing costs or expenses) if they remain wholly or partly unpaid more than 14 days after the date on which the Tribunal's judgment is recorded as having been sent to the parties, which is known as "the relevant decision day".

3. The date from which interest starts to accrue is the day immediately following the relevant decision day and is called "the calculation day". The dates of both the relevant decision day and the calculation day that apply in your case are recorded on the Notice attached to the judgment. If you have received a judgment and subsequently request reasons (see 'The Judgment' booklet) the date of the relevant judgment day will remain unchanged.

4. "Interest" means simple interest accruing from day to day on such part of the sum of money awarded by the tribunal for the time being remaining unpaid. Interest does not accrue on deductions such as Tax and/or National Insurance Contributions that are to be paid to the appropriate authorities. Neither does interest accrue on any sums which the Secretary of State has claimed in a recoupment notice (see 'The Judgment' booklet).

5. Where the sum awarded is varied upon a review of the judgment by the Employment Tribunal or upon appeal to the Employment Appeal Tribunal or a higher appellate court, then interest will accrue in the same way (from "the calculation day"), but on the award as varied by the higher court and not on the sum originally awarded by the Tribunal.

6. 'The Judgment' booklet explains how employment tribunal awards are enforced. The interest element of an award is enforced in the same way.