



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105009/2020

Held via Cloud Video Platform on 29 January 2021

Employment Judge Brewer

Mr B Gibson

**Claimant
Represented by:
Mr S Gibson**

Lothian Leisure

**Respondents
Represented by:
No appearance and
No representation**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The claimant's claim for unfair dismissal succeeds.
2. The claimant's claim for unlawful deductions succeeds
3. The claimant's claim for notice pay succeeds.
4. The claimant's claims for unlawful deductions from wages succeed.
5. The claimant is awarded the following:
 - a. For unfair dismissal:
 - i. a basic award of £6,562,
 - ii. compensation of £14,500.00,
 - b. For holiday pay for accrued untaken statutory annual leave at the date of dismissal the sum of £1,200.00,
 - c. For unlawful deductions from wages:

- i. £720.00 in respect of unpaid furlough pay, and
 - ii. £142.85 in respect of pension payments.
- d. For notice pay, the sum of £500.00 in respect of 1 weeks' notice.

REASONS

Introduction

1. The claimant in this matter is Mr Ben Gibson. He was represented at the hearing by his father Mr Stephen Gibson. The respondent had not entered a response to the claim and did not appear at the hearing. I heard evidence from the claimant and brief submissions from Mr S Gibson. I also have had sight of a number of documents provided by the claimant, including various text messages and emails.
2. The claimant says he has mental health issues, which, of course, I accept. Having accepted that, I note that he gave clear and cogent evidence, consistent with the documentation provided and which therefore I have accepted. In light of the evidence, I make the following findings of fact.

Findings of fact

3. The claimant was employed by the respondent as a chef based at the Sun Inn in Dalkeith. He started his employment in February 2019. He was successful in his role and latterly had been promoted.
4. Like many businesses, the respondent was faced with lockdown in March 2020 as a result of the Covid 19 pandemic, and in the second week in March 2020 the claimant was put on furlough. Up to that point he had had no problems at work.
5. The claimant's father, Stephen, has a number of medical issues including a brain tumour, Colitis and Addison's disease. He was shielding during the lockdown for obvious reasons.
6. During his employment the claimant's take home pay was around £2,000 per month including tips. The claimant says, and I accept that his furlough pay should have been

around £1,550 per month but he was in fact paid £1,210, a shortfall of £340 each month. The claimant has also learned that pension deductions by the respondent from the claimant's wages, were not paid into the claimant's pension for a period of around 5 months, essentially for the whole of 2020. I also note that the claimant took no holiday during 2020.

7. During furlough, and in the run up to the end of lockdown and the prospective re-opening of the restaurant sector the respondent wanted the claimant to undertake some work ("coming in and helping out for a bit" as they put it – see email of 11 April 2020). At that time, the claimant had begun to raise concerns with the respondent about the possibility of his father catching Covid 19 from him on his return to work. The claimant says that the respondent provided no personal protective equipment for staff and that they had no intention of requiring staff to take precautions and create a Covid secure working environment. As and when the claimant raised these issues the respondent's response might best be described as very robustly negative. The claimant said in evidence that he was told to 'shut up and get on with it'. The claimant believes that the respondent started to see him as a nuisance despite the previously good relationship.
8. Without any discussion or indeed any process at all, the claimant's employment was terminated with immediate effect, by Ian Minto, a director of the respondent, by text, on 30 May 2020. The relevant part of the text reads as follows:

"Moving forward I've decided to terminate your employment with ourselves. We are changing the format and running of the business on a day to day basis, and at the end of the lockdown process we will be running the business with a smaller team. Thanks for all your efforts in the past and I wish you well for the future."
9. The claimant received no notice pay and no pay for accrued untaken annual leave. The claimant's evidence is that if the dismissal was by reason of redundancy, there were two chefs, and he was the best of the two.

10. The claimant sought the help of his local CAB and eventually went to ACAS. Early conciliation took place between 20 August 2020 and 20 September 2020. The claimant presented his claim on 23 September 2020.
11. The claimant claimed unfair dismissal, notice pay, holiday pay and 'arrears of pay'. In relation to the arrears of pay, having heard the evidence, I am satisfied that this is in fact a claim for unlawful deductions covering the shortfall in the furlough pay and the unpaid pension contributions.

Issues

12. The issues in the case are as follows.
13. Unfair dismissal:
 - a. What was the reason or principal reason for dismissal?
 - b. If the reason or principal reason for dismissal was a potentially fair reason under the Employment Rights Act 1996 (ERA) then the Tribunal does not have jurisdiction to hear the claim (and ordinary unfair dismissal claim) because the claimant does not have the required continuous service to bring such a claim.
 - c. If the reason or principal reason for dismissal was what I will term an excluded reason, under the ERA then the Tribunal does have jurisdiction to hear the claim because the claimant is not required to have the continuous service to necessary to bring an ordinary unfair dismissal claim. If the dismissal was for an excluded reason it will be automatically unfair.
14. Unlawful deductions:
 - a. Were the wages paid to the claimant less than the wages he should have been paid:
 - i. in respect of January to May 2020, because no pension payments were made; and/or
 - ii. in respect of April and May 2020, because the shortfall in his furlough pay?

- b. Was any deduction required or authorised by statute?
- c. Was any deduction required or authorised by a written term of the contract?
- d. Did the claimant have a copy of the contract or written notice of the contract term before the deduction was made?
- e. Did the claimant agree in writing to the deduction before it was made?
- f. How much is the claimant owed?

15. Notice pay:

- a. What was the claimant's notice period?
- b. Was the claimant paid for that notice period?
- c. If not, did the claimant do something so serious that the respondent was entitled to dismiss without notice?

16. Holiday pay – Working Time Regulations 1998

- a. What was the claimant's leave year?
- b. How much of the leave year had passed when the claimant's employment ended?
- c. How much leave had accrued for the year by that date?
- d. How much paid leave had the claimant taken in the year?
- e. Were any days carried over from previous holiday years?
- f. How many days remain unpaid?
- g. What is the relevant daily rate of pay?

Law

17. I have considered the following statutory provisions which I do not propose to set out in full here:

- a. Sections 13, 14, 27, 43B, 100, 105 and 120 Employment Rights Act 1996;
 - b. Regulations 13, 13A, 14 and 16 Working Time Regulations 1998;
 - c. Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994.
18. I have also considered the following cases:
- a. **O’Dea v ISC Chemicals Ltd 1996** ICR 222, CA;
 - b. **Smith v Hayle Town Council 1978** ICR 996, CA; and
 - c. **Balfour Kilpatrick Ltd v Acheson and ors 2003** IRLR 683, EAT

Discussion and conclusion

19. I turn first to the dismissal. The burden to show an automatic unfair dismissal is on the claimant and he must show that there was a comparator employee who was not dismissed. The text message dismissing the claimant suggests that the respondent will have a smaller team “at the end of lockdown”. This wording is indicative of a dismissal either for redundancy or business reorganization which may amount to some other substantial reason. The claimant’s evidence is that he was a good worker, he had been praised and promoted and had worked successfully up until he began to raise issue around Covid security.
20. I have considered whether the matters the claimant raised amounted to the making of a public interest disclosure within the meaning of **s.43B ERA**. The point is arguable. The claimant was concerned only about the potential for him to cause his father to contract the virus as a result of the lack of PPE and the working conditions in the restaurant. Although that may be a matter which is also in the public interest the position is not sufficiently certain and I am not satisfied that the claimant’s concerns do meet the definition.
21. I have also considered **s.100 ERA**. I am satisfied, on the evidence, that the claimant’s actions meet the requirements of **s.100(1)(e) ERA**. The circumstance of danger was the growing prevalence of infections by the Covid 19 virus and the potential significant harm that could be done to Stephen Gibson should he contract the virus from the claimant. The claimant reasonably believed this to be serious and imminent, hence raising the issue of

PPE. The raising of that issue amounted to an appropriate step to protect his father from the danger. Until the claimant raised his concerns, he had been a successful and valued member of staff. Nothing else had occurred during his employment to alter that position.

22. I find that either the claimant was dismissed because in circumstances of danger which he reasonably believed to be serious and imminent he took steps to protect his father, or, alternatively, the claimant was selected for redundancy because in circumstances of danger which he reasonably believed to be serious and imminent he took steps to protect his father. In the circumstances I find that the claimant was automatically unfairly dismissed either under **s.100 ERA** or **s.105(3) ERA**.
23. The claimant's evidence was that having looked for work from the date of termination, he obtained employment in or around the second week in December 2020 at the same rate of pay as he enjoyed with the respondent. He was unemployed from 31 May 2020 and was therefore unemployed for 29 weeks. He did not receive any benefits. The claimant is entitled to a basic award of £6,562 by virtue of **s.120 ERA**. I award him compensation of 29 weeks pay at £500.00 per week, a total of £14,500.00.
24. Turning to the question of notice pay, the claimant was not paid notice pay and there is no evidence that the employer had any right or reason to withhold the same. The claimant was entitled to 1 weeks' notice which amounts to £500.00.
25. In relation to holiday pay, the claimant worked full time. He took no holiday for the 5 months he was employed in the holiday year 2020. He received no payment in lieu of his untaken statutory leave. This means that at the date of termination the claimant had accrued 12 days holiday under regulations 13 and 13A, Working Time Regulations 1998 (WTR). Considering regulation 14 and regulation 16, WTR, I calculate that the amount of outstanding holiday due to the claimant on termination of his employment on 30 May 2020 was 12 days. His daily rate of pay was £100.00 and therefore he is entitled to payment in lieu of untaken statutory annual leave of 12 x £100.00 i.e., £1,200.00 in total.
26. Finally, I turn to the two unlawful deductions claims. In relation to the furlough pay, there was a shortfall of £340.00 over two months and I therefore award the claimant a total of £720.00.

27. The second claim is more complex. The claimant's evidence, which I have accepted, is that for the whole of 2020 the respondent deducted from the claimant's pay the sum of £28.57 per month in respect of pension payments but did not account to the pension scheme for those deductions.
28. While the claimant agreed to the deductions, the reality must be that his agreement was conditional on the deducted sums being used for the purpose for which each of the deductions was made – to pay them into the pension scheme. That was not done and therefore I consider that the deductions were unlawful as they were not authorized in the true sense of that term. Even if I am wrong about that I consider that it was an express or implied term of the claimant's contract that such sums were to be paid into the pension scheme and the respondent's failure to do that amounts to a breach of contract. The sum was outstanding at the date of termination and therefore within the Tribunal's jurisdiction for breach of contract claims under the **Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994**. I therefore award the claimant the sum of £142.85 (i.e. 5 x £28.57).

Employment Judge: Martin Brewer
Date of Judgment: 29 January 2021
Entered in register: 24 February 2021
and copied to parties