



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Warren Quince  
**Respondent:** RO & OX Limited  
**Heard at:** Via Cloud Video Platform (Midlands East Region)  
**On:** 14 February 2022  
**Before:** Employment Judge Sharkey

## Representation

**Claimant:** In person  
**Respondent:** Mr R Juskauskas – Director  
**Interpreter:** Miss I Kambarovaite

This has been a remote hearing. The form of remote hearing was V – fully remote via Cloud Video Platform (CVP).

# RESERVED JUDGMENT

The judgment of the tribunal is that:

1. The name of the respondent is amended to RO & OX Limited.
2. The respondent was in breach of contract by dismissing the claimant without the full period of notice to which he was entitled and the respondent is Ordered to pay to the claimant damages of **£1384.62**.
3. The respondent made an unauthorised deduction from wages by failing to pay the claimant in lieu of accrued but untaken holiday and is Ordered to pay to the claimant the sum of **£553.85** being the gross sum unlawfully deducted.
4. The claim for employer's pension contributions fails and is dismissed.

# REASONS

## BACKGROUND & THE ISSUES

### Format of hearing

1. Prior to 14 February 2022, the case was deemed suitable to proceed via CVP by Employment Judge Adkinson.
2. On 7 February 2022, via email, the Respondent requested for the hearing to be converted to an attended hearing. On the same date, the Tribunal Office sent the following letter via email to both parties which directed:
3. "Employment Judge Hutchinson acknowledges receipt of the respondent's letter dated 7 February 2022. If the respondent wishes to attend the hearing, the hearing will have to take place at the Nottingham Tribunal Centre. The interpreter will still be attending by CVP as well as the claimant. The respondent is to inform the tribunal by return whether she wishes to have an attended hybrid hearing in Nottingham. Otherwise, the hearing will have to be conducted by CVP. She should also note that when she writes to the Tribunal, she should send a copy of any correspondence to the claimants."
4. As there was no response from the respondent regarding the directions, a letter was sent via email to both parties on 10 February 2022 which stated:
5. "Given that the Respondent has not contacted the Tribunal in respect of the directions of Employment Judge Hutchinson sent to the parties on 7 February, the hearing remains to be conducted via CVP only. For the avoidance of doubt all parties should therefore join remotely using the link previously provided."
6. The hearing was conducted via CVP and there were no technical issues or any other issues that arose which deemed CVP as an unsuitable form of hearing the case.

### The name of the respondent

7. The Claimant had named the respondent on the claim form as "RO & OX Couriers Limited". Mr Juskauskas initially said that the company name is RO & OX Couriers and clarified later on in the hearing that it is RO & OX Limited.
8. The parties agreed the amendment but I nevertheless applied the principles in *Selkent Bus Company Limited v Moore* [1996] ICR 836 on both occasions in deciding whether to allow the amendment to the name of the respondent, taking into account all the circumstances and balancing the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. The respondent had received the claim form and had responded to the claim. No confusion had been caused as to who was the correct respondent to this claim. The respondent was able to defend the claim at this hearing. I concluded that there was no hardship or injustice to the respondent

in allowing the claimant to amend the name of the respondent whereas if the amendment was not allowed, the claimant would lose the opportunity to pursue his claims and, if successful, be given a remedy. I considered that the balance of injustice and hardship lay in favour of allowing the amendment. I ordered that the name of the respondent be amended to RO & OX Limited and the claim be allowed to proceed against that respondent.

#### Holiday Pay (2021)

9. The claimant clarified that he was seeking 7 days unpaid holiday pay as per his claim form and schedule of loss rather than 10 days as per an email in his documentary evidence.

#### ACAS Uplift

10. The claimant claimed an ACAS uplift but abandoned it during the hearing and so I do not need to make a finding regarding this part of his claim.

#### Claims and issues

11. The claimant claimed breach of contract in respect of failure to give him full notice of termination, and unlawful deduction from wages for failure to pay him in lieu of accrued but untaken holiday on termination of employment. The claimant's claim for holiday pay included a claim for 6.9 days untaken holiday from the previous leave year. The claimant had ticked the box on the form to say he was also claiming "other payments" and he clarified that this related to employer's pension contributions otherwise the claims were in respect of notice pay and holiday pay. In relation to the employer's pension contributions, the claimant claimed that he was owed 8 months of employer's pension contributions from September to December 2020 and from January 2021 to April 2021 at a rate of £59.22 per month which amounted to £473.76.
12. The respondent denied that they breached the contract because they said that the claimant was summarily dismissed for gross misconduct which gave them the right to terminate the claimant's contract without notice. The respondent argued in its response that there was no entitlement to carry forward annual leave as per the contract and that any annual leave for the current year has not been paid due to lost company assets.
13. The claimant confirmed that he was relying on his holiday entitlement under his contract of employment and that he is claiming that failure to pay the amount due for accrued but untaken holiday pay was an unauthorised deduction from wages.
14. It was agreed by both parties that the claimant started his employment with the Respondent on 7 September 2020 and the claimant's employment was terminated and came to an end on 31 August 2021.

15. Mr Juskauskas raised an issue before the start of the hearing of evidence that there was a 2 year rule and therefore the claimant's claim should not go ahead. It was uncertain as to what the claimant was referring to at this stage and he was unable to elaborate. Prior to the closing submissions, Mr Juskauskas raised that the claim should be struck out as the claimant has not been employed for 2 years. This had not been advanced in the respondent's documentary evidence. I asked the respondent to reference the law in relation to this qualifying period that he had put forward and gave him time to do so during a short comfort break. He did not do so. As the respondent had referred to the claimant's claim as one of unfair dismissal in their response to the claim, it was possible that the respondent was referring to this qualifying period in relation to an unfair dismissal claim. I therefore explained that the claimant's claim was not for unfair dismissal but rather wrongful dismissal and so this qualifying period of employment does not apply. Mr Juskauskas became frustrated by my conclusion and said that he had struggled to read the paperwork and that he would appeal if the case goes against him. I did not find that Mr Juskauskas had any issues reading the paperwork as he had responded to the claim including drafting a witness statement and including relevant documentary evidence to support his response to the claim. The respondent had also provided his response to the claim on time and followed tribunal Orders.
16. I should observe that a difficulty arose from the respondent when it appeared on a few occasions that there was someone else present in the room and speaking to him though this person could not be seen on camera. It was initially raised by the claimant and I could see that the respondent did on occasions appear to turn his head and could be heard speaking to someone in his own language. I asked the respondent if there was anyone else in the room and at first, he said that there was not but then he said that someone was passing his documents to him. I explained to the respondent that he cannot be assisted during the hearing. I do not believe that it affected the fairness of the hearing.
17. The issues were agreed to be as follows:

Breach of Contract – notice

- a. Was the claimant given less than 3 weeks' notice of termination of his employment?
- b. If so, was the claimant guilty of gross misconduct?
- c. If the sum is due, is it paid gross or net?

Holiday Pay

- a. What holiday had the claimant accrued but not taken in the final holiday year?
- b. Was the claimant entitled to carry forward any leave from the previous leave year?

- c. What holiday pay is owed to the claimant?
  - d. Should it be paid net or gross?
18. There was reference in the respondent's written witness statement to alleged losses caused by the claimant to company assets. A breach of contract claim had not been made and I checked with the respondent that this was correct. He said that he had not made a claim and I will therefore not make a finding in this respect.
19. There was a bundle of documents which included written witness statements from the claimant and the respondent. At the start of the hearing, Mr Juskauskas requested that the transport reports that had been served as documentary evidence by the claimant and which contained confidential company information and customer's details should not be considered or referred to during the hearing. I asked for the claimant's representations on this matter. The claimant stated that he was content that they were not considered if the respondent was not proposing to rely on them. The transport reports were therefore not considered in relation to the claim.
20. Mr Juskauskas gave evidence for the respondent. The claimant was the only witness for himself.
21. The respondent spoke Lithuanian as his first language. The respondent had requested an interpreter prior to the hearing and an interpreter was present via CVP and interpreted throughout the hearing.
22. The claim was listed for two hours of hearing time. Due to the interpreter's other commitments in the afternoon, after the conclusion of evidence and closing submissions, there was insufficient time for me to consider my decision and give an oral Judgment before the interpreter had to leave. I therefore notified the parties that I would reserve my decision.

## **FINDINGS OF FACT**

23. I ask the parties to note that I have only made findings of fact where those are required for the proper determination of the issues in this claim. I have therefore not made findings on each and every area where the parties are in dispute with each other where that is not necessary for the proper determination of the complaints before me.
24. The claimant was employed by the respondent between 7 September 2020 and 31 August 2021 as a Transport Co-ordinator/Administrator and Customer Support.
25. The claimant's salary was £2000 per month.
26. The claimant had a written statement of terms and conditions of employment.
27. The claimant resigned from his employment on 27 August 2021 by sending an email to the respondent confirming his resignation.
28. The respondent summarily dismissed the claimant on 31 August 2021 and so terminated the contract of employment stating gross misconduct.

29. The claimant was not made a payment in lieu of accrued but untaken holiday.
30. The claimant was not paid in lieu of his notice period.

### Holiday Pay

31. Relevant terms relating to holiday were that the holiday year ran from 1 January to 31 December; the claimant was entitled to 28 days per annum which included public holidays and in the holiday year, one-twelfth of his annual holiday entitlement accrued for each full month of employment.
32. A further term stated, "When your employment ends, we will pay you in lieu of any accrued but untaken holiday entitlement".
33. A further relevant term stated, "Unless agreed otherwise, if you do not take all of your holiday entitlement in any holiday year, we will not normally make any payment in lieu or increase your holiday entitlement in any subsequent year. However, carry forward may be permitted if a period of extended sickness absence, statutory maternity, paternity, shared parental or adoption leave has prevented you from taking leave in the relevant year and in this case you should contact your line manager or HR representative."
34. The claimant said that he did not take his annual leave entitlement in 2020 and when he asked the company secretary, Oksana to take the leave in 2021, he was told that he could. However, he said that he did not confirm this with his line manager and he did not pursue it. Mr Juskauskas says that he relied on the contract terms in that it was not agreed that the claimant could carry over leave from 2020 and the other specific reasons did not apply. I find that the contract is clear that unless agreed otherwise, there is no entitlement to carry over annual leave from the previous holiday year and if one of the specific reasons stated applied then he should contact his line manager or HR representative. I find that the claimant did not seek agreement from the appropriate person, did not query untaken annual leave until 2021, and then did not pursue it further.
35. The claimant said that he was owed 7 days annual leave and the respondent when giving evidence said that it was 7 days and then said that he did not know exactly. It was not clear why he changed his position after confirming that it was 7 days. The claimant had a holiday entitlement of 28 days per year, the holiday year ran from 1 January 2021 to 31 December 2021, so on 31 August 2021, he had accrued 18.8 days. The evidence shows that he had already taken 13 days of annual leave which left an accrued entitlement of 5.8 days. The respondent said that he was not paid in lieu of accrued but untaken holiday as he said that the claimant caused damage to company assets. I did not find that there was any term in the contract of employment that permitted the respondent to take this action. I find that the claimant is entitled to be paid accrued but untaken holiday pay up to the date that his employment terminated regardless of any alleged misconduct issues and the number of days owed is 5.8 days.

Notice Pay

36. The contract included a term that, after the successful completion of the probationary period (2 months), the respondent would give the claimant 3 weeks notice to terminate the contract. It also stated that the respondent can end the contract of employment without letting the notice period run by making a payment equal to the basic salary that would have been due during the unexpired notice period.
37. Why the claimant's work came to an end is in dispute. I prefer the evidence of the claimant to that of Mr Juskauskas that the claimant was not guilty of gross misconduct for the following reasons:
38. The claimant emailed his resignation to the respondent on 27 August 2021 at 08:28 as follows:
- “...This email signals my intention to Resign from RO & OX Couriers Ltd as Transport Co-ordinator with effect from today.
- According to my contract I am required to provide you with 3 weeks' notice. My last working day will be 17th October 2021.
- I will be expecting the following outstanding matters to be resolved before or on my last working day:
- 3 weeks payment for notice period
  - 6.9 days annual leave not taken in 2020
  - 10 days annual leave entitlement still due until 17<sup>th</sup> October 2021
  - 7 months of employer minimum contribution to Pension fund
- Once this has been resolved to a satisfactory level, I will return the office equipment I am using to perform my duties...”
39. The respondent emailed the claimant later that morning asking him why he was not working in the office to which the claimant replied that he was waiting for the respondent to accept his resignation and terms set out in his email, at that point he will attend the office. The respondent replied asking the claimant why he still was not working in the office and that his resignation had been accepted and that he would need to bring all office equipment to the office that day. The claimant then attended the office.
40. The respondent sent a further email that evening referring the claimant to terms 14 and 17 of the contract of employment to dispute that he owed 3 weeks notice pay. Term 14 states that “We can deduct any money that you owe us from your pay or other payments due to you.” Term 17 refers to normal working hours. The respondent also stated that the last sentence of the claimant's resignation letter is harassment as it shows his further behaviour towards company assets and that from February 2021, they noticed his absence in duties and made reference to term 5 of the employment contract, “be motivate and passionate of work you do. You must take on reasonable additional or different duties when we ask you, to meet our reasonable business needs.”

41. On 31 August 2021, following a meeting arranged by the respondent with the claimant, the respondent sent an email to the claimant stating that due to the breach of term 5 as above, the harassment in the resignation email that a decision had been made to terminate the claimant's employment referring to terms 40 and 41 of the employment contract. Term 40 refers to being paid in lieu of notice if the respondent ends the contract without letting it run and term 41 refers to terminating the contract without notice or payment for the notice period if there has been gross misconduct by the claimant. It also stated that the respondent was not willing to pay for the 3 weeks notice period based on the past 4 days of behaviour.
42. In an email from the claimant dated 2 September 2021, he stated as follows: "at no time throughout my employment have you made any reference to, or taken any action to address the behaviour you allege. The first mention of your dissatisfaction came in direct response to receiving my resignation letter on 27<sup>th</sup> August 2021". The respondent replied on 7 September 2021, repeating the reasons for dismissal and stated that he has been previously advised of his behaviour verbally, in texts, and via emails.
43. There are two emails sent from the respondent to the claimant dated 17 and 18 August 2021 asking for a full daily report.
44. The respondent repeated in evidence the reasons he believed amounted to gross misconduct. The claimant said in evidence that he fulfilled his duties to the best of his ability and provided the full daily reports except for one or two and that this was not a formal issue until he give in his resignation. He further says that he was willing to return the office equipment and did return it to the office undamaged. There is no evidence to show otherwise. I find that the claimant was unaware of the issues of not fulfilling his duties prior to him handing in his resignation letter except for 17 and 18 August 2021 when emails were sent to him regarding the missing full daily reports for those two days though I find that this was not followed up by any formal action by the respondent. Due to the lack of evidence of the claimant not fulfilling his duties prior to 27 August 2021, I find that this was not part of the reason for dismissing the claimant summarily. In relation to the other reasons advanced by the respondent namely the claimant's email that he would withhold company assets until he was paid what he was owed and not working in the office rather than at home until his resignation was confirmed by the respondent on 27 August 2021, do not amount to gross misconduct.
45. Gross misconduct is misconduct that is so serious that the respondent is entitled to dismiss him summarily. I find that it is regrettable behaviour that he did not attend the office to work rather than at home on 27 August 2021 until he received confirmation of the resignation. However, once this confirmation had been received from the respondent he attended the office to work as instructed. The claimant's decision to temporarily withhold company assets until the outstanding matters of payment were resolved was not something that could overly concern the respondent at the point in time when the email was sent. This is because the claimant was permitted to work for three days at home during the week and therefore he would still be using the company's assets during his notice period. The respondent therefore had an opportunity



to resolve any matters regarding payment during his notice period and could expect to receive the company assets back. In any case, the matters regarding payment were not resolved but the claimant returned the company's assets. The respondent says that they were returned damaged but there is no evidence to substantiate this claim. Both acts by the claimant were regrettable but combined they were not acts that were so serious as to amount to gross misconduct.

## **LAW**

### Unauthorised deductions from wages

46. Section 13(1) of the Employment Rights Act 1996 (ERA) provides that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract or the worker has previously signified in writing his agreement or consent to the making of the deduction. The definition of wages in section 27 ERA includes holiday pay.

47. The meaning of wages is dealt with under s.27 of the ERA which provide as follows:

“(1) In this Part “wages”, in relation to a worker, means any sums payable to the worker in connection with his employment, including—  
(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise,...

but excluding any payments within subsection (2).

(2) Those payments are—

(c) any payment by way of a pension, allowance or gratuity in connection with the worker's retirement or as compensation for loss of office...”

### Annual leave – Regulation 14 Working Time Regulations 1998

48. Compensation for periods of untaken annual leave upon termination of employment is dealt with by Regulation 14 Working Time Regulations 1998 which provide as follows:

“14.—(1) This regulation applies where—

(a) a worker's employment is terminated during the course of his leave year, and

(b) on the date on which the termination takes effect (“the termination date”), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13(1) differs from the proportion of the leave year which has expired.

(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).

(3) The payment due under paragraph (2) shall be—

(a) such sum as may be provided for for the purposes of this regulation in a relevant agreement, or

(b) where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula—

$$(A \times B) - C$$

where—

**A** is the period of leave to which the worker is entitled under regulation 13(1);

**B** is the proportion of the worker's leave year which expired before the termination date, and

**C** is the period of leave taken by the worker between the start of the leave year and the termination date.

(4) A relevant agreement may provide that, where the proportion of leave taken by the worker exceeds the proportion of the leave year which has expired, he shall compensate his employer, whether by a payment, by undertaking additional work or otherwise."

### Notice Pay

49. The Employment Tribunals Extension of Jurisdiction Order 1994 provides that proceedings for breach of contract may be brought before a Tribunal in respect of a claim for damages or any other sum (other than a claim for personal injuries and other excluded claims) where the claim arises or is outstanding on the termination of the employee's employment.

50. A claim for notice pay is a claim for breach of contract; *Delaney v Staples* 1992 ICR 483 HL. 15. In *Neary v Dean of Westminster* [1999] IRLR 288, it was held that conduct amounting to gross misconduct justifying summary dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in his employment.

51. In such cases, it is necessary for the Respondent to prove that the Claimant had actually committed a repudiatory breach of contract. See: *Shaw v B & W Group Ltd* UKEAT/0583/11.

### CONCLUSIONS

52. Insofar as I have not already done so within my findings of fact above, I deal here with my conclusions in respect of each of the complaints made by the Claimant.

Employer's pension contributions

53. The tribunal does not have jurisdiction in relation to the claimant's claim for unpaid employer's contributions from September 2020 to April 2021 as per s.27(2)(c) of the Employment Rights Act 2002 and the case of *University of Sunderland v Drossou* [2017] IRLR 1087 so I will not be making a finding in relation to this part of the claim.

Breach of contract – notice

54. The claimant resigned from his employment on 27 August 2021 and gave 3 weeks notice. However, the respondent expressly dismissed the Claimant by bringing forward the date of termination of his employment to 31 August 2021 by then purporting to summarily dismiss him for gross misconduct.

55. As above, I have found that the claimant was not guilty of gross misconduct and so the respondent was not entitled to summarily dismiss him and so he was entitled to be paid until the balance of his notice period was worked.

56. There is a period of 3 weeks notice expressly agreed in the contract of employment. The respondent has not raised at any stage that he has paid the claimant for the period from 27 August 2021 to 31 August 2021. I therefore conclude that the claimant is entitled to 3 weeks notice. I conclude that the claimant should be paid damages equivalent to 3 weeks net pay. However, tax would be payable on an award for notice pay, so I conclude that the amount of damages should be the gross amount of wages for 3 weeks, which after deduction of tax and national insurance, should leave the claimant with the correct amount of compensation. The gross monthly pay was £2000 so multiplying this figure by 12 and divided by 52 gives £461.54 gross weekly pay. Multiplying this amount by 3 is £1384.62. I therefore Order the respondent to pay damages to the claimant for breach of contract of £1384.62.

57. The claimant will be responsible for any income tax or employee national insurance contributions which may become due on these damages.

Holiday pay

58. There is a contractual agreement as to holiday entitlement of 28 days including bank holidays and the holiday year starts from 1 January to 31 December. The claimant was employed until 31 August 2021. The claimant was entitled to be paid, on termination of his employment, in lieu of annual leave which he had accrued but not taken in the period 1 January 2021 to 31 August 2021. He therefore accrued 8/12 of his annual entitlement to leave in the final leave year. I found that the claimant had taken 13 days paid holiday in this period including public holidays. I conclude that the respondent made an unauthorised deduction from wages by not paying the claimant in lieu of accrued but untaken annual leave.

59. I find that the claimant was not entitled to carry forward annual leave from the previous year, 2020 therefore I do not award any amount in relation to this aspect of the claim.

60. The calculation is as follows:

61. The claimant works for 243 days out of 365 days from 1 January 2021 to and including 31 August 2021. This is 67% of the holiday year, multiply this by 28 days holiday entitlement per year is 18.8 days.

62. The claimant has taken 13 days which leaves 5.8 days or 1.2 weeks unpaid holiday. Multiply 1.2 by the gross weekly pay of £461.54 is £553.85.

63. I conclude that the respondent made an unlawful deduction from wages by not paying the claimant £553.85 in lieu of accrued but untaken annual leave and I Order the respondent to pay this amount to the claimant.

64. The respondent will be entitled to deduct any tax and national insurance contributions due on this amount before payment to the claimant.

65. The Claimant was also seeking compensation of £30.00 for expenses in respect of seeking alternative employment but that is not a loss flowing from the summary dismissal nor is it relevant to the issue of holiday pay and therefore it is not something that I am able to Order to be paid to the Claimant.

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Employment Judge Sharkey

Date: 20 February 2022

Note:

Public access to employment tribunal decisions

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