EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104198/2020 (V)

Held via Cloud Video Platform (CVP) on 26 April 2021

Employment Judge Murphy

Mr M Dempster	**Claimant** **In person**
Stella Brodie t/a Grouchos	**Respondent** **Not present** **Not represented**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The respondent is ordered to pay the claimant a statutory redundancy payment in the sum of SIX HUNDRED AND THIRTY POUNDS STERLING **(£630)**.

2. The respondent is ordered to pay to the claimant ONE THOUSAND TWO HUNDRED AND SIXTY POUNDS STERLING **(£1,260)** in respect of damages for the respondent's breach of contract in failing to give the statutory minimum notice period of 12 weeks of the termination of the claimant's employment as incorporated into his employment contract by section 86 (4) of the Employment Rights Act 1996.

3. The respondent has made an unauthorised deduction from wages contrary to section 13 of the Employment Rights Act 1996 and is ordered to pay to the claimant the sum of ONE THOUSAND ONE HUNDRED AND FIFTY-

NINE POUNDS STERLING AND TWENTY PENCE (**£1,159.20)** in respect of unpaid wages relating to accrued untaken holiday outstanding as at the termination of employment on 14 June 2020.

4. The sums awarded are expressed gross of tax and national insurance. It is for the respondent to make any deductions lawfully required to account to HMRC for any tax and national insurance due on the sums, if applicable.

REASONS

Introduction

The claimant brings claims for a statutory redundancy payment, damages for failure to serve the statutory minimum notice period, and a claim for an unauthorised deduction from wages in respect of accrued untaken holidays outstanding at the termination of his employment. His three colleagues, Ms Rogers, Mr Mills and Mr Scott bring similar claims arising from the same or similar facts. The four claims were brought under a single ET1 and were heard together. Ms Rogers is the lead claimant.

This final hearing took place remotely by video conferencing. The parties did not object to this format. A face-to-face hearing was not held because of the Covid 19 pandemic and issues were capable of determination by a remote hearing.

A notice of the claims was sent to the respondent on 10 August 2020. The respondent did not enter a response to any of the claims. A notice of the hearing was sent to the respondent on 15 March 2021. The respondent did not attend and was not represented at the hearing.

Findings in Fact

1. The Tribunal made the following findings in fact.

1.1 The claimant worked for Alistair Brodie, trading as Grouchos from 6 December 2014. Mr Brodie was a sole trader who traded from retail premises at Nethergate, Dundee, selling second hand vinyl and CDs.

1.2 The claimant was employed by Mr Brodie as a general shop assistant.

1.3 On 31 July 2020, Mr Brodie passed away. The respondent (Mr Brodie's widow) took over the business and continued to trade from the premises. The claimant and his three colleagues transferred under the Transfer of Undertakings (Protection of Employment) Regulations 2006 to the employment of the respondent on 1 August 2020. No written contract of employment or statement of particulars was issued to the claimant either by Mr Brodie or by the respondent.

1.4 The store closed on 21st March 2020 when the Covid pandemic struck and the national lockdown was introduced. The respondent did not claim furlough for the claimant but continued to pay his weekly wage when trade was suspended.

1.5 The claimant was paid weekly on a Friday. His weekly gross wage was £252.

1.6 The claimant received his wage as usual on 12 June 2020 for the week commencing 8 June 2020.

1.7 On 14 June 2020, the respondent contacted the claimant's colleague, Ms Rogers, and informed her that she was terminating her employment and that of her colleagues. The respondent advised she did not intend to pay any notice or redundancy payments. She asked Ms Rogers to pass this information on to her colleagues, including the claimant. Ms Rogers did so. The respondent permanently ceased trading.

1.8 Following the termination of his employment, the claimant initially sought alternative employment, without success. The claimant, therefore, sought to mitigate his losses by establishing a new business of a similar nature with his former colleagues. This entailed obtaining and refurbishing premises in readiness for opening. In the five-week period following the termination of his employment with the respondent, the claimant had no income. He was engaged in preparing for the launch of the new venture. The new business did not begin to trade and yield an income for the claimant until September 2020.

1.9 The claimant took one week's holiday in the holiday year in which his employment terminated. He took this holiday in January 2020.

1.10 The claimant was 21 years old when his employment terminated.

Observations on the evidence

2. The claimant gave evidence as did his former colleagues, Frank Mills, Lee Scott and Morag Rogers.

3. The respondent did not lead any evidence or participate in the hearing.

4. The claimant was found to be a credible and reliable witness.

5. The Tribunal accepted the claimant's evidence and that of the other claimants on the balance of probabilities in coming to the findings in fact set out above.

Relevant Law

Statutory Redundancy Payments

6. Section 135(1)(a) and section 155 of the Employment Rights Act 1996 govern the rights of employees to a statutory redundancy payment. If an employee is dismissed by reason of redundancy and he has two years' qualifying service, he has the right to a statutory redundancy payment (section 135 of ERA). The dismissal will be by reason of redundancy if it is wholly or mainly attributable to the fact that the employer has ceased to carry on the business for the purposes of which the employee was employed or to carry on that business in the place where the employee was employed (section 139(1) (a) of ERA); or the fact that the requirements of the business for employees to carry out work of a particular kind have ceased or diminished or are expected to do so (S.139 (1)(b)).

7. There is a presumption, for the purposes of entitlement to a redundancy payment, that the employee has been dismissed by reason of redundancy (s.163(2) of ERA), although there is no onus placed on the employer to rebut the presumption; rather it is a matter of deciding the issue on the facts found (**Greater Glasgow Health Board v Lamont** *UKEATS/0019/12/BI).*

Statutory notice – breach of contract

8. Under section 86(4) of ERA, a statutory minimum notice period linked to the employee's period of continuous employment is incorporated into the contract of employment. The remedy in the event of failure to give due notice is a claim for breach of contract **Westwood v Secretary of State for Employment** [1984] IRLR 209, HL and **Secretary of State for Employment v Wilson** [1977] IRLR, 483, EAT.

9. Under section 88(1)(a) of ERA, if the employee has normal working hours during the period of notice and is ready and willing to work all of those normal working hours but no work is provided (s.88(1)(b)), the employer is liable to pay a sum not less than the amount of remuneration for all the working hours based on the calculation of a week's pay as set out in Chapter 11 of the Act (s.88(1)(b)). Section 222 and 223 apply where there are 'normal working hours.'

Annual leave

10. Under Reg 14 of the Working Time Regulations 1998 ("WTR"), employees are entitled to be paid in lieu of accrued untaken holiday outstanding at the date of termination. A failure to pay in lieu the worker's entitlement in whole or in part can be enforced by way of a claim for an unauthorised deductions from wages under section 13 of the Employment Rights Act 1996.

Discussion and Decision

Statutory Redundancy Payment

11. No written reasons were provided to the claimant for the dismissal. When the claimant's employment terminated on 14 June 2020, the respondent had ceased to operate from the premises where the claimant had been employed.

12. In the circumstances, it is a straightforward matter to infer, on the balance of probabilities, that the claimant's dismissal was wholly or mainly attributable to the fact that the requirements of the respondent's business for employees to carry out the work undertaken by the claimant had ceased following the closure of the unit.

13. Applying the presumption that an employee who is dismissed by his employer is be presumed to have been dismissed by reason of redundancy (s.163(2)) to the facts found, the tribunal holds that the claimant was dismissed by this reason. He is, therefore, entitled to a statutory redundancy payment.

14. The claimant had normal working hours and his remuneration did not vary with work done, so the amount of a week's pay is the amount payable by the respondent under the claimant's contract if he worked her normal working hours in a week (ERA 1996). Given the findings regarding the claimant's length of service, annual agreed salary and age at the termination, the calculation is as follows:

A week's pay = £252
Number of complete years' service = 5
5 years under the age of 22: 0.5 x 5 x 252 = **£630**

15. As the figure for a week's pay is below the cap at the material time, the cap has no application.

Breach of Contract: Failure to provide statutory minimum notice

16. The respondent did not provide the claimant with the statutory minimum or any notice of termination. Under his contract of employment, the claimant was entitled to five weeks' notice by virtue of a term incorporated by section 86(4) of ERA. The respondent breached the claimant's contract by failing to provide such notice and the claimant is entitled to damages in respect of the breach.

17. As the claimant had normal working hours, and his remuneration did not vary during those hours with the amount of work done or the time of work, a week's pay for the purposes of the notice period falls to be calculated as the amount payable under his contract if he worked throughout normal working hours in a week.

18. The claimant made reasonable efforts to mitigate his losses but received no replacement income during the five-week period.

19. Therefore, his damages resulting from the respondent's breach are calculated as:

A week's pay = £252
multiplied by 5 (weeks' statutory notice)
= **£1,260**

Accrued untaken holidays

20. As at 14 June 2020, the claimant had not used his whole statutory annual leave entitlement for the leave year commencing 14 June 2020. He had used one week of his annual leave entitlement. He was entitled to 5.6 weeks' annual leave in total for the leave year. His accrued outstanding entitlement in lieu of annual leave at termination is calculated as follows:

4.6 weeks multiplied by £252 per week = **£1,159.20** (gross).

Lesley Murphy

Employment Judge Murphy

27 April 2021

Date of judgment

Date sent to parties