



EMPLOYMENT TRIBUNALS (SCOTLAND)

5

Case No: 4111122/2021

Heard in Dundee by means of CVP on 11 July 2022

10

Employment Judge J Young

Timothy Lowe

**Claimant
In person**

15

Racing Falcons Limited

**Respondent
Represented by
Mr A Hallgarth,
Director**

20

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

25 The judgment of the Employment Tribunal is that the respondent shall pay to the claimant:-

- (1) the sum of Seven Hundred and Sixty Three Pounds and Eight Pence (£763.08) in respect of unpaid wages;
- (2) the sum of Seven Hundred and Eleven Pounds and Ninety Five Pence
30 (£711.95) in respect of pay due for holidays accrued but untaken to date of termination of employment;
- (3) the sum of Three Hundred and Eighty One Pounds and Ninety Five Pence (£381.95) in respect of damages for not receiving due notice of termination of employment; and

- (4) the sum of Eight Hundred and Eight Pounds (£808) as compensation for not receiving written particulars of employment as specified in s1 of the Employment rights Act 1996.

5

REASONS

1. In this case the claimant presented a claim to the Employment Tribunal on 28 August 2021 complaining that he had been unfairly dismissed and was owed notice pay; holiday pay; arrears of pay and “*other payments*”. The respondent disputed all these claims. By the date of the Tribunal the claim for unfair dismissal had been withdrawn at a preliminary hearing of 6 December 2021. While there was a general claim made of wages due for hours worked but not paid the claim was clarified in the Tribunal as being restricted to wages due in the period 30 April 2021 to date of termination of the employment on 12 May 2021. Accordingly, at the hearing the issues for the Tribunal were:-

15

(1) What if any notice pay is due to the claimant given the claim by the respondent that he was dismissed for gross misconduct?

(2) What if any holiday pay is due to the claimant at termination of his employment with the respondent?

20

(3) What if any unpaid wages are due to the claimant?

(4) Is there any “set off” in respect of these claims for alleged damage to property of the respondent?

25

(5) Given the terms of the section 38 of the Employment Act 2002 is compensation due to the claimant for failure to be provided with a written statement of particulars of employment? And if so in what amount.

2. Further and better particulars had been provided by both claimant and respondent prior to the hearing in which the claimant had sought to calculate the unpaid wages due and holiday pay due; and the respondent

had sought to particularise sums “*held back due to damage to company property and replacement of items*”.

Productions

3. Following a preliminary hearing of 6 December 2021 orders were made
5 for the intimation of documents upon which parties sought to rely. The
respondent produced for the hearing a file of documents consisting of
messages which had passed between claimant and respondent in
January 2021 and May 2021 (R1-9); and payslips for the periods to
10 31 January 2021; 28 February 2021; 31 March 2021; 30 April 2021 and
31 May 2021 (R10-14). At the hearing it became clear that despite the
order for such documents to be intimated to the claimant by the
respondent that had not been done. The hearing was adjourned to allow
those documents to be provided to the claimant who was able to peruse
them. After doing so he indicated he would wish to proceed with the
15 hearing rather than there being any further delay by way of adjournment
of the hearing.

The hearing

4. At the hearing I heard evidence from the claimant; Adrian Hallgarth,
Director of the respondent; William Thomson, Co-Director of the
20 respondent; and Lynn Hallgarth, the wife of Adrian Hallgarth and who
assisted in company administration.

5. From the relevant evidence led, admissions made and documents
produced I was able to make findings in fact and conclusions on the
issues.

25 Findings in fact and conclusions

6. The respondent was incorporated 3 September 2019 and carry on the
business of breeding, maintaining and training falcons and other raptors
for the purposes of racing or performing in outside displays.

7. The claimant was employed by the respondent as an assistant Falconer
30 to Adrian Hallgarth after two video interviews with him. The claimant had

continuous employment with the respondent in the period between 7 January 2021 and 12 May 2021.

Terms and particulars of employment

8. No statement of terms and particulars of employment was provided by the respondent to the claimant. The claimant maintained that he had asked for such a statement but that had not been provided. In a message of 12 January 2021 to the claimant (R1) Lynn Hallgarth advised that she would advise Mr Thomson of the claimant's details so he can "*set up your contract and bank detail*". Mrs Hallgarth's position on that message was that she was not sure what she meant by the request for Mr Thomson to prepare a "*contract*". Mr Hallgarth was uncertain what his wife meant by indicating that Mr Thomson would set up a "*contract*". Mr Thomson's evidence was it would be normal for a contract of employment to be provided but it would be usual to wait for a few months until any trial period was over. I accepted that the claimant had asked for a statement of terms or contract of employment but that had never been provided to him.
9. There was some difference in relation to the particular terms of employment between the claimant and respondent. The claimant was unsure of the rate of pay and thought that he was to be paid at the rate of £26,000 per annum whereas the respondent's position was that pay was to be at the rate of £21,000 per annum.
10. The claimant had given detail of his bank account to which payments should be made (R1). The pay slips produced (which the claimant indicated had never been received by him) showed basic pay at the rate of £1750 per month consistent with pay at the rate of £21,000 per annum and I accepted that gross pay was at that rate which would mean a week's gross pay was $£21,000/52 = £404$.
11. Work was to be over a five-day working week but at times and in particular over March/April when eggs might be laid those days would be exceeded with the intent that the excess compensated for by time off in lieu.

Payment of wages

12. The evidence regarding pay slips to the claimant was that he disputed any receipt of pay slips. The respondent's position through Mr Thomson was that such matters were dealt with by the "*payroll lady*" who would calculate sums due including any holiday pay due at termination. The evidence from Adrian Hallgarth was that he left the issues of pay slips to Mr Thomson and he had been told that such pay slips had been issued in electronic format. I was unable from this evidence to make a finding that any pay slips had been issued to the claimant.
13. The pay slips produced at the hearing identified payments to the claimant of net amounts over January, February, March and April 2021 and he made no dispute to the amounts narrated. No pay slip was produced to show any payment to the claimant in respect of working in May 2021.
14. From the pay slips net pay for the period 7 January 2021 -30 April 2021 amounted to £6104.72 making average net weekly pay to the claimant of £381.54. (£6104.72/16weeks).
15. It was stated by Mr Hallgarth that the claimant had been suspended in early May for "*aggressive behaviour*" but there was no evidence that any such suspension had been without pay. There was an occasion when after a dispute between claimant and Mr Hallgarth the claimant had been advised to return to the caravan where he was living to "*calm down*" but no evidence that there was any suspension without pay. Mrs Hallgarth confirmed that there was no intimation to the claimant by her that there was any suspension without pay prior to termination of the employment on 12 May 2021.
16. The claimant's position was that he worked for 10 days in May 2021 (claimant's further particulars) and was due wages for that period. Given no counter evidence, or any finding of suspension without pay and no evidence of any other payment to the claimant for May, I considered that the sum of 10 days' pay for the month of May was due. Given the net weekly pay of £381.54 for five-day working week the net sum of £763.08 is due by way of wages for the period 1-12 May 2021.

Holiday pay

17. The claimant is entitled under the Working Time Regulations 1998 (“the Regulations”) to payment for holidays accrued but untaken to date of termination of employment. The calculation made by the respondent of holiday pay (which they have retained) appears on the pay slip prepared for “31/05/2021” (R14). This provides for payment of £563.84 gross leaving a net sum due of £451.24.
18. In the absence of any statement of terms and conditions the claimant’s holiday year is deemed in terms of the Regulations to have commenced 7 January 2021. He is entitled in terms of the Regulations to 28 days’ holiday in the holiday year and the proportion of holidays due to date of termination (12 May 2021) is $4/12 \times 28 \text{ days} = 9.33 \text{ days}$.
19. The claimant advised he had taken no holidays in the period of employment. None of the respondent witnesses was able to advise of holidays taken and no records were produced to show any holidays taken. There was no evidence as to how the calculation of holiday pay had been made in the pay slip at R14.
20. The daily rate of net pay is £76.30 and so the net sum of £711.95 is then due by way of holiday pay ($9.33 \text{ days} \times £76.30 \text{ per day} = £711.95$).

Notice pay

21. Section 86 of the Employment Rights Act 1996 sets out the notice required to be given by an employer to terminate a contract of employment. The notice required to be given by an employee who has been continuously employed for one month or more and less than two years is one week.
22. Thus the claimant was entitled to one week’s notice of termination. However that would not apply in terms of section 86(6) if the contract could be treated by the respondent as “*terminable without notice by reason of the conduct of*” the claimant.
23. The issue was whether the conduct by the claimant and known to the respondent prior to termination was sufficient to be in breach of contract.
24. The evidence disclosed that there was clearly a difference of view between the claimant and Adrian Hallgarth as to the feeding and watering

of the birds. The messages (R1-9) indicate the claimant's view that these were matters of concern. The claimant's position was that albeit he received abuse and aggression from Mr Hallgarth he carried on working calmly whereas the evidence from Mr Hallgarth was that the claimant was aggressive and angry and disrespectful.

5
25. This dispute led to an angry call with Mrs Hallgarth on 9 May 2021 which is encapsulated within the message of that date (R4) to the claimant from Mrs Hallgarth. At that time she considered that both the claimant and Adrian Hallgarth needed to "*calm down prior to any discussion*" which might result in a resolution.

10
26. The evidence of Mr Thomson was that in May 2021 he had received certain messages with very bad language and fabricated issues from the claimant. However, no such messages were produced for consideration. He also indicated that certain phone calls were made but was not specific about what had been said.

15
27. In any event a meeting was arranged for 12 May 2021 and attended by the claimant, Mr Thomson and Mr and Mrs Hallgarth. The position of Mr Thomson was that the meeting commenced calmly but deteriorated and the claimant was told that he had to go. Mrs Hallgarth's position was that the outcome of the discussion was that the claimant did not want to stay and wanted to leave and effectively resigned. However, I did not accept there was any resignation of the claimant. That was not the position of either Mr Thomson or Mr Hallgarth and the further particulars lodged by the respondent advise that the claimant was dismissed.

20
25 28. The further and better particulars state that the claimant was "*suspended*" for "*four days without pay due to his aggressive and threatening behaviour shouting at Lynn Hallgarth over the phone, threatening to trash the new static caravan belonging to the company he was staying in*" and the meeting was arranged to see whether the claimant would apologise but he showed no sign of doing so and that all "*directors witnessed Mr Lowe's threatening and disrespectful behaviour to Mr Hallgarth via our CCTV footage and he was dismissed for gross misconduct without notice on that point*". However there was no mention of these matters in the messages

from Mrs Hallgarth to the claimant (R1-9) or CCTV footage being referred to or viewed at the meeting or spoken to in evidence. As indicated neither was there any evidence of the claimant being suspended without pay.

5 29. In those circumstances I did not find it made out that there was breach of contract by the claimant. The evidence was not sufficiently strong to indicate on the balance of probability that there was breach of contract by him. In particular no messages were produced which would demonstrate extreme behaviour by the claimant and no CCTV footage was produced which would demonstrate abuse of Mr Hallgarth as outlined within the further particulars lodged by the respondent.

10 30. In those circumstances the notice pay is due of one week being the net sum of £381.54.

Caravan

15 31. A caravan was provided for the claimant's accommodation. There was dispute as to the state of the caravan prior to the claimant taking occupation and there was dispute in relation to the state of the caravan after the claimant left.

20 32. However I did not find it necessary to resolve these matters. There was no question of the claimant being dismissed because of the state of the caravan. If there was damage by the claimant any such evidence only come to light after the event and could not form the reason for dismissal. The significance of any damage was to substantiate the entitlement to withhold sums from the claimant to compensate for the damage caused by him (further and better particulars by respondent).

25 33. However there are difficulties for the respondent in exercising set off. The protection of wages sections within the Employment Rights Act 1996 provide that an employer shall not make a deduction from wages of a worker employed by him unless that deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision in the worker's contract; or that the worker agrees to the deduction in writing.

30 34. In this case there was no written contract by way of statement of terms provided to the claimant and so no provision within a contract which

allowed deduction from wages (which would include holiday pay) to compensate for damage caused. There is no statutory provision which would allow for that (section 13 of Employment Rights Act 1996). Neither did the claimant consent to a deduction.

- 5 35. In the absence of such entitlement if a respondent wishes to make a counterclaim against the claimant for damage caused then that should be done when there was a response made to the initiating claim sent to the respondent. The ET3 response form asks whether the employer wishes to make a “*contract claim*”. The Tribunal Rules of Procedure 2013 indicate
10 (Rule 23) that an employer’s contract claim should be made as part of the response presented. That not having been done in this case there is no “*contract claim*” before the Tribunal and so no set off can be made.
- 15 36. In any event it would be necessary in such a claim to produce evidence by way of vouchers (invoices and receipts) to substantiate such a claim and here there was no such evidence.

Failure to provide written statement of terms and conditions

- 20 37. While the respondent might have wished to await the outcome of a trial period before providing a written statement of terms and conditions the obligation in terms of section 1 of the Employment Rights Act 1996 is that a written statement of particulars of employment should be provided to employees “*not later than the beginning of the employment*”. That has been the position since April 2020.
- 25 38. Under section 38 of the Employment Act 2002 where there has been a failure to give a statement of employment particulars and there are proceedings before an Employment Tribunal relating to a claim by an employee or worker for payment of wages including holiday pay or for breach of contract (notice pay) then a Tribunal “*must*” make an award of two weeks’ pay to be paid to the employee and if it “*considers it just and equitable in all the circumstances*” to award the sum of four weeks’ pay.
30 That duty of the Tribunal does not apply if there are “*exceptional circumstances which would make an award or increase under that subsection unjust or inequitable*”.

39. Clearly the purpose of providing a written statement is to avoid disputes over the terms and conditions of employment and to enable a worker and employer to resolve issues. I did not consider there to be exceptional circumstances in this case which would mean no award. The term of employment was not lengthy in this case and it seems appropriate that the minimum amount of two weeks' pay should be paid for the failure to supply a written statement of terms and conditions. For these purposes the calculation is on gross weekly pay which ran at the rate of £404 per week. That amounts to £808 which is the sum awarded by way of compensation.

5

10

Employment Judge:	J Young
Date of Judgment:	28 July 2022
Date sent to parties:	29 July 2022