EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 2402531/2016

Held in Glasgow on 13, 14, 15 & 16 March 2017

Employment Judge: Shona MacLean
Members: Mrs L Crooks
Mrs M McAllister

Mr John Morgan-Thomas — Claimant
Represented by:
Dr A Morgan-Thomas
Relative

Andrew Porter Limited — Respondent
Represented by:
Mr I MacLean
Employment Consultant

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that:

1. The respondent is ordered to pay the claimant (a) a redundancy payment of £8,622; (b) £780 in respect of holidays accrued but not taken when the claimant's employment was terminated; and (c) £958 as compensation for failure to provide full and accurate written particulars of employment.

2. The complaint of discrimination by association is dismissed.

REASONS

Introduction

1. The claimant sent his claim form to the Tribunal's office on 2 August 2016. He complains of discrimination on the grounds of disability (by association). He also makes claims for a redundancy payment and arrears of pay.

2. The respondent sent a response form. It said that the claim for arrears of pay was not detailed. The respondent denied that the claimant was paid below the National Minimum Wage. It also denied that the claimant had been discriminated as alleged; that there had been any unlawful deductions from his wages or that he was entitled to a redundancy payment.

3. At a preliminary hearing on 3 November 2016 an Employment Judge noted that the claim form did not say that the dismissal was unfair. However, the respondent accepted that as there was reference to a redundancy payment and the issue of dismissal did arise: whether it was unfair because of redundancy or alternatively constructive unfair dismissal.

4. The Employment Judge noted that various documents were to be provided to Dr Morgan-Thomas including a contract of employment, timesheets and tachographs.

5. At the Hearing Dr Morgan-Thomas represented the claimant. Mr Maclean, Employment Consultant represented the respondent.

6. Although the parties had exchanged information and documents the claim form had not been amended nor was additional information provided explaining the basis of and detailed calculation of the “arrears of pay” being sought.

7. The Tribunal considered that the issues that were before it were:

   a. Did the respondent dismissed the clamant?
   b. If so when and what was the reason for dismissal?
   c. Was the claimant treated less favourably because he was the carer of someone with a protected characteristic (disability)?
   d. What remedy, if any should the Tribunal award?
   e. Was the claimant entitled to any “arrears of pay”?

8. The claimant gave evidence on his own account. Alisdair Bajak, a former colleague gave evidence on his behalf. Mr Worsley, Director instructed Mr

Maclean and was present throughout the claimant's case. He gave evidence for the respondent.

9. The parties prepared a joint set of productions to which the witnesses referred during the Hearing. Based on the evidence led and the information presented the Tribunal found the following facts admitted or proved.

Findings in Fact

10. The claimant is a Class 1 HGV driver. In April 2004 H Morris & Co Ltd employed the claimant as a driver. He delivered furniture to its customers.

11. The claimant was paid weekly. His normal hours of work were 39 hours per week Monday to Friday. He was paid single time up to 50 hours and any hours over 50 being paid at time and half.

12. H Morris & Co Ltd issued a Statement of Particulars of Employment to its employees (the Statement) (production 4, page 28). It stated:

"*Place of work:*
Your usual place of work is based at Southcroft Road, Glasgow, however you may be required to work at other company sites from time to time as the company may reasonably require.

Annual Holidays
The holiday year runs from 1 January to 31 December.

Employees annual holiday entitlement in the first year of employment is 28 days including 8 public holidays. Entitlement will increase to 30 days in year 2 (22 plus 8 public holidays).

Annual holiday entitlement accrues at the rate of 1/12th of the full annual holiday entitlement on the first of each month, in advance…

Employees will be paid at their basic rate of pay in respect of periods of annual holiday. Overtime will not normally be included in calculating holiday pay, except where overtime is contractually agreed.

In the event of termination of employment employees will be entitled to holiday pay calculated on a pro rata basis in respect of all annual holiday already accrued but not taken at the date of employment.

Sick Pay

If you are absent from work because of sickness or injury you will be entitled to statutory sick pay, provided you meet the qualifying conditions.

The rules relating to notification of and payment in respect of absence because of sickness or injury are set out in the Employee Handbook.

Company Sick Pay

The Company operates a sick pay scheme which provides for payment in addition to SSP with discretion. Employees should clearly understand that when payment of Company sick pay is made it is inclusive of any SSP entitlement i.e employees are not entitled to both.

Employees must have 13 weeks continued service and have successfully completed their probationary period to qualify for Company sick pay.

Employee's entitlement to Company sick pay (with management discretion) is as follows: 50 days per calendar year at 1/3 normal rate plus SSP
The calculation of Company sick pay will take into account any previous payments of Company sick pay within the 12 months immediately prior to the first date of the current sick absence.

The service length qualification will be calculated in respect of the employee's service length on the first day of absence.

Short Time Working & Lay-offs
The Company reserves the right to introduce short time working or a period of temporary lay-off without pay (with the exception of any statutory entitlement) where this is necessary to avoid redundancy or where there is shortage of work.

Grievance Procedure

If you have a grievance relating to your employment you should in the first instance raise this with your immediate manager. If a grievance is not resolved to your satisfaction you should refer to the grievance procedure set out in the Employee Handbook."

13. The claimant did not remember seeing the Statement. Mr Bajak recalled the Statement. In April 2009, following individual and collective consultation, he signed a notification changing certain terms and conditions from 28 March 2009 (production 4, page 27). The letter confirmed that all other contractual terms and conditions remained intact.

14. From 2012 onwards the claimant was his disabled father in law's carer. The claimant is also a father of three primary school children two of whom have disabilities.

15. The claimant was based at Rutherglen, Glasgow. Des Downey was the Operations Manager. The claimant mainly delivered furniture from Rutherglen to customers in Scotland and the North of England. The claimant's typical working week started around 8am in Rutherglen where he collected his trailer and paperwork. He usually took two days to deliver the furniture to several customers. Midweek the claimant returned to Rutherglen to pick up another trailer. He was available to work 15 hours per day which included travel to customers, unloading and reloading and waiting time. The claimant usually finished at Rutherglen on a Friday. To accommodate his caring commitments, he would finish early on a Friday and he did not work Saturdays or Sundays.

16. Around late February 2013 H Morris & Co Ltd transferred part of its delivery business to the respondent, a Chorley based transport company. The claimant's employment transferred to the respondent along with that of other drivers: Andrew Bajak and Tom Jones. The respondent was given the personnel files of the claimant, Mr Bajak and Mr Jones which contained the Statement.

17. The claimant and Mr Bajak continued to be based at Rutherglen working from the site belonging to H Morris & Co Ltd. Mr Jones subsequently resigned.

18. In 2013 the respondent employed approximately 90 employees of which around 30 were drivers. Mr Aspey was Managing Director. Henry Worsley was General Manager, based in Chorley. William Martin was Operational Manager, based in Rutherglen. The claimant and Mr Bajak reported to Mr Martin. Following the transfer Mr Downey continued to work for H Morris & Co Ltd in Rutherglen.

19. Mr Martin scheduled and assigned work to the claimant and Mr Bajak. Each Monday the claimant went to Rutherglen, collected paperwork and a trailer which he would return to Rutherglen on Fridays. Mr Martin notified the claimant and Mr Bajak of the start time for the following Monday. During the week, the claimant contacted Mr Martin by mobile telephone and arranged any changes to the schedule and any additional assignments.

20. The claimant had a very good relationship with his colleagues. The respondent highly regarded the claimant and Mr Bajak.

21. Around 2014 the respondent changed the way that it paid drivers, including the claimant and Mr Bajak. The claimant was to be paid a flat daily rate of £95 gross regardless of the number of hours worked. In addition, the claimant was eligible for a night out allowance of £25 and a meal allowance of £5. The claimant was also eligible for a loyalty bonus of £12.50 per week if he continued to be employed by the respondent.

22. Around October 2015 H Morris & Co Ltd announced it was closing. Between October and December 2015, the staff of H Morris & Co Ltd, including Mr Downie were made redundant.

23. Warehouse operations were closed in December 2015 and the site was advertised to let. The respondent had lost its major client in Scotland.

24. Around December 2015 the respondent offered employment to Mr Downie. He continued to live in Scotland but travelled to Chorley where he worked during the week.

25. In December 2015, the respondent commenced redundancy consultation with Mr Martin.

26. During this period the claimant and Mr Bajak asked how the closure would affect their ongoing employment. Mr Martin was unable to provide any details. Mr Worsley, who would occasionally provide holiday cover for Mr Martin indicated that consideration was being given to re-organising workloads but there was no information at that point.

27. The claimant and Mr Bajak had annual leave over the Christmas holidays in December 2015. In early January 2016, they contacted Mr Martin. He advised that as it was quiet they should just enjoy a few extra days off. After that Mr Martin stopping returning their telephone calls. Mr Martin was made redundant around mid-January 2016.

28. The claimant and Mr Bajak made repeated attempts to contact Mr Worsley. Their calls and messages went unanswered.

29. Around 10 January 2016 the claimant received a wage slip stating that he had been laid off. Lay off was backdated to the start of January 2016 and showed that the claimant was being paid half pay.

30. The lay off lasted about six weeks and the last half week's pay was paid into the claimant's account on 19 February 2016 (corresponding to the week ending 12 February 2016).

31. The claimant and Mr Bajak were invited to three meetings which Mr Downie conducted on 1, 8 and 15 February 2016. The meetings took place at Rutherglen.

32. At the meetings the claimant and Mr Bajak were asked if they would be willing to consider relocating to England. The claimant and Mr Bajak did not wish to relocate to England. The claimant explained that he felt the move

would significantly alter their working conditions and would entail longer hours of work. He explained his family circumstances and why it prevented him for searching for jobs which were not based in Scotland. Mr Downie accepted the position and indicated that it was likely that they would be made redundant and that they should consider looking for other work.

33. Although Mr Downie conducted the meetings it was Mr Worsley who wrote to the claimant on 4 and 11 February 2016 (productions 5 and 6).

34. The claimant was available to work. The respondent did not provide any work.

35. On 7 March 2016, the claimant received a letter from Mr Worsley dated 3 March 2016 (the March Letter) (production 7). The March Letter stated that the reason for the proposed redundancies was the downturn in work in particular the work that was being carried out by the claimant which had almost dried up totally. Consequently, even looking at the prospects for future orders it was unlikely that the company could sustain his role. The March Letter continued:

"*All ways of avoiding redundancies and all alternatives have now been considered and explored. Unfortunately it has not proved possible to find a solution to the current problem other than to make compulsory redundancies.*

Consequently your employment will therefore terminate by reason of redundancy.

Your length of service entitles you to 11 weeks notice which will commence on Monday 7 March 2016. You are required to work your notice and your last day of employment with the company will be Sunday 22 May 2016.

As your continuous service with us is more than the two years necessary to attract a statutory redundancy payment you will be entitled to a redundancy payment on termination of your employment.

Attached to this letter is a schedule breaking down your final entitlement including any outstanding holiday pay which you will receive together with your P45 in due course.

You have the right to appeal against my decision and should you wish to do so you should write to Tim Aspey within 7 days stating your grounds of appeal against your redundancy."

36. The schedule to which the letter referred was not enclosed. The claimant understood he was entitled to 12 weeks' notice. He contacted the respondent for a copy of the schedule. Despite repeated requests this was never forthcoming.

37. Mr Bajak received an identical letter. As his length of service was shorter his date of termination was Sunday 1 May 2016.

38. The claimant and Mr Bajak continued to be available for work. There was no contact from the respondent.

39. The respondent contacted the claimant and Mr Bajak on the afternoon of Friday 22 April 2016. They were instructed to work the following week. As there were no vehicles at the Rutherglen site they were instructed to travel from Glasgow to Chorley using their own transport and start working at Chorley from 7am in the morning of 25 April 2016. They were informed that they would also require to arrange their return from Chorley to Glasgow at the end of the week.

40. The claimant and Mr Bajak believed that if they did not agree to this they might not receive their redundancy payments.

41. Mr Bajak worked until Saturday 30 April 2016. By chance he met Mr Worsley at Chorley. During the discussion Mr Worsley said that if there was any further work he would be happy to contact Mr Bajak as at that stage Mr Bajak had not found new employment. Mr Bajak received payment of his redundancy pay together with all outstanding holiday pay.

42. The claimant was given a unit to drive home and he was told to park it at the Rutherglen site over the weekend.

43. The respondent had an arrangement to park units at the Rutherglen site from time to time. The site had a "To Let" sign displayed. The respondent no longer employed a driver to take loads to Glasgow for the claimant to pick up. The claimant required to move loads between Chorley, Carlisle and Glasgow. The claimant had to start early on a Monday, drive to Rutherglen to collect the unit, then drive to Chorley to pick up deliveries. The claimant was expected to drive an additional run from Chorley or Carlisle midweek to change trailers. The claimant would finish later than normal on a Friday. The claimant estimated that this additional workload entailed an extra 10 to 14 hours per week. He worked longer hours and spent more time in England for no additional pay.

44. The claimant had no indication how long the parking arrangement at Rutherglen would be available. He also did not know whether his start time was dependent when he arrived at Rutherglen or whether it was from the point that he uplifted the trailer.

45. During this period the respondent had not obtained any new contracts in Scotland. The claimant made repeated efforts to contact Mr Worsley to clarify what was happening. The claimant's queries went unanswered.

46. By 22 May 2016 the claimant had received no further information as to what was happening other than being asked to come to work on 23 May 2016. The claimant was confused as he did not understand the redundancy notice to contain the correct notice period and he felt that Mr Worsley was unwilling to address the issues that had been raised.

47. Around 25 May 2016 the claimant reiterated that he longer wanted to work for the respondent and wished to have his redundancy payment. Mr Worsley advised that he had taken advice and that matters were not as straightforward. There was now work available. While he could not force the claimant to do it, it was not as simple as the claimant getting paid a

redundancy payment. The claimant had worked past the official termination day and the matter was closed and that he was not entitled to a redundancy payment.

48. The claimant was upset and concerned about the uncertainty and that this took a toll on his health.

49. On 6 June 2016, the claimant contacted the respondent to advise that he was sick and unable to work. As his telephone calls were not answered, two emails were sent. He received no reply.

50. The claimant was advised he should not worry about sick leave as there was no work for him that week. The claimant received a wageslip corresponding to the week commencing 6 June 2016 showing a week of lay off.

51. On 9 June 2016, the claimant raised a grievance which was sent by email and post (production 11). The grievance related to the handling of his redundancy and the non-payment of statutory redundancy pay.

52. The claimant explained that he had received nothing in writing rescinding the notice of redundancy dated 7 March 2016. The claimant considered that he had been made redundant with effect from 22 May 2016. The grievance continued:

"*The job that I had been recalled to after 16 weeks of lay off and garden leave is not constitutive of a suitable alternative employment. The unsuitability concerns location and a material change to my work conditions. Through 12 years of my employment my job was based in Glasgow and principally involved deliveries of Morris furniture from Rutherglen, Glasgow to customers in Scotland. The current job is not based in Scotland (Glasgow) but in England (Chorley). I have been asked to commute to Chorley and despite my objections I have been made to travel there on more than one occasion. Given that the Morris premises are being advertised to let, there is sufficient uncertainty about the future commute and it is no way assured that I would not be expected to regularly commute*

to Chorley and spend more time there. I have never agreed to routinely travel to England.

My current job involves picking up trailers from and dropping them off at Chorley, a task that was previously performed by another driver. I am having to work longer hours and spend more time in England and away from Scotland. This is placing an unreasonable burden on me and my family. I am a father of two disabled children who live in Scotland and I am a secondary carer for my disabled father-in-law who lives at my home. My previous manager was aware of these commitments. Being close to home is an important factor affecting the assessment of job suitability and any job that requires me to spend prolonged periods of time in England is unsuitable given my caring responsibility.

Considering the new role involves having to pick up and drop off trailers at Chorley, I am being asked to work longer hours for no more pay. Because I receive a flat daily rate of £90, on the days when I pick up from England my work day exceeds 13 hours and I am being paid below minimum wage.

Because the main contract in Scotland no longer exists and new contracts seem highly uncertain, the risk of another lay off is high and just this week I was told there was no work for me in the second part of the week. Consequently this seems a temporary and uncertain work and being a father of three children I need permanent and secure employment.

Furthermore the redundancy proceedings involved two drivers and the other driver was made redundant as per the formal redundancy notice. The fact that Andrew Porter Ltd have elected to make another driver redundant and have not made me redundant is constitue of disability discrimination by association as per the Equality Act 2010."

53. The claimant reiterated that he considered that he had been made redundant on 22 May 2016 and wished his redundancy payment. The claimant requested that any grievance meeting take place before 17 June 2016 at his normal place of work in Glasgow. Further if the meeting was not

organised before this date the claimant was considered that his employment terminated on 17 June 2016 and he asserted his right to go to an Employment Tribunal to secure payment of the redundancy payment.

54. The claimant received no redundancy payment on 17 June 2016. He did not return to work. There was no further communication from the respondent.

55. The claimant submitted an early conciliation claim to ACAS together with all correspondence. Conciliation was unsuccessful. The claimant was on holiday in July 2016. On his return he discovered two letters from the respondent dated 8 July 2016 and 15 July 2016 inviting the claimant to grievance meetings in Chorley on 13 and 21 July 2016 respectively (productions 12 and 13).

56. Mr Worsley did not contact the claimant by telephone when he failed to attend the grievance meeting which had been scheduled without reference to the claimant's availability on 13 July 2016 and was being rescheduled, again without reference to his availability on 21 July 2016. The letter of 15 July 2016 also stated:

"*I would also like to remind you that you are still an employee. You are required to be present for normal work duties. Without a valid explanation this would be classed as unauthorised absence and formal disciplinary action could be instigated.*"

57. At the date of termination, the claimant was 55 years of age. He had been continuously employed for 12 years. His gross weekly wage £479. His net weekly wage was £389.44

58. After termination of his employment the claimant was in receipt of Jobseekers' Allowance. He found alternative employment on or around 22 August 2016. The claimant has an ongoing loss of £69.44 per week.

59. When his employment terminated, the claimant had taken four days leave since January 2016. did not receive payment of outstanding holidays that had been accrued but not taken.

Observations of Witnesses and Conflict of Evidence

60. The Tribunal considered that the claimant gave his evidence honestly and had no doubts about his credibility. On his own admission, the claimant's recollection of dates was particularly poor and on occasion his evidence in this regard was not always reliable. That said the Tribunal did not consider that he was in any way trying to mislead the Tribunal or be evasive.

61. Mr Bajak was in the Tribunal's view both a reliable and credible witness. While he worked with the claimant and gave evidence on his behalf Mr Bajak appeared to have no acrimony to the respondent.

62. The Tribunal considered that Mr Worsley gave his evidence honestly and candidly. The Tribunal did not doubt that he did not set out to offend or upset the claimant. However, Mr Worsley appeared not to have any proper regard about the consequences that his inaction was having upon the claimant.

63. There initially appeared to be some conflict in relation to whether the respondent knew of the claimant's caring responsibilities. The claimant's position was that Mr Martin and Mr Downie knew about this. Further the claimant said that had endeavoured to explain this Mr Worsley. Mr Worsley appeared to be unaware of the claimant's personal circumstances, although he knew that the claimant was not willing to relocate to Chorley. He also accepted that Mr Martin must have been aware of the claimant's circumstances as Mr Worsley did not dispute that in March 2015 Mr Martin provided a letter of support to the claimant in relation to a possible disqualification for driving. Mr Martin had indicated that the disqualification would have resulted in extreme hardship for the claimant because at that time he was his father-in-law's carer. The Tribunal was satisfied that although Mr Worsley probably did not know, the respondent was aware that the claimant had caring responsibilities for certainly his father-in-law. When the grievance was raised in June 2016 the respondent and Mr Worsley knew that the claimant also had caring responsibilities for two of his children.

64. The Tribunal considered that Mr Worsley's evidence was equivocal in several areas. Mr Worsley's position was that the respondent was unaware of exactly what was happening in relation to closure of the Rutherglen depot. He suggested that the respondent only became aware in January 2016. The Tribunal considered that this was most unlikely. Mr Downie who had been the Operations Manager with H Morris & Co Ltd began working with the respondent in late December 2015. The respondent had also commenced the redundancy consultation with Mr Martin which culminated in his dismissal in mid-January 2016. The Tribunal therefore considered that the respondent knew that there was a significant diminution in work in Scotland from January 2016 which, unless there was a significant change in development there would be a redundancy situation for the drivers.

65. The Tribunal accepted that Mr Downie was asked to conduct the redundancy consultation meetings as he, the claimant and Mr Bajak lived in Scotland. Accordingly, Mr Downie could easily consult with the drivers in person. The Tribunal did not consider that there was anything untoward in that. What it did find surprising was that the letters issued to the claimant and Mr Bajak regarding what was discussed at the meetings were not approved and signed by Mr Downie. The result was that template letters were used which Mr Worsley did not revise to reflect what happened at the meetings. The Tribunal could understand why the claimant and Mr Bajak had the impression the respondent was not treating them with any due regard but rather going through the process. This, in the Tribunal's view would have been reinforced by the fact that Mr Worsley did not consider it necessary to find time to speak with the drivers.

66. There was disputed evidence in relation to timing of a conversation between the claimant and Mr Worsley when Mr Worsley indicated that the respondent would not be paying the redundancy payment. The claimant's position was that it was after 22 May 2016. The respondent stated in its response that it was 25 May 2016. During his evidence Mr Worsley was uncertain but thought that it was probably Friday 20 May 2016. Given that the telephone conversation involved reference to the fact that the claimant

had worked beyond his termination date and that no redundancy payment was due the Tribunal considered that it was more likely the conversation took place after 22 May 2016. What was not in dispute however was that by Friday 20 May 2016 the claimant knew that he was instructed to report for duty on 23 May 2016 and he did so.

67. There was conflicting evidence about the holiday year. The claimant was vague as to when his holiday year began but thought that it was January. Mr Wolsey said that the respondent's holiday year began in April. The Tribunal had no reason to doubt Mr Wolsey's evidence. However there was no evidence that the respondent had issued the claimant with new terms and conditions or staff handbook after the business transferred. The Tribunal therefore considered that the claimant's terms and conditions were contained in the Statement contained subject to the variations made in 2009 and 2014.

Submissions

The Respondent's Submissions

68. Mr Maclean reminded the Tribunal of the claims that were advanced in the claim form: breach of national minimum wage; discrimination by association and redundancy payment.

Breach of National Minimum Wage

69. The claim of breach of the national minimum wage was rejected in its entirety. There was little evidence about why the respondent had breached the minimum wage. The claim appeared to be that the because employees were paid a flat rate if on any individual day any employee worked more that 1hours this would result in a breach of the national minimum wage.

70. The Tribunal was referred to Regulations 6 and 7 of the National Minimum Wage Regulations 2015. The Tribunal had to consider the pay reference period. It then calculate the earnings in the pay reference period divided by the hours that were worked. There was no breach of the National Minimum

Wage. For there to be a breach the claimant would have to have been to be working more than 65 hours per week.

Discrimination by Association

71. This claim is unclear. The suggestion is that the claimant was treated differently because he was a carer of someone with a protected characteristic (disability). The Tribunal had to ask if but for the fact that the claimant was a carer would he have received the treat that he did.

72. The respondent did not take issue with the fact that the claimant was a carer for his father-in law and children. It accepted that they had a protected characteristic. The respondent submitted that there was no evidence to support that the claimant was treated less favourably than Mr Bajak. Further even if was there was no causal link that the reason was because the claimant was a carer to someone who has a disability.

Redundancy Payment

73. The Tribunal was referred to the Employment Rights Act 1996 (the ERA). If there was a reduction of work and the claimant was dismissed for redundancy, then he was entitled to a redundancy payment. The caveat to this is that there is no dismissal if the contract of employment is renewed or the claimant is reengaged.

74. The renewal did not need to be in writing. A renewal is where it is the same contract. Re-engagement is where there is something different.

75. The respondent's position was that the actual job that the claimant was being asked to do was the same. He was carrying out the same job. Apart for a couple of occasion he started and finished in Glasgow. On the main he still finished early on Fridays. He made deliveries and had overnight stops. The claimant might have had concerns about having to work on or work weekend but there was no evidence that he was required to do so. He did not work weekends and there was only an occasional overnight in England. The respondent was trying to keep people employed.

Other Payments

76. There was no claim specified about holiday pay or there being no entitlement pay half salary during the lay off period. In any event there was a break of more than three months since the first lay off and the lay off in June. There would be an issue of time bar in relation to any deductions in January even if the Tribunal was minded to consider such a claim.

Unfair Dismissal

77. A redundancy situation existed. The claimant was given notice but was offered suitable alternative employment. There was no dismissal.

78. If the claimant then resigned and the contract came to an end there was no fundamental breach by the respondent entitling him to claim constructive unfair dismissal. dismissal was on the ground of redundancy he claimant is entitled to a redundancy payment

The Claimant's Submissions

National Minimum wage

79. The claimant was on unmeasured work, He had to be available for up to 15 hours a day. He was paid a flat rate of £95. If he worked three days per week at 15 hours and two days per week at 12 hours he would be working more than 69 hours per week and would therefore be paid less than the National Minimum Wage.

Discrimination by Association

80. The claimant was denied an opportunity to receive a redundancy payment. He was not selected to be made redundant. He was denied the opportunity to consult and raise the issue.

81. Mr Bajak was paid his redundancy pay. After the redundancy the claimant had to work in a hostile and degrading environment.

82. The respondent failed to carry out meaningful consultation. They operated a last in first out policy. Both drivers worked the week commencing 25 April 2016. The claimant was forced to work until the end of May. On 9 June

2016 he was laid off. The claimant's pay was unfairly deducted. His sick pay was violated and he received discriminatory treatment.

Unlawful Deductions

83. The respondent was not entitled to be lay off the claimant. He should also be paid the minimum wage.

Unfair Dismissal

84. If the claimant remained employed the respondent failed to follow the statutory code of practice in relation to grievance procedures. It failed to organise meetings.

85. The Tribunal was referred to the schedule of loss that had been produced (production 3, page 22).

Deliberations

86. The Tribunal considered that this case was about the claimant's entitlement to a redundancy payment. Accordingly, the claimant had to show the Tribunal that he had been dismissed.

87. The Tribunal therefore started by referring to the definition of dismissal for the purposes of the statutory redundancy scheme: section 136(1) of the ERA.

88. An employee is treated as dismissed if (a) his contract is terminated by the employer with or without notice; (b) he is employed under a limited – contract which expires due to the limiting event without being renewed; (c) he had been constructively dismissed; (d) resignation by an employee under notice of dismissal or (e) the termination of a contract by operation of law consequent on an act of the employer or and event effecting the employer.

89. The Tribunal noted that it is the claimant who must prove there has been a dismissal although there is a statutory presumption that a dismissed employee claiming a redundancy payment is dismissed for redundancy.

90. It was agreed that the respondent sent the claimant the March Letter. The Tribunal considered that this March Letter was a notice of dismissal as it not only informed the claimant that his employment will end but also the date on which it will end.

91. The claimant's period of continuous employment started on 1 April 2004. The March Letter stated that the claimant was entitled to 11 weeks' notice and the date of dismissal was 22 May 2016. At the date of dismissal (but not the date notice was given) the claimant would have had 12 years' continuous employment.

92. The Tribunal then turned to consider its findings about what happened around 22 May 2016. Around 25 April 2016 the respondent found driving duties for the claimant and Mr Bajak. The respondent did not withdraw either the notice of dismissal. In any event the Tribunal considered that the respondent could not do this alone, the claimant and Mr Bajak would have had to agree to it. The claimant understood that his employment was to terminate on 22 May 2016. Mr Bajak's employment was to terminate on 1 May 2016.

93. Mr Bajak's employment terminated on 1 May 2016. The claimant continued to be given work by the respondent.

94. The claimant was told to report for work on 23 May 2016. The Tribunal did not consider that there was evidence of the notice of dismissal being mutually suspended. To the contrary, the claimant insisted that he did not want to work for the respondent and wanted his redundancy payment.

95. The Tribunal then turned to consider what the respondent was seeking to do in this period. The respondent found work for the claimant around 25 April 2016. The respondent said that it offered the claimant either renewal or re-engagement as it believed that it could employed the claimant on the basis upon which he had been working since 25 April 2016.

96. The Tribunal accepted that such an offer did not need to be in writing but it must be made before the end of the employee's employment under the

previous contract. Although Mr Wolsey did not speak to the claimant until 25 May 2016 the claimant was told to report for work on 23 May 2016 which he did.

97. The Tribunal considered that on balance the respondent had made an offer before the existing contract came to an end on 22 May 2016. The Tribunal was not satisfied that the claimant accepted the job offer. The claimant made it clear to the respondent that he did not want to work on the basis that he had been since 25 April 2016. He felt that it was a material change to his terms and conditions.

98. The Tribunal then considered whether the alternative job offered was suitable and the reasonableness of the claimant's refusal to accept it. The Tribunal noted that suitability was to be assessed objectively in relation to the employee concerned. The reasonableness of the refusal depends on factor personal to the employee.

99. The claimant continued to be a driver. However each Monday he required to uplift the unit in Rutherglen, collect his assignment in Chorley (rather than Rutherglen). This involved him leaving home on his first working day and there was uncertainty about whether his working day started when he left Rutherglen or when he collected his assignment. If the claimant required to uplift a new assignment during the week there was uncertainty where that would happen (Chorley, Carlisle or Rutherglen) and whether he would be able to return to Rutherglen early on a Friday given the potential extra travelling time. The future viability of the parking at Rutherglen was in doubt as the site was "To Let". There was also considerable uncertainty about the likelihood that the work was more than temporary given that the respondent had not been awarded any new contracts in Scotland. This concern was not unfounded given that the claimant was laid off for a week in June. The Tribunal felt that the offer was not suitable and the claimant's domestic circumstances made the refusal of the offer reasonable.

100. The Tribunal therefore concluded that the claimant's employment terminated on 22 May 2016 and that he was entitled to a redundancy

payment. The Tribunal calculated that the claimant was entitled to 18 weeks' pay at the statutory maximum of £479 per week, that is £8,622.

101. The Tribunal was satisfied that when the March Letter was sent a genuine redundancy situation existed. The claimant and Mr Bajak were consulted before the March Letters were sent. At that stage, it was envisaged that both drivers would be made redundant. The respondent gave the claimant and Mr Bajak the statutory notice based on their length of service at 7 March 2016. The claimant's termination date was later than Mr Bajak's termination date because the claimant had longer service.

102. While Mr Bajak worked the week commencing 25 April 2016 the Tribunal understood that his assignments were in all in England. Mr Bajak had indicated during the consultation period that he was not interested in working from Chorley.

103. Given that Mr Bajak and the claimant were good employees the Tribunal considered that it was understandable that the respondent would if possible seek to avoid making them redundant especially as neither driver had found alternative employment meantime.

104. The Tribunal felt that during the week commencing 25 April 2016 the claimant was treated more favourably than Mr Bajak as the claimant assignments were closer to home and he could return to Rutherglen on the Friday with the unit. Mr Bajak used his own transport, worked in the south of England and worked on a Saturday.

105. The Tribunal considered that although the respondent's communication with the claimant was poor it was satisfied that an offer was made to the claimant before 22 May 2016. The Tribunal felt that the respondent was genuinely trying to avoid a redundancy situation but the Tribunal did not consider that the offer was suitable alternative employment for the claimant.

106. In the Tribunal's view it was regrettable that the respondent did not accept the claimant's position at the time. The Tribunal was satisfied that the

reason for the dismissal was redundancy and dismissal for redundancy was fair and reasonable in the circumstances.

107. As the claimant's employment terminated on 22 May 2016 by reason of redundancy. He continued to receive payment for the work that he did. In any event he treated himself as dismissed from 17 June 2016. The claimant was in receipt of Job Seekers Allowance.

108. From the above the Tribunal also concluded that the claimant was not treated less favourably because he was carer for someone with a disability. The notice periods of termination of employment were based on length of service. Work was available the week commencing 25 April 2016. There was no evidence that Mr Bajak was offered any work after that and his contract of employment terminated on 1 May 2016 because of redundancy. The claimant continued to be provided with work in May 2016. Before 22 May 2016, the respondent made an offer to the claimant. Mr Wolsey was unaware of the claimant's domestic circumstances at that point . Mr Wolsey believed, having taken advice on the matter that the offer was suitable alternative employment and the claimant was therefore not entitled to a redundancy payment. That was the reason the claimant was not paid his redundancy payment. Having reached that view the Tribunal dismissed the claimant's discrimination claim.

109. The Tribunal then turned to consider the claimant's claims for arrears of pay. There was a lack of details in the claim form. From the evidence and submissions the Tribunal understood that it related to:

a. Money due because the claimant believed that he has not been paid the National Minimum Wage.
b. Holiday pay accrued but not taken.
c. Payment of wages when for the period when the claimant was laid off.

110. The Tribunal considered that to determine if the claimant had been paid the National Minimum Wage it had to determine the claimant's hourly rate of

pay. This involved establishing the total pay received in the relevant pay reference period and the total number of hours worked during that period. The claimant was paid weekly in arrears. The claimant produced payslips. However there was no evidence about what payments were to be included and what deductions should be made when calculating the pay. While it was argued by the claimant that he worked unmeasured time the Tribunal was not provided with the calculation of the hours of unmeasured time. Given the variation to the claimant's contractual terms in August 2014, it was not clear to the Tribunal that the claimant worked salaried hours.

111. The Tribunal concluded that there was insufficient evidence before it to decide on whether there was a failure to pay National Minimum Wage and what if any was the shortfall. It did not however dismiss the claim.

112. The Tribunal then considered whether the claimant was due holiday pay. The Tribunal acknowledged that this was not specified as part of the arrears of pay in the claim form. However, the respondent accepted during the hearing that some payment was due but calculated this based on its holiday year commencing in April. The Tribunal's view was that in relation to the holiday year the Statement had not been varied. The claimant was entitled to 12 days' holiday. He had taken four days leave leaving a balance of eight days pay that is £780 gross.

113. As the Statement provided the respondent with a right to lay off the claimant without pay (with the exception of any statutory entitlement) the Tribunal did not consider that the respondent was in breach of contract by doing so nor had it made any unauthorised deduction of wages.

114. The Tribunal also considered that when the respondent gave the claimant notice of termination in March 2016 he was only entitled to 11 weeks' notice which he received albeit that for calculation of the redundancy payment the claimant had by that stage accrued 12 years continuous service.

115. Finally, the Tribunal turned to consider whether there had been a failure to provide written terms and conditions. The Tribunal found that the claimant

had been issued with the Statement. There had been written notification of changes in 2009. The Tribunal considered that on the transfer of the business to the respondent there was continuity of employment and there was no change to any of the other matters in the Statement. Accordingly, the respondent needed only to notify the claimant in writing no later than one month after the change and confirm the date of his continuous employment. There was no need for a new statement. A copy of such a letter was not produced. There was also no written evidence provided about the respondent providing notification to the claimant of the change to the drivers' rate of pay in August 2014. At that stage the Tribunal considered that it would have been appropriate to issue a new statement especially as the respondent was of the view that employees annual leave commenced in April rather than January.

116. The Tribunal considered that had the respondent provided the claimant with full and accurate terms and conditions of employment much of the confusion and uncertainty about the issues before the Tribunal could have be avoided. The Tribunal therefore decided to award the minimum of two weeks' pay, that is £958 (2 x £479).

Employment Judge: S MacLean
Date of Judgment: 18 July 2017
Entered in register: 21 July 2017
and copied to parties