



# THE EMPLOYMENT TRIBUNALS

**Claimant**

**Ms C Feetham**

**Respondents**

**Oxman 5 Star Car Sales Ltd (R1)**

**Oxman 5 Star Car Valet Parking Services Ltd (R2)**

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

**HELD AT NORTH SHIELDS**

**ON 9<sup>th</sup> November 2017**

**EMPLOYMENT JUDGE GARNON ( sitting alone)**

Appearances

For the claimant

Mr P Lott Solicitor

For the respondents

No Attendance

## JUDGMENT

1. The claim is amended to add Oxman 5 Star Valet Parking Services Ltd as second respondent . The employer of the claimant at the date her causes of action arose was Oxman 5 Star Car Sales Ltd against which the following judgments are made . The claims are not well founded against Oxman 5 Star Valet Parking Services Ltd.

2 The claim of wrongful dismissal (breach of contract) is well founded. I award damages of **£ 120** to be paid by the respondent to the claimant .

3. The claim of unlawful deduction of wages is well founded. I order the respondent to repay to the claimant **£ 357.40** gross of tax and national insurance (NI )

4 The claim for compensation for untaken annual leave is well founded. I order the respondent to pay compensation to the claimant of **£ 230.13** gross of tax and NI

5 I make an additional award of **£ 480** under Section 38 of the Employment Act 2002

## REASONS

### Issues and Law

1. Rule 47 of the Employment Tribunals Rules of Procedure 2013 ( the Rules) says  
*If a party fails to attend or to be represented at the hearing, the Tribunal may dismiss the claim or proceed with the hearing in the absence of that party. Before doing so, it shall consider any information which is available to it, after any enquiries that may be practicable, about the reasons for the party's absence.*

2. This hearing was listed to start at 10am. The Tribunal clerk informed me there was no attendance by the respondent. It had instructed " Legal Solutions 4U" , so I asked the clerk to telephone and was present when she did. The person to whom she spoke said she would have to enquire as to why the person dealing with the claim , a Mr M Graham, was not here. After being called back the clerk spoke to Mr Graham and I was present when she did.. He informed her he had gone to collect Mr Oxman who refused to attend saying he was depressed and had " de-instructed" " Legal Solutions 4U". The clerk asked if he was applying for a postponement. Mr Graham said he was not because Mr Oxman was of the view whenever the case was heard the outcome would be the same so it was pointless attending . The clerk asked him to confirm in writing which he did by e-mail at 10:45 am. He asked in the e-mail the judgment be sent direct to the respondent and apologised for inconvenience caused due to matters outside Mr Graham's control. I decided to proceed with the hearing in the absence of the respondents.

3. Rule 34 says I may add as a respondent any person if I consider there are issues between that person and any other party which it is the interests of justice to have determined in the proceedings. A limited liability company is an association of one or more human beings which is registered at Companies House. It is a legal **person** in its own right. The people who manage it are called Directors. The people who "own" it are called shareholders. Neither are personally responsible for the debts of a company. When a company is formed it is said to be "incorporated". When it is later " dissolved " it ceases to exist and cannot be sued unless it is restored to the Company register.Partnership is the relation which subsists between persons carrying on a business in common with a view of profit. Companies may trade in partnership, but the mere fact they are associated companies using the same premises is insufficient to prove the existence of a partnership .

4 The claim was presented on 12<sup>th</sup> September 2017 against R1 only . The claimant started employment on 20<sup>th</sup> January 2016 as a receptionist working 16 hours per week at £7.50 per hour = £120 per week on which no tax or National Insurance (NI) was payable Her place of work was 206, Roker Avenue, Sunderland ( the premises).

5. More than one company operated from the premises but all those companies appear to be connected by common Directors Shareholders and/or Managers. As a receptionist, the claimant did tasks which benefited more than one of those companies. The respondent says her employer was R2. All of the claims are ones for which the "employer" only can be liable. The first issue I have to determine is who was the employer. To do so, it is obvious R2 must be joined to the proceedings.

6. The claims are unlawful deduction of wages , breach of contract and failure to pay compensation for untaken annual leave. I am also asked to make an additional award because the claimant was not provided with a statement of terms and conditions of employment ( "a s1 statement" ) as required by s 1 of the Employment Rights Act 1996 (the Act ) . As will be seen when I set out the applicable law the issues are

(a) did the employer on any occasion not pay the claimant the total amount of the wages properly payable

(b) did the employer dismiss the claimant and if so without such notice as to which she was entitled

- (c) did the employer fail to pay compensation for untaken annual leave
- (d) did the employer fail to provide to the claimant a s1 statement.

6.1 The relevant law relating to unlawful deduction of wages is in s13 of the Act :

(1) An employer shall not make a deduction from wages of a worker employed by him unless —

(a) 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

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction”.

(3) “Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions) the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.”

6.2. Section 23 includes

“(1) A worker may present a complaint to an Employment Tribunal—

(a) that his employer has made a deduction from his wages in contravention of section 13 ...”.

6.3. The remedy available from a Tribunal, should I find the complaint well founded, is set out in section 24 and includes the power to order the employer to pay the amount of any deduction made.

6.4. The meaning of “wages” is dealt with in section 27

(1) In this Part “wages”, in relation to a worker, means any sum payable to the worker in connection with his employment, including

(b) statutory sick pay under Part XI of the Social Security Contributions and Benefits Act 1992

6.5 In Taylor Gordon & Co Ltd (T/A Plan Personnel) v Stuart Peter Timmon EAT/0159/03 Mr Recorder Luba QC decided an Employment Tribunal has no jurisdiction to determine disputes as to entitlement under the relevant Social Security statutes and Regulations, but if entitlement is clear and the issue is one of pure non-payment, the Tribunal has jurisdiction.

7. The common law provides a contract of employment may be brought to an end by reasonable notice. Dismissal without such notice is termed “wrongful”. Damages for wrongful dismissal are the pay due during the notice period (see Addis v The Gramophone Company) In this case the statutory minimum period is one week

8.1. The law in relation to compensation for untaken annual leave is contained in the Working Time Regulations 1998. ( the Regulations), Regulation 14 says:

(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 and regulation 13A 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 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.

8.2. The leave year in the absence of a "relevant agreement" (which is defined as being an agreement **in writing** ) commences on the anniversary of the start date .

9. Section 38 of the Employment Act 2002 includes :

(3) If in the case of proceedings to which this section applies—

(a) the employment tribunal makes an award to the employee in respect of the claim to which the proceedings relate, and

(b) when the proceedings were begun the employer was in breach of his duty to the employee under section 1(1) or 4(1) of the Employment Rights Act 1996,

the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.

(4) In subsections (2) and (3)—

(a) references to the minimum amount are to an amount equal to two weeks' pay, and

(b) references to the higher amount are to an amount equal to four weeks' pay.

(5) The duty under subsection (2) or (3) does not apply if there are exceptional circumstances which would make an award or increase under that subsection unjust or inequitable.

### **Findings of Fact and Conclusions**

10. I heard the claimant who gave evidence on oath confirming the truth of her witness statement and had a small bundle of documents she produced. A Companies House search shows R1 as having its registered office at 32 Saltwell View, Gateshead (which is the address of R Walker and Co , Accountants) It was incorporated on 30<sup>th</sup> March 2017 so cannot have been the claimant's employer when she started, because it did not then exist.

11. Such a search also shows Oxman 5 Star Valet Parking Services Ltd incorporated on 15<sup>th</sup> January 2015 , Oxman 5 Star Service Centre Ltd incorporated on 28<sup>th</sup> November 2016 and Oxman Family Cars (since 1966) Ltd incorporated on 29<sup>th</sup> April 2008 and dissolved on 8<sup>th</sup> November 2016, all with the same registered office. I find they all traded from the premises.

12. Only R2 can have been the claimant's employer throughout. However, by operation the Transfer of Undertakings (Protection of Employment) Regulations 2006, which applies to transfers of parts of undertakings, or by agreement, her contract could have transferred to R1 after she started. The documents show the overwhelming likelihood that happened with effect from the beginning of April 2017 . Until then her payslips are headed with the name of R2, albeit without the word "Limited". On the pay dates 7<sup>th</sup> 14<sup>th</sup> and 21<sup>st</sup> April the payslips are headed with the name of R1. The Facebook message by which the claimant was dismissed came from Mr Nigel Oxman and contains "*I have just closed Oxman 5 Star Valet Parking who you are employed by and reopened as Oxman 5 Star Cars*". I repeat R1 was incorporated on 30<sup>th</sup> March 2017

13. The claimant had a back injury in November 2016. It caused her to be off work periodically. She sent a message to Ms Angela Cowley at the respondent on 24<sup>th</sup> April saying she had been signed off sick by her GP for one month. She later sent the sick note covering 24<sup>th</sup> April to 24<sup>th</sup> May by post to the Accounts Department .

14. She had been paid Statutory Sick Pay (SSP) for earlier absences but received no payments after 24<sup>th</sup> April. She sent a message to Ms Cowley about this, and her prospective return to work, on 24<sup>th</sup> May.

15. She had no response from Ms Cowley but on 25<sup>th</sup> May received a Facebook message from Mr Oxman saying she should have been sent her P45 a couple of weeks earlier because she had failed to send in a sick note or contact her employer to explain her absence. This was plainly untrue and the Facebook message was a dismissal on that date, as supported by the text which includes "*I have really enjoyed you working here Claire, but I need someone who is here all the time .If ever you need a reference I will gladly give you glowing praise*". This also shows whatever the reason for dismissal it was not gross misconduct, which is the only justification in law for not giving, or paying in lieu of, notice. The message starts with enquiries about her health and ends with wishes for a speedy recovery. She replied she had sent the sick note. There was no more contact from the respondent. Early Conciliation through ACAS failed.

16. The response form says the claimant was never employed by R1 , and I quote , *“left work and failed to return , and provided no evidence of medical illness. She made no contact with her employer and as a result her employment was summarily dismissed .* I reject all these points as untrue as shown by the documents .

17. The claimant was plainly dismissed wrongfully and is entitled to one weeks pay, being £120, as damages . Equally she was not paid SSP to which she was plainly entitled at the rate on £ 89.35 for four weeks = £357.40

18. She says the leave year was 1<sup>st</sup> April to 31<sup>st</sup> March and in 2017 she had taken no paid leave. She worked even on Bank Holidays. When I asked her if there was any relevant agreement in writing about the leave year , she said there was not and affirmed she had never been given a s1 statement by either respondent company . Her leave year therefore commenced on 20<sup>th</sup> January each year and by termination on 25<sup>th</sup> May 2017,125 days of the year had elapsed. Her annual entitlement to leave was 5.6 weeks. Leave pay for a whole year would be 5.6 x £120 = £672. Dividing by 365 and multiplying by 125 = £230.13.

19. The file shows how much time, and taxpayers money, has been wasted because R1 attempted to evade any liability and , by deliberate obfuscation of who employed the claimant, divert her and her representative into pursuing the claims against R2 against which any judgement would be unenforceable if , as appears likely, whatever assets it had have been transferred to R!. That damaged the credibility of the whole response coupled with the several assertions therein which were disproved by the documents. One of the main reasons for s1 statements is to clarify such matters as the identity of the employer and the dates of any leave year . I am convinced the failure to provide one was no oversight but a deliberate ploy to make it more difficult for employees to know, and therefore enforce, contractual rights . In such circumstance the higher award of four week pay is just = £480.

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**TM Garnon Employment Judge**

**Date signed 9<sup>th</sup> November 2017**

**SENT TO THE PARTIES ON**

**13 November 2017**

**G Palmer**

**FOR THE TRIBUNAL OFFICE**