EMPLOYMENT TRIBUNALS

Claimant: Mr L Moreira

Respondent: Abc Coach Limited

HELD AT: Manchester **ON:** 23 April 2021

BEFORE: Employment Judge Barker

REPRESENTATION:

Claimant: In person
Respondent: Mr Brotherton, solicitor

JUDGMENT

1. The claimant was automatically unfairly dismissed for asserting a statutory right from the fixed term contract with the respondent which was to run from 11-17 October 2020.

2. The respondent is to pay compensation for unfair dismissal of £750 to the claimant immediately.

3. The claimant was not constructively unfairly dismissed from his earlier employment with the respondent, but resigned on 28 September 2020 with immediate effect. The claimant's claim of wrongful dismissal fails and is dismissed.

4. The respondent had paid the claimant's holiday pay and other deductions from wages to him before the hearing and these claims are dismissed on withdrawal by the claimant.

REASONS

Preliminary Matters and Issues for the Tribunal to Decide

1. This was a remote hearing which was not objected to by the parties. The form of remote hearing was a code "V" hearing, being conducted entirely by CVP video platform. A face-to-face hearing was not held because it was not practicable and no one requested the same. The documents that I was referred to are in a bundle, the contents of which I have recorded. Witness statements were provided by the claimant himself and Ms Vicky Bowe, the respondent's office manager.

2. The claimant brings claims of unfair dismissal, wrongful dismissal, unpaid holiday pay and unlawful deductions from wages. The respondent's case is that the claimant resigned and was not dismissed and that all sums owing to him have been paid. The claimant accepted that holiday pay and pay that had been deducted for a road traffic fine had been repaid to him before the hearing and that these claims were now not being pursued.

3. The claimant was employed by the respondent as a full-time coach driver from 5 March 2018 until his resignation on 28 September 2020. There is a dispute between the parties as to whether the claimant was offered and accepted further work by means of a fixed-term contract which was to run from 11-17 October 2020, or whether the further work was part of a continuation of his contract caused by a refusal to accept his resignation on the part of the respondent. It is the respondent's case that the claimant resigned on 28 September and did not accept the offer of further work to begin on 11 October.

4. The parties provided evidence to the Tribunal on a number of factual disputes which do not form part of the findings of fact below. This is not because this evidence has not been considered, but because it was not relevant to the issues that the Tribunal had to decide.

Findings of Fact

5. It is the claimant's evidence, which I accept, that his relationship with the respondent ran relatively smoothly and that he had enjoyed working for the respondent until the spring and summer of 2020. In April 2020, the claimant was informed that due to the impact of the coronavirus pandemic, the amount of work to be offered to him would be reduced and on 20 April 2020, the claimant was informed that he would be placed on furlough immediately.

6. It was Ms Bowe's evidence, which I accept, that the impact of the pandemic had a drastic effect on the respondent's business and placed the respondent's management under a great deal of pressure.

7. The claimant told the tribunal that a series of incidents in the late spring and summer of 2020 caused him to consider his position with the respondent. These included being told by the respondent to remain available for work at all times.

The claimant's evidence, which I accept, was that was unmanageable with his childcare arrangements and that he was unable to plan his annual leave to spend with his children, who did not live with him at that time.

8. Additionally, the claimant was accused by the respondent of having damaged the door of a coach he had driven on 22 September 2020. The claimant provided evidence to the Tribunal, which I accept, to demonstrate that he did not cause damage to the coach, in the form of a report from the garage that repaired the door. The report shows that the door fault was caused by a failed internal mechanism and not external damage. The claimant's evidence, which I accept, was that he was repeatedly threatened by Stuart Bowe, the respondent's managing director, that the money for the repairs and the respondent's consequential losses (which were the cost of taxis for the respondent's customers) would be deducted from his wages.

9. It was the evidence of Ms Bowe that Mr Bowe had found the stress of the financial impact of the pandemic very difficult to manage.

10. On 28 September 2020, the claimant offered his resignation to the respondent. He apologised for not giving notice, but asked that he be able to resign with "immediate effect" for personal reasons. The claimant told the Tribunal that he had found another job at a higher rate of pay. He told the Tribunal that he did so because he was unwilling to put up with the threats to withhold pay and was concerned that he may be unfairly penalised again in the future by deductions from his wages. He was also unhappy with the respondent's approach to taking annual leave. However, the claimant's resignation letter to the respondent was drafted in good terms and provided his thanks for the "*opportunity you have given me over the years*".

11. The respondent acknowledged the claimant's email on 29 September 2020, but separately contacted him the same day with an offer of further work, which the claimant accepted. The claimant's evidence, which I accept, that he had wanted to do one last job as a favour for the respondent, because Ms Bowe had told him that it was a big job and that she needed good drivers. He told the Tribunal that he had wanted to leave "*on good terms*", which I accept. The claimant's evidence was that he had notified his new employer that he would have to put back his start date to the end of October, which his new employer had agreed to. The claimant was offered and accepted a fixed sum of £750 to do this final job for the respondent.

12. Ms Bowe told the Tribunal that the respondent's contract for October 2020 was for a major film studio who were filming in Liverpool. The respondent had, she told the Tribunal, "laid off" a number of their drivers so they only had 7 drivers at the time they were offered the film contract and they needed 20-25 drivers to fulfil the requirements of the film studio. She therefore needed to find a large number of drivers in a short space of time. She told the Tribunal that at 8 October, she had still not managed to find a full complement of drivers to work on the contract.

13. There was some dispute during the claimant's cross-examination as to whether he admitted that his resignation had been accepted or not. In box 8.2 of his claim form, the claimant states "*my resignation was accepted*", but his case at the hearing was that his employment continued due to the offer of further work which was made on 29 September.

14. I find that the claimant resigned on 28 September 2020, which resignation was accepted on 29 September by Ms Bowe, and that both parties understood this to be the case. I find that the claimant resigned voluntarily and did not do so because of any fundamental breach of contract, or any breach of the duty of trust and confidence. Had the relationship between him and the respondent been damaged such as to no longer exist, I find that he would not have accepted the respondent's offer of further work. He had found a job on better terms at a higher rate of pay, and resigned to accept it. This is not to say that the claimant did not have complaints about the respondent's actions towards him, but that these complaints were not sufficiently serious to prevent him from returning to work for them in October.

15. It was the claimant's evidence that he received the offer of further work on 29 September and told the respondent that he would have to make arrangements with his new employer to delay his start date, which he says he did. The claimant's evidence was that, having done so, he telephoned Stuart Bowe on 30 September and told him that he would do the job but that it would be his last job for the respondent.

16. Ms Bowe's evidence as to whether the claimant accepted the work was inconsistent. She said that the claimant did not accept the work when offered on 29 September, but that he said that he would need to speak to his new boss. She told the Tribunal that the claimant simply never rang her or Mr Bowe back to accept and they assumed he had declined. Her witness statement at paragraph 13 refers to "*the claimant's lack of response to me*".

17. However, she also said in answer to questions from the Tribunal that Mr Bowe offered the work to the claimant and the claimant declined the job immediately. She told the Tribunal that Mr Bowe came off the phone and told her "*that's a no from Luis*". I do not accept Ms Bowe's evidence in this regard. I prefer the evidence of the claimant, which was that he was offered the job, made arrangements with his new employer to delay his start date, and telephoned the respondent back to accept it on 30 September 2020.

18. The respondent produced a payslip for the claimant dated 4 October 2020. In it, he was paid for 5.6 days annual leave that was outstanding on the termination of his employment, which was £415.38. However, this payment was subject to deductions for the alleged damage to the coach and taxis for the respondent's clients, such that a deduction of £375 was made from that annual leave payment.

19. On 5 October 2020, the claimant emailed Mr Bowe as follows:

"I am writing this email in regards to my employment which ended on 28/09/20 As of this date, holidays in the amount of 5.6 days are owed to me. I request that payment be made in full five business days from the date that this email is received. If a payment is not made by this due date, I will take legal action. Regards Luis Moreira"

20. It was the claimant's evidence, which I accept, that following the sending of this email Mr Bowe telephoned him the same day (5 October) and said he would come to his house and have a word with him. Mr Bowe did so, but as the claimant was not at home Mr Bowe telephoned him from outside his house. The claimant's evidence was that Mr Bowe was angry with him and told him that he didn't need him for the film job anymore and said he had another driver for the job. The claimant told the Tribunal that Mr Bowe told him he would not be paid his final wage or holiday pay because Mr Bowe did not have any money.

21. I accept the claimant's evidence that this was the conversation he had with Mr Bowe. I find that, taking Ms Bowe's evidence into account, it was not correct that Mr Bowe had another driver for the job. Ms Bowe's evidence was that, by the start of the contract, she was still short of the required number of drivers. This would, I find, have also been the case when Mr Bowe came to the claimant's house on 5 October. Therefore, the reason for the claimant's dismissal on 5 October was not that he was no longer needed, but that he had angered Mr Bowe by asking for payment of his holiday pay in full without deductions, and/or that he had threatened legal action.

22. Following this conversation, the claimant sent a further email dated 7 October 2020, in which he referred to his resignation of 28 September and informed the respondent

"You should be aware that I resigned in response to various repudiatory breach's of contract by you and I therefore consider myself constructively dismissed and i will seek legal advice on the matter".

23. The email of 7 October did not refer to the conversation about the fixed-term work in Liverpool, but referred back to events that took place prior to 28 September.

24. It is the claimant's case that he was subsequently sent emails from the film production company with security, password and Covid-19 safety instructions relating to the work, but that he was denied the chance to do the work by the respondent. It is the respondent's case that all drivers in the company were sent this information, whether or not they were employed on that particular job. The claimant told the Tribunal that this was implausible because it would be a breach of the security and password protocols to send these to all staff.

25. I accept the claimant's submission that this further demonstrates that he had accepted the job but was subsequently dismissed from it. I find that, given how much in need of drivers the respondent was, and given that they were still short-staffed by 8 October, they would have in all likelihood chased the claimant for a response, if he had not replied following the conversation of 29 September. I also

find on the balance of probabilities that security information would not have been sent to all of the respondent's drivers, irrespective of whether they were working for the film company or not (as alleged by Ms Bowe). To do so would, I find, undermine the secure nature of the working arrangements.

26. It was the claimant's evidence, which I accept, that the photographs of the allegedly damaged coach provided by the respondent to him were not of the coach that the claimant had driven. The claimant contacted the Mercedes garage that had carried out the repairs and was eventually informed in November 2020 that the fault to the door was a malfunctioning valve, not damage caused by external impact, and that the repair had been done under warranty.

27. The claimant obtained evidence of this information from the garage and sent it to the respondent, and was paid for his outstanding annual leave on 9 November 2020 in full, without the sums for the repairs to the coach being deducted.

28. I have taken into account the claimant's evidence of Mr Bowe's repeated comments about being made to pay for repairs to the coach door and the respondent's actions in withholding money from the claimant's wages for it until the claimant discovered that the repairs were covered by the warranty and not caused by his actions. I have also taken into account Ms Bowe's evidence that the respondent's financial difficulties caused by the pandemic put Mr Bowe under pressure and that he was "*not managing very well*". The claimant's email of 5 October, I find, prompted Mr Bowe to act as he did in withdrawing the job offer.

29. It is the claimant's evidence that he lost £1440 by having agreed to delay the start of his new job to accommodate the respondent's film contract. Although the film job would have finished by 17 October 2020, it was the claimant's evidence that the regulations on drivers' rest and the maximum number of hours that can be worked in a period meant that he could not start work for his new employer until later than that. The claimant would have been paid £750 for the fixed-term contract with the respondent.

The Law

30. The right in s98 of the Employment Rights Act 1996 ("ERA") not to be unfairly dismissed generally only applies to employees with more than two years' continuous service. The exceptions from this rule are those dismissals said to be for an automatically unfair reason, and the right not to be dismissed for an automatically unfair reason applies to employees irrespective of their qualifying service with an employer.

31. Section 104 of ERA 1996 provides that it is automatically unfair to dismiss an employee because they have asserted a statutory right. Section 104(1) and (2) provide as follows:

104 Assertion of statutory right.

(1)An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee—
(a)brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or
(b)alleged that the employer had infringed a right of his which is a relevant statutory right.

(2)It is immaterial for the purposes of subsection (1)—

(a)whether or not the employee has the right, or
(b)whether or not the right has been infringed; but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.

32. Cases which fall within s104 ERA are not confined to those where a statutory right has actually been infringed. It is sufficient if the employee alleges that the employer has infringed a statutory right and that the making of that allegation was the reason or the principal reason for the dismissal. The allegation need not be specific, provided it has been made reasonably clear to the employer what right was claimed to have been infringed.

33. Furthermore, section 104(2) ERA also applies where the employee has the right in question but there has been no actual infringement by the employer. The case of *Mennell v Newell and Wright (Transport Contractors) Ltd 1997 ICR 1039, CA,* held that the employer does not actually need to have infringed a statutory right in order for the claim to succeed. It is sufficient that the employee genuinely believes that an infringement has occurred and makes the assertion in good faith.

34. Constructive dismissal cases are governed by the provisions established in *Western Excavating v Sharp 1978 ICR 221 CA*, which determined that in order to demonstrate he has been constructively dismissed, an employee must show that the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. The employee must therefore show:

    a. that there was a fundamental breach of contract on the part of the employer;
    b. the employer's breach caused the employee to resign; and
    c. the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

35. The provisions of s212 ERA provide for how continuous employment is to be calculated, as follows:

212 Weeks counting in computing period

> *(1) Any week during the whole or part of which an employee's relations with his employer are governed by a contract of employment counts in computing the employee's period of employment.*
>
> *(2) . . .*
>
> *(3) Subject to subsection (4), any week (not within subsection (1)) during the whole or part of which an employee is—*
> *(a) incapable of work in consequence of sickness or injury,*
> *(b) absent from work on account of a temporary cessation of work, [or]*
> *(c) absent from work in circumstances such that, by arrangement or custom, he is regarded as continuing in the employment of his employer for any purpose, . . .*
> *(d) . . .*
> *counts in computing the employee's period of employment.*
>
> *(4) Not more than twenty-six weeks count under subsection (3)(a) . . . between any periods falling under subsection (1).*

36. The expectation of the parties of further work is not a relevant factor in the definition of a "temporary cessation of work" in s212(3)(b) ERA. What is required is to find the reason for the termination of the first contract of employment. If it has ended because of a temporary cessation of work, and the claimant is employed again, the case falls within s 212(3)(b): *Hussain v Acorn Independent College [2011] IRLR 463.*

37. Except as is otherwise specifically provided in ERA, ss 215–217, any week which does not count in the computation breaks the continuity of a period of employment (ERA s 210(4)). Ss 215-217 relate to periods of employment abroad, industrial disputes and reinstatement after military service.

Application of the Law to the Facts Found

38. I find that the claimant voluntarily resigned from his employment with the respondent on 28 September 2020. He was not constructively dismissed. At the time of his resignation, although the claimant was unhappy with the actions of the respondent, they were not sufficient to have damaged the relationship of trust and confidence between the two parties. Had that relationship been irreparably damaged, I find that the claimant would not have accepted the respondent's further offer of work, which he did as a favour to the employer at a lower rate of pay than he would have earned with his new employer. I find that this demonstrates that at the time he accepted the offer of further work on 29 September, there was still a good relationship between them, albeit less cordial than it was previously.

39. I find that the respondent accepted the claimant's resignation by email on 29 September 2020. No contract of employment existed between the parties after 29 September 2020. The claimant was not required to make himself available for work as he had previously been. He asked that his dismissal take immediate

effect and that he be excused from the requirement to provide notice, which the respondent agreed to. He is therefore not entitled to any notice monies from this employment.

40. I find that the respondent offered the claimant further work by way of a fixed-term contract on 29 September 2020, which the claimant accepted on 30 September 2020. The contract was for the duration of the filming work in Liverpool from 11-17 October 2020 and both parties agreed that the claimant would be paid £750 for it. The terms were set out in a text message from Ms Bowe to the claimant. The parties agreed that this would be the claimant's last job for the respondent and that thereafter he would take up his new job, the start of which he had postponed in order to assist the respondent.

41. I find that there was no continuity of employment between the claimant's resignation on 29 September 2020 and his dismissal by Mr Bowe on 5 October 2020. There existed no contract of employment between the parties during this time, nor could it be said that there was a "temporary cessation of work" as per s212(3)(b) ERA. The reason for the termination of the first contract of employment was the claimant's resignation, not a temporary cessation of work. The claimant therefore did not have the required two years' service to bring a claim of "ordinary" unfair dismissal under s98 ERA.

42. I find that Mr Bowe dismissed the claimant from his fixed-term contract by telephone on 5 October 2020. The reason for this dismissal was the claimant's email of the same day in which he requested payment of his holiday pay in full and threatened legal action if this was not paid. The dismissal was anticipatory and related to the start date of the fixed term contract on 11 October 2020.

43. I have considered whether it could be said that the claimant was dismissed for asserting his statutory right to payment for his annual leave under the Working Time Regulations 1998, as he did in his email of 5 October 2020. However, the findings of fact that I have made and the evidence that I have examined does not support this conclusion. The respondent did not fail to account for sums for annual leave; on the contrary this was paid in good time shortly after the claimant's contract ended. It was, of course, subject to the disputed deductions, but it was accounted for nonetheless.

44. However, the claimant was, I find, asserting a statutory right not to suffer unauthorised deductions from his wages. A dismissal for this reason would be automatically unfair. This is not confined to cases where a statutory right has actually been infringed. It is sufficient if the employee alleges that the employer has infringed a statutory right and that the making of that allegation was the reason or the principal reason for the dismissal and that the employee genuinely believes that an infringement has occurred (as per *Mennell v Newell and Wright (Transport Contractors) Ltd 1997 ICR 1039, CA).*

45. It is therefore irrelevant whether or not the respondent would have been entitled, under the terms of the claimant's contract, to deduct sums for damage to a coach and any consequential losses suffered by them, or not.

46. However, was the assertion by the claimant made in good faith? This is for the Tribunal to decide on the facts of a case. In the claimant's case, I find that it was. The claimant believed at the time that he was not responsible for the damage to the coach and should not be made to pay for the respondent's losses. He therefore asserted his right not to have deductions made from his wages on the basis of a liability that he believed was not his to bear. This was the reason for his dismissal, not that he was no longer needed for the film contract.

47. The claimant was therefore automatically unfairly dismissed on 5 October for asserting a statutory right by email of that day, from the fixed term contract which was to run from 11-17 October and for which he was to be paid £750.

Remedy

48. The claimant is not entitled to a basic award for unfair dismissal, as he did not begin the employment from which he was dismissed. He is, however, entitled to a compensatory award. On the basis of the information available to the Tribunal, including the claimant's schedule of loss of 14 April 2021, the claimant is entitled to his loss of earnings of £750 that he would have been paid by the respondent, had he not been unfairly dismissed.

49. The claimant is not entitled to his expenses in looking for work as he had already secured alternative employment by the time he accepted the fixed-term contract from which he was dismissed. He is also not entitled to the £1440 he would have earned from his new employer had he not agreed to carry out the fixed-term contract for the respondent, as he had agreed to forego this sum when he accepted the fixed-term contract. For the same reason, he is not entitled to any future losses as the claimant took up his new employment at the end of October as agreed at the end of September.

50. The claimant asked that he be compensated for the income tax and National Insurance that he told the Tribunal had not been paid by the respondent to HMRC, but the respondent was able to demonstrate via evidence of payment records that the claimant's tax and NI had been accounted for.

51. The claimant is also not entitled to compensation for loss of statutory rights as the period of his fixed term contract was short enough that he would not have accrued any statutory rights as a result of it.

Employment Judge Barker

Date 11 June 2021

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
Date: 16 June 2021

FOR THE TRIBUNAL OFFICE

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: 2417604/2020

Mr L Moreira v Abc Coach Limited

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order: -

"the relevant decision day" is: 16 June 2021

"the calculation day" is: 17 June 2021

"the stipulated rate of interest" is: **8%**

For the Employment Tribunal Office

INTEREST ON TRIBUNAL AWARDS

GUIDANCE NOTE

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at
www.gov.uk/government/collections/employment-tribunal-forms

If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

2. The Employment Tribunals (Interest) Order 1990 provides for interest to be paid on employment tribunal awards (excluding sums representing costs or expenses) if they remain wholly or partly unpaid more than 14 days after the date on which the Tribunal's judgment is recorded as having been sent to the parties, which is known as "the relevant decision day".

3. The date from which interest starts to accrue is the day immediately following the relevant decision day and is called "the calculation day". The dates of both the relevant decision day and the calculation day that apply in your case are recorded on the Notice attached to the judgment. If you have received a judgment and subsequently request reasons (see 'The Judgment' booklet) the date of the relevant judgment day will remain unchanged.

4. "Interest" means simple interest accruing from day to day on such part of the sum of money awarded by the tribunal for the time being remaining unpaid. Interest does not accrue on deductions such as Tax and/or National Insurance Contributions that are to be paid to the appropriate authorities. Neither does interest accrue on any sums which the Secretary of State has claimed in a recoupment notice (see 'The Judgment' booklet).

5. Where the sum awarded is varied upon a review of the judgment by the Employment Tribunal or upon appeal to the Employment Appeal Tribunal or a higher appellate court, then interest will accrue in the same way (from "the calculation day"), but on the award as varied by the higher court and not on the sum originally awarded by the Tribunal.

6. 'The Judgment' booklet explains how employment tribunal awards are enforced. The interest element of an award is enforced in the same way.