EMPLOYMENT TRIBUNALS

Claimant: Mr M Williams

Respondent: Sudlows Enterprise Services Ltd

HELD AT: Manchester **ON:** 12 June 2017

BEFORE: Employment Judge Franey
(sitting alone)

REPRESENTATION:

Claimant: In person
Respondent: Mr P Nield, Finance Director

JUDGMENT

1. The complaint of breach of contract in relation to notice pay succeeds. The respondent is ordered to pay the claimant the sum of £628.18 as damages for breach of contract.

2. The respondent is ordered to reimburse the claimant the issue fee of £160 which he has paid, and within 14 days of receipt of proof of payment, any hearing fee he now pays.

REASONS

Introduction

1. By his claim form of 3 April 2017 the claimant brought a complaint of breach of contract in relation to notice pay. The basis of his case was that he had resigned on four weeks' notice, but had not been required to work the final week. He sought payment for that final week.

2. The response form of 28 April 2017 resisted the complaint. It said that the four week notice period had not been agreed. The agreement was only that the claimant was going to stay on until he was no longer needed.

3. I clarified the issues with the parties at the start of the hearing. It was common ground that the claimant had been paid until 10 March. The respondent said that if he was entitled to anything beyond that it should only be until 14 March, because he had given his notice verbally on 15 February. The respondent maintained that the calculation should be based on working days alone.

Evidence

4. I heard oral evidence on oath from the claimant. The respondent did not call any oral evidence as there was no dispute about the primary facts.

5. Both parties supplied some documents and I will refer to them as appropriate.

Relevant Legal Principles

6. When a contract of employment is terminated on notice the contract remains in force during that notice period. An employee is entitled to be paid during the notice period whether he attends for work or not, as long as he is willing to attend if required. If there is a breach of contract arising or upon termination of employment, the Tribunal has jurisdiction over it by virtue of article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.

7. If the claim succeeds the measure of damages is the amount required to put the claimant in the same position as if there had been no breach of contract. This is generally taken as the net value of pay and other benefits during the notice period, reduced by any other earnings generated by the claimant in that same period.

Relevant Findings of Fact

8. The claimant was employed as a senior electrical estimator by the respondent with effect from 28 November 2016 on an annual salary of £40,000 with entitlement to an annual car allowance of £3,600. He had a contract of employment which provided for a one week notice period on either side during the first three months by way of a probationary period, but thereafter for the contract to be terminated on "not less than four weeks' prior notice in writing" (clause 2).

9. The contract required the claimant to devote the whole of his time and attention to his work. Clause 6.1 said that his normal working hours would be 8.30am to 5.00pm Monday to Friday, but with such additional hours as necessary for the proper performance of his duties. Clause 7.2 dealt with salary and said:

> **"The employee's salary shall accrue from day to day…"**

10. The salary was paid monthly three weeks in arrears and one week in advance.

11. On 15 February 2017 the claimant spoke to his line manager, Jake McCarthy. I accepted the claimant's evidence about what they discussed. Mr McCarthy was not called to give evidence. He told Mr McCarthy that he had a new job and his employer wanted him to start on 3 April. He was willing to give four weeks' notice from the end of February, by which time his probationary period would just have finished. He was doing this out of courtesy because he knew that the company would have difficulty recruiting a replacement. Mr McCarthy said he would discuss it with the directors.

12. The following day Mr McCarthy told the claimant that the company was happy and grateful for him to work a four week notice period. At just after 2.30pm on 16 February 2017 Mr McCarthy emailed the claimant asking for the resignation in writing, and the claimant responded at 3.09pm in the following terms:

> **"As discussed, I formally confirm my notice of resignation as of Friday 17 February 2017. I am happy to work a four week notice period which will make Friday 17 March my final day."**

13. The reply from Mr McCarthy about ten minutes later was simply to say:

> **"Thanks Matt, that should be sufficient for our records!"**

14. The claimant worked as normal for the next three weeks. On Thursday 9 March 2017 the claimant was approached by Mr McCarthy and told he was not needed for the following week. He took some advice and came into work on 10 March 2017. At shortly after 10.00am he was told by Mr McCarthy he could go home because he was not needed. He left the premises and did not return.

15. The claimant started his new job on 3 April 2017.

16. Payslips produced by the claimant showed that each month he was paid a gross salary of £3,333.33 and a car allowance of £300. The deductions for tax and national insurance varied, as did the pension deduction once he was auto enrolled in the respondent's scheme. In his last full payslip for February 2017 (which predated pension deductions) he had paid national insurance of £350.33 and tax of £543.20, leaving him with net pay of £2,739.80.

Submissions

17. The claimant submitted that he had agreed with the company that his employment would end on 17 March 2017, and the company broke that agreement

by terminating his contract early. He was entitled to a week's net pay. He calculated that as £684.95 based on taking his monthly net pay and then dividing it by four.

18. The respondent's position was that the claimant had only ever agreed to work until he was no longer needed, and therefore that there was no breach of contract. If there had been a breach, however, it said that he should only be paid for the two working days on 13 and 14 March 2017 since his notice had been given verbally on 15 February 2017. The company calculated the amount due to him on the basis of an email from its Payroll Department dated 18 April 2017. The working out had not been explained, but the net salary for a week had been identified as £563.33. The company was proposing to pay him two fifths of that because it was a working day calculation only.

Discussion and Conclusions

19. The first matter I had to decide was whether the claimant had been dismissed in breach of contract on 10 March 2017. I was satisfied that was the case. His exchange of emails with Mr McCarthy showed very clearly that he had given notice to end his employment with effect from 17 March 2017. His notice was given in the email not orally on 15 February. The contract required notice to be in writing. The terms of the emails were consistent with his oral evidence about what had been agreed. I rejected the proposition that the agreement was that he would only work until he was no longer needed.

20. It followed that by ending his employment on 10 March rather than allowing him to work to 17 March the company breached his contract and terminated it a week early without his consent. His claim succeeded.

21. As to the value of that week's pay, I took account of the provisions of the Apportionment Act 1870, the decision of the Supreme Court in **Hartley and others v King Edward XI College** handed down on 24 May 2017, and of the terms of the contract. The terms of the contract made it clear that salary accrued from day to day, in line with section 2 of the Apportionment Act 1870. There was no express or implied stipulation in the contract for any other basis of apportionment as envisaged by section 7. The appropriate approach, therefore, was to treat salary as accruing equally on each calendar day in a year.

22. There was dispute about how the net annual salary should be calculated. Mr Williams had done a calculation using an online salary calculator which produced a net annual figure of £32,755.20. This ignored any deduction in respect of pension, which I was satisfied was appropriate for these purposes as no contributions were being made to the pension scheme for the week in question. However, Mr Nield contended for a net figure of £29,596, which was based on the figures provided by the company's Payroll Department who had divided annual gross salary by 52.178 to produce a gross weekly figure of £838.46. I rejected those figures because how net figures had been calculated from gross was not apparent from the email. They also included a deduction for pension yet that was the claimant's own money in the week in question.

23. I therefore awarded the claimant £32,755.20 divided by 365 multiplied by 7, which was a figure of £628.18. That figure represents his net loss of earnings between 11 and 17 March 2017 inclusive.

Costs

24. The claimant had paid an issue fee of £160. He has not yet been required to pay the hearing fee of £230. He sought reimbursement of those matters. Mr Nield did not resist that and I ordered that the respondent should reimburse the claimant those figures.

25. The claimant also applied for reimbursement of expenses in the form of travel costs for today's hearing and for the loss of annual leave from his new job in taking time out to attend the hearing. Under rule 76 an order in respect of such costs can be made where a party or its representative has acted vexatiously, abusively, disruptively or otherwise unreasonably in the conduct of the proceedings, or if a response had no reasonable prospect of success. I was satisfied that condition was not met. Although my determination had been in favour of the claimant, the respondent and Mr Nield had acted perfectly properly in resisting the claim. There had been some discussions through ACAS and offers made, although below the level of the actual award. There was no unreasonable conduct by the respondent and therefore no basis on which these costs could be ordered.

Employment Judge Franey

12 June 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON

20 June 2017

FOR THE TRIBUNAL OFFICE

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number(s): 2401805/2017

Name case(s):	of	Mr M Williams	v	Sudlows Enterprise Services Ltd

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: 20 June 2017

"the calculation day" is: **21 June 2017**

"the stipulated rate of interest" is: 8%

MISS K MCDONAGH
For the Employment Tribunal Office