



EMPLOYMENT TRIBUNALS

Claimant: Mr P Moran

Respondent: Portico Estates Limited

HELD AT: Liverpool **ON:** 25 October 2017

BEFORE: Employment Judge Holmes

REPRESENTATION:

Claimant: In person

Respondent: Not in attendance or represented

JUDGMENT

The judgment of the Tribunal is that:

1. The respondent's application for a postponement is refused.
2. The claimant's claim for unlawful deduction from wages is well founded, and succeeds. The respondent unlawfully deducted £2,333.33 from the claimant's wages, and the respondent is ordered to pay that sum to him, less the appropriate deductions for tax and national insurance, for which the respondent will account to HMRC, a net sum of **£1,859.98**.
3. The claimant's claim for pay in lieu of untaken holiday is well – founded and succeeds. The claimant was entitled to pay in lieu of 5 days untaken holiday, a gross sum of £538.46, less the appropriate deductions for tax and national insurance, for which the respondent will account to HMRC, a net sum of **£429.22**.
4. The claimant's claims for damages for breach of contract are well founded and succeed. The claimant is entitled to one week's notice pay, in the gross sum of £538.46, less the appropriate deductions for tax and national insurance, for which the respondent will account to HMRC, a net sum of **£429.22**.
5. Further, the claimant is entitled to damages for breach of contract in relation to the failure of the respondent to make a payment to him in respect of his previous pay in lieu of untaken holiday when employed by Ward & Co., a gross sum of

£2,630.78, less the appropriate deductions for tax and national insurance, for which the respondent will account to HMRC, a net sum of **£2,021.22**.

6. Further, the tribunal being satisfied that the claimant sustained financial loss by reason of the respondent making the unlawful deductions from wages found above, it awards the claimant, pursuant to s.24(2) of the Employment Rights Act 1996, the sum of **£92.35** in respect of fees and charges incurred by the claimant.

REASONS

1. The Tribunal this morning has been listed to consider the claims made by Mr Moran against his former employer, either Portus Capital Partners Limited or Portico Estates Limited, and I will come to that in due course, but either way this hearing has been listed following a previous preliminary hearing held on 18 August 2017 in front of Employment Judge Shotter, at which she made Case Management Orders and the hearing was listed for today.

2. The history of the claims is that the claimant originally presented his claim form on 20 April 2017, and his claims relate to a period of employment in November and December 2016. He is claiming sums due to him, he alleges, in respect of that period and he makes the point this morning that that is now some 11 months ago, and that he has been kept out of his money for that period.

3. In terms of the history of the claim thereafter, being the sort of claim that it was, it was originally listed upon issue on 19 June 2017 at 2.00pm for one hour. The respondent in due course, after some re-service I think had occurred at some point, did submit a response, and also suggested that one hour may not be sufficient to deal with the claims, given the issues that are involved, which are primarily issues in relation to what was agreed between the claimant, and Mr Ward in particular of the respondent in relation to his pay for November 2016, holiday pay from a previous employment and other allied matters. So in light of that information and indeed, although the claimant would not necessarily be aware of this, not uncommonly for a claim of this nature, it was postponed from the one hour hearing that was originally given, and was re-listed to be heard for three hours in light of the issues that were raised. Additionally, Case Management Orders were made on 14 June 2017 setting out what both parties were to do in relation to the case going forward, and in due course the hearing was re-listed for 18 August 2017.

4. The respondent, however, made an application to vacate that hearing on the basis that Mr Andrew Ward, its main witness, was out of the country, and indeed an application was made on the basis that he had a business meeting in Spain; there was a meeting convened which it was said he had to attend and in support of that application a copy of a notice convening that meeting was sent. Consequently on the basis that Mr Ward was, and the claimant does not dispute this, a crucial witness, the tribunal did accede to that request, and did postpone the hearing on 18 August 2017. But, whilst it postponed the liability hearing it nonetheless kept the matter in the list, and it converted the hearing from a final hearing to a further preliminary hearing. Consequently the Tribunal, in the person of Employment Judge Shotter

saw the parties, Mr Moran appearing in person and Mr Wilkinson appearing on behalf of the respondent on that occasion, when further Case Management Orders were made, one of which was that the claimant would be responsible for the preparation of the trial bundle, it having previously been the case that the respondent should have been, but the claimant effectively complaining that the respondent had dragged its feet in relation to that , therefore took over responsibility for that particular case management matter. The hearing date was set either at or shortly after that hearing, because it was included in the order that was sent to the parties on 23 August 2017, and matters have proceeded since then.

The postponement application.

5. Mr Moran has attended today ready for his claims to be heard, and most anxious that they be heard, but yesterday in the post he received an application from the respondent to postpone today's hearing. He received that application, but no such application was made to the tribunal, and the tribunal only became aware that any such suggestion had been made by the respondent because the claimant, very helpfully, telephoned the tribunal to enquire what was going on, and it was that that alerted the tribunal to the fact that the respondent was seeking a postponement at all because up until then the tribunal had no indication whatsoever that the respondent was seeking this further postponement. As a result of that, and on the tribunal's own initiative, which frankly should not have been necessary, the tribunal contacted the respondent's representative, Mr Wilkinson.

6. Mr Wilkinson, it should be noted, appeared for the respondent on the previous occasion as a director of the company but is also apparently a solicitor, albeit it would appear a non practising one. He has been conducting the matter, it would seem, on behalf of the respondents for some time, and certainly appeared for them on 18 August 2017. It is perhaps even more surprising then that, other than to notify Mr Moran of the application to postpone, he did not see fit to notify the tribunal, and it was only when the tribunal contacted the respondent by telephone late yesterday that the application was actually made to the tribunal at all.

7. It may have been the case, and does sometimes happen that a respondent who wants a postponement "sounds out", as it were, the opposition to see if there will be agreement, because obviously if there is an agreement to postponement then it is often easier to persuade the tribunal that such a postponement should be granted. But it appears that that is not the case here, because the claimant did not agree, when he got the request from the respondent, and consequently at 5.40pm yesterday evening the respondent contacted the respondent by email, and Mr Wilkinson then responded and sent to the tribunal a copy of the letter that had been sent to the claimant seeking a postponement. He effectively reiterated that application to the tribunal referring to "extenuating circumstances", and enclosing in that email a brief letter from a Dr Sriram, (dated, it is to be noted 19 October 2017) in relation to Mr Andrew Ward which reads as follows:

"This is to inform that Mr Andrew Ward is been [sic] seen in GP surgery on 19/1017 with low back pain and been advised to rest and avoid long travel with is [sic] intensity of pain..." [There is no full stop at the end of that sentence, if sentence it be].

8. That was sent to the tribunal in support of the respondent's application that the hearing be postponed.

9. That matter in fact was referred to myself, and a reply was sent from the tribunal to the respondent's representative at 18:08 on 24 October 2017, indicating that I had considered the request for a postponement, and had noted it had not been made until 17:40 on the day before the hearing, despite the fact that, according to the information provided by the respondent the witness, Mr Ward, had been aware since 19 October 2017 that he was unwell, because he saw the doctor on that day. No prior indication that such an application may be made was given to the tribunal or indeed to Mr Moran. I also went on to comment that the medical evidence adduced was brief, and that it did not state in terms that Mr Ward could not attend a hearing. Also it was recorded that Mr Moran had been contacted and objected to the application, and for those reasons the application was refused.

10. Following that refusal, however, during the evening on 24 October 2017 Mr Wilkinson responded further by an email to the tribunal of 18:44 in which he explained that the respondent had waited until 24 October to see if Mr Ward's condition improved, which it had not, otherwise there may not have been any need to make such an application.

11. In terms of representation, because it is said on behalf of the respondent that Mr Ward was not only to be a witness, but was also to represent the respondent at this hearing (whereas Mr Wilkinson had been previously been its representative), Mr Wilkinson said that he was unable to attend as he was working away and it had been arranged that Mr Ward would represent the company as he was the CEO and the main witness. He went on to say whoever might have been representing the company could not have proceeded in any event without the main witness for the company being available to give evidence on its behalf, and he expressed his regret that the respondent had to make the application but that it was a situation which had, as he put it, "arisen unexpectedly". He went on to say that he asked the Tribunal to take this into account when considering the matter but unfortunately circumstances had prevailed in this way and no-one could in fact attend and that the respondent had no choice but to ask the tribunal to deal with this application on the basis of the letter and emails provided.

12. That was followed up by a further email at 20:30 in the evening where Mr Wilkinson says this:

"On further reflection on this matter we would advise that it has been impossible to undo the arrangements that we made for the hearing tomorrow, this resulting in it being impossible to be represented purely through circumstance. We have complied with all Case Management Orders so in the absence of this circumstance would have been ready to have the matter heard tomorrow.

We fully appreciate that such an application is entirely at the discretion of the Tribunal but we would ask that in these circumstances the Tribunal exercises that discretion in our favour. We consider our presence and in particular the presence of our main witness is essential for a fair trial of this case."

13. Mr Wilkinson then goes on to refer to the Human Rights Convention and the right to a fair trial under article 6, and how to deny the application and to deny the respondents the opportunity to call their witness would be to deny them a fair trial, and the interests of fairness; and he repeated the application although he accepted that the claimant would undoubtedly be inconvenienced.

14. The claimant this morning has repeated his strenuous objection to this application. He cites the general history of this matter pointing out that it has gone on since November 2016, 11 months now, and has submitted that the respondent has throughout deployed delaying tactics and dragged matters out. In support of that he submits that at the very outset when these issues first arose Mr Ward led him to believe that he would sort them out, perhaps in an attempt to string matters out so the claimant would thereby miss the date for filing his claims, but he did file them in time. Thereafter, the claimant points out that the respondent sought and was granted two postponements.

15. In terms of Case Management Orders, the claimant does accept that the respondents have largely complied (albeit he would say belatedly) with those Case Management Orders, save in relation to a counter Schedule of Loss that was ordered to be provided in the last hearing which has not been so provided. He also points out that in the last hearing, as recorded in paragraph 6 of Employment Judge Shotter's Order, the respondent did accept that there was an entitlement to statutory holiday pay in respect of 4.7 days, and she invited the parties to agree the amount that so that a judgment could be issued. The claimant says he provided those figures to the respondent but they have not responded to that and this is a further example of them simply not accepting liability for what has in fact been an agreed amount and continuing to drag this matter out to his detriment.

16. In terms of the position of Mr Ward and the medical evidence, the claimant points out that he himself, and his wife, of course, live quite near to where Mr Ward resides. His address is on the brief medical report that has been provided and is indeed in Prestatyn, and the claimant himself is from the Prestatyn area and lives relatively close to Mr Ward. In terms of travelling to the tribunal the claimant has been able to do so this morning by car; it has taken around about 50 minutes to an hour and, if anything, he believes Mr Ward would have been closer and could have got here sooner.

17. In terms of medical positions, the claimant himself has had a hip operation and indeed attends today with a crutch. He points out that he has got here and notwithstanding his medical needs has been able to attend, and he suggests in these circumstances that Mr Ward should and could have been able to attend as well. He has also made observations in relation to the last postponement where Mr Ward was said to be in Spain on business, and Facebook sightings that Mr Moran has had of Mr Ward on that occasion suggest that there was more than just business involved, and there was a degree of entertaining, which, of course, is not mutually exclusive, but he does point out that there are pictures on Facebook which show that Mr Ward whilst on business on that occasion was also apparently receiving entertainment, or certainly leisure activities other than simply just attending a meeting. The point is made that the respondents had that postponement in circumstances where they sought and was granted it on the basis of what they told

the tribunal, and here is a second application made at this late stage for a further postponement, further delaying things as far as Mr Moran is concerned.

Discussion and ruling.

18. The tribunal therefore has to decide whether to accede to the respondent's application. In doing so, as Mr Wilkinson rightly points out in his correspondence, it has a discretion, and that is a discretion to be exercised judicially in the interests of justice and of both parties. It is a balancing act. There is no right to a postponement in these circumstances, and there is equally no right to prevent one. Furthermore, when a party contends that to refuse a postponement would effectively deprive it of a fair trial because its main witness is unavailable, and consequently the claimant would effectively have an unopposed hearing, the tribunal does consider very carefully whether to accede to such a request, because, ordinarily, if a witness is unavailable, and that is a crucial , and indeed seemed the only witness for the respondent in this case, then a tribunal would ordinarily be sympathetic to an application for a postponement, given the seriousness of the effect of denying that postponement to the party seeking it.

19. That said, as is clear from the Presidential Guidance on postponement applications and how they should be made and the material that should be before the tribunal, this is not a discretion which is exercised simply because a party seeks it, and in terms of weighing up the relevant factors, one factor is whether or not a previous application has been made by either side. In this case there was initially a postponement from the initial listing , which, frankly was going to be inevitable once it was clear that the claims were contested, originally being listed for only an hour as this type of claim tends to be on issue. So that first postponement, whilst doubtless frustrating to the claimant, was not really one that was at the respondent's behest: it was probably inevitable once it was clear that a short hearing would not have been sufficient to deal with the issues. So to that extent I discount that in terms of postponement application..

20. The second application, however, is rather different, because that is an application made on the basis again of the unavailability of Mr Ward. Mr Ward is clearly, and the claimant does not dispute this, a crucial witness for the respondent because he is the person with whom it is alleged any agreements as to payments to be made or not to be made to the claimant were made, but that application was made on the basis that Mr Ward had business commitments in Spain that he had to attend to, and consequently would not be available for the hearing on 18 August 2017. In support of that application documentation was produced indicating that there was a meeting Mr Ward appeared to be required to attend, and on that basis the Employment Tribunal, in this instance myself, exercised its discretion in favour of the respondent.

21. Having said that, at the time that was rather on the basis of the benefit of the doubt. That is a decision I well remember taking, and havoring somewhat about it, because it did seem to me that it may be the case that this was a respondent choosing to put one business interest over another, and choosing to attend to one particular aspect of business whilst there was the outstanding Tribunal claim. On balance at the time, that being the first such application that was made, and given that there was evidence in support of it in relation to the convening of a business

meeting that involved Mr Ward in Spain, the tribunal did exercise its discretion, but it was very much on balance.

22. That is, it seems to me, a highly relevant factor in determining this application. This application has a number of disturbing features about it. The first is that it is clear from the very scant, it must be said, medical evidence that has been provided that Mr Ward consulted a doctor on 19 October. Mr Ward presumably knew that he was due to attend the Tribunal on 25 October, some six days later. Whatever it was that prompted him to contact his GP and see him must have been such that he considered that it may require treatment, and would be a potentially incapacitating matter. That would be doubtless a reason why he saw his GP. No explanation, however, whatsoever is given as to why at that stage neither he nor Mr Wilkinson saw fit to alert the claimant or, more importantly, the tribunal to the fact that he had had this consultation, and that therefore there was a risk, and it may have been no more at that stage, that he would not be fit to attend the Tribunal on 25 October. That would at least have put everyone on notice and given them some time to consider what to do in those circumstances. The choice appears to have been made, however, not to do that and a “wait and see” attitude was taken it would seem by Mr Wilkinson and/or Mr Ward, as to whether he might get better, and then yesterday, that being of course some five days after the consultation, it was apparently realised that he had not got better and would not be able to attend the Tribunal.

23. In those circumstances the application was made, but not made to the tribunal, it was made initially solely to Mr Moran. Frankly, that is staggering given Mr Wilkinson is a solicitor, and he has attended on behalf of the respondent previously. Quite why Mr Wilkinson made the initial approach by letter by post to the claimant, which it has to be observed is probably the slowest way of making it, without contacting the tribunal even to say that an approach had been made to the claimant, is a mystery. It may be the case, as I suggested to Mr Moran in the course of the discussion, that this was a case, as sometimes happens, where a respondent sees if a claimant will agree to a postponement, and then makes a joint application, and then takes a view if there is opposition that it will not pursue such an application, but that has not been the case here. Having made the application to Mr Moran and he having then contacted the Tribunal it was the tribunal that had to contact the respondent to find out if any such application was being made. The first it knew of any application being made then was at 17:40 on 24 October 2017. It virtually had to prompt the respondent into making that application, which it then did.

24. In support of that application, of course, is the letter written to Mr Moran and in similar terms to the tribunal in which reference is made to “extenuating circumstances” and a request is made, and it is put in those terms, to consider agreeing to a postponement. That is hardly the strongest application, and indeed it is not the basis upon which the matter has been put to the tribunal today.

25. In support of the application if the very brief, as I observed on 24 October, medical report of 19 October 2017 in relation to Mr Ward. One overlooks its grammatical inaccuracies, presumably because it was done in haste, but basically in terms of what this establishes, it establishes that the witness, Mr Ward, saw his GP on 19 October with low back pain and that he had been advised to “rest and avoid long travel with is [“his”, presumably] intensity of pain”. That is all it says. It does not say Mr Ward is unfit to attend the tribunal and give evidence. It does not say he

cannot travel. It does not say he cannot get through a tribunal hearing. It says he has been advised to rest and avoid long travel. It does not actually give a diagnosis. It says he has been seen with low back....in fact the word "pain" is missing (I had not noticed that before), but presumably it means low back pain, and that is the advice that has been given. Apparently no other treatment has been given. There is no reference to painkillers or any other treatment, physiotherapy or anything being advised. That is the extent of the medical evidence. I should add that this letter is dated 19 October 2017, the day of the consultation, it has not been obtained after it.

26. By contrast, and it is a very valid point made by Mr Moran, he having undergone a hip operation, has attended today. He has been brought by his wife in a car, and has been able to get here in less than an hour. He makes the equally valid point that in terms of where Mr Ward is travelling from it is about the same distance, if anything slightly less, than where the claimant has travelled from. He makes the point that if he could get here, why could Mr Ward not get here? Frankly, on the medical evidence, the Tribunal cannot see any reason why Mr Ward could not get here. In terms of low back pain, a large proportion of the population suffers from low back pain at some time or another, but they manage their day-to-day affairs, they manage to get around the country and get to hearings and things of that nature. The tribunal at the moment itself is dealing with a case with someone with a fused hip, in the middle of a two week hearing in Blackpool, and he is able to get to and from the tribunal, albeit with breaks, and things of that nature, and the tribunal can always accommodate people's difficulties in terms of medical issues. Frankly, the medical evidence adduced in this case falls way short of any indication that Mr Ward cannot attend today. At best it suggests that he might have a problem with low back pain, and it would be better if he rested and did not travel long distances. Frankly that is insufficient to satisfy the tribunal that he is unable to attend today, and given the previous history of the postponement granted to the respondent in August 2017 on the basis of Mr Ward's unavailability "for business reasons" the tribunal is now concerned, as indeed the claimant is, that the respondent is in fact now delaying these matters, and does not wish to attend the tribunal to see them concluded.

27. Consequently, the basis for the application has not been made out, and whilst appreciating that the respondent will thereby be deprived of its main witness, the discretion in relation to adjournments is not absolute. The interests of justice cut both ways and although it is right that the respondent will be prejudiced, a fair trial means a fair trial to both sides. In my judgment it would not be fair to the claimant now to make him wait any longer by granting this application on what is, frankly, a very flimsy basis, and the application is refused and the hearing will proceed.

28. Further, having read the papers in this case which the tribunal had not done at the time that the application was initially considered, it has become apparent that, in addition to the witness statement of Mr Ward which the respondents would rely upon, they have also submitted a statement of one Raymond Bacon, who indeed as the papers suggest would be a potentially relevant witness. Indeed it is noted that originally the respondent proposed to call some three witnesses, and presumably the third of those would have been the other person who allegedly was present when agreements were made in relation to the claimant's pay. That person has not made a witness statement but Mr Bacon has. The question arises, therefore, as to why Mr Bacon could not attend the tribunal today on behalf of the respondent. If Mr Ward was unavailable, then Mr Bacon presumably could have turned up to represent the

company, and indeed give the evidence that he was going to give from his witness statement. The claimant could have given evidence; Mr Bacon could have given evidence, and if the Tribunal could proceed no further because of the absence of Mr Ward, the case could at least have been started and adjourned, if the tribunal thought fit, for Mr Ward then to attend in due course. No reference has been made whatsoever to Mr Bacon and why he cannot be present. He obviously is not present, and no-one has attended from the respondent at all. This further reinforces the Tribunal's view that the basis of the adjournment was indeed a very flimsy one and this reinforces its decision, if it needed it, to deny the application.

The claimant's claims.

29. The Tribunal having declined the respondent's application for a postponement proceeded to determine the claimant's complaints. The claimant has made a witness statement and has confirmed it on oath before the Tribunal today, and in support of his claims has referred to a number of documents which are included in the bundle before the tribunal. Also before the tribunal were witness statements from Mr Andrew Ward and Raymond Bacon, which had been submitted on behalf of the respondent, but, of course, they have not attended to give that evidence and that evidence has not therefore been tested in cross examination. To the extent, however that the respondent's case has been advanced in the response, and indeed in those witness statements, the respondent's case has been considered by the tribunal and has been given due weight. These are the findings of the Tribunal in relation to the claims in terms of the disputes between the parties.

30. The claimant's witness statement sets out the circumstances in which he came to be employed by the respondent, which arose out of the cessation of a previous employment with a company called Ward & Co Property Investment in which Mr Andrew Ward was also involved, but which went into creditor's liquidation in September 2016. Arising, as it were, from the ashes of that company Portico Estates Limited arose, and there was a discussion with the claimant about going to work for that company. Not surprisingly, given what had happened to that company he was reluctant to do that, but in terms of incentive to do that he has contended, and I accept on the evidence, that there was an agreement made between himself and Portico Estates Limited that his new employer would be responsible for meeting the unpaid holiday pay claim that he had in relation to Ward & Co., and I accept that it was a term of his employment that his new employer, Portico Estates Limited, would pay that liability which otherwise of course would potentially be one that the claimant would not receive, or certainly not receive in a timely fashion, so that was part, I accept, of the agreement that he made in relation to going to work for Portico Estates Limited.

31. The terms of his new employment were actually set out in a document which has been produced to the tribunal in the bundle at page 50, which is stated to be, and indeed clearly was, a contract of employment between Portico Estates Limited and the claimant. It sets out the usual terms as one would expect in such a document and in particular, in relation to remuneration at clause 4 onwards, it is stated that the claimant's salary will be £28,000 per annum subject to tax and national insurance deductions, and at 4.2 that it would be paid in equal monthly instalments in arrears on or around the last day of each month by credit transfer into the bank account. Any changes to these arrangements would be advised to the

claimant, and the timing of any commission payments would be dealt with separately. So that is the basis upon which the claimant was engaged by the respondent company and was the contractual position. The fact that that is a written agreement, of course, carries very great weight and consequently the onus upon any party seeking to persuade the court or tribunal that those terms which have been reduced into writing are not in fact the terms, or that they were subsequently varied has the burden of establishing that contention.

32. In essence, the claimant worked for some two months or so for the company. He was paid in respect of the first month, although the payments were actually made by Mr Ward personally rather than the company, but nonetheless the claimant was paid.

33. The respondent's response to the claimant's claim for pay in respect of November is that the claimant agreed to forego salary for that month. The claimant disagrees that that is the case, but the respondent's case is that he did so agree and consequently, notwithstanding that a payslip was issued for that month's pay (page 64 of the bundle) and is in the same rate of pay as the previous month, some £2,333.33 gross, notwithstanding that such a payslip was issued that the claimant had actually in the meantime agreed to forego his salary for that month and effectively to work for nothing, effectively going onto a commission only basis. The claimant's position set out in his witness statement, and indeed amplified in the answers to the questions I asked him today is that that is not the case. He accepts, as indeed the respondent has said in its evidence, that there was discussion as to whether he would actually go onto such an arrangement, but he is adamant and clear, and I accept his evidence today in written and indeed oral form, that he never actually agreed to do that. To the extent that there was discussion in a telephone call, a transcript of which has been provided by the claimant in the bundle with Mr Ward on 1 December, one can see a degree of ambiguity in the respondent's position, because what effectively Mr Ward appears to be saying in that conversation, and indeed other occasions, is that the company could not pay the claimant. That may have been so, but the fact the company "can't pay" is not necessarily the same as the claimant then agreeing to forego pay. The poor financial position of an employer does not mean that the employee then agrees to forego their right to salary even if the company is saying it is having difficulty in paying it. Mr Ward may well have been right about the company's ability to pay, but ultimately, in terms of whether the claimant agreed to forego what was clearly his contractual entitlement set out in his contract of employment and reinforced by the payment of not only one but two payslips in the terms that I have described, I am satisfied that his contractual entitlement remained the same. More importantly the respondent has not, on the evidence that is before the tribunal, which of course is untested because no-one has attended to give that evidence orally, the respondent has not persuaded the tribunal, on that evidence, to discount the claimant's evidence that no such agreement was made. I find there was no variation in the terms of the contract of employment, and the claimant remained entitled to be paid for the month of November. He was not paid and consequently that claim succeeds.

34. In relation to what occurred thereafter in the conversation on 1 December, as is clear from the transcript, this employment relationship came to an end. The claimant says that is when he was effectively summarily dismissed, and indeed whilst not expressed in those terms clearly, from what Mr Ward was saying in that

conversation the relationship was over. There was, I am satisfied, a dismissal at that stage. That was a dismissal without notice and, of course, without notice pay, and I am satisfied on that basis that the claimant is entitled to pay in lieu of notice and I will make an award in respect of that as well.

35. In terms of holiday pay, as an employee of the respondent for some two months the claimant has a right to pay in lieu of accrued but untaken holiday. He took no holiday in that period and on that basis he had accumulated what rounded up will be five days' entitlement and so he is entitled to holiday pay which is a claim by way of a deduction from wages or under the Working Time Regulations, it matters not, but he is entitled to five days in lieu of untaken holiday in respect of working for the respondent.

36. I am also satisfied, as I have already found, that an agreement having been made that the respondent would meet the liability for unpaid holiday pay that the claimant was entitled to from his previous employment with Ward & Co., that that too is established and that as a contractual provision that is one that was a contractual term of his engagement with the respondent and consequently in failing to pay that sum the respondent is in breach of contract and the claimant is entitled to damages.

The awards of the tribunal.

37. In terms of the awards, therefore, in respect of the first claim for unlawful deduction from wages for November 2016 the award will be £2,333.33 less the appropriate tax and national insurance which from the payslip provided would mean a net award of £1,859.98. The second award will be in relation to pay in lieu of untaken holiday with the respondent, five days, in the gross sum of £538.46, a net sum of £429.22. Similarly in relation to pay in lieu of notice, that would also be a week, that being the claimant's entitlement, both statutory and indeed under the terms of the contract, and that coincidentally is also five days' pay, a week's pay, £538.46 gross, £429.22 net.

38. In terms of the holiday from Ward & Co., the holiday pay due from that company which the respondent agreed to pay, the claimant has calculated that by reference to his salary with Ward & Co. at £36,000 per annum. He had 19 days' untaken holidays at the conclusion of his employment with that company. That is a weekly rate of £692.30 and 19 days on that basis gives a gross entitlement to £2,630.78, some £2,021.22 net.

39. Thereafter in the claimant's Schedule of Loss he has included a sum for interest in the sum of £3,415 or so, and the Tribunal did explore with him the basis for such a claim. The basis for it in effect was that not having been paid by the respondent some £4,000/£5,000 or so as it turns out to be, he felt he had effectively "lent" the respondent that money because it kept that money and used it for its own end which had it borrowed that money either by way of a payday loan or indeed as an unsecured commercial loan would have attracted substantial interest and the claimant has accordingly applied such interest rates to the amounts that he has been unpaid by the respondent. The tribunal can understand how he has come to do that and appreciates his feeling that he would be entitled to such a sum. Unfortunately, however, the Tribunal does not have power in claims of this nature to make awards of interest, and certainly not on that basis, so consequently whilst the claimant may

feel that he has, as it were, effectively funded the respondent to the tune of the £5,000 or so that he has been unpaid, the Tribunal cannot award him notional interest, as it were, on those sums as part of its awards.

40. The position, however, is different in relation to the next head of claim that he has, which is for overdraft fees and interest, and as a consequence of not being paid by the respondent towards the end of 2016, and of course he was wholly unpaid from October onwards, he has incurred charges and interest from his bank, and at page 74 of the bundle is a letter from his bank dated 4 October 2017 which has set out the charges which he has incurred and has continued to incur. It seems to me as permitted under the amendments to section 24 of the Employment Rights Act, I think it is section 24(2) that allows this, but basically the Tribunal has power where making awards in respect of unpaid wages to award consequential losses of this nature and I am satisfied, as indeed is clear, that the failure to be paid these substantial sums at the time when they were due has indeed resulted in these charges being levied upon the claimant in the total sum of £92.35 and I do make additional awards in respect of that sum as well.

41. Finally, for some reason, in the Orders made following the last hearing the name of the respondent was given as Portus Capital Partners Limited. The claim form did refer to Portus Capital Partners, without the "Limited", but the response entered was by Portico Estates Limited, trading as Portus Capital Partners. The recent correspondence from Mr Wilkinson has been on stationery bearing the details of Portico Estates Limited. That company is clearly the correct respondent.

Employment Judge Holmes

Dated : 10 November 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON
14 November 2017

FOR THE TRIBUNAL OFFICE



NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number(s): 2401971/2017

Name of Mr P Moran v Portico Estates Limited
case(s):

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: 14 November 2017

"the calculation day" is: **15 November 2017**

"the stipulated rate of interest" is: 8%

MISS K MCDONAGH
For the Employment Tribunal Office