



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr G Broadway

**Respondent:** Knowsley Metropolitan Borough Council

**HELD AT:** Liverpool

**ON:** 10 October 2017

**BEFORE:** Employment Judge T Vincent Ryan

## REPRESENTATION:

**Claimant:** Mrs T Broadway (the claimant's wife)

**Respondent:** Mr A Johnson, Solicitor

# JUDGMENT

The judgment of the Tribunal is:

1. The claimant resigned from his employment with the respondent on 31 March 2017 but he did not do so in circumstances in which he was entitled to terminate his employment without notice by reason of the respondent's conduct. The claimant was not constructively unfairly dismissed.
2. The respondent made unauthorised deductions from the claimant's wages earned in respect of work performed by him on 15-17 and 20-22 March 2016 inclusive. The sum payable by the respondent to the claimant in respect of this judgment is to be determined at a remedy hearing.
3. The respondent failed to pay to the claimant the holiday pay due to him that had accrued up to and including the effective date of termination of his employment on 31 March 2017 during the holiday year immediately preceding that date. The sum that the respondent is to pay to the claimant in respect of this judgment is to be determined at a remedy hearing.
4. The claimant's claim that the respondent failed to pay to him wages and/or sick pay due to him (and therefore that the respondent made unauthorised deductions from wages and/or was in breach of contract) for the period from 23 March to 31 March 2017 is not well-founded, fails and is dismissed.

# REASONS

## 1. The Issues

The issues in the case, that is the questions that the Tribunal had to decide upon, were agreed with the parties at the outset when the claimant clarified what it was exactly that he was alleging against the respondent. The questions that the Tribunal had to decide upon were:

- 1.1 Did the respondent act in such a way as to seriously damage or destroy the relationship of trust and confidence with the claimant, justifying the claimant resigning and claiming that he had been dismissed in one of the following ways:-
  - 1.1.1 Requiring the claimant to work in circumstances that endangered his health and safety;
  - 1.1.2 Requiring the claimant to work in circumstances where the health and safety of pedestrians, and specifically children, were put at risk;
  - 1.1.3 By the attitude of management to the claimant which was discourteous, unfair and applied underhand pressure upon him causing him stress;
  - 1.1.4 In not dealing with a request that he be allowed to reduce his hours of work (referred to the claimant in his resignation letter as "financial restraints");
  - 1.1.5 Whether one or more of those matters, if they amounted to breaches of contract, were the reason for the claimant's dismissal or had an influence upon it;
  - 1.1.6 Whether the claimant delayed too long between the matters of which he complained and his resignation such that he could be said to have accepted the respondent's behaviour?
- 1.2 Whether the respondent breached the claimant's contract of employment expressly with regard to his contractual entitlement to sick pay by requiring him to make personal contact with his line manager in accordance with its sickness policy.
- 1.3 Whether the respondent failed to pay to the claimant wages and/or sick pay due to him for the period from 15 March 2017 to his resignation on 31 March 2017, where the claimant was in work and says he had earned wages for the period from 15 March to 20 March 2017, but that he was ill for the period from 23 July to 31 March 2017 and did not attend work.
- 1.4 Whether the claimant was entitled to holiday pay during the final holiday year in which he worked, and whether the respondent paid to him holiday pay that was due to him or that he had accrued and was due on termination of employment.

## 2. The Facts

- 2.1 The claimant was employed by the respondent as a School Crossing Patrol person (“SCP”) from 23 October 2003 until his resignation on 31 March 2017 which he confirmed to the respondent in an email dated 3 April 2017 which appears in the respondent’s bundle at pages 17-20. The claimant worked 18 hours per week between Mondays and Fridays of each week on three shifts, namely 07:50 to 09:00, 12:00 to 13:20 and 14:50 to 16:00. He worked at a pedestrian crossing at Valley Road, Kirby. This crossing was a public crossing for pedestrians on a busy dual carriageway and he was appointed SCP because of the use of that crossing by students attending a school and attending a college. The claimant used to oversee the carriageways that took traffic towards Kirby. His wife (and advocate at today’s hearing) worked with him, working the same shifts and hours per week, managing the crossing on the carriageways that led from Kirby to Fazakerley.
- 2.2 There is no dispute that this was a very busy thoroughfare. At the material time in question, that is from Monday 6 February for a period of some eight weeks, the respondent was engaged in installing pedestrian crossing lights and consequential road design and improvement so that the crossing would be traffic light controlled. It was not intended that the installation of lights at this crossing would lead to termination of the claimant's employment or redeployment, but the lights were seen as additional assistance and a safety measure. The roadworks and installation of lights was being overseen by contractors referred to as “Kings”. Kings engaged subcontractors.
- 2.3 The claimant’s immediate line manager was Patrick Titman (Security and School Crossing Patrol Coordinator) who gave evidence to the Tribunal. Mr Titman’s immediate line manager was Mr Stephen Donnelly (Security and School Crossing Patrol Manager) who gave evidence to the Tribunal. Mr Richard Thorpe (Road Safety and Sustainability Team Leader) also gave evidence to the Tribunal on behalf of the respondent, as he liaises on a regular basis with Stephen Donnelly and Patrick Titman as he did throughout the material events in this case, in a situation where his responsibilities included design and supervision of road safety and sustainability engineering schemes reviewing amongst other things the suitability of traffic management layouts and road safety education. The claimant gave evidence to the Tribunal as did his wife, who confirmed the truth of the claimant's statement having been intimately involved in all the matters described below.
- 2.4 Because of the nature and extent of the roadworks being undertaken by Kings on behalf of the respondent at the Valley Road, Kirby crossing commencing on 6 February 2017, it was suggested that an alternative crossing place be used which would be patrolled by the claimant and his wife in their roles as SCPs. The alternative crossing site was some hundreds of yards further along the dual carriageway. Through habit or perceived convenience, or for whatever personal reason, a considerable number of pedestrian students at the school and college nearby continued 6 and 8 February 2017 to cross Valley Road at the original

crossing site and not the alternative that was provided for them. The alternative was considered by Kings and the respondent's experts to be safer. The situation, however, was rendered unsafe by the persistence particularly of students in crossing at the original crossing place during the roadworks. The claimant raised his concerns which were shared by Kings and the respondent.

- 2.5 The respondent re-commissioned the original crossing site and abandoned the alternative. There was one brief period of a return to the alternative site to make good deficiencies on the original site, but to all intents and purposes the original crossing site was staffed by the claimant and his wife throughout the remainder of February and most of March.
- 2.6 Throughout February and until 3 March the claimant and his wife raised concerns at various times about the conduct of pedestrians and of road users, suggesting that the safety precautions in place as to the positioning of cones, cordoning off of lanes and signage, rendered the site unsafe for both them and pedestrians.
- 2.7 There is no doubt that the working environment was compromised and safety issues indeed arose because of the behaviour of some pedestrians, some drivers, and because of prevailing weather conditions which included wet and windy weather which disrupted the cones which had to be placed to close off lanes to assist in the navigation of traffic away from pedestrians and pedestrians away from traffic. There were further concerns on occasions when either Kings or their subcontractors parked vehicles close to the crossing. Some signage on various days slipped down the posts and had to be altered or removed. Some of the efforts made at securing the barriers between traffic and pedestrians and vice versa by way of cones proved inadequate. The conditions were made worse by puddles in the vicinity of the crossing following adverse weather.
- 2.8 The respondent reacted to concerns raised by Kings and by any subcontractors via Kings and specifically those raised by the claimant and by Mrs Broadway. When concerns were raised through the good offices of either Mr Thorpe, Mr Titman or Mr Donnelly, remedial action was taken to reduce or remove hazards and to mitigate against the potential risks created at the time of the roadworks by the conduct of pedestrians, drivers and by adverse weather. The measures taken by the respondent by way of signage, coning and lighting were at all times compliant with the applicable traffic safety regulations and were in accordance with assessments carried out by the respondent's officers who instructed its operatives and those of both Kings and subcontractors via Kings to comply with safe practices and procedures.
- 2.9 On occasions, the claimant and/or Mrs Broadway were concerned about matters that they did not raise with the respondent, such as specific "drive throughs" where motorists would pass through the crossing without heeding the presence of the claimant or pedestrians. Similarly, there were occasions when particularly motorists but also contractors

were rude and abusive to the claimant or to Mrs Broadway. Such issues as drive throughs and abuse from motorists and pedestrians were usual and commonplace regardless of the roadworks.

- 2.10 On 3 March 2017 in a further attempt to reduce any concerns and risks the respondent saw to the installation of temporary traffic lights through its contractor and their subcontractors. Those lights were in place until 17 March 2017. Further lighting referred to as “wigwags” were removed. Wigwags are flashing lights to indicate to road users and pedestrians that there is a patrolled crossing. It was the considered professional opinion of the respondent’s experts that sets of flashing wigwags created a hazard in close proximity to other lighted traffic signals, and it was appropriate to remove them. The respondent formed the conscientious view that this was an appropriate step notwithstanding the concerns expressed by the claimant through Mrs Broadway.
- 2.11 On 21 March 2017 the claimant made a written request to vary his working hours such that he would not have to work the lunchtime shift from 12:00 hours to 13:20. The request appears in the respondent’s bundle at page 21. In his request, the claimant stated:
- “I have had to take on further employment elsewhere, unfortunately the hours of this new employment conflicts with the lunchtime crossing.”
- He went on to say that he had used his best endeavours to try and gain further employment that did not affect the lunchtime crossing but had not been successful. He asked for a timely response to his request to reduce his hours. In response, it was explained to him that the respondent may take some time while it assessed the need for two SCPs at the Valley Road, Kirby crossing at the lunchtime period. The situation was to be monitored.
- 2.12 On 22 March 2017 Andrea Bate (Senior Road Safety Adviser, Highways and Transportation, who did not give evidence) visited Valley Road, Kirby. She reported to Messrs Donnelly and Titman that she arrived at the site at 11:50 (which appeared at one point to have been the commencement of the lunchtime shift but those times have been changed over time) and that she remained until 13:20. She reported that the claimant started his shift at 12:00 hours (which was the amended commencement time) but that Mrs Broadway did not appear on the crossing until after 12:20. She reported that both of them left site at 13:15. She asked for clarification of the correct working hours.
- 2.13 In the light of Ms Bate’s email Mr Donnelly attended at the Valley Road crossing on 23 March 2017 where he spoke to Mrs Broadway but found that the claimant was absent. He believed from the claimant's request for a reduction in hours that the claimant had commenced employment elsewhere in the lunchtime period. He also suspected that neither the claimant nor Mrs Broadway were working to their contracted hours as evidenced by what was observed on 22 and 23 March 2017. Mrs Broadway explained to Mr Donnelly that the claimant had to attend hospital that morning and had not had an opportunity to report his

absence. He did so later, explaining that he had had to attend hospital because he was suffering with sciatica and that he had no telephone battery and could not contact his line manager.

- 2.14 The respondent's policies, procedures and practices with regard to absence specify that where an employee fails to follow the procedure for notification of absence he or she will be considered absent without permission; it further states that the respondent reserved the right to stop an employee's pay where an employee unreasonably fails to comply with the applicable procedure and that the respondent may pursue disciplinary action. What is required by the reporting sickness absence procedure is that an employee must personally report absence to their manager. That policy is on the respondent's intranet which was not easily accessible other than by request or appointment to the claimant, and he was not given a hard copy of it. The claimant was given a school crossing patrol handbook which appears in the claimant's bundle at page 115 and following. In that handbook the procedure specified where there is an absence from duty requires an SCP to contact their line manager by 7.30am using the phone numbers provided within the handbook. The handbook gave Mr Donnelly's telephone and mobile numbers. The claimant stated in evidence that he understood this to mean that he must call Mr Donnelly on the morning of any absence. He did not do so.
- 2.15 The claimant did not return to work after 23 March 2017. He had worked up to and including 22 March 2017.
- 2.16 From 23 March 2017 to 31 March 2017 there were several repeated and frequent conversations and exchanges of text messages between Mr Donnelly and/or Mr Titman and the claimant and Mrs Broadway. The claimant would not respond to any messages. Mrs Broadway was asked to emphasise to the claimant that he must respond. The respondent's managers made abundantly clear to Mrs Broadway and in messages to the claimant that they required direct personal engagement with him, for him to confirm the reason for his absence, the dates when he would be absent and when he hoped to return to work.
- 2.17 The claimant said in evidence supported by Mrs Broadway that he suffers telephonophobia. In the claimant's own evidence this means that he suffers anxiety when he receives an incoming phone call and when he must make a telephone call to someone that he does not know. He did not give evidence to the effect that he was unable to make a phone call without suffering symptoms of stress and anxiety to somebody that he did know. Based on the evidence heard and the documentation provided including transcripts of text messages I find that the claimant was both physically and mentally able to conduct a telephone conversation which he could initiate, although I accept he may have been anxious on receipt of a message from someone that he did not know personally. I did not believe the claimant's evidence that he was incapacitated through a phobia from calling either Mr Titman or Mr Donnelly. No evidence was adduced by the claimant to suggest why he could not have reported to Mr Donnelly and Mr Thorpe at their place of work or arranged a meeting. I accept Mr Donnelly's evidence when he

says that had he known that the claimant had any difficulty with the telephone then he could have arranged either for an appointment at his office or to visit the claimant. The respondent's emphasis was consistently on ensuring direct personal contact one way or another, by way of meeting or speaking, so that the respondent could satisfy itself as to the reason for the absence and likely period of absence.

- 2.18 The respondent's managers made it clear to the claimant, directly via text and through Mrs Broadway, that he would not be paid for days of unauthorised absence and that without his following the notification procedure his absence was unauthorised.
- 2.19 The respondent referred the claimant to its Occupational Health advisers in accordance with established practice and procedure.
- 2.20 On 27 March 2017 Mr Donnelly wrote to the claimant advising him that his pay was being withdrawn and deductions made for the dates 23, 24 and 27 March and that such deductions would continue until he contacted Mr Donnelly, in circumstances where Mr Donnelly had made it clear that there had to be personal contact. He stressed the importance of the claimant attending the Occupational Health adviser and asked him not to postpone or cancel the Occupational Health appointment. That letter appears at pages 125 and 126 of the claimant's bundle of documents for this hearing. The claimant understood and accepted the contents of that letter; it did not cause him concern and he says it was not the cause of his resignation.
- 2.21 Mr Donnelly wrote again to the claimant on 29 March 2017 and that letter appears at page 31 of the respondent's bundle of documents. In that letter Mr Donnelly informed the claimant that he intended to carry out a welfare meeting, visiting the claimant at his home, at 11.00am on Wednesday 5 April 2017. He said that he would attend with Mr Titman. He gave the claimant the opportunity to contact him to rearrange the meeting if it was inconvenient. He stressed that this was to be a welfare meeting, but that if he felt more comfortable then he could be accompanied by a member of his family, a colleague or a trade union representative. The purpose of the meeting was said to gather information regarding the claimant's absence and to offer support which the claimant may find beneficial in assisting in his return to work. The claimant took exception to this letter. He felt that it was heavy-handed for the respondent to arrange a welfare meeting which would be attended by two members of management as opposed to a line manager and a representative from the Human Resources department. I accept Mr Donnelly's evidence that this was not a unique occurrence and that in appropriate circumstances members of management would attend, either alone or with a colleague, and not necessarily from HR because of internal arrangements regarding the provision of HR support and advice.
- 2.22 On 30 March 2017 the claimant's Occupational Health adviser notified an appointment for the claimant to be seen on 21 April 2017.

- 2.23 In response to Mr Donnelly's letter of 29 March concerning the home welfare visit the claimant decided to resign from his employment.
- 2.24 The next day on which the claimant would normally have been working was Monday 3 April 2017 and on that date he sent an email to the respondent, which was effectively a grievance letter and resignation, backdated to Friday 31 March 2017. That letter appears in the respondent's bundle at pages 17-20. In summary, the claimant cited in that letter as reasons for his resignation:
- 2.24.1 Concern about the health and safety of children using the Valley Road crossing;
- 2.24.2 A lack of a response to concerns that he had raised regarding health and safety issues concerning himself and pedestrians at the Valley Road, Kirby crossing;
- 2.24.3 Management's attitude which he considered was discourteous, unfair and amounts to underhand pressure.
- 2.25 The claimant also cited "financial restraints" which he stated in evidence was the difficulty he was having in managing on his part-time earnings from the respondent and other part-time earnings as a delivery driver which led him to seek work as a handyman in a residential home. He says it was this offer of employment that led to his request for a reduction in hours by removal of the shift from 12:00 to 13:20 each day Monday to Friday. He says that he was under financial difficulty and this was part of his reason for resignation, which he referred to as "financial restraints".
- 2.26 The claimant's resignation was accepted by the respondent by a letter dated 6 April 2017 and his P45 was sent to him on 13 April 2017.
- 2.27 Whereas the respondent had indicated to the claimant that it considered his absences from work to be unauthorised absences on Thursday 23, Friday 24 and Monday 27 March 2017 and continuing for so long as he did not make personal contact with Mr Donnelly, no reference was made to payments due to the claimant in respect of his earnings for the period from 15 March (the date of the last pay and payslip received by him) to Wednesday 22 March 2017. The claimant worked on those days and was not paid.
- 2.28 The claimant was not paid for his accrued but untaken holidays in his final holiday year up to and including his effective date of termination of employment on 31 March 2017.

### 3. The Law

#### Constructive unfair dismissal

- 3.1 Dismissal can include where an employee resigns because of conduct by the employer which seriously damages or destroys the relationship of trust and confidence. Such behaviour would amount to a fundamental breach of contract. If there was such a breach of contract, and it is not a



question of reasonableness which is relevant to the principles in respect of statutory unfair dismissal, then an employee is entitled to resign but claim dismissal provided the fundamental breach of contract is the cause of the resignation and the employee has not delayed so long that he can genuinely be said to have affirmed the contract. To affirm the contract would be to accept the behaviour which the employee could otherwise complain about and to as much as accept that the contract has been changed to allow the employer to act in that way. This is not only a question of how much time has elapsed but whether the conduct by the employee over the period of time is genuinely an acceptance of the employer's behaviour.

- 3.2 An employee is entitled to be paid for work undertaken. Section 13 of the Employment Rights Act 1996 (ERA") provides that an employer may not make a deduction from an employee's wages without having a prior signed written authority or in some other limited circumstances that do not apply in this case. The worker must previously signify in writing authority or consent to the making of any deduction from wages.
- 3.3 By virtue of the Working Time Regulations an employee is entitled to receive payment for holiday periods that are covered by those regulations or contract if the contract is more generous. On employment coming to an end an employee is entitled to receive payment for holidays that had accrued during the leave year but which had not been taken.
- 3.4 I am satisfied that having explained the applicable law both at the beginning of the case and before submissions were made by the parties that both the claimant and his advocate, Mrs Broadway, understood the law as I have briefly summarised it above.

#### **4. Application of Law to Facts**

##### **4.1 Claim of constructive unfair dismissal –**

4.1.1 The respondent did not commit a fundamental breach of the claimant's contract. At all times the respondent reacted to concerns expressed by Kings, by the claimant and Mrs Broadway. At all times the respondent's responses to health and safety issues raised both in respect of pedestrians and the claimant were in compliance with good practice and the applicable health and safety regulations affecting the highway and crossings. The claimant made many and varied complaints about the conduct of pedestrians, drivers, the effect of adverse weather, the behaviour of contractors and subcontractors, the signage and underfoot conditions. The respondent reacted appropriately on each occasion. The claimant has not proved that the conduct of the respondent jeopardised the health and safety of pedestrians, workers or employees and specifically the claimant. The respondent was entitled to query the attendance at work of both the claimant and Mrs Broadway and did so in an appropriate manner. The respondent was entitled to insist upon personal contact from the claimant in respect of his ill health

absence and continued absence, and did so in a proportionate and reasonable way. The conduct was in accordance with the contract. The respondent was entitled to suggest in the way that it did that there be a welfare meeting and a referral of the claimant to Occupational Health advisers. At all times the respondent not only took appropriate steps to safeguard pedestrians, the claimant and his colleague, but also to emphasise, clarify and explain what the respondent required with regard to the reporting of ill health absence. The respondent made no unreasonable or undue demands on the claimant.

- 4.1.2 As the respondent acted in accordance with good practice with regard to health and safety and absence management, and in accordance with applicable regulations and procedures, I find that it did not act in a manner that would seriously damage or destroy the relationship of trust and confidence. It is a matter for the claimant whether or not he remained in employment and I do not criticise his decision to resign as that is a matter for him.
- 4.1.3 The claimant resigned over issues related to the enquiries being made of him as to his absence and a requirement that he follow procedures, but specifically because his line manager, Mr Titman, and Mr Donnelly, the senior manager, intended to visit him and he did not wish this to take place. The claimant did not wish to attend Occupational Health. The claimant did not comply with the sickness absence reporting procedures. He knew that the respondent was suspicious that he had obtained alternative employment as that was the clear and obvious reading of the claimant's letter requesting a reduction in hours dated 21 March 2017.
- 4.1.4 This was a straight forward resignation and not one that amounted to a dismissal. The claimant's claim that he was unfairly dismissed fails; he was not dismissed.

#### 4.2 Unauthorised deduction from wages –

- 4.2.1 The claimant was not paid for all of the shifts that he worked. His last payment was prior to 15 March 2017 evidenced by a wage slip of that date. The respondent adduced no evidence of payment of wages after 15 March but justified non-payment during the period of time that the claimant failed to comply with the sickness absence procedures, that is from 23 March onwards. The respondent has failed to account for its non-payment of wages for hours worked prior to 23 March 2017, and this is a matter that must be resolved at a remedy hearing.
- 4.2.2 I find that the respondent made an unauthorised deduction from wages as the claimant had not previously signed an authority or consent for his wages to be withheld and he was not in breach

of the requirements of the sickness absence procedure until 23 March 2017.

4.3 Holiday pay –

- 4.3.1 The claimant gave evidence that he worked throughout the holiday year leading up to his resignation on 31 March 2017 without taking any paid leave. He accrued leave. He was vague as to the number of days accrued but thought it was in the region of 3½ weeks and further evidence will be required of this at a remedy hearing. The claimant gave evidence that he had not been paid his accrued holiday pay on termination of employment.
- 4.3.2 The respondent did not adduce any evidence of pay in respect of accrued but untaken holidays. This claim succeeds.

Employment Judge T Vincent Ryan

Date: 22.10.17

JUDGMENT AND REASONS SENT TO THE PARTIES ON

27 October 2017

FOR THE TRIBUNAL OFFICE