EMPLOYMENT TRIBUNALS

Claimant: **Melvin Taylor**

Respondent: **AB Metalwork Ltd**

Heard at: **East London Hearing Centre (by CVP)**

On: **16 & 17 June 2022**

Before: **Employment Judge Housego**
Members: **Ms P Alford**
Ms M Daniels

Representation

Claimant: In person

Respondent: Ernestina Afriyie, Senior Litigation Consultant, Peninsula Business Services

JUDGMENT

1. **The claims for constructive unfair dismissal are dismissed.**
2. **The claims for unlawful deduction from wages are dismissed.**
3. **The Respondent is ordered to pay to the Claimant £550 in respect of his claim for holiday pay due at the termination of his employment.**
4. **The Respondent's claim for costs is refused.**

REASONS

Background

1. The Claimant is a welder fabricator who worked for the Respondent for about 7 years. He resigned and claimed unfair dismissal. He also claims that his furlough pay was not calculated properly, that for a period he was wrongly not paid at all, and that his holiday pay was not calculated properly

Claims made and relevant law

2. For the claim of unfair constructive dismissal[1] the Claimant must show that the Respondent is guilty of a fundamental breach of contract showing that it does not intend to be bound by it. He must show that he resigned because of that breach, in a reasonable time and without affirming the contract before doing so. The last matter complained of need not itself be a breach of contract.

3. In this claim the issue about unfair dismissal are to establish the facts and to decide whether those facts amount to a fundamental breach of contract, or not.

4. The Claimant did not make a claim for notice pay.

5. The Claimant said that his holiday pay was not calculated properly. He says that he was due 11.3 days holiday. He says that as he left in May 2020 the amount of a week's wages should be the average of the last 52 weeks' pay. It is common ground that he was on a 40 hour a week contract until 30 September 2019, when it was changed to 17½ hours a week. The holiday pay was calculated on 17½ hours a week.

6. The furlough pay was calculated at 80% of the pay for 17½ hours a week. The Claimant says that it should have been the higher of that figure or his pay for the same period the previous year, which was at 40 hours a week. He says that the provisions applicable to those with variable hours applied to him, and not the provisions for those with fixed hours, and those provisions mean that his pay should have been calculated on the pay for the current year or, if higher, for the previous year. The previous year he was working 40 hours a week, which was higher pay, and he says furlough pay should have been based on that higher pay.

7. The claim under S13 of the Employment Rights Act 1996 (unlawful deduction from wages) is because he was not paid between 12 May 2020 and 26 May 2020 when he resigned without giving notice.

8. The burden of proof for these claims is on the Claimant on the balance of probabilities.

[1] S95(1)(c) of the Employment Rights Act 1996

Evidence

9. Mr Taylor gave oral evidence. Paul Mitchell, a director of the Respondent gave oral evidence. There was a bundle of documents of 558 pages. There had been no case management and no attempt by the parties to identify the issues in the case.

The hearing

10. The hearing was a virtual hearing, and there were no difficulties in completing the hearing satisfactorily.

Submissions

11. I made a full typed record of proceedings which can be read by a higher Court if required.

Facts found, reasons for findings of fact and conclusions.

12. The Respondent employs around 7 or 8 people. The nature of the work is that it has to be done in the workplace. Mr Taylor made steelwork, usually architectural. There was one bookkeeper, Lisa, who was able to work from home, and did so when lockdown started. Mr Mitchell is dyslexic, and leaves all the paperwork to others. His evidence about financial matters was that he had asked Lisa to check things and she said it was all correct, but he had no personal knowledge at all about the financial claims. His evidence about documentary matters was that he sought advice from Peninsula, and they told him what to do. In so far as letters were concerned, others sent them, and he had no reason to doubt that they were sent out on the dates they bore.

13. The Claimant has a daughter who has autistic spectrum disorder. He is separated from her mother. His parents are an important part of care for his daughter. She stays with them sometimes. He stays there too when she is there. When he is staying there with his daughter her actions can make it impossible for him to leave for work. On 30 September 2019 Mr Mitchell gave the Claimant a new contract to sign. It reduced his hours from 40 to 17½ a week, fixed hours 1:30 pm to 5:00 pm, Monday to Friday. Mr Taylor agreed to this, perhaps reluctantly, but seeing the need for him to have time in the mornings to look after his daughter. The contract provided that Mr Taylor would be paid time and a third for overtime. Mr Taylor worked some overtime and he accepts that he was paid the enhanced rate for that overtime. By the time lockdown 1 started Mr Taylor says that he was rarely working overtime, because the atmosphere and relationship had worsened, so far as he was concerned.

14. Mr Taylor's contract provided that the holiday year is the calendar year. It stated that holiday pay would be calculated on the average earnings over the last 12 weeks until 06 April 2020, when the basis of calculation would change to the average of the previous 52 weeks (because the law had changed).

15. Mr Taylor had a series of matters about which he was unhappy with Mr Mitchell. These predated the lockdown in 2020.

16. When lockdown 1 started in late March 2020, Mr Taylor had to stop production. When the furlough scheme came out, he put all the staff (except Lisa) on the furlough scheme. He paid Mr Taylor 80% of his pay for his contracted hours, at £12.75 an hour.

17. On 11 May 2020 Mr Mitchell personally rang all his staff to ask them to come back to work. Mr Taylor denies this conversation took place, but Mr Mitchell's account was plainly truthful: he described how Mr Taylor was reluctant to do so, and when pressed to be more specific said that Mr Taylor said that he was *"not coming back as fucking cannon fodder"*. Mr Mitchell had a letter sent to Mr Taylor on 11 May 2020 to that effect. It was sent to Mr Taylor's home, but Mr Taylor was at his parents' house. He says Mr Mitchell well knew where he was. The letter should have been sent by email, then Mr Taylor would have got it wherever he was. At the very least Lisa or Mr Mitchell should have checked with him where he was living. The Tribunal finds as a fact that Mr Mitchell knew that Mr Taylor was spending quite a lot of time at his parents' home and ought to have checked where he was. However, Mr Taylor knew that he was expected to return to work, because Mr Mitchell had told him so on the telephone.

18. Not every employee came back to work the next day. One was abroad and could not get back. Another was on a course of new medication and not working was advisable in case there were side effects. Everyone else (save Lisa) returned to the workplace without delay.

19. Mr Taylor was very concerned about Covid-19. This was pre vaccine. He was concerned for himself and for his parents. His concern for his parents was not realistic. While he lived with them for much of the time, it was in the annexe in which his grandparents had once lived, and although there is a communicating door they are separate units of accommodation.

20. Mr Taylor has no medical conditions that might make him any more at risk from Covid-19 than anyone else, and nor has his daughter.

21. The letter sent by Mr Mitchell said that Mr Mitchell's absence from work was authorised, but would be unpaid. The Grounds of Resistance and the witness statement prepared for Mr Mitchell both assert that this was to be unauthorised absence, but that is wrong. Mr Mitchell so agreed in his oral evidence, and the letter, after using the phrase, said that Mr Taylor had taken unpaid leave before, so this should not be a problem for him. It was not a typographical error in the letter. Mr Mitchell was agreeing that Mr Taylor could stay away from work because he was worried about Covid-19, but he was needed at work, so would not be furloughed.

22. Mr Taylor got the letter on 15 May 2020. He says that he was retrospectively unfurloughed, which he says cannot be right, and that was shortly after he had returned the letter agreeing to be furloughed which had not been done at the time he went off in March 2020 (and it is the case that he had only just had the letter agreeing to be furloughed when he was unfurloughed).

23. Mr Taylor asked for the risk assessment Mr Mitchell said had been carried out. It was not sent, although Mr Mitchell did write to say what steps had been taken. Mr Taylor was unconvinced. He did not come to look round the workplace. He said that he had heard there were people in the office and the windows were closed, and that it was not possible to work distant enough from others. The bundle of documents does not contain the risk assessment Mr Taylor said was carried out, and he says that the government told him to destroy all furlough records for GDPR reasons, although it must be in a computer file somewhere. The Tribunal very much doubts that the government told employers to destroy furlough records. Given the known level of fraud in the CJRS it is highly unlikely that would be the case.

24. Be that as it may, the Tribunal has no doubt but that the workplace was as Covid secure as possible, and notes that welding is not an activity undertaken in close proximity to others. There was no reason why Mr Taylor could not return to work. Mr Mitchell was, very fairly, not taking issue with Mr Taylor staying off work, accepting that his concerns were genuine. It was reasonable of him not to pay Mr Taylor during that absence. As Mr Taylor was wanted back at work it was correct of Mr Taylor not to put Mr Taylor back on furlough. The job retention scheme was to fund employers to pay employees who could not work, in order that they would not be dismissed as redundant. It was not meant to apply to people who were asked to return to work but who declined to do so.

25. This means that the claim under S13 of the Employment Rights Act 1996 for non-payment from 15-26 May 2020 must be dismissed.

26. The furlough pay was at 80% of Mr Taylor's contracted hours. He says it should have been on the variable hours basis. The Tribunal does not agree: Mr Taylor was working his contracted and fixed 17½ hours a week when furloughed. While he had worked overtime in 2019, he accepted in his oral evidence that by the time he was furloughed he was working overtime *"hardly at all".* He said this was because he was increasingly dissatisfied with what he saw as poor treatment from Mr Mitchell. This is also relevant to the decision of the Tribunal about unfair dismissal. It follows that overtime was not a significant part of the overall remuneration of Mr Taylor. He was therefore on fixed hours, and was not to be treated as someone on variable hours. The bundle of documents contained clock in and out times, but this does not mean that Mr Taylor was working overtime if clock in and out was a little either side of 1:30 pm to 5:00 pm. They simply record when he arrived and left, but even if it was overtime, the amounts are not sufficient to make the hours variable rather than fixed.

27. Mr Taylor says that furlough pay should have been the higher of 80% of the pay at the time furloughed, or if higher 80% of the pay for the comparable period the previous year. This would lead to the extra ordinary situation that Mr Taylor would get not £12.75 x 17.5 = £223.13 x 80% = £178.50, but £12.75 x 40 = £510 x 80% = £408. That is nearly double his contracted pay.

28. It is inherently unlikely that the government would pay people nearly twice as much as their pre-Covid pay when furloughed, but the Tribunal does not need to address that issue, as on the evidence placed before it, Mr Taylor

was not on variable hours. It may have been otherwise in 2019, when Mr Taylor was working significant amounts of overtime, but this was not (on Mr Taylor's own evidence) the case in 2020.

29. Mr Taylor raised the issue of furlough pay in generalities applicable to all. He said that this might have led to him being underpaid and to Mr Mitchell underclaiming. At no point did he put the case as he now does. It was not the case that Mr Mitchell ignored a grievance from Mr Taylor.

30. Mr Taylor's requests for the risk assessment went unmet. As it has still not been produced, the Tribunal finds that there was no risk assessment. Mr Mitchell said that one had been sent, but as Mr Taylor was saying that he had not got one he should have sent another copy (had it existed).

31. Mr Taylor resigned on 26 May 2020. He claims that he resigned because his grievances about lack of risk assessment, the amount of furlough pay, and not being paid after 11 May 2020 were the reasons and that all three are fundamental breaches of contract.

32. The Tribunal finds that the amount of furlough pay and being placed on authorised but unpaid leave were not breaches of contract. They cannot, for this reason, found a claim for constructive unfair dismissal.

33. The lack of provision of the risk assessment is culpable, but not a fundamental breach of contract, because Mr Mitchell had spelled out all the alterations and adjustments that had been made, and they were all that government guidelines required (masks, sanitiser, social distancing). Mr Taylor was not willing to consider a return to work under any circumstances, at this point in time. He did not go to the workplace to see what the situation was. The construction industry did not stop during lockdown. Mr Mitchell has a business to run. Of the 8 or 10 employees, two could not return (as set out elsewhere in this judgment), so it was reasonable for Mr Mitchell to ask Mr Taylor to return to work.

34. Mr Taylor claims that his dismissal is automatically unfair by relying on S100(1)(c) of the Employment Rights Act 1996 – that he brought to his employer's attention by reasonable means circumstances which he reasonably believed were harmful or potentially harmful to health or safety. When asked about whether he had thought to report his concerns his reply was:

"a no - it is small potatoes - not extreme harm - was concerned for my ex colleagues but they chose to go back and were happy to do so - it was my perceived risk - if people were in immediate danger I might have done.

q but you thought you were in immediate danger?

a it would have raised the chance of catching Covid to an unacceptable level. Hundreds were dying every day, but a bit later and with lower risk level I went to work"

35. Mr Taylor did return to work a week or so later, self-employed for someone else. He expressly stated in his Particulars of Claim that he was not claiming loss of earnings for that reason.

36. Only now does he say this was a resignation for health and safety reasons, and when asked to describe the risk accepted that it was his risk profile that was particularly sensitive.

37. There was no risk from Covid-19 to his parents or to his daughter above that faced by everyone, so that cannot found a claim under S100 of the Employment Rights Act 1996.

38. However, this is all academic. If there was a breach of contract in not providing the risk assessment, or in working conditions, it was not the reason Mr Taylor resigned. His resignation letter stated:

"Please accept this letter as formal notice of my resignation and termination of my employment contract with you.

Due to: bullying and harassment in the workplace, a reduction in pay, or not being paid at all, allegations of poor performance or misconduct which are unfounded, being subjected to unreasonable or unfair treatment, being forced to work in breach of health and safety laws I feel that I have no other alternative but to resign from my position."

39. He concluded that these things amounted to a breach of the duty of mutual trust and confidence. Nowhere in this letter is any mention of furlough pay. Not being paid is a small part of the letter. It is plain that the main things generating the resignation are nothing to do with, and pre-date the pandemic. While the *"final straw"* does not have to be a breach of contract, there must be a fundamental breach predating the final straw and there is not.

40. It is significant that Mr Taylor was very dissatisfied with Mr Mitchell before lockdown, which was why he was working hardly any overtime in 2020.

41. The claim for holiday pay is unusual. The holiday entitlement all accrued in 2020, as the holiday year is the calendar year. Mr Taylor then had a working week of 17½ hours, evenly spread over 5 days, which is a weekly pay of £223.13 and a daily pay of £44.63.

42. If he took holiday in late March, and so prior to 05 April 2020 it would have been at the average for the last 12 weeks, so at that rate. After 06 April it is the last 52 weeks that form the period for the averaging of weekly pay. That is a period from 27 May 2019. From then until 29 September 2019 he was on a 40 hour a week contract, which was £408 a week or £81.60 a day.

43. The period from 27 May 2019 to 29 September 2019 is 18 weeks x £408 = £7,344. The remaining 34 weeks are at £223.13 =. £7,587.44. Adding these two gives £14,931.44, and dividing that by 52 gives an average weekly pay of £287.14.

44. While this may be an accidental outcome, Mr Taylor was employed throughout, and the contract states that it has continuity from 2013, the law clearly is that holiday pay is calculated on the basis of pay in the last 52 weeks.

45. It is impossible to work out what Mr Taylor was due from the information the Tribunal was given. In his claim form Mr Taylor said he was due 11.3 days. The Respondent made it 11.67 days. Mr Taylor said he was paid £371.79 holiday pay. The Respondent says it was £474.13. Ms Afriyie helpfully produced a spreadsheet showing her calculation on the basis of accrual based on the last 12 weeks up to 05 April 2020, and on the last 52 weeks from then until 26 May 2020. It showed that an entitlement of £768.40, of which the Respondent says £474.13 was paid, leaving a balance that was accepted as being due for holiday pay of £294.27.

46. That calculation is not correct, because it omits pension contributions, and uses the 80% of pay during the furlough period 28 March 2020 – 14 May 2020, and includes the period when there was no pay 15-26 May 2020. The Tribunal has also decided that the basis of the calculation is incorrect.

47. Mr Taylor says that he is due 11.3 days and arrived at a figure, in his schedule of loss, of £512.12 (page 50 of the bundle of documents). He based that on the period 10 March 2019 – 09 March 2020, and net pay in that period of £16,269.85, which he then grossed up by 25%, and divided the result by 52 to get a week's pay, and divided that by 5 to get a daily pay rate of £78.23. He made the total for 11.3 days £884 and deducted £371.79, which was what he said was the amount paid to give a claim of £512.21.

48. The Tribunal took the figures from Ms Afriyie's spreadsheet, of £3778 and £18,438 for the 52 weeks (£22,216) divided by 52 = £427.23, divided by 5 = £85.23 daily, multiplied by 11.5 (midway between 11.3 and 11.67) to give £982.68. From this the Tribunal deducted a figure midway between what the Claimant and Respondent said had been paid, £425, to arrive at a figure of £557.68. This is all approximate, and the Tribunal rounded it down to £550, which is still a little bit larger than the Claimant asked. This does not take account of the 20% reduction for furlough pay or employer pension contribution, but there is only so much the Tribunal can do, and this amount is larger than the Claimant's calculation. It seems to the Tribunal to be a fair outcome.

49. Accordingly, all the claims are dismissed save the claim for holiday pay in respect of which the Respondent is ordered to pay £550 to the Claimant.

50. The Respondent's representative asked for costs on the basis that an offer of more than £550 (£1,875) was made and it was stated that costs would be sought if it was refused.

51. In answer to the Tribunal's questions, Ms Afriyie said that the Respondent had no costs to pay them, as they were retained to advise. She was not able to say how much their internal costs might be.

52. Mr Taylor said that the offer was made only Tuesday afternoon. Ms Afriyie accepted that the only costs incurred after that letter were the costs of this hearing.

53. The Tribunal refused this application. Mr Taylor had won his holiday pay claim which the Respondent, on the advice of Peninsula, had defended in full. The other claims were arguable, and were determined on the evidence heard and read, after consideration. Mr Taylor was not someone bringing a case for any motive other than that he thought he had a good case, and he put forward coherent arguments, soundly based in law. That ultimately he did not succeed does not mean that he acted in any way that meant it would be appropriate to award costs against him. He was, in the circumstances of this case, entirely within his rights to reject the offer and to seek to persuade the Tribunal to award him more than the amount offered.

54. It may assist Mr Taylor for him to know that the Tribunal would not have awarded future loss had he succeeded, as the claim form expressly stated that he had no such loss.

Employment Judge Housego
Dated: 17 June 2022