EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104818/2020

Held via Cloud Video Platform (CVP) on 1 February 2021

Employment Judge Smith

Mr P Kinnear	**Claimant** **In Person**
Simple Comms Ltd	**Respondent** **Represented by:** **Mr V Moore -** **Director**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The Claimant's claim in respect of his statutory redundancy payment succeeds. The Respondent is ordered to pay to the Claimant the balance of **£1,614**.

2. The Claimant's claim in respect of his notice pay succeeds. The Respondent is ordered to pay to the Claimant the balance of **£1,730.76**.

3. The Claimant's claim in respect of accrued but untaken holiday pay is dismissed.

4. It is declared that the Respondent made an unauthorised deduction from the Claimant's June 2020 wages. The Respondent is ordered to pay to the Claimant the gross sum of **£1,709.50**.

5. By consent, the Claimant's claim of breach of contract in respect of the sum of £200 payable to him on 26 August 2020 succeeds. The Respondent is ordered to pay to the Claimant the gross sum of **£200**.

REASONS

The issues

1. By way of a Claim Form accepted by the Tribunal with effect from 25 September 2020 the Claimant presented complaints relating to the Respondent's failure to pay a statutory redundancy payment, notice pay and holiday pay, and a complaint relating to other payments. This case arise out of the Claimant's dismissal by reason of redundancy, which all parties agreed was effective on 26 June 2020.

2. The issues were clarified by Employment Judge R McPherson in his case management summary from a Preliminary Hearing on 4 December 2020, and are reproduced as follows:

    (1) What is the correct start date for the statutory redundancy payment claim and what should therefore be the correct statutory redundancy payment? If that is different to the sum paid, the Tribunal should award the balance.

    (2) What is the correct start date for the notice pay calculation and what would therefore be the correct notice entitlement? If that is different to the sum paid, the Tribunal should, award the balance.

    (3) Was the Claimant entitled to rely upon the March 2020 furlough agreement in relation to June 2020? If so, he would be entitled to an award by judgment of the sum due.

    (4) What accrued holiday pay entitlement was the Claimant entitled to at the date of termination? If that is different to the sum paid, the Tribunal would award by judgment the balance.

    (5) Is the Claimant entitled to be paid the asserted deposit payment? If so, the Tribunal would award by judgment the sum due.

3. At the hearing itself the issues between the parties were further refined:

    (1) As to issue 3, both parties agreed that as a consequence of the furlough agreement reached between the parties in March 2020, the Claimant was entitled to 80% of his wages for the period 1 to 26 June 2020, when he

remained on furlough pay even though the Respondent discovered it was not eligible for support in paying his wages through the Coronavirus Job Retention Scheme ("CJRS"). The Respondent's revised position was that the Claimant had in fact been paid his wages for this period in his final payment, documented in his 5 July 2020 payslip. The question therefore essentially became one of fact. If the Claimant had been paid his June wages in full, that claim would fail. If he had not, it would succeed as an unauthorised deductions claim.

(2) As to issue 4, at the start of the hearing the Claimant clarified in evidence that his holiday pay claim related not to annual leave he had accrued but to annual leave he would have accrued had he worked his notice period, beyond his effective date of termination, 26 June 2020 (he was paid in lieu).

(3) As to issue 5, the Respondent conceded that the Claimant had not been paid £200, a sum which was described as a "deposit" and to which the Respondent accepted he was entitled to be paid at a date two months after the termination of his employment, 26 August 2020. The only determination the Tribunal needed make in these circumstances was therefore to issue a judgment in the Claimant's favour in respect of this discrete claim. That judgment is set out above.

4. It was clear from the case management summary from 4 December 2020 that a key issue in the case appeared to be whether the Claimant's employment had in early 2015 transferred from Xltec Solutions Limited ("Xltec"; the company with which he had commenced employment, in 2012) to a group company of the Respondent, Simple Digital Solutions Limited ("Digital"), by virtue of the **Transfer of Undertakings (Protection of Employment) Regulations 2006** ("**TUPE**"). There was no dispute between the parties that a later transfer – from Digital to the Respondent – occurred so as to transfer the Claimant's employment with effect from 1 May 2018. The issue was whether the 2012 to 2015 employment with Xltec would count for continuity purposes. If it did, the basis upon which the Claimant's statutory redundancy payment, notice pay and holiday pay would have been inadequately calculated by the Respondent and sums lower than the Claimant's actual entitlements paid.

5. On the morning of the hearing I drew the parties' attention to the case of **Oakland v Wellswood (Yorkshire) Limited [2010] IRLR 82**, a decision of the Court of Appeal in England and Wales which touched on the issue of continuity where there had been a transfer. Whilst I recognised that the case was not formally binding it would likely be highly persuasive authority as it considered a statutory point common to both Scots and English law. The principle in **Oakland** is that for continuity purposes it does not matter if **TUPE** applied to a business transfer so long as a Claimant proved that the criteria relating to business transfers set out in **s.218(2) Employment Rights Act 1996** applied. If it did, continuity would be preserved so as to include an earlier period of employment. I invited the parties to consider their positions accordingly.

6. In determining the issues I heard evidence from the Claimant on his own behalf, and from Mr Vincent Moore (Director) and Mr Graeme Magee (accountant) for the Respondent. I had the benefit of a small bundle of productions which the Claimant had sent to the Tribunal and the Respondent. The Respondent provided no documentary evidence at all, but did provide a copy of an Employment Tribunal judgment in the case of **Taylor v Simple Digital Solutions Limited (4105470/2020)** which had been decided by the Employment Tribunal on 8 January 2021.

Findings of fact

7. On 5 June 2012 the Claimant commenced employment with Xltec, as an engineer. Xltec was a company whose shares were owned 50% by Mr Moore and 50% by his brother Mr Kevin Moore. Xltec provided office support services under contracts with commercial customers. Such services included the maintenance of office and telecommunications equipment.

8. Digital was incorporated as limited company on 9 December 2014. I was told that its sole director upon incorporation, and its sole shareholder, was a Mr Thomas O'Neill. The company was established to sell IT hardware.

9. The Claimant confirmed in cross-examination that he understood that Xltec and Digital had entirely different ownership and directorships.

10. Initially, Digital had no formal relationship with Xltec. However, in 2015 Xltec experienced financial difficulty as a consequence of having lent another company – Johnstone's Just Desserts Limited – around £1.1million, only for that company to go into liquidation owing Xltec around £800,000. I was told that these difficulties were so severe that the company might not survive.

11. Mr Moore told me in evidence that matters came to a head in March 2015 and in that month (although he was unable to say precisely when) a meeting was convened between Xltec and KPMG with a view to obtaining advice as to how Xltec should deal with this situation. He said that at this meeting he was told to *"have something ready."* He did not specify what exactly this was, but he did say that it was with the objective of protecting Xltec and its staff.

12. In the same exchange in evidence he also referred to two later conversations with KPMG and Macroberts (presumably the solicitors appointed to assist the provisional liquidators) in the same month whereby, following the first meeting, a plan was formulated with this objective in mind. The second conversation involved Mr Moore signalling to KPMG that the plan should be carried out. Whilst it was also unclear when precisely this took place, Mr Moore told me that he called KPMG because of his brother informing him that Johnstone's Just Desserts had been closed down overnight and that he (Mr Kevin Moore) had been removed from that company's premises. Mr Moore stated in evidence that he *"needed to act on this straightaway"*.

13. Provisional liquidators were appointed in respect of Xltec with effect from 26 March 2015. Mr Moore contended that he had checked Companies House and that the date of appointment shown on its records was 9 April 2015. I was shown a letter dated 2 April 2015 from KPMG (on letterhead paper) which confirmed the 26 March date and named the two individuals appointed as provisional liquidators. The letter went on to state that their understanding was that *"<u>prior to our appointment as Provisional Liquidators</u>, your contract of employment transferred from* [Xltec] *to* [Digital]" (emphasis added). It went on to state that, *"Any queries which you may have should now be referred to the senior management of that company"*, meaning Digital.

14. On the face of the letter it is not clear to whom the word *"your"* (as in, *"your contract of employment"*) refers as no addressee is named, but the Claimant told me that it was he who received this letter at the time. I accepted the Claimant's evidence that this is what he was told at the time because it was corroborated by an email sent by a Ms Paterson (Assistant Manager, Restructuring) of KPMG to him in relation to this matter, on 19 August 2020. That email was the result of the Claimant having made a direct approach to KPMG during the course of this litigation. It addressed the Claimant directly and said *"I can advise our records show that we understood your employment <u>had</u> transferred to* [Digital]. *"I've attached a letter, a copy of which was sent to you on 2 April 2015."* I noted that Ms Paterson referred to the transfer of employment in the past tense.

15. I noted that this letter was sent to the Claimant within a week of the appointment of the provisional liquidators. Whilst suggesting that KPMG cited the wrong date the Respondent did not suggest that the letter itself was fabricated, even though Mr Moore stated that he himself did not receive a similar letter at the time. It was sent by persons independent of both the Claimant and the Respondent, and as provisional liquidators at the time of writing such persons had been appointed to that office by the court. The letter was apparently written on behalf of Xltec because it concluded with the phrase *"For Xltec Solutions Limited – in Provisional Liquidation."* For these reasons I therefore attached considerable weight to this letter and what it said, and rejected Mr Moore's oral contention that the provisional liquidators were appointed on 9 April 2015. They had in fact been appointed on 26 March 2015. The Respondent's paper apart – drafted by solicitors – had also confirmed that date, which made Mr Moore's suggestion of the later date somewhat surprising.

16. In cross-examination by the Claimant Mr Moore said that at some point in April 2015 Digital became not merely a company selling IT hardware but a service company, doing the things Xltec had previously done. He was unable to say precisely when, but Mr Moore accepted that Digital acquired around 300 of Xltec's commercial customers. He could only identify one customer that had not followed the rest to Digital: First Bus. He told me that Xltec's customer contracts had been purchased from the liquidators and that there had been a short period

of time between the appointment of the liquidators and the acquisition, but he could not say how long. The two individuals from KPMG had been appointed only as provisional liquidators appointed to act on behalf of Xltec; therefore even if Mr Moore was right the purchase of the customer contracts was nevertheless a purchase by Digital of a significant asset belonging to Xltec. On his evidence, it must therefore have occurred after 26 March 2015, the date the provisional liquidators had been appointed.

17. Mr Moore accepted that around the same time Digital also acquired around 75% of Xltec's employees, including the Claimant. Whilst Mr Moore stated in evidence that he believed that some former Xltec employees' roles changed upon their transfer to Digital, he could not say to what degree or in what way, save that he thought some people may have changed focus from *"dealing with copiers"* to IT. Unfortunately his recollection of this time and the detail of what had happened was hazy.

18. Whilst the Claimant (understandably but erroneously) referred to it as administration rather than provisional liquidation, he was very clear that in advance of the appointment of KPMG he and his colleagues had attended a meeting where it was explained to them that the business would transfer from Xltec to Digital because of the difficulties with Johnstone's Just Desserts, and that in essence Xltec's employees (including himself) would finish one week of work on a Friday and start another on a Monday without noticing any difference. Further, and significantly, he told me that the Xltec customer contracts had in fact been acquired by Digital before the provisional liquidation commenced. On his evidence, it must therefore have occurred prior to 26 March 2015, the date the provisional liquidators had been appointed.

19. By contrast with Mr Moore's evidence, the Claimant stated with clear recollection that there had in fact been no change to the former Xltec employees' tasks and duties, and no change to their place of work or indeed their line managerial structure following their transfer into Digital. Matters had indeed proceeded as anticipated: the Claimant completed work on a Friday whilst employed by Xltec and began the following Monday as an employee of Digital without any noticeable difference.

20. The Respondent provided no documentary evidence to the Tribunal save for the judgment in **Taylor v Simple Digital Solutions Ltd**, to which I shall return. I found this surprising because it is a company within the same group as Digital and it might have been able to obtain documents from Digital to support the assertions made by Mr Moore in evidence, had it wished to do so. Had it done so, the factual position might have been substantially clarified. Doing his best, the Claimant provided as much documentary evidence as could reasonably be expected of him and it was informative.

21. In my judgment, the Claimant's clear oral evidence – corroborated by what limited documentary evidence there was available – is to be preferred. KPMG confirmed on 2 April 2015 that the Claimant's employment had already transferred to Digital before their appointment as provisional liquidators on 26 March of that year. The Claimant's oral evidence that Xltec's customer contracts had also been acquired by Digital prior to the provisional liquidation was logically consistent with that. Before this, Digital only sold IT hardware and would only have needed Xltec's employees if it had acquired obligations to perform the kinds of services Xltec had previously performed. With the acquisition of the contracts came the need for staff to service them, and neither party suggested (for example) that services were being provided under some kind of interim arrangement between the two companies, such as secondment. On the balance of probabilities, my finding is that Xltec's customer contracts were in fact acquired by Digital prior to the appointment of Xltec's provisional liquidators on 26 March 2015.

22. For **TUPE** purposes it is necessary for me to make a precise finding as to the date on which these events occurred. On this point both the Claimant's and Respondent's evidence lacked clarity. Within a few weeks of that date Mr Moore had been advised to have a plan in place to protect Xltec's business and its employees. The employees themselves – including the Claimant – had been told they would transfer from Xltec to Digital upon returning to work on a Monday, as if nothing had happened. Therefore, whilst the date must have been before 26 March 2015, doing the best I can with the limited evidence before me I find on the balance of probabilities that the likeliest date was in fact Monday 23 March 2015, when the Claimant returned to work after the weekend.

23. The Claimant told me that there had been no interruption in his pay at the material time and this was supported by the payslips he produced in evidence. His gross salary payment for March 2015 (dated 31 March 2015) was £2,083 and paid by Xltec. His gross salary payment for April 2015 (dated was the same amount, but this time paid by Digital. That evidence was supportive of a transfer having occurred no later than 31 March 2015, as the Claimant was paid for the full month of April 2015 by Digital. The Claimant also told me, and I accepted, that there was no change in his line management at the material time. He continued to be line managed by a Mr David Cairns.

24. Although it had been suggested by Mr Moore that there had been a gap between the Claimant's employments of a month or possibly a couple of months, by his own admission his evidence was unspecific on this point. In truth, Mr Moore did not really know. I did not accept his version and preferred the Claimant's version which was specific, well-articulated and corroborated by what little documentary evidence that was available. There was no such gap.

25. The Claimant provided his P60 for the financial year ending 5 April 2015. That showed his employer as Xltec, although it did not specify a date by which his employment with that company came to an end. In September 2020 HM Revenue and Customs (HMRC) confirmed to the Claimant that as far as their records showed, his dates of employment by Digital were 6 April 2015 to 1 May 2018. I was shown the letter that confirmed this. On their face, these documents suggested that the date of transfer was somewhat later than that which I have found. However, those documents only show what someone else may have told HMRC and furthermore, HMRC's given date was inconsistent with not only what KPMG had told the Claimant on 2 April 2015 but also with the Claimant having been paid by Digital for the full month of April 2015, as was evident from his payslip. I therefore attached more weight to the latter evidence and did not accept that 6 April 2015 was the true date of transfer.

26. The Claimant's employment transferred from Digital to the Respondent with effect from 1 May 2018. That was an agreed fact. I was shown a statement of employment particulars issued to the Claimant by the Respondent shortly after the transfer date. Whilst he did not know for sure who drafted this document, Mr

Moore told me that it would likely have been by *"someone in HR or the Finance Director."* He confirmed that it may in fact have been his wife, Mrs Georgina Moore, whose name appeared in the documents provided by the Claimant and whose title appeared as *"Group HR Director."* Although this document was prepared by the Respondent, it stated that the Claimant's *"continuous employment"* started on 5 June 2012, which was the date he in fact commenced employment with Xltec.

27. The same statement of particulars also included a notice provision, including a term that following the completion of two years' service the Claimant would be entitled to be given notice of the termination of his employment representing one week for each complete year of service, up to a maximum of twelve weeks.

28. The statement of particulars also included provisions relating to annual leave, stating that the Respondent's leave year ran from 1 January to 31 December. It also set out that the Claimant was entitled to 23½ days' annual leave a year plus nine public/Bank Holiday days. Those provisions did not include an entitlement to additional annual leave depending on length of service, nor did they include a provision entitling the Claimant to be paid compensation for accrued but untaken annual leave save for the following term:

"If you… leave without giving and working your full notice, you will only be entitled to the statutory minimum holidays for the current holiday year."

29. In response to the Covid-19 pandemic the Respondent sought to utilise the CJRS (better known as the "furlough scheme") and on 24 March 2020 it wrote to the Claimant proposing a furlough agreement in which the Claimant would receive 80% of his wages. Following a request for clarification, the following day the Claimant indicated his assent to this proposal in writing. From this time the Claimant's gross salary was reduced from £2,500 per month to £2,000 per month and this was reflected in his payslips. For reasons that are unclear, the Respondent later discovered that it was not eligible for grants under the furlough scheme.

30. The Claimant's employment with the Respondent was terminated with effect on 26 June 2020. It was accepted by both parties that the reason for dismissal was

redundancy. The Claimant contended that he had not been given notice of termination by the Respondent in advance: at most, he recalled attending a meeting with Mrs Moore around 6 June 2020 in which he was told that there was a risk his role might be made redundant, but he was told no more than that.

31. On behalf of the Respondent, Mr Moore did not know whether the Claimant had in fact been given advance notice that his employment would terminate and deferred to the company's accountant, Mr Magee, on this matter. Mr Magee told me that for his part all he had done was to process payroll for the month of June 2020 based upon what information he had been given by others, namely *"HR"*. He too did not know whether the Claimant had been given notice of the termination of his employment. The only person who could therefore comment on whether notice had in fact been given was the Claimant himself.

32. The Claimant showed me a number of payslips from the time in which he was employed by the Respondent. In every month except June 2020, the Claimant's payslips showed him being paid *"salary"*. He told me, and I accepted, that the Respondent typically paid its employees on the last working day of each month. Occasionally his payslips showed him being paid "expenses" in addition, but nothing turns on that. The June 2020 payslip (dated 5 July 2020) describes the components of pay being paid to the Claimant at that time as being *"holiday pay"*, *"notice pay"* and *"redundancy"*. As Mr Magee fairly accepted, there is no *"salary"* component included in that payslip or indeed anything to suggest that the properly payable salary was paid to the Claimant, in lieu or at all, at that time.

33. My finding is that the Claimant was not paid his salary for the period from 1 to 26 June 2020.

34. It was an agreed fact that the Claimant's notice pay (shown in the June 2020 payslip in the gross sum of £2,884.62) and redundancy payment (shown in the same payslip as £4,035) were paid on the basis the Claimant having completed five full years of service rather than the eight weeks the Claimant contended he was entitled to because of his additional service with Xltec.

35. In the 2020 leave year the Claimant took four days' annual leave. He accepts that the *"holiday pay"* component displayed on his June 2020 payslip represents 11 days' pay as compensation for accrued but untaken leave as at the date of termination, and he accepts that that was his entitlement up to 26 June 2020.

The Issues

<u>What was the Claimant's correct start date?</u>

36. It is common ground that the answer to this question determines the outcome of issues 1 and 2. The Claimant was paid notice pay and a redundancy payment based upon the Respondent's contention that he had five complete years of service. The Claimant contends that those calculations should instead have been made, and sums paid to him, based upon eight years' complete service because the earlier period of employment with Xltec should have counted. The Respondent accepts that if the period with Xltec is to be counted, the Claimant has been underpaid in the ways he contends.

The Law

37. Continuity of service is a statutory concept set out in **<u>Part XIV</u>** of the **<u>Employment Rights Act 1996</u>**; it is not something the parties can simply agree (**<u>Collison v BBC [1998] IRLR 238</u>**, EAT). Generally speaking, for the purposes of statutory continuity, time spent working for one employer cannot be counted with time spent working for another. That is subject to a number of exceptions where earlier time can be counted, and one of those is where a business is transferred (**<u>s.218(2)</u>**).

38. Many business transfer cases arise in the context of **<u>TUPE</u>**, which – if it applies – preserves continuity because it treats the contract of employment as if it had been entered into with the new employer (the transferee), rather than the old (the transferor), from the start (**<u>reg.4(1)</u>**). For **<u>TUPE</u>** to have that effect in cases such as this one the Claimant must first satisfy **<u>reg.3(1)</u>**, which states that:

These Regulations apply to—

(a) a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity.

39. Independently of **TUPE**, **s.218(2)** preserves continuity in the following circumstances:

(2) If a trade or business, or an undertaking (whether or not established by or under an Act), is transferred from one person to another—

(a) the period of employment of an employee in the trade or business or undertaking at the time of the transfer counts as a period of employment with the transferee, and

(b) the transfer does not break the continuity of the period of employment.

40. If at the time of the transfer the Claimant's employer was *"the subject of… insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of an insolvency practitioner"* **reg.8(7)** would have the effects of disapplying **reg.4** and, at least for the purposes of **TUPE**, ruling out the Claimant's period of employment with Xltec as counting towards his continuity. That was the decisive factor in the **Taylor** case, to which I was referred by the Respondent.

41. However, **s.218(2) Employment Rights Act 1996** contains no equivalent to **reg.8(7) TUPE**. Whilst **Taylor** is another first-instance decision and I am not bound by it, having read the judgment it appeared to me that the **s.218(2)** point was not raised or argued before the Tribunal in that case. It was with this in mind that I raised the case of **Oakland v Wellswood (Yorkshire) Limited** with the parties prior to the commencement of the hearing. The principle in **Oakland** is that for continuity purposes it does not matter if **TUPE** applied to a business transfer so long as a Claimant proved that **s.218(2)** did apply. If it did, continuity would be preserved so as to include an earlier period of employment.

Discussion

42. It therefore became necessary to determine whether there was, for at least **s.218(2)** purposes, a transfer which had the effect of preserving continuity. In **D36 Ltd v Castro UKEAT/0853/03** (13 May 2004, unreported) the EAT confirmed that the meaning of "transfer" is the same under both **s.218(2)** and **reg.3(1) TUPE**, and the case of **Cheesman v R Brewer Contracts Ltd [2001] IRLR 144** (EAT) remains the leading authority on what factors the Tribunal ought to consider in making that determination.

43. The key question is whether there was an *"economic entity that retained its identity"* after the transfer. That, as **Cheesman** tells us, is normally the decisive factor as to whether there has been a transfer and is *"indicated … by the fact that its operation is actually continued or resumed."* In my judgment, there was such an entity. Xltec had a group of persons (including the Claimant) whose purpose and objective was to provide maintenance services in relation to office and telecommunications equipment under the auspices of Xltec's commercial contracts, presumably with assets such as the equipment necessary for carrying out those services. It was a group which was organised with a line managerial structure.

44. As to whether that economic entity retained its identity after the transfer, in my judgment it did. As I have found, Mr Cairns remained the Claimant's line manager at all material times before and after 23 March 2015. Equally, whilst some employees within Xltec's group may not have transferred into Digital at that time, around 75% of them did. Those that remained were, on my findings, still almost entirely devoted to work necessarily carried out under the commercial contracts which had previously been owned by Xltec. Prior to the transfer Digital only sold IT equipment. It was only upon the acquisition of Xltec's contracts and employees that it became, additionally, a company providing services. The tasks and responsibilities that were carried out before and after 23 March were the same, as the Claimant himself told me.

45. I am reinforced in that view by the fact that around 300 of Xltec's commercial contracts were in fact acquired by Digital. They were acquired through a contractual transaction between two separately owned and separately

controlled legal entities. As I observed earlier, Mr Moore was only able to point to one customer who chose not to follow the rest into Digital. It is therefore clear to me that not just the vast majority of the Xltec business and operations but almost the entirety of them were acquired by Digital as at 23 March 2015.

Conclusion on Issues 1 and 2

46. My conclusion is, therefore, that on 23 March 2015 a business transfer occurred. Following **Castro**, that transfer was *"relevant transfer"* for **reg.3(1) TUPE** purposes and a *"transfer"* for **s.218(2) Employment Rights Act 1996** purposes. It follows from that determination that the Claimant's employment transferred from Xltec to Digital at that time. I did not hear the evidence in the **Taylor** case and determined the date of transfer on the basis of the evidence presented to me in this case, as set out in my findings of fact.

47. Further, because as at 23 March 2015 Xltec was not the subject of insolvency proceedings instituted with a view to the liquidation of its assets under the supervision of an insolvency practitioner, **reg.8(7) TUPE** would not have disapplied **reg.4(1)** so as to nullify the transfer.

48. Further, even if I am wrong about the date of transfer and that it happened at a time when Xltec would otherwise have satisfied **reg.8(7)**, its terminal, supervised insolvency would have had no impact on the Claimant's continuity of service because **s.218(2)** would have applied so as to preserve it, following **Oakland**. In any event, it is by no means settled that the appointment of a provisional liquidator under the **Insolvency Act 1986** is something that would satisfy **reg.8(7)**, but it is not necessary for me to determine that point and I make no finding on it.

49. The Claimant's correct start date for both statutory redundancy payment and notice pay purposes was 5 June 2012, when he commenced employment with Xltec. It follows that he has been underpaid on both counts.

Order – Statutory Redundancy Payment

50. The Claimant's weekly gross pay was £576.92. This exceeded the £538 maximum week's pay for statutory redundancy payment purposes applicable at his effective date of termination (26 June 2020).

51. The Claimant was continuously employed for slightly more than eight complete years. Working backwards from his effective date of termination that complete-year period started on 27 June 2012. At that time the Claimant was 38 years of age and he turned 41 on 11 September 2014. For statutory redundancy payment purposes, he is entitled to 1 week's pay for each of those three years in which he was under the age of 40 years.

52. Five of the Claimant's eight years' continuous service were worked when he was over the age of 41. For statutory redundancy payment purposes he is entitled to 1½ weeks' pay for each of those five years.

53. The Claimant's statutory redundancy payment entitlement was 10½ multiplied by £538, totalling £5,649. He was paid £4,035.

54. The Respondent is ordered to pay to the Claimant the balance of £1,614.

Order – Notice pay

55. By virtue of the **Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994** the Tribunal has a limited jurisdiction to consider breach of contract claims, but this jurisdiction includes notice pay claims which arise or are outstanding on the termination of employment and would otherwise be actionable in the Sheriff Court.

56. At the date of the termination of his employment the Claimant had eight years' complete service. He was paid notice representing five weeks. The Respondent was therefore in breach of the notice entitlement term of the contract.

57. The Claimant is entitled to damages representing three weeks' unpaid notice. That sum, calculated gross, is £1,730.76. The Respondent is ordered to pay damages to the Claimant assessed in that sum.

June 2020 Wages

58. The next issue (issue 3) is the Claimant's unauthorised deductions from wages claim relating to wages due to him for the period 1 to 26 June 2020.

The Law

59. A claim of unauthorised deduction from wages is a statutory one set out in the **Employment Rights Act 1996**. **Section 13** of the **Act** confers upon workers the right not to suffer unauthorised deductions from wages. The starting point for determining whether there has been a deduction from wages (authorised or not) is therefore to identify what sum, in "wages", was *"properly payable"*. *"Properly payable"* appears in **s.13(3)** and has been determined to mean sums to which the worker has some legal – but not necessarily contractual – entitlement (**New Century Cleaning Company Ltd v Church [2000] IRLR 27**, England and Wales Court of Appeal; **Helliwell & another v Axa Services Ltd & another UKEAT/0084/11/CEA**, 25 July 2011, unreported). It requires a finding of fact (**Davies v Droylsden Academy UKEAT/0044/16**, 11 October 2016, unreported).

60. The second stage is the "occasion" of the payment and, by extension, the deduction. Both occasions must be the same (**Murray v Strathclyde Regional Council [1992] IRLR 396**, EAT) and it is necessary to identify that point in time with precision.

61. The third stage concerns the making of a deduction. **Section 13(3)** provides the definition of the word "deduction", namely: *"Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion."* The third stage therefore involves identifying the sum "properly payable" and comparing it to what was actually paid. The difference between the sums is the "deduction", and it can include a total non-payment (**Delaney v Staples [1992] IRLR 191**, House of Lords).

62. The fourth and final stage is to identify whether the deduction was "authorised". **Section 13(1)** provides for two situations in which a deduction is authorised: either where *"the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract"* (**s.13(1)(a)**) or where *"the worker has previously signified in writing his agreement or consent to the making of the deduction"* (**s.13(1)(b)**).

Discussion

63. On 25 March 2020 the Claimant consented to a reduction in pay to 80% of his ordinary salary. As my findings above set out, that resulted in his gross pay being reduced to £2,000 per month. Multiplying that figure by 12 (months) and then dividing by 365 (days), the Claimant's gross daily rate of pay was £65.75.

64. The sum properly payable in wages to the Claimant was 26 days' pay, representing the period 1 to 26 June 2020. Using this multiplier and the gross daily rate, the Claimant was entitled to wages of £1,709.50 for that period.

65. Based upon my finding as to when payments were typically made by the Respondent, the occasion for payment of these wages was the last working day of June 2020, which was Tuesday 30 June 2020. On that same occasion, whilst payments of other kinds were made to him my finding is that nothing was paid to the Claimant by way of what had previously been described as "salary" in his payslips. In the context of **s.27 Employment Rights Act 1996**, that meant *"wages"*. That in my judgment amounted to a deduction from wages.

66. There was no suggestion that the Claimant had in any way authorised such a deduction through indicating his consent, in advance, in writing or indeed by virtue of a relevant term of the contract.

Conclusion on Issue 3

67. It follows that the Respondent's deduction of £1,709.50 from the Claimant's properly payable wages due on 30 June 2020 was unauthorised.

Order – Unauthorised deductions from wages

68. It is declared that the Respondent has made an unauthorised deduction from the Claimant's wages.

69. Accordingly, the Respondent is ordered to pay compensation to the Claimant in the gross sum of £1,709.50.

<u>Holiday Pay Claim</u>

70. The final claim (issue 4) is one in respect of accrued but untaken annual leave. As was clarified in evidence at the hearing, the Claimant's contention is that he would have accrued an additional four days' leave had he been permitted to work out his notice period. On his contention, the additional accrual would have been based on his notice period of eight weeks. For the reasons expressed above, I have agreed with the Claimant that his entitlement to notice was indeed eight weeks.

Discussion

71. That said, the Claimant's holiday pay claim is novel one and it is a claim that can be dealt with relatively swiftly. There are generally three routes by which employees can claim compensation for accrued but untaken annual leave. Employees who have a contractual right to compensation upon the termination of their employment may bring proceedings for breach of contract under the **<u>Extension of Jurisdiction (Scotland) Order 1994</u>** referred to above. However, as my findings have made clear, the Claimant enjoyed no such express contractual right and it is generally unlikely that any contractual right would be implied by other means (see, for example, **<u>Morley v Heritage plc [1993] IRLR 400</u>**, England and Wales Court of Appeal). Therefore the Claimant would have to rely upon the either (or both) of the two other avenues in order to succeed.

72. The first of those avenues would be the **<u>Working Time Regulations 1998</u>**. **<u>Regulation 14</u>** makes provision for the payment of compensation to workers for accrued but untaken annual leave and **<u>reg.30(2)</u>** permits complaints for non-payment to be brought to the Employment Tribunal. However, **<u>reg.14(2)</u>** makes it plain that the end of the period for which compensation during a leave year

should be paid is the date the *"termination takes effect"*. In the Claimant's case, that date was 26 June 2020 and he accepts he was paid his entitlement up to that point. In my judgment, **reg.14(2)** defeats the Claimant's claim to any annual leave he may in future have accrued after that date.

73. The Claimant would therefore be left with an unauthorised deductions from wages claim under **s.13 Employment Rights Act 1996**. I have already set out the relevant legal tests applicable to such claims, above. The difficulty for the Claimant in this final regard is that he must be able to point to a sum that was *"properly payable"* and to the "occasion" when it was not paid. The statutory wording refers to these events has having already occurred, in the past tense. In addition, the **Church** and **Helliwell** cases remind us that a legal entitlement to the wages in question of some kind has to be proven. Logically, to have accrued a greater legal entitlement to annual leave the Claimant would have had to have remained in employment beyond 26 June 2020. He did not, and therefore his claim would be bound to fail.

Conclusion on Issue 4

74. For the reasons expressed above, the Claimant's holiday pay claim fails and is dismissed.

Employment Judge: Paul Smith

Date of Judgment: 24th February 2021

Entered into Register: 27th February 2021

Copied to parties