



EMPLOYMENT TRIBUNALS

Claimant: Mr M Bruce

Respondent: All Kent Services Limited

Heard at: London South Employment Tribunal by video (CVP)

On: 6 September 2024 at 2 pm

Before: Employment Judge Macey

Representation

Claimant: Mr Mortin, counsel

Respondent: Did not attend

RESERVED JUDGMENT

1. The respondent breached the contract by dismissing the claimant without notice.
2. The respondent is ordered to pay the claimant damages of £5,040 (gross) for that breach.
3. The respondent did not breach the contract by failing to pay employee and employer pension contributions into the National Employment Savings Trust.
4. The claimant is entitled to a statutory redundancy payment.
5. The respondent is ordered to pay the claimant a statutory redundancy payment of £9,240.
6. The respondent is ordered to pay to the claimant additional compensation of £1,680 pursuant to section 38 Employment Act 2002 for failure to provide the claimant with a complete written statement of employment particulars.

RESERVED REASONS

CLAIMS AND ISSUES

1. The claimant claimed breach of contract, in relation to not being given notice of termination of employment to which he was entitled, and for the respondent's failure to pay pension contributions into National Employment Savings Trust (NEST), and failure to pay him a statutory redundancy payment.
2. The issues for the Tribunal to consider were discussed and agreed at the outset of the hearing and the agreed issues were as follows:
 - 2.1. What was the claimant's notice period?
 - 2.2. Was the claimant paid for that notice period?
 - 2.3. Was there a contractual entitlement to a pension and for the employee contributions and employer contributions to be paid into NEST?
 - 2.4. If so, did this claim arise or was it outstanding when the claimant's employment ended?
 - 2.5. Did the respondent fail to pay employee contributions and employer contributions into NEST from April 2019 to 11 August 2023?
 - 2.6. How much should the claimant be awarded as damages?
 - 2.7. How much was the claimant entitled to receive as notice pay?
 - 2.8. Was the claimant entitled to receive a statutory redundancy payment?
 - 2.9. Was a statutory redundancy payment paid to the claimant?
 - 2.10. If not, what is the amount of statutory redundancy payment that the claimant is entitled to?
 - 2.11. When these proceedings were begun, was the respondent in breach of its duty to give the claimant a written statement of employment particulars or of a change to those particulars?
 - 2.12. If the claim succeeds, are there exceptional circumstances that would make it unjust or inequitable to make the minimum award of two weeks' pay under section 38 of the Employment Act 2002? If not, the Tribunal must award two weeks' pay and may award four weeks' pay.

2.13. Would it be just and equitable to award four weeks' pay?

PROCEDURE

3. The respondent did not attend the hearing. The notice of hearing had been sent to the address provided by the respondent on its ET3 and it had not been returned to the Tribunal by Royal Mail. The respondent did not provide an email address or its telephone number on its ET3. The Tribunal telephoned the telephone number provided by the respondent to Companies House. No-one answered. Mr Mortin also informed the Tribunal that Royal Mail had notified his instructing solicitors that Royal Mail had been unable to deliver the bundle of documents and the claimant's witness statement to the respondent because it could not access the property.
4. Taking into account all of the above the Tribunal exercised its discretion under Rule 47 of the Employment Tribunals Rules of Procedure 2013 to continue the hearing in the respondent's absence. The respondent did not attend the CVP room during the course of the hearing which concluded at 15.50 pm.
5. The claimant brought a claim for breach of contract for failure to pay notice pay. In the ET1 at box 6.5 and in the attachment to the ET1 (under background information) the claimant had set out facts relating to non-payment of employee and employer pension contributions by the respondent to NEST from April 2019. This had not been expressly labelled as being a claim for breach of contract. The claimant applied to relabel these facts as being a breach of contract claim.
6. The test from **Selkent Bus Company Limited -v- Moore [1996] ICR 836** is that the Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.
7. I took into account that the claimant had raised this failure to pay pension contributions with the respondent in correspondence prior to presenting his claim to the Tribunal and that the respondent in its ET3 had responded to other facts raised by the claimant under background information in the ET1. The respondent was fully aware of the facts relating to the non-payment of pension contributions when the claim was presented to the Tribunal.
8. The ET1 contained all the facts from which the claim could be identified and the application to amend was not raising a new claim for the first time. Taking into account all of the above I decided to allow the amendment, as to not allow it would cause more injustice and hardship to the claimant.
9. At 15.15 pm the claimant applied to add an additional document which was a screenshot from claimant's online account at NEST showing the latest contributions from the claimant's salary and from the employer. I allowed this document to be added to the bundle of documents because some of the annual

statements from NEST had been confusing and this additional document would clarify the situation regarding when the last contributions for the claimant had been made to NEST by the respondent. As the claimant's evidence had already concluded I recalled the claimant to give further evidence to the Tribunal on this additional document.

10. I heard evidence from the claimant. There was a written witness statement for the claimant.
11. There was a bundle of documents prepared by the claimant of 151 pages (including the additional document) ("the Bundle"). Page references to the Bundle are in square brackets.
12. The claimant provided written submissions to the Tribunal after the hearing on 13 September 2024.

FACTS

13. The claimant commenced employment with Orchard Windows (Kent) Limited on 17 July 2006. The trading name used by the company was Orchard Windows and it supplied and fitted UPVC windows and doors and carried out other property maintenance work. The claimant was not provided with a written contract of employment or statement of particulars of employment at the start of his employment but he worked 40 hours per week in return for an agreed remuneration paid weekly. He also received other benefits, including holiday pay.
14. Initially the claimant was a glass cutter but later became a window and door fitter.
15. The underlying company that was operating the business of Orchard Windows changed in June 2011 from Orchard Windows (Kent) Limited to the respondent. On 5 September 2011 the claimant was issued with a one page "contract of employment" [58]. This was headed "Orchard Windows" and in the small print at the bottom of the page the respondent and its company number was included.
16. The claimant signed this one-page document on 6 September 2011 after raising a query with Mr Bowerman (a director) asking why he now needed to sign a contract. Mr Bowerman informed the claimant that the claimant had to sign the contract of employment [58] as a formality and it would transfer the claimant to the respondent. Mr Bowerman also confirmed that it would not affect the claimant's employment rights.

17. The contract of employment [58] contained the following information:

“

Employee's name:	<i>Mark Bruce</i>
Working Hours:	<i>40 hours per week between 7.30 am – 5.00 pm (variable).</i>
Sick Pay:	<i>For injury caused at work half pay for the first three days, thereafter statutory sick pay.</i>
Salary:	<i>£404pw gross.</i>
Probationary Period:	<i>3 months from 20 June 2011.</i>
Holiday:	<i>20 days per year from 1 January – 31 December 5 days to be retained for Christmas shut down.</i>

“

18. The claimant's payslips still listed "Orchard Windows" as being the claimant's employer [79-81]. The claimant continued working 40 hours per week for the respondent.
19. On 4 October 2016 the respondent enrolled the claimant into NEST (National Employment Savings Trust) [91]. The claimant says initially that the employee contributions into NEST were 3% and the employer's contributions were 2% but that this increased from April 2019 to employee contributions of 5% (including tax relief at 5%) and employer contributions of 3% [85].
20. The claimant says that no contributions were made into NEST from April 2019 to 11 August 2023 despite deductions being made from his salary.
21. The NEST annual statement dated 7 May 2020 covering the period up to 31 March 2020 [105 – 113] does state that contributions were made into NEST between 1 April 2019 to 31 March 2020 [109]. This details employee contributions of £191.26, employer contributions of £159.30 and tax relief of £53.44. The total contribution for the period between 1 April 2019 and 31 March 2020 being £404.00. The screenshot of the claimant's online account with NEST [151] contradicts the annual statement [105-113] because the claimant's online account confirms that the latest contributions were made on 9 April 2019. I find that the last employee and employer contributions were made by the respondent on 9 April 2019.
22. The NEST annual statements dated 23 June 2021 [114-122], 28 June 2022 [123-132] and 23 June 2023 [133-141] confirm that no contributions were made into NEST between 1 April 2020 to 31 March 2023.
23. A letter from NEST to the claimant dated 19 October 2023 [142] also informed the claimant that no contributions were made into NEST for the period between 6 July 2023 to 12 July 2023.

24. The claimant says [85] employee contributions of £7.30 plus tax relief of £1.83 = £9.13 minus contribution charge of £0.13 and minus contribution charge on tax relief of £0.03. Employee contribution £8.97. The employee contribution of £7.30 as at April 2019 is confirmed by the screenshot of the claimant's online account with NEST [151].
25. Employer contribution of £6.08 minus contribution charge of 0.11. Employer contribution of £5.97. The employer contribution of £6.08 is confirmed by the screenshot of the claimant's online account with NEST [151].
26. The claimant did not have sight of his payslips between April 2019 to 1 May 2023.
27. The payslip for the pay period 1 May 2023 to 7 May 2023 [70] shows gross earnings of £420 and a deduction for pension of £12.08. The payslip for the pay period 8 May 2023 to 14 May 2023 [71] show gross earnings of £420 and a deduction for pension of £12.08. The payslip for the pay period 15 May 2023 to 21 May 2023 [81] shows gross earnings of £420 and a deduction for pension of £12.08.
28. The claimant says tax relief of £2.42 would have been added to the £12.08. And that a contribution charge and a tax relief contribution charge in total of 0.22 would have been deducted and that, therefore, a total of £14.28 should have gone into the NEST in respect of employee contributions.
29. The claimant also says that a 3% contribution from the employer would also have been £12.08 minus a contribution charge of £0.22 and that this would equal £11.86. This would have been a total of £26.14 per week as at May 2023.
30. The claimant raised a grievance with the respondent on 21 July 2023 [22] one of the issues raised in that grievance was that the pension amount of £12.08 had been deducted from the claimant's pay each week and had not been paid into NEST. The respondent replied to the claimant's grievance on 18 August 2023.
31. The claimant was first told about being made redundant on 9 August 2023.
32. The claimant was given his P45 [82-84] on 11 August 2023 and this confirms a leaving date of 11 August 2023 and that the employer was "Orchard Windows".
33. The claimant was also handed two other envelopes by Mr Gallyot (director of the respondent and a majority shareholder in the respondent from August 2014) on 11 August 2023. One contained an offer of permanent employment with All Kent Windows Doors and Home Improvement Ltd (a company incorporated by Miss Johnstone who had been employed as an administrator for the respondent up to 11 August 2023) to start on 14 August 2023 [67-72] and the other envelope contained an offer of self-employment with All Kent Windows Doors and Home Improvement Ltd to start on 14 August 2023 [62]. The offer of permanent employment [67-72] included a contract that did contain terms about pension.

34. The claimant did not accept either of these offers and on 14 August 2023 the claimant requested a covering letter to his P45. On 14 August 2023 the claimant received an email from the respondent containing a letter dated 11 August 2023 [61] stating the following:

“As you are fully aware All Kent services ltd have been struggling to keep above water since lockdown. We have tried to cover all basis to keep this business running but unfortunately it has come to the point where liquidation is the only option ...”

“... Unfortunately, this means all 3 employees including myself are to be made redundant from 11th of august.

Notice to end employment.

A. We will not require you to work your notice.

B. Your employment will terminate on 11.08.2023 with your p45...”

“...Entitlement to redundancy pay.

Due to the company going into liquidation with no assets and no money you can apply for a redundancy pay from the government’s redundancy payment service (RPS)...”

35. The claimant did not receive notice pay or a payment in lieu of notice or a statutory redundancy payment from the respondent.

36. The respondent was not put into liquidation, nor has it been dissolved. All Kent Windows Doors and Home Improvement Limited did not trade prior to June 2023 (it issued a set of dormant accounts up to 30 June 2023). All Kent Windows Doors and Home Improvement Limited is now trading. The Orchard Windows website is still active (orchardwindowskent.co.uk). The claimant believes that Mr Gallyot is working for All Kent Windows Doors and Home Improvement Limited.

37. At the date of termination on 11 August 2023 the claimant’s gross weekly pay was £420 as demonstrated by the payslips in May 2023 [79-81]. The claimant’s age on 11 August 2023 was 51.

38. The respondent replied to the claimant’s grievance on 18 August 2023 [73-74]. In respect of the pension contributions the letter stated:

“Pension is taken out your wages automatically through pay roll each week and unfortunately some months the company struggle to make payments, but this doesn’t affect you personally as nest pension will be paid regardless which I mentioned last week, it will be deal with and you won’t be affected.”

39. ACAS early conciliation started on 28 October 2023 and ended on 9 December 2023.

40. The claimant presented his claims to the Employment Tribunal on 7 January 2024.

LAW

Breach of contract

41. Under rule 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, proceedings may be brought before an employment tribunal in respect of a claim of an employee for recovery of damages or any other sum) other than a claim for damages, or for a sum due, in respect of personal injuries) if – (a) the claim is one to which section 3(2) of the Employment Tribunals Act 1996 applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine, (b) the claim is not one to which article 5 applies and, (c) the claim arises or is outstanding on the termination of the employee's employment.

Failure to give notice

42. An employer will be in breach of contract if they terminate an employee's contract without the contractual notice to which the employee is entitled, unless the employee has committed a fundamental breach of contract which would entitle the employer to dismiss without notice. If there is no expressly agreed period of contractual notice, there is an implied contractual right to reasonable notice of termination. This must not be less than the statutory minimum period of notice set out in section 86 of the Employment Rights Act 1996 ("ERA"). For someone who has been employed for more than 12 years this is 12 weeks.

43. The aim of damages for breach of contract is to put the claimant into the position they would have been in had the contract been performed in accordance with its terms. Damages for breach of contract are, therefore, calculated on a net basis, but may need to be grossed up to take account of any tax that may be payable on the damages. Damages relating to notice pay are subject to tax.

Failure to pay pension contributions

44. Section 1 of the ERA states the following about the provision of a statement of initial employment particulars:

"(1) Where a worker begins employment with an employer, the employer shall give to the worker a written statement of particulars of employment.

(2) Subject to sections 2(2) to (4)—

(a) the particulars required by subsections (3) and (4) must be included in a single document; and

(b) the statement must be given not later than the beginning of the employment.

(3) The statement shall contain particulars of—

(a) the names of the employer and worker,

(b) the date when the employment began, and

(c) [in the case of a statement given to an employee], the date on which the employee's period of continuous employment began

(taking into account any employment with a previous employer which counts towards that period).

(4) The statement shall also contain particulars, as at a specified date not more than seven days before the statement [(or the instalment of a statement given under section 2(4) containing them)] is given, of—

(a) the scale or rate of remuneration or the method of calculating remuneration,

(b) the intervals at which remuneration is paid (that is, weekly, monthly or other specified intervals),

(c) any terms and conditions relating to hours of work including any terms and conditions relating to—

(i) normal working hours,

(ii) the days of the week the worker is required to work, and

(iii) whether or not such hours or days may be variable, and if they may be how they vary or how that variation is to be determined,

(d) any terms and conditions relating to any of the following—

(i) entitlement to holidays, including public holidays, and holiday pay (the particulars given being sufficient to enable the worker's entitlement, including any entitlement to accrued holiday pay on the termination of employment, to be precisely calculated),

(ii) incapacity for work due to sickness or injury, including any provision for sick pay, [...]

(iia) any other paid leave, and

(iii) pensions and pension schemes,

(da) any other benefits provided by the employer that do not fall within another paragraph of this subsection,

(e) the length of notice which the worker is obliged to give and entitled to receive to terminate his contract of employment or other worker's contract,

(f) the title of the job which the worker is employed to do or a brief description of the work for which he is employed,

(g) where the employment is not intended to be permanent, the period for which it is expected to continue or, if it is for a fixed term, the date when it is to end,

(ga) any probationary period, including any conditions and its duration,

(h) either the place of work or, where the worker is required or permitted to work at various places, an indication of that and of the address of the employer,

(j) any collective agreements which directly affect the terms and conditions of the employment including, where the employer is not a party, the persons by whom they were made,

(k) where the worker is required to work outside the United Kingdom for a period of more than one month—

(i) the period for which he is to work outside the United Kingdom,

(ii) the currency in which remuneration is to be paid while he is working outside the United Kingdom,

(iii) any additional remuneration payable to him, and any benefits to be provided to or in respect of him, by reason of his being required to work outside the United Kingdom, and

- (iv) any terms and conditions relating to his return to the United Kingdom [,]
 - (l) any training entitlement provided by the employer,
 - (m) any part of that training entitlement which the employer requires the worker to complete, and
 - (n) any other training which the employer requires the worker to complete and which the employer will not bear the cost of.
- (5) Subsection (4)(d)(iii) does not apply to a worker of a body or authority if—
 - (a) the worker's pension rights depend on the terms of a pension scheme established under any provision contained in or having effect under any Act, and
 - (b) any such provision requires the body or authority to give to a new worker information concerning the worker's pension rights or the determination of questions affecting those rights.
- (6) In this section "probationary period" means a temporary period specified in the contract of employment or other worker's contract between a worker and an employer that—
 - (a) commences at the beginning of the employment, and
 - (b) is intended to enable the employer to assess the worker's suitability for the employment."

45. Section 4 of the ERA states the following about the provision of a statement of changes to the statement provided under section 1 of the ERA:

"(1) If, after the material date, there is a change in any of the matters particulars of which are required by sections 1 to 3 to be included or referred to in a statement under section 1, the employer shall give to the worker a written statement containing particulars of the change."

46. Section 3 of the Pensions Act 2008 states the following about automatic enrolment into a scheme:

"(1) This section applies to a jobholder—

- (a) who is aged at least 22,*
- (b) who has not reached pensionable age, and*
- (c) to whom earnings of more than £10,000 are payable by the employer in the relevant pay reference period (see section 15).*

(2) The employer must make prescribed arrangements by which the jobholder becomes an active member of an automatic enrolment scheme with effect from the automatic enrolment date.
(3) Subsection (2) does not apply if the jobholder was an active member of a qualifying scheme on the automatic enrolment date...
...(7)The automatic enrolment date, in relation to any person, is the first day on which this section applies to the person as a jobholder of the employer."

47. Section 34 of the Pensions Act 2008 states the following about the effect of failure to comply with the Pension Act 2008:

"(1) Contravention of any of the employer duty provisions does not give rise to a right of action for breach of statutory duty."

- (2) *But nothing in the employer duty provisions or this Chapter affects any right of action arising apart from those provisions.*
- (3) *In this Chapter, references to the employer duty provisions are references to any provision of sections 2 to 11 or of regulations under those sections.”*
48. Section 37 of the Pensions Act 2008 states the following about unpaid contributions notices:
- “(1) The Regulator may issue an unpaid contributions notice to an employer if it is of the opinion that relevant contributions have not been paid on or before the due date.*
- (2) An unpaid contributions notice is a notice requiring an employer to pay into a pension scheme by a specified date an amount in respect of relevant contributions that have not been paid.*
- (3) “Due date” has the meaning prescribed.*
- (4) An unpaid contributions notice may, in particular—*
- (a) specify the scheme to which the contributions are due;*
 - (b) specify the workers, or category of workers, in respect of whom the contributions are due;*
 - (c) state the period in respect of which the contributions are due;*
 - (d) state the due date in respect of the contributions;*
 - (e) require the employer to take such other steps in relation to remedying the failure to pay the contributions as the Regulator considers appropriate;*
 - (f) state that if the employer fails to comply with the notice, the Regulator may issue a fixed penalty notice under section 40.*
- (5) In this section, “employer” in relation to a worker means the person by whom the worker is or, if the employment has ceased, was employed.”*
49. The key regulations which prescribe the information requirements on employers and schemes are the Occupational and Personal Pension Schemes (Automatic Enrolment) Regulations 2010 (SI 2010/772) (“the Regulations”).
50. Regulation 6(1)(a) of the Regulations provides that within 6 weeks of the automatic enrolment date (i.e. the start of employment) the employer must provide a pension scheme with information so that the employee becomes an active member of the pension scheme. It provides insofar as is relevant as follows:
- “(1) The arrangements the employer must make in accordance with section 3(2) (automatic enrolment) of the Act are to enter into arrangements with—*
- (a) the trustees or managers of an automatic enrolment scheme which is an occupational pension scheme, so that before the end of a period of six weeks beginning with the automatic enrolment date the jobholder to whom section 3 of the Act applies becomes an active member of that scheme with effect from the automatic enrolment date”*
51. Regulation 8 of the Regulations requires an employer after the automatic enrolment date to deduct pension contributions. It provides that:

“An employer must, on or after the automatic enrolment date, deduct any contributions payable by the jobholder to the scheme, from qualifying earnings or pensionable pay due to the jobholder”.

52. Regulation 9 of the Regulations permits an employee to opt out of paying contributions. It provides for the opt-out notice to be given by the employee within a month of being given the “enrolment information”. It provides insofar as is relevant as follows:

“(1) A jobholder who has become an active member of an occupational pension scheme or a personal pension scheme in accordance with arrangements under section 3(2) of the Act, may opt out by giving their employer a valid opt out notice obtained and given in accordance with this regulation.

(2) Where the jobholder has become an active member of an occupational pension scheme, the jobholder must give their employer a valid opt out notice within a period of one month beginning with the later of—

(a) the date on which the jobholder became an active member of the scheme in accordance with regulation 6(1)(a), or

(b) the date on which the jobholder was given the enrolment information.”

53. Regulation 2 of the Regulations defines the “enrolment information” as the information described in paragraphs 1-15, and 24 of Schedule 2 to the Regulations. These set out a considerable amount of information, including at paragraph 1, “A statement that the jobholder has been, or will be, enrolled into a pension scheme”.

54. NEST was created and is administered under the following primary and secondary legislation:

54.1 Chapter 5 of Part 1 of the Pensions Act 2008.

54.2 The National Employment Savings Trust Order 2010 (SI 2010/917) (NEST Order). The NEST Order came into effect on 5 July 2010. The NEST Order has been amended on three occasions since then. The current version came into effect on 25 May 2018.

54.3 The National Employment Savings Trust Corporation Naming and Financial Year Order 2010 (SI 2010/3).

54.4 The Application of Pension Legislation to the National Employment Savings Trust Regulations 2010 (SI 2010/8).

54.5 The National Employment Savings Trust (Consequential Provisions) Order 2010 (SI 2010/9).

54.6 The Application of Pension Legislation to the National Employment Savings Trust Corporation Regulations 2011 (SI 2011/673).

55. Tribunals will not imply a term simply because it is a reasonable one. Nor will they imply a term because the agreement would be unreasonable or unfair without it. A term can only be implied if the Tribunal can presume that it would have been the intention of the parties to include it in the agreement at the time the contract was made. In order to make such a presumption, the Tribunal must be satisfied that:

- 55.1 the term is necessary in order to give the contract business efficacy;
- 55.2 it is the normal custom and practice to include such a term in contracts of that particular kind;
- 55.3 an intention to include the term is demonstrated by the way in which the contract has been performed (i.e., the conduct of the parties); or
- 55.4 the term is so obvious that the parties must have intended it.
56. Where a contract of employment is in short form and contains only the bare bones of the agreement, it may fall to the Tribunal to flesh out the details based on what they determine the parties' intentions to have been when entering the contract. In **Carmichael and anor v National Power plc 1999 ICR 1226, HL**, the question arose of whether tour guides engaged under agreements that required them to work on 'a casual as required basis' were entitled to enforce rights that were dependent on their being employees employed under a contract of employment that persisted even during the substantial periods when they were not actually working.
57. When the case reached the House of Lords, their Lordships held that it was only appropriate to determine the issue of employment status solely by reference to the contractual documentation (such as it was) if it appeared from the written terms and/ or from what the parties said or did subsequently that such documents were intended to constitute an exclusive record of their agreement. In the instant case, the employment tribunal had seemingly concluded that this was not the clear intention of the parties. It was therefore open to it to infer the parties' true intention not just from the written contractual terms but also by means of objective inferences reasonably drawn from what the parties had said and done, both at the time the claimants were engaged and subsequently. The determination of this issue was a question of fact and the tribunal had been entitled to infer, from the documents and the surrounding circumstances (including how the parties conducted themselves following the engagement of the claimants), that their intention was not to have their relationship regulated by contract while the claimants were not working as tour guides; and that, accordingly, the tribunal's decision — which had been overturned by the Court of Appeal — should be reinstated.
58. However, the court or tribunal's proper role is confined to that of interpreter and it is not entitled to draw on surrounding evidence to create the bargain between the parties. In the absence of an express term, it is not, for example, entitled to imply a term into a contract based on an assessment of what it thinks would be a fair bargain. Accordingly, the use of evidence drawn from sources other than the contractual documentation itself is appropriate as an aid to interpreting express terms only in so far as it assists the court to discern what the actual intention of the parties was when they signed up to those terms.
59. There is a general presumption that the parties to a contract intended to create a workable agreement. If, therefore, it is necessary to imply a term in order to give business efficacy to the contract and make it workable, the courts will be prepared to do so (**Reigate v Union Manufacturing Co (Ramsbottom) Ltd 1918 1 KB 592, CA**). A term may only be implied on this basis if it is necessary to make the whole agreement workable. In **Scally and ors v Southern Health and Social Services Board and ors 1991 ICR 771, HL**, the House of Lords felt that it would be stretching the doctrine of implication by virtue of business efficacy too far to imply a term which was only necessary to the one isolated

aspect of the whole agreement at issue in that case — i.e. pension entitlement.

60. The test is whether the term is *necessary*, not simply reasonable or desirable. In **Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd and anor 2016 AC 742, SC**, the Supreme Court observed that some academics and judges had mistakenly understood the Privy Council's decision in **Attorney General of Belize and ors v Belize Telecom Ltd and anor 2009 1 WLR 1988, PC**, to have diluted the business efficacy test, such that a term could be implied if it was merely reasonable (not necessary) to do so. However, Lord Neuberger, with whom Lords Sumption and Hodge agreed, pointed out that the test is not one of 'absolute necessity', and suggested that it might be more helpful to say that a term can only be implied if, without the term, the contract would lack 'commercial or practical coherence'.
61. The implication of terms on the basis that the parties obviously intended them to apply is generally referred to as the 'officious bystander' test. The term derives from the case of **Shirlaw v Southern Foundries (1926) Ltd 1939 2 KB 206, CA**, where the Court of Appeal — in a decision subsequently affirmed by the House of Lords (**Southern Foundries 1926 Ltd v Shirlaw 1940 AC 701, HL**) — held that a term could be implied in a situation where 'if while the parties were making their bargain, an officious bystander were to suggest some express provision for it in the agreement, they would testily suppress him with a common "oh, of course"'. In practice, this means that a term will be implied if it can be said that it is so obvious that it goes without saying.
62. The 'officious bystander' test overlaps somewhat with the business efficacy test. If a term is necessary to render the agreement workable, then it can be said that the parties obviously intended it to apply. Consequently, many of the cases do not clearly state which of the two tests is being relied upon to imply the relevant term.
63. Tribunals may imply a term into employment contracts by looking at how the parties have operated the contract in practice, including all the surrounding facts and circumstances. This approach may demonstrate that the contract has been performed in such a way as to suggest that a particular term exists, even though the parties have not expressly agreed it.
64. In **Mears v Safecar Security Ltd 1982 ICR 626, CA**, the Court of Appeal applied this test where the point at issue was whether there was an implied term that the employer would pay sick pay. On the evidence, it had never paid sick pay to anybody in the past and M had never asked for it, despite having been off sick for about half of his 14 months' employment with them. Therefore, the only term that could be implied from the conduct of the parties was that employees were not entitled to sick pay. The Court of Appeal went on to say that if a tribunal is unable to determine, from the facts and circumstances, what would have been agreed, it must determine what should have been agreed, bearing in mind that the employer breached its statutory duty under section 1 of the Employment Rights Act 1996 (i.e. failed to provide a written statement of particulars of employment setting out the terms as to sick pay in accordance with section 4(d)(ii)) and that in consequence any doubt about what particulars ought to be included should be resolved in favour of the employee.

Failure to pay a statutory redundancy payment

65. The right to a statutory redundancy payment is set out in section 135 of the ERA. This provides:

“(1) An employer shall pay a redundancy payment to any employee of his if the employee is dismissed by the employer by reason of redundancy, or...

66. The employee must have been employed continuously for a period of at least two years as at the effective date of termination.

67. In the context of a claim for a statutory redundancy payment, there is a presumption that an employee who has been dismissed has been dismissed for redundancy unless the contrary is proved (section 163(2) of the ERA).

68. The definition of redundancy is set out in section 139 of the ERA. This provides, as far as relevant:

“(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –

(a) The fact that the employer has ceased or intends to cease-

(i) to carry on the business for the purposes of which the employee was employed by him, or

(ii) to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business-

(i) for employees to carry out work of a particular kind, or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish.”

69. The provisions relating to the statutory redundancy payment are contained in ERA section 162. The award is calculated according to a formula based on age, length of service and gross weekly pay. A week's pay is subject to a statutory maximum which, at the time of the claimant's dismissal stood at £643 (see ERA section 227).

70. Where a Tribunal finds in favour of an employee in a complaint of failure to pay a statutory redundancy payment and breach of contract, and the Tribunal finds that the employer has failed to provide the employee with a written statement of employment particulars, the Tribunal must award the employee an additional two weeks' pay unless there are exceptional circumstances which would make that unjust or inequitable, and may, if it considers it just and equitable in all the circumstances, order the employer to pay an additional four weeks' pay.

CONCLUSIONS

Breach of contract

Failure to give notice/ pay notice pay

71. I conclude that the claimant's continuous employment with the respondent commenced on 17 July 2006. The claimant was initially employed by Orchard Windows (Kent) Ltd, with the trading name Orchard Windows. Orchard Windows was then transferred to All Kent Services Limited in June 2011 and the claimant's employment transferred to All Kent Services Limited.
72. I conclude that the claimant's effective date of termination from the respondent was 11 August 2023 because this is the date the claimant was handed his P45 [82-84] which details the last day of his employment as being 11 August 2023. In addition, this is confirmed in the letter dated 11 August 2023 [61].
73. The claimant was entitled to notice of termination and the claimant did not receive notice of termination or a payment in lieu of notice, the claimant was merely informed that the respondent did not require the claimant to work his notice period [61].
74. There was no period of notice expressly agreed. The claimant is entitled to reasonable notice, which must not be less than the statutory minimum notice. I conclude that reasonable notice would be the same as statutory minimum notice for the claimant in his position as a window and door fitter. I conclude that the claimant was entitled to 12 weeks' notice and the respondent was in breach of contract by not giving him this notice of termination.
75. I conclude that the claimant should be paid damages equivalent to 12 week's net pay. However, tax and national insurance contributions would be payable on award for notice pay, so I conclude that the amount of damages should be the gross amount of wages. The claimant's gross weekly pay was £420 per week.
76. I therefore award the claimant damages for breach of contract of £5,040.00 (12 x £420).
77. The claimant will be responsible for any income tax or employee national insurance contributions which may become due on these damages.

Failure to pay pension contributions

78. There is no express term in the contract of employment [58] that the claimant was entitled to a pension or specifying what percentage contributions the employer would make to a pension scheme (employer contributions and employee contributions).
79. Mr Mortin submitted that the Tribunal should imply the following clause into the contract:

(a) *“the employee will be automatically enrolled in the NEST pension scheme”;*
and

(b) *“the employee and employer will abide by the rules of the NEST pension scheme and/or applicable provisions in connection with the delivery of the scheme including the deduction at source of employee pension contributions and payment of such contributions together with employer pension contributions into the scheme at the rate set by the scheme”.*

80. Before I consider the law on implying terms into a contract of employment there are some general conclusions that I have set out in the paragraphs below.

81. Under the Pensions Act 2008 the duty to automatically enrol workers into a pension scheme is a statutory obligation. There is nothing in the Pensions Act 2008 to suggest that it was parliament’s intention that the statutory obligations should also have the status of contractual obligations between the employer and employee.

82. The Pensions Act 2008 has its own enforcement mechanism enforced by the Pensions Regulator. In particular, section 37 of the Pensions Act 2008 specifically deals with unpaid contributions by an employer, that the Pensions Regulator can issue an unpaid contributions notice to an employer and the Pensions Regulator may issue a fixed penalty notice under section 40 of the Pensions Act 2008 if the employer does not comply with the unpaid contributions notice.

83. Although section 1(4)(d)(iii) of the ERA places a requirement on employers to provide workers with particulars of any terms and conditions relating to pensions and pension schemes, section 1(5) of the ERA provides an exception if: (a) the worker's pension rights depend on the terms of a pension scheme established under any provision contained in or having effect under any Act, and (b) any such provision requires the body or authority to give to a new worker information concerning the worker's pension rights or the determination of questions affecting those rights.

84. I conclude that the claimant’s pension rights did depend on the terms of a pension scheme established under any provision contained in or having effect under any Act. NEST is a central scheme set up by the UK government in 2010 to help employers meet their statutory pension auto-enrolment duties under the Pensions Act 2008. I have detailed the relevant primary legislation and secondary legislation relevant to NEST above.

85. I also conclude that the Pensions Act 2008 together with the Regulations do require the employer to give a new worker information concerning the worker’s pension rights or the determination of questions affecting those rights.

86. I, therefore, conclude that section 1(5) of the ERA applies in this case and that the respondent did not have an obligation under section 1(4)(d)(iii) of the ERA to provide particulars to the claimant of any terms and conditions relating to pensions and pension schemes.

87. Mr Mortin submitted that the Tribunal should imply the above term into the contract on the following grounds:

(a) *The conduct of the parties demonstrates that the parties understood that the term was implied as:*

- i. *The NEST pension statements indicate that R did pay into the NEST pension for a period of time. The statement confirms he joined NEST on 4 October 2016 and that contributions were made by C in the sum of £199.54 and R in the sum of £167.23 in the year ending 31 March 2019 [100];*
- ii. *The screenshot at [151] and C's evidence in supplemental questions confirms that the final payments that were made to his account were made on 9 April 2019. This again identified both employee and employer contributions;*
- iii. *The contract given to C in connection with a role in the new company with the same individual Director/shareholder expressly contains a pension clause at paragraph 14 [64];*
- iv. *This is a case where the parties did comply with these obligations and then R simply stopped doing so. It is not an issue of questioning whether any such term applied because R did comply with this from October 2016 to 9 April 2019. The parties clearly intended for this to apply and this is even acknowledged in the response to C's grievance, which reads "pension is taken out your wages automatically thorough pay roll every week and unfortunately some months the company struggle to make payments" [73].*

(b) *The term is an essential term of an employment contract given the requirements on employers to enrol individuals into pensions. This, either on its own, or particularly when taken together with the conduct of the parties in the case means the terms should be implied. In this regard, the ET's attention is drawn to the following provisions which make it clear that pension provisions should form part of the contract of employment and C contends they amount to an essential feature of a contract of employment:*

i. *S.3(2) Pensions Act 2008 ("PA"), which requires employers to make arrangements to automatically enrol workers in a pension scheme. It provides as follows: "(2) The employer must make prescribed arrangements by which the jobholder becomes an active member of an automatic enrolment scheme with effect from the automatic enrolment date."*

ii. *S.3(7) PA, which provides that the automatic enrolment date is the first day of employment. It provides insofar as is relevant as follows: "(7) The automatic enrolment date, in relation to any person, is the first day on which this section applies to the person as a jobholder of the employer."*

iii. *Regulation 6(1)(a) of the Occupational and Personal Pension Schemes (Automatic Enrolment) Regulations 2010 ("OPPS Regs") provides that within 6 weeks of the automatic enrolment date (i.e. the*

start of employment) the employer must provide a pension scheme with information so that the employee becomes an active member of the pension scheme. It provides insofar as is relevant as follows: “(1) The arrangements the employer must make in accordance with section 3(2) (automatic enrolment) of the Act are to enter into arrangements with—(a) the trustees or managers of an automatic enrolment scheme which is an occupational pension scheme, so that before the end of a period of six weeks beginning with the automatic enrolment date the jobholder to whom section 3 of the Act applies becomes an active member of that scheme with effect from the automatic enrolment date”

iv. Regulation 8 of the OPPS Regs requires an employer after the automatic enrolment date to deduct pension contributions. It provides that: “An employer must, on or after the automatic enrolment date, deduct any contributions payable by the jobholder to the scheme, from qualifying earnings or pensionable pay due to the jobholder”

v. Regulation 9 of the OPPS Regs permits an employee to opt out of paying contributions. Insofar as is relevant to this case, it provides for the opt-out notice to be given by the employee within a month of being given the “enrolment information”. It provides insofar as is relevant as follows: “(1) A jobholder who has become an active member of an occupational pension scheme or a personal pension scheme in accordance with arrangements under section 3(2) of the Act, may opt out by giving their employer a valid opt out notice obtained and given in accordance with this regulation. (2) Where the jobholder has become an active member of an occupational pension scheme, the jobholder must give their employer a valid opt out notice within a period of one month beginning with the later of— (a) the date on which the jobholder became an active member of the scheme in accordance with regulation 6(1)(a), or (b) the date on which the jobholder was given the enrolment information.”

vi. Regulation 2 of the OPPS regs defines the “enrolment information” as the information described in paragraphs 1-15, and 24 of Schedule 2 to the OPPS Regs. These set out a considerable amount of information, including at paragraph 1, “A statement that the jobholder has been, or will be, enrolled into a pension scheme”.

vii. S.1(4)(d)(iii) ERA sets out the requirement that information on pension provisions is contained in the contract of employment.

88. Firstly, I will consider whether the above term was implied into the contract of employment because an intention (at the time the contract was made) to include the term is demonstrated by the way in which the contract has been performed (i.e., the conduct of the parties).
89. Mr Mortin’s submission that an offer of permanent employment to the claimant by another company (All Kent Windows Doors and Home Improvement Ltd) on 11 August 2023 is conduct by the parties cannot be correct. This offer was made by a different company to the respondent, it was not made by the respondent. The two companies have different

majority shareholders and different directors. Miss Johnstone was simply employed by the respondent. There is not enough evidence for the Tribunal to pierce the corporate veil. The fact that this offer of employment contained a contract with a pensions clause [64] is, therefore, irrelevant.

90. Mr Mortin also relies on the fact that the respondent did in fact make employer and employee contributions into NEST from 4 October 2016 to 31 March 2019 [100 and 151].
91. The respondent was complying with its statutory obligations when it was making these payments into NEST. When the respondent ceased making payments into NEST it was no longer complying with its statutory obligations (the reason why the respondent ceased making the payments is irrelevant).
92. Further under section 1(5) of the ERA there was no obligation on the respondent to provide particulars to the claimant about the pension. I have not seen any case authority (binding on the Tribunal or otherwise) that holds that complying with regulation 8 of the Regulations amounts to conduct by an employer that implies a term into the contract of employment between the employer and employee that there is a contractual obligation on an employer to make the employer and employee contributions into NEST.
93. I am not prepared to make this leap either. I conclude that the term above has not been implied into the contract by the conduct of the parties.
94. Secondly, turning to Mr Mortin's submission that the term in paragraph 79 above is an essential term of an employment contract given the requirements on employers to enrol individuals into pensions. I am not sure whether Mr Mortin is referring to the Tribunal implying a term when the term is necessary in order to give the contract business efficacy or implying a term on the basis that the term is so obvious that the parties must have intended it (officious bystander test). I will, therefore, deal with both possibilities for completeness.
95. In respect of the term being necessary in order to give the contract business efficacy the case of **Scally** is relevant here. The House of Lords in **Scally** felt that it would be stretching the doctrine of implication by virtue of business efficacy too far to imply a term which was only necessary to the one isolated aspect of the whole agreement at issue in that case, i.e. pension entitlement.
96. I conclude that the term in paragraph 79 above is only necessary to one aspect of the whole agreement, being the claimant's pension entitlement and what contributions the respondent should be making into NEST. Following, **Scally** I therefore conclude that the term above is not necessary in order to give the contract business efficacy.
97. I have not seen any case authority (binding on the Tribunal or otherwise) that holds that the statutory obligations of the Pensions Act 2008 and the Regulations on employers mean that the term in paragraph 79 above should be implied into the contract between the claimant and the respondent on the basis that the parties obviously intended it to apply (the officious bystander test). Further as I have concluded in paragraph 86 above there

was no statutory obligation on the respondent to provide particulars of terms and conditions relating to pensions and pension schemes to the claimant under section 1 of the ERA in this case.

- 98. I am not prepared to make this leap either. I conclude that the term above has not been implied on the basis that the parties obviously intended it to apply.
- 99. I conclude that the term in paragraph 79 above was not part of the contract of employment by implication between the claimant and the respondent.
- 100. I conclude there was no contractual entitlement in the contract of employment between the claimant and respondent to a pension nor was there a contractual entitlement for the employee contributions and employer contributions to be paid into NEST by the respondent.

Failure to pay a statutory redundancy payment

- 101. The claimant was dismissed and in a claim for a statutory redundancy payment there is a presumption that the dismissal was by reason of redundancy. The respondent did not attend the hearing and did not present any evidence to rebut that presumption.
- 102. The claimant was continuously employed by the respondent from 17 July 2006 to 11 August 2023 and I conclude that he had the required two years' continuous employment with the respondent.
- 103. I also conclude taking into account the contents of the letter dated 11 August 2023 [61] that the respondent was closing its business and intended to put the company into liquidation. The letter [61] specifically states that the claimant is being made redundant.
- 104. I conclude that the respondent has ceased or intended to cease to carry on the business for the purposes of which the claimant was employed by the respondent under section 139(1)(a)(i) and that this redundancy situation caused the claimant's dismissal.
- 105. I conclude that the claimant was entitled to receive a statutory redundancy payment and that he did not receive a statutory redundancy payment.
- 106. The claimant's statutory redundancy payment entitlement is £9,240.00, which is calculated as follows:

Employment dates	17/07/2006 – 11/08/2023
Length of service	17 complete years
Age	51
Multiplier	22
Weekly wages	£420.00
Statutory redundancy payment	£9,240.00

Failure to provide employment particulars

107. The claimant has succeeded in his claims for notice pay and a statutory redundancy payment. An award of additional pay under section 38 of the Employment Act 2002 for failure to provide a written statement of employment particulars is, therefore, possible.
108. The claimant was entitled under section 1 of the ERA to be provided with a written statement of his employment by not later than 2 months after the start of his employment, i.e., by 17 September 2006. The claimant was not given a written statement of particulars until 5 September 2011 [58]. I conclude that this written statement of particulars only partially complied with section 1 ERA. It confirmed that the claimant's working hours were 40 hours per week between 7.30 am to 5.30 pm, it included terms for sick pay, the probationary period, holiday pay and it stated that the claimant's salary was £404 per week. Prior to the claimant's effective date of termination, he was not issued with any other written statement of particulars by the respondent.
109. The respondent has not put forward any evidence of exceptional circumstances which would make it unjust or inequitable to order them to pay the claimant an additional amount for this failure, in accordance with section 38 of the Employment Act 2002. I must, therefore, award the claimant an additional two week's pay and may, if I consider it just and equitable in all the circumstances, order the employer to pay an additional four weeks' pay.
110. There was a complete failure to provide written statements of particulars between 17 September 2006 and 5 September 2011. The written statement of particulars given to the claimant on 5 September 2011 [58] was very deficient, in particular it did not provide, amongst others, details of the start date of the continuous employment with the respondent (including previous employers), the name of the employer, the job title, place of work, length of notice, disciplinary rules, information relating to collective agreements and confirmation that the claimant would not be required to work outside the United Kingdom for more than a month.
111. Given that the claimant was employed for 17 years and that he only received a written statement of particulars that was partially compliant over five years after he had commenced employment with the respondent I conclude that it is just and equitable to award the claimant an additional four week's pay.
112. I award the claimant an additional four week's pay, i.e., $4 \times £420 = £1680.00$.

Employment Judge Macey
Date: 18 September 2024

Notes

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.