



# EMPLOYMENT TRIBUNALS

**Claimant:** Ajantha Samaranayake

**Respondent:** T G Ram Limited

**Heard at:** Watford (CVP)

**On:** 5-6 September 2024

**Before:** Employment Judge Rakhim (sitting alone)

## Appearances

**For the claimant:** Represented by Mr C Devlin, counsel

**For the respondent:** Represented by Ms J Splavska, consultant

## JUDGMENT

1. The claimant's complaint for automatic unfair dismissal is well founded and succeeds.
2. The complaint of unauthorised deductions from wages is well-founded. The respondent made an unauthorised deduction from the claimant's wages for August 2022.
3. The complaint in respect of holiday pay is well-founded. The respondent made an unauthorised deduction from the claimant's wages by failing to pay the claimant for holidays accrued, but not taken, on the date the claimant's employment ended.
4. The complaint of breach of contract in relation to notice pay is well-founded.
5. When the proceedings were begun, the respondent was in breach of its duty to provide the claimant with a written statement of employment particulars. There are no exceptional circumstances that make an award of an amount equal to two weeks' gross pay unjust or inequitable. Further, it is just and equitable to make an award of an amount equal to four weeks' gross pay.
6. The respondent unreasonably failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015 and it is just and equitable to increase the compensatory award payable to the claimant by 25% in

accordance with s.207A Trade Union & Labour Relations (Consolidation) Act 1992.

7. The claimant is entitled to the following remedies, which the respondent is ordered to pay:
  - a. Unauthorised deductions from wages - **£4,077.52** (gross) (wage deduction £3,000, annual leave £1,077.52)
  - b. Failure to provide written statement of employment particulars - **£2,284** (gross).
  - c. Notice pay - **£692.31** (gross), this figure has been calculated using gross pay to reflect the likelihood that the claimant will have to pay tax on it as Post Employment Notice Pay.
  - d. Compensatory award – **£17,407** (net). (Past loss of earnings £13,520, pension loss £405.60, ACAS uplift £3,481.40).
8. The Employment Protection (Recoupment of Benefits) Regulations 1996 apply:
  - a. The total monetary award (i.e. the compensatory award) payable to the claimant for unfair dismissal is £17,407.
  - b. The prescribed element is £17,407.
  - c. The period of the prescribed element is from 12 September 2022 to 13 March 2023.
  - d. The total award payable is £24,460.83. The prescribed element is £17,407. The balance payable by the respondent before recoupment is carried out is £7,053.83.

## **REASONS**

### **Introduction**

1. The claimant brings a claim against his former employer, the respondent for the following:
  - a. Automatic unfair dismissal - s.104 of the Employment Rights Act 1996 (“**ERA**”);
  - b. Unauthorised deductions from wages - s.13 ERA;
  - c. Failure to provide written particulars - s.1 ERA; and
  - d. Wrongful dismissal.
2. The claimant was employed by the respondent, as an Accountant, from 2 June 2022 to 12 September 2022, as agreed between the parties.

3. The claimant started the ACAS early conciliation process on 31 October 2022. The ACAS certificate was issued on 12 December 2022. The claim was issued on 20 December 2022 and there is no time jurisdiction issue raised,
4. The claimant's case is that he was dismissed following asserting a statutory right, namely, to be paid in accordance with agreed terms and for requesting a written contract of employment. The respondent's defence is that the claimant was dismissed for poor performance. The claimant also alleges that the respondent failed to pay him his wages for the month of August 2022, accrued annual leave and notice pay. The respondent defends these claims.
5. The employment status of the claimant is also in dispute.

### **The hearing**

6. The hearing took place by way of a CVP remote hearing. The technology held up well, I was satisfied that proceeding remotely did not affect the fairness of the hearing and that there were no complaints about proceeding remotely.
7. In attendance was the claimant, represented by Mr C Devlin, Counsel from Doughty Street Chambers. Also in attendance was the Managing Director of the respondent, Mr C Tilvar, and the respondent was represented by Ms J Splavska, consultant at Peninsula Business Services. Each of the four individuals appeared using their own individual remote links. There was an observer, Ms I Ristici, who was an employee of the respondent, but I only noted her being present for part of the morning and she played no part in the hearing.
8. I was assisted by the following documents;
  - a. Main bundle [HB1, pp.108] (with an additional page provided to be inserted into the bundle), witness statement of the claimant [HB2, pp.5], and witness statement of C Tilvar [HB3, pp.5].
  - b. At 15:52 on the day prior to the hearing, the claimant's solicitors emailed the Tribunal an updated schedule of loss dated 4 September 2024 and provided the claimant's CV, whilst copying in the respondent, and submitting they wish to rely upon these documents. The respondent's advocate confirmed there were no objections to these documents being included and relied upon by the claimant. I noted under Rule 41, the Tribunal is not bound by any rule of law relating to the admissibility of the evidence, I am to avoid formality and I had regard to the overriding objective of being flexible and avoiding delay. I considered the evidence was relevant, was not opposed and determined it is to be admitted.
  - c. The parties confirmed there were no additional documents.
9. I heard oral witness evidence from the claimant, followed by oral evidence from Mr Tilvar. Both affirmed and adopted their respective witness statement. Each was cross examined and neither witness was re-examined. Neither witness required any adjustments. Their evidence addressed both liability and remedies.

10. At the end of the oral evidence, both advocates had written submissions that they wished to finalise, they were given time to do this, and the hearing resumed approximately 45 minutes later. Both advocates relied upon their written submissions, which they confirmed addressed both liability and remedies. The respondent's advocate provided very brief oral submissions and the claimant's advocate provided some lengthier oral submissions.

## Background

11. The following facts are not disputed between the parties:

- a. The respondent is a civil engineering company. The claimant commenced his employment, as an Accountant, with the respondent on 2 June 2022 and the employment ended on 12 September 2022.
- b. The respondent had agreed to pay a salary of £36,000 in monthly instalments.
- c. The claimant was paid £2,077.39 in June 2022 with a payslip issued dated 30 June 2022. The claimant was paid £2,253.96 in July 2022, albeit there is a dispute between the parties whether the payslip of 31 July 2022 was issued.
- d. Mr Tilvar, sent a WhatsApp message to the claimant on 30 July 2022 informing him that the office will be closed throughout August 2022 and that the claimant is to return to work on 1 September 2022.
- e. The claimant returned to work on 5 September 2022.
- f. The claimant met Mr Tilvar and the bookkeeper (Ms. I Ristici) on 7 September 2022. The claimant's last attended day at the office was 12 September 2022.
- g. A union representative, on behalf of the claimant, emailed the respondent on 15 September 2022. Mr Tilvar called the claimant on 16 September 2022 to discuss that email, albeit the specifics of the conversation are disputed.
- h. The claimant was paid £1,418.46 on 30 September 2022.

12. The following matters are disputed:

- a. The claimant was to work 3-days a week, 09:00 – 17:00. The respondent says this was a flexible contract on a probationary period.
- b. The claimant requested his written contract and August 2022 pay at the meeting of 7 September 2022. The respondent denies this and says the claimant's performance and qualifications were discussed and they mutually agreed to end the engagement as the claimant was unable to perform the duties.
- c. The claimant emailed, on 9 September 2022, to chase the written contract and August 2022 pay. The respondent denies this and says that the claimant had sent a WhatsApp message on this date requesting his

accrued holiday pay and was informed this would be calculated then paid, and that it was paid in September 2022.

- d. Mr Tilvar had told the claimant on 12 September that he did not like the email of 9 September 2022. The respondent denies this and disputes the employment being terminated due to this.
- e. Mr Tilvar had threatened or shouted at the claimant when he called the claimant on 16 September 2022. The respondent denies this and says it was the claimant who made a racial comment against Mr Tilvar.
- f. The claimant did not receive his September 2022 payslip or his P45. The respondent denies his and states that this was provided.

### The issues

13. The case management order set out the various list of issues in dispute, and this included:

1. **Employment Status** – s.230 ERA
  - i. Was the claimant employed by the respondent as per s.230 ERA?
2. **Automatic unfair dismissal** – s.104 ERA
  - i. Do each of the following amount to instances when the claimant asserted his statutory rights?
    1. When the claimant queried why he had suffered an unlawful deduction of wages, contrary to s.13 ERA, by failing to pay for the month of August 2022, on 7 and 9 September 2022.
    2. When the claimant requested a written contract of employment, as the respondent was required to provide the claimant under s.1 ERA, on 7 and 9 September 2022.
  - ii. If the claimant was employed, was the claimant's dismissal on 12 September 2022, for asserting one, or both, of the above statutory rights, contrary to s.104 ERA 1996.
3. **Unlawful deductions from wages** – s.13 ERA 1996
  - i. Has the claimant suffered an unlawful deduction of wages contrary to s.13 Employment Rights Act 1996, in relation to the following:
    1. Failing to receive payment of £2,253.96 in wages on 31 August 2022.
    2. Failing to receive a payment in lieu of unpaid but accrued annual leave entitlement upon termination of employment.
4. Failure to provide **written particulars** – s.1 ERA
  - i. Did the respondent fail to provide the claimant with written particulars, contrary to s.11 ERA?
5. **Wrongful dismissal** - notice pay.
  - i. What was the claimant's notice period?
  - ii. Was the claimant paid for that notice period?
  - iii. If not, did the claimant do something so serious that the respondent was entitled to dismiss without notice?

## The Law

14. The claimant's advocate had summarised the relevant law in the written submissions. The respondent's advocate had been given time to consider the written submissions and additional time was provided when we resumed. The parties did not disagree with me adopting the law that has already been set out in the claimant advocate's written submissions.

### Employee status (s.230 ERA)

15. An individual must be an "employee" to bring a claim for unfair dismissal under s.94 ERA. For the purposes of the ERA:

- a. "employee" is defined in s.230(1) as "*an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.*"
- b. A "contract of employment" is defined in s.230(2) as "*a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.*"
- c. A "worker" is defined in s.230(3) as "*an individual who has entered into...or, where the employment has ceased, worked under...(a) a contract of employment, or (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual; and any reference to a worker's contract shall be construed accordingly.*"

16. The statutory definition defines employee by reference to a particular kind of contract. The case law draws a distinction between a contract of service (i.e. a contract of employment) and a contract for services.

17. McKenna J in Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497 held:

*"A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service."*

18. The Court of Appeal in Quashie v Stringfellow Restaurants Ltd [2012] EWCA Civ 1735 considered McKenna J's formulation and held at:

*"This approach recognises, therefore, that the issue is not simply one of control and that the nature of the contractual provisions may be inconsistent with the contract being a contract of service. When applying this test, the court or tribunal*

*is required to examine and assess all the relevant factors which make up the employment relationship in order to determine the nature of the contract.”*

19. The tribunal is therefore required to conduct a multi-factorial analysis to determine whether the claimant worked under a contract of employment.
20. Where there is no written contract, the tribunal has to ascertain the intention of the parties to the contract from their oral exchanges and conduct. Lord Hoffmann in *Carmichael v National Power plc* [2000] IRLR 43 held that the ascertainment of the terms of the agreement is a question of fact for the tribunal.
21. Further, the EAT in *Cotswold Developments Construction Ltd v Williams* [2006] IRLR 181 considered a case where a carpenter was engaged to work for the respondent over a period of twenty months without a written contract. The EAT noted that the concept of “*mutuality of obligation*” is used in two senses:
  - a. First, there is a requirement for mutual obligations in the sense of an “*exchange or promises (or consideration)*” for there to be a contract between the putative worker and the putative employer.
  - b. Second, if there is a contract, it is necessary to determine what type of contract it is. “*It cannot simply be control that determines whether a contract is a contract of employment or not. The contract must also necessarily relate to mutual obligations to work, and to pay for (or provide it): to what is known in labour economics as the ‘wage-work bargain’.*”
22. The Supreme Court in *Uber v Aslam BV* held that ascertaining whether an individual is a worker within the meaning of s.230(3)(b) ERA is primarily a question of statutory interpretation rather than contractual interpretation and that the statutory definition must be interpreted to give effect to its purpose of protecting workers. This general approach applies equally to the interpretation of s.230(1) ERA.

#### **Automatic unfair dismissal (s.104 ERA)**

23. S.104 ERA provides:

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee—

...

(b) alleged that the employer had infringed a right of his which is a relevant statutory right.

(2) It is immaterial for the purposes of subsection (1)—

(a) whether or not the employee has the right, or

(b) whether or not the right has been infringed;

but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.

(3) It is sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.

24. The burden of proof is on the employee to establish the reason for the dismissal on the balance of probabilities. However, where the parties advance different reasons for the dismissal, the tribunal is required to consider the evidence of both parties and make a finding as to the reason for dismissal: Derbyshire v Davis and anor t/a Samuel Davis EAT 0703/03.

#### **Unauthorised deduction from wages (s.13 ERA)**

25. Section 13 ERA provides:

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

- (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
- (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

#### **Failure to provide written statement of employment particulars (s.1 ERA)**

26. Section 1 ERA provides:

(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.

...

27. Where the tribunal finds that the employer was in breach of his duty under s.1(1) ERA, it must make an award of the minimum amount of two weeks' pay or, if it considers it just and equitable in all the circumstances, award the higher amount of four weeks' pay: ss.38(2)-(3) and 38(4) of the Employment Act 2002 ("**EA 2002**"). The tribunal may decline to make any award if there are exceptional circumstances which would make an award unjust or inequitable: s.38(5) EA 2002.

#### **Wrongful dismissal**

28. Where an employee has been continuously employed for one month or more and his period of continuous employment is less than two years, the statutory minimum notice period is not less than one week's notice: s.86 ERA.



29. Termination of a contract without notice is not a wrongful dismissal where the employee has waived the right to notice: Baldwin v British Coal Corporation [1995] IRLR 139.

### Findings of fact

30. In reaching my decision, I have carefully considered the oral and documentary evidence, the closing submissions, and my record of proceedings. The fact that I have not referred to every document in the evidence bundle should not be taken to mean that I have not considered it.
31. Where it has been necessary to make a finding of fact in respect of contested matters, I have done so by deciding which version of events is more likely, taking the evidence in the round.
32. I made a rounded assessment of the evidence of both witnesses and their respective credibility as a witness:
33. I found the claimant to be a credible witness. His evidence remained consistent, including at the hearing. His account is consistent between his Grounds of Claim [HB1, p.16-19], witness statement, oral evidence and, importantly, his documents. I had no concerns about his evidence or the manner in which it was given. He gave prompt, straightforward and consistent answers in oral evidence. His evidence attracted significant weight.
34. I found Mr Tilvar's evidence as contradictory, unsupported by documents and on occasions his evidence was contradicted by the documents before me. There was no relevant contemporaneous evidence that supported Mr Tilvar's account. I find he had great difficulty recalling as his evidence was unclear and prone to changing. He was not internally consistent and his oral evidence was contradicted by the Particulars of Response [HB1, p.23-26] and his own witness statement. Within the oral evidence, his answers changed on a number of occasions. I was unable to attach much weight to his evidence.
35. The claimant's advocate drew my attention to specific examples of inconsistencies in Mr Tilvar's evidence. Mr Tilvar did say in his witness statement that on 12 September 2022 he had a conversation with the claimant and they mutually agreed no notice was required. In cross examination he was unclear on this and appeared to be guessing, and when pressed he conceded that the notice was not discussed. This raises the concern as to what else is inaccurate in his statement, but I would not go so far as to say he is a dishonest witness, as invited by the claimant's advocate, and rather I consider that Mr Tilvar's practice of not retaining any notes/records work against him and he started making assumptions about what may have happened. This does undermine his evidence.
36. The Grounds of Response would have been prepared and lodged by the representatives on the instruction of the respondent, for whom Mr Tilvar was the Managing Director. These state that the claimant refused to sign and accept a written contract at the start of his engagement. This was not true as Mr Tilvar's oral evidence was that claimant was expected to go into the respondent's system,

amend the terms, print the contract and then provide it to Mr Tilvar. This was not mentioned in his statement, and was inconsistent with the Grounds of Response.

37. There were other inconsistencies in Mr Tilvar's oral evidence. With respect to the claimant raising the holiday issue on 5 September 2022; Mr Tilvar said in oral evidence this was raised verbally, but when taken to his statement which states this was via email, then Mr Tilvar's evidence changed to saying it was by email. His changing evidence worked against him. Little weight could be placed on Mr Tilvar's account.

**Employee status (s.230 ERA)**

38. The first issue to resolve is whether the claimant was an employee as claimed by him, or a worker as claimed by the respondent. It is undisputed that there is no written contract of employment, which means I have to ascertain the intention of the parties to the contract from their oral exchanges and conduct. There were verbal discussions about the terms of the employment. I am required to consider all the relevant factors of the employment relationship to determine the nature of the contract and the terms of the agreement are a question of fact for me to determine.

39. Mr Tilvar's insisted that the claimant was a worker and not an employee. Through his evidence, he did not appear to understand the difference between a worker and an employee. In oral evidence, he said the claimant said he wanted to be a worker, but later accepted this had not been discussed at the interviews that took place. His changing evidence undermined his evidence. I also had no contemporaneous documents to support the respondent's position that the claimant was engaged as a worker working under a contract for service.

40. I considered there was an element of control in the relationship. The claimant was reporting to Mr Tilvar. Although his work was not managed daily by Mr Tilvar, that merely reflects the fact that it was the claimant who had the accountancy experience, as opposed to Mr Tilvar, and also that the claimant held a senior role. Any autonomy in such role does not equate to Mr Tilvar having no control. Whilst the claimant could choose alternate days to work, his evidence was that this did not happen and if it did he would have to ask Mr Tilvar. The claimant was unable to substitute anyone else for his role. I accept the claimant's evidence.

41. Mr Tilvar's evidence on the discussion between them was light in the Grounds of Response and his witness statements, as he omitted to mention that two interviews took place. The claimant gave a very detailed account of both interviews in his statement:

- a. The claimant's evidence was that at the first interview of 24 May 2022 with Mr Tilvar, it was agreed the claimant would be hired for a permanent role, on a 6-month probation, on an annual gross salary of £36,000, paid every month, for 3 days per week, Monday to Wednesday, 09:00 to 17:00 and 28-days of non-pro-rated annual leave was agreed.
- b. The claimant detailed the second interview at the external accountants' office on 31 May 2022 with Mr Tilvar and Mr Shah, where the job

requirements were discussed and the claimant was told that his role involved "*bringing the accounting process in-house and producing monthly management accounts*". He also mentioned Ms Ristici was leaving and there was a discussion of her tasks as well as the finance tasks on the documents provided within the bundle [HB1, p.92-96].

42. There was no dispute that two interviews took place and they are also confirmed by text messages [Hb1, pp.102-103]. The claimant gave a very detailed account and was consistent upon the details in his oral evidence. I struggled accepting Mr Tilvar saying that the arrangement was temporary, or flexible, as it was common ground that there was an annual salary of £36,000, paid every month (as supported by the relevant gross pay being shown in the June and July 2022 payslips) and it was also common ground that the claimant was entitled to 28 days annual leave.
43. I considered it unlikely that the claimant himself would say that he did not want a contract in his probationary period, as stated by Mr Tilvar. This was at odds with the claimant's presentation at the hearing where he showed a good grasp of his legal rights and it was also at odds with the emails showing the contract being chased in the email of 9 September 2022, where he also referred to the request at the meeting of 7 September 2022 [HB1, p.54]. The claimant's consistent evidence was that he was an experienced accountant with almost 30-years experience, as supported by his CV, and I considered it unlikely he would be unaware of his rights where he had come from a more senior role of a Financial Controller, where he had worked for 13-years.
44. I had numerous contemporaneous documents before me in the bundle to support the claimant's assertions that he was working under a contract of employment; this included the aforementioned email [HB1, p.54], the claimant's right to work checklist [HB1, P.46], the Employee Health and Safety Handbook [HB1, p.49], the email from the external accounts regarding the July 2022 payslip [HB1, p.56] and the 23 June 2022 email to the claimant confirming that he had been enrolled into the pension scheme on the date he commenced employment on 2 June 2022 [HB1, p.43]. All these documents lend further support to the claimant being engaged in a contract of employment.
45. I find the claimant was working under a contract of employment, there was a mutual obligation to offer and accept work, and the agreed terms of the contract were 6-month probation, on an annual gross salary of £36,000, paid every month, for 3 days per week, Monday to Wednesday, and 28-days of non-pro-rated annual leave had been agreed.

**Automatic unfair dismissal (s.104 ERA)**

46. The statutory rights being claimed to be infringed were pleaded to include the August pay deduction, not providing the statement of written particulars, the objection to the statutory rights being asserted (in the meeting of 7 September 2022 and the email of 9 September 2022), and then dismissing the claimant as a result.

47. Mr Tilvar accepts the agreement at the outset was to pay £36,000 to the claimant and that this was paid every month. The June and July 2022 payslips reflect this. I accept the claimant's account that he did not know, prior to receiving Mr Tilvar's WhatsApp message, that the respondent would close in August. I find the claimant was an employee and there was no persuasive reason as to why he was not entitled to the pay in August 2022. It is a matter for the respondent to close in August, and any formal agreement that reflects employee would not be paid for that period has not been evidenced.
48. The respondent's denied that the claimant was dismissed for asserting a statutory right. The Grounds of Response state as follows; the claimant had stated in his interview that he had the required skills and qualifications to carry out the role, it became evident this was untrue, he was not proficient in QuickBooks, training was provided but the claimant was insisting on moving to Sage software when he returned to work on 7 September 2022, the claimant had not been performing to a satisfactory standard and a decision was made to end his employment due to his performance.
49. Whilst Mr Tilvar did say he took issue with the claimant repeatedly preferring Sage software, that does not equate to an inability to perform his roles. Given the claimant's senior role, and his task of bringing the accounting function in house, I accept it would be reasonable for him to consider the type of software package used for the future. I preferred the claimant's evidence where he stated that the basic accounting principle is double entry bookkeeping, the programmes including Quickbook, are all the same as the accounting procedures do not change, mere familiarisation with a new programme is required and over his near 30-year career he had worked with many accounting programmes.
50. It was common ground that a meeting took place between the claimant and Mr Tilvar on 7 September 2022. Mr Tilvar accepted that the holiday entitlement had been raised at the meeting by the claimant. Mr Tilvar says the meeting was to discuss the claimant's performance and it was agreed that the claimant's engagement would end. I do not find there is any evidence of the meeting being held to discuss the performance of the claimant, as stated by Mr Tilvar. In oral evidence, he referred to emails regarding performance issues raised by external accountants, but he failed to produce these, despite being represented by Peninsula since March 2023 [HB1, p.29]. There was no evidence of any prior probation or performance review meeting. Mr Tilvar accepted during his oral evidence that nothing related to performance arose to trigger the 7 September meeting. Mr Tilvar says in his statement that they agreed to end the engagement due to an inability of the claimant to perform his duties, yet in oral evidence he was unable to detail the duties. If the parties had agreed to mutually end the engagement on 7 September 2022, then I would expect some acknowledgement or reference to this in the follow up email, especially given it is alleged that it was a mutual decision, yet the email of 9 September 2022 makes no such reference:

*"Further to our meeting on Wednesday, 7 September, and WhatsApp messages earlier today (Friday, 09 September), I still have not even received my Statutory earned holidays as discussed. Also, I still have not received my contract either.*

*I wanted to reach out to you to resolve my financial concern this month. As you are aware, there was no work available to me in August this was completely out of my control and when I was informed of this instruction it was by a brief WhatsApp text message, there was no other information provided in the message. It has come to my shock on payday that I have received no pay for the month of August and struggling to pay my bills this month as there was no notification explaining the pay situation.*

*I would also really appreciate you providing me a copy of my Contract of Employment, as this will enable me to understand my terms & conditions inclusive of hours, pay and holiday entitlement”*

51. The respondent’s advocate, in the written closing submissions, accepted that the 9 September email evidences the claimant asserting his statutory rights not to suffer from unlawful deductions of wages and the right to be given written contract of employment.
52. It is was unlikely that the claimant attended on 12 September 2022 to return his keys, as stated by Mr Tilvar, as I would have expected the keys to be handed back at the point of the supposed mutual agreement to end the engagement on 7 September 2022. Mr Tilvar’s evidence on this was further undermined by his changing evidence in cross examination on when the keys were returned, initially stating 7 September 2022 and then changing to 12 September 2022. It was further unlikely that Mr Tilvar’s account is correct as he accepted that he never contact the claimant 7 September 2022 to 12 September 2022 to discuss the keys. I did not accept Mr Tilvar to be a reliable historian.
53. For these reasons, I considered the first time the discussion to end the employment occurred was on 12 September 2022. I note the meeting took place on Wednesday 7 September, which was the last working day of the week for the claimant, he sent the email at 23:57 on Friday 9 September and he next attended work on Monday 12 September. The more plausible account, and what I find more likely occurred, is that there were no discussions to end the employment on 7 September and instead this was on 12 September. The claimant’s account is consistent that he arrived at work, was turning on his computer, Mr Tilvar approached, stated that he did not like the email and that the claimant was sacked with immediate effect.
54. I find that the 9 September email is persuasive evidence of the statutory rights being asserted; namely unauthorised deductions from his wages (August pay and holiday pay) and/or a failure to provide a written statement of employment particulars. The email refers to the 7 September meeting, and states that the claimant had “still” not received his holiday, and had “still” not received his contract. I accept this as strong contemporaneous evidence to support the claimant’s assertion that these rights were also asserted at the 7 September meeting. It was clear that the claimant was asserting these rights.
55. Further, Mr Tilvar accepted in oral evidence that the claimant had discussed the holiday pay on 5 September and I had sight of the follow up email the following

day [HB1, p53], which is from the claimant to Ms Ristici and copies in Mr Tilvar, has the subject header as “*Statutory Earned Holidays up to August 2022 including Bank Holidays pay*” and opens by referring to the conversation about the holidays with Mr Tilvar on the previous day.

56. I accepted the claimant was dismissed upon return to work on 12 September due to Mr Tilvar taking issue with the 9 September email. The contemporaneous documentary evidence showing the statutory rights were raised and the timing of the dismissal in the following days persuades me that the reason for the dismissal was due to the claimant raising the statutory rights. I note the claimant’s P45 [HB1, p.79] recorded the employment end date as 12 September 2022 and Mr Tilvar and confirmed in his statement that the claimant had worked until this date. I accept the submission by the claimant’s advocate that given the absence of any evidence of performance concerns, the dismissal taking place in the days following the statutory rights being raised supports an inference being drawn that it was due to this that the claimant ended up being dismissed.
57. I thus find that the principle reason for the dismissal on 12 September 2022 was that the claimant had raised his statutory rights as being infringed by the respondent. This was the unauthorised deduction from wages contrary to s.13 ERA and the failure to provide a contract of employment constitutes an allegation of a breach of s.1 ERA.

**Unauthorised deduction from wages (s.13 ERA)**

58. The claimant states there is an unauthorised deduction for his August 2022 pay and accrued leave on determination. The £277 deduction between 1 - 12 September 2022 was confirmed as no longer being pursued.
59. It was not disputed that payment was made to the claimant for August 2022. There was no dispute that the claimant was to be paid £36,000 per annum and that this would be on a monthly basis. The payslips of June and July 2022 support that this was monthly pay, albeit I note the slightly reduced pay for June to reflect the claimant’s start date of 2 June 2022.
60. I had no contract of employment, thus no evidence of any agreement of there being no pay intended in August. There is also no written agreement presented to show me that the claimant had consented to the August 2022 pay being deducted. The claimant’s accepted evidence is that there was no agreement to deduct the pay and he was surprised this had not been paid and took steps to pursue this when he resumed work in September 2022. I have seen contemporaneous evidence where he is pursuing this pay.
61. I find there is a deduction of **£3,000** for the August 2022 salary. This is gross.
62. In respect of the holiday pay issue, there was no dispute on the claimant having accrued but untaken annual leave. Mr Tilvar accepted the claimant was entitled to 28 days per annum and stated that the respondent’s calculated 3.23 days entitlement was a calculation done by the accounting department, he relied upon that and was unable to explain the calculation. I note the written submissions by

the respondent's advocate reiterated the point that the figure was derived from payroll, and thus seeks to rely on it as being accurate, without anything more added.

63. I was assisted by the written submissions of the claimant advocate's on calculating 7.8 days holiday. My own calculation was that the claimant was employed for 103 days that year (the solicitors omitted to include the end date), which is 28.2% of the year. When applied to the annual allowance, this amounts to 7.9 days entitlement. I accept his daily rate was £230.77 (£36,000 / 52 weeks / 3 days per week). I thus calculate the holiday entitlement as £1,823.08 (£230.77 daily rate x 7.9 days). The payslip for September 2022 [HB1, p.84] shows £745.56 was paid for the annual leave, thus the balance due to the claimant is **£1,077.52**. This is gross.

**Failure to provide written statement of employment particulars (s.1 ERA)**

64. The claimant's claim for unauthorised deductions from pay and unfair dismissal succeed, so he is entitled to be considered for an award under s.38 of the Employment Act 2002. Indeed, s.38(3) imposes a mandatory duty on me to consider the additional award for failing to give a statement of the particulars.

65. It is common ground that no written statement of particulars had been provided. This is required to be given in writing when the employee starts and this had never been issued throughout the employment term. Mr Tilvar states that the claimant asked this is not provided, which is firstly improbable given the claimant was later chasing this, and secondly it does not change the fact that s.1 ERA is still breached.

66. The claimant did not know what his rights were with respect to his August pay, as he was not provided written particulars. This caused the misunderstanding between the parties. I consider it just and equitable to award the higher amount of 4 weeks' pay as the contract had been sought on multiple occasions and there had been a complete failure to provide this.

67. I calculate this to be **£2,284** (£571 per week cap for 2022/23 tax year x 4 weeks). This is gross.

68. It is not subject to any reduction for contributory fault.

**Wrongful dismissal / notice pay**

69. The claimant was an employee and is entitled to notice pay. Mr Tilvar did state in his witness statement that on 12 September 2022 he had a conversation with the claimant and that they mutually agreed no notice was required. In cross examination, he conceded that the notice was not discussed. On balance, I did not accept there was any mutual agreement to end the employment and little weight could be attached to Mr Tilvar's evidence on this issue given his inconsistencies.

70. Under s.86(1)(a) ERA, the claimant had been employed for more than a month and is entitled to a week's notice. No payment of notice had been made and this right had not been waived.

71. I calculate the notice period award to be £692.31 (£36,000 / 52). This is gross.

### **Compensatory award**

72. Compensation is for financial losses only and not punitive. I remind myself of the relevant parts of the Employment Rights Act 1996:

- a. s.123(1) states; "*the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer*".
- b. S.123(4) states the duty to mitigate applies in the same way as it does to damages recoverable under common law.

73. No expenses are claimed.

74. Past financial losses:

- a. There is a claim of loss of earnings. This uses net weekly figures. I note the gross weekly pay is £692.31. I adopt the claimant solicitor's calculated net weekly pay as £520.
- b. Net pay was claimed at £53,560 for 103 weeks from the dismissal date to the hearing (12 September 2022 to 6 September 2024). The loss of earnings are £53,560 (£520 net weekly pay x 103 weeks).
- c. The claimant has not been employed since he was dismissed. He stated in his witness statement that he had an interview in October 2022 for a Finance Manager role with Sodexo UK but he was not being offered enough money. In oral evidence he said he thought he was offered £39,000 – 40,000 but was unsure. He also stated that he had other interviews but was not agreeable to the pay, albeit he did not provide any further details. He stated that he knows his market rate, he earned £72,000 per annum in his previous role and he would not accept a low level pay. He believed his age and the amount he sought was a barrier to him securing a job.
- d. The claimant says he has been on job seekers allowance (JSA) followed by employment support allowance (ESA) from 1 December 2022 since being dismissed, and that this is ongoing. He was unable to give a precise figure, but stated the benefits he received were just under £80 per week.
- e. It is for the respondent to satisfy me, on the balance of probabilities, that the claimant failed to act reasonably in seeking replacement income and that he would have had greater income had he done so. The respondent relies on job adverts printed on 11 March 2024 [HB1, pp.60-65] and the details for these jobs is provided [HB1, p.66-78].



- f. I was not persuaded by the claimant's efforts to find an alternate job to limit his loss:
- i. He was dismissive of the job adverts assuming his expected salary and age are a barrier, and he failed to provide any evidence of his attempts to secure a job. He stated that his PC crashed twice, the hard drive needed to be replaced and he could not provide details of his efforts to find a job. It was unclear when this was and why there is no evidence of the further efforts made since that date. His evidence on changing his internet service provider was confusing and unclear, and I could not understand how he could lose access to his email account as there are many free email accounts available.
  - ii. The respondent provided job adverts, which included jobs paying £45,170-50,000 per annum [HB1, pp.66-67], £50,000 – 60,000 [HB1, pp.77-78], £55,000 – 65,000 per annum [HB1, p.62] and £300-350 per day [HB1, p.62]. The latter would be equivalent to over £90,000 per year.
  - iii. The claimant was 63 years old at the time, and he has provided no evidence of his job efforts or the result of such efforts. There are jobs available paying a similar range. I accept the offer in October 2022 was low, but considered that 6 months would have been a reasonable amount of time to secure a job offer and that this struck a fair balance when taking his age into account.
  - iv. I adopt the claimant's calculation of the net weekly pay of £520. I calculate the loss of earnings as **£13,520** (£520 net per week x 26 weeks). This is net.
  - v. I note the pension loss claimed of £1,606.80 at 3%. There is no challenge to the 3% contribution rate. On the figure calculated for loss of earnings, this would be (£13,520 x 3%) **£405.60**. This is net.

75. In terms of adjustments:

- a. Contributory fault – to make a reduction to the compensatory award, I have to find that the dismissal was caused or contributed to by any action of the claimant, and if so I can reduce the compensatory award by an amount I consider just and equitable. I could not find any fault on the part of the claimant. Any allegation of an inability to navigate the QuickBooks software was countered by the claimant and I preferred his evidence on this for the reasons given earlier. I do not find any blameworthy conduct on the part of the claimant. There is no contributory fault deduction.
- b. Polkey – this reflects a reduction on the compensatory award because of the likelihood that the claimant would have been dismissed in any event if the employer had acted fairly. I find there is no evidence that the claimant would have been dismissed in any event. There was no evidence of any

performance related issues being raised. I found he was dismissed due to asserting his statutory rights. There is no Polkey deduction.

- c. ACAS code – s.207A of the Trade Union and Labour Relations (Consolidation) Act 1992 provides for unfair dismissal awards to be adjusted if either side has unreasonably failed to comply with a relevant Code of Practice. Any increase is applied only to the compensatory award, and is applied before any reduction for contributory fault. I found no fault on the part of the claimant with respect to his dismissal. However, I did find that the respondent had failed to follow the ACAS Code. I refer to my earlier findings with respect of the respondent's conduct. In my view, this does justify an uplift of 25%.
- d. I note the loss of earnings was **£13,520** and the pension loss was **£405.60**. The 25% uplift on these figures amounts to **£3,481.40**. These figures amalgamated do not exceed the statutory cap. The total compensatory award is thus **£17,407**.
- e. No grossing up is required, and the award is under £30,000.

76. The Employment Protection (Recoupment of Benefits) Regulations 1996 apply for any state benefits that have been paid. This applies to the past loss of earnings element of the compensatory award from the date of the dismissal, 12 September 2022, to 13 March 2023. The total monetary award (i.e. the compensatory award) payable to the claimant for unfair dismissal is £17,407. The period of the prescribed element is from 12 September 2022 to 13 March 2023. The total award payable is £24,460.83. The prescribed element is £17,407. The balance payable by the respondent before recoupment is carried out is £7,053.83.

### *Conclusion*

77. I thus make the remedies as per the amounts in the Judgment:

- a. Unauthorised deductions from wages - **£4,077.52** (gross)  
(wage deduction £3,000, annual leave £1,077.52)
- b. Failure to provide written statement of employment particulars - **£2,284** (gross).
- c. Notice pay - **£692.31** (gross), this figure has been calculated using gross pay to reflect the likelihood that the claimant will have to pay tax on it as Post Employment Notice Pay.
- d. Compensatory award – **£17,407** (net).  
(Past loss of earnings £13,520, pension loss £405.60, ACAS uplift £3,481.40).

---

Employment Judge Rakhim  
25 October 2024

**Case Number: 3315274/2022**

Sent to the parties on: 3/12/2024

For the Tribunal Office: N Gotecha