



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Maninder Singh  
**Respondent:** First Stop (Wombourne Common Road) Limited  
**Heard at:** Birmingham  
**On:** 13 December 2017  
**Before:** Employment Judge Flood (sitting alone)

## Representation

**Claimant:** In person  
**Respondent:** Did not attend

# JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's complaint of constructive unfair dismissal is well founded and succeeds. The claimant is awarded the sum of **£6371.38** in respect thereof.
2. The respondent has made an unauthorised deduction from the claimant's wages (including accrued but untaken holiday entitlement) and is ordered to pay the claimant the sum of **£3333**.

# REASONS

## The Complaints and preliminary matters

1. The Claimant brought a complaint of unfair dismissal contrary to **section 94 of the Employment Rights Act 1996 ("ERA")** and a complaint of unlawful deduction of wages in relation to non payment of wages and holiday pay under **section 23 of the ERA**.

2. A bundle of documents had been prepared by the Claimant (“the Bundle”) and the claimant had prepared a witness statement and attended to give evidence today. The respondent did not attend the hearing. Attempts were made to contact the respondent by telephone by the clerk. The hearing had been previously postponed due to the ill health of one of the directors of the respondent and had been rescheduled. I decided that it would not be in the interests of justice for any further postponements to be made and that the respondent had received notification of the hearing and had opportunity to attend. Therefore the hearing proceeded in the absence of any appearance from the respondent.
3. The hearing proceeded and I delivered oral judgment on the day. The claimant requested written reasons for the decision, which are hereby provided.
4. The claimant had the able assistance of an interpreter during the hearing as English is not his first language.

### **The Issues**

5. I discussed the issues with the claimant at the outset and these broadly were:
  - 5.1. Did any conduct by the respondent amount to a fundamental breach of contract? In particular, were any of the following matters a fundamental breach of contract:
    - 5.1.1. The continual delay in paying wages and non payment of wages for February;
    - 5.1.2. The allegation of missing stock made against the claimant?
  - 5.2. Did the claimant resign, because of any such act or omission (or series of acts or omissions) by the respondent?
  - 5.3. If so, had the claimant affirmed the contract following the breach by delaying too long in resigning?
  - 5.4. If there was a constructive dismissal:
    - 5.4.1. has the respondent shown the reason for dismissal?
    - 5.4.2. if so, was it a potentially fair one?
    - 5.4.3. if so, has the respondent otherwise acted reasonably?
  - 5.5. If there was a constructive dismissal, did the claimant’s conduct in any way contribute to or cause this constructive dismissal?

### **Findings of Fact**

6. The claimant gave evidence himself. I have also considered the relevant parts of the Bundle, being those documents pointed out to me by the claimant during the course of his evidence and referred to in his witness

statement. Having considered the evidence raised, I make the following findings of fact:

- 6.1. The respondent is a family run business consisting of a convenience store/supermarket, which is run and managed by four family members, Tajinder Singh (known as Andy), Gurmeet Singh (known as Tony), Harkesh Kaur and Balbir Kaur.
- 6.2. The claimant started working for the respondent in July 2014 and his role was that of sales assistant. His duties included cash handling, managing orders, cleaning the shop and reporting enquiries to management. The claimant worked long hours at the store – sometimes 6 days a week for 10 hours each day and he often worked overtime including Sundays.
- 6.3. The claimant was never issued with a written contract of employment or any statement of terms and conditions of employment or particulars. He was employed at the rate of the applicable minimum wage and was not initially given any entitlement to holidays or paid holiday pay. He was not paid for any days he took as holiday and if a day was taken, he would have to work an additional day instead, usually a Sunday. He was only paid for days actually worked.
- 6.4. This changed in March 2016 when he started to receive holiday entitlement and pay. He was informed he was eligible to take 5.6 weeks holiday per year.
- 6.5. From the commencement of his employment, the respondent was usually late in paying the claimant's wages. His first pay cheque bounced and the next was delayed by some months. There was generally a day of at least a couple of weeks before he was paid for the preceding month.
- 6.6. The claimant was not happy with these delays but things reached a head when in December 2016 there was a 5-6 week delay in paying his wages – they were finally paid on 3 February 2017 as shown in the bank statement on page 132 of the Bundle. He was not paid his January pay until 8 March and his February pay had also not been paid. The claimant was finding it increasingly difficult to manage his household expenses. He reached the conclusion some time around 18 March 2017 that he was no longer able to tolerate the non payment of his wages and he decided to resign. He informed the respondent around the 18/19 March 2017 of his decision, telephoning both Balbir Kaur and Tajinder Singh to inform them of his decision explaining that he was unhappy with the non-payment of his wages. He informed the respondent that he would work until 31 March 2017.
- 6.7. During this conversation, Tajinder Singh said to the claimant that the till at the shop was short and implied that the claimant was somehow to blame for this. The claimant denied this at the time and continues to deny any wrongdoing. No formal allegations of any alleged misconduct were ever put to the claimant. There were then some discussions between the claimant and various members of management by telephone

and also the Staff Whatsapp group where the claimant asked several times for his outstanding wages to be paid. The claimant was then removed from the Whatsapp group and Gurmeet Singh repeated the allegation surrounding missing stock on the Whatsapp group.

- 6.8. At some stage after this, Balbir Kaur made some attempts to persuade the claimant to stay in his employment but the claimant confirmed that he had provided the two weeks notice as required and his employment would terminate on 31 March 2017. He was then informed by Balbir Kaur that he would not get a good reference if he left, and by Gurmeet Singh that he would not pay his outstanding wages and the claimant would have to take him to court.
- 6.9. The claimant was not paid for February or March 2017 despite asking for this on many occasions. He sent an e mail on 3 April 2017 which is referred to at page 27 of the Bundle to which no reply was received and with the help of the Citizens Advice also wrote on 4 April 2017 (page 28 of the Bundle) requesting his wages to be paid. He was told that he would not be paid his outstanding wages and that when the claimant said he would go to court to enforce his rights, he was told he could do so if he wanted and that he would be given the money in court.
- 6.10. The claimant contacted ACAS to commence conciliation as required and during discussions with ACAS the respondent provided to ACAS two payslips for February and March 2017 which are shown at pages 87 and 88 of the Bundle. The claimant accepts that the payslip for February 2017 shows the correct amount he was owed i.e £1473.24 but that the payslip for March 2017 (including accrued but untaken holiday pay for the 2016-17 holiday year) was incorrect – it indicated that he was owed £1683.68 when in fact he was owed £1859.76 as more hours were worked than indicated. I preferred the evidence of the claimant on this issue than the contentions made by the respondent. The claimant was meticulous in recording his hours as shown by the records he kept (pages 34-48 of the Bundle) The claimant was never paid the amounts specified in the payslips provided by the respondent or any other amounts.
- 6.11. The respondent entered into discussions with the claimant after commencement of proceedings about the correct amount of holiday pay that was due to the claimant. It alleges that the claimant was paid correct holiday for the years 2014-15 and 2015-16 and that in fact he was overpaid holiday pay for the holiday year 2016-17 – see e mail to the Employment Tribunal dated 26 July 2017. I find that the claimant was not paid any holiday pay for the holiday years 2014-15 or 2015-16 but that he was paid holiday pay during the holiday year 2016-17. He was not however paid for the accrued but untaken holiday for this holiday year as at the date of termination of his employment.
- 6.12. The claimant immediately started to look for work once he had left the respondent and obtained employment in May 2017. Evidence of his attempts to find alternative work are shown at pages 69-71 of the Bundle. He worked from 2 May 2017 until the end of September for a car parts manufacturer at the hourly rate of £7.67 per hour (plus overtime). This

job ended at the end of September and he was then out of work for a further 5 weeks. He is now working on a self-employed basis as an Amazon delivery driver, again earning in excess of what was earned with the respondent. A schedule of loss was produced relating to the Claimant's alleged losses and shown in the Bundle. The claimant updated this and sent this to the Tribunal and the respondent following the initially postponed hearing.

- 6.13. The claimant also made an application for a costs order and he claims in his schedule of loss in respect of legal expenses incurred. This legal advice was obtained and paid for by the claimant in November 2017 and was in order to find out what the merits of his claim were and how to progress the litigation.

### The Law

7. **Section 94 of the ERA** sets out the right not to be unfairly dismissed and **Section 95 (1) (c) of the ERA** says that an employee is taken to have been dismissed by his employer if the employee terminates his contract of employment (with or without notice) in the circumstances in which he is entitled to terminate if not notice by reason of the employer's conduct i.e constructive dismissal.
8. If the dismissal is established then the Tribunal must also consider the fairness of the dismissal under **Section 98 of the ERA**. This requires the employer to show the reason for the dismissal (i.e: the reason why the employer breached the contract of employment) and that it is a potentially fair reason under **sections 98 (1) and (2)** and where the employer has established a potentially fair reason then the Tribunal will consider the fairness of the dismissal under **section 98 (4)**, that is:
- 8.1. did the employer act reasonably or unreasonably in treating it as a sufficient reason for dismissal; and
- 8.2. was it fair bearing in mind equity and the merits of the case.
9. It was established in the case of **Western Excavating (ECC) Limited v Sharp** [1978] IRLR 27 that the employer's conduct which can give rise to a constructive dismissal must involve a "*significant breach of contract going to the root of the contract of employment*", sometimes referred to as a repudiatory breach. Therefore, to claim constructive dismissal, the employee must show:-
- 9.1. that there was a fundamental breach by the employer;
- 9.2. that the employer's breach caused the employee to resign;
- 9.3. that the employee did not delay too long before resigning, thus affirming the contract of employment.
10. **Section 13 of the ERA** provides that a worker has the right not to suffer unauthorised deductions from their wages. **Section 23 ERA** provides a right for a worker to present a complaint to Employment Tribunal that their

employer has made an unlawful deduction from their wages, contrary to **section 13**.

11. **Section 1 of the ERA** provides that where an employee begins employment *“the employer shall give to the employee a written statement of particulars of employment”* and that this *“shall be given not later than two months after the beginning of employment”*.
12. If an employer fails to provide such a statement, a complaint can be brought under **section 12 (3) of the ERA**. In addition under **section 38 of the Employment Act 2002 (“EA”)** if an Employment Tribunal makes a finding in favour of an employee in a number of specified claims (including for unfair dismissal and unlawful deduction of wages) and makes an award to the employee in respect of those claims, and in so doing finds that the employer was in breach of its **section 1 ERA** duty when the proceedings were begun *“the tribunal must...increase the award by the minimum amount [2 week’s pay] and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount [4 week’s pay] instead”*. This does not apply if there are *“exceptional circumstances which would make an award or increase....unjust or inequitable”*.

### **Conclusion**

13. I heard submissions from Mrs Kumari on behalf of the claimant.
14. Dealing with the questions I posed at the outset, I have concluded that the ongoing and continual delay and subsequent non payment of wages for February 2017 was a fundamental breach of the claimant’s contract of employment. The claimant had been subject to delays in payment of wages throughout his employment but his December pay was 5 weeks late and he had not been paid for January until early March 2017, similarly 5 weeks late. His February pay had not been paid at the time he took his decision to resign around 18 March 2017. Pay for work carried out is perhaps the most fundamental term of the contract of employment and a continual failure to comply with this term in a timely manner or at all goes to the heart of the contractual relationship.
15. The unspecified allegations of missing stock against the claimant I also find to be a breach of the implied term of trust and confidence inherent in the claimant’s contract of employment and that such breach was a fundamental breach. No formal allegations were put to the claimant and the matter was only raised when the claimant started to chase for payment of his wages.
16. When considering whether the claimant resigned, because of any such act or omission (or series of acts or omissions) I find that the claimant did resign in response to the first fundamental breach of contract, namely the continual delay and non payment of his wages. His evidence was clear that he was finding it increasingly difficult to manage his household and the non payment of his wages for February was the last straw that led the claimant to decide that he had to leave and find alternative employment.

He did not have a job to go to but still concluded that he could no longer put up with the delays in payment and non payment. When he was then accused of being involved in missing stock, the claimant concluded that he should not rescind his resignation and return to work (as requested by the respondent) but at this stage he had already resigned.

17. I do not find that there was any delay in resigning which would suggest that any breach had been affirmed. I considered whether the fact that the claimant had suffered delays throughout his employment meant that he accepted this state of affairs but have concluded that this is not the case. He had consistently asked for his wages to be paid on time. It was the excessively long delay for December's and January's wages and the non-payment of February pay, that ultimately led the claimant to resign. At this point, he acted promptly in confirming his resignation to the respondent.

18. As I had therefore found that there was a constructive dismissal, it was necessary to consider the following questions:

- 18.1. had the respondent shown the reason for dismissal?
- 18.2. if so, was it a potentially fair one?
- 18.3. if so, has the respondent otherwise acted reasonably?

19. The answer is negative to all of these questions. The respondent has not averred what the reason for any dismissal was other than some vague allegation relating to stock losses that the claimant was responsible for. This does not amount to a fair reason for dismissal and the respondent has not otherwise acted reasonably.

20. I also considered whether the claimant's conduct in any way contributed to or caused this constructive dismissal and have concluded that this is not relevant to the situation here - the claimant in no way contributed to his constructive unfair dismissal.

21. I therefore find that the claimant's complaint of unfair dismissal succeeds.

22. In considering the compensation to which the Claimant is entitled to in light of his unfair dismissal, I have calculated this as follows:

**Basic Award**

22.1. The claimant commenced employment in July 2014 and his employment terminated on 31 March 2017. Therefore he has 2 years full service. The claimant was aged 33 when his employment terminated. He is therefore awarded a Basic Award as follows:

2 weeks at £432 per week (60 hours at £7.20 per hour)

Basic award **£864**

No deductions are applicable.

## Compensatory Award

### Prescribed element

- 22.2. The claimant's weekly gross pay was £432. Deductions were calculated at £77 per week, consisting of £44.00 weekly income tax (based on tax code of 1100L on a non-cumulative basis) and weekly NI of £33.00 (based on NIC table letter A for a non-director). The claimant's weekly net pay is therefore calculated at £355.00 (equivalent to £1538.33 per month or £18,460.00 per year).
- 22.3. The claimant was unemployed between 1 April 2017 and 31 May 2017 (4 weeks) amounting to £1420 loss of earnings and between 1 October 2017 and 5 November 2017 (5 weeks) amounting to £1775 loss of earnings. I therefore calculate that the claimant has incurred £3195 in loss of earnings to the date of hearing. This already takes account of earnings in alternative employment between 1 June 2017 and 30 September 2017, where the claimant was paid broadly the same as he was earning with the respondent. No relevant benefits were claimed. There is no Polkey reduction or increase/reduction under **section 124A ERA**. Lost earnings therefore amount to £3195.
- 22.4. In respect of the claimant's complaint that the respondent's failed to provide a statement of initial employment particulars, I find that there was indeed such a failure. The claimant never received anything in writing from the respondent in respect of his terms and conditions of employment at any time let alone within 2 months of his employment beginning. No written statement of employment particulars was provided as is required under **sections 1 and 4 of the ERA**.
- 22.5. As **section 38 of the EA** also provides that when the Employment Tribunal makes an award to the employee in respect of the claim to which the proceedings relate and when the proceedings begun the employer was in breach of their duty under **Section 1(1) or 4(4) of the ERA** the Tribunal must, subject to subsection (5) increase by the minimum award and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead. The two amounts concerned are two weeks or four weeks pay. The Tribunal is obliged, therefore, to make such an award, whether applied for or not, unless there are exceptional circumstances. In this case, I do not consider there are exceptional circumstances,
- 22.6. I am exercising my discretion to increase the award therefore by 4 week's pay amounting to £1728. There was a complete and abject failure on the respondent's behalf to comply with its **section 1 ERA** obligations and the claimant was left with no information as to what his employment terms and conditions were. Therefore in my discretion, an increase of the maximum level is appropriate in these circumstances. I therefore add the sum of 4 weeks pay pursuant to **section 38 EA 2002** amounting to £1728 to the loss of earnings already calculated.



Loss of earnings	£3195
Increase in award under <b><u>section 38 EA</u></b>	<u>£1728</u>

22.7. No adjustments are relevant in respect of a **section 207A** failure to comply with a relevant code of practice and there was no contributory fault % reduction to be made under **section 123(6)**.

Total prescribed element	<u>£4923</u>
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**Non prescribed element**

22.8. I have not awarded any amounts for future loss of earnings as the claimant is now employed and earning more than he did when employed at the respondent. However the claimant has incurred expenses of £234.38 in seeking alternative employment and I am awarding the sum of £350 for loss of statutory employment rights

Expenses incurred seeking employment	£234.38
Loss of statutory employment rights	£350
Total non prescribed element	<u>£584.38</u>

Total compensatory award	£5507.38
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Add basic award	<u>£864</u>
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<b>TOTAL AWARDED FOR UNFAIR DISMISSAL</b>	<b>£6371.38</b>
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23. In respect of the claimant's complaint of non payment of wages I award the claimant the following sums in respect of unpaid wages for February and March 2017.

February 2017	£1473.24
March 2017	<u>£1859.76</u>

<b>TOTAL AWARDED FOR UNLAWFUL DEDUCTIONS FROM WAGES</b>	<b>£3333</b>
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24. The claimant seems to be claiming two elements which he says relate to unpaid holiday pay. The claimant's holiday year ran from 1 April to 31 March.

24.1. There is holiday pay accrued but untaken as at the date of termination of his employment for the 2016/7 holiday year which is awarded and has been included in the calculation for the claimant's unpaid wages for March 2017 set out at paragraph 23 above.

- 24.2. He also states that he should be paid holiday pay for two previous holiday years from July 2014 until March 2015 and from April 2015 until March 2016. The claimant alleges he did not take any paid holiday during those years as he was informed he would not be paid in respect of it. He was therefore prevented from taking his holiday entitlement for those years. In the time available today and in the absence for any clear legal basis being set out by the claimant for such claims, I am not in a position to make any decision on this particular element of the claimant's holiday pay claim.
- 24.3. I asked the claimant to consider what he was claiming on this point, take some advice on the issue and provide me with further particulars of the legal basis of this complaint within 14 days of the date of receipt of the written reasons for this decision. I will then consider this further and endeavor to make a decision on this element of the claimant's complaint without the need to hold a further hearing.
25. The claimant has also made a claim for an order to recover his legal costs incurred in November 2017 in the sum of £275.40. As this legal advice was to the claimant on the merits of his claim generally, it does not fall under any of the grounds for awarding costs against the respondent set out in under **Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.** I therefore declined to make an award of costs in this regard.

Employment Judge Flood

Date: 15 January 2018