EMPLOYMENT TRIBUNALS

Claimant	***Respondent***
Mr J Frater	Darley Homes Renovations Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT MIDDLESBROUGH ON 20th December 2017
EMPLOYMENT JUDGE GARNON (sitting alone)

Appearances
For the Claimant in person
For the Respondent no attendance

JUDGMENT ON REMEDY AND COSTS

The Judgment of the Tribunal is:

1. On the claim of unfair dismissal, I award compensation of £ 16500 being a basic award of £600 and a compensatory award of £15900. The Recoupment Regulations apply. The prescribed period is 10th May – 20th December 2017. The prescribed element is £9600. The difference between the total award and the prescribed element is £6900.
2. I make no awards on the claims of wrongful dismissal and unlawful deduction of wages.
3. On the claim for failure to pay compensation for untaken annual leave, I order the respondent to pay compensation of £ £147.60 to the claimant.
4. I make an additional award under s38 Employment Act 2002 of £1200
5. I make a costs order that the respondent pay to the claimant £1650 plus VAT of £330 being a total of £1980.

REASONS

1. The claimant gave sworn evidence today producing a written statement the contents of which are verified. JWK Solicitors (JWK) have acted for him throughout until today when they have not attended in order to save costs. The tribunal file shows the respondent has been made fully aware it could have attended today, and been heard on the question of remedy, but it has chosen not to attend.

2 The claimant was born on 16 February 1992. He started doing work, but not every week, for Darley Homes Ltd (Homes) in early 2014 and, from 15 February 2015 every week for 40 hours plus occasional overtime. He was a painter and decorator. He was never given payslips or a statement of terms and conditions of employment. A Companies House search I performed shows Homes was incorporated on 5 March 2007. Its registered office is 1-2 Teesdale Ave, Billingham, TS23 1NA.. Members of the Darley family are its directors and probably shareholders.

3 On 17 November 2015 a company named Darley Homes Renovations Ltd (Renovations) with the same registered office was incorporated. The claimant commenced proceedings against both companies saying he was not sure which employed him. He presented his claim on 28 August 2017 of unfair dismissal, wrongful dismissal, failure to pay for holiday accrued but untaken by the date of termination and a request for an uplift under section 38 of the Employment Act 2002.

4. The claim was served on both respondents on 30 August with a notice of hearing for today. Standard directions were given for a schedule of loss to be provided by the claimant by 25 September 2017. Document disclosure was to take place by 11 October. The respondent was to prepare the bundle of documents for the hearing by 25 October and witness statements to be exchanged by 18 November.

5. Response forms were received on 26 September 2017 from Hewitts Solicitors for both respondents. Homes denied it was the claimant's employer. Renovations admitted it was but contended his continuous employment had not commenced until 23 November 2015. The effective date of termination was 9 May 2017 and, as in order to claim unfair dismissal two years continuous employment is needed, the headline defence was the tribunal could not consider the claim. The response also said he was paid £150 per week, gross and net, for working 20 hours a week.

6. I accept the claimant's evidence he was never to be paid that amount for those number of hours. From February 2015 his pay was £300 gross for a 40 hour week and, if he worked in excess of 40 hours, he was entitled to overtime pay. However there is no pattern of regular overtime I can discern, or he can recall, upon which I can base any of my awards today. As he was never given payslips, he does not know how much overtime he worked. Many payslips have been produced on disclosure but I accept the claimant's evidence the contents are wholly unreliable.

7. £150 per week was paid by credit transfer to his bank and the remaining pay given to him in cash. Taken with facts which follow, this case is redolent of practices to avoid liability by any means such as using successive companies to conduct the same business. The claimant being a young man simply did what he was told. If there was tax evasion was in my judgment purely on the part of the respondent so the claimant is not deprived of his rights by the doctrine of illegality.

8. On the incorporation of Renovations the entire undertaking of Homes appears to have been transferred to it. Therefore by virtue of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) the claimant's contract transferred to Renovations without any break in continuity of employment.

9. Virtually as soon as the response was received, JWK , in correspondence with the tribunal and Hewitts, alleged there had been a TUPE transfer so the defence the claimant lacked continuity of service was spurious. Documents disclosed in these proceedings include payslips showing £150 per week paid by Homes from 15 February to 20 November 2015 and then payment from the next week to termination made by Renovations. The response form said the claimant had been given a statement of terms and conditions dated 18 November 2015 but I have not seen one. I accept he never saw such a document.

10. The substantive defence put forward in the response form was that the claimant was dismissed for non-attendance at work on 9 May 2017. He accepts he did not attend on time that morning. He had holiday authorised on 8 May and, because he had driven some distance on that day and arrived home late , was too tired to drive to work on time . He made contact with Mr Darley to say he would be late. He was then dismissed with no disciplinary process vaguely resembling the ACAS code on disciplinary practices being followed. The claimant was not given notice of the allegation against him or any opportunity to answer it. There was not even a meeting. The response form says he had a record of non-attendance including a final written warning on 26 August 2016. The claimant denies this and I accept his evidence. The response form also says he was paid in lieu of notice but there is no evidence he was and he denies it. It says he was paid for his holiday accrued due but there is again no evidence of that and he denies it.

11. When the response forms were received at the tribunal they were reviewed by an Employment Judge under Rule 26 of the Employment Tribunal Rules of Procedure 2013 (the Rules). JWK had submitted representations that the defence the claimant lacked continuity was bogus. On 24 October JWK wrote to the tribunal applying for the response to be struck out on the basis the denial of unfair dismissal was simply inconsistent with their own admission that no procedure had been used.

12. On 25 October Hewitts came off the record saying the respondent was in financial difficulty. They admitted the continuity of employment point was wrong because there had been a transfer . On **6 November** the tribunal wrote to **both** respondents saying correspondence would now be sent direct to them. Employment Judge Johnson said the claim should be remain listed for a full trial on 20 December

13. On or about 26 October application was made to the Registrar of Companies by the directors of Homes and Renovations to have both companies struck off the company register. A search performed by me today reveals that on 25 October 2017 a company called Darley Homes Estates Ltd was incorporated with the same registered office. JWK lodged an objection at Companies House to the striking off and, according to an email from Companies House dated 30 November, a stay has been placed on that until 22 February 2018 .

14. On 6 November 2017 JWK wrote to the tribunal saying the respondent was in breach of the Orders in that it had not prepared the bundle. On 7 November Employment Judge Buchanan invited their comments by return. No such comments were received . On 28 November JWK applied to strike out the response on the bases first that the defence stood no reasonable prospect of success and second for failure to comply with Orders . On **29 November** Employment Judge Johnson issued

an order that unless the respondent confirmed by 5 December it had complied with all directions the claim would be struck out for non-compliance with orders. No such confirmation was received.

15. On 7 December Employment Judge Johnson confirmed the strike out and issued a judgment under rule 21, on liability only, against Renovations only, as liability had passed them under TUPE. He converted the hearing for today to a remedy hearing. **On** 12 December the Rule 21 judgment was sent to the parties, including Renovations, with a letter inviting them, if they wished, to apply for a reconsideration. No such application has been received .

16. On 16 December JWK notified the tribunal they would today be making a costs or "wasted costs" application . The two vital letters sent to the respondents by the tribunal on 6 November and the unless order sent on 29t November (emboldened in the paragraphs above) were returned to the tribunal offices on 18 December with manuscript notes on the envelope saying " not at this address return to sender'. I have known Royal Mail returnsuch envelopes but for two sent 23 days apart to arrive back on the same day is unique in my experience and tends to suggest the recipient put them back in a postbox on the same day.

17. I now turn to a brief statement of the law on remedy and my conclusions. There are two elements to unfair dismissal compensation. The basic award is one "week's pay" (which in a contract with normal working hours is the gross pay for those hours,) for every complete year of continuous employment during the whole of which the employee was over 22 but under 41 years of age. There were two such years and if I take the week's pay as £300, the least it could be, the basic award is £600. The compensatory award is explained in section 123 which includes:

(1).. 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.

(4) In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales ..

18. Section 124 imposes an overall cap of 52 week's pay. The claimant always believed tax was being deducted from the cash payment he received which was frequently more than £150 because he worked overtime most weeks. Tax may not have been paid . For the purposes of today's calculation of his net pay, I believe it should be at least £300 because the amount of tax and national insurance probably equates to the periodic over time the claimant worked.

19. Following his dismissal the claimant attempted to find work. He denies the assertion in the response form that he has done any paid for his father since dismissal. He began claiming Universal Credits not long after. He has been unable to find alternative employment in the 32 weeks from dismissal to date. At the rate of £300 per week his loss of earnings to date is £9600 . Recoupment applies to that. As for future loss of earnings the claimant has had some interviews recently and tried to find work in other trades. However he is not optimistic and I accept he will remain

out of work for the next 20 weeks. Because I cannot be sure about the amount of a "week's pay", I do not believe I am exceeding the maximum amount compensatory award if I award £6000 for future loss **as well as** £300 for loss of statutory rights. Although his dismissal was plainly wrongful as I have taken account of the notice period in the award for unfair dismissal I making no further award in respect of that, though arguably I could , see O'Laoire-v-Jackal Industries. My task in assessing compensation has been an exercise in informed guesswork as to the correct figures for weekly gross and net earnings because the claimant's memory cannot make up for the absence of genuine payslips and a written statement of his employment terms

20. The Rule 21 judgment of Employment Judge Johnson treated the non-payment of holiday pay either as an unlawful deduction from wages or compensation for untaken annual leave under regulation 14 of the Working Time Regulations 1998 However it is labelled the calculation is the same so I make an award under the latter but not the former. The claimant's leave year commenced on the anniversary of his starting 15 February. By dismissal on 9 May, 12 weeks of the year had elapsed. His total holiday pay for the year 5.6 weeks would be £1680. The proportion of the year which had expired 12/52 of that which means the award would be £387.60. From that I subtract the four paid days i.e. three bank holidays and one additional leave day on 8 May,he did take at £60 per day (£300 a week when he normally worked five days per week). The sum to be awarded is £147.60.

21 Section 38 of the Employment Act 2002 says that where an employer has failed to comply with a duty imposed upon him under Section 1 of the Act to provide an employee with a written statement of her terms and conditions of employment , or changes to such terms ,then, when making an award under any of the foregoing sections, I must increase the award by either two weeks or four weeks pay depending on the gravity of the employer's breach. This breach was blatant and there is no doubt in my mind that I should make the higher award of £1200

22. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 as amended includes

(2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b) the employer has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable,

the employment tribunal may, ***if it considers it just and equitable in all the circumstances to do so,*** *increase any award it makes to the employee by no more than 25%.*

The section applies to unfair dismissal claims and the relevant code is the ACAS Code on Discipline and Grievances at Work. The important point is that this is a discretionary power, which, if exercised, compensates the claimant to a greater extent than his losses. I will explain later why I chose not to exercise it.

23. Much of the much of the facts recounted above relate not to the remedy but to the costs issue. Costs orders in an Employment Tribunal:
(a) are rare and exceptional.
(b) whether the Tribunal has the right to make a costs order is separate and distinct from whether it should **exercise its discretion** to do so
(c) in determining whether to make a costs order, the paying party's conduct as a whole needs to be considered. Per Mummery LJ in Barnsley MBC v. Yerrakalva [2011] EWCA 1255 at para. 41:
"*The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had.*"
(d) there is no rule/presumption that a costs order is appropriate because the paying party lied or failed to prove a central allegation of their case, see HCA International Ltd. v. May-Bheemul 10/5/2011, EAT.
(e) even if there has been unreasonable conduct making it appropriate to make a costs order, it does not follow that the paying party should pay the receiving party's entire cost of the proceedings. Yerrakalva at para. 53

24. So called "wasted costs" are awarded against representatives whose conduct has been improper, unreasonable or negligent. Hewitts as solicitors have in my view done nothing wrong. They are bound to follow their clients instructions unless they know they are by doing so deceiving the Tribunal or furthering some unlawful scheme . They could not be expected to know anything like that .

25. As for the amount of costs the schedule prepared by JLK is entirely reasonable. It is hard to imagine more unreasonable conduct of the proceedings that has occurred in this case, so I exercise my discretion to make a costs order. The schedule of loss asks for an ACAS uplift of 25% . I was tempted to make one but, if Homes and Renovations do enter formal insolvency proceedings, as Hewitts indicated they might, other unsecured creditors to whom money is owed would be prejudiced in order for the claimant to receive a sum greater than his loss. I think justice is best done by a full costs award but no s207 uplift .

____

T M Garnon EMPLOYMENT JUDGE
SIGNED BY EMPLOYMENT JUDGE ON 22nd DECEMBER 2017