EMPLOYMENT TRIBUNALS

Claimant: Mr P Stevenson

Respondent: Mr J Hunt T/a Granelli's

HELD AT: **Sheffield** **ON:** **19 and 20 October 2020**

BEFORE: **Employment Judge Little (sitting alone)**

REPRESENTATION:

Claimant: In person
Respondent: Mr J Munro, Consultant (Peninsula Business Services Limited)

JUDGMENT

My Judgment is that:-

1. The claimant was constructively dismissed.
2. That dismissal was unfair.
3. That dismissal was also wrongful.
4. The complaint in respect of unauthorised deduction from wages succeeds and the claimant is awarded the sum of £615 (wage arrears) and a further sum of £225 (pay for holiday taken) and so the total award is £840.
5. The other aspect of a holiday pay complaint fails.
6. In respect of unfair dismissal the claimant is awarded a basic award of £4387.50 and a further award of £500 in respect of loss of statutory rights.
7. Damages for wrongful dismissal are assessed and awarded at £2700.
8. There is a further award under the provisions of the Employment Act 2002 being a higher award in the amount of £900.
9. Accordingly the total compensation and damages payable to the claimant by the respondent forthwith is £9327.50.

10. The recoupment regulations do not apply.

REASONS

1. Judgment and oral reasons were given on the day, but towards the end of the hearing the respondent's representative requested written reasons.

2. **The complaints**

In a claim form presented on 13 November 2019 Mr Stevenson brought the following complaints:-

- Unfair dismissal (constructive).
- Wrongful dismissal (constructive) – notice pay.
- Unpaid holiday pay.
- Unauthorised deduction from wages.

He also sought a further remedy on the basis that he had not been provided with a statement of initial employment particulars.

3. **The issues**

There had been a preliminary hearing for case management on 5 March 2020 before Employment Judge Rostant when the complaints were identified along with the relevant issues. There was then a subsequent case management hearing conducted by Employment Judge Deeley on 25 May 2020 when it was noted that some of the issues which had been identified at the earlier hearing were inaccurately recorded. For instance there was in fact no issue in relation to the time of presentation of the claim and there had been some confusion about the competing dates for resignation – as to which see later.

At the beginning of this hearing I prepared a list of issues a copy of which was distributed to the parties and it was agreed that those were the issues which this Tribunal would determine. That list was in these terms:

<u>Constructive dismissal</u>

1. Did the respondent commit a fundamental breach of the contract of employment because of his alleged failure to pay the claimant's wages on time or sometimes at all? (Although in his witness statement the claimant has referred, for the first time, to allegations that he was required to drive company vehicles which were unroadworthy, I have not permitted that to be added as a further aspect of the alleged fundamental breach.)

2. Was the claimant's resignation on 16th (or 19th) September 2019 an acceptance by him of a repudiatory breach by the respondent and so in law a constructive dismissal?

3. Had the claimant affirmed (forgiven) any breach prior to his September 2019 resignation?

4. Should the claimant's subsequent return to fresh employment with the respondent briefly in the period 24 September 2019 to 22 October 2019

lead to the conclusion that there had been no fundamental breach in the first employment?

Unfair dismissal

5. Did the claimant have sufficient qualifying continuous employment immediately prior to 16 or 19 September 2019 so as to give him the right not to be unfairly dismissed?
6. Fairness – it was clarified at this hearing that the respondent does not seek to show a potentially fair reason for any dismissal which might be found. It's defence to the unfair dismissal complaint is simply that there was no dismissal.

Wrongful dismissal

7. If the claimant was constructively dismissed, was that wrongful because no notice or payment in lieu of notice was given to him?
8. If so what damages (notice pay) is the claimant entitled to?

Deduction from wages

9. As of the effective date of termination, did the respondent owe the claimant any arrears of wages?
10. If so in what amount?

Holiday pay

11. Did the respondent fail to pay the claimant for a weeks' holiday which he had taken in August 2019?
12. If so was that an unlawful deduction from wages?
13. Was the claimant owed any accrued but untaken holiday as of the effective date of termination?
14. If so what compensation should be paid to the claimant for that?

Section 38 remedy

15. Was the claimant given a written statement of employment particulars?
16. If not, should the claimant be given a higher or lower award under the provisions of the Employment Act 2002, section 38?

4. **Evidence**

The claimant gave evidence. The respondent gave evidence as did his mother, Mrs Rosita Hunt.

5. **Documents**

The parties had agreed a bundle which ran to 59 pages. During the course of the hearing an additional document was added at page 60. This was a note to the claimant by Mrs Hunt.

6. **The facts**

1. I find that the claimant's employment commenced on 3 October 2002. That is the date which the claimant states in his ET1. In the grounds of resistance (paragraph 3) the respondent accepts that the claimant did start on that date – although the grounds of resistance go on to contend that there were various occasions when the claimant left the employment so as to break continuity. The respondent contends that the relevant employment only commenced on 24 September 2019. I do not accept that proposition for the reasons set out in the conclusions below. Returning to the original start date, in Mr Hunt's witness statement (paragraph 2), it is clear that the typed date for commencement is 2002 but in manuscript the respondent has crossed that out and inserted 2003. When I asked Mr Hunt why he had made that change he said that he was now able to remember that it was 2003 because the claimant had begun shortly after the death of one of Mr Hunt's uncles. As the respondent never issued any contract of employment or statement of employment terms and there is no other documentation that I have been shown that would establish a later start date, I find that the employment did begin on 3 October 2002.
2. The claimant's job title was delivery driver and general warehouse worker. The role included driving ice cream vans during the season.
3. The respondent is a sole trader who operates a sweet shop, some sweet stalls and a fleet of ice cream vans and trailers. He is a small employer and the ET3 says that he only has two employees although it is probably a few more than that. Mr Hunt told me that the Granelli's business had been in operation for 146 years and he appeared to be offering that as an explanation for what I find to be the respondent's failure to comply with the most basic record keeping and the obligations which the law places on any employer.
4. I have not accepted the respondent's case that there were frequent gaps in the employment of the claimant. It appears that relations between the claimant and Mr Hunt may from time to time have become heated and that the cause of that was by no means limited to what the respondent describes as the claimant's hot headed nature. I find that at the most the claimant would on occasion leave the workplace in a temper and that that was often because he had been provoked or felt the need to do so for self-protection. However I find that on none of those occasions was the claimant intending to resign nor did the respondent treat his actions as a resignation. As Mrs Hunt put it during cross-examination "*the claimant never completely left or resigned – sometimes he got in a strop"*. The respondent has not been able to offer any dates (other than the circumstances prevailing in September and October 2019 which I deal with below) when the claimant had allegedly resigned and/or when he allegedly returned to the employment.
5. In February 2019 the respondent ceased to operate a stall within the Moor Market in Sheffield – although apparently it continued to operate stalls outside the market. The claimant contends that the respondent was forced to leave the Moor market because he failed to pay the rent. However the respondent contends that the decision was taken to close that stall because it was not profitable.

6. The respondent contends that this event meant that there was less work for the claimant to do and that an agreement was reached with the claimant whereby his hours, which had been 30 per week, were reduced to 24 per week. The claimant denies that that happened. The respondent did not issue any documentation in respect of the alleged variation to this important term of the claimant's contract of employment and had shortly after this date, apparently on the advice of his accountant, ceased to issue payslips to the claimant or any other employee. The advice apparently was that it was only necessary to issue payslips if an employee requested that. Although the respondent alleges that the reduction of hours took place with effect from March 2019, the very last payslip that was issued to the claimant (page 55) dated 5 April 2019 still shows his hours at 30 per week. For the reasons explained there are no subsequent payslips which could have supported the respondent's case that the hours had been reduced. It is also to be noted that Mr Hunt does not seem sure himself what the arrangement was with hours. In paragraph 5 of his witness statement he states that the hours were reduced to 24 per week, but in paragraph 10 he has amended an obvious typo (which probably read 254 per week) to read 25 per week. Answering questions from the Employment Judge, Mr Hunt said that it had been 25 hours not 24 and he sought to avoid the reference to 30 hours in the last payslip by saying that the reduced hours had not yet come into effect when that payslip was issued, or at least in relation to the period for which it was issued.

7. On the balance of probabilities therefore I find that the claimant had continuous service from October 2002 (which is in fact 16 complete years not 17) and that his working week continued to be 30 hours for the whole of the relevant period.

8. I find that there had been problems about the claimant receiving his wages on time since at least 2012. He explains that at that time prior he had been paid by cheque but the cheques kept bouncing. In or about 2012 the claimant said that he would not accept payment by cheque any longer and thereafter for the remainder of the employment he received cash payments. I find that there were frequent delays in the payments being made and often the claimant would only be paid part of what he was entitled. The claimant says that there was always what he describes as a running wage owed balance and that he would have to hound and chase down Mrs Hunt in order to get payment. The claimant refers to various messages or excuses he would receive with enquiries being made about how much was he owed, did he need all his wage that week and that the respondent was not able to pay everybody. I have seen one example of such a note and Mrs Hunt when giving evidence acknowledged that the note, which now appears at page 60 in the bundle, was written by her, probably in August 2019. It reads:

   "Paul I am v very v v v v sorry but £50 is here for today. I will, <u>all being well</u> – straighten up with you at the weekend."

9. Mrs Hunt also accepted during questions from the claimant that in addition to the claimant going to the yard on Saturdays in order to receive his cash payment, there was also an arrangement that from time to time on a Sunday the claimant and Mrs Hunt would rendezvous on a side road

in the Sheffield suburb of Banner Cross. On these occasions Mrs Hunt would give the claimant cash. Mrs Hunt explained that Banner Cross was chosen (which is on the other side of the city from where the claimant lives) because on Sundays Mrs Hunt would travel through Banner Cross whilst operating one of the respondent's ice cream vans.

10. I have already explained the decision which the respondent took to suspend issuing payslips. Whilst there are a number of payslips dating from 2018 to April 2019 in the bundle (pages 33 to 55), the claimant says that he would only get payslips intermittently. Again the respondent appears to have taken the approach that even if produced, payslips were only distributed if the employee asked for one. In any event in the period from April 2019 to the termination of the claimant's employment no payslips were issued, the respondent did not require the claimant to sign any receipt for cash that was given to him and it appears that the respondent has no other bookkeeping records to establish what was or what was not paid to the claimant. It appears that the claimant and Mrs Hunt were, as best they could, keeping a running total in their heads and that Mrs Hunt monitored the position on the basis of what money she recollected was in the safe.

11. By reason of these wholly unsuitable arrangements I find on the balance of probability that the respondent was operating an extremely precarious approach to the payment of wages and the recording of those payments. In those circumstances I do not accept Mr Hunt's evidence that he always paid wages on time to the correct amount. Nor do I accept Mrs Hunt's evidence in her witness statement, at paragraph 2, that to her knowledge the claimant never complained about not being paid correctly. She volunteers no information in her witness statement about the rendezvous in Banner Cross, nor does she make mention of the note at page 60.

12. I also have concerns about the respondent's approach to that note. The claimant wrote to the Tribunal on 23 June 2020 asking the Tribunal to "add the enclosed five documents to my file". In fact these are documents which really the claimant should have disclosed directly to the respondent. However, as is its usual practice if documents or letters have not been sent to the other side, the Tribunal on 9 July 2020 provided copies of those five documents to the respondent. Four of those documents have found their way into the trial bundle, including statements from a Gillian Grimbley (page 57) and a statement from Danielle Platton at page 58. However the fifth document, Mrs Hunt's "*v very sorry note*" was not included in the trial bundle by the respondent. Its provenance and potential significance was not realised by me until the claimant made reference to it whilst asking Mrs Hunt questions. I asked Mr Munro to explain why this document, which is not at all helpful to the respondent's case, had been omitted from the bundle. Mr Munro said that he had not been involved in preparing the bundle and so could not say. Whilst I accept that there may be an innocent explanation for its exclusion I am on balance of the view that the respondent and its advisor decided to omit this document, realising that it would be damaging to their case that the claimant was always paid on time.

13. The claimant's evidence is that the situation with his pay got worse in 2019. Previously arrears would usually be paid in the week following but

he says that throughout the period of 2019 that he worked for the respondent there were always arrears. The claimant and Mrs Hunt had a friendly relationship, born no doubt from the very lengthy period of the claimant's employment. The claimant speaks of help that he gave to the family above and beyond his obligations as an employee, including on one occasion intimate care for Mrs Hunt's husband, who has now sadly passed away. The claimant says and on the balance of probability, I find this as a fact, that Mrs Hunt would ask the claimant not to tell her son about the arrangements which Mrs Hunt and the claimant made for the payment of his wages by erratic instalments. Nevertheless the claimant contends that Mr Hunt could not help but to have been aware of the situation.

14. Further I find that the claimant applied a shrewd analysis to the state of the respondent's business which he had known and worked in for so many years. His verdict was that in 2019 the business was failing.

15. Matters came to a head in September 2019. The claimant has had some difficulty in recollecting with precision relevant dates. This may have led to some confusion at Employment Judge Rostant's case management hearing.

16. Having regard to both the claimant's account of events in the week commencing 16 September 2019 and those recollections of Mr Hunt set out in his witness statement I make the following findings.

17. On Monday 16 September 2019, which was a non-working day, the claimant drove to the respondent's site and left his vehicle there whilst he made a visit to the Job Centre. When he returned to collect his car he had a brief conversation with Mr Hunt and told him where he had been and that he would not be in work the next day and might not be in for the rest of the week.

18. On Thursday 19 September 2019 the claimant again parked his vehicle at the respondent's premises and again visited the Job Centre. Again on his return he had a brief meeting by chance with Mr Hunt and, in the account given by Mr Hunt in paragraph 15 of his witness statement said "*he was done with this job and that, after 17 years, it was all over*".

19. I accept the claimant's evidence that later in the week he received a telephone call from Mrs Hunt, who asked him to return to work. On Saturday 21 September (a non-working day in any event) the claimant went to the respondent's premises ostensibly to collect his possessions but he ended up having a lengthy conversation with Mrs Hunt during which she offered to pay the claimant his full wage and an amount of the accrued arrears. Mrs Hunt said that if the claimant returned to work his wages would now be paid on time.

20. In those circumstances, and apparently on what the claimant describes as advice from ACAS, the claimant agreed to be re-employed by the respondent and he returned to what I find to be fresh employment on 24 September 2019.

21. However regrettably the promises made by Mrs Hunt did not materialise. In the following week the claimant was only paid £30 and the claimant was told to come back on the following day, Sunday 29 September 2019

when the balance of the money owed to the claimant would have been left in a jug in the yard. On the claimant attending he found no money in the jug. The claimant then hoped that he would receive payment on the following Tuesday 1 October 2019, but again no money was to be found in the jug. The claimant was then told by Mrs Hunt that she would square up with him the following weekend. This led to the claimant and Mrs Hunt meeting on Saturday 5 October in the archway to the respondent's business premises but the claimant was given only £20 because Mrs Hunt said that that was all she had. The claimant was then told that the money would be in the jug the following Tuesday. The claimant duly attended on 8 October 2019 but again it was empty.

22. The claimant says that in these circumstances he terminated this second period of employment, but again the dates are somewhat hazy. The implied timeline given in his witness statements suggests that that would have been 8 October 2019, but it is quite possible that it was 22 October 2019. In circumstances where my focus has been on the termination of the 16 year period of employment, which I have found occurred on 19 September 2019, the termination of the subsequent and much briefer period of employment is not directly relevant in this case.

23. The claimant wrote no letter, email or text to confirm his resignation and the respondent did not write to the claimant after the 19 September 2019 resignation, nor for that matter after the resignation from the subsequent employment in October 2019.

24. On 29 October 2019 the claimant secured a new job. He told me that because of his desperate financial situation and concern that he would be evicted from his rented home he took the first job that he was offered even though that was in a different city and meant that he would incur significant commuting costs. However the actual pay from the new job was more than his pay in the old job.

7. The parties' closing submissions

1. Claimant's submissions

   Mr Stevenson explained that he had not wanted to take this to court and that he felt out of his league and did not wish to say more.

2. The respondent's submissions

   Mr Munro reminded me of the law relating to constructive dismissal and the guidance given in the leading case of **Western Excavating (ECC) Limited v Sharp** [1978] ICR 221. He also mentioned the case of **Kaur v Leeds Teaching Hospitals NHS Trust** [2019] ICR 1.

   The respondent's case was that the claimant had been hot headed and that there had been frequent departures and returns. The claimant's return to work on 24 September 2019 was the last of many such returns. Mr Munro suggested that there was little evidence to support the claimant's case about late or non-payment of wages. In any event by returning to the employment on 24 September 2019 the claimant had affirmed any pre-existing breach. He contended that any late payment accompanied by an apology would not be a repudiatory breach and in any event any earlier delays had been forgiven by the claimant. The note now at page 60 was the only evidence of delays in payment. Mr Munro

contended that the claimant had really left because he had a new job. I reminded Mr Munro that in paragraph 21 of the grounds of resistance the respondent asserted that the claimant had resigned of his own volition "and for some other reason". I pointed out to him that that alleged 'some other reason' had never been advanced during the evidence and it was too late to seek to do that in closing submissions.

With regard to the deduction from wages complaint, Mr Munro accepted that there was evidence of some late payments but no evidence of short payments.

Returning to the unfair dismissal aspect of the case, Mr Munro said that the claimant did not have sufficient qualifying employment because of his pattern of leaving and returning.

The wrongful dismissal complaint should fail because there was no dismissal. In respect of the holiday pay complaint, the claimant had accepted that he had been paid in full for time off (in fact the claimant had clarified that that had been up to, but not including, August 2019).

In relation to the remedy sought under section 38, the respondent accepted that no written contract had been provided to the claimant. Mr Munro suggested that the lower award was appropriate because of the size and resources of the respondent. He went on to suggest that in terms of what he described as the last period of the claimant's employment – allegedly September to October 2019 - the claimant had not been employed for a sufficient period to require the respondent to issue a written contract.

8. **My conclusions**

1. Was the claimant constructively dismissed?

    a. Did the respondent commit a fundamental breach of the contract of employment?

    The task of proving that there was a fundamental breach of the contract of employment rests with the claimant. On the basis of my findings of fact I have concluded that there was throughout the employment a persistent failure to pay the claimant's wages in full on time, or sometimes, to pay them at all. Whilst that state of affairs had existed for many years, my finding was that the position had very much worsened in 2019 so that the situation was one of a constant attempt, not usually met, to catch up the claimant's due payments. The ability of the claimant to be absolutely sure about the monies owed to him was obviously caused mainly by the respondent's abject failure to operate a proper system for the payment of and recording of wages paid. In those circumstances I have rejected Mr Hunt's bold assertions that the claimant was simply paid his correct wages at the right time throughout the employment. I have taken into account the following matters:-

    - The respondent's failure, even as a small employer, to comply with the most obvious and basic bookkeeping requirements and the denial of the claimant's statutory right to receive an itemised pay statement in the crucial latter period of his employment.

- The corroborative information contained in the letters of Mrs Grimbley and Ms Platton. Those two statements have, without objection, been included by the respondent in the agreed bundle. Whilst those statements have not been proffered by the claimant as witness statements and I have of course not heard from Mrs Grimbley or Ms Platton, those letters support the claimant's contention about employees having difficulty getting paid. Mrs Grimbley, speaking of the position in 2019, writes that she was having to take a small amount of wage until getting paid something further the following week and so as she puts it always playing catch up. This caused her to seek alternative employment. Ms Platton says that she also had to leave in August 2019 because the respondent was finding it hard to pay her full wage on a weekly basis. She writes of multiple times where she had to go without her full 100% wage and had to wait weeks for the respondent to catch up. Mr Hunt has sought to downplay those accounts because Mrs Grimbley is the claimant's partner it appears and Ms Platton is related to either the claimant or his partner. Whilst I have not been able to assess these two individuals as witnesses, what they have to say does tend to support the claimant's account.
- There is then Mrs Hunt's 'very v sorry note'. Whilst this is the only document of its type which the claimant has been able to produce, I have accepted his evidence that it was not an isolated event. What Mrs Hunt says in this note is completely in line with the state of affairs which the claimant said had applied for considerable time.
- There is then the evidence of the somewhat bizarre meetings between Mrs Hunt and the claimant on Sundays in Banner Cross. This again supports the claimant's case that payment of wages was irregular and sporadic.

For obvious reasons, payment of the wage for services rendered is an obligation at the very heart of the employment relationship. Accordingly in circumstances where I have found there to have been a persistent failure by the respondent to meet this obligation I am satisfied that there was a fundamental breach of the contract of employment.

b. Was the claimant's resignation on 19 September 2019 an acceptance of this repudiatory breach and so in law a constructive dismissal?

On the evidence before me I find that it clearly was. It is only in closing submissions that the respondent has suggested that the claimant had an ulterior reason. As I have found, it seems that the claimant certainly did not have a job lined up when he resigned but it is hardly surprising that he was anxious to get a new job just as soon as he had finally parted company with the respondent. In any event, as the relevant resignation is 19 September 2019, in

fact the claimant did not start new employment with a third party until over a month later.

c. Had the claimant affirmed or forgiven any breach prior to his September 2019 resignation?

Whilst the claimant had put up with late and partial payment for some considerable time, it is clear that that was under protest and had been tolerated by the claimant for longer than one might have anticipated by reason of the long standing employment relationship and the claimant's own economic necessity. Because the term in question was so fundamental – the payment of wages - it would be exceptional if an employee accepted or condoned his employer consistently failing to pay the correct amount of wages.

Some consideration does need to be given to the claimant's re-employment by the respondent on 24 September 2019. At face value it may seem odd that, against the backdrop I have set out the claimant agreed to in effect be re-employed by the respondent. However, something which occurred after what I have found to be the claimant's constructive dismissal on 19 September 2019 cannot retrospectively affirm the breach which led to that dismissal.

In any event the claimant's agreement to be re-employed on 24 September 2019 can be explained by what was the close and lengthy friendly relationship which the claimant had had at least with Mrs Hunt and because of the promises of payment which she made which must be viewed against the claimant's own economic necessity. He accepted those promises perhaps against his better judgment but unfortunately those promises proved to be false. However in my judgment none of that affects the claimant's earlier constructive dismissal save to the extent that his treatment in the second period of employment appears to have mirrored his treatment in the first period of employment.

2. Unfair dismissal

a. Did the claimant have sufficient qualifying employment to have the right not to be unfairly dismissed?

On the basis of my findings the answer to that question is yes. The employment had begun in 2002 and was continuous up to the point of resignation on 19 September 2019.

b. Was the dismissal unfair?

As the respondent has not defended the claim in the alternative by contending that there was a fair reason to dismiss, it follows inexorably from the finding that there was a constructive dismissal that that dismissal was unfair.

3. Wrongful dismissal

    a. As the claimant was dismissed and as in the circumstances no notice was given by the employer, it follows that the dismissal was wrongful, being in breach of contract. The claimant is therefore entitled to damages representing the statutory minimum notice period provided by the Employment Rights Act 1996, section 86 which in the claimant's case is 12 weeks.

4. Unauthorised deduction from wages

    In the claimant's letter to the Tribunal of 22 December 2019, as noted, he states that he is owed £615 for wages and a further £225 for a weeks' holiday which he took in August 2019 but for which he was not paid. I accept that the claimant has not been able to provide a breakdown of the figure of £615 but, as I have noted, the claimant has been put in a very difficult position because of the chaotic arrangements which the respondent had for the payment of wages. In these circumstances and as the amount is relatively modest, I have no reason to disbelieve the claimant and therefore conclude that both the wages and the August holiday pay was withheld amounting to an unauthorised deduction from wages.

5. Holiday pay

    Over and above the claim for the holiday taken in August 2019 the claimant is seeking a further payment for what he describes as "my yearly November week off". However it transpired during the evidence that the claimant meant that as the employment had ended in September 2019 he would not be able to take a paid holiday in November 2019. Whilst obviously that is the case, it does not mean that the claimant can seek compensation for a prospective holiday which post-dates the termination of his employment. Usually an employee can only claim for accrued but untaken holidays as of the date of dismissal. The claimant is not making any further complaint in the latter category and accordingly this complaint must fail.

9. **Remedy**

1. Unfair dismissal compensation

    The claimant is entitled to a basic award based upon 16 complete years of service and him being 48 years of age at the effective date of termination. His weekly pay was £225. Applying the statutory formula, basic award is £4387.50.

    I have also awarded the claimant some compensation for loss of statutory rights. Whilst he had full and statutory employment rights in the old employment, he will have to work for two years in the new job in order to acquire those rights. I considered that the sum of £500 was appropriate compensation for this loss.

    As the claimant's new employment pays more than his old employment he was not seeking any loss of earnings either immediate or future.

    The claimant told me that he had received a one off lump sum by way of Universal Credit but that he was now re-paying that by instalments which

were automatically deducted from his wage in the new job. In those circumstances the Recoupment Regulations do not apply.

2. Compensation in respect of deduction from wages and wrongful dismissal damages

   I have explained the rationale for these awards in my conclusions set out above.

3. The additional award under the provisions of the Employment Act 2002 section 38

   This section provides for an additional award to be made when another substantive complaint has been successful and where an employer has failed to comply with its duty under the Employment Rights Act 1996, section 1 to issue a written statement of particulars of employment. Section 38 of the 2002 Act provides that a Tribunal must make an award of the minimum amount (2 weeks' pay) and may, if it considers it just and equitable in all the circumstances, award the higher amount instead (4 weeks).

   Whilst any such award is made to the claimant, the award is in effect a penalty against an employer who has failed to meet an essential requirement. I therefore need to take into account the degree of failure. In the case before me, there was no contract of employment and no letter of appointment. In fact no attempt at all had been made to document the terms of employment. That needs some explaining. Mr Hunt had referred to the length of time the business has been operating apparently as an excuse. However one might think that a well-established business would be more aware of its obligations as an employer than would an employer with a shorter history. I accept that in terms of mitigation, this is a small employer without anything like a dedicated HR function although I accept that Mrs Hunt does her best in the circumstances. However, whatever the size of the employer, the need for and purpose of a clear written documentation of employment terms is hardly esoteric or obscure and so should be within the grasp of the smallest employer. Whilst a case where a small employer has issued a statement or even a letter of appointment which does not precisely meet the requirements of the statute that would be a case attracting a lower award, I consider that in a case where absolutely no documentation has been issued the appropriate award is at the higher level.

Employment Judge Little
Date 2nd November 2020