



THE EMPLOYMENT TRIBUNALS

Claimant: Mr L Daniels

Respondent: Kingly Solicitors Ltd. t/a Coles Solicitors (in voluntary liquidation)

Heard at: Newcastle CFCTC (By CVP) **On:** 1 February 2021

Before: Employment Judge Newburn

Members:

Representation:

Claimant: In person

Respondent: no attendance

RESERVED JUDGMENT

1. The Claimant's claim for unfair dismissal is dismissed upon withdrawal by the Claimant.
2. The Claimant's claim for breach of contract brought under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 succeeds in respect of the Claimant's claim for notice pay, holiday pay, expenses, and his contractual bonus and the Respondent is ordered to pay the following sums to the Claimant:
 - 2.1. unpaid notice; the Respondent is ordered to pay the net sum of **£5,887.18** in respect of the Claimant's notice pay and **£265.19** in respect of Employer's pensions contributions;
 - 2.2. holiday pay; the Respondent is ordered to pay the sum of **£215.54** for 6 days' pay in lieu of untaken holiday. This is a gross award and the Claimant shall be liable to the Inland Revenue for any payments of tax and national insurance thereon;
 - 2.3. unpaid expenses; the Respondent is ordered to pay the sum of **£123.75**;

- 2.4. unpaid bonus; the Respondent is ordered to pay the sum of **£12,591.69**;
3. This is a total award of **£19,083.35** in respect of the Claimant's claim for breach of contract.
4. The Respondent has made an unauthorised deduction from the Claimant's wages and is ordered to pay the Claimant the gross sum of **£1,000.72** plus a further **£83.04** representing employer's pension contributions. This is a gross award and the Claimant shall be liable to the Inland Revenue for any payments of tax and national insurance thereon.
5. The Employment Protection (Recoument of Jobseeker's Allowance and Income Support) Regulations 1996 do not apply to these awards.

REASONS

The Issues

1. The issues to be determined in this case were as follows:
 - 1.1. What was the Claimant's notice period?
 - 1.2. Was the Claimant paid for that notice period?
 - 1.3. If not, was the Respondent entitled to dismiss without notice?
 - 1.4. Did the Respondent fail to pay the Claimant for annual leave the Claimant had accrued but not taken when his employment ended?
 - 1.5. Did the Respondent make unauthorised deductions from the Claimant's wages and if so, how much was deducted?
 - 1.6. Did the Respondent breach the terms of the Claimant's contract in failing to make a payment relating to a bonus and his unpaid expenses?
 - 1.7. If so, how much should the Claimant be awarded in damages?
 - 1.8. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply to the Claimant's claims?
 - 1.9. Did the Respondent or the Claimant unreasonably fail to comply with it?
 - 1.10. Is it just and equitable to increase or decrease any award payable to the Claimant?
 - 1.11. If so, by what proportion, up to 25%?

The Hearing

2. The Claimant informed me at the start of the hearing that as he had not worked for the Respondent Company for over 2 continuous years, he wished to withdraw his claim for a compensatory award for unfair dismissal including the compensatory elements of that claim relating to expenses for seeking alternative employment and a claim for loss of statutory rights.
3. The Claimant's claim was one of multiple claims brought against the Respondent company. Evidence in respect of the Claimant's claim and the claims of 7 other employees were heard together.
4. At the start of the hearing I was provided with an up to date Excel spreadsheet which comprised a table confirming the claims that each Claimant was making against the Respondent.
5. I was also provided with one bundle of evidence amounting to 240 pages in respect of each Claimant's case against the Respondent. The bundle contained each Claimant's witness statement, schedule of loss, and documentary evidence.
6. To this bundle, I admitted further evidence from the Claimants amounting to an additional 27 pages which was inserted at the end of the bundle, making the total bundle 267 pages. None of the further evidence that was admitted to the bundle related to the Claimant's claim. I considered all of the evidence submitted by the Claimant and heard his evidence on oath.
7. Despite the fact that the Respondent is in voluntary liquidation, the Claimant confirmed that he wished to obtain a judgment.
8. There was no evidence that any stay of this claim had been obtained under section 112 of the Insolvency Act 1986.

Findings of Fact

9. The Respondent carried on business as a solicitors' practice operating from multiple offices across the North of England. The Claimant was employed for the Respondent firm of Solicitors as from 1 April 2019, as a Solicitor working 5 days per week.
10. The Claimant's payslips at pages 97 to 102 of the bundle showed that the Claimant's earnings. The figures taken from these wage slips demonstrated that the Claimant earned:

10.1. Pay:

- | | |
|------------------|------------------------------------|
| 10.1.1. monthly: | £3,333.33 gross and £2,457.43 net; |
| 10.1.2. weekly: | £769.23 gross and £567.10 net; |
| 10.1.3. daily: | £153.85 gross and £113.42 net. |

10.2. Employer's pension contribution:

- | | |
|------------------|------|
| 10.2.1. monthly: | £150 |
|------------------|------|

10.2.2. weekly: £34.62
10.2.3. daily: £6.92

11. The Respondent employer's pension contributions were unclear from the Claimant's payslips however all of the Claimants in the hearing gave evidence in their Schedule of Loss that employer's pension contributions were 4.5%. I accepted this figure and I calculated the Claimant's employer pension contributions accordingly.
12. On 12 August 2020, the Respondent company was subject to an intervention by the Solicitors Regulation Authority ("SRA") resulting in the immediate shutdown of all of the Respondent's offices. There was no warning, consultation, or notice of redundancy given to the Claimant, as the offices were immediately closed further to the intervention on 12 August 2020.
13. The Claimant was dismissed by reason of redundancy on 12 August 2020.
14. The Claimant's last payslip at page 102 of the bundle was the last payment the Claimant received from the Respondent and covered the period up to the end of July 2020. Further to this payment the Respondent did not pay the Claimant in respect of the following:
 - 14.1. his notice pay;
 - 14.2. accrued but untaken holiday;
 - 14.3. arrears of pay for the period 1 August 2020 to 12 August 2020;
 - 14.4. expenses he had submitted; and,
 - 14.5. his contractual bonus.
15. Dealing with those payments in turn:

Notice pay:

16. At page 81 of the bundle, clause 10.2 of the Claimant's employment contract confirmed the Claimant was entitled to 3 months' notice on termination of his contract.
17. The Respondent did not make any payment to the Claimant on termination of his employment in relation to his notice pay.

Holiday pay:

18. The Claimant's contract of employment at clause 8.1 (page 79 of the bundle) confirmed that the Respondent company holiday year ran from 1 January 2020 to 31 December 2020, and that he was entitled to 24 days holiday plus bank holidays.
19. I accepted the Claimant's oral evidence that he had taken 9 days leave as at the date his employment terminated.
20. The Respondent did not make any payment to the Claimant on termination of his employment in relation to his annual leave.

Arrears of pay:

21. In April 2020, the Respondent company changed the payment day of the Claimant's wages, so that instead of being paid on or around the last day of the month, the Claimant was paid on or around the 25th of the month. The Claimant's payslips from April 2020 onwards demonstrated that the Claimant was paid on or around the 25th of each month thereafter. The Claimant accepted that this payment represented payment for the entire month and not payment up to the 25th of that month only.
22. The Respondent did not make any payment to the Claimant in relation to the period of 1 August to 12 August 2020 and there was no authorised reason for the Respondent to withhold this payment from the Claimant.

Expenses:

23. At page 78 of the bundle, paragraph 3.2 of the Claimant's employment contract confirmed the Claimant was entitled to claim travel expenses in relation to "*journeys made for work purposes*".
24. The Claimant gave oral evidence that the firm of Solicitors appointed by the SRA to deal with the Respondent's files ("the Intervening Solicitors") had emailed him to confirm the sum of £123.75 was due to him for expenses he had claimed. The Claimant did not have a copy of that email and had stated in his schedule of loss at page 65 of the bundle that he was entitled to £200.
25. In oral evidence the Claimant explained that he believed he was due expenses in relation to travel and parking to and from Leeds for his attendance at a two-day trial however he did not know if those travel expenses were included within the £123.75 sum detailed by the Intervening solicitors or if those expenses were due in addition to that sum. As such, he confirmed he had estimated that he was entitled to £200 in his schedule of loss, comprising the £123.75 disclosed to him by the Intervening solicitors, and his estimate of a further £76.25 representing the expenses incurred in relation to the trial in Leeds.
26. I accept the Claimant's evidence that he had received an email from the Intervening Solicitors and that it stated he was due the sum of £123.75. I found this to be the correct sum representing the expenses due to the Claimant.
27. The Respondent did not make any payment to the Claimant on termination of his employment in relation to his expenses.

Contractual bonus:

28. At page 78 of the bundle the Claimant's employment contract provided that the Claimant was entitled to a bonus payment depending on performance. The relevant clause 5 reads as follows:

"5.1 The Company operates a bonus scheme in which you will be entitled to an additional payment of 10% of any bills delivered over your fee earning target

which is 3.2 times your salary at the time of the commencement of the bonus period.

5.2 The bonus is calculated on bills delivered at two points in the year – for the bills delivered in the six months to the end of September and March – with payments due to you in your January and June salaries respectively.”

29. The Claimant's salary was £40,000 per annum and 3.2 x this salary gave a fee earning target of £128,000. The Claimant was entitled to receive 10% of all fees billed in excess of £64,000 between April 2020 and September 2020.
30. In the bundle, the Claimant had submitted print outs from a case management system which he obtained from the Intervening solicitors. The Claimant confirmed they showed the bills he had submitted in April, May, and July 2020, this being £51,785.63, £9,057.46, and £99,073.78, respectively totalling £159,916.87.
31. The Claimant was unable to obtain print outs from the Intervening solicitors of his bills for the months June and August 2020. He submitted handwritten notes of his own estimates for fees he believed he billed in the months June and August 2020, this being £20,000 and £10,000 respectively amounting to a further £30,000 billed. The Claimant orally submitted that he had been conservative in his estimates when considering what he believed he had billed in these two months.
32. I accepted the Claimant's evidence that his estimates of his bills for June and August were conservative, and that he did submit bills in at least this further amount during June and August 2020. The Claimant's total delivered bills for the period April to September 2020 amounted to £189,916.87, this being £125,916.87 over his fee earning target, equating to a bonus payment in the sum of £12,591.69.
33. The Respondent did not make any payment to the Claimant on termination of his employment in relation to his contractual bonus.

Payments received by the Claimant:

34. The Claimant made a claim to the Redundancy Payments Service, and received the following payments:
 - 34.1. Arrears of pay: £845.43 gross, £618.81 net;
 - 34.2. Holiday pay £707.56 gross, £523.45 net and,
 - 34.3. Notice pay £538 gross, £387.80 net.
35. The Claimant submitted evidence that he had searched for alternative employment and had obtained a job with Asda on 2 October 2020 at a rate of £9.18 per hour working between 30 and 40 hours per week. The Claimant's bank statements at page 140 of the bundle demonstrated that the Claimant had received 2 payments from Asda for £1,046.07 and £1,1115.34. The Claimant confirmed he was paid every 4 weeks. The Claimant's average net weekly salary based on these payments was £270.18.

36. The Claimant's contract of employment with Asda confirmed the Claimant would be enrolled into the Asda employer pension scheme. However, as the Claimant could not provide payslips for his new employment, he could not confirm the amount of the employer's pension contributions paid by his new employer.

The Law

Unlawful deductions:

37. Section 13(1) employment Rights Act 1996 ('the Act') provides:

"13 Right not to suffer unauthorised deductions.

- (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. that a worker has the right not to suffer unauthorised deductions from wages."*

38. In University of Sunderland v Droussou UKEAT/341/16 the Employment Appeal Tribunal held that pension contributions paid by the employer constitute remuneration for the purposes of calculating a week's pay because the statute does not require payment to be made to the employee, and pension contributions are as much a reward for work as salary.

Breach of Contract

39. Under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 a Tribunal can award a Claimant damages for breach of contract where the claim arises or is outstanding on termination of employment. The cap of the award that a Tribunal can make is currently £25,000.
40. The measure of damages in contract is a sum of money the payment of which will place the Claimant in the position that he would be in but for the breach.

ACAS Uplift

41. Section 207A Trade Union and Labour Relations (Consolidation) Act 1992, provides:
- (1) *This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.*
- (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%.”*

Conclusions

42. Based on the findings of fact above and considering the relevant law as it applies to the agreed issues I conclude as follows:

Notice Pay

43. In breach of contract the Claimant was dismissed without notice in circumstances where the Respondent has failed to demonstrate that it was entitled to so dismiss him.
44. The Claimant was contractually entitled to receive 3 months' notice.
45. The Claimant obtained further employment on 2 October 2020 at an average net weekly rate of £270.18 and is enrolled in his new employer's pension scheme.
46. The Claimant was therefore unemployed for a period of 7.4 weeks. At his weekly net rate of pay of £567.10 this amounts to £4,196.54
47. The Claimant is entitled to the employer's pensions contributions for this period that he would have earned from the Respondent in the sum of £265.19 (7.4 weeks of £34.62).
48. For the remaining 7 weeks of the Claimant's notice period, the Claimant had mitigated his losses and was earning at a rate of £296.92 less than the net weekly wage he was earning with the Respondent. For this period, the Claimant is therefore entitled to £2,078.44 (this being 7 x £296.92).
49. The Claimant is entitled to a net payment of £6,274.98 (this being £4,196.54 + £2,078.44) less £387.80 net sum received from the Redundancy Payments Service in respect of notice pay, this being a total sum of **£5,887.18**.
50. The Claimant is entitled to **£265.19** in respect of Employer's pension contributions.

Holiday pay

51. The Claimant is entitled to 24 days annual leave per year and his contract was terminated 32 weeks into the leave year.

52. The Claimant had accrued 15 days at the date of termination of his employment (this being $24 \times 32/52$) and had taken 9 days leave. The Claimant is therefore entitled to 6 days leave at his normal rate of pay.
53. In breach of contract the Respondent failed to pay the Claimant in respect of his accrued but untaken holiday pay on termination of his employment.
54. The Claimant is therefore entitled to £923.10 (this being $6 \times £153.85$) less £707.56 gross sum received from the Redundancy Payments Service in respect of holiday pay, this being a total sum of **£215.54**.

Bonus pay

55. The Claimant was contractually entitled to a bonus pay of 10% on all bills he had submitted for the period April 2020 to 12 August 2020 that were in excess of 3.2 times his annual salary.
56. From April 2020 to 12 August 2020, the Claimant had submitted £125,916.87 above the Claimant's target of £64,000.
57. In breach of contract the Respondent failed to pay the Claimant in respect of his contractual bonus pay on termination of his employment.
58. The Claimant is entitled to **£12,591.69**, this being 10% of £125,916.87.

Expenses

59. In breach of contract, the Respondent failed to pay the Claimant in respect of his unpaid expenses on termination of his employment.
60. The Claimant was entitled to payment of his unpaid expenses in the sum of **£123.75**.

Unpaid wages

61. The Claimant was not paid for the period 1 August 2020 to 12 August 2020, this being 12 days at the Claimant's gross daily rate of pay of £153.85.
62. There was no lawful reason for the Respondent to withhold this payment and the Claimant's claim of unlawful deduction of wages succeeds.
63. The Claimant is therefore entitled to £1,846.20 less £845.43 gross sum received from the Redundancy Payment Service, this being a total sum of **£1,000.72**.
64. The Claimant is entitled to Employer's pensions contributions for this period from the Respondent in the sum of **£83.04**, this being 12 days at a daily rate of £6.92.

ACAS Uplift

65. With respect to all of the Claimant's claims, in the circumstances of this case, the Respondent would not have reasonably been in a position to engage with the ACAS Code of Practice on Disciplinary and Grievance in order to resolve any grievances raised by the Claimant after 12 August 2020. As such, I find that there was no unreasonable breach of the code and do not award any uplift on the Claimant's claims for breach of contract or unlawful deduction from wages.

Summary

66. The Respondent shall pay to the Claimant:

- 66.1. Notice pay in the net sum of **£5,887.18**;
- 66.2. Holiday pay in the gross sum of **£215.54**;
- 66.3. Pay for contractual expenses in the sum of **£123.75**;
- 66.4. Pay for the contractual bonus in the sum of **£12,591.69**;
- 66.5. Pay in respect of unauthorised deduction of wages in the sum of **£1,000.72**;
- 66.6. Pay in respect of Employer's pension contributions in the sum of **£348.23**.

67. The Employment Protection (Recoument of Jobseeker's Allowance and Income Support) Regulations 1996 do not apply to these awards.

EMPLOYMENT JUDGE NEWBURN

**JUDGMENT SIGNED BY EMPLOYMENT
JUDGE ON 1 March 2021**

.....

Public access to employment tribunal decisions

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

Format of the Hearing

The hearing was conducted by the parties attending by Cloud Video Platform. It was held in public in accordance with the Employment Tribunal Rules. It was conducted in that manner because a face to face hearing was not possible in light of the Government Guidance in connection with the coronavirus pandemic and it was in accordance with the overriding objective to do so.