



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr N Selimi

**Respondent:** Bakproco Ltd

**Heard at:** London Central (remotely, by video) **On:** 04 March 2021

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

## Appearances

For the claimant: Ms Fadipe, Counsel

For the respondent: Mr Manavi, Director

**Note:** This has been a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video, conducted using Cloud Video Platform (CVP). It was not practicable to hold a face to face hearing because of the COVID-19 pandemic.

## RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The respondent was in breach of contract by dismissing the claimant without the period of notice to which he was entitled and the respondent is ordered to pay to the claimant damages of £9,183.48 for that breach.
2. The respondent is ordered to pay to the claimant additional compensation of £2,152.00 pursuant to section 38 Employment Act 2002 for the failure to provide a written statement of employment particulars.

## REASONS

### Claims and issues

1. By a claim form submitted on 13 November 2020 the claimant claimed breach of contract, in relation to not being given the notice of termination of employment to which he was entitled when his employment was terminated by reason of redundancy. The claimant also sought an additional 4 weeks' pay under section 38 Employment Act 2002 for the failure to provide him with a written statement of employments particulars. The claimant received redundancy pay.
2. The respondent contests the claim in relation to notice pay and asserts that pay in lieu of notice was paid.

3. The papers in the claim were reviewed by Employment Judge Goodman, who arranged for the parties to be sent this list of issues by email on 02 March 2021:
  - a. what was the date of termination of employment?
  - b. has the respondent paid the claimant wages in lieu of notice?
  - c. when did the respondent pay this to the claimant?
  - d. was this before or after 13 November 2020 (date of claim to tribunal)?
  - e. if after, had the respondent at any time given the claimant written particulars of employment pursuant to section 1 or updated them pursuant to section 4 of the Employment Rights Act 1996 (ERA)?
  - f. if no, what award is to be made under section 38 Employment Act 2002 – is it just and equitable to award more than 2 weeks' pay? Are there exceptional circumstances justifying no award?
4. Mr Manavi confirmed that the respondent accepts that the claimant was not given a written contract of employment. The other issues were agreed as the issues for the tribunal to decide.

#### **Procedure, documents and evidence heard**

5. I heard evidence on oath from the claimant and Mr Manavi and considered the following documents: a bundle of 146 paginated pages plus a 3 page unpaginated index, the claimant's witness statement and the respondent's witness statement.
6. I allowed the respondent to add a 2-page document showing the claimant's annual leave requests for 2008 and 2009. The respondent wanted this to be considered in response to the claimant's comments in his witness statement about not taking his full leave entitlement (paragraphs 14, 44). The claimant said that the document was not relevant as there was no claim for holiday pay but, in the interests of making best use of the time available for the hearing, did not object to it being admitted as evidence. I explained to the parties that I would decide what weight, if any, to give to the evidence when I made my decision. It was not necessary to refer to it to make my decision.

#### **Findings**

7. The claimant and Mr Manavi met in 1997 when the claimant moved into a rented property owned by Ruthward Properties Limited, of which Mr Manavi was a director. The date that the claimant started to work for the respondent is disputed. In his ET1 the claimant said that he was employed by the respondent from 01 January 1998. In his witness statement he says that on checking his tax records he now realises the start date was some time in 1999. The respondent says that it employed the claimant from 04 April 2004.
8. It is common ground between the parties that (i) the claimant carried out maintenance work for Ruthward Properties from 1999 to 2004, (ii) the claimant was employed by Mr Manavi's company, W2 Maintenance Services Ltd, from 04 April 2004 and (iii) Mr Manavi transferred the W2 Maintenance Services Ltd to the respondent company in 2006. It is also common ground that the transfer in 2006 was covered by the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) and the claimant has continuity of employment from 04 April 2004.

9. The claimant believed that Ruthward Properties was owned and controlled by Mr Manavi and the change of employer in 2004 was covered by TUPE so that he has continuity of employment from 1999. Mr Manavi says that there was no transfer from Ruthward Properties Ltd to W2 Maintenance Services Ltd. Mr Manavi and the claimant had developed a friendship. When Mr Manavi was informed that Ruthward Properties Ltd was selling its properties he knew the claimant would no longer have a job so he offered him employment at W2 Maintenance Services.
10. It is not necessary for me to make a finding as to whether the claimant's continuity of employment with the respondent runs from 1999 in order to determine his claim for notice pay. I find that the claimant was employed by the respondent from 04 April 2004 at the latest.

#### Furlough

11. As a result of schools closing in March 2020, the claimant advised the respondent that he would not be able to work after 20 March 2020 for a week until he could make childcare arrangements for his son.
12. On 30 March 2020 the respondent advised the claimant that he would be placed on furlough for 12 weeks. On 05 June 2020 Mr Manavi advised the claimant by telephone that he might remain on furlough or be made redundant. On 09 June 2020 the respondent advised the claimant by email that he would remain on furlough at his full salary until there was a change in his employment status. In that email, Mr Manavi invited the claimant to meet to discuss furlough, the impact of Covid-19 on the respondent's business and to discuss potential redundancy or ways of avoiding redundancy. The meeting took place on 14 June 2020. By email dated 17 June 2020 at 14:20 (p130) Mr Manavi confirmed furlough would be extended to the end of July.
13. The parties agree, and I find, that the claimant remained on furlough and in receipt of his full salary until his employment ended.

#### Termination of employment and notice pay

14. Mr Manavi and the claimant met again on 27 July 2020. Mr Manavi told the claimant at that meeting that he was going to be made redundant. It is common ground that Mr Manavi said the claimant would receive an enhanced redundancy payment and that the payment would be around £20,000. The parties disagree about whether that figure also included pay in lieu of notice. In his witness statement Mr Manavi said he mentioned the figure of 6 months' pay, £20,000, and in evidence at the hearing he said that this figure included pay in lieu of notice and the failure to refer to this in correspondence and the claimant's payslip was a mistake. The claimant's evidence is that he was told he would receive an enhanced redundancy payment of £20,000, as he had been very loyal, and 3 months' pay.
15. The respondent's letter dated 31 July 2020 confirms what was said at the meeting on 27 July 2020. The letter refers to notice to end employment and entitlement to redundancy pay as separate items and states:

##### **Notice to end employment**

You are entitled to 12 weeks' notice to end your employment with Bakproco Ltd., based on your length of service.

Your employment will terminate on 01 August 2020. You will not be required to work your notice period and the organisation will make a payment in lieu

(instead) of notice to you. This means you should not come into work as from 1<sup>st</sup> August 2020.

**Entitlement to redundancy pay**

Under our redundancy policy, you are entitled to an enhanced redundancy payment of £19,900. This includes your statutory redundancy payment, as well as any outstanding holiday pay and annual leave.

16. On 03 August 2020 the claimant's representative asked the respondent for information, including:

3. Confirmation of the calculation (the sum presently paid) and that this is net of
  - a. His outstanding holiday pay, including the calculable holiday pay for the notice period-
  - b. That the notice period is to be added to the sum already paid, and when such sum is to be paid
4. That there is no obligation to work during the notice period

17. The respondent's reply of 07 August 2020 states:

- 3(a) I refer you to the email of 17th June (attached).
- (b) It is confirmed that the three month notice period, for the months of August, September and October is in addition to the Statutory Redundancy payment. The monies have been paid on account, and the balance will be paid within seven days, once my accountant returns from holiday.
- 4 It is confirmed that there is no obligation to work during the notice period

18. The email 17 June 2020 is a second email on that day, sent at 18:50 (p88), setting out details of annual leave.

19. In reply to an email from the claimant's representative dated 10 August 2020 asking for further clarification, the relevant sections of the respondent's reply dated 11 August 2020 state:

For clarification, Mr. Selimi's contract terminated on the last day of July at 5 pm, and 3 months 'Payment in Lieu of Notice' will be paid imminently. He is NOT on Gardening Leave, and is of course free to seek employment elsewhere...

The initial calculations of redundancy allowance were originally backdated to 1997. These will be recalculated for the period of Mr. Selimi's employment at Bakproco Ltd...

I endeavour to have the final figures ready by the Thursday evening, subject to receiving the requested pieces of legislation regarding the carrying forward of Annual Leave. If not received I will calculate and will forward the funds to you on Friday, to be held to my order.

20. I prefer the evidence of the claimant and find that the enhanced redundancy payment does not include payment in lieu of notice because:

- a. The respondent intended to pay more than the statutory entitlement and spoke of 6 months' pay as a redundancy payment. It is difficult to understand how the respondent could have included notice pay in reaching that figure. The claimant's statutory redundancy payment based on 16 years' service, i.e. from April 2004, was calculated as £12,105 (p76-77). 12 weeks' pay is £9,184.62 gross. This amounts to £21,289.62, without any calculation of deductions for tax and national insurance at that stage. That is over £20,000 before adding any amount for outstanding holiday pay or an enhancement to the statutory redundancy payment.

- b. The claimant's evidence is consistent with what is stated in the respondent's letters of 31 July, 07 August and 11 August 2020. I do not accept the respondent's assertion that the list of what was included in the redundancy pay in the letter of 31 July 2020 was not exhaustive and should have included that it also covered payment in lieu of notice. Notice pay and redundancy are separate items in the letter, as set out above. It is unlikely that a statement of what is included in the redundancy pay would include holiday pay and annual leave but omit any reference to notice pay, which would be greater than holiday pay, particularly when notice pay had already been mentioned in the letter.
  - c. There was initial confusion as to whether the claimant was being given notice but was not required to attend the workplace or being dismissed without notice. It was subsequently clarified that his employment was terminated on 31 July 2020 and he would be paid in lieu of notice. Despite that confusion, the letters from the respondent state that the claimant was entitled to 12 weeks' notice and state on 3 occasions that payment in lieu of notice is additional to the redundancy pay.
21. There are two versions of the claimant's last payslip dated 27 July 2020. At p56 the payslip issued in August 2020 shows a payment of salary of £3,316.67 (gross) and redundancy pay of £19,900 (p56). After deductions from the salary for pension, tax and national insurance, the net payment is £22,347.04. At p58 the revised payslip, issued in January 2021, shows a payment of salary of £3,316.67 (gross), 3 months' pay in lieu of notice of £9,950 (gross), with deductions for pension, tax and national insurance from both, redundancy pay of £12,105.00 and discretionary redundancy pay of £1462.24, but without any figure for outstanding holiday pay. There is no change to the total net payment of £22,347.04. I find that the payslip issued in August 2020 is correct. The second payslip was amended to reflect the respondent's assertion that the payment of £19,900 included an amount for pay in lieu of notice.
22. I find that the claimant was dismissed without notice on 31 July 2020.

Written statement of employment particulars

23. The respondent concedes that the claimant was not given a written statement of employment particulars. The respondent suggests that I should make no award as this was an oversight, both when the claimant worked for Ruthward Properties Ltd, of which Mr Manavi was a director, and when the claimant was employed by W2 Maintenance Services Ltd. The respondent did not provide a statement when the claimant's employment was transferred to Bakproco Ltd. However, the respondent is aware of the requirement and has a standard document that it provides to other employees. There is no reason for the claimant to have been treated differently to other colleagues.

**The law**

Breach of contract

24. If there is no expressly agreed period of contractual notice, there is an implied contractual right to reasonable notice of termination. This must be not less than the statutory minimum period of notice set out in section 86 ERA.
25. Section 86(1)(c) ERA provides that the notice required to be given by an employer to terminate the contract of employment of a person who has been continuously

employed for one month or more is not less than twelve weeks if his period of continuous employment is 12 years or more.

Section 38 Employment Act 2002

26. Where a tribunal finds in favour of an employee in a complaint of breach of contract, and the tribunal finds that the employer has failed to provide the employee with a written statement of employment particulars, the tribunal must award the employee an additional two weeks' pay, unless there are exceptional circumstances which would make that unjust or inequitable, and may, if it considers it just and equitable in all the circumstances, order the employer to pay an additional four weeks' pay.

**Conclusions**

27. I found that the claimant was employed by the respondent up to and including 31 July 2020, when he was dismissed by reason of redundancy. The claimant notified ACAS under the early conciliation process of a potential claim on 05 October 2020 and the ACAS Early Conciliation Certificate was issued on 15 October 2020. The claim was presented on 13 November 2020. The claim of breach of contract was presented in time.

28. The claimant was dismissed without notice and is entitled to damages for the breach of contract. The intention of damages is to put the claimant in the position he would have been had the contract been performed correctly, i.e. he had been given notice.

29. The claimant is entitled to no less than 12 weeks' notice and reasonable notice in this case is 12 weeks. Although damages are calculated on a net basis, since the claimant will be liable for tax on the notice pay, I use the gross figure in the calculation. The claimant's gross weekly pay was £765.38. The damages for breach of contract are  $£765.38 \times 12 = £9,184.62$ .

30. The claimant was employed by the respondent from April 2004 at the latest and had no written statement of employment particulars throughout that time. In the circumstances, I consider it just and equitable to award an amount equivalent to 4 weeks' wages in additional compensation pursuant to section 38 Employment Act 2002 for the failure to provide a written statement of employment particulars. I award £2,152.00.

---

Employment Judge Smailes

07 May 2021  
Date

JUDGMENT SENT TO THE PARTIES ON

14/05/2021..

.....  
FOR THE TRIBUNAL OFFICE

**Public access to employment tribunal decisions**

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