



## EMPLOYMENT TRIBUNALS

**Claimant:** Mr R Rimal

**Respondent:** BSS Associates Limited

**Heard at:** London Central Employment Tribunal **On:** 22<sup>nd</sup> and 23<sup>rd</sup> March 2022

**Before:** Employment Judge Hopton

### Appearances (by video):

**For the Claimant:** represented himself

**For the Respondent:** did not attend

## JUDGMENT

The judgement of the tribunal is that:

1. The claimant was unfairly dismissed by the respondent. The respondent is ordered to pay compensation to the claimant of **£36,664.76**.
2. The respondent failed to provide the claimant with a written statement giving particulars of the reasons for his dismissal as required by s.93 Employment Rights Act 1996. A sum of 2 weeks' pay amounting to £1,088 is awarded as part of the compensation payment set out above.
3. The respondent failed to provide the claimant with a statement of employment particulars, contrary to section 1 ERA 1996. A sum of 4 weeks' pay amounting to £2,176 is awarded as part of the compensation payment set out above.
4. The respondent has made unlawful deductions from the claimant's wages by failing to pay 5.6 weeks' holiday pay. The respondent is ordered to pay the claimant **£5,168.80**.
5. The respondent has made unlawful deductions from the claimant's wages by failing to pay the claimant his salary for June. The respondent is ordered to pay the claimant **£4,000**.
6. The respondent was in breach of the claimant's contract by dismissing the claimant without notice and is ordered to pay damages of 5 weeks' salary amounting to **£4,143**.

## REASONS

1. Oral judgment was given at the hearing and the claimant requested written reasons at the end of the hearing.

### Preliminary issues

2. The respondent did not attend the hearing and has not filed a response to this claim, although it has written to the tribunal a number of times. It had told the tribunal on several occasions that it did not intend to attend the hearing. I considered whether to go ahead in the respondent's absence and concluded that it would be in accordance with the overriding objective to proceed with the hearing for the following reasons:

2.1. As the respondent had not filed a response it would only be permitted to participate in the hearing to the extent permitted by the Judge in any event (rule 21 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013). Mr Bhattacharya, one of the respondent's Directors, has written to the tribunal four times to say he would not attend. On 10<sup>th</sup> March he said he would not attend because of a 'police warning' and that the respondent's directors were afraid to attend the tribunal. On 18<sup>th</sup> and 21<sup>st</sup> March he said he would not attend due to another meeting. Mr Bhattacharya specifically says in his email of 21 March that he is not going to ask another Director to attend on his behalf. By email at 8.51am on 22<sup>nd</sup> March he repeated that he will be in a meeting and his mobile will be turned off at the time of the hearing. I therefore decided it would not be practicable to attempt to telephone the Respondent.

2.2. I am confident the respondent is aware of the claim and of the consequences of not filing a response and not attending the hearing. The ET1 was sent to the company's registered address on 11<sup>th</sup> August 2021. The Tribunal sent a reminder on 4<sup>th</sup> January 2022 warning that if no ET3 was filed a default judgment might be entered. On 16<sup>th</sup> March Employment Judge Hodgson confirmed that the hearing would go ahead on 22<sup>nd</sup> March and reminded the respondent that it may not be able to take part or take part fully in the hearing and that it should heed the letter of 4<sup>th</sup> January.

2.3. Therefore, in accordance with rule 47 and the overriding objective to deal with cases fairly and justly, dealing with cases in ways which are proportionate to the complexity and importance of the issues and avoiding delay so far as compatible with proper consideration of the issues, I decided to go ahead with the hearing in the respondent's absence.

3. The respondent's name is amended from 'BSS Associates' to 'BSS Associates Limited'.

### Claims

4. Mr Rimal brings claims of unfair dismissal, notice pay, holiday pay, arrears of pay and failure to provide a written statement of the reasons for dismissal, against his employer, BSS Associates Limited, an accountancy firm.
5. During the hearing it appeared that the claimant had not been given a written statement of particulars of employment, so I also considered the provisions of s.38 Employment Rights Act 1996.

### Issues

6. The issues to be decided were:
  - 6.1. Was the claimant unfairly dismissed by his employer? If so, should any uplift or reduction to compensation be awarded under s.207A TULCRA for failure to comply with the ACAS Code?
  - 6.2. Did the respondent provide the claimant with a written statement giving particulars of the reasons for his dismissal and did the claimant request one? If no statement was given and the claimant did request one, the tribunal must make an award of two weeks' pay.
  - 6.3. Did the respondent provide the claimant with a written statement of particulars of employment? If not, the tribunal must award the minimum amount under s.38 Employment Act 2002. Is it just and equitable in all the circumstances to increase the award by the higher amount instead?
  - 6.4. Did the respondent make unauthorised deductions from the claimant's wages by not paying him holiday pay and arrears of pay, and if so, what sum is the claimant owed?
  - 6.5. Did the respondent owe notice pay to the claimant, and if so, what is the sum owed?

### The law

#### 7. Unfair dismissal:

S.94 Employment Rights Act 1996

*(1) An employee has the right not to be unfairly dismissed by his employer.*

S.95 Employment Rights Act 1996

*(1) ...an employee is dismissed by his employer if... (a) the contract under which he is employed is terminated by the employer (with or without notice)*

S.98 Employment rights Act 1996

*(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show (a) the reason (or, if more than one, the principal reason) for the dismissal, and (b) that it is either a reason*

*falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

*(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)*

*(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*

*(b) shall be determined in accordance with equity and the substantial merits of the case.*

8. ACAS adjustment

s.207 TULCRA 1992

*(2) In any proceedings before an employment tribunal... any Code of Practice issued under this Chapter by ACAS shall be admissible in evidence, and any provision of the Code which appears to the tribunal or Committee to be relevant to any question arising in the proceedings shall be taken into account in determining that question.*

s.207A TULCRA

*(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) the 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%.*

9. Written statement of the reason for the employee's dismissal

s.92 Employment Rights Act 1996

*(1) An employee is entitled to be provided by his employer with a written statement giving particulars of the reasons for the employee's dismissal...(b) if the employee's contract of employment is terminated by the employer without notice.*

*(2) ...an employee is entitled to a written statement under this section only if he makes a request for one...*

S.93 Employment Rights Act 1996

*(1) a complaint may be presented to an employment tribunal by an employee on the ground that (a) the employer unreasonably failed to provide a written statement under section 92...*

*(2) where an employment tribunal finds a complaint under this section well-founded, the tribunal...(b) shall make an award that the employer pay to the employee a sum equal to the amount of two weeks' pay.*

10. Written statement of employment particulars

S.1(1) Employment Rights Act 1996

*Where a worker begins employment with an employer, the employer shall give to the worker a written statement of particulars of employment.*

S.38 Employment Act 2002

*(2) If in the case of proceedings to which this section applies (1) the employment tribunal makes an award to the worker in respect of the claim to which the proceedings relate, and (b) when the proceedings were begun the employer was in breach of his duty to the worker under section 1(1) ERA 1996... the tribunal must, subject to subsection (5) increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.*

*(4) in subsections (2) and (3) (a) references to the minimum amount are to an amount equal to two weeks' pay, and (b) references to the higher amount are to an amount equal to four weeks' pay.*

11. Unauthorised deduction from wages – holiday pay and arrears of pay

S.13 Employment Rights Act 1996

*(1) an employer shall not make a deduction from wages of a worker employed by him...*

*(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.*

12. Breach of contract – notice pay

12.1. The claimant claims 5 weeks' statutory notice pay.

**Procedure, documents, and evidence heard**

13. I was referred to a selection of 27 documents from the claimant – mainly emails from the respondent to the claimant, and a document he had written for the

purposes of the hearing entitled 'summary of the event'. I also heard oral evidence from the claimant.

14. The respondent had sent a reasonable amount of correspondence to the tribunal regarding the claim. Much of the correspondence attacked the character of the claimant and was irrelevant to the issues in the claim. I took no account of correspondence that fell in that category. The day before the hearing the respondent sent to the tribunal a number of character references for Mr Bhattacharya. I did not put any weight on these as they were not relevant to the issues before the tribunal. On 5th March 2022 Mr Bhattacharya sent to the tribunal comments on the claimant's 'summary of the event' document. Many of the respondent's comments were irrelevant to the issues before the tribunal. I disregarded those. I put little weight on the comments that were relevant, as Mr Bhattacharya was not present in the tribunal to be cross examined on his evidence.

## **The facts**

### Unfair dismissal

15. Mr Rimal was employed by the respondent as a Senior Accountant for five years from 1st March 2016 until 30th June 2021.
16. At the end of June 2021, with no explanation, he received a P45 from his employer which stated that his employment was terminated from 30th June 2021. On 30<sup>th</sup> June he emailed the respondent to ask the reason for the termination of his employment, and for the annual leave, notice pay and June salary due to him.
17. The respondent responded, also on 30th June, in a short, hostile email that made various allegations against the claimant and said it had informed the claimant that he was no longer working for the respondent. That email did not give an explanation for the claimant's dismissal and the respondent has not since clarified the reason for the claimant's dismissal.
18. However, in correspondence the respondent sent to the claimant before and after his dismissal, the respondent made some allegations against the claimant in relation to his handling of some client accounts. I therefore conclude that the respondent viewed the claimant's actions as misconduct and that the real reason for dismissal was the respondent's belief in the claimant's misconduct, even though the respondent did not give a reason to the claimant and has not provided a reason to the tribunal. The claimant denies any misconduct on his part and there was no evidence before the tribunal to suggest any misconduct had taken place, save for the respondent's allegations. There was no evidence that the respondent undertook an investigation into the allegations. I conclude that no investigation took place and that the respondent's belief that the claimant had committed misconduct was not based on reasonable grounds.
19. The respondent went through no disciplinary or other process before dismissing the claimant and failed to follow the ACAS Code.
20. Taking into account the correspondence I have seen in evidence, I find that the respondent made little attempt to comply with legal requirements when dismissing

the claimant and failed to take account of many employment law requirements during the claimant's employment. For example, in one email to the claimant on 29<sup>th</sup> May 2021, Mr Bhattacharya told the claimant that if he was not happy he could resign and pay 18 months' salary to the respondent. That email also asked the claimant to refund to the respondent his salary for May 2021 in response to an alleged mistake the claimant had made. No disciplinary or performance meetings were held with the claimant in relation to these alleged issues. Mr Bhattacharya's correspondence to the claimant on behalf of the respondent that I have seen in evidence has been inappropriate and unprofessional. It threatened the claimant and his family to the extent that the claimant felt obliged to seek help from the police. The respondent's conduct towards the claimant was hostile and aggressive, both during his employment and afterwards.

Failure to provide a written statement of employment particulars and a written statement giving particulars of the reasons for the employee's dismissal

21. The respondent did not provide the claimant with a written statement giving particulars of the reasons for his dismissal, despite the claimant requesting this in writing on 30<sup>th</sup> June 2021.
22. The respondent did not provide the claimant with a contract of employment or a written statement of employment particulars at any point during his employment.

Notice pay, holiday pay and arrears of pay

23. The claimant was given no notice of termination of his employment. He had been employed by the respondent for five years and was entitled to a statutory notice period of five weeks.
24. The claimant took no holiday during the last year of his employment due to Covid issues. He had taken one or two bank holidays off, but had worked days in lieu of these in the evening and at weekends. He was therefore entitled to statutory holiday of 5.6 weeks on termination of employment. He was not paid any holiday pay on dismissal.
25. The claimant worked throughout June, partly in the office and partly at home. He was given a payslip for June, but he was not paid his June salary.

**Conclusions**

Unfair dismissal

26. The respondent's actions in sending the claimant a P45 and the email on 30<sup>th</sup> June amounted to a dismissal for the purposes of s. 95 Employment Rights Act 1998 in that it made clear to the claimant that the contract under which he was employed had been terminated by the employer.
27. The respondent gave no reason to the claimant for dismissal and has not provided a reason to the tribunal. It has therefore not shown a fair reason for dismissal as required by section 98(1)(a) ERA 1996.

28. I concluded that the real reason for the claimant's dismissal was the respondent's belief in the claimant's misconduct. Even if the respondent had shown conduct as the fair reason for dismissal, I concluded that the respondent's belief was not based on reasonable grounds. The respondent carried out no investigation into the matter, and it did not follow any procedure, let alone a reasonably fair one. The dismissal was therefore outside the range of reasonable responses. In the circumstances, even taking into account the small size of the respondent company, the respondent acted unreasonably in treating misconduct as a sufficient reason for dismissing the claimant.

29. The claimant was therefore unfairly dismissed.

Failure to provide a written statement of employment particulars and a written statement giving particulars of the reasons for the employee's dismissal

30. The claimant asked the respondent for a written statement giving particulars of the reasons for his dismissal. The respondent failed to provide this. The respondent has therefore unreasonably failed to provide a written statement as required by section 92 ERA 1996. Having found this complaint well founded, under section 93 ERA, I must make an award that the respondent pays to the claimant a sum equal to the amount of two weeks' pay.

31. The respondent was required under sections 1(1) and (4) ERA 1996 to provide the claimant with a written statement of particulars of employment during his employment. When these proceedings were begun the respondent was in breach of that duty. As an award has been made to the claimant in respect of the claim to which the proceedings relate, I must, under section 38(3) Employment Act 2002 make an award to the claimant of two weeks' wages, and may, if it is just and equitable in all the circumstances, increase the award to four weeks' wages instead.

32. In this case I conclude that it is just and equitable to award the higher amount of four weeks' wages. The respondent was a firm of professionals – accountants, accustomed to complying with legal rules in its business, and accustomed to instructing other professionals such as lawyers. Its failure to provide written particulars of employment is one of a number of failures to comply with its legal obligations in this case that suggests it took little account of employment law requirements, including its obligation to provide written particulars of employment, and I award the higher amount accordingly.

Notice pay, holiday pay and arrears of pay

33. The respondent dismissed the claimant without notice. The claimant is entitled to five weeks statutory notice. The respondent was therefore in breach of contract by dismissing the claimant without notice.

34. The claimant was entitled to 5.6 weeks' holiday. He was not paid any holiday pay on termination of employment. He was therefore paid less than the total amount of the wages properly payable to him which amounts to a deduction from wages under s.13(3) ERA 1996.



35. The claimant worked in June and his June salary was therefore properly payable to him. The respondent did not pay the claimant any salary for June. He was therefore paid less than the total amount of the wages properly payable to him which amounts to a deduction from wages under s.13(3) ERA 1996.

## Remedy

### Unfair dismissal

36. The claimant does not wish to be reinstated or reengaged.

37. The claimant has been doing freelance work since his dismissal. His earnings were variable, and considerably lower than his previous salary until December 2021. From December 2021 they have been consistent at £2400 which is £800 lower than his salary with the respondent. His notice payment covers the period to 4<sup>th</sup> August 2021.

38. The claimant's loss to the date of the tribunal hearing was 33 weeks at £663/week = £21,879 less sums earned (£9593.43) plus pension loss (£160 x 33 = £5280) amounting to £17,565.57.

39. The claimant estimates that for the next few months he will earn the same amount per month in his freelance work as he has earned from December 2021. He also believes that by the end of June 2022 he will be in a position to find a role which pays a comparable salary and pension to that which he earned with the respondent. I accept this. His future loss is therefore 14 weeks at a loss of £184.62/week + pension loss of 14 x £160, the total of which is £4824.68.

40. The claimant's total loss is therefore £22,390.25.

41. I considered whether it was appropriate to increase the award under s.207A TULCRA 1992. Although the respondent has not shown a fair reason for dismissal, I concluded that the real reason for dismissal was the respondent's belief in the claimant's misconduct. The claim to which the proceedings relate therefore concerns a matter to which a relevant Code of Practice applies – the ACAS Code. The respondent did not comply with the ACAS code when dismissing the claimant; it did not go through any process at all. Its failure to comply with the code was unreasonable. Its correspondence with the claimant throughout was hostile in the extreme. Although the respondent is a small company, its failure to attempt to follow any process or to comply with the code means that it is just and equitable in all the circumstances to award the maximum 25% uplift.

42. Including the 25% uplift, the claimant's compensation for past and future loss is £27,987.81.

43. The claimant is also awarded two weeks' statutory pay pursuant to the s.93 ERA 1996 award, and four weeks' statutory pay pursuant to the s.38 EA 2002 award. Six weeks statutory pay at £544 is £3,264.

44. The total compensatory award is therefore £31,251.81. Grossed up, this amounts to a compensatory award of **£32,584.76**

45. The basic award is **£4080**. The total compensation awarded to the claimant for unfair dismissal, including the additional awards is therefore **£36,664.76**.

Notice pay, holiday pay and arrears of pay

46. The respondent must pay to the claimant 5.6 weeks' holiday pay. (£923 gross x 5.6) amounting to **£5,168.80**.

47. The respondent must pay to the claimant arrears of pay for the month of June. One month's gross salary of **£4,000**.

48. The respondent must pay to the claimant damages for breach of contract for failure to provide five weeks' notice of termination of employment.  $5 \times £663 = £3,315$  net. Grossed up = **£4,143**. *[This figure amended from the oral judgment under rule 69, to use net rather than gross figures]*

**Employment Judge Hopton**

\_23<sup>rd</sup> March 2022\_

**Date**

JUDGMENT & REASONS SENT TO THE PARTIES ON

.24/03/2022...

FOR THE TRIBUNAL OFFICE