



# EMPLOYMENT TRIBUNALS

## Claimant

Mr Simon Denzel

v

## Respondent

No Silly Business Ltd

**Heard at:** Reading

**On:** 6 April 2022

**Before:** Employment Judge Talbot-Ponsonby

## Appearance

**For the Claimant:** Miss Kelleher

**For the Respondent:** No appearance

**JUDGMENT** having been sent to the parties on 17 April 2022 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

## REASONS

### Introduction

1. This is a claim by Mr Simon Denzel, the claimant, for unpaid wages, notice pay and unpaid pension contributions arising out of his employment by the Respondent, No Silly Business Limited from 12 March 2020 until 2 March 2021, on which date he resigned as he had not been paid for 8 months.

### Claims and issues

2. The claimant claims:
  - 2.1 Unlawful deductions from wages for the period 1 July 2020 to 2 March 2021.
  - 2.2 Notice pay of 8 weeks.
  - 2.3 The contributions that his employer was required to pay to his pension during that period.
3. At the start of the hearing, the Tribunal identified the issues that were required to be considered. These are as follows:
  - 3.1 In respect of the wages claim:
    - 3.1.1 Was the claimant employed by the respondent?
    - 3.1.2 Is the claim for wages?
    - 3.1.3 Was the claim made in time?
    - 3.1.4 Has the respondent made a deduction from the wages?

- 3.1.5 Did the respondent have a statutory authority for the deductions?
- 3.2 In respect of the claim for breach of contract:
  - 3.2.1 What were terms of the contract regarding pension and notice?
  - 3.2.2 Is the respondent in breach of contract?
  - 3.2.3 In respect of the claim for notice pay based on an allegation of constructive dismissal, was the respondent in fundamental breach of contract?
  - 3.2.4 Was the claim made in time?
  - 3.2.5 Has the claimant suffered loss as a result?
- 3.3 In respect of the remedy due if the claimant is successful:
  - 3.3.1 In respect of wages, how much is due?
  - 3.3.2 In respect of the breach of contract claim, how much notice pay is due?
  - 3.3.3 How much should have been paid in pension contributions?
- 3.4 Should the damages be adjusted due to a failure by the respondent to follow ACAS code of conduct?

**Procedure, documents and evidence**

- 4 The claimant attended the hearing, represented by Miss Kelleher of LawWorks. The respondent did not attend. At the start of the hearing, I considered whether to proceed in the Respondent's absence pursuant to Rule 47 of the Employment Tribunal Rules of Procedure, and delivered a short judgment concluding that I should do so. My reasons for this were as follows.
- 5 I noted that the respondent was not present.
- 6 Pursuant to Rule 47, I may proceed in the absence of a party. Before doing so, I am required to consider any information that is available to me, after any enquiries that may be practicable, about the reasons for the party's absence.
- 7 My clerk checked the Tribunal correspondence and confirmed that nothing had been received from the respondent to suggest why there was no attendance.
- 8 I noted that the form ET1 was originally sent to the respondent's registered office, but that the respondent changed its registered office 2 days later. The registered office was changed several times in quick succession. The papers were then resent to new registered office.
- 9 On 17 May 2021, the respondent contacted the Tribunal to provide an email address for correspondence and requested that all the documents for the

claim be emailed to that address. The request quoted claim number, so the respondent was clearly aware of the existence of the claim.

- 10 I was told by the claimant that emails were sent to this email address initially, and no notification failure was received. A notification failure was first received when the claimant applied for rule 21 judgment in November 2021 and has been received on each subsequent occasion that the claimant has attempted to email the respondent. Notice of the hearing was in any event sent by post to the current registered office of the respondent on 20 December 2021.
- 11 I was satisfied that the respondent knew or should have known about the hearing on 6 April 2022.
- 12 I then considered Rule 2, which sets out the overriding objective. I considered that it was appropriate in the interest of justice proceed in the absence of the respondent, especially having regard to the following:
  - 12.1 The respondent did not respond to the claim; and
  - 12.2 There was proposal for automatic strike-off of the respondent at Companies House. It was not clear what current status of this proposal was, but it was important to have hearing before the respondent was struck off.
- 13 The documents before the tribunal were:
  - 13.1 ET1 and grounds of claim
  - 13.2 Schedule of loss
  - 13.3 Witness statement of the claimant dated 4 April 2022
  - 13.4 Correspondence by the claimant and the Respondent with the Tribunal
  - 13.5 The claimant's employment contracts dated 12 March 2021 and 15 September 2021
  - 13.6 The claimant's payslips
  - 13.7 Correspondence from Nest regarding pension contributions
  - 13.8 Correspondence between the claimant and the respondent and employees of the respondent, including correspondence using a messaging service called "Slack".
- 14 I took into account those that were relevant and was grateful to Miss Kelleher for her assistance in directing me to the relevant documents. Page references below, designated [thus], are to the electronic trial bundle.

## **Facts**

- 15 The claimant commenced employment with the respondent on 12 March 2020. A copy of the employment contract is at [49].
- 16 Pursuant to clause 6, at [53], the claimant was due to be paid a salary of £36,000, which was to be paid monthly on 10<sup>th</sup> of each month.

- 17 The pension contributions were in clause 7 of the contract, at [54]. Clause 7.4 stipulates in square brackets that the employer is to pay 3%.
- 18 There was a conversation between the claimant and Blue Jay, who was the primary decision maker at the respondent, even if not a director; the Claimant and Mr Jay discussed when the claimant would be eligible to join the pension scheme. On 7 April, Mr Jay confirmed that the claimant could join the scheme on 1 July 2020 [121].
- 19 The claimant was employed under the March employment contract until September, when he was promoted to the post of Creative Director; he signed a new employment contract, which is at [77]. This was largely on the same terms as the March contract, but the claimant's salary was increased to £57,000 at clause 6.1, payable on the 10<sup>th</sup> of each month.
- 20 The September contract also contained pension contributions at clause 7.4.
- 21 The contractual notice period to terminate the contract is given at clause 16.8, at [91], and provides for 8 weeks' notice either way.
- 22 There is no term in contract that allows the company to make any deductions from the employee's salary.
- 23 The Respondent made payments to the claimant for the first few months, but not always on time or in accordance with the contract. For example, the first payment was on 11 May 2020 and was for March and April 2020. The claimant's bank statement showing this is in the bundle at [238].
- 24 The respondent then paid the claimant's salary in June 2020, in fact on 9 June. This can be seen by the payment of £2,343.20 at [239].
- 25 The final payment made by the respondent, on 10 July 2020 in the sum of £2,204.52, can be seen at [241].
- 26 Thereafter, the respondent made no further payments. The respondent made a number of excuses for this, which are set out in the grounds of claim and the claimant's witness statement. The excuses include that the Respondent was having difficulties setting up a bank account, issues with accountants, a problem with an account suspension in Korea, and a miscommunication with the bank. Copies of the relevant correspondence are in the bundle.
- 27 The excuses, and the failure to pay the claimant, continued until November 2020. At that time, the claimant felt that his position had become untenable because he was not being paid. The claimant proposed that he was placed on furlough, in the hope that this would guarantee the payment of at least part of his salary. This was confirmed in a Slack message on 20 November 2020, a copy of which is at [193]
- 28 Given the level of his earnings, the claimant was entitled to receive the maximum permitted furlough payment of £2,500 / month.

- 29 I was taken to what I was told is a screenshot from list of companies who made claims for furlough payments at [255]. No Silly Business Ltd is included I this list. I find that No Silly Business did make a claim for furlough payment.
- 30 On 16 December, the claimant asked about status of his furlough payments. The respondent responded to say that payment would be made by 24 December 2020. A copy of this exchange is at [196]. However, it was not paid.
- 31 The claimant raised a grievance on 5 Jan 2021 [198]. The only response from the Respondent was a short note from Mr Jay, to say, “I haven’t read it but will be settling your salary next week”. There was no subsequent investigation or consideration of the grievance.
- 32 The claimant contacted ACAS on 4 January 2021, but the respondent failed to engage with ACAS.
- 33 Ultimately, the claimant felt he had no choice but to resign on 2 March 2021. A copy of his letter is at [222] and I find that is the date of termination of his employment.
- 34 As to the pension contributions, I was referred to correspondence from Nest at [98] *et seq*, which states that the respondent has not paid. The latest such letter is at [110] and is dated 22 March 2022. I am told that this is only a sample and there are letters from every month. I find that the respondent did not make any payments to Nest on the claimant’s behalf.

## Law

- 35 Other than to the extent regulated by legislation such as the National Minimum Wage Act 1998 and regulations made thereunder, the level of a salary payable to an employee, and how and when it is payable, is a matter to be agreed by the employer and employee (or occasionally by collective bargaining) and is governed by the terms of the relevant employment contract.
- 36 Once this agreement has been reached, however, the employer is obliged to pay the salary in the times and manner agreed. This is governed by Part II of the Employment Rights Act 1996 (“the ERA”), and section 13 provides as follows:
- “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.*

- (2) *In this section “relevant provision”, in relation to a worker's contract, means a provision of the contract comprised—*
- (a) *in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or*
  - (b) *in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.*
- (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.*
- (4) *Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.*
- (5) *For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.*
- (6) *For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.*
- (7) *This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting “wages” within the meaning of this Part is not to be subject to a deduction at the instance of the employer.”*

37 Section 14 of the ERA excludes from section 13 any deductions made to recoup overpaid wages or expenses, and certain other deductions, none of which is relevant to this case.

38 A “worker” is defined in section 230 of the ERA and includes (but is not restricted to) an employee.

39 “Wages” are defined by section 27 of the ERA and include “any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise” (section 27(1)(a)).

- 40 Pension contributions are not wages within the meaning of the ERA, as confirmed by the EAT in Somerset County Council v Chambers EAT 0417/12.
- 41 Under the Coronavirus Job Retention Scheme, introduced pursuant to s.76 of the Coronavirus Act 2020, employers were permitted and encouraged to place staff on furlough. The staff were not permitted to work, but employers were to pay them 80% of their wages, subject to a cap of £2,500 per month. Employers were entitled to claim a grant from the government (administered by HMRC) to cover a proportion of the wages of staff who were placed on furlough; this started as an amount equal to the 80% paid to the staff, but gradually decreased, with the employer still being required to pay the 80% to the employee (subject to the cap). It follows from this that the payments due to employees under the furlough scheme are wages within the meaning of s.27 ERA.
- 42 Pursuant to section 23 of the ERA, any claim to the Tribunal must be made within 3 months of the deduction or, in the case of a series of deductions, 3 months of the last of the series (subject to any extension of time arising out of a reference to ACAS).
- 43 The claim before the Tribunal includes claims for breach of contract, including a failure to pay the contractual notice pay of 8 weeks and failure to pay the pension contributions.
- 44 The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 gives the Tribunal jurisdiction to hear claims for damages made by employees against their employers. Any such claim can only be brought after the termination of employment and must relate to a cause of action which arises or is outstanding on the termination of employment.
- 45 As with claims in respect of deductions from wages, any such claim must be brought within 3 months of the termination of employment.
- 46 The claim for notice pay arises out of an allegation of constructive dismissal under section 95(1)(c) of the ERA. So far as relevant, this provides:

“95 *Circumstances in which an employee is dismissed*

(1) *For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) ..., only if)—*

*[...]*

(c) *the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.”*

- 47 This relies on the common law concept of a repudiatory breach of contract, as expressed by Lord Denning MR in Western Excavating (ECC) Ltd v Sharp [1978] ICR 221 (CA):

*“If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer*

*no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."*

- 48 In Malik and Mahmud v BCCI [1997] ICR 606, the House of Lords found that it is an implied term of a contract of employment that the employer shall not:

*"Without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."*

- 49 It is well established that the failure by an employer to pay the salary of its employees amounts to a breach of this obligation, as well as being a breach of the original contractual obligation to pay the salary.
- 50 ACAS publishes codes and guidance for employers and employees on grievance procedures. The most recent code is from 2015 and the most recent guidance is from February 2019.
- 51 The code recommends that, in the event of a grievance raised formally by an employee, the employer should:
- 51.1 Hold a meeting with the employee to discuss the grievance, allowing the employee to be accompanied
  - 51.2 Decide on appropriate action
  - 51.3 Allow the employee to take it further if not satisfied
- 52 If the Tribunal finds that there has been non compliance with a relevant ACAS Code of practice, the section 207A Trade Union and Labour Relations (Consolidation) Act 1992, an employer has unreasonably not complied with a relevant code of practice, an award under Part II of the ERA and under the Jurisdiction Order can be adjusted by up to 25%.

## **Conclusions**

- 53 I now turn to the issues that were identified, and consider them in the light of the facts that I have found and the law set out above.
- 54 In respect of the wages claim:
- 54.1 Was the claimant employed by the respondent?  
As set out in my findings of fact, it is clear from the 2 contracts of employment that the claimant was employed from 12 March 2020 until he resigned on 2 March 2021.
  - 54.2 Is the claim for wages?  
The claim for the unpaid salary (including while on furlough) amounts to a claim for wages under the ERA.
  - 54.3 Was the claim in time?



The claim was received by the Tribunal on 13 April 2021. The failure to pay amounted to a series of deductions and the claim was brought within 3 months of the last deduction and is therefore in time.

54.4 Is there a deduction?

A failure to pay wages amounts to a deduction within the meaning of s.13(3) of the ERA as set out above.

54.5 Was there a statutory authority for the deductions?

There was no statutory authority for the deduction, and the claimant had not agreed to it.

55 It follows that the respondent is liable in principle for the claim for loss of wages. I will calculate the relevant amount later.

56 In respect of the claim for breach of contract:

56.1 What were terms of the contract regarding pension and notice?

I have set out at paragraphs 17 to 21 above the terms of the contract regarding the payment of pension and the notice requirements to terminate the contract.

56.2 Is the respondent in breach of contract?

The respondent did not make the pension contributions and did not pay the claimant's salary, so it was in breach of contract.

56.3 In respect of the claim for notice pay based on an allegation of constructive dismissal, was the respondent in fundamental breach of contract?

As set out above, the failure to pay is a breach of a fundamental term of the contract, and is a repudiatory breach, entitling the claimant to treat the contract as at an end with immediate effect.

56.4 Was the claim made in time?

As with the wages claim, the claim was made within 3 months of the termination of the contract.

56.5 Has the claimant suffered loss as a result?

The fact that the claimant has not received the money to which he is entitled amounts to loss he has suffered.

**Remedy**

57 In respect of wages, how much is due? This is set out in the table below, based on the schedule of loss. PAYE is to be deducted by the employer from the gross amount of £25,347.94

58 In respect of the breach of contract claim, how much notice pay is due? This is a gross amount of £4,614.38 as per the calculations in the table below.

59 How much should have been paid in pension contributions? These are set out in the table below, based on the schedule of loss and amount to £760.44

Head of Loss	Amount
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<p>Unlawful deductions from wages claim</p> <p>1 July 2020 to 30 September 2020 with a gross salary of £36,000 = £36,000/365 days x 92 days</p> <p>1 October 2020 to 19 November 2020 with a gross salary of £57,000 =£57,000/365 days x 50 days</p> <p>20 November 2020 to 2 March 2021 with a gross salary of £30,000 =£30,000/365 days x 103 days</p> <p>Sub-total of unlawful deductions from wages claims</p>	<p>£9,073.97 (gross pay)</p> <p>£7,808.22 (gross pay)</p> <p>£8,465.75 (gross pay)</p> <p>£25,347.94 (gross pay)</p>
<p>Breach of contract claim – notice pay</p> <p>Contractual notice pay of eight weeks' notice =£30,000/52 weeks x 8 weeks</p>	<p>£4,615.38 (gross pay)</p>
<p>Breach of contract claim – employer's pension contributions</p> <p>3% of gross salary from 1 July 2020 to 30 September 2020 = 36,000/365 days x 0.03 x 92 days</p> <p>3% of gross salary from 1 October 2020 to 19 November 2021</p>	<p>£272.22</p> <p>£234.25</p>

= 57,000/365 days x 0.03 x 50 days	
3% of gross salary from 20 November 2020 to 2 March 2021	
= 30,000/365 days x 0.03 x 103 days	£253.97
Sub-total of claimed pensions contributions	
	£760.44

60 Should the damages be adjusted due to a failure by the respondent to follow ACAS code of conduct? I have found that the respondent failed to comply with the ACAS code of conduct and failed to respond when the claimant referred the matter to ACAS for early conciliation. Accordingly, I uplift the award by 25% as per the calculation below.

Total before uplift: 29,189.15

Uplift of 25%: 7,297.29

Total: £36,486.45

Employment Judge Talbot-Ponsonby

Date: 30 May 2022

Judgment sent to the parties on

07 June 2022

For the Tribunal office