



EMPLOYMENT TRIBUNALS

Claimant

Mr N Bharati

v

Respondent

BSS Associates Limited

Heard at: London (CVP)
Before: Employment Judge R Wood

On: 25 and 26 May 2022

Appearances

For the Claimant: In person

For the Respondent: Did not attend and was not represented.

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 **£25,149.75**.
2. 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 **£2176** is awarded as part of the compensation payment set out above.
3. The respondent has made unlawful deductions from the claimant's wages by failing to pay 1.9 weeks' holiday pay. The respondent is ordered to pay the claimant **£2280**. This sum is a gross figure. The respondent is liable for the tax on this sum.
4. The respondent has made unlawful deductions from the claimant's wages by failing to pay the claimant his salary for July 2021. The respondent is ordered to pay the claimant **£5312.50**. This sum is a gross figure. The respondent is liable for the tax on this sum.
5. The respondent was in breach of the claimant's contract by dismissing the claimant without notice and is ordered to pay damages of 12 weeks' salary amounting to **£14,400**. This sum is a gross figure. The respondent is liable for the tax on this sum.

REASONS

1. Oral judgment was given at the hearing. The respondent did not attend the hearing and was not represented. I considered whether to go ahead in the respondent's absence and concluded that it would be in accordance with the overriding objectives to proceed with the hearing for the following reasons
2. The respondent has participated in the proceedings only to a very limited extent. Although it had submitted a response, it was in my view inadequate, in that it did not address the salient issues in the claim, namely why the claimant had been dismissed, and why it was fair. The respondent had not provided documents or witness statements. It had not responded to the claimant's documents which, given the remarkable content of some of them, demanded some sort of response, particular so far as Mr Bhattacharya, one of the respondent's Directors, is concerned. Neither did the respondent file a counter schedule to the detail schedule provided by the claimant as to his alleged losses.
3. When on the day of the hearing, it became apparent that the respondent was not going to attend, my clerk called the Mr Bhattacharya to ascertain his view. The call was made at about 9.55. He explained that he would not be attending because he had a funeral to attend. He also explained that the claimant had made a complaint about him to the police. The implication seemed to be that he had been advised not to participate in tribunal proceedings whilst he was under investigation. It then became apparent that he had sent two emails to the tribunal the day before, at 6pm and 11.59pm. They both variously expressed the similar reasons for non-attendance and requested an adjournment. They also set out that he had not had sufficient notice of the hearing to be able to instruct legal representation and wanted an opportunity to do so.
4. The claimant resisted the application for an adjournment. He suggested he had done something similar in relation to the tribunal proceedings of one of colleagues, Mr Rimal (see claim number: 2204538/2021). He doubted he would attend if the case was adjourned. He had reported Mr Bhattacharya to the police, but this was in relation to harassment of himself and his family. He denied that the investigation was an adequate excuse for not participating in this hearing.
5. In my judgment, the respondent was unlikely to attend on another occasion. His reasons for not being present were unconvincing. He had received as much notice as the claimant, the notice of hearing having been sent out to the parties in 2021. There were others who could have attended from the respondent. Mr Bhattacharya had not submitted a witness statement so would have been able to participate only to a limited extent in any event. I was not convinced that there was a funeral, or that it took priority over these hearings. I am sure he could have given the Tribunal more notice of the funeral than he did if he was genuinely committed to engaging with this process. He had given multiple excuses, at the last minute, all of which gave his reasons an air of implausibility. I decided to proceed in his absence.

6. The claimant brings claims of unfair dismissal, notice pay, holiday pay, arrears of pay and failure to provide a written statement of his particulars of employment, against his employer, BSS Associates Limited, an accountancy firm.
7. The respondent made a contractual claim for £144,000. It is difficult to understand what the basis of the claim might have been. However, the respondent has provided no evidence in support of it, and I therefore dismiss this claim.
8. The issues to be decided were:
 - (i). 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?
 - (ii). 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?
 - (ii). 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?
 - (iv). Did the respondent owe notice pay to the claimant, and if so, what is the sum owed?

Procedure, documents, and evidence heard

9. I was referred to a selection of documents from 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. I allowed him to adopt the content of the aforementioned summary as his evidence in chief. He confirmed on oath that the contents were truthful and accurate.

Findings

10. The claimant was employed by the respondent, as an accountant in December 2004. I reject the alternative account put by the respondent in the response namely that he was not employed until 2008. I have seen a Home Office letter which is clear on its face that the claimant was employed by the respondent at the date of the letter, which is 23 August 2005. The claimant told me that the respondent had helped him with his visa application. I accept his evidence on this point.
11. In terms of credibility in a more general sense, I should say that I found the claimant to be, in large part, a credible and plausible witness. Save for some confusion as to his post dismissal earnings, he was clear and straightforward, and was keen to assist the tribunal by obtaining further documents during the

hearing. This is in stark contrast to the attitude of the respondent, and in particular, Mr Bhattacharya, who have conducted themselves during these proceedings, in an unprofessional and uncooperative manner. They have chosen not to challenge the testimony of the claimant, whose evidence I prefer where there is disagreement.

12. The next relevant matters occur in 2021. Having gone through the large amount of correspondence submitted by the claimant, it is apparent that the relationships between Mr Bhattacharya of the respondent, and at least some of his employees, had become rather strained, and in particular the relationship with the claimant. It is difficult to get to the root of the problems in the absence of the respondent, and it is not necessary to do so. In summary though, the claimant told me that he had borrowed £20,000 from another limited company owned by Mr Bhattacharya in 2012 in order to help him to purchase his first house. He had repaid some of the money but then had been told not to worry about it by Mr Bhattacharya in 2013. The issue resurfaced in 2021 when Mr Bhattacharya began to demand further repayments. The claimant refused indicating that he had understood that what remained outstanding had been gifted. These matters are of only peripheral significance to the issues which I must decide, but I mention them so as to put the events into a more rounded perspective.
13. On 2 June 2021, the claimant and some of his colleagues had felt it necessary to write to Mr Bhattacharya to complain about his intimidating and threatening conduct towards them and concerning his threats to deduct salary from them.
14. In July 2021, the respondent refused to pay the claimant's wages for June. It was only when the claimant refused to work that the respondent backed down on the issue.
15. On 2 August 2021, the claimant called Mr Bhattacharya because he had not been paid his wages for July, when it appeared that everyone else's wages had been paid. There is a remarkable audio recording of the conversation which follows in which Mr Bhattacharya tells the claimant that he will not be paid, save for a few hundred pounds. It is not entirely clear to me from listening to the recording why this decision had been taken. In any event, the claimant indicated that he would not work if he was not paid. He was told to leave by Mr Bhattacharya, who went on to state on several occasions that the claimant was a thief, and that he was considering making a complaint about him to the claimant's professional regulator and/or to the police. The call is ended by the claimant.
16. At the hearing, I was told by the claimant that he had no further communication with the respondent about his dismissal. He left the office and heard nothing further. I accept this evidence. It has not been challenged by the respondent. The claimant did not receive a P45 or any other correspondence marking the end of his long employment with the respondent.
17. It is right to say that the claimant and Mr Bhattacharya have been in contact with each other since then, but not to discuss matters which are pertinent to this tribunal. Since then, the claimant has made a police complaint concerning

allegations of harassment. I have seen correspondence from Mr Bhattacharya which contained the most appalling and unprofessional personal abuse. One is cautious about coming to conclusions based on having heard one side of the story in this regard. However, on any view, the documents do not paint an attractive picture of Mr Bhattacharya's character and credibility.

18. It is my view that by refusing to pay the claimant (not for the first time), by telling him to leave the office, and by repeatedly calling the claimant a thief, that he was in clear terms indicating to the claimant that he was dismissed without notice, on the grounds of misconduct. I do not find that Mr Bhattacharya had a genuine belief in misconduct. The respondent failed to satisfy me that this was the real reason for the dismissal. In any event, I am satisfied that even if misconduct was the genuine reason, that there was no reasonable investigation carried out. The claimant denies any misconduct and the respondent has failed to adduce sufficient evidence that any allegation of misconduct was based on reasonable grounds. It was therefore unfair.
19. The respondent failed to go through any disciplinary or other process and failed to follow the ACAS guidelines.
20. If I am wrong that the respondent expressly dismissed the claimant, then in the alternative I am satisfied that the claimant was constructively dismissed in that the respondent was in clear breach of the implied term as to the relationship of trust and confidence which exists between employer and employee, which the claimant accepted by leaving his employment. As I have already touched upon, the correspondence in this case demonstrates that Mr Bhattacharya tended to conduct himself in an oppressive, unprofessional and aggressive manner. In my judgment, he appears to have made little attempt to comply with relevant legal requirements.
21. The claimant had contributed to a letter on 2 June 2021 which made clear that he and others found Mr Bhattacharya's conduct unacceptable. He had then gone onto refuse to pay the claimant in July and August, this being one of the issues about which the letter took issue. In repeatedly calling him a thief, in a completely unsubstantiated way, and without proper process, and by threatening to report the claimant to the police and his profession body, Mr Bhattacharya had brought matters to a head. As the claimant put it, it was the final nail in the coffin. I accept that this was, at least, a case of constructive unfair dismissal. In coming to this conclusion, I have regard to all of the correspondence submitted by the claimant. I have not chosen to expressly mention all of it in my decision.
22. In addition, I find that the claimant was given no notice of termination of his employment. He had been employed by the respondent for 16 years and was entitled to a statutory notice period of 12 weeks. This was not paid by the respondent.
23. The claimant had not taken any holiday during the last holiday year which had commenced on 1 April 2021. He told me that he was entitled to 5.6 weeks holiday. He had not worked any holiday and had not been paid for any upon

termination of his employment. I accepted the claimant's evidence on this point.

24. The claimant worked through July but was not paid for that month. 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.
25. Although it was not raised in the ET1, it became apparent that the respondent had not provided the claimant with a written statement of employment particulars, as required by sections 1(1) and 1(4) of the Employment Act 1996. I accepted his evidence on this point. It was noteworthy that the respondent had not supplied one for the purposes of this hearing. 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.
26. 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 professional 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.

Remedy

Unfair Dismissal

27. The claimant does not wish to be reinstated or reengaged.
28. The basic award is calculated over a period of 16 years, all of which occur when the claimant is younger than 41 but not below the age of 22. On any view, the claimant's gross weekly wage is in excess of the statutory maximum which was £544. Therefore, the basic award is calculated as a £544 x 16 = £8,704
29. Since he was dismissed, the claimant has started up an accountancy business with others called Sky Accountancy Limited. He commenced employment in August 2021. He stated that he was paid net wages of £1,000 per month of the business. I saw wage slips relating to this income that were consistent with this figure. However, I was also shown the claimants bank statement which showed a further £2,000 per month going into his account along with the £1,000 figure. When asked about this the claimant became rather confused. He explained that it was a loan from the company which might turn into dividends in the future depending on the profit generated by the business. When asked to clarify what his net monthly PAYE was from the business, he first of all said it was £1,000, then he changed to say it was £3,000. He then reverted back to £1,000. I am afraid it was unconvincing, especially for a senior accountant. I requested a copy of the any loan

agreement. However, he said there was nothing in writing. It was an agreement between the directors.

30. In summary, I was not impressed by this part of the claimant's testimony. I find that it is more likely than not that his monthly net income from his new business is £3,000. This makes greater sense when compared to his previous income at the respondent. It seems likely that he would have chosen comparable income with another employer, if setting up his own business was likely to result in such a significant and prolonged reduction in his earnings to £1,000 per month. I also noted that it is a manner of accounting for income which has some similarity with what was happening at the respondent, where only part of the claimant's wages was going through payroll.
31. The claimant's loss to the date of the tribunal hearing was 30.3 weeks. The claimant's notice period would have taken him to 25 October 2021. His weekly income is £4250 divided by 31 x 7 = £960. The loss of income from the respondent up to the date of the hearing is 960 x 30.3 = £29,088; plus, loss of pension which is £125 per month, which is £28.2 per week x 30.3 = £854.5. From this is to be reduced the income from Sky Accounting Ltd. The weekly wage was £3,000 divided by 31 and x 7 = £677. Therefore, income from Sky up to the date of the hearing is 677 x 42.3 (period from dismissal to hearing) = 28,637.
32. Therefore, the net compensatory award up to the date of the hearing is £29,088 - £28,637 = £1,305.46.
33. The claimant estimates that for the next few months he will earn the same amount per month from his business. He hopes that the business will grow. The claimant told me that he will, within 12 months be in a position to earn a weekly sum which is equivalent to that enjoyed when at the respondent. He might have reached this position sooner had he sought employment rather than starting his own business. However, in the circumstances, it was not unreasonable for him to have taken this option. His future loss is therefore 52 weeks at a loss of £282 per week (the difference between BSS and Sky salary = £14,664.
34. In addition, there is continuing loss of pension benefits at £28.2 x 52 = £1,466.40
35. The claimant's total compensatory award is therefore £17,435.86.
36. I considered whether it was appropriate to increase the award under s.207A TULCRA 1992. The respondent has not shown a fair reason for dismissal. It has also failed to apply any kind of due process to the dismissal. The claim to which the proceedings relate 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 unprofessional and unpleasant. 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.

37. Including the 25% uplift, the claimant's compensation for past and future loss is £21,794.83.
38. The claimant is also awarded four weeks' statutory pay pursuant to the s.38 EA 2002 award (failure to provide a particular of employment). Four weeks statutory pay at £544 is £2,176.
39. The total compensatory award is therefore £23,970.83.
40. Including the basic award of £4080. The total compensation awarded to the claimant for unfair dismissal, including the additional award, is therefore £28,050.83.

Notice Pay, holiday Pay and Arrears of Pay

41. The respondent must pay to the claimant 1.9 weeks' accrued holiday pay. (£1200 gross x 1.9) amounting to £2,280.
42. The respondent must pay to the claimant arrears of pay for the month of July. One month's gross salary of £5,312.50.
43. The respondent must pay to the claimant damages for breach of contract for failure to provide 12 weeks' notice of termination of employment. 12 x £1200 = £14,400 net. This is a gross figure.

Employment Judge R Wood

Date: 23/07/2022

Sent to the parties on: 25/07/2022

Olu – For the Tribunal