



## EMPLOYMENT TRIBUNALS

**Claimant:** Mr Ford  
**Respondent:** The Secretary for Business, Energy and Industrial Strategy SOS  
**Heard at:** Midlands West Employment Tribunal  
**On:** 14 September 2022  
**Before:** Employment Judge MURDIN (sitting alone)

**Appearances:**

**For the Claimants:** Mr Gree (representative)  
**For the Respondent:** No attendance

## JUDGMENT

1. The Respondent do pay Mr Ford in respect of his claim number 1300763/2022 the net sum of £4357.81 in respect of the aforesaid claim.
2. The aforesaid sum to be paid by 4pm on 20<sup>th</sup> October 2022.

## WRITTEN REASONS

1. Following a hearing on 14<sup>th</sup> September 2022, I ordered that the Respondent pay the Claimant the net sum of £4357.81 in respect of his claim. A request has now been made under Rule 62 of the Employment Tribunal Rules of Procedure for written reasons.

### The Background

2. The Claimant brought claims for unfair dismissal under sections 94 and 98 of the Employment Rights Act 1996 (ERA), wrongful dismissal, unlawful deduction of wages S13 ERA and right to statement of employment particulars under S38 Employment Act 2002 under claim number: 3327927/2017 against Sheffield & Ford (Builders), a family business.
3. The Claimant succeeded with this claim on 1<sup>st</sup> July 2019 and was awarded judgment dated 26<sup>th</sup> June 2020 for the following sums:
  - (i) Basic Award - £9,187.50;
  - (ii) Compensatory Award - £500.00;
  - (iii) Damages for Breach of Contract - £4,500 plus £1,125.00 and £206.25 under S207A Trade Union and Labour Relations (Consolidation) Act 1992;
  - (iv) Unlawful Deduction from Wages - £825.00;
  - (v) S38 Employment Tribunal Act 202 - £750.00.
4. The Respondent is a Government department which has the authority of the Redundancy Payments Office and The Insolvency Service.
5. Sheffield & Ford (Builders) Ltd entered administration and consent was obtained from the administrators, CBA Business Solutions Ltd, on 10<sup>th</sup> February 2020 to lift the stay on proceedings in order for the remedy judgment to be obtained.

6. The Claimant lodged his claim with ACAS against the Respondent on 13<sup>th</sup> December 2021 and a certificate was issued on 14<sup>th</sup> December 2021.

### The Claim

7. The Claimant asserted that the basic award given by the previous Tribunal for the Claimant's Unfair Dismissal pursuant to s94 ERA met the definition of an employer's payment under s184(1)(d) Part XII, ERA.
8. The Claimant asserted that in accordance with s166 (1)(b) Part XII, ERA, Sheffield & Ford (Builders) Ltd is insolvent and in accordance with s183(3)(aa), Part XII, ERA whole or part of the basic award made within the Judgment is outstanding from the Respondent.
9. The Claimant therefore asserted that the employer's payments are due from the Respondent.
10. The Claimant further asserted that his award for wrongful dismissal brought under s86 ERA 1996 is a debt in accordance with s184 (1) (b) Part XII, ERA.
11. The Claimant asserted that his situation met the requirements under s182, Part XII, ERA on the following basis:
  - (i) Sheffield & Ford (Builders) Ltd is insolvent in accordance with under s183(3)(aa), Part XII, ERA 1996;
  - (ii) his employment has been terminated; and
  - (iii) he was entitled to payment for whole or part of the debts on the appropriate date when the remedy Judgment was issued.

12. The Claimant therefore asserted that the Respondent should pay the employee out of the National Insurance Fund in respect of the outstanding debt. The Claimant submitted that payment has not been received and brings a claim against the Respondent in accordance with s188(1)(a) Part XII, ERA.

### **The Response**

13. By an email dated 8<sup>th</sup> September 2022, the Respondent filed and served "*an additional ET3*", which would "*serve as his written submissions for the hearing on 14<sup>th</sup> September 2022*". The Respondent did not attend at the hearing on 14<sup>th</sup> September 2022, however his further ET3, together with the written submissions of Mr Craig Johnson dated 8<sup>th</sup> September 2022 contained therein, and the case law referred to as part of those written submissions were read, and carefully considered.
14. In short, the Respondent submitted that deductions should be made from the sums previously ordered by the Tribunal dated 26<sup>th</sup> June 2020, on the following bases:
- (i) Under Section 86 of the 1996 Act, an employee was entitled by statute to notice of dismissal for redundancy. This entitlement amounts to 1 week notice if the employee has been continuously employed for one complete calendar month and for each year of continuous employment after the first year of service, a further week up to a maximum of 12 weeks. The number of years' service up until the date of notice of dismissal, determines the number of weeks of notice entitlement;
  - (ii) any contractual notice entitlement in excess of the statutory notice entitlement was not payable under Part XII of the Act and required the debt to be lodged with the Insolvency Practitioner in the insolvency;
  - (iii) if an employee was not given the correct statutory notice of dismissal before being made redundant, he or she was entitled to claim a compensatory notice payment from the NI Fund under Section 184(1)(b) of the 1996 Act;

- (iv) as any failure to give statutory notice was classed as a breach of contract, the compensatory notice payment payable from the NI Fund is akin to common law damages and subject to deductions and mitigation. For clarification, the SOS drew the Tribunal's attention to the cases of *Secretary of State for Employment v Cooper (1987) ICR 766* and *Westwood v Secretary of State for Employment (1985) ICR 209* in which the Employment Appeal Tribunal confirmed that the Secretary of State was correct to deduct, by way of mitigation : wages received from new employment in the notice period, unemployment benefit received in that period including Jobseeker's Allowance and income tax payable on the amount due. Additionally, the EAT found, in the case of *Secretary of State for Employment v Stewart (1996) IRLR 334*, that "*there is a duty to mitigate loss by reasonable means, and accordingly what has to be taken into account is not merely any sum which the employee has actually recovered under the head of, for example, unemployment benefit, but any sum which would have been recovered if reasonable steps has been taken*".
- (v) this mitigation meant that the Compensatory Notice Payment from the NI Fund must be reduced by amounts received or payable during the relevant statutory notice period, regardless of whether or not any breach of contract award against the employer was subject to deductions.

Therefore it was not admitted that a Compensatory Notice Payment from the NI Fund should be paid without any deductions.

### **The Issue**

15. Should there be any deductions to the amount that remained outstanding, having been ordered by the Tribunal on 26<sup>th</sup> June 2020?

### Submissions

16. On behalf of the Claimant, it was said by Mr Gree that there should be no deductions. Employment Judge Tynan had already considered the Respondent's arguments in June 2020, had taken them into account, and had rejected them in his detailed decision, which was set out in pages 1-5 of the bundle. The arguments being raised in writing amounted to a second bite of the cherry, and complaints as to the decision of Employment Judge Tynan should have been considered by way of an appeal, if it is said that they are wrong.
17. Whilst the Respondent did not attend, I reminded myself of their written submissions, and the case law upon which they relied.

### Conclusion

18. I agree with the Claimant. The Respondent has fundamentally misunderstood the nature of today's hearing, and has sought to re-open arguments which have already been determined by Employment Judge Tynan some 2 ½ years ago.
19. I note that the Respondent does not seek to deny that the relevant statutory criteria are met, and it is inevitable therefore that an award will be made. However, the Respondent has sought to challenge the amount of that award, and persuade the Tribunal that various deductions (in unspecified amounts) should be made.
20. It is clear from the written reasons of Employment Judge Tynan that submissions and arguments as to mitigation and deductions from the Claimant's awards were heard by him, and determined by him. It is not now appropriate to re-open those determinations.
21. In the circumstances, I agree with the Claimant that no deductions should be made at this juncture and I award the outstanding sum as follows:

|                                       |          |
|---------------------------------------|----------|
| Previous award for wrongful dismissal | £4500    |
| Amount already paid                   | £142.19  |
| Balance outstanding                   | £4357.81 |

22. Consequently, I award £4357.81 to the Claimant in respect of this claim.

Employment Judge **Murdin**

1<sup>st</sup> December 2022

Sent to the parties on: