



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr B Lewis

**Respondent:** Causeway Heating Services Limited

**Heard at:** Liverpool

**On:** 13 September 2023

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

## Representatives

For the claimant: Ms Duane, Counsel

For the respondent: Not in attendance

# JUDGMENT

## Employment Tribunals Rules of Procedure 2013 – Rule 21

1. The respondent has made an unauthorised deduction from the claimant's wages and is ordered to pay the claimant the gross sum of **£405.73**.
2. The claimant was constructively dismissed and the respondent is ordered to pay to the claimant a basic award of **£3426** and a compensatory award of **£18,416.82**
3. The respondent failed to provide the claimant with a written statement of particulars of employment and is ordered to pay the claimant the sum of **£2284**.
4. The respondent breached the ACAS Code of Practice in relation to Grievance Procedures and is ordered to pay the claimant the sum of **£1841.68**.

# REASONS

## Introduction

1. On 11 September 2023 the response was struck out. I determined that this matter should be dealt with in accordance with rule 21 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. However, it was necessary to have a hearing to consider the claimant's Schedule of Loss.

2. The respondent was allowed to participate in this hearing despite the response being struck out. The respondent has not participated in this hearing. The respondent has informed the Tribunal that he intends to appeal the decision to strike out of the response and did not see any merit in attending this hearing.

3. I determined at the outset of the hearing that I would proceed with the hearing: the respondent had notice, had been given the opportunity to attend and the possibility of an appeal should not stop a matter from progressing. The respondent did not set out the grounds of appeal or seek a reconsideration of the decision to strike out the response, and I therefore concluded that it was in accordance with the overriding objective to avoid any further delay in these proceedings.

### **Evidence**

4. I heard evidence from the claimant under oath and submissions from his representative.

5. I had the benefit of reading the Schedule of Loss and some of the documents within the agreed bundle. I also had an opportunity to read the witness statements that had been prepared by the claimant and the respondent.

### **Relevant Law**

6. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996. An unfair dismissal claim can be pursued only if the employee has been dismissed, and the circumstances in which an employee is dismissed are defined by Section 95. The relevant part of Section 95 is Section 95(1)(c) which provides that an employee is dismissed by his employer if:

**“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.”**

7. If the claimant is successful with the claim for constructive unfair dismissal they are entitled to payment of a basic award, calculated in accordance with section 119 of the Employment Rights Act 1996 as follows:

- “(1) Subject to the provisions of this section, sections 120 to 122 and section 126, the amount of the basic award shall be calculated by —**
  - (a) determining the period, ending with the effective date of termination, during which the employee has been continuously employed,**
  - (b) reckoning backwards from the end of that period the number of years of employment falling within that period, and**
  - (c) allowing the appropriate amount for each of those years of employment.**
- (2) In subsection (1)(c) “the appropriate amount” means —**
  - (a) one and a half weeks’ pay for a year of employment in which the employee was not below the age of forty-one,**
  - (b) one week’s pay for a year of employment (not within paragraph (a)) in which he was not below the age of twenty-two, and**

(c) half a week's pay for a year of employment not within paragraph (a) or (b).

- (3) Where twenty years of employment have been reckoned under subsection (1), no account shall be taken under that subsection of any year of employment earlier than those twenty years.

8. The claimant is also entitled to payment of a compensatory award in accordance with section 123 of the Employment Rights Act 1996 which provides as follows:

- “(1) Subject to the provisions of this section and sections 124 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.
- (2) The loss referred to in subsection (1) shall be taken to include—
- (a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and
- (b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.”

9. Rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provides that when a response is struck out, the effect shall be as if no response has been presented. This allows the Tribunal to determine the claim in accordance with Rule 21 which provides:

- “(1) Where on the expiry of the time limit in rule 16 no response has been presented, or any response received has been rejected and no application for a reconsideration is outstanding, or where the respondent has stated that no part of the claim is contested, paragraphs (2) and (3) shall apply.
- (2) An Employment Judge shall decide whether on the available material (which may include further information which the parties are required by a Judge to provide), a determination can properly be made of the claim, or part of it. To the extent that a determination can be made, the Judge shall issue a judgment accordingly. Otherwise, a hearing shall be fixed before a Judge alone. Where a Judge has directed that a preliminary issue requires to be determined at a hearing, a judgment may be issued by a Judge under this rule after that issue has been determined without a further hearing.
- (3) The respondent shall be entitled to notice of any hearings and decisions of the Tribunal but, unless and until an extension of time is granted, shall only be entitled to participate in any hearing to the extent permitted by the Judge.”

10. Regulation 14 of the Working Time Regulations 1998 provides that a worker is entitled to payment of accrued but untaken annual leave on termination of employment. The value of that payment is calculated by multiplying the annual leave allowance by the percentage of the leave year that has expired on the date of termination and deducting the leave already taken by the claimant.

11. Section 13 of the Employment Rights Act 1996 provides that an employer should not deduct wages that are properly payable to an employee.

12. Section 38 of the Employment Act 2002 provides that if an employer fails to provide an employee with a written statement of particulars of employment an award

of two or four weeks pay (subject to the statutory maximum) can be made to compensate the employee for this failure.

13. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that where a Tribunal determines that there has been a breach of an ACAS Code of Practice, the Tribunal may uplift certain elements of the compensation by up to 25%.

### **Relevant Findings of Fact**

14. The respondent did not attend the hearing today and therefore the claimant's evidence was unchallenged. The claimant was constructively unfairly dismissed. The claimant did not contribute to his dismissal and therefore there will be no reduction in any compensatory award.

15. The claimant submitted a grievance on 29 April 2022 following his suspension. The respondent appointed a HR company to hear the claimant's grievance. The grievance hearing took place on 13 May 2022. During the hearing the claimant offered to provide further evidence after the hearing. The claimant received a copy of the minutes of that hearing on 16 May 2022 and immediately contacted the HR company to tell them adjustments were required. Notwithstanding the claimant's position, on 20 May 2022 the claimant was informed that his grievance was unsubstantiated and was offered the right to appeal.

16. When the claimant did exercise his right to appeal, he discovered that the person appointed to hear the appeal was in fact a friend of the respondent. As a result, the claimant resigned on 6 June 2022.

17. The ACAS Code of Practice on discipline and grievance procedures 2015 states at paragraph 4.3 that a grievance appeal handler should be impartial. At the time the claimant submitted the grievance appeal, the respondent had dispensed with the services of the HR company. Therefore, I have determined that the grievance appeal would not have been dealt with impartially and this amounted to a breach of the Code of Practice for which the claimant was entitled to resign.

18. The claimant's evidence was that he only ever received full pay whilst off sick. The respondent asserted in his witness statement that the terms and conditions were changed by the claimant's mother (who at that point was the respondent's wife). However, the respondent has provided no evidence of this and in particular, the Tribunal notes that there is no contract of employment to suggest a contrary position.

19. The claimant has sought notice pay in accordance with section 86 of the Employment Rights Act 1996 of one week for each full year that he worked for the respondent. The claimant started work on 1 August 2015 and the termination date was 6 June 2022. The claimant was therefore entitled to a notice period of 6 weeks.

20. I have concluded that the claimant's new employment started on 8 June 2022 because this is when his company was incorporated. The claimant told me that he received a wage up until December 2022. The claimant has drawn a dividend since January 2023 and is earning in excess of what he would have earned had he remained employed by the respondent. Therefore, the claimant's loss of wages claim runs from 6 June 2022 until December 2022.

21. I have considered the payslips and note that the claimant did not receive any wages from his new company until 28 July 2022. The claimant received his last payslip from the respondent on 31 May 2022, despite working until 6 June 2022. The claimant is therefore owed 4 days wages up until the date of his resignation.

### **Calculations and Conclusions**

#### Gross pay

22. The claimant's gross monthly salary whilst working for the respondent was £3,085.23. The gross annual salary was £37,022.76. The respondent made a monthly pension contribution of £76.96. The claimant's weekly gross salary of £711.98 is calculated by dividing the gross annual salary by 52 weeks.

#### Net pay

23. The net monthly salary for the claimant was £2,403.89. The net annual salary was £28,846.68. The claimant's weekly net salary of £554.74 is calculated by dividing the net annual salary by 52 weeks.

#### Basic Award

24. The ET1 was issued on 14 October 2022 and therefore the statutory maximum weekly figure that applied as of that date for use in the calculation of the basic award was £571.

25. The basic award of £3,426 is calculated by using the claimant's six years' service multiplied by the age factor of one and applying the statutory maximum weekly figure of £571.

#### Unlawful deduction from wages

26. The respondent did not pay the claimant's wages between 1 June 2022 to 6 June 2022. The award of £405.73 is calculated by dividing the gross annual salary by 365 days and then multiplying that figure by 4 days.

#### Compensatory Award

##### (i) Wage loss

27. The claimant was unemployed for a period of six weeks from the date of his resignation. The award of £3,328.44 is calculated by multiplying the net weekly salary by six weeks.

28. The claimant earned £1048 per month from July 2022 to December 2022. The claimant did not pay any tax and national insurance during this period. The net monthly loss for this period was £1,355.89.

29. The award for £8135.34 is calculated by multiplying the net monthly loss of £1355.89 by six months.

30. The claimant gave evidence that he was unable to apply for new employment due to the homophobia he suffered whilst working for the respondent. Therefore, the

claimant set up a new business in order to mitigate his losses. I have determined that his was a reasonable course of action to take and that the expenses that he has incurred flow from the claimant's constructive unfair dismissal.

31. During evidence and in submissions, the claimant conceded that he suffered a loss of wages for a period of six months. The claimant claimed ongoing startup expenses for a period of twelve months. In light of the claimant's concession, I have determined that an award of £5991.28 should be made to reflect ongoing expenses for the first period of six months before the claimant was in a position to draw a dividend from the company and presumably meet the ongoing expenses thereafter.

(ii) Loss of statutory rights

32. I heard evidence from the claimant that he would not have left the respondent's employment but for the behaviour of the respondent. The claimant gave clear evidence about his lack of confidence and ill health. The claimant described that following his employment with the respondent, he was incapable of applying for a new job through fear of being treated in a similar way. An award of £500 is an appropriate figure for loss of statutory rights.

(iii) Pension Loss

33. I have determined that the claim for pension loss can be dealt with by way of a simple calculation. The respondent made a monthly contribution of £76.96 to the claimant's pension. The award of £461.76 is calculated by multiplying the monthly contribution by the six month loss period between July 2022 and December 2022.

34. The total compensatory award is £18,416.82.

Holiday pay claim

35. The claimant gave evidence that the holiday year ran from January to December. Regulation 14 of the Working Time Regulations 1998 confirms that the claimant is entitled to payment of accrued but untaken annual leave on termination of employment. The claimant confirmed he had the statutory entitlement of twenty days annual leave plus eight days' Bank Holiday.

36. By 6 June 2022 the claimant had taken five Bank Holidays. The claimant confirmed in evidence that by the same date he had taken seven days' annual leave. Therefore, by the effective date of termination they claimant had used 12 days of his annual leave entitlement.

37. Forty three per cent of the leave year had expired by 6 June 2022 and the claimant had accrued 12.04 days of annual leave. As a result, I have not made an award for unpaid holiday because the claimant had taken the accrued holidays and received payment by the effective date of termination.

Failure to provide particulars of employment

38. The claimant worked for the respondent for almost seven years and was never provided with a contract of employment. Section 38 provides a discretion to award between two and four weeks' salary by way of compensation, subject to the statutory maximum of £571.

39. Given the duration of the claimant's employment, I have determined that an award of £2,284 is appropriate which has been calculated by multiplying £571 by 4 weeks.

ACAS uplift

40. I have determined that there should be an uplift of 10% for the respondent's failure to follow the ACAS Code of Practice in regard to the grievance appeal.

41. The nominated grievance appeal handler was not independent and that stopped the claimant from pursuing a grievance appeal. The claimant wanted to pursue an appeal to adduce the evidence not considered by the grievance handler and to rectify the inaccuracies in the notes of the grievance meeting.

42. The claimant was clear that he wanted to resolve matters through the grievance procedure in order that he could remain in employment with the respondent.

43. The award of £1841.68 has been calculated by applying a 10% uplift to the total compensatory award.

Total Award of Compensation

44. The total award of compensation is £26,374.23. I have therefore not grossed up this award.

Employment Judge Ainscough

Date: 17 October 2023

JUDGMENT AND REASONS SENT TO THE PARTIES ON

31 October 2023

FOR THE TRIBUNAL OFFICE



## NOTICE

### THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990 ARTICLE 12

Case number: **2408410/2022**

Name of case: **Mr B Lewis** v **Causeway Heating  
Services Ltd**

Interest is payable when an Employment Tribunal makes an award or determination requiring one party to proceedings to pay a sum of money to another party, apart from sums representing costs or expenses.

No interest is payable if the sum is paid in full within 14 days after the date the Tribunal sent the written record of the decision to the parties. The date the Tribunal sent the written record of the decision to the parties is called **the relevant decision day**.

Interest starts to accrue from the day immediately after the relevant decision day. That is called **the calculation day**.

The rate of interest payable is the rate specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as **the stipulated rate of interest**.

The Secretary of the Tribunal is required to give you notice of **the relevant decision day**, **the calculation day**, and **the stipulated rate of interest** in your case. They are as follows:

**the relevant decision day** in this case is: 31 October 2023

**the calculation day** in this case is: 1 November 2023

**the stipulated rate of interest** is: **8% per annum**.

For the Employment Tribunal Office