EMPLOYMENT TRIBUNALS

Claimant: **J Hammond**

Respondent: **Intumescent Systems Ltd**

Held at: **London South Employment Tribunal by video**

On: **20 September 2023**

Before: **Employment Judge Burge**

Representation
Claimant: Mr Tapsell (Counsel)
Respondent: Ms Splavska (Consultant)

JUDGMENT

The Judgment of the Tribunal is:

1. The complaint of unfair dismissal is well founded and succeeds.

2. Compensation for unfair dismissal is to be decided at a hearing, if not agreed, with the following adjustments:

    (a) The £10,000 ex gratia payment shall be deducted from the basic and compensatory award;

    (b) There shall be no *Polkey* reduction;

    (c) There shall be an uplift to the compensatory award of 20% for failure to follow the ACAS Code; and

    (d) There shall be no reductions to the basic and compensatory awards on the grounds of contributory fault.

3. If the parties cannot agree, the Tribunal will decide the remedy for unfair dismissal at a further hearing lasting 3 hours on 6 December 2023.

4. The complaints of unlawful deductions from wages (in respect of notice pay and from an ex-gratia payment) fail and are dismissed.

REASONS

The evidence

1. Derek Ward (Business Owner and Managing Director) gave evidence on behalf of the Respondent. Mr Ward has poor eye sight. He had an employee finding page numbers for him and each extract that anyone was taken to in the hearing was read aloud to enable Mr Ward to fully participate in the hearing.

2. The Claimant, John Hammond, gave evidence on his own behalf.

3. I was referred during the hearing to documents in a hearing bundle of 293 pages.

4. Mr Tapsell provided me with a skeleton argument and oral closing submissions. Ms Splavska provided me with written closing submissions and answered my questions on them.

Issues for the Tribunal to decide

5. At the start of the hearing the parties agreed that the claims that were to be decided were unfair dismissal (including whether there should be ACAS uplift, *Polkey* deduction and deduction for contributory fault) and unauthorised deductions from wages (notice pay and from an ex gratia payment). The issues to be decided were therefore:

    a. The principal reason for the dismissal and whether it was a potentially fair reason within section 98(1) -(2) of the Employment Rights Act 1996, the Tribunal noting that the Respondent's case is that this was a reason relating to Some Other Substantial Reason;

    b. Whether the dismissal was fair or unfair within the meaning of section 98(4) of the Employment Rights Act 1996 and whether, as to the dismissal itself and the procedure which attended the same, the Respondent acted reasonably in all the circumstances;

    c. If the Claimant's dismissal was unfair, is the Claimant entitled to a Basic Award and/or a Compensatory Award, and, if so, should there be any of the following adjustments:

        i. any uplift to the Compensatory Award as a consequence of a failure to follow procedures under the ACAS code?

        ii. any reduction or limit in the Compensatory Award to reflect the chance that the Claimant would have been dismissed in any event and that any procedural errors

accordingly made no difference to the outcome in accordance with *Polkey*? and/or

iii. any reduction in either award to reflect any contributory fault on the Claimant's behalf towards his own dismissal?

d. Did the Respondent make unauthorised deductions from the Claimant's wages and if so how much was deducted? This relates to alleged deductions in respect of
   i. Deducted the sum of £7,206.43 for a van from an ex-gratia payment; and
   ii. Notice pay

6. At the start of the hearing Ms Splavska also raised that employment status was not accepted and that she would be asking questions about that. This was not something that the Respondent had raised previously. Both Mr Tapsell and Ms Splavska gave closing submission on employment status.

7. If the Claimant was successful, then Remedy would be decided at a separate hearing.

Findings of Fact

8. The Respondent manufacturers and supplies passive fire protection products including timber paint which offers 60 minutes fire protection, and trades under the name Envirograf.

9. The Claimant was employed by the Respondent as a Technical Fire Consultant/Sales Representative from 5 January 2011 until his employment terminated on 31 October 2022. The Claimant was employed under a contract of employment as a Technical Fire Consultant / Sales Representative. His duties involved answering customer queries and selling the Respondent's products. The Claimant was employed to work 40 hours per week.

10. By the time of the Claimant's termination of employment, it is agreed by the parties and I accept, that he was entitled to 11 weeks' notice.

11. In 2014 the Claimant raised with Derek Ward that he would like to run a business on the side installing the Respondent's products for customers at weekends and in the evenings. This business went well and the Claimant soon employed others to operate the business and install the products. This was in addition to the Claimant's day to day work for the Respondent on the technical advice/sales side of the business. It was also of benefit to the Respondent who was selling their product to be installed.

12. In 2018 following an accident the Claimant set up working from home. Calls made to the Respondent could still be transferred to the Claimant. I accept the Claimant's evidence that administrators would make a note of new enquiries and then Mr Ward would decide who should deal with them. In addition to himself there were a number of distributors who may be passed an enquiry. I also accept the Claimant's evidence that he only sold and

promoted the Respondent's products and that Mr Ward controlled what he did because it was up to him which leads were given to him.

13. On 30 January 2020 the Respondent acquired a van for the Claimant's use. The Claimant paid the monthly payments and the intention was for it to be the Claimant's property at the end of the repayment period. The first van the Claimant used and bought in this way had Envirograf marketing stuck to the bodywork.

14. In 2021 Mr Ward suggested that the Claimant set up a company to regularise the work being done on the side and so that the new company would be able to function independently of the Respondent and the Claimant. With the help of the Respondent's accountant, the Claimant set up Complete Fire Protection Upgrades Limited ("CFPU") in April 2021. While previously the Claimant had invoiced the Respondent for products sold, now it was CFPU who then invoiced for them.

15. The relationship was working well and both parties were doing well out of the employment relationship and the Claimant's side business installing the Respondent's products.

16. However, on 11 January 2022 Mr Ward wrote to the Claimant "You must do your work via your own companies in future".

17. On 5 August 2022 Mr Ward wrote to the Claimant "It has been decided to stop the money we pay you from the end of October, I will send you over as many leads as I can . . ". I accept Mr Ward's evidence that he thought the Claimant was doing very well with his business, as he was now employing someone. Mr Ward felt that he had helped him enough and so he thought that he should no longer be paying him a wage.

18. On 28 September 2022 Mr Ward wrote to the Claimant's solicitors referring to the history of the matter and referring to a 35% discount provided to the Claimant. He said "I wrote to [the Claimant] 6 weeks ago to remind him I was stopping his money at the end of October, he would be paid all money due, including accrued holiday money and £10,000.00."

19. In a letter dated 7 October 2022 Mr Ward wrote to the Claimant's solicitors indicating that direct cash sales achieved by the Claimant stopped in March 2022 (when the discount was increased to 35%) and

> *"the job role he was employed for has not been fulfilled since March 2022, whilst John was still being paid a wage at this time, We feel this shows his role is now redundant and therefore, we will make him redundant at the end of October."*

20. A settlement agreement was provided to the Claimant (which has not been produced to the Tribunal) but was not signed by the Claimant. Mr Ward gave evidence that he was told by a lawyer that he should sign a settlement agreement, pay the Claimant until October and pay him an ex-gratia payment of £10,000.

21. In submissions Ms Splavska submitted that the notice period was calculated from 12 September as this was the date of the settlement agreement. The notice period due should have been 11 weeks, but the Respondent's position was that the Claimant worked his notice period from 12 September 2022 and was then paid the remainder of his notice period as a Pay In Lieu of Notice £2,297.60.

22. On 25 and 27 October 2022 Mr Ward wrote to the Claimant's solicitors with the Claimant's P45 and payslip.

23. At the termination date the £10,000 ex gratia payment was made with the sum of £7,206.43 being deducted for the outstanding payment of the van, which then became the Claimant's. In evidence to the Tribunal the Claimant said that he did not want the money to be taken out of the money owed to him, he wanted the van to be paid for and owned by his company CFPU. The remaining £2,793.67 was sent to the Claimant's solicitors which they cashed. In his witness statement the Claimant said

    "When the time came to make what the Respondent termed "the termination payment" to me, they simply deducted the settlement sum from my wages/compensation for loss of office/alleged redundancy payment."

24. In oral evidence the Claimant attempted to resile from this and said that he did not know what the money was for, that he himself had not received the £2,793.67 balance as he had agreed with his solicitors to use that money in payment of their fees. I reject this oral evidence and accept his written evidence that the £10,000 was a payment for "wages/compensation for loss of office/alleged redundancy payment" and he knew this. He accepted the £10,000 as a payment for "wages/compensation for loss of office/alleged redundancy payment".

25. After the termination date of 31 October 2022 the plan had been for the Claimant to continue to operate in the same way that he had been, but without being paid a salary. However, a dispute arose regarding the 35% discount being given to the Claimant on product sales and Mr Ward became aware that in emails and in some marketing the Claimant was using a reference on emails to being "in partnership with" the Respondent.

26. On 7 November 2022 the Claimant's solicitors acknowledged the letters sent from the Respondent and enquired on behalf of their "client/his company CFPU Limited, whether the former discount and sales leads previously provided will now be restored?"

27. On 17 November 2022 Mr Ward wrote to the Claimant

    "You have on your website saying that your company is in direct partnership with Envirograf. Please take this and any reference to Envirograf and Intumescent Systems off of any of your literature and website.
    You and your company are nothing to do with Envirograf and Intumescent Systems.

You only sell our products like any other merchant and any installation work in not guaranteed by my company."

28. Mr Ward gave evidence to the Tribunal that, although he accepted the Claimant had been putting that CFPU and Envirograph were in partnership for some time, he had not been aware of it and it was only at that point that he was alerted to it when a staff member had received telephone calls asking if Mr Ward was dead or if they had sold out. Because of this Mr Ward was no longer prepared to supply the Claimant and accordingly wrote to the Claimant on 22 November 2022.

29. The Claimant contacted ACAS on 13 January 2023 and a certificate was issued on 24 February 2023. The Claimant submitted his claim on 17 March 2023.

Law

Dismissal

30. Section 94 of the Employment Rights Act 1996 ("ERA") confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. The employee must show that he was dismissed by the respondent under section 95, but the respondent must show the reason for dismissing the Claimant (within section 95(1)(a) ERA which provides that there is a dismissal if " … the contract under which [the employee] is employed is terminated by the employer (whether with or without notice)".

31. *In Riley v Direct Line Insurance Group PLC* [2023] EAT 118, the Employment Appeal Tribunal per HHJ Shanks

> "*Whatever the respective actions of the employer and employee at the time when the contract is terminated, at the end of the day the question always remains the same: "Who really terminated the contract?" (see: Sir John Donaldson MR in **Martin v MBS Fastenings** [1983] IRLR 198). The issue is one of causation."*

32. S.98 ERA deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within s.98(2).

s.98 (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.*

(2) A reason falls within this subsection if it—

> *(a) relates to the capability or qualifications of the employee*

for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

33. The second part of the test is that, if the Respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the Respondent acted fairly or unfairly in dismissing for that reason:

s.98 (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.

34. The employer bears the burden of proving the reason for dismissal whereas the burden of proving the fairness of the dismissal is neutral. The burden of proof on employers to prove the reason for dismissal is not a heavy one. The employer does not have to prove that the reason actually did justify the dismissal because that is a matter for the Tribunal to assess when considering the question of reasonableness. As Lord Justice Griffiths put it in *Gilham and ors v Kent County Council (No.2)* 1985 ICR 233:

> *"The hurdle over which the employer has to jump at this stage of an inquiry into an unfair dismissal complaint is designed to deter employers from dismissing employees for some trivial or unworthy reason. If he does so, the dismissal is deemed unfair without the need to look further into its merits. But if on the face of it the reason could justify the dismissal, then it passes as a substantial reason, and the inquiry moves on to [S.98(4)], and the question of reasonableness".*

Contracting out of unfair dismissal rights

35. Section 203 ERA contains restrictions on contracting out of unfair dismissal rights:

"(1) Any provision in an agreement (whether a contract of employment or not) is void in so far as it purports—

(a) to exclude or limit the operation of any provision of this Act, or

(b) to preclude a person from bringing any proceedings under this Act before an employment tribunal.

(2) Subsection (1)—

(a) does not apply to any provision in a collective agreement excluding rights under section 28 if an order under section 35 is for the time being in force in respect of it,

(b) does not apply to any provision in a dismissal procedures agreement excluding the right under section 94 if that provision is not to have effect unless an order under section 110 is for the time being in force in respect of it,

(c) does not apply to any provision in an agreement if an order under section 157 is for the time being in force in respect of it,

(e) does not apply to any agreement to refrain from instituting or continuing proceedings where a conciliation officer has taken action under any of sections 18A to 18C of the Employment Tribunals Act 1996, and

(f) does not apply to any agreement to refrain from instituting or continuing . . . any proceedings within the following provisions of section 18(1) of the Employment Tribunals Act 1996 (cases where conciliation available)…

(3) For the purposes of subsection (2)(f) the conditions regulating settlement agreements under this Act are that—

(a) the agreement must be in writing…"

Compensation

36. If an unfair dismissal complaint is well founded, remedy is determined by sections 112 onwards of the ERA. Where re-employment is not sought compensation is awarded by means of a basic and compensatory award.

37. The compensatory award can be reduced if the Tribunal considers that a fair procedure might have led to the same result, even if that would have taken longer (*Polkey v A E Dayton Services Limited)* [1988] ICR 142.

38. S.124A ERA provides for adjustments to the compensatory award if a party has failed to comply with the ACAS Code of Practice on Discipline and Grievance Procedures (2015).

39. The basic award is a mathematical formula determined by s.119 ERA. Under section 122(2) it can be reduced because of the employee's conduct:

> *"Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly".*

40. A reduction to the compensatory award is primarily governed by section 123(6):

> "*Where the tribunal finds that the dismissal was to any extent caused*

or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding…"

41. The leading authority on deductions for contributory fault under section 123(6) remains the decision of the Court of Appeal in *Nelson v British Broadcasting Corporation (No. 2)* [1980] ICR 111. It said that the Tribunal must be satisfied that the relevant action by the Claimant was culpable or blameworthy, that it caused or contributed to the dismissal, and that it would be just and equitable to reduce the award.

Ex gratia payment

42. Ex gratia payments made without reference to what they are for will be offset against any compensatory award insofar as they reduce the employee's financial losses. However, where the payment is not referrable to a particular right, the payment will not offset it (*Chelsea Football Club and Athletic Co Ltd v Heath 1981 ICR 323, EAT*).

Unauthorised Deduction from Wages

43. Section 13(1) of the Employment Rights Act 1996 ("ERA") provides:

"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."

44. Section 23 ERA gives a worker the right to complain to an Employment Tribunal of an unauthorised deduction from wages.

45. Section 27(1) ERA sets out the meaning of "wages"

"(1) In this Part "wages", in relation to a worker, means any sums payable to the worker in connection with his employment, including—
(a)any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise…."

46. Section 27(2) sets out what is excluded:

"Those payments are—
(a)any payment by way of an advance under an agreement for a loan or by way of an advance of wages (but without prejudice to the application of section 13 to any deduction made from the worker's wages in respect of any such advance),
(b)any payment in respect of expenses incurred by the worker in carrying out his employment,
(c)any payment by way of a pension, allowance or gratuity in connection with the worker's retirement or as compensation for loss of office,

(d)any payment referable to the worker's redundancy, and
(e)any payment to the worker otherwise than in his capacity as a worker."

47. Payments in lieu of notice are not "wages" (*Delaney v Staples* [1992] IRLR 191).

Conclusions

48. While the Respondent had not raised the issue of employment status until today's hearing, it was still important for me to consider whether or not the Claimant was an employee because otherwise he would not be entitled to bring a complaint of unfair dismissal to a tribunal. It is a matter of jurisdiction.

49. The Claimant and the Respondent's relationship was an unusual one. There was a contract of employment in existence and yet it would be the Claimant, and then his company once that had been set up, who would be invoiced for any paints that he had sold. However, he was also paid a monthly salary. In my view it is particularly important that he only sold and promoted the Respondent's products. The contact between himself and the office was daily and I do not consider that him working from home from 2018 changed the nature of the relationship. While the Claimant paid for his own work van, the first one had Envirograf marketing on it. Mr Ward decided which work came to him and which work went out to distributors, he had control over the work that the Claimant did for him. On balance I conclude that the Claimant was an employee and so is entitled to bring a complaint of unfair dismissal.

50. In order to bring a claim for unfair dismissal there must be a "dismissal" for the purposes of section 95 of the Employment Rights Act 1996. The Respondent argues that there was a termination by mutual consent. The question for me is, who really terminated the contract? Documentation shows that the termination of the contract was one sided. Mr Ward decided that he was going to stop paying the Claimant - on 5 August 2022 Mr Ward wrote to Claimant "**It has been decided** to stop the money we pay you from the end of October, I will send you over as many leads as I can" (my emphasis)". Mr Ward did not think that he should be paying him anymore as the Claimant was doing very well with his side business. However, that fundamentally overlooked his responsibility as the Claimant's employer. I conclude that it was the Respondent who terminated the contract.

51. I also conclude that on 5 August 2022 the Respondent gave notice to the Claimant that he was being dismissed at the end of October 2022. In response to a letter sent by the Claimant's solicitors (not provided to the Tribunal) on 28 September 2022 Mr Ward confirmed this position:

> *"I wrote to [the Claimant] 6 weeks ago to remind him I was stopping his money at the end of October, he would be paid all money due, including accrued holiday money and £10,000.00."*

52. I conclude that the Claimant was entitled to 11 weeks' notice and he was given just over 12 weeks' notice. He has therefore been paid for his notice period. In any event, pay in lieu of notice is not "wages".

53. In a letter dated 7 October 2022 Mr Ward wrote to the Claimant's solicitors indicating direct cash sales achieved by the Claimant stopped in March 2022 (when the discount was increased to 35%) and:

> *"the job role he was employed for has not been fulfilled since March 2022, whilst John was still being paid a wage at this time, We feel this shows his role is now redundant and therefore, we will make him redundant at the end of October".*

54. However, Ms Splavska, rightly in my view, concedes that there was not a redundancy situation. She submits that there was a termination by mutual consent and that this can be seen by the Claimant's acceptance of the ex-gratia payment. I do not accept this. Documentation before the Tribunal does not indicate that the Claimant agreed to his termination. The evidence he gave to the Tribunal also did not indicate that he left by mutual consent. He did benefit from the ex-gratia payment but did not sign away his rights when accepting it - he did not sign the settlement agreement and s.203 ERA is clear that any agreements seeking to exclude or limit the operation of any provision of the Act or to preclude a person from bringing any proceedings under the Act before an employment tribunal are void unless they fall within the small number of exceptions. The Claimant did not sign the settlement agreement, the draft agreement therefore does not prevent him from bringing his complaints to a Tribunal.

55. For these reasons I conclude that the Respondent has not shown that the Claimant's dismissal was for one of the potentially fair reasons contained in s.98(1) or (2). The Claimant's claim of unfair dismissal is therefore successful.

56. Even if I am wrong about that, the Respondent would not be able to show that they acted reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant. The reason for dismissal was that Mr Ward thought the Claimant was doing too well in his side business. That is not a sufficient reason to dismiss. Further there was no process at all.

57. While quantum and mitigation were not decided at this hearing, Polkey, ACAS, contributory conduct and ex gratia payment were.

58. Certainly only the Claimant's salaried earnings are to be used for calculations of a basic and compensatory award, the work the Claimant performed through his company CFPU would not be recoverable in this claim of unfair dismissal.

59. The Claimant accepted the £10,000 as a payment for "wages/compensation for loss of office/alleged redundancy payment". £7,206.43 went towards the outstanding payment of the van (which then became the Claimant's) and the remaining £2,793.67 was paid to the Claimant via his solicitors. In closing submissions, Mr Tapsell, rightly in my view, conceded that an ex gratia payment does not constitute "wages" and so the Claimant's complaint of unauthorised deductions from wages in respect of the deduction for the Claimant's van fails.

60. The £10,000 ex-gratia will be offset from any award made to the Claimant. The ex gratia payment should be deducted from the basic award first and then any remainder should be deducted from the compensatory award.

61. The Respondent submits that a *Polkey* reduction is appropriate because the Claimant would have been dismissed in any event and that the employer's procedural errors accordingly made no difference to the outcome. She says that in establishing his own company, the Claimant naturally created the situation when the Respondent decided to end the Claimant's employment. However, in 2021 it was Mr Ward who suggested that the Claimant set up his own company to regularise the work being done on the side and so that the new company would be able to function independently of the Respondent and the Claimant. This worked to the satisfaction of both parties for some time, I reject that this meant that the Respondent would have dismissed the Claimant in any event. No *Polkey* reduction is therefore appropriate.

62. In breach of the ACAS code there was no dismissal procedure and so this warrants a high uplift. However, the Claimant, despite being legally represented, also did not request an appeal of his dismissal and so I conclude that the uplift should be 20%.

63. The Respondent argues contributory fault as the Claimant wrote on his documentation that he was "in partnership" with the Respondent. This was not a new thing, the Claimant had been putting this on his documentation for some time, although Mr Ward was only aware of it after the Claimant had been dismissed. The Claimant and his company only sold and installed the Respondent's products and they had a relationship going back over 10 years. This is, at worst, clumsy phraseology but in my view cannot be described as culpable or blameworthy. It did not cause or contribute to the dismissal, and it would not be just and equitable to reduce the award. A reduction to the basic and compensatory awards on the grounds of contributory fault is therefore not appropriate.

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Employment Judge **Burge**

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Date 28 September 2023