# EMPLOYMENT TRIBUNALS

**Claimant:** Mr D Silberman

**Respondent:** Peninsula Business Services Ltd

# JUDGMENT

1. Time is extended to 7 May 2024 for the claimant's application of 7 May 2024 for reconsideration of the Judgment sent to the parties on 19 April 2024.

2. That application is refused under rule 72(1) because it has no reasonable prospect of success.

3. The award for breach of contract of £1,667.67 made in the Reconsideration Judgment of April 2024 is uplifted by 10% because of an unreasonable failure by the respondent to follow the ACAS Code of Practice. The respondent is ordered to pay the claimant a further £**166.77** under section 207A Trade Union and Labour Relations (Consolidation) Act 1992.

4. The claimant's application for a preparation time order is dismissed.

# REASONS

**Introduction**

1. This case was originally heard by Employment Judge Gianferrari on 24 May 2022 and having deliberated in chambers on 10 June 2022 he issued a Reserved Judgment with Reasons which was sent to the parties on 20 October 2022. He dismissed the unfair dismissal complaint and the claim for wrongful dismissal (breach of contract).

2. The claimant appealed to the Employment Appeal Tribunal. The appeal was stayed in December 2023 to allow the claimant to make an application for reconsideration in relation to the wrongful dismissal complaint.

3. I determined that application in a Judgment on Reconsideration sent to the parties on 19 April 2024, in which I found the wrongful dismissal claim well-founded and ordered the respondent to pay the claimant £1,667.67 in respect of his four week notice period. That amount had in fact already been paid by the respondent.

4. In paragraphs 33-41 of the Reasons with that Judgment I identified that two matters remained outstanding. The first was the question of a possible uplift to the award because of an alleged unreasonable failure to follow the ACAS Code of Practice by the respondent, and the second was an application by the claimant for a preparation time order. Directions were given for written submissions on those two points, which I indicated I would deal with on the papers unless either side requested an oral hearing. Neither side has done so.

5. Prior to making those submissions, however, the claimant applied by email of 7 May 2024 for reconsideration of my Judgment. There are therefore three matters I need to address.

**Reconsideration Application 7 May 2024**

6. The test for reconsideration of a Judgment is whether it is in the interests of justice (rule 70), and it is a power which must be exercised in accordance with the overriding objective in rule 2. Rule 72(1) says that:

> **"If the Tribunal considers that there is no real prospect of the original decision being varied or revoked (including, unless there are special reasons, where substantially the same application has already been made and refused), the application shall be refused and the Tribunal shall inform the parties of the refusal."**

7. This this context "the Tribunal" means the Tribunal which took the decision in question.

8. I have given the application preliminary consideration. It was made a few days outside the 14 day period required by the Rules, but I am prepared to extend time under rule 5 given the medical difficulties which the claimant is experiencing. They are confirmed in a letter from NHS Psychological Wellbeing Services dated 25 April 2024.

9. The central point made by the application is that the respondent was bringing forward the date of termination resulting from the claimant's resignation, rather than imposing a new dismissal with its own termination date and notice period. Reliance is placed on the wording of the outcome letter of 7 February 2020.

10. However, in my judgment these arguments have no prospect of persuading me to vary or revoke my decision. Seen in context, the termination letter is based on a belief that the claimant had been discussing the grievance matter with colleagues, and making remarks about another colleague, and had been "*commenting on management/Seniors in a derogatory manner*". The fourth paragraph of the termination letter refers to a "*disregard for adhering to management instructions and [a] refusal to carry out…duties as informed*".

11. In those circumstances, read objectively, the letter was taking a fresh decision to terminate employment, not simply bringing forward the impending termination resulting from resignation. There is no prospect of this point changing my decision that the verbal agreement to pay notice related to the four weeks due upon termination by the employer, not the balance of the 8 weeks' notice given by the employee.

12. In any event these are matters which the claimant could have raised in his application for reconsideration made in January 2024.

13. The application for reconsideration is therefore refused.

**ACAS Code**

Background

14. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 empowers a Tribunal to increase any award made to the employee by no more than 25%, if it considers it just and equitable in all the circumstances to do so, where:

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies;

(b) the employer has failed to comply with that Code in relation to that matter; and

(c) that failure was unreasonable.

15. The jurisdictions listed in schedule A2 to the Act include breach of contract claims. In principle, therefore, an uplift is possible in this case.

16. The findings of fact made by Employment Judge Gianferrari in his Reserved Judgment show that the claimant raised a grievance in December 2019, attended a grievance hearing on 3 January 2020, and then discussed his grievance with witnesses. He resigned on 24 January 2020 giving a period of eight weeks' notice which would terminate on 19 March 2020. He attended a grievance appeal hearing on 29 January 2020. On 4 February 2020 he raised a matter relating to the grievance with members of staff, and was later spoken to by Ms Knighton about discussing the grievance. Employment Judge Gianferrari found as a fact that the claimant offered no explanation for this and that he was told that he would be paid in lieu. Dismissal was confirmed by a letter of 7 February 2020.

Claimant's Submission

17. The claimant submits that there was a failure to follow the provisions of the ACAS Code insofar as it relates to disciplinary proceedings because he was effectively being disciplined for discussing his grievance. There was an informal discussion on 4 February 2020 which should have been arranged as a formal misconduct hearing. He was denied the right to be accompanied. He also submits that there was a failure to deal properly with his grievance. He seeks an uplift of 25%.

Respondent's Submission

18. The respondent's submission raises a technical point. It says that no uplift is appropriate, arguing that because the amount I ordered to be paid had already been paid, my Judgment should have been a bare declaration with no award which was capable of being uplifted. I do not accept that the Judgment should have been a bare declaration because the amount which I awarded as damages for breach of contract had already been paid. In my judgment that is a matter which goes to

enforcement, not to quantum. Alternatively, even if I should have made no order for payment, as opposed to a declaration of the damages resulting from the breach, the Judgment (as the Reasons made clear) expressly did not address the ACAS uplift point. It remains live in principle.

19. Turning to substance, the respondent also submits that the reasons of Employment Judge Gianferrari (paragraph 32) refer to an ACAS uplift regarding the disciplinary procedure, not the grievance. It is suggested that the claimant was not denied any right to be accompanied but admitted the allegations. It is suggested that no uplift is appropriate, or at most 5%.

Conclusions

20. In relation to the grievance, there was no unreasonable failure to comply with paragraphs 32-45 of the ACAS Code of Practice. The claimant had a meeting to discuss his grievance and the right to be accompanied. He was allowed to appeal the outcome and there was an appeal meeting.

21. In relation to the disciplinary matter, it seems to me that the termination of employment confirmed by the letter of 7 February 2020 was a dismissal for misconduct. The respondent did fail to comply with the requirement of paragraph 9 of the Code to notify the employee of the problem in writing, with the requirement in paragraph 10 to provide notice of the time and venue for the meeting and of the right to be accompanied, and did not provide any right of appeal.

22. In considering if this failure was unreasonable, I take into account that this occurred at a time when the claimant had already resigned and was serving out his notice period. Nevertheless, the decision to terminate employment early by reason of a dismissal for misconduct was a matter to which the ACAS Code of Practice applied, and given the size and resources of this employer, and the fact it provides employment law services to clients, I am satisfied it was unreasonable not to comply with the rudimentary provisions of the ACAS Code of Practice, and in particular by notifying the claimant in writing of the concerns and allowing him the opportunity to be accompanied at the meeting to discuss them. There was ample time to undertake this in the notice period which was already running.

23. Bearing in mind that this is an uplift which applies only to an award for wrongful dismissal, however, I am satisfied that it would be just and equitable to make an uplift of 10%.

**Preparation Time Order**

24. The claimant's application for a preparation time order was mentioned in an email of 7 March 2024 and confirmed in two emails of 10 May 2024. He provided a copy of Reasons issued by Employment Judge Holbrook for a decision taken at a hearing on 22 April 2021, which included a refusal to make a costs/preparation time order in favour of either side. The claimant also attached a copy of his application of 22 February 2021 which had been refused.

25. The basis of the application now is simply that the defence to the wrongful dismissal claim had no reasonable prospect of success, and that defending the claim knowing there was no basis for doing so amounted to unreasonable conduct which should give rise to a preparation time order. The claimant also relies on some

breaches of Case Management Orders which predate the hearing before Employment Judge Holbrook in April 2021. The schedule shows a number of matters for which a claim is made, the total amount being £5,447.13.

26. The respondent has not made any submission opposing this application, but I have considered it on its merits.

27. A preparation time order is an order under rule 75(2) that payment be made to another party in respect of the receiving party's preparation time while not legally represented. "Preparation time" means time spent by the receiving party, including by any advisers, in working on the case, except for time spent at any final hearing.

28. The power to make a preparation time order arises under rule 76(1)(a) where a party has acted unreasonably in the way the proceedings or part of them have been conducted, or a response has had no reasonable prospect of success.

29. Many of the items on the schedule of costs provided by the claimant are outside the scope of such an order. There is no power to award him anything for attendance at a final hearing, or for any costs incurred in the appeal to the Employment Appeal Tribunal. Costs there are a matter for the EAT.

30. However, the main difficulty for the claimant is that the Gianferrari Tribunal found that he committed a repudiatory breach of contract which entitled the respondent to summarily dismiss him. He succeeded in the wrongful dismissal complaint only on the basis that there was nevertheless an agreement to pay him in lieu of notice, the dispute which I resolved being what that agreement meant in terms of the notice period. As far as substance is concerned, the respondent successfully defended the claimant's primary allegations: (1) that there were no grounds for summary dismissal and (2) that he was entitled to eight weeks of notice pay.

31. In those circumstances I do not consider that the proceedings were conducted unreasonably by the respondent: it was entitled to defend the two primary contentions of the claimant and did so successfully.

32. As a consequence, my decision is that the application for a preparation time order is dismissed.

Regional Employment Judge Franey
2 July 2024

JUDGMENT AND REASONS SENT TO THE PARTIES ON
11 July 2024

FOR THE TRIBUNAL OFFICE

**Public access to employment tribunal decisions**

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

# NOTICE

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

Case number: **2402608/2020**

Name of case: **Mr D Silberman** v **Peninsula Business 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: 11 July 2024

**the calculation day** in this case is: 12 July 2024

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

Mr S Artingstall
For the Employment Tribunal Office

# GUIDANCE NOTE

1. There is more information about Tribunal judgments here, which you should read with this guidance note: www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

   If you do not have access to the internet, you can ask for a paper copy by telephoning the Tribunal office dealing with the claim.

2. The payment of interest on Employment Tribunal awards is governed by The Employment Tribunals (Interest) Order 1990. Interest is payable on Employment Tribunal awards if they remain wholly or partly unpaid more than 14 days after the **relevant decision day**. Sums in the award that represent costs or expenses are excluded. Interest starts to accrue from the day immediately after the **relevant decision day**, which is called **the calculation day**.

3. The date of the **relevant decision day** in your case is set out in the Notice. If the judgment is paid in full by that date, no interest will be payable. If the judgment is not paid in full by that date, interest will start to accrue from the next day.

4. Requesting written reasons after you have received a written judgment does **not** change the date of the **relevant decision day**.

5. Interest will be calculated as simple interest accruing from day to day on any part of the sum of money awarded by the Tribunal that remains unpaid.

6. If the person paying the Tribunal award is required to pay part of it to a public authority by way of tax or National Insurance, no interest is payable on that part.

7. If the Secretary of State has claimed any part of the sum awarded by the Tribunal in a recoupment notice, no interest is payable on that part.

8. If the sum awarded is varied, either because the Tribunal reconsiders its own judgment, or following an appeal to the Employment Appeal Tribunal or a higher court, interest will still be payable from **the calculation day** but it will be payable on the new sum not the sum originally awarded.

9. The online information explains how Employment Tribunal awards are enforced. The interest element of an award is enforced in the same way.