



# EMPLOYMENT TRIBUNALS

**Claimant:** Liam Tantrum

**Respondent:** Stone Supplies (Wales) Limited

**Heard at:** Cardiff      **On:** 8 July 2021

**Before:** Employment Judge RL Brace

**Representation**

Claimant: In person

Respondent: Did not attend

## JUDGMENT

The Judgment of the Tribunal is as follows:

1. The name of the Respondent in claim 1602158/2020 (and the claimant in the employer's counterclaim 1600049/2021) is amended to Stone Supplies (Wales) Limited.
2. The Tribunal does not have jurisdiction to consider the Claimant's complaint of unfair dismissal which is dismissed.
3. The Claimant's claim for wrongful dismissal is well-founded and the Respondent is ordered to pay to the Claimant the sum of **£184.00** in respect of two days' pay for 14 and 15 September 2020.
4. The Claimant's claim for unlawful deduction of wages in the sum of **£850.00**, deducted on 14 September 2020, is well founded as is the claim for unlawful deductions of wages in respect of 15 minutes pay per day from 4 March 2019 to 10 September 2020 in the sum of **£940.13** (327 days x 15 mins @11.50 per hour).
5. The Claimant's claim for unlawful deduction of wages in respect of holiday pay is not well-founded and does not succeed.
6. Total award **£1,974.13**
7. The amounts awarded are gross awards and the Claimant shall be liable to the Inland Revenue for any tax and national insurance payments thereon.
8. The Respondent's counterclaim under the case number 1600049/2021 is not well-founded and is dismissed

# REASONS

1. The hearing was held by video (CVP). The Respondent did not attend.

## *Background*

2. On 20 October 2020 the Claimant filed his ET1 claim forming against 'Martyn Christopher (stone supplies) director' having entered into early conciliation against Stone Supplies (Wales) Limited on 17 September 2020 which ended on 16 October 2020.
3. Within the ET1 claim form the Claimant claimed that he had been employed from 3 June 2019 to 8 September 2020 as an HGV driver and brought claims of:
  - a. Unfair dismissal;
  - b. Notice pay;
  - c. Holiday pay;
  - d. Arrears of pay.
4. The ET1 claim form was not vetted by an Employment Tribunal Judge at the vetting stage and the Notice of Claim and Notice of hearing were sent out to the parties on 20 October 2020 confirming that a full merits hearing had been listed for one hour on 28 January 2021.
5. On 25 November 2020, the ET3 Response form was received by the Tribunal which confirmed that the Respondent preferred to be contacted by email. On 16 December 2021, the Tribunal wrote to the Claimant and was asked to note that the Respondent's title in the ET3 differed from the ET1 and whether he objected to a change in the Respondent's name to Stone Supplies Wales Limited.
6. On 13 January 2021, the Notice of an Employer's Counterclaim (Rule 24 Employment Tribunal Rules of Procedure 2013) was sent to the Claimant with a copy to the Respondent. The acting Regional Employment Judge, Judge S Davies directed that the original claim and the employer's counter-claim would be heard together unless either party objected in writing no less than 14 days prior to the hearing date. Both parties were directed to be prepared to deal with the original claim and the employer's counter-claim and the original hearing date of 28 January 2021 was postponed. The parties were informed that a new notice of hearing would be sent in due course.
7. On 26 January 2021, the Claimant submitted his response to the employer's counter-claim and attached 12 documents as pdf attachments which included:
  - a. Copies of payslips;
  - b. Photographs of clocking in and out cards; and
  - c. Photographs of a HGV.
8. No objection to hearing the claim and counter-claim together was received by the Tribunal and on 6 April 2021, the Tribunal sent to the parties by email, to the email addresses provided by the parties within the ET1 and ET3, a copy of:
  - a. The Notice of Hearing for today's hearing; and

- b. The documents submitted by the Claimant on 26 January 2021.
9. The parties were notified that the hearing had been listed for 3 hours by video (CVP) and the parties were directed to co-operate on an agreed set of documents (paginated and in chronological order) and that the Respondent must email them to the Tribunal and send a paper copy to the Respondent.
  10. On 17 June 2021, the Claimant was given a strike out warning in respect of his unfair dismissal claim as it appeared from his ET1 claim form that he had been employed for less than two years by the Respondent.
  11. On 5 July 2021, a further copy of the Notice of Hearing was sent to the parties by the Tribunal way of email and it was confirmed to them that the matter remained listed for hearing on 8 July 2021.
  12. On 6 July 2021, the Tribunal wrote to the parties confirming that the Tribunal had not received a bundle or documents for the hearing and asked the parties to advise when the Tribunal could expect them.
  13. On 7 July 2021, as no documentation had been received by the parties, the clerk to the Tribunal telephoned the Claimant who confirmed that he would be attending. The clerk also telephoned the office of the Respondent, using the telephone number provided in the ET3 and was informed that Mr Martyn Christopher, director of the Respondent and named in the ET1, was not in the office but at Wimbledon, and they were asked to contact the Tribunal as soon as possible dur to the hearing listed for 8 July 2021. No contact was made by the Respondent.
  14. The Claimant attended the hearing but as there was not attendance by 10am on behalf of the Respondent, the Respondent was again contacted by telephone and was again informed that the Respondent's director, Mr Martyn Christopher, was not in the office and was not available.
  15. I was satisfied that the Notice of Hearing had been sent to the Respondent at the address provided by it in the ET3 and that this hearing date had been re-confirmed in two additional emails from the tribunal subsequent to that Notice being sent out. The Tribunal had also made several attempts to contact the Respondent by telephone, on the day prior to the hearing, when a message was left confirming the hearing was taking place on 8 July 2021.
  16. I was satisfied that all enquiries that may be practicable had been made and that the Respondent would have had notice that the hearing was taking place by video commencing at 10am.
  17. I also made enquiries of the Claimant and he confirmed that he had sent to the Respondent copies of the documents he was relying on, but that he had not received documents from the Respondent despite the ET3 and counter-claim having been filed.
  18. I therefore determined to proceed hold the hearing in the Respondent's absence.
  19. The Statement of Truth and response to the Counter-Claim was taken as the Claimant's witness statement and the documents attached to that Statement of Truth (documents were agreed would be numbered 1-12,) together with the Claimant's pay-slip of 14 September 2020 and Contract of Employment signed on 17 May 2019, were accepted as documentary evidence. The Claimant gave live evidence by way of affirmation.

### Parties, Claims and Issues

20. The Claimant accepted that his employer was Stone Supplies (Wales) Limited and not Martyn Christopher personally and the name of the Respondent (and claimant in the employer's counterclaim) was amended by consent.
21. The Claimant also accepted that he did not have two years' service and I confirmed that I would be issuing a judgment dismissing that specific claim for lack of jurisdiction.
22. The Claimant accepted that the commencement date of his employment, as provided by the Respondent within the ET3 and was correct.

### Facts

23. The Claimant was employed as an HGV driver for the Respondent from 4 March 2019 to 10 September 2020, when his employment was summarily terminated by the Respondent on that day.
24. He was employed on terms and conditions set out in a written Contract of Employment signed and dated by both parties on 17 May 2019 (the "Contract").
25. Under the terms of the Contract:
  - a. The Claimant was employed on an hourly rate of £11.50 (Contract clause 6.1);
  - b. his normal hours of work were 40 hours per week and that this would include a 45 minute break which would be unpaid (Contract clause 5.1);
  - c. The Claimant was entitled to 20 days paid holiday a year plus the usual bank and public holidays (Contract clause 8.2) which could not be carried over;
  - d. The employer could terminate the employment with one week's notice and the employee with two week's notice (Contract clause 14.1 and 14.2)

26. Clause 6.4 and 15 of the Contract included deduction from wages.

27. Contract clause 6.4 provided as follows:

*'The employee acknowledges that the company may at any time deduct from their salary, or such other amounts as may be owed to the employee, any sums that may be owed by the employee to any Group Company including, but not limited to, overpayment of annual leave, unauthorized expenses and outstanding loans.'*

28. Contract clause 15 provided as follows:

#### **15 Deductions**

*15.1 The Company is authorised, **without** further agreement, to deduct from pay any **sums** due to the Company including, by way of example, any overpayment or any outstanding loans or advances, or any sum in respect of breach of clause 16. If the final payment is insufficient to allow for the whole of any such deduction, you will be required to repay the outstanding amount due to the Company within 1 month of the termination of your Employment.*

*15.2 Where any losses are sustained in relation to the property or money of the Company or any client of the Company during the course of the Employment caused through your carelessness, negligence, recklessness or through a breach of the Company's rules or dishonesty on your part, the Company reserves the right to require you to repay any of the said losses (including the value of replacement or repair of any property) either by*

*deduction from pay or other method acceptable to the Company.*

*15.3 The Company also reserves the right to withhold payment in accordance with clause 6 or deduct from pay a days' pay for each day of unauthorised absence and deduct from any monies due to you on termination any pay received for holiday taken in excess of your accrued entitlement.*

29. The Claimant had been placed on furlough as part of the government's Coronavirus Job Retention Scheme, effective from 28 March 2020 and remained on furlough until he returned to work on Monday 18 May 2020.
30. As he had been on furlough the Claimant had not taken any annual leave since his return to work on 18 May 2020 and had taken bank holiday leave only, on 25 May 2020 and 31 August 2020. He was unable to confirm the dates of annual leave taken earlier in 2020 but confirmed, and I accepted that evidence, that from commencement of employment in March 2019 to the termination of employment on 10 September 2020, he had taken 37 days annual leave and bank holidays.
31. The Contract did not include provision for start or finish times but I accepted the Claimant's live evidence which was that he was informed when he first started employment with the Respondent, that his start time was 6.15am. That he started at 6.15am was also supported by the clocking in cards provided in the documents before me which indicated that each morning the Claimant clocked in prior to or at 6.15am. I found that the Claimant's working time therefore commenced at 6.15am each shift, Monday to Friday each week.
32. Only copies of four clocking cards were provided in evidence. The Claimant explained that these were copies of photographs he had managed to take of the cards whilst in employment and that he had no others. He also confirmed that he had requested disclosure of all his clocking cards from the Respondent and they in September 2020 and that they had not been received.
33. On considering and comparing the Claimant's clocking cards and the payslips for the same periods within the evidence, I also found that there was a shortfall each week and found that it was more likely than not that the Claimant had not been paid for working time in each week, of 15 minutes per day.
34. The Claimant's live evidence, which I also accepted, was that he was regularly worked in excess of the 40 hours stated in the Contract. Whilst the payslips had been provided for weeks ending 20 July 2020; 3 August 2020, 10 August 2020, 17 August 2020 and 13 September 2020, and evidenced that for those weeks the Claimant had worked in excess of 40 hours, the Claimant had not provided evidence of hours actually worked in the 52 week' period leading up to termination of employment, despite being in possession of his pay-slips over this period which could have supported his verbal evidence.
35. Whilst I did find that on balance of probabilities the Claimant had worked regularly in excess of 40 hours each week, I unable to conclude on the evidence before me what hours on average the Claimant had worked in the 52 week period leading up to the termination of his employment.
36. On 8 September 2020, the Claimant resigned from his employment with the Respondent providing the contractual notice of two weeks in accordance with the Contract clause 14.2. On 10 September 2020, the Claimant asked if his two weeks' notice could be reduced to 15 September 2020 so that he could leave early. Later that

day, the Respondent terminated the Claimant's employment with immediate effect and his employment terminated on 10 September 2020 by reason of the employer's termination without notice.

37. The Claimant did not receive any of his final pay as a deduction of £850 was made by the Respondent. The payslip for week ending 14 September 2020 evidenced that the Claimant had been paid up to 13 September 2020 and that a deduction of £850 had been made to his net pay leaving a negative amount and that as a result, no payment had been made to the Claimant in respect of his last week of work.
38. The Claimant had been informed initially by the Respondent when he questioned the deduction, that this was in respect of oil from the Respondent's truck but was subsequently informed by the Respondent that it was in fact for alleged damage to the truck. The Claimant disputes this damage and/or that he caused any damage.
39. Within the ET3 the Respondent has asserted that the Claimant was dismissed because of the Claimant's gross misconduct arising from '*wilful neglect and damage to the company vehicle he was driving*' which the Respondent considered to be gross misconduct. It brings a counter-claim of £8,753.67 in respect of repairs to the vehicle and for over-claiming hours worked relying on clocking cards, payslips, tracker information and drivers cards.
40. No evidence had been provided to the Tribunal from the Respondent to support the deductions and/or the counter-claim and the Claimant tells me that no such evidence has been provided to him by the Respondent either to support the immediate dismissal or the counter-claim, despite having requested the same.

### Submissions

41. The Claimant claims the following in respect of:
  - a. Notice pay - £1,199.31;
  - b. Unlawful deductions of:
    - i. £851 in respect of holiday pay undercalculated;
    - ii. £1,032.13 in respect of 15 minutes pay per day (359 days from 4 March 2019 – 10 September 2020); and
    - iii. £850 in respect of the deduction on 14 September 2020.
42. With regard to the notice pay, the Claimant accepted that the final pay-slip reflected that he had been paid up to 13 September 2020 although in fact no monies were received as a result of the deductions by the employer. He also accepted that he had requested his employment end on 15 September 2020.
43. He contends that the allegation that he was driving erratically as justification for his summary dismissal is unfounded and that such allegation was to remove the Claimant immediately.
44. The claimant uses the same submissions for the £850 deduction and counter-claim.
45. With regard to his unlawful deductions claim, the Claimant submits that:
  - a. he was a worker who was entitled to be paid holiday pay at the rate of a week's pay in respect of each week of annual leave and that as he regularly worked in excess of 40 hours per week, his annual leave from commencement of

employment, should be calculated using actual hours worked not the 40 hours per week stated in the Contract;

- b. that he was not paid, from commencement to termination of employment, for the 15 minutes at the start of each day of work between the hours of 6:15am and 6:30am, despite this being working time; and
- c. the final deduction of £850 was an unlawful deduction. He denies having caused any damage to the Respondent's vehicle and contends that this is a spurious attempt to avoid payment to him of his salary after he had resigned.

### **Conclusion**

46. The Claimant does not have sufficient service to bring a claim of unfair dismissal and his complaint of unfair dismissal is therefore dismissed.
47. I had no evidence before me to support the Respondent's assertions, set out in its ET3, that the Claimant did something so serious that the Respondent was entitled to dismiss without notice. In particular, I was not persuaded that the Claimant's dismissal was caused by the damage to the vehicle and/or Claimant's driving ability.
48. Likewise, I had no evidence before me to support the employer's counterclaim that the Respondent had suffered damage or losses, whether by way of alleged damage to property and/or overpayment of wages. The Respondent does not succeed in its counter-claim for breach of contract by the Claimant and is not entitled to be awarded damages. It also follows that I did not conclude that the Respondent was entitled to make deductions from the Claimant's salary in respect of such amounts.
49. The Claimant was entitled to one week's notice and was not paid for that period of notice receiving payment to 13 September 2020 only. I concluded that the Claimant's claim for wrongful dismissal / notice pay to be well founded.
50. In the circumstances, where the Claimant sought to leave on 15 September 2020 in any event, I award the Claimant two days' pay to 15 September 2020 being the date he wished his employment with the Respondent to end.
51. The Respondent's employer counter-claim is not proven, is not well-founded and is dismissed. It follows that the Claimant's claim of unlawful deduction of the £850 is well founded and succeeds.
52. Having reviewed and considered the clocking in cards and payslips that have been available to the Claimant, I persuaded that there has also been an unlawful deduction in respect of the Claimant's pay from 4 March 2019 to 10 September 2020 and concluded that the Respondent had made unauthorized deductions from the Claimant's wages of £2.875 (15 minutes @£11.50 per hour) in respect of each day worked
53. Taking into account annual leave, bank holidays and furlough period, I awarded the Claimant the sum reflected in the judgment in respect of 327 days for the unlawful deductions from 4 March 2019 – 10 September 2020.
54. On the evidence before me, whilst I was persuaded that the Claimant did work in excess of his 40 hours per week, the Claimant had not persuaded me of the amount of hours that he did in fact work from 4 March 2019 – 10 September 2020. Despite being in possession of his own payslips for this period, where he could have produced this evidence, he failed to do so and in those circumstances I did not find that the Claimant had demonstrated that the holiday pay paid to the Claimant was less than he

should have been paid.

1. Had the Claimant produced such evidence, I may have reached a different conclusion on the calculation of the Claimant's 'week's pay'. As a result the claim for unlawful deductions in relation to the calculation of the Claimant's holiday pay was not well founded and is dismissed.

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Employment Judge R Brace  
Date 9 July 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR EMPLOYMENT TRIBUNALS Mr N Roche