



## EMPLOYMENT TRIBUNALS

**Claimant: Mr M Budds**

**Respondent: Huptown Incorporated Ltd**

**Heard at: London Central**

**On: 21 June 2022**

**Before: Tribunal Judge J E Plowright acting as an Employment Judge**

### Appearances

**For the Claimant: In person**

**For the Respondent: Mr O Onikoyi, Director**

## RESERVED JUDGMENT

1. The claim for unfair dismissal is dismissed.
2. The respondent made an unauthorised deduction from wages by failing to pay the claimant wages due to him for the period 01 August 2021 to 30 November 2021 and is ordered to pay the claimant the sum of £2249.62 being the gross sum due.
3. The respondent made an unauthorised deduction from wages by failing to pay the claimant in lieu of accrued but untaken annual leave on termination of employment and is ordered to pay to the claimant the sum of £2538.46 being the gross sum due.
4. The respondent was in breach of contract by dismissing the claimant without notice and the respondent is ordered to pay the claimant the sum of £3,333.33 being the total gross sum due for that breach.
5. The total award that the respondent must pay to the claimant is £8121.41 gross.

## REASONS

### Claims and Issues

1. The claimant worked as London operational manager for the respondent, Huptown Incorporated Limited, which is a small business. The claimant has brought claims for unfair dismissal, unauthorised deduction of wages (arrears of pay), unauthorised deduction of wages (holiday pay), breach of contract (notice pay) and for the payment of a withheld tax rebate.
2. The issues in the case are as follows:
  - 2.1 Is the claimant entitled to claim for unfair dismissal?
  - 2.2 Did the respondent fail to pay the claimant wages that were lawfully owed to him? The claimant claims that he was underpaid for each of the months that he worked for the respondent.
  - 2.3 Is the claimant entitled to be paid for holiday accrued but untaken during his employment?
  - 2.4 Is the claimant entitled to notice pay?
  - 2.5 Is the claimant entitled to a tax rebate?

### Procedure/Procedure, documents and evidence heard

3. In terms of documentation, I had before me a bundle of documents containing 112 pages. At the start of the hearing, I was also provided with the offer of employment letter dated 21 July 2021 and signed by the claimant on 21 July 2021.
4. The claimant made an application to amend his claim to bring additional claims for loss of Employer Pension Contributions, loss of potential profit from stock awards, a claim for mental and emotional distress and a claim for reputational damages. This application was opposed by the respondent. I refused the application and gave reasons for my refusal at the hearing, which I set out below.
5. I then heard evidence from the claimant and from Mr Onikoyi (the director of the respondent company) on behalf of the respondent, following which both the claimant and Mr Onikoyi made submissions.

### Application to Amend the Claim

6. In his Claim Form, the claimant had claimed for unfair dismissal, unauthorised deduction of wages (arrears of pay), unauthorised deduction of wages (holiday pay), breach of contract (notice pay) and for the payment of a withheld tax rebate.
7. However, in the claimant's Schedule of Loss, which was included in the bundle which had been prepared by the claimant for the hearing before me (and sent to the tribunal and the respondent on 01 June 2022), the claimant also makes reference to claims for loss of Employer Pension Contributions, loss of potential

profit from stock awards, a claim for mental and emotional distress and a claim for reputational damages.

8. The claimant had not previously notified the tribunal of an application to amend his claim to include any of these additional claims. However, the claimant made an oral application to amend the claim at the hearing to include the above claims which was opposed by the respondent.
9. In **Selkent Bus Company Ltd v Moore** [1996] IRLR 661, it was stated that in considering an amendment application, all the circumstances should be taken into account and that injustice and hardship should be balanced. An exhaustive list of the relevant circumstances was impossible but of relevance was certainly the nature of the amendment, the applicability of time limits and the timing and manner of the application.
10. In **G Vaughan v Modality Partnership** [2020] UKEAT/0147/20 BA, the EAT considered further the test for an application to amend and reiterated that the core test in considering applications to amend is the balance of injustice and hardship in allowing or refusing the application. It was also stated at paragraph 21 in that judgment that parties should start by considering the practical consequences of allowing or refusing an amendment.
11. In his Claim Form, which was submitted on 15 December 2021, the claimant had made no mention of claims for loss of Employer Pension Contributions, loss of potential profit from stock awards, a claim for mental and emotional distress or a claim for reputational damages.
12. This case had been listed for a full merits hearing on 04 May 2022. However, the Judge hearing the claim converted the hearing into a Case Management Hearing because at that time the respondent was not properly prepared for the hearing. At that hearing, the claimant made no reference to any of these additional claims.
13. The claimant explained that it was not until after the hearing of 04 May 2022 when he was preparing the Schedule of Loss that he realised he should also be making these additional claims.
14. When considering the balance of injustice and hardship in allowing or refusing the application for an amendment to the claim to include the additional claims that are now being raised, I note that the Employment Tribunal has no jurisdiction to deal with claims for mental and emotional distress or a claim for reputational damages. Therefore these claims have no reasonable prospect of success.
15. I am therefore left with the potential additional claims of loss of employer pension contributions and loss of potential profit from stock awards.
16. The respondent has prepared for this hearing on the basis of the claims as pleaded in the Claim Form and it would not be fair for the respondent to have to defend these additional claims today. A postponement of today's hearing would inevitably involve delay in terms of the resolution of this case and additional expense for the respondent in having to defend these claims. Whilst I acknowledge that by refusing the amendment, the claimant will not be in a position to bring these additional claims against the respondent, I find that the injustice to

the respondent in terms of the delay that would follow by postponing this hearing and then the expense of having to defend these additional claims, in circumstances where the claimant could have but did not raise them earlier, outweighs any hardship to the claimant, in terms of not being able to bring these claims.

17. I therefore refused the application to amend the claim to include claims for loss of Employer Pension Contributions, loss of potential profit from stock awards, a claim for mental and emotional distress and a claim for reputational damages.

### **The Facts**

18. The claimant began working for the respondent company as its London Operational Manager on 01 August 2021. The claimant's salary was £40,000 gross per annum (which amounts to £3,333.33 gross per month).

### Unauthorised Deduction of Wages

19. The claimant was paid £2,560 gross for his work in August 2021 and argues that he ought to have been paid £3,333.33. The claimant acknowledges that he had pre-booked holidays from 23 August 2021 to 31 August 2021 (7 days) which he stated that he informed the respondent of prior to the commencement of his employment. The claimant states that he was asked by the respondent to work during this period and was available for collaboration and produced documents whilst he was away.
20. The director of the respondent company stated in evidence that the claimant had not informed him of this pre-booked holiday when he started his employment. He said that he told the claimant that the reduction from his salary reflected the fact that he was not available for work during this period.
21. However, the claimant's payslip for August 2021 shows that the amount of £2,560 was arrived at on the basis of the claimant working 128 hours at £20 per hour. The respondent was unable to explain where the figures of 128 hours and £20 per hour had come from, bearing in mind the fact that the claimant was being paid an annual salary of £40,000 and not on an hourly rate.
22. Furthermore, although the director of the respondent company claims that he was not previously informed of this pre-booked holiday I found the claimant's evidence to be more plausible and therefore more reliable than the director's evidence on this issue. I find that the claimant did inform the respondent that he had pre-booked holiday prior to the commencement of his employment and also that he was asked by the respondent to be available for collaboration whilst he was away. I therefore find that the claimant was entitled to be paid a full month's salary for August 2021.
23. The claimant was paid £3000 gross for his work in September 2021. The claimant ought to have been paid £3,333.33. He was therefore owed £333.33. The claimant was paid a further £300 in October 2021 as a balancing payment which, on the face of it, still means that the claimant was owed £33.00 for September 2021.

24. The claimant travelled to Macedonia for a short period of time in September 2021 but the respondent never suggested to the claimant that this time away should be regarded as paid or unpaid annual leave. A text from the respondent to the claimant confirmed that the claimant should work on planned tasks when he had time whilst he was away.
25. Although in evidence, the director of the respondent company initially suggested that the reduction of £33.33 for September 2021 reflected the lack of attendance by the claimant, he then changed his evidence and stated that this was an error. The suggestion that it was an error on the payslip is further supported by the additional payment of £300 in October 2021 to reflect the fact that the claimant had only been paid £3000 in September 2021. I therefore find that the claimant was owed an additional £33.33 for September 2021.
26. The claimant was paid £3,300 for his work in October 2021, along with a further £300 for the work he did in September 2021, that I have already referred to. The claimant was therefore owed £33.33 for the work he did in October 2021.
27. For November 2021, the claimant was paid £1616.00 salary both gross and net. The payslip for November 2021 is difficult to understand. In addition to the £1616.00 salary that is referred to, there is also reference to a correction of £177, although the director for the respondent company could not explain what this correction of £177 related to. There is also reference to a tax rebate on the payslip for November 2021 in the sum of £1320. The Net Pay figure suggests that the claimant should have been paid £3014.72. However, the director of the respondent company accepted that the claimant had only been paid £1616.00. The director was unable to explain why the payslip showed a net figure of £3014.72 and yet the claimant was only paid £1616.00.
28. Putting aside for one moment this discrepancy, the respondent argues that the claimant did not work all the hours he was meant to in November 2021 and was therefore only entitled to £1616.00.
29. In the Response Form, the respondent states that the claimant did not work the 40 hours per week that he was meant to. The respondent states that the claimant only worked 25 hours or less per week in November 2021 and also missed around 4 days of work during November 2021.
30. In a document entitled "Statement of Payment", the respondent states that the claimant failed persistently to complete the contracted 40 hours per week of his employment. The respondent claims that the claimant claimed to be working remotely when he ought to have been in the office. The respondent claims that the claimant would log-in remotely but would then be absent for many hours. The respondent claims that the situation got worse in November 2021 when the claimant hardly turned up for work and that after 12 November 2021, the claimant did not turn up for work, claiming that he was helping the company to do some research but with no end result. The respondent states that as a result, deductions were made to the claimant's payment which reflected that his record of attendance which was less than 20 hours per week.
31. In the Response Form the respondent had recorded the claimant as working less than 25 hours per week in November 2021 and that he missed 4 days of work.

However, in the “Statement of Payment”, the respondent records the claimant as working less than 20 hours per week and that he did not turn up for work after 12 November 2021. Although the respondent claims that the claimant’s payment is reflected through his record of attendance, the respondent has not provided any record of attendance for the claimant so that these assertions can be checked.

32. The claimant acknowledges that he took two days off sick in November 2021 but maintains that he was working throughout November 2021 for the rest of the time. In support of this contention, the claimant has provided various text messages covering the period 13 October 2021 to 24 November 2021 between him and a potential employee which show that he was working between those dates. On 01 December 2021, the claimant sent a final text message to this potential employee to let her know that he was no longer working for the respondent but might be back in January 2021.
33. When I consider all the evidence in the round, I find that the respondent’s evidence about the work carried out by the claimant in November 2021 is less reliable than that of the claimant and I find that the claimant did work for the whole of November 2021 (minus the two days’ sick leave that the claimant acknowledges he took off). Therefore the claimant was entitled to £3,333.33 (minus two days’ sick leave).

#### Holiday Pay

34. The offer of employment, signed by the claimant, and dated 21 July 2021 states the following:

*“On behalf of Huptown Incorporated Ltd, I am pleased to offer you employment with the Company on the terms described below:*

35. The letter goes on to say the following in respect of holiday pay:

*“Holiday entitlement - 40 days per year plus bank holidays.”*

36. However, the Staff Handbook records the following in respect of Annual Leave:

*“Employees of Huptown whether part-time or full-time are entitled to a minimum 5.6 weeks' paid annual leave. A week's leave allows you to be away from work for a week – that is the same amount of time as your working week. If you do a five-day week, you are entitled to 28 days leave per year, if you do a four-day week the entitlement is 22.4 days leave etc. Your manager will let you know your annual leave entitlement for the current leave year*

37. There is a discrepancy between what is stated in the offer of employment, namely that the claimant is entitled to 40 days holiday per year plus bank holidays and what is stated in the Staff Handbook, namely that an employee is entitled to 5.6 weeks holiday (which is the equivalent of 28 days per year).
38. The respondent made three arguments about why the claimant ought not to be entitled to holiday pay (or indeed any of the claims being brought against the respondent).
39. Firstly, it was suggested on behalf of the respondent company that the claimant had not provided satisfactory references and so the respondent was not bound by

any terms and conditions of employment. The claimant maintains that he did provide references to the respondent, although the respondent denied that this happened. The fact of the matter is that the respondent did employ the claimant, in circumstances where, if there was an issue about the claimant failing to provide any or adequate references, the respondent could have refused to employ the claimant or alternatively terminated his employment for failure to provide satisfactory references. Neither of these things happened. In these circumstances, I find that the claimant did provide references to the respondent which were sufficiently adequate for the respondent to employ and continue to employ the claimant on the terms and conditions agreed between them.

40. Secondly, it was suggested that in any event the claimant was on probation and so the respondent was not bound by any of the terms of conditions of employment. However, there is nothing in either the offer of employment letter dated 21 July 2021 or the Staff Handbook to suggest that neither the respondent nor the claimant would not be bound by any of the terms and conditions of employment during the claimant's probation period.
41. Thirdly it was suggested that the terms and conditions as set out in the Staff Handbook superseded the terms and conditions as set out in the offer of employment letter dated 21 July 2021.
42. I find however, that with regard to any discrepancies between the offer of employment letter dated 21 July 2021 and the Staff Handbook, the claimant and respondent are bound by the terms and conditions as set out in the offer of employment letter dated 21 July 2021, given that the claimant signed this letter which was personally addressed to him setting out various terms and conditions.
43. This letter made it clear that the claimant was entitled to 40 days' holiday per year plus bank holidays. I therefore find that the claimant was entitled to 40 days' holiday per year plus bank holidays.
44. It is not disputed that the claimant has not been paid any holiday pay. Furthermore, there is no reference on any of the payslips to the claimant having been paid any holiday pay. Therefore I find that the claimant has not been paid any holiday pay during his employment.

#### Notice Pay

45. The offer of employment letter states the following:

*"It is the intention of both parties to form a long and mutually profitable relationship. However this relationship can be terminated by either party at any time provided a 30-day written notice is delivered to the other party."*

46. However, the Staff Handbook records the following in respect of Notice Periods:

*"Unless your employment is terminated by agreement, or specified otherwise in your principal statement of terms and conditions, you or the Company are required to give a period of notice in writing as follows:*

- *one week's notice after one month's employment*
- *two weeks after two years*

- *three weeks after three years and so on up to 12 weeks maximum after 12 years or more.*

*These periods of notice will apply if you are dismissed on grounds of inefficiency or if your dismissal is the result of disciplinary proceedings in circumstances where summary dismissal is not justified. Your employment may be terminated without notice where dismissal follows disciplinary proceedings.”*

47. Again, there is a discrepancy between what is stated in the offer of employment letter dated 21 July 2021 and the Staff Handbook. The offer of employment letter states that the employment relationship can only be terminated by 30-day written notice whereas the Staff Handbook suggests that for an employee who has been in employment for less than two years, only one week’s written notice is required. Again, I find that although there is a discrepancy between the two documents, the claimant and respondent are bound by the letter dated 21 July 2021, given that the claimant signed this document which was personally addressed to him setting out various terms and conditions and which made it clear that he was entitled to 30 days’ written notice of termination. I therefore find that the claimant was entitled to 30 days’ written notice of termination.

48. On 26 October 2021, the respondent wrote to the claimant in the following terms:

*“As you are aware, your current employment probation period will end on the 31st of October 2021.*

*Due to current circumstances such as delays to our London operational license, I am unable to confirm a full and continuous employment, however, I will extend the probation period for another month until the 30th of November 2021.*

*If full contract terms are not discussed or provided afterwards, please be assured of my full cooperation and a potential discussion for other roles.”*

49. The claimant claims that he never received this letter, although the respondent states that it was given to the claimant directly by hand. Whether the claimant was handed the letter directly or not does not ultimately matter. The terms of the letter dated 26 October 2021 do not state that the claimant’s employment will come to an end on 30 November 2021 but merely indicate that the claimant’s probation period with the respondent company will be extended to 30 November 2021 on the basis that the respondent was unable to confirm full and continuous employment. The letter goes on to suggest that if contract terms are not discussed or provided afterwards then there will be a potential discussion for other roles but this is not the same as stating that the claimant’s employment will be terminated on 30 November 2021.

50. On 29 November 2021, the respondent wrote to the claimant in the following terms:

*“I wish to inform you that following the initial probation period, Huptown will not be extending your employment offer further. Therefore, as advised verbally many times the current employment will be terminated by the 30th of November 2021.*



*Based on new terms, Huptown will be open to negotiating a new position commencing at a future date that will be confirmed.*

*As soon as is reasonable please return company fobs, phone, and computer and should you have any further question, please do not hesitate to get in touch with me.”*

51. Unlike the letter of 26 October 2021, the letter of 29 November 2021 makes it unambiguously clear that the claimant’s employment will terminate on 30 November 2021. Although the letter of 29 November 2021 states that the claimant has been advised verbally many times that his current employment will be terminated on 30 November 2021, it is clear from the offer of employment letter dated 21 July 2021 that notice of termination must be in writing. I therefore find that notice of termination of employment was given on 29 November 2021 which is one day prior to the claimant’s termination of employment.

### Tax Rebate

52. In his November 2021 payslip, the claimant is recorded as having a tax rebate of £1320. Within the bundle, there is an HMRC document which suggests that the claimant has been paid £1320 as a tax rebate by the respondent company. However, the respondent accepts that, although this tax rebate of £1320 is referred to on both the November 2021 payslip and HMRC documentation, the claimant was never paid this £1320 tax rebate in November 2021.

### **The Law**

53. The claimant has brought a claim for unfair dismissal. To succeed in an unfair dismissal claim he would have had to have been continuously employed by his employer for not less than two years under section 108(1) of the Employment Rights Act 1996.
54. Section 13(1) of the Employment Rights Act 1996 provides that an employer shall not make a deduction from wages of a worker employed by them unless 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 the worker has previously signified in writing his agreement or consent to the making of the deduction.
55. An employee has a right to complain to an Employment Tribunal of an unlawful deduction from wages pursuant to Section 23 of the Employment Rights Act 1996.
56. The Working Time Regulations 1998 provide for minimum periods of annual leave and for payment to be made in lieu of any leave accrued but not taken in the leave year in which the employment ends. The Regulations provide for 5.6 weeks leave per annum. The leave year begins on the start date of the claimant’s employment in the first year and, in subsequent years, on the anniversary of the start of the claimant’s employment, unless a written relevant agreement between the employee and employer provides for a different leave year.
57. The Working Time Regulations 1998 only provide for minimum periods of annual leave and in this case the terms of conditions as set out in the offer of employment

letter dated 21 July 2021 state that the claimant is entitled to 40 days' annual leave plus bank holidays.

58. There will be an unauthorised deduction from wages if the employer fails to pay the claimant on termination of employment in lieu of any accrued but untaken leave.
59. A worker is entitled to be paid a week's pay for each week of leave. A week's pay is calculated in accordance with the provisions in sections 221-224 Employment Rights Act 1996, with some modifications. There is no statutory cap on a week's pay for this purpose. Since the payment for leave in this case was due after the 6<sup>th</sup> April 2020 (when there was a change to the relevant provisions) an average of pay over the previous 52 weeks is taken.
60. If there is no expressly agreed period of contractual notice, there is an implied contractual right to reasonable notice of termination. This must be not less than the statutory minimum period of notice set out in section 86 of the Employment Rights Act 1996.
61. Section 86(1)(a) of the Employment Rights Act 1996 provides that the notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more is not less than one week if his period of continuous employment is less than 2 years.
62. However, in this case, there is an expressly agreed period of contractual notice as set out in the offer of employment letter dated 21 July 2021, namely 30 days' written notice.

## **Conclusions**

### Unfair Dismissal

63. The claimant was employed between 01 August 2021 and 30 November 2021. In order to succeed in his claim for unfair dismissal, he would have to show that that he was employed by the respondent for a period of not less than two years. However, the claimant was employed by the respondent for a period less than two years and therefore his claim for unfair dismissal cannot succeed.

### Unauthorised Deductions

64. The claimant was employed by the respondent between 01 August 2021 and 30 November 2021. The claimant was paid an annual salary of £40,000 gross (or £3333.33 gross per month).
65. The claimant was paid £2,560 gross for his work in August 2021. However, I have already found that he was entitled to be paid £3,333.33 for his work in August 2021. He was therefore paid £773.33 less than he ought to have been paid (£3,333.33 - £2,560). I therefore find that the claimant is entitled to a further £773.33 for the work he did in August 2021.
66. The claimant was paid £3000 gross for his work in September 2021. The claimant ought to have been paid £3,333.33. He was therefore owed £333.33. The

claimant was paid a further £300 in October 2021 for September 2021. I therefore find that the appellant is entitled to a further £33.33 for the work he did in September 2021.

67. The claimant was paid £3,300 gross for his work in October 2021. However, he ought to have been paid £3,333.33. I therefore find that the claimant is entitled to a further £33.33 for the work he did in October 2021.
68. The claimant was paid £1616.00 gross for his work in November 2021. However he ought to have been paid £3,333.33 (minus two days' sick leave - £153.85 x 2 = £307.70). He is therefore owed £1,409.63 (£3,333.33 - £1,616.00 - £307.70 = £1409.63) for the work he did in November 2021.
69. In total, I find that the respondent made unauthorised deductions (arrears of pay) of £2,249.62.

#### Holiday Pay

70. The offer of employment letter makes it clear that the claimant was entitled to 40 days annual leave per annum plus bank holidays. That is the equivalent of 8 weeks leave per annum plus bank holidays. The claimant was entitled to be paid, on termination of his employment, in lieu of annual leave which he had accrued but not taken in the period 01 August 2021 to 29 December 2021 – which is when his employment would have terminated had he have been given the appropriate notice period of 30 days ( which is a total of 150 days or 21.4 weeks).
71. The claimant had not taken any paid holiday during his employment. I conclude that the respondent made an unauthorised deduction from wages by not paying the claimant in lieu of accrued but untaken annual leave. The claimant had accrued  $21.4/52 \times 8$  weeks' annual leave which is 3.3 weeks' annual leave.
72. The claimant was paid £40,000 per annum which is the equivalent of £769.23 per week. The claimant's entitlement to pay in lieu of accrued but untaken annual leave is therefore  $3.3 \times £769.23 = £2538.46$  gross.

#### Notice Pay

73. The claimant was given notice of termination of his employment in a letter dated 29 November 2021 which stated that his employment would be terminated with the respondent company on 30 November 2021. However, the offer of employment letter dated 21 July 2021 states that he was entitled to 30 days' written notice and I have found that the claimant was entitled to 30 days' written notice which is the equivalent of one month's written notice.
74. The claimant was not given the required notice and therefore I find that the claimant is entitled to £3,333.33 gross which is the equivalent of one month's pay.

#### Tax rebate

75. I have found that the respondent did not pay the claimant the tax rebate of £1320 which is recorded on both his November 2021 payslip and HMRC documentation as having been paid to the claimant. However, I have no jurisdiction to order the

respondent company to rectify that error or any other errors that the respondent company may have made in terms of payment tax and National Insurance contributions to the claimant. If the claimant cannot resolve these issues with the respondent, then it may well be that the claimant will have to take the matter up directly with HMRC.

Conclusion

76. The total award I make is therefore £2249.62 (wage arrears) £2538.46 (holiday pay) + £3,333.33 (one month's notice) = £8121.41.

Date: 22/06/22

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**Tribunal Judge J E Plowright acting as an Employment Judge**

Sent to the parties on:

22/06/2022.

For the Tribunal: