

Appeal No. UKEAT/0237/18/BA

**EMPLOYMENT APPEAL TRIBUNAL**  
FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal  
On 28 January 2019

**Before**

**HIS HONOUR DAVID RICHARDSON**

**(SITTING ALONE)**

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GOVDATA LIMITED

APPELLANT

MR DAVID DENTON

RESPONDENT

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Transcript of Proceedings

JUDGMENT

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## APPEARANCES

For the Appellant

MR BERNARD WATSON  
(Legal Consultant)  
Peninsula Business Services Limited  
The Peninsula  
Victoria Place  
2 Cheetham Hill Road  
Manchester  
M4 4FB

For the Respondent

No appearance or representation by or on  
behalf of the Respondent.

## **SUMMARY**

### **Contract of Employment – Written particulars – uplift under section 38(3) of the Employment Act 2002**

The Employment Judge erred in law in increasing an award by virtue of section 38(3) of the **Employment Act 2002**. The Appellant was not in breach of its duty under section 1 of the **Employment Rights Act 1996** when the proceedings began. The Appellant had been in breach of duty but had complied with the duty prior to the commencement of the proceedings.

**A**     **HIS HONOUR DAVID RICHARDSON**

**B**

1.     By a Judgment dated 15 June 2018 Employment Judge Shotter, sitting alone in the Liverpool Employment Tribunal, ordered that Govdata Limited (“the Respondent”) must pay to Mr David Denton (“the Claimant”) the sum of £958 under section 38 of the **Employment Act 2002**. The Respondent appeals against that award. The appeal raises a very short point about the interpretation of section 38(3) of the **2002 Act**.

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2.     Section 38(1) and (3) of the **Employment Act 2002** provide as follows:

“38. *Failure to give statement of employment particulars etc*

**D**

(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule 5.

...

(3) If in the case of proceedings to which this section applies -

(a) the employment tribunal makes an award to the employee in respect of the claim to which the proceedings relate, and

**E**

(b) when the proceedings were begun the employer was in breach of his duty to the employee under section 1(1) or 4(1) of the Employment Rights Act 1996,

the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.”

**F**     **The Proceedings Below**

**G**

3.     The Claimant was employed by the Respondent from 1 December 2015. He was not given a written statement of initial employment particulars until 15 June 2016. The failure to do so was a contravention of section 1 of the **Employment Rights Act 1996**, which in effect requires the statement to be given within two months of the beginning of the employment: see section 1(1) and (2) of the **1996 Act**. As I say, the Claimant was given such a statement on 15 June 2016.

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A 4. The Claimant's employment terminated with effect from 19 August 2016. On 22  
November 2016 he brought a claim to the Employment Tribunal for arrears of pay, holiday pay,  
B notice pay and other payments. By a Reserved Judgment dated 22 March 2018 the Employment  
Judge upheld those complaints. They fell within section 38(1) and Schedule 5 to the **2002 Act**.  
C The Claimant's solicitors applied to the Employment Tribunal to increase the award under section  
38(3). The Respondent's representative wrote to the Claimant pointing out that the Claimant had  
received particulars on 15 June 2016, some months prior to the commencement of the  
Employment Tribunal proceedings. Nevertheless, the Claimant proceeded with the application;  
the Employment Judge granted it.

D 5. In her Reasons the Employment Judge summarised the effect of section 1 of the  
**Employment Rights Act 1996**. She noted that the Claimant was not provided with the written  
statement until 15 June 2016. She continued as follows:

E "4. The claimant's claims are for unlawful deduction of wages, breach of contract, accrued  
holiday pay and failure to provide a statement of terms and conditions of employment in  
accordance with the Employment Rights Act 1996 as amended. They were relatively  
straightforward claims and listed fast track, but following the delayed filing of the ET3 and an  
extension of time application heard at a preliminary hearing, the matter became more complex.  
F The respondent maintained the first claimant had fabricated his claim for wages and expenses,  
it was denied he worked the hours claimed and alleged he had "purposely" taken business from  
the respondent during his employment and he had resigned. With reference to the second  
respondent it was alleged he had been dismissed for "gross misconduct" and under the legal  
principle "ex turpi causa non oritur actio" was not entitled to money; he was under criminal  
investigation, he had made fraudulent claims and "fraudulently signed in and business bank  
accounts." With reference to the third claimant gross misconduct was also alleged."

G 6. She made an award in the sum of £958.

### **The Appeal**

H 7. On behalf of the Respondent Mr Bernard Watson submits that the Employment Judge  
erred in law in making an award. The Respondent had complied with its duty under section 1 of  
the **Employment Rights Act 1996** prior to the commencement of the proceedings. The condition

**A** in section 38(3)(b) was therefore not met and the Respondent was no longer in breach of its duty under section 1.

**B** 8. On behalf of the Claimant his solicitors have lodged an Answer resisting the appeal. They have, however, not said in the Answer or elsewhere by what legal analysis the Claimant was entitled to an increase under section 38. By letter dated 4 January 2019 the Claimant's solicitors have said that the Claimant does not intend to be present or represented at the hearing, given that **C** the cost would far outstrip the amount at stake. Speaking for myself, I am sympathetic to this, given that the sum at stake is very small; but it would have been helpful if the Claimant's solicitors, assuming their instructions were still to oppose the appeal, had briefly explained why **D** they say the Respondent's contention is wrong.

9. In the result, neither the Respondent nor the Employment Judge have explained how, in **E** the light of section 38(3)(b), an award can be justified when the Respondent had complied with its duty under section 1 prior to the commencement of the Employment Tribunal proceedings. Assuming that the wording of section 38(3)(b) was not simply overlooked, the only argument I can envisage is that since compliance with the duty under section 1 was out of time, the **F** Respondent was indeed in breach of duty prior to the commencement of proceedings and this breach, even if remedied, remained a breach to which section 38(3)(b) applied.

**G** 10. In my judgment Mr Watson is right in his submission. The Respondent had complied with its duty under section 1 of the **Employment Rights Act 1996** late, but it has complied with it before the proceedings were begun. Section 38(3) contemplates that a breach of section 1 may **H** be remedied, and if it is remedied before the proceedings had begun the power to order an increase

**A** in an award will not be available. I cannot see any other sensible reason why Parliament would have put the phrase, “when the proceedings were begun” at the start of section 38(3)(b).

**B** 11. It follows that the appeal will be allowed, and the Judgment dated 15 June 2018 will be set aside.

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