



EMPLOYMENT TRIBUNALS

Claimant: Mr B S Barana

Respondent: Knitmania UK Limited

Heard at: Leicester On: Thursday 2 June 2016

Before: Employment Judge Hutchinson (sitting alone)

Appearances

Claimant: Ian Lewis, Solicitor

Respondent: Sam Healy, Counsel

JUDGMENT ON REMEDY AND COSTS

The Employment Judge gave judgment as follows:-

1. The Respondent is ordered to pay compensation to the Claimant for unfair dismissal in the sum of £65,935.76.
2. The Recoupment Regulations do not apply.
3. The Respondent is ordered to pay costs to the Claimant under Rule 75(1) (b) in the sum of £1,200 in respect of the issue and hearing fee paid by the Claimant in these proceedings.
4. The Respondent's further application for costs under Rule 75(1) (a) fails and is dismissed.

REASONS

Background and Issues

1. Following a liability hearing that I heard over 3, 4 and 5 February 2016 I determined that the Claimant had been unfairly dismissed. I had reserved judgment and my judgment and reasons were dated 2 March 2016 and the judgment was sent to the parties on 8 March 2016.

2. At the liability hearing the Claimant had been represented by Mr Meichin of Counsel and Mr Healy had represented the Respondents.

3. Having found that the Claimant had been unfairly dismissed the hearing today was set to deal with the issue of remedy.

4. Having received my judgment and reasons the Claimant's solicitors wrote on 10 March to the Tribunal to make a formal application for the Respondents to pay the costs of the Claimant in connection with the hearing.

5. The grounds of that application were that:
"That given the Judge's findings at paragraph 71 "it was a capricious decision by Nick Barana to rid himself of his brother from the business", that under Rule 76(1)(a) the Respondent acted vexatiously and/or otherwise unreasonably in conducting and defending the proceedings and/or the response had no reasonable prospect of success."

6. At the start of the hearing certain matters were agreed:-

6.1 That the Claimant is not entitled to a basic award.

6.2 That any compensatory award is subject to the statutory cap of £78,335.

6.3 That the Claimant's net pay was £8,600 per month.

6.4 The Claimant had been paid notice pay of £39,230.76.

6. At the request of the parties I had dealt with the issues of Polkey and contributory conduct in my liability judgment. As can be seen from that liability judgment and reasons I had decided that this was a case where a Polkey reduction was appropriate.

7. It had already been agreed that there should be no reduction in the compensatory award for contributory conduct.

8. It was therefore agreed between the parties that in making the award of compensation for unfair dismissal I have to refer myself to Section 123 of the Employment Rights Act 1996 and determine the amount of the compensatory award which should be:

"Such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer."

9. Mr Healy asked me to consider 3 matters in particular:-

9.1 What were the Claimant's losses?

9.2 Has he taken steps to mitigate his losses?

9.3 Had he intended to leave the company in any event?

10. On the issue of costs I have to decide whether the Respondent acted unreasonably or vexatiously in its conduct of the proceedings. Alternatively did the response have no reasonable prospect of success?

11. If I am satisfied with the above, should I in all the circumstances of this case exercise my discretion to award costs, other than the reimbursement of the Court fees that the Claimant has paid.

Evidence

12. I heard evidence from the Claimant only. There was an agreed bundle of documents and where I refer to page numbers it is from that bundle. The Claimant also produced at a late stage management accounts for his new business and I will refer to that document separately.

Facts

13. The Claimant was 52 years old at the date of his dismissal. He had worked in the family owned business since 1980. He had been responsible for building this business with his brother Nick Barana. He was a Director of the company at the time of his dismissal.

14. Knitmania UK Limited is a family business and employed many members of the Barana family to work in it. It produced ladies, gentlemen's and children's jersey wear and knitwear.

15. The Claimant had undertaken a variety of roles but his main job was to work in production alongside Jinder Basi. His other activities included working in the warehouse and dealing with some sales and accounts.

16. The Respondent's business was very successful and at its height in the year ended 31 December 2013 its turnover was £19,195,000 per annum.

17. The Claimant was highly paid and it is agreed that his gross earnings were £170,000 per annum and that his net weekly take home pay was £2,008.55.

18. The Claimant has a large number of contacts within what was described to me as "the rag trade". They are suppliers, customers and employees. Baljit Singh Barana is undoubtedly a successful entrepreneur and is capable of running his own business.

19. As I described in my judgment on liability he was dismissed on 15 May 2015 and was paid statutory redundancy pay and pay in lieu of notice of £39,230.76. The notice pay is equivalent to twelve weeks' gross pay.

20. There had been issues between him and Nick Barana for a number of months before dismissal took place. He had been involved with the setting up of a company called "Project Tekstil UK Limited". As can be seen from the Companies House documentation (pages 33-40) the company was incorporated on 14 April 2015. He is one of 2 active Directors, the other being his relative Sterling Singh Barana. As described at page 36, which is an abstract from its website, it is a "design led manufacturing company with generations of experience".

21. In view of the difficulty between Baljit Barana and Nick Barana I am not at all surprised that he was involved in setting this company up. It was only after his dismissal though that he decided to run his own business. It can be seen from the management accounts that within a few months the business generated by this new company is considerable. The profit and loss report that was produced to me shows that between the period 1 May 2015 to 31 March 2016 sales were generated of £124,654.22. Although the profit and loss account showed a net loss of £147,870.60, that needs to be seen in the context of a business that is operating from a cold start and has only had premises and been operating for a period of 3 months from January to March 2016.
22. After his dismissal the Claimant did not apply for other work. This was because he had made a conscious decision at that time to set up his own business.
23. The business is still in the knitwear trade selling fabrics and buying and supplying to the retail trade as a design house. To do this he needed to obtain premises in which to place his machinery.
24. After his dismissal the first premises he obtained were at Abbey Gate but these were to store the considerable amount of fabric that he had purchased from the Respondent at the time of his dismissal. These premises were never going to be used as a manufacturing facility.
25. In respect of this he located premises at Mansfield Street in Leicester but this deal fell through and he spent more time searching for alternative premises, eventually locating premises at 39 Spalding Street, Leicester.
26. Pages 25-31 of the bundle contain the lease in respect of those premises. At that time the company was called "Basic Clothing Limited". After he had spent many months pursuing these premises the transaction did not go ahead because the landlord decided to sell the building and not complete the lease.
27. The Claimant then obtained premises at 24 Mandervell Road, Oadby. The first three pages of the lease were produced to me at pages 28-30. The Claimant only took possession of the premises in January 2016. He was able to rent machinery to make up samples to submit to customers and at that stage he commenced trading. The business now employs 12 employees and 3 members of Baljit Barana's family also work as Directors.
28. Baljit Barana's son is one of 4 designers employed in the business. They also have 3 pattern cutters and 3 sample machinists.
29. Baljit Barana has put the sum of £239,900 into the business which he had raised from the sale of his property for £1,740,000. He has now purchased a more modest property for £680,000 which is mortgage free.
30. I am satisfied that whilst the management accounts show no profit and indeed a loss at the present time, a considerable profit will be made in the future.

Law

31. The relevant provision of the Employment Rights Act 1996 is Section 123(1) which provides:

“(1) Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

(2) The loss referred to in subsection (1) shall be taken to include:-
(a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and
(b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.

(4) In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales.

32. I was referred to the following cases:-

- **Cooper Contracting Limited v Lyndsey** [2016] ICR D3
- **Norton Tool Company Limited v Tewson** [1972] ICR 501
- **Addison v Babcock FATA Limited** [1987] ICR 805

33. The Cooper Contracting case reminded me of what the principles that should be applied to the issue of mitigation of loss are. They are:-

33.1 The burden of proof of a failure to mitigate is on the wrongdoer. The Claimant did not have to prove that he had mitigated the loss.

33.2 If evidence as to mitigation was not put before the Employment Tribunal by the wrongdoer, it had no obligation to find it; providing the information was the task of the employer.

33.3 What had to be proved was that the Claimant acted unreasonably; he did not have to show that what he did was reasonable.

33.4 What is reasonable or unreasonable is a matter of fact. It has to be determined taking into account the wishes of the Claimant as one of the circumstances, although it was the Tribunal's assessment of reasonableness, and not the Claimant's that counted.

33.5 The Tribunal was not to apply a standard to the victim that was too demanding. He should not be put on trial as if the losses were his fault, when the central cause was the act of the wrongdoer.

33.6 The test could be summarised by saying that it was for the wrongdoer to show that the Claimant acted unreasonably in failing to mitigate.

33.7 In a case where it might be reasonable for a Claimant to have taken a better paid job. That fact did not necessarily satisfy the test. It was important evidence that might assist a Tribunal to conclude that the employee had acted unreasonably.

34. Mr Lewis argued that I should not take into account the pay in lieu of notice when I calculate the compensatory award that the Claimant is entitled to. With respect to Mr Lewis I disagree with him. The court held in the **Addison** case that a notice payment is not an independent right to which the employee is entitled in addition to, and apart from, any compensation from his ex-employer for lost earnings during the notice period. The employee does have to give credit for the notice payment by offsetting it against such part of a compensatory award as covers the notional notice period. If I did agree with Mr Lewis the Claimant in this case would reap the benefit of a double payment in respect of the same period of loss.

My Conclusions on Liability

35. To answer Mr Healy's questions, but not necessarily in the same order that he asked them, I find that the Claimant has mitigated his losses. I am satisfied that setting up his own business was not only reasonable but the only sensible option that he had. I am satisfied that what he has set up will be a very successful business.

36. I am also satisfied that Baljit Barana had not intended to leave the Respondent company in any event. There were clearly considerable difficulties around the time of his dismissal between himself and his brother. That is why he set up the company project Tekstil UK Limited. It did not mean he had decided to leave the Respondent business. Leaving the business would not only have meant a loss of a substantial salary. He would also be leaving the family business he had spent his life building with his brother and which employed many members of his family.

37. As to what the Claimant's losses are, the answer to that is most uncertain. I only have a limited amount of information about the profitability of the new business. Referring myself back to Section 123(1) I have to award an amount which I consider to be just and equitable in all the circumstances, having regard to the loss sustained in consequence of the dismissal insofar as that loss is attributable to action taken by the employer.

38. In this case I am satisfied that the period of loss is the period of 12 months from the date of his dismissal. I am satisfied that in a 12 month period the Claimant is capable of and in my view will be able to earn from his new business that which he earned when he was employed by the Respondents.

39. Twelve months' net loss in his case is £104,416.

40. The Claimant is also entitled to compensation for loss of his statutory rights which in this case I am satisfied should amount to £750.00.

41. The compensatory award is therefore calculated as follows:-

- 12 months' net loss - £104,416
- Less 12 weeks' notice pay - £39,230.76
- Balance - £65,185.76
- Add loss of statutory rights - £750.00
- Compensatory Award - **£65,935.76**

42. The Claimant has not been in receipt of benefits and therefore the Recoupment Regulations do not apply.

Costs

43. Mr Scott on behalf of the Claimant makes an application for costs under Rule 76(1) of the Employment Tribunal Rules of Procedure 2013. He has asked me to make an order on the basis that:-

- The Respondent acted unreasonably in the manner in which it conducted the proceedings and/or
- The response to the claim had no reasonable prospect of success

44. Rule 76 provides:

"(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that:-

- (a) A party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way the proceedings (or part) have been conducted or;
- (b) any claim or response had no reasonable prospect of success."

45. There are a number of matters that I need to take into account which are:

- The fundamental principle remains that costs orders are the exception rather than the rule; **Yerrakalva v Barnsley Metropolitan Borough Council** [2012] ICR 4201B. The range of circumstances in which costs are awarded in the Employment Tribunal is much narrower than in civil courts where costs are said to "follow the event"
- This is a complex case involving a family dispute between the owners of a successful business
- As a result I have had to resolve a hotly contested dispute and have had to make findings on the credibility of witnesses.
- This is not the basis for making an award of costs

46. I have to undertake a 2 stage process, namely:-

46.1 Are there grounds for making an award for costs?

46.2 If so, should I exercise my discretion to award the costs?

47. **Lodwick v Southwark London Borough Council** [2004] ICR 884 and the statement of Sir Hugh Griffiths are often quoted. He said:

"Ordinary experience of life frequently teaches that that which is plain for all to see once the dust of battle has subsided was far from clear to the combatants when they took up arms."

48. I have in this case had to make findings as to who I should believe and disbelieve. The fact that I accepted the Claimant's evidence in preference to the evidence of the Respondent's businesses does not mean that the Respondent's response had no reasonable prospect of success or that the Respondent acted unreasonably in defending the claim. This is a claim where for the parties the stakes were high. The case was hard fought on both sides and both sides were entitled to advance their case. The fact that the Respondent lost the argument does not mean to say that their response had no reasonable prospect of success or that they had acted unreasonably in pursuing their submissions.

49. As per the case of **HCA International Limited v May-Bheemul UK EAT/0477/10**, it is important that I look at the Respondent's conduct, not that of individual witnesses. In this case whilst I have criticised the behaviour of Mr Barana ultimately and I was referred to paragraph 71 of my judgment where I said:

"It was a capricious decision by Mr Nick Barana to rid himself of his brother from the business."

That does not mean as the Claimant's advocate contends that the Respondent:
"Acted vexatiously and/or otherwise unreasonably in conducting and defending the proceedings and/or the response had no reasonable prospect of success"

50. In deciding whether or not to exercise my discretion I would in any account have been bound to take into account the behaviour of the Claimant. I refer to the issue of the Claimant's intimidation of the Respondent's witnesses which I found in paragraph 26 of my reasons in the liability judgment. I was bound to take into account this behaviour if I was having to decide whether I should exercise my discretion and I am satisfied that I would not have exercised my discretion in the circumstances of this case.

51. In all those circumstances I am satisfied that the Claimant has not passed the high threshold that he has to pass for me to make an order for costs against the Respondent and that his claim for costs under Rule 76(1)(a) of the Rules of Procedure fail and is dismissed.

52. In respect of the question of fees paid. That is a different matter. In my view the Claimant is entitled to reimbursement of his fees under the provisions of Rule 76(1) (b) of the Rules and I make an award by agreement with the Respondent in the sum of £1,200.



Employment Judge Hutchinson

Date 26 July 2016

JUDGMENT SENT TO THE PARTIES ON

27 July 2016



FOR THE TRIBUNAL OFFICE