



EMPLOYMENT TRIBUNALS

Claimants: (1) Don Amarasekara
(2) Ahangama Ahangama

Respondent: (1) Pirathini Elanchcheliyan
(2) Manickam Jasokaran

Heard at: Southampton On: 19th June 2017
Employment Tribunal

Before: Employment Judge M. Salter

Representation:

Claimants: In person, but by the First Claimant.

Respondent: (1) Mr. H. Celis (Trade Union Representative)
(2) No attendance

RESERVED REMEDIES JUDGMENT

1. The First Claimant is awarded:
 - a) national minimum wage shortfall of £12,986.15;
 - b) Basic Award of £402.00;
 - c) Compensatory Award:
 - i) 1 weeks' pay: £150.00;
 - ii) loss of statutory rights: £300.00;
 - d) Compensation for wrongful dismissal: £402.00;
 - e) Unpaid holiday: £525.00;
 - f) Failure to provide written statement of terms and conditions: £600.00;
 - g) Failure to inform and consult under TUPE: £3,900.00 jointly and severally against both respondents.

2. The Second Claimant is awarded:
 - a) national minimum wage shortfall of £21,530.00;
 - b) Basic Award: £1,266.30;

- c) Compensatory Award:
 - i) 1 weeks' pay: £300.00;
 - ii) loss of statutory rights: £600.00;
 - d) Compensation for wrongful dismissal: £1266.30;
 - e) Unpaid holiday £1,050.00;
 - f) Failure to provide written statement of terms and conditions: £1,200.00;
 - g) Failure to inform and consult under TUPE: £7,800.00 jointly and severally against both respondents.
3. In relation to both claimants I do not award an uplift for failure to follow the ACAC Code of Practice, nor do I impose a reduction.
4. I order the First Respondent shall pay the Secretary of State a Financial Penalty in accordance with s12A of the Employment Tribunals Act 1996 of £5,000.00.

REASONS

Introduction

1. These are my reasons for the above judgment in the above claims. As the Second Respondent was not in attendance (for more see below) I ordered written submissions be provided by all parties in relation to the claims for failure to inform and consult under TUPE.
2. In this judgment numbers in squared brackets refer to pages in the bundle of documents I was provided with by the claimants and which all parties agreed I should use.

Background

3. There are two Claimants in this matter: Mr. Don Amarasekara ("the First Claimant") and Mrs. Ahangama Ahangama ("the Second Claimant"). After a three-day Final Hearing in May 2017 and for the reasons set out in my Reserved Judgment I found the Claimants had been largely successful in their claims they presented against the First Respondent and, to a lesser degree, the Second Respondent.
4. For reasons of space I do not repeat my findings here.

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5. At the end of the liability hearing I provisionally listed the matter for a remedy hearing on 19th June 2017 and directions given for the progression of the matter to that remedies date. Consistent with the history of this case there appeared to have been failures to comply with the agreed case management orders and so I had cause to write to the parties informing them that the hearing would proceed on the 19th June 2017.
6. Whilst on route to the tribunal on the morning of the 19th June 2017 I received from the Clerks at Bristol ET, where Southampton ET is administered, an email sent by the Second Respondent in the evening of Sunday 18th June 2017 attaching a photograph of an appointment letter for the Second Respondent's son for Monday, 19th June 2017. The appointment letter was dated 5th June 2017.

The Application to Adjourn

7. When the matter was called on at 1000 the Claimants, the First Respondent, her husband and their representative Mr. Celis were all in attendance.
8. I explained the correspondence we had received from the Second Respondent and that I was going to treat it as an application to adjourn.
9. Both the Claimants and the First Respondent objected to the application to adjourn as they were present and had prepared for the hearing. I heard the submissions from all parties as to why they wished the hearing to proceed and considered the factors set out in the President's Practice Direction.
10. I considered also that the Second Respondent's liability was limited to a joint and several award for failure to inform and consult under the Transfer of Undertakings (Protection of Employment) Regulations 2016, whereas the First Respondent was liable for the remaining claims alone.
11. Having considered these factors and the lengthy history for this matter, I decided that I would reject the application to adjourn and would hear evidence and submissions in relation to the claims the First Respondent was liable for alone. I

would then invite written submissions from all parties (including the Second Respondent) addressing the level of award for the TUPE claim.

Documents Before Me

12. I had before me the bundles of documents prepared for the liability hearing which contained schedules of loss for both Claimants. However, a new set of papers was provided and were added to this file [374-436]. These new pages contained updated Schedules of Loss for both Claimants as well as mitigation documents.

13. I also had a small bundle of documents produced by the First Respondent for the purposes of demonstrating her ability to pay any Financial Penalty I imposed on her.

The Hearing

14. To determine what matters I needed to hear evidence on I discussed the Claimants' Schedules of Loss with Mr. Celis. It transpired that many of the figures in the Schedules of Loss were agreed.

15. However, as the Schedules of Loss contain claims that were unsuccessful or not raised in the claim, for the purposes of this judgment, I will work through the relevant heads of compensation, say whether the figures are agreed and, if not, determine the appropriate level and give reasons for these decisions

First Claimant

16. The First Claimant's Schedule of Loss is at [384].

National Minimum Wages Claim

17. The First Claimant was not paid in accordance with the National Minimum Wage. As such he is entitled to receive compensation for this breach determined using the National Minimum Wage rate applicable at the time of assessment.

18. At the date of assessment the National Minimum Wage was agreed as being £7.50 per hour.

19. The figures agreed by the First Respondent are:

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- a. 21.11.2011 until 05.04.2012 20 hours a week with an hourly shortfall of £3.50 an hour, totals £1,674.75 as claimed in the Schedule
- b. for each year 06.04.2012 until 05.04.2014 was 104 weeks at 20 hours a week with an hourly shortfall of £3.50 an hour: total £7,280.00
- c. 6.04.2014 until 05.04.2015 20 hours a week with an hourly shortfall of £3.00 an hour: total £3,120.00.
- d. from 06.04.2015 until dismissal on 28.07.15 with an hourly shortfall of £3.00 total £911.40.

Total of a+b+c+d = £12,986.15

Basic Award

20. Agreed at £402.00

Compensatory Award

21. In accordance with my findings this was limited to one-weeks' pay (20 hours x £7.50 an hour = £150.00.

Notice Pay

22. This was agreed at £402.00

Holiday Pay

23. As I found the Claimants failed in their holiday pay claims apart from the holiday taken in July 2015. This was for three-and-a-half weeks at 20 hours a week at £7.50 an hour: total £525.00

Failure to Provide a Written Statement of Terms and Conditions of employment.

24. The Respondents accepted and admitted they did fail to provide these. There was no mitigation for their failure other than they were doing the First Claimant a favour. Their failure was deliberate. This is a serious breach of a fundamental employment right.

25. I award the Claimant four weeks' pay (20hours x £7.50 an hour = £150 a week. Four weeks is £600.00.

Loss of Statutory Rights

26. To reflect the fact the Claimant will now have to wait for two-years to receive employment protection rights. I award £300.00 as two weeks' wages as part of the Compensatory Award.

TUPE: Failure to Inform and Consult

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27. I found there were two relevant transfers. In neither of these did either Respondent comply, or seek to comply, with their obligations under regulations 13, 13A, 14 and 15 of TUPE.
28. I make a declaration that the Claimant's claims regarding a failure to inform and consult are well founded, and need to consider whether to order the Respondents pay appropriate compensation to the Claimants as affected employees.
29. "Appropriate compensations" is up to 13 weeks pay for each transfer as I consider just and equitable having regard to the seriousness of the failure of the employer.
30. In accordance with the case law (Sweetin v Coral Racing [2006] IRLR 252) the award is punitive and so is not there to compensate the Claimant for any perceived loss; rather the award should reflect the nature and extent of the breach.
31. In the transfer from the First Respondent to the Second Respondent I can find no mitigating circumstances: the Regulations are well known, have been in place for a number of years, the First Respondent owns and runs a number of shops and so should be aware of the requirements of businesses.
32. I also bear in mind the failure of the Respondents here is absolute and complete: there was no effort to try and inform and consult at all.
33. Identical factors applied to the transfer back from the Second Respondent to the First.
34. Weighing all this material up I consider that an award of 13 weeks' pay is appropriate in the circumstances of both transfers.
35. 13 weeks' pay (20 hours x £7.50 an hour = £150) x 13 = £1,950.00.
36. two transfers with failure to inform and consult £1,950.00 x 2= £3,900.00.

Second Claimant

37. The Second Claimant's Schedule of Loss is at [387].

38. But for an issue with the hours of work the Second Claimant undertook, all the same issues that were agreed in relation to the First Claimant were agreed in the Second Claimant's Schedule of Loss.

Hours of Work

39. The First Respondent challenged the Second Claimant's assertions of the hours of work that she undertook. It was stated that there was no evidence of the Second Claimant hours. Doing as best as I can on the material I had before me I find that there is clear evidence of the hours the Second Claimant worked for the First Respondent: the evidence is in her witness statement and in the unchallenged Rota the First Claimant produced during his time as the shop's manager [
40. When assessing the evidence I do not consider that it lies well with an employer to seek to criticise an employee for not being able to prove the hours they worked: any competent and compliant employer would have their own records, indeed one would expect this material was highly relevant for tax and payroll purposes. Balancing this paucity of evidence against the assertions of the Second Claimant and the documents in the bundle leads me to conclude the Second Claimant did work the hours she claims she did.

National Minimum Wages Claim

41. The Second Claimant was not paid in accordance with the National Minimum Wage. As such she is entitled to receive compensation for this breach determined using the National Minimum Wage rate applicable at the time of assessment.
42. At the date of assessment the National Minimum Wage was agreed as being £7.50 per hour.
43. The figures agreed by the First Respondent are:
- a. 25.06.2012 to 05.04.2013 40 hours a week with an hourly shortfall of £3.50 an hour, totals £6,090.00 as claimed in the Schedule
 - b. for year 06.04.2013 until 05.04.2014 40 hours a week with an hourly shortfall of £3.50 an hour: total £7,280.00
 - c. 6.04.2014 until 05.04.2015 40 hours a week with an hourly shortfall of £3.00 an hour: total £6,240.00.
 - d. from 06.04.2015 until dismissal on 28.07.15 (16 weeks) with an hourly shortfall of £3.00 total £1,920.00

Total of a+b+c+d = £21,530.00

Basic Award

44. Agreed at £1,266.30

Compensatory Award

45. In accordance with my findings this was limited to one-weeks' pay (40 hours x £7.50 an hour = £300.00).

Notice Pay

46. This was agreed at £1,266.30.

Holiday Pay

47. As I found the Claimants did not succeed in their holiday pay claims apart from the holiday taken in 2015. This was for three-and-a-half weeks at 40 hours a week at £7.50 an hour: total £1,050.00

Failure to Provide a Written Statement of Terms and Conditions of employment.

48. The Respondents accepted and admitted they did fail to provide these. There was no mitigation for their failure other than they were doing the First Claimant a favour. Their failure was deliberate. This is a serious breach of a fundamental employment right.

49. I award the Claimant four weeks' pay (40hours x £7.50 an hour = £300.00 a week. Four weeks is £1,200.00.

Loss of Statutory Rights

50. To reflect the fact the Claimant will now have to wait for two-years to receive employment protection rights. I award £600.00 as two weeks' wages.

TUPE: Failure to Inform and Consult

51. I found there were two relevant transfers. In neither of these did either Respondent comply, or seek to comply, with their obligations under regulations 13, 13A, 14 and 15 of TUPE.

52. I make a declaration that the Claimant's claims regarding a failure to inform and consult are well founded, and need to consider whether to order the Respondents pay appropriate compensation to the Claimants as affected employees.

53. I repeat my findings and conclusions set out above in relation to the First Claimant's claims under TUPE as relevant here.
54. 13 weeks' pay (40 hours x £7.50 an hour = £300) x 13 = £3,900.00.
55. two transfers with failure to inform and consult £1,950.00 x 2 = £7,800.00.

Both Claimants

s207A of the Trade Union and Labour Relations (Consolidation) Act 1992

56. Pursuant to this section the claims for a compensatory award for unfair dismissal, breach of contract and breach of the Working Time Regulations (holiday pay) stand to be uplifted by up to 25% if the Employer has failed to comply with a relevant code (in this case the ACAS code relating to dismissals and the grievance procedure) and the employer's failure was unreasonable.
57. I found that the Claimants were dismissed on ground of redundancy. The ACAS Code on Disciplinary and Grievance Procedures, expressly does not apply to redundancy dismissals.
58. I find that the Claimants' letter post dismissal to the First Respondent was a grievance to which they received no substantive response by the First Respondent [122 and 123].
59. However, the letters do not address the unpaid holiday pay or underpayments of the minimum wage.
60. Accordingly, I find that there are no grounds to award any uplift: the disciplinary code does not apply to the dismissal on grounds of redundancy and the issues of holiday pay and national minimum wage were not raised in the grievance.
61. That being so I went on to consider whether I should reduce the awards for holiday pay and national minimum wage breaches owing to the Claimants' failure to raise these issues with the employer. I find this failure was unreasonable as the Claimants clearly were aware of the unpaid holiday or the underpayment of their wages, yet said nothing to the First Respondent about it.

62. However, I do not think it would be just and equitable for me to apply any reduction to the Claimants' compensation in this case. I remind myself of the findings of fact I have made over the First Respondent's breaches of the Claimants' employment rights. The right to receive paid holiday and to be paid a minimum wage are fundamental, yet basic rights all employees should enjoy, yet the First respondent denied the Claimants these rights.
63. Further, I find the conduct of the First Respondent as an employer is reprehensible and do not think it would be just or equitable to reduce the Claimants compensation, effectively to allow the First Respondent to benefit from the Claimants' failures.
64. I also bear in mind that even when the Claimants did complain about their dismissal their complaints were effectively ignored by the First Respondent, as they received no substantive reply at all to their letter referred to above.

Financial Penalties

65. Pursuant to s12A of the Employment Tribunals Act 1996 I have a power to order the employer pays the Secretary of State a sum of money if the worker's rights have been breached and there are one or more aggravating features.
66. In light of my findings of liability I find the Claimants' rights have been breached.
67. I also consider there are aggravating features: the First Respondent failed to comply with basic, fundamental and well known right of the claimants; the First Respondent, whilst a small-scale employer, was clearly aware of its obligations to provide contracts, pay the minimum wage and pay for holidays as, I was told, they did this in their other shops. Furthermore, these breaches were longstanding and repeated.
68. I have considered the First Respondent's ability to pay: I have been provided with documentation, most of it relating to the First Respondent's husband, which shows his financial situation. I have been provided with very little material about

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the First Respondent herself. Much of the material I have received has been redacted so I cannot tell who it is addressed to (see for instance the letter before action from Fredrickson). Some of the material are bills, which admittedly show some unpaid sums on them (see for instance the British Gas Bill).

69. The one Self-Assessment Tax form I have from the First Respondent shows she has credit with HMRC of £257.59.
70. I have received no evidence of any bank statements from the First Respondent
71. On the basis of the material I have before me I consider that the First Respondent's ability to pay is such that the award should be made.
72. As I am considering two workers against but with the same employer s12A(7) of the Employment Tribunals Act 1996 applies. Accordingly, the award is capped at £5,000 or 50% of the award made. Considering the levels of the award made above, I order that the sum of £5,000.00 is paid as a penalty to the Secretary of State by the First respondent.

I

Employment Judge Salter
18 August 2017

JUDGMENT & REASONS SENT TO THE PARTIES ON

24th August 2017