



EMPLOYMENT TRIBUNALS

Claimant: Mr W Wawrzyniak

Respondent: Cramscene Limited

HELD AT: Leeds

ON: 6 December 2017

BEFORE: Employment Judge Wedderspoon
Mr W Roberts
Mr M Brewer

REPRESENTATION:

Claimant: Mrs B Wawrzyniak (the Claimant's wife)

Respondent: Mr B Hendley (consultant)

Interpreter: Ms Marta Sarachan

JUDGMENT ON REMEDY

The unanimous Judgment on Remedy is:

1. The Claimant would have been dismissed for capability (a non discriminatory reason) by 20 weeks of the accident namely by 25 April 2016.
2. The Respondent is ordered to pay the following amounts to the Claimant:-
 - 2.1. Injury to feelings award in the sum of £6,500 (uplift by £1,625) total £8,125.
 - 2.2. Notice pay (breach of contract) £462.12 (uplift of £115.53) total £577.65.
 - 2.3. Holiday pay £877.99 (uplift £219.49) totals £1,097.48.
 - 2.4. Four weeks for failure to provide terms and conditions £1,916.The grand total of award is £11,716.13.
3. By 13 December 2017 the Respondent will pay to the Claimant non contentious sums of breach of contract £462.12; holiday pay £877.99 and four weeks failure to pay terms and conditions £1,916 totals £3,256.11.

4. The remainder of the Judgment (including the uplift for the non payment award) to be paid within 14 days in the normal way pursuant to Rule 66 of schedule 1 of the Employment Tribunal Constitution and Rules of Procedure Regulations 2013.

REASONS

1. Following the unanimous Judgment of the Tribunal promulgated on 14 November 2017 the Tribunal determined remedy today. On 5 December the Respondent notified the Tribunal it had lodged an appeal against the Tribunal Judgment at the EAT and sought to postpone the remedy hearing. The Employment Tribunal Judge considered the lodging of the appeal was irrelevant to the issue of remedy and the application was dismissed.
2. In awarding compensation the Tribunal were identified at the beginning of the hearing the following issues:
 - 2.1. When the Respondent would have dismissed the Claimant for a non discriminatory reason namely capability.
 - 2.2. The level of injury of feelings award.
 - 2.3. The calculation of one weeks notice pay.
 - 2.4. The calculation of 9.5 days of holiday pay.
 - 2.5. The calculation of 4 weeks pay to compensate for a failure to provide terms and conditions.
 - 2.6. The application of 25% uplift for breach of the ACAS Code.
3. At the outset the Respondent accepted the Claimant's figures of net weekly wage of £462.12 and the gross weekly wage of £592.25.

The law

4. Pursuant to section 104 of the Equality Act 2010 the Tribunal is entitled to award compensation to the Claimant and it is awarded and assessed under the same principles as apply to Tort law; See section 124(6) of the Equality Act 2010. The central aim is to put the Claimant in the position so far as is reasonable that he would have been had the Tort not occurred (Ministry of Defence v Wheeler 1998 IRLR 23).
5. Injury to feelings awards compensate for non financial loss. The Employment Appeal Tribunal in the case of Prison Service v Johnson (1997) IRLR 162 at paragraph 27 provide general principles to be applied when assessing such an award namely:
 - 5.1. Injury to feelings awards are compensatory and should be just to both parties. They should compensate fully without punishing the discriminator.
 - 5.2. Awards should not be too low as would diminish respect for the policy of the anti-discrimination legislation.

- 5.3. Awards should bear some broad general similarity to the range of awards in personal injury cases.
- 5.4. The Tribunal should take into account the value of every day life of the sum they have in mind.
- 5.5. The Tribunal should bear in mind the need for public respect of the level of awards made.
6. The Court of Appeal gave guidelines in Vento which identified three broad bands of compensation. These bands have been updated by the cases of Da'Bell v NSPCC 2010 IRLR 19 and Simmons v Castle 2010 EWCA Civ 1288 so that the upper band is now £19,800 to £33,000; the middle band is £6,600 to £19,800 and the lower band is £660 to £6,600.
7. Pursuant to section 207A of the Trade Union and Labour Relations Consolidation Act of 1992 (schedule A2) an uplift for a breach of the ACAS Code can be made to an award for injury to feelings, breach of contract and failure to pay holiday pay.

The hearing

8. The Claimant provided the Tribunal with an updated schedule of loss dated 6 November 2017 and some medical documents and sick notes. The Claimant gave evidence.

Facts

9. Following the Claimant's accident on 7 December 2015 the Claimant did not return to work. For a period of 28 weeks he received albeit delayed statutory sick pay. The Claimant raised in his schedule that the Respondent had failed to cover him via employer's insurance which would have entitled him to payment of full wages. However this was not a matter which was identified as a live issue between the parties nor had the Respondent been challenged in evidence upon it at the previous hearing.
10. The Claimant fractured his left calcaneum. He was treated surgically with open reduction and internal fixation. He was admitted to the Leeds Teaching Hospital on 7 December 2015 and discharged on 17 December 2015. He resumed work in an administrative role for an insurance company on 1 November 2016.
11. The Claimant was prescribed some pain relief medication namely Ibrufen and Dihydrocodeine which was stopped due to a stomach reaction. The Claimant was unfit as a crane operator. He underwent investigations for osteoporosis. The Claimant also suffers from hypertension. Upon discharge from hospital he was cared for by his wife.
12. He eventually received statutory sick pay after a delay but he received this sum from the government as opposed to his employer. This was a result of the Respondent putting an incorrect date of termination on the P45.
13. The Claimant was upset to be dismissed. He had been well regarded and valued as a devoted employee. In fact he had been assured by the Respondent that he had long term employment with them. It damaged his self esteem and his confidence significantly. As a result of the dismissal and failure to receive sick pay the Claimant suffered some financial uncertainty. The Claimant stated he suffered panic anxiety and depression. However there was no evidence before the Employment Tribunal to support this contention as being caused by the

dismissal itself. He had been prescribed Tramadol for the pain. At the time Mr Colin Reed examined the Claimant on 13 March 2017. Mr Reed is a consultant orthopaedic surgeon. He stated that the Claimant suffered no long term psychological problems. He in fact suffered side effects of Tramadol that he used for pain.

Submissions

14. The Respondent submitted an employer acting for a non discriminatory reason would have dismissed the Claimant 20 weeks after the accident on the basis that it would have taken steps to obtain an assessment of the Claimant's ability to work, held a capability meeting and made a decision that the Claimant was not able to work as a crane operator. The Respondent submitted that an injury to feelings award should be at the lower end of the Vento bracket. The act of discrimination was dismissal and was a one off event. In regard to financial claims namely notice pay of £462.12, 9.5 days of holiday pay at £877.99 and four weeks pay for failure to pay terms and conditions at 1916 the Respondent had no submissions on these issues as they were uncontentionous figures. The Respondent submitted that the Claimant received 28 weeks of sick pay and the Tribunal had no power to award further sick pay.
15. The Claimant submitted that it disputed the Respondent's submission that it would have dismissed for a non discriminatory reason 20 weeks post accident on the basis that the Respondent showed no interest in the Claimant and had simply got rid of him as soon as they could. The Claimant submitted that the Respondent had not even sent an accident report to the HSE. The Claimant had received sick pay via the Inland Revenue, not from the Respondent. The Claimant submitted due to the Respondent's actions the Claimant could not claim the benefits he required and suffered financially. In fact he wasn't paid sick pay until September 2016. The Claimant submitted that this was a mid band Vento case. The Claimant had suffered hurt feelings and felt the consequences even now. The Claimant submitted had the Respondent acted fairly they would have done the right thing. There were no further submissions on financial matters.

Conclusion

16. The Tribunal had previously found that the Claimant was employed as a crane operator a physically demanding job. There was no alternative administrative roles for the Claimant to perform in the Respondent's workplace. If the Respondent had acted in a non discriminatory manner the Tribunal conclude the Respondent would have investigated the Claimant's health situation by week 14 post accident. This would have involved the Respondent seeking an examination and occupational health assessment of the Claimant inviting him to a capability meeting and reaching a conclusion that the Claimant was not fit to work as a crane operator for the Respondent. The Tribunal accept the submission that by 20 weeks post dismissal the Respondent would have reached the decision to dismiss the Claimant for capability namely a non discriminatory reason.
17. The Claimant had an accident and was entitled to sick pay. Albeit for a delay the Claimant has received sick pay for this period via the Inland Revenue and the Tribunal calculate therefore there is no financial loss.
18. As previously indicated the fact that the Respondent failed prior to the Claimant's accident to include him on an insurance policy so as to provide him with full pay following the accident was not a point raised by the Claimant nor was the

Respondent challenged upon this at the earlier hearing. In the circumstances the matter was not identified as a live issue and the Respondent was not challenged on it. The Tribunal cannot make any determinations upon it.

19. The Tribunal found that the dismissal itself was discriminatory. The Claimant had also suffered a significant injury which required surgical treatment and inevitably caused some upset and distress. However it is not the accident which this Employment Tribunal can award injury to feelings for. The Tribunal make an award based on the discriminatory dismissal alone. The Tribunal accepts that the Claimant was a well respected individual and had been assured he had long term employment with the Respondent, so to lose his career on 23 February by email was very upsetting. On the basis that the Tribunal find that this was an upsetting matter for this Claimant and taking into account the medical evidence of Dr Reed that there was however no long term psychological effect the Tribunal conclude that an award is made at the bottom band of Vento but towards the top end of that bracket namely £6,500 and apply a 25% uplift of £1,625 which makes £8,125.
20. Breach of contract is awarded at £462.12 with an uplift of £115.53 totalling £577.65, 9.5 days of holiday is £92.42 per day, at 9.5 days is £877.99 plus an uplift of £219.49 totals £1,097.48. Four weeks for a loss of term and conditions £479 x 4 is £1,916.
21. The Tribunal notes that the Respondent has appealed the liability Judgment but the details are not included in the application for adjournment. However the Respondent is ordered to pay the non contentious sums to this Claimant within seven days namely the breach of contract claim at £462.12, holiday at £877.99 and four weeks of terms and conditions of £1,916. That is £3,256.11 due to this Claimant no later than 13 December. The remainder of the Judgment including the uplift will be paid in the normal manner 14 days from today.

Employment Judge Wedderspoon

Date: 12 January 2018