



EMPLOYMENT TRIBUNALS

Claimant:

Ms S Geddes

v

Respondent:

Roger Barker t/a R & H Barker
Funeral Directors

Heard at:

Reading

On: 4 December 2017

Before:

Employment Judge Milner-Moore

Appearances

For the Claimant: Mr K Wilson (Counsel)

For the Respondent: Mr M Cameron (Consultant)

JUDGMENT RECONSIDERATION AND REMEDY

1. The application for reconsideration and for an extension time to file a response is refused.
2. The claimant was dismissed for redundancy.
3. The claim for a statutory redundancy payment succeeds and the claimant is awarded the sum of £1,912.50.
4. The claim for breach of contract in relation to failure to pay salary for the period 11-13 April 2017 succeeds and the claimant is awarded £182.14.
5. The claim for wrongful dismissal succeeds but no award of compensation is made.
6. The claim for unfair dismissal succeeds and the claimant is awarded a compensatory award of £16,632.00

(A) Total monetary award £16,632.00

(B) Prescribed element £10,283.00

(C) Period of prescribed element
FROM: 14 April 2017 to 4 December 2017

(D) Excess of (A) over (B) £6,349.00

7. The claim for unpaid holiday pay succeeds and the claimant is awarded the sum of £1,062.50.
8. The claim for failure to provide a written statement of particulars of employment succeeds and the claimant is awarded the sum of £1,700.00.
9. The claim of failure to provide written reasons for dismissal succeeds and the claimant is awarded the sum of £850.00.

REASONS

Background

1. It is necessary to set out something of the procedural history of this case. The claim was filed on 13 June 2017. No response having been filed by the respondent within the relevant time limit, a default judgment pursuant to rule 21 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 was issued on 30 August 2017 and sent to the parties on 15 September 2017.
2. That prompted the respondent to make an application pursuant to rule 70 seeking a reconsideration and requesting that the default judgment be set aside and that time be extended for the submission of a response. Accordingly, on 14 October 2017, this matter was listed for hearing on 4 December 2017 to consider the respondent's application. The listing notice provided that if that application were to succeed, case management directions could be given and if the application were refused, the parties were advised that the Judge would proceed to consider issues of remedy in relation to the various claims.

Application for reconsideration

3. Mr Cameron submits it would be in the interests of justice for the respondent's application to be granted. The respondent, Mr Barker, is a small business owner who had misunderstood the communications that he had received from the tribunal. He had not appreciated the importance of entering a response and had imagined that he would be able simply to attend the hearing in order to explain his position.
4. The respondent, Mr Barker, gave evidence in support of the application. In light of his evidence and the documentary evidence put forward by the parties, including a letter from the claimant's GP, I made the following findings:-
 - 4.1. The tribunal's letter makes quite clear the importance of filing a response and the deadline for doing so (or for seeking an extension

of time for doing so). It drew the respondent's attention not only to the proposed hearing date but also to the various case management steps that needed to be completed before the hearing.

- 4.2. The respondent had the opportunity to seek legal advice from the solicitors from the Federation of Small Businesses. If he was uncertain as to what was required of him he could have sought advice.
 - 4.3. The respondent not only failed to have regard to the clear wording of the tribunal's letter. He also ignored multiple communications from the claimant's solicitors in which they explained the claimant's reasons for pursuing her claim and drew to his attention the various directions that needed to be complied with in advance of the hearing. It was only once a default judgment had been issued that he appears to have woken up and begun to take steps to respond to the proceedings.
5. For the following reasons, I do not consider that it would be in the interests of justice to set aside the default judgment and to allow the filing of a late response:-
- 5.1. Any misapprehension on the respondent's part as to the necessity for filing a response was wholly unreasonable. The Tribunal's letter to the respondent makes it perfectly clear that he had to file a response and that there was a deadline for doing so. I cannot accept that someone who is capable of running his own business could fail to understand this perfectly clear letter. The respondent's approach has been to bury his head in the sand and to ignore communications until it became clear that this had resulted in the issuing of a judgment against him.
 - 5.2. I recognise that the respondent will be prejudiced in not being permitted to enter a response and being subject to a default judgment. However, the respondent can scarcely complain of being deprived of the opportunity to defend the claim when that failure is entirely due to his own unreasonable behaviour.
 - 5.3. The claimant would be put to real disadvantage. Granting the application would delay the final determination of the proceedings in circumstances where she is already suffering from depression following her dismissal.
 - 5.4. I have also had regard to the merits of the respondent's defence. A number of the claims are not even disputed by the respondent. It is

not disputed that the claimant was entitled to a statutory redundancy payment, nor that she is entitled to compensation for failure to provide written reasons and for failure to provide a statement of terms and conditions. It is admitted that the claimant was dismissed. The proposed ET3 puts forward no positive case to support an argument that the dismissal was procedurally fair. I am not therefore persuaded that the respondent has, in any event, a strong defence to the proceedings.

6. For these reasons, I did not grant the application for a reconsideration

The respondent's subsequent participation in the remedy hearing

7. Having refused that application, this case proceeded on the basis that no response had been entered and that it was a matter for judicial discretion as to the extent to which the respondent was to be permitted to participate in the subsequent remedy process.
8. I heard submissions from both representatives in relation to the extent of the respondent's participation in the remedy hearing. The respondent submitted it would be reasonable and in the interests of justice to ensure that any award made to the claimant was correct, was not based on a one-sided version of events and that the respondent should therefore be allowed to participate to ask questions in cross-examination. In particular the respondent wished to explore in cross examination whether the claimant had received a cash payment of £350.00 and to explore the claimant's efforts to mitigate. The claimant's representative accepted that it may be useful for the respondent to have some limited participation in the remedy hearing but asserted that Mr Barker, had already demonstrated his unreliability as a witness and that if there were any conflicts of evidence between the claimant and the respondent, I should prefer the evidence of the claimant. I decided that the respondent would be permitted to participate in the remedy hearing in order to put some points to the claimant in cross examination.

Claims and Issues

9. The claims and issues arising for determination were as follows:-
 - 9.1 Was the claimant entitled to a redundancy payment?
 - 9.2 What compensation should be awarded to the claimant by way of compensation for unfair dismissal by reference to section 123(1) to (4) of the Employment Rights Act 1996.
 - 9.3 Should an award pursuant to section 38 of the Employment Act 2002 be made to reflect the respondent's failure to provide the claimant with a statement of terms of employment?

- 9.4 What compensation should be awarded to the claimant in respect of the respondent's failure to provide a written statement of reasons for dismissal?
- 9.5 Was the claimant wrongfully dismissed and if so what remedy should be awarded to her?
- 9.6 Was the claimant entitled to pay 12.5 days in lieu of accrued but untaken holiday?
- 10. During the hearing, it became apparent the respondent did not dispute the claimant's entitlement to a redundancy payment or that there had been failures to provide a statement of terms and conditions of employment or written reasons for dismissal. The respondent also indicated that the amount of holiday pay being claimed was agreed.

Evidence

- 11. I received a small bundle of documents from the claimant and heard evidence from the claimant herself.

Findings of fact

- 12. In light of the evidence, I made the following factual findings.
- 13. The claimant began employment with the respondent on 22 April 2013 and worked as a Funeral Director in the Wantage office. The respondent is an individual who trades as R & H Barker Funeral Directors, a family-owned, independent, funeral director's business, operating two offices, one in Wantage and one in Didcot. The claimant earned £425.00 gross a week and £350.00 net. The claimant was 52 at the time of the termination of her employment. It is admitted by the respondent that the claimant was not provided with a written statement of terms and conditions of employment. No explanation for this failure was put forward by the respondent.
- 14. On 7 April 2017, the claimant was told orally by the respondent that she was going to be made redundant, that he planned to pay her four weeks' pay and to pay for two weeks' accrued annual leave. He offered no explanation as to the reason why the claimant was being made redundant, nor did he engage in any consultation with her about the reasons why she had been selected for redundancy or whether there were any steps that could be taken to avoid redundancy. The claimant was not paid her ordinary wages for the period 11-13 April 2017.
- 15. On 13 April 2017, the respondent confirmed orally to the claimant that she would be dismissed on grounds of redundancy and she was told to leave then and there. The claimant asked to have a written confirmation of the

reasons for her dismissal and was told that these reasons would be provided in writing. However, they were not subsequently provided by the respondent and the respondent has offered no explanation for the failure to provide written reasons.

16. After the claimant's employment had terminated, the respondent made a payment to her of £2,100.00 through a series of bank transfers. It was suggested during the hearing that the respondent also gave her a cash payment of £350 on or around 10 April 2017. The claimant disputes this and there is no evidence that any such payment was made in any of the contemporary documents. I find it unlikely that the respondent would have made a significant cash payment of this sort to the claimant without requiring some sort of receipt from her or without in some way recording the payment that had been made so as to evidence it subsequently. I do not therefore accept that this cash payment was ever made to the claimant.
17. At the date of termination of her employment, the claimant had accrued entitlement to 12.5 days' holiday which she had not yet taken. This much is agreed by the respondent.
18. After her dismissal, the claimant, through her solicitors, made efforts to obtain notice pay, compensation for unpaid holiday, a redundancy payment and compensation for failure to provide written reasons for dismissal. However, the respondent ignored that correspondence and failed to make any of the payments sought from him.
19. During her employment with the respondent, the claimant sustained a hip injury after falling down some stairs. She has been receiving treatment for that injury for some time and it has limited the nature of the work that she felt able to seek after dismissal. Before joining the respondent, the claimant had worked as a carer in a residential care home. However, she was unable to take up that sort of work again due to the significant requirements for manual handling which it would have involved. The claimant had experience of office work through her employment with the respondent and also had some previous experience of retail work. After her dismissal, the claimant made six or seven job applications including to Homebase and Robert Dyas.
20. However, in or around June 2017, the claimant began to suffer from depression. The claimant and her GP both attribute her depression to her dismissal and I accept that evidence. The claimant's GP records that the condition has been present since June. As at 21 September 2017, the GP's assessment of the claimant's condition was that "*She is very low in mood, not sleeping and constantly tearful. In my opinion, having met her for the first time today, I don't think she is currently able to seek or hold down employment because of the severity of her depression.*" As a result of her depression the claimant has not been in a position to seek work. The claimant is, however, keen to return to work and is hopeful that she

will be fit to return to work within a few months. She seeks compensation for loss of earnings up to 12 April 2018.

The law

21. Section 38 of the Employment Act 2002 provides as follows :

“(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

(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[or under section 41B or 41C of that Act]2,

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.

(4) In subsections (2) and (3)—

(a) references to the minimum amount are to an amount equal to two weeks' pay, and

(b) references to the higher amount are to an amount equal to four weeks' pay.

(5) The duty under subsection (2) or (3) does not apply if there are exceptional circumstances which would make an award or increase under that subsection unjust or inequitable.”

22. The right to receive written reasons for dismissal is established by section 92 of the Employment Rights Act 1996 (ERA). Where written reasons are requested but there has been an unreasonable failure to provide such reasons a Tribunal may make a declaration as to the employer's reasons for dismissal and shall award a sum equal to the amount of two weeks' pay (section 93 ERA).
23. Section 135 ERA sets out the right to a redundancy payment where dismissal is on grounds of redundancy. Section 139 defines the circumstances in which a dismissal will be on grounds of redundancy which include a diminishing requirement for employees to carry out work of a particular kind either generally or at a particular location. Where a redundancy payment is due it is calculated in accordance with the formula set out at section 162 ERA.
24. Section 98 ERA sets out the test to be applied in determining whether a dismissal is fair or unfair. Where a claim for unfair dismissal succeeds, the claimant is entitled to compensation to be determined by reference to section 119 -122 (Basic Award) and sections 123-124 of the ERA (compensatory award). The amount of any basic award is to be reduced by any redundancy payment made (section 122(4) ERA 1996). Section 123(1) provides that the compensatory award should be:

“such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the claimant in consequence of the dismissal, insofar as that loss is attributable to action taken by the employer.”

25. Subsection 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...”

26. The respondent in this case has argued that the claimant has failed to take reasonable steps to mitigate her loss. It is for the respondent to show that there has been an unreasonable failure to mitigate. In doing so, it does not suffice for the respondent to point to additional, or alternative, steps that the claimant could have taken to find new employment, the respondent must show that the claimant acted unreasonably in failing to take those steps.

Conclusions

27. It is not in dispute that the reason for dismissal in this case is redundancy and that the claimant has sufficient qualifying service to be entitled to a redundancy payment under section 135-139 ERA. In accordance with section 162 ERA the claimant is entitled to a redundancy payment in the sum of £1,912.50 (3 years' service x 1.5 x £425 (gross pay)).
28. As regards the claim under section 38 of the Employment Act 2002, in relation to the failure to supply a statement of terms and conditions, I consider that it would be just and equitable to award four weeks' pay in relation to this failure. The respondent has put forward no good reason for a failure to supply terms and conditions of employment. The respondent runs a business and is a member of the Federation of Small Businesses. I would expect the respondent to be aware of his obligation to provide a statement of written terms and conditions to employees.
29. In relation to the complaint of a failure to supply written reasons for dismissal, I find that the reason for dismissal in this case was redundancy and I make an award of two weeks' pay in relation to the failure to provide written confirmation of the reason for dismissal.
30. The Respondent admits that the claimant was dismissed without notice. The claimant contends that reasonable notice would have been four weeks' notice. The statutory notice to which the claimant was entitled would have been three weeks. However, given the responsible nature of claimant's role as a Funeral Director I consider that a 4 week period of notice would have been reasonable.

31. The sums claimed by the claimant in relation to holiday pay are not disputed nor is it disputed that the claimant was not paid for the period 11-13 April 2017.
32. As regards compensation for unfair dismissal, I have concluded that the claimant should be compensated in full for the loss of earnings that she has suffered between the date of dismissal and the date of the hearing (factoring in the £2,100.00 already paid to her by the respondent). I have reached that conclusion for the following reasons:-
 - 32.1. I cannot accept the respondent's arguments that the claimant has unreasonably failed to mitigate her losses. The respondent has not put forward any specific evidence of opportunities that the claimant has failed to explore. The respondent's case is simply that the claimant could have done more than she did. However, the claimant made some efforts to mitigate her loss during the period April to June 2017 by seeking retail work. Given the hip injury that she had sustained and the impact of that injury on her ability to carry out manual work, it was not unreasonable for her to focus at that stage on seeking retail employment rather than returning to the care work in which she had been occupied before going to work for the respondent.
 - 32.2. By June 2017, the claimant was suffering from depression and I find that in light of the GP's assessment of her in September 2017, that she has not been fit to work or seek work from June 2017 to the date of hearing. I have also accepted the claimant's evidence that her depression was caused by the dismissal.
 - 32.3. The respondent did not contend that I should make a reduction on Polkey grounds but I have considered whether or not such a reduction would be appropriate. I have concluded that it would not be appropriate to speculate about what might have occurred had a fair process been conducted. Although I found that the claimant was made redundant, I have had no evidence as to the circumstances in which the redundancy situation arose or as to what alternatives to redundancy might have existed. There is certainly no basis for reliably concluding that a fair process would inevitably have resulted in the claimant's dismissal at some future date.
33. As regards future loss, given that the claimant has been suffering from depression for several months and given the evidence from her GP as to the severity of that condition I find that that the claimant is unlikely to make an immediate recovery such that she is likely to be ready to return to work early in 2018. However, I consider it likely that by mid-February, the claimant will be sufficiently recovered in order to begin to seek work once again. Given her broad previous experience in a number of fields (care

work, office work, and retail), she will be well placed to find other employment. The claimant is obviously keen to obtain such employment and I therefore conclude that she will find comparably paid work within a few months. I therefore consider it appropriate to award the future loss claimed, i.e. loss until 12 April 2018 but not to award compensation beyond that date.

34. I have calculated the amounts due to the claimant as follows:

Redundancy payment

3 x 1.5 x £425.00 (gross weekly pay) £1,912.50

Unpaid wages

for the period 11 - 13 April 2017

3/7 x £425.00 £182.14

Wrongful dismissal compensation

1 month covering the period 14 April – 14 May 2017

52/12 x £350.00 £1,517.00

Less £2,100.00 paid by the respondent (£2,100.00)

(-£400.86)

Unfair dismissal**Basic award**

In the light of the award of a redundancy payment

£0.00

Compensatory award

Loss to date of hearing covering the period
14 April to 4 December 2017

33 weeks and 5 days x £350.00 £11,800.00

Less £1,517.00 (for pay during notice period) (£1,517.00)

Loss of statutory rights £300.00

Future loss from 5 December 2017 to 12 April 2018

18 weeks and three days x £350.00 £6,450.00

Less balance paid by respondent (£400.86) (£400.86)

TOTAL £16,632.00

Unpaid holiday pay

12.5 / 5 x £425.00 £1,062.50

Failure to provide written statement of particulars

4 x £425.00 £1,700.00

**Failure to provide written reasons for
dismissal**

2 x £425.00

£850.00

Employment Judge Milner-Moore

Date: 8/1/2018

Judgment and Reasons

Sent to the parties on:

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For the Tribunal Office