



EMPLOYMENT TRIBUNALS

Claimant:
Mrs M Nin

v

Respondent:
PBH Precision Engineering Co
Ltd

Heard at: Reading

On: 11 May 2018

Before: Employment Judge Chudleigh

Appearances

For the Claimant: In person

For the Respondent: No attendance or representation

JUDGMENT having been sent to the parties on **22 May 2018** and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. In a claim presented on 13 November 2017, the claimant complained of unfair dismissal, wrongful dismissal (failure to give notice), a failure to pay accrued holiday pay and an unlawful deduction of wages. By the time the hearing had commenced, the only matter that was outstanding was the question of unfair dismissal.
2. The respondent presented a response but on 13 April 2018, the respondent was issued with an Unless Order stating that "Unless within seven days from the date the order was sent to the parties, the respondent complies with the case management order sent to the parties on 21 November 2017, the response will stand dismissed without further order".
3. The respondent did not comply with the Unless Order within the required time and in the circumstances, the response stood as dismissed. This fact was communicated to the parties by the Employment Tribunal on 1 May 2018.
4. The hearing was listed for 11 May 2018. The respondent applied for an adjournment on 24 April 2018 on the basis of ill health but the application was not supported by any medical evidence and the application for an adjournment was refused on 1 May 2018. In the circumstances, the hearing proceeded in the absence of the respondent.

The issues

5. The issues for consideration were:-
 - 5.1 Whether the claimant was dismissed or whether she resigned;
 - 5.2 If the claimant was dismissed, whether the dismissal was for a reason that was capable of being fair within the meaning of section 98 of the Employment Rights Act 1996 (“ERA”);
 - 5.3 If the dismissal was for a reason that was potentially fair or unfair within the meaning of section 98(4) of the ERA;
 - 5.4 Whether compensation fell to be deducted by reason of the claimant’s conduct or, if appropriate, because but for any procedural irregularity, there was a prospect that the claimant would have been dismissed in any event.
 - 5.5 Remedy, including whether the claimant is entitled to an uplift by reason of the respondent’s failure to comply with the ACAS Code of Practice.
6. The claimant attended the hearing and gave evidence. In addition, she called Mr Nikola Uchkunov. Mr Uchkunov was formerly employed by the respondent as Production and Quality Coordinator.

Findings of fact

7. The tribunal made the following findings of fact:-
 - 7.1 The claimant commenced employment with the respondent on 6 January 2014 as an Account Administrator. Two years later she was promoted to the position of Finance Manager. The claimant worked four days a week and at the time of her dismissal her annual salary was £30,000.00.
 - 7.2 The claimant’s partner was Mr Michael George. He was, until 20 June 2017, a director and the owner of the respondent. On 20 June 2017, Mr George sold the company to Mr Douglas Watson.
 - 7.3 In preparation for the sale, the employment contracts of the respondent were updated and in around January 2017, an employment contract was produced for the claimant in her role as Finance Manager.
 - 7.4 The respondent was in the business of precision engineering and, at the material time, had about 15 employees.
 - 7.5 The claimant’s role as Finance Manager required her to undertake payroll and undertake a wide range of other finance-related functions. She did the invoicing and input data into the Sage payroll system. In addition, she undertook bank reconciliations, dealt with cashflow, and produced a profit and loss statement every month.

- 7.6 It was envisaged that the claimant would stay on in employment after the ownership of the respondent company changed. There was an arrangement between Mr George and the respondent for him to undertake consultancy work. After the sale, Mr George did some consultancy work but the relationship between Mr George and Mr Watson soured and that work petered out.
- 7.7 On 11 July 2017, Mr Watson told Mr George that he was going to have to let the claimant go. Mr George advised the claimant of this fact and accordingly when Mr Watson approached her for a meeting later that day, the claimant recorded the conversation on her mobile phone. I have seen a copy of a transcript of that meeting and having heard the claimant's evidence, I am satisfied that it is an accurate transcription. The meeting started with Mr Watson telling the claimant: *"So I am afraid Marlene, I am going to let you go and we are making you redundant"*. He said that the cost of her role to the business was high and that her role could be absorbed. He also said: *"Off the record, because it's only you and I in the room, I would have loved you to stay but I think you are compromised because of your relationship with Mike [Mr George]. I have already said that to Mike"*. He also said: *"You do a really good job"* and *"Matt, my auditor, said it was one of the best audits he's ever done"*. He went on: *"But the problem for me is you are compromised because of your relationship with Mike. Obviously, Mike and I we haven't fallen out but we don't agree on some things and it's difficult, it's difficult for you because you are stuck in the middle between that"*.
- 7.8 He also said: *"I am as sad as you are because actually you are bloody good and actually whilst we might have changed things around, I could have brought other work for you to do here anyway"*. Further, Mr Watson said: *"What you do is excellent and I would have happily gone along with it and see it and work for us but there is this compromise with Mike and we can't get away from that and whilst you know, I'm being honest with you, officially I can't say that, that has brought the decision around for me to this"*.
- 7.9 Mr Watson then produced a gov.uk sheet showing a redundancy calculation and gave the claimant a pre-prepared letter dated 11 July 2017 purporting to dismiss her for redundancy with effect from 11 August 2017 and not requiring her to work her notice.
- 7.10 By letter dated 17 July 2017, the claimant was given the right to appeal. She sent in a letter dated 16 July 2017 appealing against the decision to dismiss her. She said that she did not believe there was a redundancy situation and that *"I believe I have simply been selected because I am the partner of the director from whom you bought the business and my role is not redundant"*.
- 7.11 In its response, the respondent said that on 11 July 2017, a meeting took place with the claimant to discuss the possibility of redundancy but she left the office and the business premises and refused to

agree a date to return to discuss the redundancy process. The suggestion is that the claimant was not dismissed but resigned. The respondent's response has been struck out but in any event, I rejected the account given in the response document. The claimant did not resign, she was dismissed.

- 7.12 Moreover, I find as a fact that there was no true redundancy situation. The functions which the claimant undertook at the material time had not diminished or reduced and were still required to be undertaken. It appeared to me that Mr Watson was uncomfortable with the claimant remaining in the business because she was the partner of the former owner. This was the reason that the claimant was dismissed, not redundancy.
- 7.13 It had been the claimant's intention to stay on with the respondent business for another year. She was 55 years old at the date of her dismissal, having been born on 15 September 1961. She enjoyed the role and wanted to continue with the company to ensure the smooth running of the finance function.
- 7.14 Following her dismissal, the claimant became ill with stress. She visited a cardiologist at Barts Health NHS Trust in February of 2018 complaining that she suffered a lot of stress during the summer of 2017 because of work-related issues and that she had been experiencing palpitations. The diagnosis was that the claimant was stable from a cardiac point of view but that her palpitations were probably related to the stressful events of the summer of 2017. I have seen a letter from Dr K Hain, the claimant's GP, dated 1 March 2018. In that letter, it is indicated that in July 2017, the claimant presented in a clearly stressed state following her redundancy. She was in an emotional state and having panic attacks. It was suggested that she should self-refer to "Talking Therapies" which she did. In the letter, Dr Hain indicated that the claimant had had a very difficult past six months from a physical and mental health aspect.
- 7.15 The claimant did not start searching for work immediately because she felt unwell. From about September 2017, she started looking for administrative roles but was unsuccessful in her searches.
- 7.16 The claimant's salary was £30,000.00 gross per annum. Her net pay was £1,973.00 per month.

Submissions on behalf of the claimant

8. The claimant put in written submissions. Her case was that she was dismissed because of her relationship with Mr George and that that was unfair. She contended that there was no fair procedure, that she did not contribute to the dismissal and that she would have stayed on with the respondent for a year had she not been dismissed. She also contended that the respondent had failed to comply with the ACAS Code of Practice and that there should be an uplift to her compensation to reflect this fact. In addition, she claimed a reference.

The Law

9. The burden was on the respondent to establish whether the reason for the dismissal was capable of being fair within the meaning of section 98(2) of the Employment Rights Act 1996 ("ERA"). If so, it was for the tribunal to consider whether the dismissal was fair or unfair within the meaning of section 98(4) ERA.

Conclusions

10. I have had no hesitation in finding that the claimant was dismissed by the respondent on 11 July 2017. That dismissal was communicated to the claimant orally by Mr Watson and was confirmed in writing. The dismissal took effect on 11 August 2017.
11. I was not satisfied that there was a redundancy situation or if there was, that that redundancy situation was the reason for the dismissal. The finance functions that the claimant undertook continued to be required within the respondent organisation. It may be that the decision was taken by the respondent to absorb those functions into the work of other employees. However, the reason that that course was taken was because the respondent wanted to get rid of the claimant. The reason that the respondent wanted to get rid of the claimant was because she was in a relationship with Mr George, the previous owner.
12. In the circumstances, my finding was that the reason for the dismissal was not redundancy. It was possible that the reason could have been for a substantial reason of a kind such as to justify the dismissal within the meaning of section 98(1)(b) of the ERA but I was not satisfied on the evidence before me that that was the case. It did not appear that Mr Watson and Mr George had had some form of dramatic falling out. It seemed that Mr Watson simply did not want the claimant working in the business because she was in a relationship with Mr George. It seemed to me, on the face of it, that that was not a substantial reason of a kind such as to justify the claimant's dismissal from her role as Finance Manager. Accordingly, my conclusion was that there was no fair reason for the dismissal within the meaning of section 98(2) of the ERA.
13. Further, and in any event, the dismissal was profoundly unfair because there was a complete lack of any form of procedural fairness. The claimant was not put on notice that the respondent was considering dismissing her because of her relationship with Mr George. She was not given the opportunity to state her case. Moreover, her letter requesting an appeal was completely ignored. Accordingly, in the circumstances, the dismissal was unfair within the meaning of section 98(4) of the ERA.
14. The claimant did not contribute to the dismissal. It would be inappropriate for me to make a reduction from compensation by reason of her conduct. Furthermore, I could see no reason for a Polkey reduction. It seemed to me in the circumstances that but for the unfairness the claimant would have continued in her role as Mr Watson indicated that she might have been able to do at the meeting on 11 July 2017.

15. I was not satisfied that the provisions of section 207A of the Trade Union and Labour Relations (Consolidation) Act was applicable in this case. The dismissal did not involve any element of culpability on the claimant's part and accordingly, I did not consider that the ACAS code applied – see Holmes v Qinetiq Ltd UKEAT/0206/15/BA and Bethnal Green and Shoreditch Education Trust v Dippenaar UKEAT/0064/15. Accordingly, I declined to make an uplift to the compensation payable to the claimant.
16. The basic award fell to be calculated on the basis of three complete years of service during which time the claimant was over the age of 41. The basic award in question amounts to £2,200.50 (1.5 x £489 x 3).
17. Insofar as the compensatory award is concerned, the claimant was entitled to compensation for loss of statutory rights in the sum of £450.00.
18. The claimant claimed a gross sum of £30,000.00 representing a year's pay. However, it is necessary for any award to be calculated in net terms to compensate the claimant for what she would have received but did not because of the dismissal.
19. Insofar as the question of mitigation is concerned, the burden was on the respondent to show that the claimant failed to mitigate her losses. The respondent failed to discharge that burden. Moreover, having heard the claimant, I considered that she did take reasonable steps to mitigate her losses. She was unwell during the summer of 2017. This was demonstrably the case on the medical evidence before me. It was therefore reasonable for her not to start searching for work until September 2017. Thereafter, the claimant has been unable to find any appropriate role. At the time of the hearing, nine months had passed since the claimant had been dismissed and my view was that there was no chance of her obtaining another job within the next three months. In the circumstances, I considered that it was appropriate and just and equitable to award the claimant a year's net loss in the sum of £23,676.00.
20. The total award therefore comprised a basic award of £2,200. 50 and a compensatory award in the total sum of £24,126.00 making a total of £26,326.50.

Employment Judge Chudleigh

Date:11/7/18.....

Reasons sent to the parties on

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For the Tribunal office

