EMPLOYMENT TRIBUNALS

Claimant: Mr M Harris

Respondent: Pelloby Ltd

Heard at: Birmingham **On: 6 June 2018**

Before: Employment Judge Wynn-Evans

Representation
Claimant: Ms Roberts, Counsel
Respondent: Mr Casewell, Director

Judgment having been sent to the parties on 19 June 2018, a certificate of correction to that judgment having been sent to the parties on 2 August 2018 and written reasons having been requested in accordance with rule 62(3) of the Employment Tribunals Rules of Procedure 2013 the following reasons are provided derived from the oral decision delivered at the conclusion of the hearing.

REASONS

1. This remedy hearing was listed by Order of Employment Judge Hughes of 8 February 2018 on the basis that, under rule 21 of the Employment Tribunals Rules of Procedure 2013, because the respondent had not entered a response within the time limit prescribed by rule 16(1) of those rules, a judgment may now be issued. These reasons record the reasons given for my judgment at this remedy hearing on the basis and including the correction made to the final judgment in this matter set out in the certificate of correction referred to above.

2. The claimant was represented at this hearing by Ms Roberts and the respondent by Mr Casewell its Operations Director.

3. I had before me a remedy hearing bundle, a witness statement of the claimant and the claimant's schedule of loss. I heard evidence from the claimant whose evidence I had no reason to doubt not least given his willingness readily to accept certain of minor errors which had been made in the calculation of the amounts which he claimed and the consistency of his evidence with the documentation. On careful consideration of his evidence and the documentation before me I had no reason to doubt the claimant's evidence.

4. No response had at any time been submitted by the respondent and no application had been made for reconsideration of the decision to list this remedy hearing or for an extension of time in which to present a response.

5. I drew to the attention of the parties the provisions of rule 21 of the Employment Tribunal Rules of Procedure 2013 and in particular rule 21(3) which provides that the respondent shall only be entitled to participate in any hearing to the extent permitted by the Judge and I sought the representations of the parties on this issue. The claimant contended that in the circumstances the respondent should not in any way be allowed to participate in essence on the basis of its complete failure to engage in and cooperate in relation to these proceedings. The respondent ascribed its lack of engagement in these proceedings to recent difficult trading conditions which had led to its trading under a company voluntary arrangement. Having considered the matter, particularly since there was some factual dispute about whether expenses were owing and an assessment to be made about any appropriate adjustment to compensation to reflect alleged unreasonable breach of the Acas Code, I concluded that the interests of justice would be best served by allowing the respondent to cross examine the claimant on the remedies sought, noting that the respondent would not be allowed to give evidence itself on the substantive claims in relation to which it had failed to respond without sufficient excuse. In the event the respondent's challenge to the claimant's account of events was minimal and did not in my judgment lead me to doubt any of the claimant's evidence or contentions.

6. At the outset of the hearing I clarified that the claimant's claims were for: -

- Payment for time off in lieu ("TOIL") by way of breach of contract and, in the alternative, unlawful deductions from wages.
- Payment of expenses unpaid on termination by way of a breach of contract claim.
- Damages for breach of contract in respect of the claimant's notice period.
- Compensation by way of the basic and compensatory awards for unfair dismissal.

7. I noted that the claimant sought a 25% uplift for alleged unreasonable failure on the respondent's part to comply with the ACAS Code on Disciplinary Procedures and indicated to the claimant's representative the need specifically to address the claimant's contentions in that regard.

8. In the course of evidence and discussion it became clear that there was a degree of double counting in relation to the claimant's schedule of loss since the schedule sought recovery of net loss in respect of the period from 31 July 2017 to 11 August 2017 under both the heads of wrongful dismissal/breach of contract damages and the compensatory award for unfair dismissal. It was therefore agreed that the correct calculation of the claimant's total loss in respect of the compensatory award should therefore adjusted from £10,619.28 to £10,354.52 – to which figure any appropriate adjustment is to be applied.

9. It was also clarified that the claimant's claim for TOIL was in effect a breach of contract claim for unpaid holiday - given that the agreement he had reached with the respondent was that TOIL be treated as additional holiday – and that the net amount sought in that regard was £775.44 as opposed to the gross figure of £1,115.34 set out in the claimant's schedule of loss.

10. I accepted the claimant's evidence on all the matters which he addressed before me as well as the calculations which he put forward in his schedule of loss

subject to the corrections already identified. I identified no jurisdictional issue why the Tribunal was not competent to adjudicate this claim whether by way of employment status, compliance with the Early Conciliation proceedings, the requisite service to bring an unfair dismissal claim, presentation of the claim form within the applicable time limit or otherwise. In light of the respondent's failure to present a response and on review of the evidence before me in my judgment the claimant's breach of contract and unfair dismissal claims should succeed. It therefore falls to be to determine the appropriate compensation for the claimant's claims for breach of contract and unfair dismissal.

11. With regard to both such claims I remind myself of the need, when determining compensation, to take into account ofwhether the claimant has used reasonable efforts to mitigate his loss. With regard to the claimant's unfair dismissal claim, since he seeks only the remedy of compensation, I remind myself of section 119 of the Employment Rights Act 1996 with regard to the calculation of the basic award and section 123 of the Employment Rights Act 1996 with regard to the assessment of the compensatory award and in particular that such award shall 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 his dismissal in so far as that loss is attributable to action taken by the employer.

12. Consequent upon this decision the tribunal is obliged under section 38 of the Employment Act 2002 to make an award of two weeks' pay or, if just and equitable in all the circumstances, four weeks' pay subject always to the applicable statutory limit on a week's pay which was at the time of the effective date of the termination of the claimant's employment £489 per week.

13. Turning to issues of remedy I accept that the claimant's account of his actual and likely losses are a reasonable assessment given his evidence about the stability of the amount of work he is doing in his new role and his assessment of his net loss which was, in my credibly and appropriately based on and evidenced by his current net earnings as set out in his accountant's supporting documentation as disclosed in the hearing bundle.

14. I accept that the claimant has used reasonable endeavours to mitigate his loss by seeking alternative employment opportunities and doing some temporary work for a previous employer on a contract basis before joining Jaguar Land Rover in a position which he undertakes through a limited company. This position with JLR mitigates the claimant's losses very materially and is a position in which it is understandable that he wishes to stay for a period in order effectively to stabilize his career history after his dismissal by the respondent. I accept that, given the lengthy training needed a transfer to another job at Jaguar Land Rover, even if such a position were available and desirable, for the claimant to seek such a transfer would be unlikely to lead to a material increase in the claimant's remuneration - ad therefore his mitigation - during the period for which he seeks prospective compensation.

15. As I have accepted the claimant's evidence, I therefore accept that the TOIL for which he seeks compensation did fall to be treated as holiday and therefore

payable on termination of employment to the extent untaken at that point, and that the expenses which he claims, and for which there was evidence in the bundle are payable to him.

16. Turning to the findings which I need to make in respect of the contention by the claimant that the respondent was in unreasonable breach of the Acas Code on Disciplinary and Grievance Procedures ("the Code") in dismissing the claimant I also accept, based on the evidence before me, that in proceeding to terminate the claimant's employment the respondent did breach the Code, and that it was unreasonable to do so My specific findings in this regard are as follows: -

- Mr Casewell investigated the issues and was the dismissing officer in contravention of para 6 of the Code which provides that these functions should where possible be conducted by separate individuals – there was no apparent reason why the investigatory ad disciplinary functions could not have been conducted separately;
- The claimant was not, in breach of para 9 of the Code, given sufficient information about the alleged misconduct to enable him to prepare to answer the case at the disciplinary meeting as the supporting evidence relied upon by the respondent was not provided in the initial letter convening the disciplinary hearing and new allegations were raised at the disciplinary meeting.
- the claimant was not, in breach of para 12 of the Code, afforded the opportunity to raise questions about the new allegations raised at the disciplinary hearing.
- in breach of para 17 of the Code, the claimant's companion was not allowed to address the hearing as was confirmed in the letter convening the disciplinary meeting.
- There was no apparent excuse or justification for or the respondent's failures to adhere to the requirements of the Code.

17. Turning to the findings which I need to make in respect of the Tribunal's obligation, following one of the relevant claims being successful, to consider whether an award under section 38 of the Employment Act2002 should be made and on what basis, I accept that the claimant's employment contract did not specify when the claimant's employment began or whether any collective agreements directly affected the terms and conditions of the claimant's employment including, where the employer is not a party, the persons by whom they were made or whether any collective bargaining arrangements. These are particulars required to be provided under sections 1(3)(b) and 1(4)(j) of the Employment Rights Act 1996 as part of the requisite statement of initial employment particulars. I note for completeness that, pursuant to section 2(1) of the Employment Rights Act 1996, if no particulars are to be entered in respect of a relevant matter that fact shall be stated. No such statement was made in respect of the specific particulars referred to above.

18. On the basis of the evidence before me I make the following specific findings in relation to the claimant's schedule of loss: -

- in my view, as the respondent's infractions of its obligations to provide a written statement of particulars of employment pursuant to section 1 of the Employment Rights Act 1996 were relatively minor in the context of a reasonably detailed employment contract, I do not consider it just and equitable to make an award in this regard of 4 weeks' pay as opposed to the minimum award of 2 weeks' pay.
- I am satisfied on the basis of the evidence before me that the respondent's handling of the disciplinary process constituted a very significant and material breach of the Acas Code in the respects already identified, and for which there as no reasonable excuse or mitigation, and therefore that the uplift which I should apply should be the 25% sought by the claimant not least given the serious and potentially career wrecking allegations which the respondent made against the claimant of gross misconduct with regard to time sheets and expenses and which were not addressed in a procedurally fair fashion in accordance with the requirements of the Code.

19. Applying my findings to the claimant's schedule of loss, which I otherwise accept subject to the corrections already identified, my decision in terms of remedy is as follows: -

(a) Breach of contract -wrongful dismissal - £1667.19
(b) Breach of contract – pay in respect of time off in lieu - £775.44
(c) Basic award for unfair dismissal - £978
(d) Compensatory award for unfair dismissal - £13,443.15
(e) Award pursuant to section 38 Employment Act 2002 - £978.
(f) Breach of contract in respect of unpaid expenses - £1457.60.

_____

Employment Judge Wynn-Evans

Date__10.08.2018 _____

JUDGMENT SENT TO THE PARTIES ON

.....

.....
FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.