EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr J Rodriguez-Paz	**- V -**	CSCS Contracts Ltd

Heard at: London Central **On**: 19 November 2018

Before: Employment Judge Baty

Representation:

For the Claimant: In person
For the Respondent: Mr G Brooker (director)

JUDGMENT (REMEDIES)

1. The Claimant's complaints of unfair dismissal and breach of contract (notice pay) having succeeded, the tribunal makes a total award of £3,417.84, payable by the respondent (CSCS Contracts Ltd) to the claimant. This comprises:

a. unfair dismissal basic award of £253.80; and

b. unfair dismissal compensatory award of £3,164.04.

2. The Recoupment Regulations do not apply.

REASONS

Rule 21 judgment

1. The respondent, CSCS Contracts Ltd, had not submitted a response to the claimant's claim. At an earlier hearing on 9 October 2018, Employment Judge Pearl issued a rule 21 judgment that the claimant's complaints of unfair

dismissal and breach of contract succeeded against CSCS Contracts Ltd. He directed that this remedies hearing be listed and that CSCS Contracts Ltd should be entitled to make representations at this hearing.

2. The claim had originally been brought against two respondents, the other being Personal Touch Cleaning Services ("Personal Touch"). However, at the previous hearing, Judge Pearl determined that, a transfer under the Transfer of Undertakings (Protection of Employment) Regulations 2006 having transferred the employment of the claimant from Personal Touch to CSCS Contracts Ltd, CSCS Contracts Ltd had simply refused to accept him as an employee. Hence it was liable for the claimant's unfair dismissal and breach of contract complaints. CSCS Contracts Ltd had neither presented a response to the claim nor attended at the hearing on 9 October 2018. Judge Pearl had at that hearing also, therefore, discharged Personal Touch from the proceedings.

3. References in these reasons to "the respondent" are from now on to CSCS contracts Ltd.

4. Judge Pearl also made various findings at the last hearing which are relevant. These are that the claimant earned £84.60 in his part-time job with Personal Touch which should have transferred under TUPE to the respondent. The basic award for unfair dismissal was therefore £253.80. All of these findings were backed up by documentary evidence which I saw at the remedies hearing.

The Issues

5. The issues for me to determine were what compensation should be payable to the claimant and, in connection with this, whether the claimant had adequately mitigated his loss.

6. The claimant produced a short statement for the hearing. He was briefly cross-examined by Mr Brooker and I had a few questions for him as well. Both parties were given the opportunity to make further representations. Mr Brooker chose to do so briefly; the claimant made no further representations beyond what was in his statement.

7. As well as the documentation that was already on the employment tribunal file, I was also provided by the claimant with his pay slips from his time at Personal Touch.

8. I adjourned to consider my decision and, when the parties returned, gave my decision orally. At the end of the hearing, Mr Brooker asked for written reasons for the decision.

The Law

Unfair dismissal compensation

9. Unfair dismissal compensation comprises a basic award calculated by reference to a statutory formula set out in s.119 of the ERA and a compensatory

award. In relation to the compensatory award, s.123(1) of the ERA provides as follows:

> "Subject to the provisions of this section…, the amount of the compensatory 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 the dismissal insofar as that loss is attributable to action taken by the employer."

10. Further s.123(4) provides as follows:

> "In ascertaining the loss referred to 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 or (as the case may be) Scotland."

11. Where one party seeks to allege that another has failed to mitigate his loss, the burden of proof is on the party making that allegation to prove it on the balance of probabilities.

Findings of Fact

12. I make the following findings of fact. In doing so, I do not repeat all of the evidence, even where it is disputed, but confine my findings to those necessary to determine the agreed issues.

13. The claimant's date of birth is 27 August 1972.

14. The claimant's continuous employment with Personal Touch began on 24 August 2015. At the time of the termination of his employment by the respondent, the claimant had accrued over two years' continuous employment.

15. The claimant was entitled to statutory notice of termination of employment; in the claimant's case, because of his length of continuous employment, this statutory notice was two weeks' notice.

16. The claimant had worked on three different contracts which Personal Touch had, only one of which (the "Douglas" contract) transferred to the respondent. It transferred with effect from 1 March 2018.

17. The claimant worked nine hours per week on the Douglas contract. These hours were from 11 AM to 2 PM on Monday, Wednesday and Friday. (The claimant occasionally did limited extra hours on the Douglas contract, but only seeks compensation on the basis of the nine core hours per week which he worked).

18. The claimant was paid at the rate of £9.40 gross per hour on the Douglas contract. He was therefore paid £84.60 gross per week for his nine core hours on the Douglas contract.

19. His rates of pay on the other contracts were different, although not radically so.

20. Of the total hours which the claimant worked for the three contracts for Personal Touch, the hours worked on the Douglas contract comprise roughly a quarter of the total hours, albeit the hours could vary slightly on each of the three contracts. The claimant was provided with pay slips by Personal Touch on a monthly basis; these showed the hours worked on each of the three contracts; any deductions shown on the payslips were shown as the totality of deductions for that month for all of the contracts and were not done by reference to each of the three individual contracts or broken down to a weekly basis.

21. The claimant did not work for anyone apart from Personal Touch. However, as regards the other non-Douglas contracts, he worked from 7 AM to 10 AM Monday to Friday, on Monday from 2 PM to 5 PM, and on Tuesday and Thursday from 11 AM to 2 PM.

22. The claimant's wife works full-time and has a better paid job than the claimant. The claimant is responsible for caring for their eight-year-old daughter after 2 PM on Tuesdays to Fridays. He is not able to get cover for this period. However, that situation will change with effect from January 2019, when a relative of the claimant will be moving to the UK who can look after the claimant's daughter during this period. This means that the claimant will be able to work during that period from January 2019 onwards. On this basis, the claimant only seeks compensation for the period from the beginning of March 2018 until the end of December 2018.

23. The claimant's efforts to find alternative work have therefore focused only on replacing the 11 AM to 2 PM slots which he has lost as a result of no longer working on the Douglas contract; he is unable, for the reasons above, to work at times of the day other than these.

24. The claimant has made searches on the Internet and has contacted agencies such as Reed and Adecco. However, whilst there is cleaning work available, it is difficult for him to obtain work during these specific hours and none has been available so far.

25. The claimant has not been in receipt of any unemployment benefits.

Conclusions on the issues

26. I make the following conclusions, applying the law to the facts found in relation to the agreed issues.

Basic award

27. The claimant had two complete years continuous employment at the time of his dismissal on 1 March 2018. As he was over the age of 41 during all of his service with Personal Touch, a multiplier of 1.5 is also applied under the statutory formula to calculate the basic award.

28. The claimant is entitled to a basic award calculated by reference to his gross weekly wage of £84.60, multiplied by his two years' complete service, multiplied by 1.5. This formula produces a basic award of £253.80.

Compensatory award

29. It is not reasonable to expect the claimant to look for work at times when he is already working on the remaining contracts for Personal Touch. Furthermore, it is not reasonable to expect the claimant to look for work at times when he has childcare responsibilities in relation his daughter; as his wife has a full-time job, particularly one which pays more, it is entirely reasonable for her to continue in that job and for the claimant to undertake the childcare responsibilities in relation to their daughter. There are no other feasible options in this respect.

30. As that covers working hours within the working day apart from the hours on the Douglas contract which the claimant lost, it was reasonable for the claimant to focus his search only on those specific hours. He made reasonable attempts to find further work, as set out in my findings of fact above, but that work was not available. He has, therefore, made reasonable attempts to mitigate his losses.

31. That situation will change in January 2019, when he can widen his search due to his no longer having childcare responsibilities to the same extent as he has now. Therefore, and this is own submission, he will be able to mitigate his losses fully with effect from the start of January 2019.

32. The claimant is therefore entitled to his ongoing losses for the period from the start of March 2018 to the end of December 2018. That is a period of roughly 44 weeks.

33. On a gross basis, his compensatory award would therefore be £84.60 multiplied by 44 weeks, which totals £3,722.40 gross.

34. However, I did not have figures for what the claimant's net weekly pay was and the compensatory award is calculated by reference to net weekly pay rather than gross weekly pay. I explained this to the parties when I had given the decision above and we had a general discussion about how to proceed in the circumstances.

35. The problem was that the pay slips which were before me were not only done on a monthly basis but lumped together all of the hours from the three different contracts on which the claimant worked. Furthermore, the hours on these contracts varied. It was not, therefore, possible to ascertain how much tax and national insurance was deducted precisely on a weekly basis at all, let alone specifically in relation to the Douglas contract. The amounts which the claimant earned would on an annual basis take him slightly above the personal tax allowance and, for the most part, the pay slips did include deductions for tax and national insurance, albeit not of large amounts. I noted that, when one looked at the pay slips together, on average the sort of amounts deducted for tax and

national insurance were up to roughly 15% of the total payments over the three contracts. I therefore asked the parties if, given that it was impossible to calculate it precisely, they were prepared to take a pragmatic approach and to agree a deduction from the gross figure in that sort of order.

36. Mr Brooker suggested that, as the claimant's employment with him would have been a second employment, he would have been obliged to deduct basic rate tax from all payments which he would have made to him. I did not, however, have before me legal authority on this point.

37. As the parties were unable to agree an approach here, I decided to impose one. As set out in my summary of the law above, I am obliged to make a compensatory award of an amount which I consider to be "just and equitable". In the absence of the information required precisely to calculate the claimant's net weekly pay, I therefore looked at the various payslips before me, which covered a period of roughly 2 years. On a very general view, I considered that on average the deductions were up to around 15% as a whole. I therefore concluded that it would be just and equitable in the circumstances to deduct 15% from the total gross losses over the 44 week period in order to calculate the net losses which would form the compensatory award. £3,722.40 less 15% equals £3,164.04. I therefore made a compensatory award in this amount.

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Employment Judge Baty

Dated:. 19 November 2018

Judgment and Reasons sent to the parties on:

20 November 2018

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For the Tribunal Office