



EMPLOYMENT TRIBUNALS

Claimant: Mr G Aston

Respondent: Ultra Furniture Limited (In administration)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Heard at: Birmingham

On: 5 March 2019

Before: Employment Judge Kelly

Representation

Claimant: Mr B Frew of counsel

Respondent: No appearance

JUDGMENT

The judgment of the Tribunal is that:

The claimant was unfairly dismissed. The respondent is ordered to pay the claimant compensation of £97,144.00 being made up of £13,462.00 basic award and £83,682.00 compensatory award.

The claimant was wrongfully dismissed. The respondent is ordered to pay the claimant £25,000.00 for breach of contract in respect of his notice pay.

The respondent made a deduction from the wages of the claimant in the sum of £2,519.26. The respondent is ordered to pay the claimant the sum of £2,519.26.

The claimant's claim for holiday pay under the Working Time Regulations 1998 is well founded. The respondent is ordered to pay the claimant compensation in the sum of £2,159.37.

The Recoupment Regulations do not apply.

REASONS

1. By a claim presented on 26 Jun 2018, the claimant brought claims for unfair dismissal, wrongful dismissal (notice pay), wages and holiday pay. He conciliated via ACAS from 16 to 30 Apr 2018.
2. The respondent did not present a response.
3. On 9 Aug 2018, the administrator gave consent to the claim proceeding against the respondent.
4. The Secretary of State for Business, Energy and Industrial Strategy was formerly named as a respondent and presented a response. He sought to be dismissed from the claim, which was effected on 18 Feb 2019.
5. In the course of the Hearing, the claimant withdrew a claim for an uplift for the respondent's failure to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures.
6. We heard oral evidence from the claimant.
7. We were given a bundle of documents and a schedule of loss.
8. References to "the Hearing" are to the Tribunal Hearing.

What happened

9. We make the following findings of fact relevant to the issues in dispute.
10. We accept the claimant's evidence on the circumstances of his employment and dismissal, and his mitigation of loss, the respondent not having presented a response nor sought to cross examine the claimant.
11. The claimant was dismissed with immediate effect on 7 Apr 2018. On 21 Jun 2018, the respondent went into administration.
12. The claimant had 18 years continuous employment with the respondent from 5 Jul 1999 to 7 Apr 2018. His role on termination was managing director. His date of birth is 29 January 1960 and he was aged 58 at the date of termination of employment.
13. The claimant was employed under a service agreement of 1 July 2005 between himself and Raven Holdings Limited ("the Contract"). His employment was then subsequently transferred under the Transfer of Undertakings Regulations and the Contract remained current.
14. The Contract provided as follows:
15. At clause 1.1.1, that the respondent could terminate the claimant's employment on not less than 6 months' notice in writing.
16. His employment could be ended without notice under clause 16.1 in the event of gross misconduct and other eventualities. In particular:

- 16.1. Under clause 16.1.2, if the claimant committed any gross misconduct or gross negligence;
 - 16.2. Under clause 16.1.2, if the claimant committed any material breach of the agreement or, after warning, any breach of the agreement;
 - 16.3. Under clause 16.1.8, if the claimant failed “to keep such accounts and records as the Board shall from time to time require in connection with the Company’s business”;
 - 16.4. Under clause 16.1.13, if the claimant committed “any fraud, dishonesty or conduct tending to bring himself, the Company or any Group Company to disrepute.”
17. Under clause 16.5, the respondent reserved the right to terminate the employment with immediate effect by notifying this to the claimant and confirming it would make a payment in lieu of notice. In that event, the payment in lieu of notice would be an amount equal to the claimant’s normal basic salary plus a cash sum equivalent to his benefits in respect of the unexpired period of notice “subject to an obligation on the respondent to mitigate his loss”. The respondent did not in fact exercise that right.
 18. The claimant was suspended, further to disciplinary allegations, on 17 Jan 2018. The respondent’s Chairman was an investigator of the allegations. The respondent instructed Grant Thornton to investigate the allegations and it reported on 8 Mar 2018 that there was no evidence of wrongdoing other than some unreceipted expenses for which the claimant was able to provide evidence in support retrospectively. This allegation was later withdrawn.
 19. At a supposed disciplinary hearing, on 21 Mar 2018, the respondent’s Chairman informed the claimant that the hearing was an investigation meeting. The claimant asked for the allegations against him to be clearly set out and for copies of all evidence relied on. These were not provided and the claimant was dismissed by letter of 7 Apr 2018 for gross misconduct by the Chairman who said in his letter “I do not feel that there is anything that you could now do to change my view”.
 20. In the dismissal letter, the Chairman referred to clause 16.1.8 of the Contract and said that serious and unsatisfactory performance within a senior management and leadership role fell within this definition. The claimant contended, and we accept, in the absence of a response in these proceedings from the respondent, that business failings were the responsibility of the operations director, the finance director and the Chairman and that the claimant was not guilty of serious unsatisfactory performance or failing to keep accounts required by the Board.
 21. The Chairman also made other allegations which the claimant refuted in an email of 21 Feb 2018, as explained by the claimant at para 35 - 48 of his witness statement. We accept his refutations, in the absence of a response in these proceedings from the respondent. We accept that the claimant did not commit a gross misconduct or gross negligence or any material breach of the agreement.
 22. We find that the Claimant did not do anything to warrant his dismissal without notice under clause 16.1 of the Contract.
 23. The claimant did not appeal because the Chairman was the most senior person in the respondent and he considered clear that the Chairman had been intent on dismissing him and an appeal would be futile.

24. On the day of his suspension, the claimant saw a presentation from the respondent to an invoice discounting company, referring to a turnaround plan under fresh leadership. The claimant contended that this supported his belief that the disciplinary allegations were contrived to dismiss him at minimum cost and we agree with that conclusion.
25. On termination, the claimant was owed seven days salary and six days accrued but untaken holiday. This is acknowledged by the respondent in an email of 26 Apr 2018 which also confirms the figure due of a total of £4,678.63. The claimant broke this figure down as £2,519.26 for seven days salary and £2,159.37 for six days accrued holiday, which we accept.
26. On termination, the claimant was paid an annual salary of £80,000 and an annual car allowance of £12,000. He was reimbursed all private fuel. He received a 6% pension contribution. He was entitled to private medical insurance. He was provided with a mobile phone. The claimant calculated his monthly net pay including pension contributions and benefits was £6350, which figure we accept.
27. After dismissal, the claimant paid a professional service to help him prepare his CV and he had received no reply after applying for several vacancies. He enrolled with three specialist recruitment agencies. He applied for 40 vacancies with no interview. One of the recruitment agencies advised the claimant that his long service with the respondent was a major contributing factor to his not getting interviews and he suggested that the claimant look to find short term consultancy. The claimant set up his own company and got his first assignment in September 2018 which is due to expire at the end of March 2019. He worked an average of 17.5 days per month during the assignment. He had hoped to achieve a daily fee rate of £500 gross but was in fact paid £350 gross per month in the assignment because of his inexperience in a consultancy role.
28. The claimant has earned gross £26,525 from consultancy from the end of his employment to the date of this Hearing. He estimates this to represent the net sum of £18,570, which estimate we accept. He expects to earn £5850 gross in March 2019, which he calculates as being £4095 net, which we accept. He has no further work arranged after the end of his current consultancy.
29. The claimant gave evidence, which we accept, that he had just contacted two agencies looking for another assignment, but had been told that there were no opportunities at present. We also accept the claimant's evidence that this kind of work is very quiet from June to August inclusive and picks up again in September, and that contracts are usually 3 – 6 months in duration. The claimant hoped to achieve £500 per day gross in his next assignment.
30. For unfair dismissal, the claimant claimed lost pay and benefits to date of Hearing of £68,869.57 net, against which he set off the £18,570 net earned during the period, making a sum claimed of £50,299.57.
31. He claimed £300 for loss of statutory rights.
32. He claimed 52 weeks future losses in the sum of £76,196.32 against which he set off £4095 net in future earnings, leaving a balance of claimed loss of £72,101.32.
33. He total claimed compensatory award was £122,700.89, of which he applied £25,000 to his breach of contract claim and £97,700.89 to his compensatory award.

The law

34. Under section 98(1) Employment Rights Act 1996 (ERA), in determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show – (a) the reason (or, if more than one, the principal reason) for the dismissal, and (b) that it is either a reason falling within sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
35. The burden is also on the respondent in the breach of contract claim to show that the contract was lawfully terminated without notice, although the burden is on the claimant to show he is contractually entitled to the sums due on the breach of contract claim. The burden is on the claimant in the wages and holiday pay claims to show his entitlement.
36. Calculation of basic award for unfair dismissal is set out in s119 ERA.
37. Calculation of compensatory award for unfair dismissal is set out in s123 to 124 ERA.
38. Under Rule 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 (the Extension of Jurisdiction Order), proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if – (a) the claim is one to which section 131 (2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine, (b) the claim is not one to which article 5 applies and, (c) the claim arises or is outstanding on the termination of the employee’s employment.
39. Under Rule 10 of the Extension of Jurisdiction Order, the maximum sum which an employment tribunal may order to be paid is £25,000.
40. Under Regulation 14 of the Working Time Regulations 1998:

“(1)This regulation applies where -

 - (a) a worker’s employment is terminated during a course of his leave year, and
 - (b) on the date on which the termination takes effect (“the termination date”), the proportion he has taken of the leave to which he is entitled in the leave year under Regulation 13 and Regulation 13A differs from the proportion of the leave year which has expired.

(2) Where the proportion of leave taken by the employer is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).”
41. Under Part II ERA, an employer shall not make an unauthorised deduction from the wages of a worker employed by him.

Conclusions

Salary and holiday pay claims

42. The claimant has proved his loss to outstanding salary and holiday pay in the sum of £4,678.63, through providing an email in which the respondent confirms that this sum is due.

Wrongful dismissal claim

43. The burden is on the respondent in the wrongful dismissal claim to show that it was entitled to dismiss the claimant summarily and the respondent has failed to put in a response. We have found that the claimant did not commit any act warranting his dismissal without notice under clause 16.1 of the Contract. Under the terms of the Contract, the claimant was entitled to six months' notice of termination, unless the respondent exercised a right to pay in lieu of notice, which the respondent did not do. We find that the claimant was wrongfully dismissed.

Unfair dismissal claim

44. The burden is on the respondent in the unfair dismissal claim and the respondent has failed to put in a response and has not shown the reason for the dismissal or that it was of a kind such as to justify the dismissal. We find that the claimant was unfairly dismissed. There were also important procedural failings prior to dismissal such as the failure to hold a disciplinary hearing which would have rendered the dismissal unfair.

Quantum

Unlawful deduction from wages and holiday pay claims

45. We accept the claimant's explanation of the sum which the respondent wrote was due to the claimant, being £2,519.26 for seven days salary and £2,159.37 for six days accrued holiday.

Wrongful dismissal claim

46. The claimant's notice pay claim comes to a sum in the region of $6 \times £6350 \text{ net} = £38,000$, which is substantially in excess of the £25,000 cap on the sum we can order be paid for such claims. Therefore, even if a small amount (up to 17.5 days pay at £350 gross per day) of mitigation may be due for the claimant's earnings in September 2018 (on the basis that the respondent could lawfully have chosen to terminate the contract under clause 16.5 of the Contract), this would not reduce the sum due to the claimant below the statutory cap. Accordingly, the maximum figure of £25,000 is ordered to be paid.

Unfair dismissal

47. The claimant's basic award, on the basis of his age and length of service at termination of employment, is calculated as $26.5 \times £508$ (being the statutory cap on a week's pay for these purposes at the date of termination) = £13,462.00.
48. In respect of the compensatory award:
49. The claimant claims £300 for loss of statutory rights, which we accept as reasonable.

50. We accept the claimant's calculation of net loss of earnings to date of Hearing being earnings in employment with the respondent less earnings from alternative sources IE £50,300.
51. With regard to future loss, we do not accept that the claimant has given sufficient weight to future earnings in consultancy. Having heard the claimant's evidence on this, we consider that it is unlikely that the claimant will find a new assignment before the quiet summer period, given that contracts tend to be for a minimum of three months and he does not currently have any prospect of a new assignment. We consider that the most likely scenario is that the claimant will find a new assignment giving an average of 17.5 days work a month (being his current work rate) and paying £500 gross per month, after the end of the quiet summer period IE in September which will last for six months. This will then pay him £52,500 gross. Taking into account that the claimant will be in the higher rate tax bracket, we suggested that a rate of tax of 60% should be assumed and this was accepted by the claimant. This then equates to £31,500 net.
52. Therefore, during the next period of 12 months loss period claimed by the claimant, his loss of earnings will be as follows:
- 52.1. 12 months losses at £6350 net per month = £76,200
 - 52.2. Less
 - 52.2.1. Receipts in current assignment: £4095 net
 - 52.2.2. Receipts in anticipated future assignment: £31,500 net
 - 52.2.3. Total receipts: £35,595 net
 - 52.3. Total loss net: £40,605
53. Total net loss pre Hearing and post Hearing: £90,905
54. Less £25,000 for breach of contract claim: £65,905
- 54.1. Less £30,000 tax free, leaves balance of £35,905
 - 54.2. Gross up £35,905 for tax at rate of 60%: £35,905 divided by 60% = £59,842
 - 54.3. Add back in £30,000 tax free element:
55. Total loss for compensatory award after grossing up: £89,842

56. Apply statutory cap: £83,682.00.

Employment Judge Kelly

5 March 2019