EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4104749/2018
Held in Edinburgh on 7 and 8 January 2019
Employment Judge: Ms Amanda Jones (sitting alone)

Mr A Neilson	**Claimant – represented by Mr I Burke, solicitor Burke and Bannerman**
B&K Hume Groundswork Ltd	**Respondent Represented by Mr Howson, consultant Peninsula**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claimant was unfairly dismissed, that he was not paid for his full notice entitlement and that the respondent should pay to the claimant £350 in unpaid notice, a basic award of £6035 and a compensatory award of £15,146.20.

The Employment Protection (Recoupment of Jobseekers' Allowance and Income Support) Regulations 1996 apply to this award. The prescribed element is £12,250 and relates to the period from 26 January 2018 to 19 September 2018.

REASONS

E.T. Z4 (WR)

INTRODUCTION

1. The claimant presented a claim to the Tribunal claiming unfair dismissal and a failure to pay his full notice pay entitlement. The claimant gave evidence on his own behalf. The respondent led evidence from Pauline Hume and Robert Hume. A joint set of productions was lodged and some additional documents were lodged with consent during the course of the hearing, including an updated schedule of loss, the calculations of which were agreed. The respondent accepted that the claimant had taken appropriate steps to mitigate his losses.

2. Following the hearing the parties were invited to make further submissions on the relevance of section 210(5) of the Employment Rights Act 2010 on the question of the claimant's claim in relation to notice pay and received brief submissions from both.

ISSUES TO BE DETERMINED

3. The Tribunal was required to consider whether the claimant had been unfairly dismissed in terms of the Employment Rights Act 1996 ('ERA'). The Tribunal was also required to determine the length of the claimant's continuous service in order to consider whether the claimant had in fact been paid the notice pay to which he was entitled.

4. The Tribunal was required to consider the following issues:

    a. What was the date of commencement of the claimant's continuous service?
        i. Was the claimant laid off or dismissed in September 2010?

    b. Was the claimant unfairly dismissed, and in particular

i. Did the respondent dismiss the claimant on grounds of capability in relation to his ongoing absence from work on grounds of ill health, and if so,

ii. Did the respondent adopt a fair and reasonable procedure in dismissing the claimant., and if so

iii. Was the respondent act reasonably in dismissing the claimant taking into account his likely return to work and the impact on the business of his ongoing absence.

c. If the claimant was unfairly dismissed, should the Tribunal make a basic award and/or an award in respect of compensation for loss of earnings

FINDINGS IN FACT

5. Having listened carefully to the evidence, considered the documents lodged, and submissions made on behalf of the parties, the Tribunal made the following findings in fact:

6. The claimant is a 62 year old man. He was employed by the respondent as a general operative from 1 March 2008 until his dismissal on 26 January 2018. His duties were generally physical although they also involved driving and 'banksman' duties which were providing direction and guidance in relation to other works.

7. The claimant worked 39 hours a week and was paid £450 per week gross and around £350 per week net.

8. The respondent is a small family run company which carries out groundwork operations on buildings and roads, where it carries out work to ground level before passing over to a contractor to continue work.

9. The respondent employs 13 staff. It is run by three directors, Mr Robert Hume and his sons, Kenneth and Paul Hume. The respondent employs the wives of all three directors in various administrative capacities. The remaining 8 employees are employed as either general operatives or plant operatives.

10. The respondent engages agency staff for additional labour when necessary.

11. When there is insufficient work available for operatives, the respondent will generally lay those employees off, pending an upturn in work. This has happened a number of times in recent years.

12. Such a period occurred between September and November 2010. The claimant was not dismissed during that period and did not receive a P45 or redundancy pay.

13. The claimant was issued with an updated contract in March 2015 which stated his employment began on 15 November 2010. The claimant did not raise this issue at the time as he was of the view that it was not important.

14. The claimant was viewed as a valuable employee and performed well during his employment. He was described as ‘knowing the job inside out’ by Mrs Hume.

15. The claimant commenced a period of sickness absence from 30 March 2017 and did not return to work before his dismissal.

16. The claimant was diagnosed as having a hernia, which required an operation.

17. That operation was delayed due to the claimant’s diabetes not being under control when the operation was first scheduled.

18. In the event, the claimant underwent an operation in October 2017.

19. The respondent did not contact the claimant by phone, in person, or in writing during his absence until a letter of 24 November 2017 was sent to him requiring the claimant to consent to an occupational health assessment.

20. Any contact with the respondent during the claimant's absence came about when the claimant contacted the respondent requesting to use his holiday entitlement.

21. The respondent did not engage any particular cover for the claimant's absence.

22. The claimant was paid Statutory Sick Pay by the respondent. The claimant continued to submit fit notes during this period for varying periods between 2 and 12 weeks.

23. An occupational health assessment took place on 22 December 2017. This assessment consisted of a 20 minute phone call between the claimant and an occupational health advisor from Health Assured, which was arranged through the respondent's employment law advisors, Peninsula.

24. Following this assessment, a report was produced dated 22 December which was sent to the respondent, and a copy of which was provided to the claimant.

25. A return to work meeting was then arranged between the claimant and respondent on 8 January 2018. Present at that meeting were the claimant, Bob Hume, Pauline Hume and Kenny Hume. The claimant confirmed that he was not at that time fit to return to his duties.

26. A pro forma note of that meeting was produced by Pauline Hume. The claimant agreed that the note was an accurate reflection of the discussion.

27. The respondent then wrote to the claimant by letter dated 9 January requiring him to attend a 'Medical Capability Hearing' on 16 January to discuss his ongoing absence. The letter indicated "I have to inform you that if the meeting

indicates that there is little likelihood of a return to work within a reasonable timescale and there are no reasonable adjustments that can be made or alterative employment available, then the outcome may be notice of the termination of your employment on the grounds of ill health."

28. A hearing took place and was chaired by Saragh Reid of HRFace2Face who were engaged through the respondent's employment law advisors to conduct the hearing.

29. Pauline Hume attended the meeting to take notes and the meeting was recorded. The claimant was not accompanied at that meeting.

30. Although the notes of the meeting suggest that the meeting was taking place following receipt of 'a GP Medical report', the respondent did not at any time seek advice from the claimant's GP in relation to his health or return to work.

31. A report was produced following that hearing which made recommendations to the respondent. In particular, the report recommended "Having given full and thorough consideration to the information presented, I recommend that if the business are unable to sustain AN's absence and considering the facts, that there is no indication of a return to normal duties, there are no suggested adaptations that can be put in place to assist with a return to work, that AN himself cannot identify what he believes he would be able to do within the workplace and that there are no alternative roles available the business will now have to consider the termination of employment on the grounds of capability." The respondent did not meet with the claimant to discuss the report or otherwise ask for his input on its terms.

32. By letter dated 26 January, the respondent wrote to the claimant dismissing him with immediate effect and indicating that he would be paid 7 weeks' pay in lieu of notice. The letter stated "As you know, we engaged an independent and impartial consultant to conduct a medical capability meeting on 16 January 2018 at 15.30. Please find attached their report, which represents

my decision. Under these circumstances and taking into account the fact we need to find a permanent replacement for you, I have regretfully been left with no alternative other than to terminate your employment on the grounds of ill health."

33. The claimant then appealed against that decision by letter dated 6 February.

34. An appeal hearing was arranged for 22 February which was again conducted by a representative of HRFace2Face, Elizabeth Cook.

35. At this hearing, the claimant was accompanied by his partner Kerry Yule. The meeting was again recorded and Pauline Hume again attended to take notes.

36. The claimant had a fit note which was presented at this hearing which stated that the claimant was fit for a phased return to work, indicating that he "could undertake a graded increase in manual tasks within the limits of his discomfort". The fit note was dated 15 January and was valid for a month.

37. The claimant's position at this meeting was that he was now fully fit for work.

38. A report was produced following the hearing which made recommendations. The HR consultant recommended "Having given full and thorough consideration to the information resented, EC recommends that the Medical Capability Appeal be dismissed in its entirety and that the original sanction of termination of employment be upheld."

39. The report did not make any reference to whether the fact that the claimant was now fit for work should be a relevant factor when considering the appeal.

40. The respondent then wrote to the claimant by letter dated 6 March, stating "As you know, we engaged an independent and impartial consultant to conduct an appeal meeting on 22 February 2018 at 3.30pm. Please find attached their report, which represents my decision. You have now exercised your right of appeal under our procedures and this decision is final." The

respondent did not invite the claimant to meet to discuss the report or otherwise ask for his input on its terms.

41. At some point during the claimant's absence from work, the claimant intimated to the respondent that he was considering raising a personal injury claim in respect of the injury which led to his absence from work.

42. The respondent recruited a replacement for the claimant two or three months before the Tribunal hearing, some 18 months after his dismissal.

43. The claimant took steps to secure alternative employment, and is now employed by Sainsbury's as a delivery driver. He has been employed in this role since 20 September 2018 and works 18.5 hours per week and earns £680 per month net.

OBSERVATIONS ON THE EVIDENCE

44. The witnesses who gave evidence before the Tribunal were all credible. However, Mr Hume could not remember much of the detail of the events surrounding the dismissal of the claimant and therefore the Tribunal concluded that much of his evidence about the circumstances of the claimant's dismissal were not reliable..

45. There was little dispute in relation to the evidence or facts. There was a suggestion made to the claimant that he was not in fact fit when he attended the appeal hearing and was misrepresenting the position. However, there was no actual evidence to contradict the position of the claimant which was consistent both at the appeal hearing and before the Tribunal. The Tribunal preferred the claimant's evidence in this regard. Further, at no stage did the respondent seek to have the claimant examined in person, or seek a report from his GP or carry out any kind of risk assessment in relation to the duties which the claimant carried out.

46. The Tribunal also noted that the respondent simply accepted the recommendations of the HR company it engaged to carry out both the Medical Capability Hearing and the appeal. Neither of the individuals concerned gave evidence before the Tribunal, therefore it was not possible to explore their considerations. Further, the Occupational Health Advisor who assessed the claimant did not give evidence. The HR consultants relied heavily on the terms of the Occupational Health report in the reports they provided, and in particular the recommendation that the claimant should not lift anything more than 10kg. There was no evidence before the Tribunal in relation to the reasoning why the Occupational Health Advisor made such a recommendation, particularly when there was no physical assessment of the claimant or information provided from his GP and appeared inconsistent with the advice received from the claimant's GP. Neither was there any evidence that the respondent had given any independent thought to the matter.

47. In addition, the report from the Occupational Health Advisor was contradictory in relation to recommendations made about the claimant's ability to return to work. At one point in the report there is reference to a phased return over 8 weeks. However, there is also reference to a recovery period of between 3-6 months and full duties being reintroduced over a 3-4 month period. There was no evidence from the respondent which suggested that any independent thought or analysis had been given to the terms of the reports and instead they were simply accepted wholesale.

48. While the Tribunal recognises that the respondent sought external advice to assist in dealing with the claimant's absence, and that such an approach is of course appropriate, this did not absolve the respondent of applying its mind to the advice which was being given in determining whether the claimant should be dismissed and whether his appeal should be upheld.

49. At no point during his evidence did Mr Hume's suggest that he or the other directors had given any independent thought to whether or not the recommendations of the HR consultants should be followed.

RELEVANT LAW

Unfair dismissal

50. Section 98(2) of ERA sets out the potentially fair reasons for dismissal. Section 98(2)(a) states that the dismissal of an employee for reasons which "relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do" is potentially fair.

51. It will then be for the Tribunal to determine whether such a dismissal was fair in all of the circumstances. The case of *East Lindsey District Council v Daubney* [1997] ICR 566 remains good authority in this area.

52. It is also crucial that the Tribunal in considering these issues does not adopt what has been termed 'a substitution mindset'.

53. The Tribunal must consider whether the respondent has adopted a fair procedure in dismissing the employee.

54. If a Tribunal is satisfied that a fair procedure has been followed, then it must turn its mind to the question of whether in all the circumstances of the particular case, the employer acted fairly in dismissing the employee.

55. The authorities outline various factors which must be considered in assessing the question of fairness. The Tribunal must have regard to the size and nature of the respondent's operations. However, in cases such as this involving long term absence, relevant factors also include availability of temporary cover and its cost, whether the employee has exhausted his sick pay entitlement;

administrative costs of keeping the employee employed (see for instance *BS v Dundee City Council* [2013] CSIH 91.

Notice pay

56. Section 86 of ERA sets out an employee's entitlement to notice in the event of termination of employment. Section 86(1)(b) states that such entitlement where an employee has been employed continuously for one month of more is "not less than one week's notice for each year of continuous employment if his period of continuous employment is two years or more but less than twelve years."

57. In order to determine the length of an employee's continuous service, regard should be had to sections 201 and 211 of ERA. Section 210(5) states that "A person's employment during any period shall, unless the contrary is shown, be presumed to be continuous."

58. A break of more than a week in service will normally break an employee's continuous service unless it comes within one of the bridging provisions set out in section 212 ERA. This will include a break in service due to a temporary cessation of work, which is otherwise known as a 'lay off' (section 212 (3)).

59. While the terms of an employee's contract will always be relevant for the purpose of evidential value, an employee's continuous service will be a matter of law determined by the application of the statutory principles to the factual matrix of the case.

SUBMISSIONS

60. The respondent's submission in relation to the claimant's claim that he had not been paid sufficient notice pay was that the Tribunal should have regard to the contract of employment. Mr Howson indicated that there was no firm

evidence either way in relation to the claimant's position that he had been laid off. Mr Howson maintained that the claimant had been paid more notice pay than that to which he was entitled and that the excess amount should be taken into account in relation to any compensation which might be awarded to the claimant should the Tribunal determine that the claimant had been unfairly dismissed.

61. In relation to the issue of the claimant's dismissal, Mr Howson invited the Tribunal to accept that the respondent was entitled to come to the view that the claimant was not fit to do his job at the date of termination of employment. Mr Howson referred the Tribunal to the Occupational Report which had been produced and while he accepted that the report itself was a bit contradictory in relation to timescales, he invited the Tribunal to accept that it meant that the claimant would be restricted in his ability to lift more than 10kg until June 2018.

62. Mr Howson pointed out that this was not the only relevant evidence and that the note of the return to work meeting which took place referred to the claimant commenting that he had suffered pain when lifting shopping bags. In referring to particular extracts from the report, Mr Howson submitted that it was reasonable for the respondent at the time of dismissal to conclude that the claimant was not physically able to return to work at that time.

63. In addressing the position of the claimant at the appeal hearing that he was now fit, Mr Howson submitted that the question to be considered was whether the claimant's statements at that hearing were sufficient to override what had been said before. He submitted that the Tribunal should consider what a reasonable employer would do in those circumstances and suggested that the Tribunal should accept the evidence of Mr Hume that the situation "had gone too far" for the respondent to consider re-employing the claimant.

64. In addressing the fact that the claimant had not been replaced until some 18 months after his dismissal, Mr Howson submitted that the Tribunal should only analyse the actions of the respondent at the time and not retrospectively and should acknowledge that it was difficult for the respondent to find suitable labour in the area.

65. Mr Howson invited the Tribunal to accept that the claimant's dismissal was within the band of reasonable responses and dismiss the claim.

66. For the claimant, Mr Burke indicated that there was no dispute on the timeline of the events leading up to the claimant's dismissal; there was a period of 2 months between the respondent first making any enquiry in relation to the claimant's likely return and his dismissal and the respondent's operations were closed for 2 weeks during that period. He indicated that it was unreasonable of the respondent to rely on a 20 minute phone call with a stranger to reach a decision to dismiss, without having made any enquiry of the claimant's GP. Mr Burke submitted that there was a rush to dismiss the claimant and that this was related to the possibility of the claimant raising a personal injury claim.

67. Mr Burke referred to *Daubney and BS v Dundee City Council* (above) and highlighted the factors to be considered when an employer is determining whether it should wait longer before dismissing an employee. In particular, Mr Burke highlighted that other than his accruing entitlement to holiday pay, the claimant was not a financial burden on the respondent. He also reminded the Tribunal of Mr Hume's evidence that it was difficult to recruit labour in the area and that the claimant was fit well within the period of notice for which he was paid. In addition, Mr Burke highlighted that there was no issue with the claimant's ability and that he was viewed by the respondent as 'knowing the job inside out'.

68. It was submitted that there was a lack of proper consultation with the claimant or steps taken to properly discover the claimant's likely return to work. While

there had been a 20 minute phone call in December, on 16 January the claimant produced a fit note which was a significant step up in terms of the likely return to work, stating as it did that the claimant could 'undertake a graded increase in manual tasks within the limits of his discomfort.' Mr Burke indicated that the Occupational Health assessment had been no more than a box ticking exercise.

69. In referring to the case of *BS v Dundee*, Mr Burke indicated that the employer should weigh up the balance of their needs and the prospect of return. Mr Burke invited the Tribunal to accept that on the basis of the evidence heard, the respondent ought to have waited longer, that the investigation into the claimant's condition had been of poor quality and that the refusal to wait for the claimant to be fit to return to work was not within the band of reasonable responses.

70. Mr Burke highlighted that the area in which the claimant and respondent operated had a very small population and so it must have been obvious to the respondent that they would find it very difficult to recruit a replacement for the claimant. In all those circumstances, Mr Burke invited the Tribunal to find that the claimant's dismissal had been unfair.

DISCUSSION AND DECISION

71. The Tribunal preferred the submission on behalf of the claimant.

72. The Tribunal was satisfied that the respondent had dismissed the claimant on the grounds of capability in terms of section 98 (2)(a) of ERA.

73. The Tribunal was not satisfied however, that the procedure followed had been fair. In particular, the Tribunal was concerned at the respondent's over reliance on a 20 minute call between the claimant and an Occupational Health Advisor and the terms of the report produced thereafter which were

contradictory. Further, the Tribunal was concerned that the respondent had simply accepted the recommendations of the HR advisors without giving any independent thought to whether they ought to be accepted.

74. The Tribunal had concerns over the appropriateness of any reliance being place on the report from the Occupational Health Advisor. It was created following a 20 minute call with the claimant and is contradictory in its terms. It is also not at all clear how it made a recommendation as to the weight the claimant should lift. In the circumstances, the Tribunal was of the view that this report was of limited value in assessing the claimant's likely return to work or the duties he could carry out when he did return.

75. Further, the respondent did not meet the claimant to discuss the report which was provided by HRFace2Face.

76. While the Tribunal was particularly mindful that this was a small employer with limited resources, the respondent did engage professional assistance to provide advice during the process. However, the respondent appears to have failed to recognise that it required to consider that advice rather than simply accept the terms of a report without giving it independent thought or discussing it with the claimant.

77. In addition, the Tribunal concluded that the decision taken by the respondent to dismiss the claimant was not within the band of reasonable responses.

78. In particular, the Tribunal was concerned that the respondent stated in the letter of dismissal to the claimant that "taking into account the fact we need to find a permanent replacement for you", but there was no evidence presented to the Tribunal that this in fact was the case. Neither was the issue discussed with the claimant at all.

79. The Tribunal was surprised that Mrs Hume could not recollect whether any additional labour had been taken on to cover for the claimant, given the small

number of staff involved and that she was responsible for administration of the wages. Her evidence was that people came and went so it was not possible to be sure. That suggested to the Tribunal that in fact there was no requirement to replace the claimant with a permanent employee at the point of his dismissal. It suggested that in fact the claimant's sickness absence had not caused any operational difficulties to the respondent at all. Indeed, there was no evidence whatsoever before the Tribunal that the claimant's absence had either caused operational difficulties for the respondent or had an impact on the rest of the workforce.

80. Further it was not suggested that there were any particular jobs which were coming up for the respondent which required permanent cover for the claimant. In any event, the claimant was not in fact replaced for 18 months and it was clear that the respondent was aware that it would be difficult to find a replacement for the claimant.

81. In addition, the claimant had been absent for over 8 months before the respondent made any enquiries as to his likely return and then dismissed the claimant within 2 months of the first enquiry.

82. Moreover, the Tribunal concluded that even if it had been reasonable for the respondent to dismiss the claimant on 26 January, the respondent did not act reasonably in dismissing the claimant's appeal against dismissal.

83. Again the respondent appears to have failed to understand that it was its responsibility to reach a decision on the appeal. Mr Hume's evidence that 'it had gone too far' resulted in the Tribunal concluding that the respondent was simply going through the motions of an appeal process and had no intention of giving consideration to upholding the appeal.

84. In any event, the report by the HR consultancy in relation to the appeal was fundamentally flawed. It failed to consider the consequences of the claimant now being fit for work and did not give any consideration whatsoever whether

that was a factor which should be taken into account in the determining the appeal. Again, it appeared to the Tribunal that this was an exercise in going through the motions of an appeal hearing without properly considering whether there was any merit in the appeal.

85. The Tribunal concluded that a reasonable employer, having dismissed the claimant, would have given serious consideration to re-employing him following the appeal hearing given he was now fit to return to work, particularly given no replacement had been found for him.

86. In all of these circumstances, the Tribunal concluded that the claimant had been unfairly dismissed.

Remedy

87. The Tribunal then went on to consider whether and if so, what, compensation should be awarded to the claimant. The claimant was entitled to a basic award of £6075 as he had 9 completed years' service, was aged 61 at the date of dismissal and earned an average of £450 gross per week. He is therefore entitled to a basic award of 13.5 weeks' pay of £450 per week.

88. The claimant had loss of earnings over 35 weeks to the date he commenced alternative employment which it was submitted amounted to £12,250 and received Job Seekers' Allowance over that period.

89. The claimant has ongoing wage loss of £193.08 per week. His losses to the date of the Tribunal were £2896.20 (being 15 weeks). The Tribunal considered in the circumstances, and bearing in mind that the claimant would find it difficult to obtain further employment at a level of that with the respondent, it was just and equitable to make an award of compensation to the date of the hearing. The claimant did not make any submission that future losses should be awarded. The respondent did not make any submission that

there was any basis on which to reduce any compensation to the claimant (other than the additional notice pay, if appropriate). The Tribunal considered that in the circumstances, the claimant should be entitled to receive:

Unpaid notice pay.	£350
Basic award	£6,075
Losses to date of hearing	£15,146.20
Loss of statutory rights.	£350
Total amount	£21,921.20

Recoupment Regulations

As the claimant has been in receipt of Job seekers allowance, the relevant department will serve a notice on the respondent stating how much is due to be repaid to it in respect of Job seekers allowance. Meantime, the respondent should only pay to the claimant the amount by which the monetary award exceeds the prescribed element. The balance if any falls to be paid once the respondent has received the notice from the Department.

Employment Judge: A Jones
Date of Judgement: 12 February 2019
Entered in register: 25 February 2019
And copied to parties