Case Number: 3400806/2014
3303905/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss L Dear	**v**	Sabrefix (UK) Limited

Heard at: Norwich **On**: 23, 24 and 25 April 2019

Before: Employment Judge Postle

Members: Mr V Brazkiewicz and Mr R Allen

Appearances
For the Claimant: Mr Ashley, Counsel
For the Respondent: Mr Bealey, Consultant

JUDGMENT

1. The Claimant was unfairly dismissed.

2. The Claimant's claim for unpaid wages in respect of time off in lieu is well founded.

3. The Respondents were in breach of contract and are ordered to pay damages to the claimant.

REMEDY JUDGMENT

1. The Respondents are ordered to pay compensation to the Claimant in the sum of **£20,414.56**

2. By consent the Respondents are ordered to pay the Claimant's costs in the sum of **£15,340.20** inclusive of VAT.

3. By consent the Respondents are ordered to pay Mr Jermy expenses in the sum of **£180.**

REASONS

The views that I now express are the unanimous views of the Tribunal.

The Facts

1. The claimant brings claims to the Tribunal on the grounds that she was unfairly dismissed, there was a breach of contract and there was unpaid wages in respect of time off in lieu.

2. In this Tribunal we have heard evidence on behalf of the respondents from Mr Hodge and Mr Tweed. The claimant gave evidence and on her behalf Mr Jermy a former employee of the respondents. All witnesses giving their evidence through prepared witness statements. The Tribunal also had the benefit of a bundle of documents consisting of 101 pages.

3. The facts of this case show that the respondents are part of a group of companies run by Mr Tweed the Chief Officer, of which Grouse Limited appears to be a Management company for that group of companies. Mr Tweed being the sole shareholder and Director of the respondents.

4. The claimant came to work for, originally, World Wide Steels Limited in or about January 2012 and was transferred pursuant to the Transfer of Undertakings (Protection of Employment) Regulations in April 2013. The claimant was employed in the accounts department at the respondent's office in Watford. The claimant's job description was given to the claimant when she commenced her employment and is at page 32. The claimant being classified as 'Accounts Manager' or 'Accounts Technician'.

5. The respondent manufactures metal work, hangers, straps, ties, plates and bracelets for the construction industry.

6. Originally the claimant reported to Mr Murtagh who was the General Manager and following Mr Murtagh's departure, Mr Tweed became apparently more involved in the respondents. It appeared to the claimant that Mr Tweed had unrealistic expectations of the business and was seemingly prepared to finance other activities outside the respondent's operation using the respondent's resources. Furthermore, he would often insinuate that any financial shortfall in the respondent's finances was due either to previous employees, and on one particular occasion a Mr Paul Simpson who Mr Tweed had alleged mismanaged the finances and had been stealing from the respondents.

7. The claimant had raised issues with Mr Tweed about diverting funds from the respondents to other activities but these were always disregarded. The summer of 2013, Mr Jermy became Operations Manager for the respondents and after he left the respondent's, Mr Tweed accused him of stealing stock from the respondents.

8. One of the respondent's major customers is a company called Screwfix. It would appear that company had the right to return goods supplied and obtain a rebate from the respondents if such goods had not been sold or had become obsolete. This was apparently contained in a clause in a contract between the parties, although the Tribunal has not seen this particular contract. The claimant said that she was not privy to the contents of the contract, nor was she made aware of Screwfix's right to return goods if they were not sold and thus obtain a rebate. What the claimant was aware of, is that Mr Tweed had agreed in late 2013 that Screwfix could return a large number of parts that they had had in stock for a number of years and considered obsolete. This clearly would have a major impact on the financial performance of the respondents and the claimant and Mr Jermy only seemingly became aware of this when the goods arrived back in the factory at the same time Screwfix required reimbursement. The resulting confusion in financial terms of the respondent led to a meeting with Screwfix in Yeovil on 4 February 2013. That was attended by Mr Tweed, the claimant, Mr Jermy and others from the respondent's office. At which Mr Tweed understood the shortfall that appeared in the respondent's finances was due to a genuine reimbursement of the stocks that had been taken back and not the fault of the claimant.

9. Although the issue appears to have been resolved, it appeared to be the source of some tension between Mr Tweed and the claimant and clearly soured the relationship between the two of them. Nothing, however, was said following that meeting. Mr Tweed had also not raised the issue with the claimant on the way down to Yeovil as he at that stage did not know what the problem was until it came out during the course of the meeting.

10. The claimant then went on a period of annual leave from 27 February to 17 March. At the time of the claimant going on holiday there had been no issues raised with her by Mr Tweed or by Mr Jermy about her performance and indeed, none throughout her employment. On 4 or 5 March, Mr Jermy was summoned to Mr Tweed's office which is situated in Mr Tweed's home for a meeting at which Mr Tweed informed Mr Jermy words to the effect that Laura (the claimant) was going to have to go. The implication was that she was to be dismissed. Mr Tweed also informed Mr Jermy he had already started looking for a replacement. Mr Jermy's view was this was not a good idea, but knew that if you crossed Mr Tweed it could lead to the end of one's own employment. The reason Mr Tweed gave for the claimant's dismissal to Mr Jermy, was that she had been stealing from the respondents which Mr Jermy did not believe. Mr Jermy being the claimant's line manager working with her on a daily basis had no issues with her quality of work or any reason to believe she was underperforming in her role. Mr Jermy believed the real reason Mr Tweed wished to dismiss the claimant was the fact that she had challenged him about personal expenditure using company money.

11. On 7 March, or thereabouts, Mr Tweed instructed Mr Jermy to speak to a Miss Denise Berry whom he had informed had been offered the claimant's job and that Mr Jermy was to induct her, whereupon she was shown around the site and explained her new role.

12. On 14 March, Mr Jermy was again summoned to Mr Tweed's office and was instructed to attend the respondent's office the following Monday, the day the claimant was to return from leave, where they would meet the claimant with Mr Tweed and the words were,

"to go through the procedure of getting rid of her".

13. On 17 March, the claimant, without warning or notice, was indeed invited to a meeting upon her return first thing in the morning. She was not given the right to be accompanied and nor was she told what the meeting was about. At the meeting it is clear that Mr Tweed and Mr Jermy, Mr Jermy said nothing, the claimant was almost immediately informed that her employment was to be terminated and that she could either resign or be made redundant. Mr Tweed continuing that the claimant was incapable of performing her job, notwithstanding there had been no performance or capability issues raised either by Mr Tweed or Mr Jermy in the past. When the claimant asked the reason for her dismissal, Mr Tweed declined to further elaborate. Not surprisingly, the claimant was shocked and requested the terms of any redundancy to be put in writing. The meeting appeared to last no more than ten to fifteen minutes. The claimant then left the meeting, returned to the accounts team and told her colleagues what had just transpired, whereon her colleagues informed her that Mr Tweed had notified them the week before that she was going to be removed from the company.

14. Mr Jermy then came to see the claimant and informed her that Mr Tweed wanted her off the premises and there seemingly was no right to appeal against the decision. Before leaving, the claimant then collected her outstanding expenses for the previous period of £60 or thereabouts, and those expenses were given to her being collated by Amanda Coleman. Mr Tweed maintains he had no further involvement in the process after 17 March and that it was all left for Mr Jermy to implement the decision.

15. Then there is what can best be described as a confusing exchange of emails by the respondents following the claimant's email of 22 March (at page 52) requesting details from Mr Tweed of his proposals following the meeting on 17 March. The email was addressed to Mr Jermy. That was followed by a letter from the respondents that was back dated on the instructions of Mr Tweed, to 17 March, sent out on 27 March, the office franking machine confirms that, and the letter from Mr Tweed, although pp signed on his behalf by Mr Jermy, reads,

"After explaining to you the company's reasons for terminating your employment on the grounds of redundancy, you recall that discussions including you agreeing to accept the redundancy. Having considered all

the circumstances I confirm that your position is to be made redundant. Your termination date will be 24 March 2014."

The letter then goes on to deal with other matters.

16. This is all the more confusing as Mr Tweed had tried to maintain before the Tribunal that he had not dismissed the claimant and it was all down to Mr Jermy. The claimant's response to the respondent's letter (at page 62) in terms of,

"This was the first and only communication sent by the company stating its intentions to cease my employment. During the unannounced brief meeting, 15 minutes on Monday 17 March there was no proper consultation and no reason given to explain the grounds of the redundancy. I do not agree, as alleged in the letter, to voluntary redundancy, in fact I requested that the terms of the redundancy including the one month's notice were detailed in writing."

She then goes on to detail various failings the company had and the amounts she believes were due to her.

17. That was responded to by letter / email of 7 April from Mr Tweed, but pp by Mr Jermy (at page 64) which contradicts Mr Tweed's assertion he had nothing to do with the claimant's dismissal after the meeting of 17 March. The letter also, for the first time, mentions the closure of the respondent's accounting office and if that was true it is odd that wasn't explained before and that her position in the company was now redundant and for the first time raises the possibility of alternative employment, goes on to suggest the claimant left the meeting and was going to think about it and get back. This letter in fact makes no sense given the respondent's previous letter and assertions in it of 17 March. In particular, that confirms the dismissal and also no mention of alternative employment.

18. The claimant responds on 15 April (at page 66) and amongst other things says,

"My recollection of the very brief meeting on 17 March, no more than 15 minutes, differs dramatically from the account given in the correspondence. From my notes on the day I recall the company requested the submission of my resignation otherwise I would be made redundant. As I have stated before, there was no consultation and at no time during the meeting was there any suggestion of forms of alternative employment within the group of companies."

The letter goes on to deny various other allegations that had been made. As far as the Tribunal are aware, that letter receives no response from the respondents.

19. Dealing first with credibility, the Tribunal found the claimant an honest, consistent, reliable witness whose evidence was convincing and indeed, on some matters, the claimant was not even challenged on her evidence. It was supported also by the evidence of Mr Jermy, whom again was a man the Tribunal found to be honest and straightforward. Contrast that with the unfortunate witness put forward on behalf of Mr Tweed and the respondents, Mr Hodge, who was not only an employee of the respondent, which in itself is not unusual, but lives in a property owned by Mr Tweed and whose statement had clearly been prepared for him and not by him.

20. As for Mr Tweed, his evidence before the Tribunal was in direct contrast to the respondents own pleaded case and at first would not even concede that the claimant had been dismissed. When he eventually did concede, he claimed to have had nothing to do with it after the 17 March, it was all down to Mr Jermy who took the decision and followed the process. Mr Tweed was, to the Tribunal's mind, a thoroughly unconvincing, inconsistent and contradictory on his own case and a man who appears to find the truth an alien concept.

The Law and Conclusions

21. Given the way the case has been presented and the evidence of Mr Tweed before the Tribunal, the Tribunal can conclude in the first instance that the respondents simply failed to discharge the burden of proof required under Section 98(1) of the Employment Rights Act 1996, which makes it clear:

    '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 subsection (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.

22. Mr Tweed failed. He cannot give a reason for the dismissal before this Tribunal. Mr Tweed, before the Tribunal, says he did not make the decision and had nothing to do with it after 17 March. He clearly failed to discharge that burden that is on him and therefore the dismissal in the first instance would be unfair.

23. Even if the Tribunal were wrong in that approach, what was the reason for the dismissal? Was it redundancy? Or, was it some other substantial reason as variously advanced in this hearing and in the pleadings?

24. The Tribunal were unanimous of the view that the dismissal would, and is, substantially and procedurally unfair in that there was no evidence of a reorganisation before the Tribunal. Particularly, there was no substantive evidence that the claimant's role was genuinely redundant. Further, the meeting the claimant was called to on 17 March, the claimant had no advance warning of, no allegations were put to her, there was no right to be accompanied at that meeting and no right of appeal. The suggestion was that you resign or you take redundancy, there was no consultation and no warning of a possible redundancy. The whole thing was a sham. It would appear that the only reason that the claimant was dismissed was because Mr Tweed had taken a dislike to her which clearly is not a valid reason for dismissing employees. Clearly, there were no conduct issues justifying dismissal, the respondents whole approach to the claimant's dismissal was muddled, misconceived and we repeat, substantively and procedurally unfair.

25. Dealing with the other issues. The respondents have conceded the issue of time off in lieu of payments and notice pay, which in any event from the claimant's payslip had not been discharged.

Remedy

26. The Tribunal then went on to deal with remedy and had further submissions from Mr Bealey on the question of mitigation of loss. He feels the claimant has not fully mitigated this, bearing in mind he accepts she mitigated her loss to August 2014 at a less well paid job. Then it took another 12 months thereafter for her to achieve an income at a greater sum to that which she received from the respondents.

27. Mr Bealey also argues against loss of statutory rights on the basis that the claimant now has two years continuous employment.

28. Mr Bealey further argues the reasons the Tribunal found for the dismissal were not within the Acas Code and therefore entitled to uplift on the compensatory award.

29. Not surprisingly, Mr Ashley for the claimant, argues that the claimant clearly has mitigated her common law duty by initially finding alternative employment within a few months of being dismissed in August 2014 and then being fortunate enough to continue to look for remunerative employment at a rate higher some 12 months after obtaining the first job.

30. In relation to the Acas Code of Conduct, Mr Ashley takes the view that the Code has a wide definition as to the circumstances at which uplifts can be awarded.

31. In relation to the loss of statutory rights, the fact that this case has taken a number of years to get to Tribunal and in the intervening period the claimant now has two years continuous employment does not prevent the

claimant from claiming initially the loss of statutory rights, as when she was dismissed she did not have protection from dismissal.

32. The Tribunal were unanimous of the view the claimant had fully mitigated her loss and was thus entitled to be compensated up to the period she reached the same level of income as that with the respondents.

33. Further, the fact the claimant now has two years continuous employment in her new employment, does not detract from the fact when she was dismissed she lost her statutory right not to be dismissed under two years with a new employer. Therefore, she is entitled to claim £500 loss of statutory rights.

34. The Tribunal are also satisfied the uplift for non-compliance with the Acas Code applies on the facts of the case, not only was there no reason advanced for the claimant's dismissal by Mr Tweed, but the process of dismissal was completely flawed from start to finish, there was no proper procedure followed at all with the claimant's dismissal. On that basis the Tribunal awards the maximum of 25% uplift.

35. The financial compensation is therefore as follows:

35.1 Claimant's age at dismissal 49 years;

35.2 Period of service 31 January 2012 – 31 March 2014;

35.3 Gross pay - £28,000.00 per annum;

35.4 Gross weekly pay - £ 538.46

35.5 Net weekly pay - £ 420.33

35.6 Net weekly pay in mitigation - £ 288.84

35.7 **As calculated:**

Basic award	£ 1,350.00	
Loss following dismissal to August 2015	£29,423.10	
Unpaid overtime (TOIL)	£ 753.84	
Loss of statutory rights	£ 500.00	£32,026.94

Less Mitigation

35.8 Income from Graham Wortys (52 weeks 2 days) £15,135.22

35.9	Redundancy payment	£ 1,350.00	£15,541.72
35.10	Total Financial Loss		£15,541.72
35.11	Increase uplift 25% Failure to follow Acas Code		£ 3,885.43
35.12	Interest on past losses (notice and TOIL at 8%)		£ 987.41
	Total		**£20,414.56**

Costs Application

36. At the conclusion of the proceedings the claimant's Counsel made an application for costs under Rule 77 of the Employment Tribunals Rules of Procedure 2013.

37. Originally Mr Bealey for the respondent, requested a postponement of the costs application. However, Mr Ashley for the claimant pointed out to the Tribunal that by email / letter of 5 April to the respondents, they were on notice of the costs application, which was met by this response from Mr Bealey,

"Thank you so much for the warning, enjoy the weekend".

38. The application for a postponement was refused by the Tribunal. The Tribunal then adjourned for 30 minutes to allow Mr Bealey to look at the claimant's costs schedule. On return to the Tribunal, Mr Bealey conceded that having looked at the application, he accepted he could see no justifiable ground to oppose the application and by consent agreed to the claimant's application and sums claimed of £15,340.20 inclusive of VAT, together with Mr Jermy's expenses of attending Tribunal of £180.00.

_____
Employment Judge Postle

Date: …12.07.19……

Sent to the parties on: ...12.07.19.....

.....
For the Tribunal Office