



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH EMPLOYMENT TRIBUNAL

BEFORE: EMPLOYMENT JUDGE WEBSTER

BETWEEN:

Mr R Dziwinski

Claimant

AND

LCM Scrap Company Ltd

Respondent

APPEARANCES:

Claimant: Ms Kolbut (Lay representative)

Respondent: Mr Rice (Company Secretary)

JUDGMENT

1. The claimant's claim for unpaid Statutory Sick pay is upheld and he is awarded £1,737.96.
2. The claimant's claim for unfair dismissal is upheld and he is awarded a net compensatory award of £2,855, a basic award of £1,000 and an amount in respect of his loss of statutory rights of £150.
3. Total payable to the claimant by the respondent is £5,742.96.

REASONS

Background

1. The claimant was employed to clear scrap metal. On a day to day basis control of what he did and management of his work was carried out by a man called Charles Matthews. Charles Matthews owned a company called LCM Scrap Company Ltd.
2. The respondent (originally called C and C Metals (London) Ltd) paid Mr Matthews and his company to carry out a project for them which involved clearing a particular site. They agreed however to pay the workers on that project directly and Mr Matthews and his company did not pay them directly at all for that work.
3. In or around 2017 the owners of C and C Metals (London) Ltd bought LCM Scrap Company Ltd from Mr Matthews, and then changed their own company name to LCM Scrap Company Ltd.

The Hearing

4. The claimant did not speak much English. As far as I could tell from the files nobody had suggested that he needed an interpreter. As opposed to adjourning the hearing it was agreed by all parties that his representative, Ms Kolbut, could act as his interpreter.
5. The hearing was poorly prepared for. The respondent was represented by their company secretary, Mr Rice. He came without any documents or witnesses. He stated that this was because they did not have any records pertaining to the claimant and had no knowledge of the issues the claimant was raising.
6. The claimant was better prepared but had not produced evidence of his current earnings, any benefits received, any pay slips or any witness statements. He did however bring a bundle of approximately 49 pages. He was represented by a friend, Ms Kolbut.
7. Some time was spent at the outset of the hearing trying to identify what was in dispute and what was agreed. It was helpfully agreed by the respondent that they had been the employer of the claimant. Mr Rice accepted that the claimant had been paid by the respondent throughout his employment and that even if he had worked for a different company at some point, all employees from that company had ended up transferring to the respondent's employment under TUPE and so the claimant would have done as well were he employed at the relevant time.
8. The respondent also helpfully accepted that if the claimant had been employed after April 2017, he was entitled to the SSP that he was claiming. There was no dispute that the claimant was entitled to SSP.

9. The issues that were agreed for the tribunal to consider were therefore as follows:

Issues

10. Was the claimant dismissed in or around April 2017 which is when he stopped being paid SSP?
11. If he was then it was accepted that the claimant's claims all fail because he would not have the required continuity of employment and any claim for unfair dismissal would be out of time.
12. If the claimant was not dismissed in April 2017 when was he dismissed? It is not in dispute that the claimant does not work for the respondent as at the date of this hearing.
13. If the claimant was dismissed does he have the relevant continuity of employment (2 years) to be able to bring a claim for unfair dismissal?
14. If yes was his dismissal for a potentially fair reason under s98(4) ERA?

Factual findings

15. It was in dispute as to when the claimant commenced employment. The respondent stated that it had no records of the claimant at all. However on questioning by the tribunal Mr Rice confirmed that it had been responsible for paying the claimant throughout his employment whenever it started or finished and therefore they would have payroll records for him. They had not looked at those payroll records before attending the hearing today.
16. The only document I had to consider was the contract of employment at page 9 of the bundle. That document states that employment started on 3 July 2016 and is signed on the same date. The claimant stated that he actually commenced employment almost exactly a year before that in July 2015. He stated that he was only issued with a written contract when he asked for one because he was renting a flat and needed it for those purposes. Previously he had no written terms of employment. He said that he had payslips going back to 2015 but had not brought them to the tribunal today.
17. It is disappointing that neither party brought what would have been very helpful evidence – however without it I must consider whether I believe the claimant's assertions. The respondent had no means of challenging the claimant's version of events. Mr Rice explained that Mr Matthews ran the site in a very unorthodox manner. They paid the individuals working there directly because otherwise Mr Matthews would not pay them. In addition he said that Mr Matthews could not write and therefore, I presume, put very little if anything in writing.

18. I find it plausible that the claimant would only be given a written contract if he asked for it and his reasons for asking seemed plausible. I find it difficult to understand why the respondent did not make any effort to provide evidence today to refute these claims and I believe that if it existed it would have been brought today. I therefore prefer the claimant's evidence that he has the payslips at home should they be needed and that he commenced employment at the site in or around July 2015.
19. The next relevant question of fact was when the claimant was dismissed. It was not in dispute that he had an accident at work on 16 March 2017 which resulted him being signed off sick due to a knee injury. Medical evidence and confirmation of his ill health were provided in the bundle. Copies of his sick certificates were also provided and the claimant remained signed off from work until 31 December 2017. This was also not in dispute.
20. What was in dispute was whether the claimant was dismissed following an argument in April 2017. Mr Rice stated that they had understood from Mr Matthews that he had had an argument with the claimant and that he no longer worked there and therefore they did not need to pay him SSP anymore. The respondent relies upon this as being the time at which the claimant's employment ceased though they gave no specific dates and no witness evidence corroborating this version of events. Mr Rice stated that the fact that the SSP stopped around this time corroborated that this was true and that the SSP stopped because of the dismissal.
21. The Claimant stated that he had approached Mr Matthews when his SSP stopped and asked him to pay it. He said that Mr Matthews shouted at him, told him that he had received all the money he was owed and told him to fuck off. The claimant said that he did not take this conversation as a dismissal as Mr Matthews frequently swore at his staff. He thought that this was a disagreement about SSP not about his continued employment. He also received an email dated 21 April the origins of which are not clear (page 30 bundle), which states that he had received up to date SSP to 21 April and asking him for an update from his doctor as to when he would be able to work. This does not imply that there was a dismissal at the time at which his SSP stopped.
22. He subsequently kept asking for a copy of the SSP1 so that he could claim benefits from the Job Centre Plus but to no avail as his requests continued to be refused by Mr Matthews. There are emails recording that request and his requests for the accident records from May 2017, June 2017 and November 2017. He attaches his sick certificates to those emails. Nowhere in the responding emails does anybody say that he is no longer an employee. The claimant also clearly believed he was still an employee as he starts the emails with "Good evening boss" on 16 and 17 May (pg 32).

23. Given that the respondent could not provide any precise dates for the incidents I conclude that it is likely that the SSP stopped before the argument with Mr Matthews, not afterwards. Therefore the cessation of the SSP does not confirm a dismissal because of the row, in fact it confirms Mr Matthew's decision to stop paying the claimant which then resulted in the claimant challenging him. The claimant then challenged him and continued to ask for his SSP1 in the absence of the SSP. This does not imply that he understood he had been dismissed. Even Mr Bearfield's email, dated 12 January 2018, (pg 47) states that the dismissal date appears to be 31 July 2018 but with no explanation of why that date is relevant or what happened on that date.
24. Further there is absolutely nothing in writing from the respondent or Mr Matthews confirming that the claimant was dismissed. No notice was given and no communication took place at all apart from emails around his SSP and SSP1 requests and his request for accident forms and information around his injury at work claim.
25. I therefore conclude that the claimant was not dismissed in April 2017 as asserted by the respondent.
26. The claimant stated that he believed he was dismissed in a series of emails from Mr Bearfield in January 2018. He had attended two meetings prior to this, one in September 2017 and one on 9 January 2018. There were transcripts of the meetings in the bundle. The origin of these transcripts appears to be that the claimant recorded them on his mobile phone and they have been professionally transcribed. The respondent did not object to them being in evidence but said he could not agree that they were valid. He was unable to take instructions on their validity because nobody from the respondent had come to the hearing apart from him and he was not present at the meetings.
27. The majority of the conversation in September 2017 appears to be about trying to settle the claimant's personal injury claim. However there are several comments about the claimant returning to work e.g.

"Christian P 18.02 – We just want to be fair and to get your work back?"

Christian P 18.25 No because I am giving him his job back? "

I find that these statements could be read either way in terms of whether he was returning from sick leave to work or getting his old job back following a dismissal. Given the clear language barrier between the people having the conversation (which all parties acknowledged) – it could mean either. There are also comments that he would start from fresh (page 17) with a fresh contract.

28. Nonetheless this does not detract from the fact that nobody expressly tells him at this meeting that his old contract has ceased and/or that he was dismissed at any point nor the reason for that dismissal.
29. I accept the claimant's assertion that it does not become entirely clear until the emails from Mr Bearfield on 10 January and 12 January (pgs 46-48). There it becomes clear that the respondent does not believe that he has been employed for some time though at both the tribunal hearing and in those emails, no explanation is given as to why the claimant was dismissed or how this was communicated to him before these emails.
30. Mr Rice says that the claimant was sent a P45 but did not provide it today. The claimant said that he has not received this. I prefer the claimant's version of events given that he has been experiencing difficulties regarding his tax position with HMRC and presumably this would not have occurred if a P45 had been issued.
31. It was not reasonable for the claimant to have understood that he was dismissed before the emails on this date.

Conclusions

32. The claimant was employed from July 2015 until January 2018 when he was dismissed without notice by email dated January 10 2018. The claimant therefore had the requisite 2 years' continuity of employment.
33. The claimant was entitled to SSP and is therefore entitled to the shortfall in those payments.
34. No potentially fair reason as falls within s98(4) ERA has been identified by the respondent in terms of the dismissal in January 2018. They have therefore failed to demonstrate that this was a fair dismissal either substantively or procedurally. No reason has been given save that they did not know that he existed. This seems unlikely given that they had paid him throughout his employment whether it was managed by Mr Matthews and his company or after they bought out Mr Matthews' company and took on his staff. Even if it is correct, had they checked their payroll records or kept anything in writing regarding his employment, they would have been able to ascertain that he had not been dismissed.
35. It seems likely that the respondent would have continued to employ him on his return to work had he not been bringing a personal injury claim or agreed to drop his personal injury claim. Whilst I have not addressed it in detail in my judgment, as no claim in this regard has been brought by the claimant, it is worth noting that had the respondent dismissed the claimant for raising a potential industrial injury accident this would have been unlawful and would not have required the requisite two year continuity of employment in any event.

36. Further, dismissing someone for raising a health and safety matter is an automatically unfair dismissal. I therefore conclude that the claimant was unfairly dismissed.

Remedy

37. The claimant is entitled to his loss of earnings that have occurred as a result of the dismissal. In evidence he said that he started new work on 21 March 2018. This is not a long period of time and I find that it demonstrates that he tried to find alternative work once his dismissal became clear and he ought to be compensated for his loss of earnings between 12 January 2018 and 21 March 2018.

38. The respondent accepted the figures that the claimant outlined regarding the shortfall of SSP and the amount that he currently earns. I therefore carried out the calculations regarding the claimant's loss with the agreement of the parties and awarded the following amounts.

39. The claimant's claim for unpaid Statutory Sick pay is upheld and he is awarded £1,737.96.

40. The claimant's claim for unfair dismissal is upheld and he is awarded a net compensatory award of £2,855, a basic award of £1,000 and an amount in respect of his loss of statutory rights of £150.

41. Total payable to the claimant by the respondent is £5,742.96.

Employment Judge Webster
Date: 23 January 2019