EMPLOYMENT TRIBUNALS

Claimant: **Mr J Duckworth**

Respondent: **Hampshire Demolition and Recycling Limited**

Heard at: **Birmingham** **On:** **29 November 2019**

Before: **Employment Judge Gilroy QC**
Sitting with Members: Mrs G Sheldon and Ms J Keene

Representation

Claimant: **Mr Alex Passman - Consultant**
Respondent: **Mr Anthony Korn - Counsel**

JUDGMENT

The unanimous judgment of the Tribunal is that the Respondent shall pay the Claimant compensation in the sum of £9,022.93, made up as follows:

Unfair dismissal compensatory award

(1) Loss of earnings: £6,587.04.

(2) Loss of statutory rights: £250.00.

(3) Loss of private use of vehicle: £315.62.

Award under s.38 Employment Act 2002

(4) Two weeks' pay: £1,050.00.

REASONS

Background

1. Following a contested hearing on 14 and 15 October 2019, the Tribunal unanimously held that the Claimant was automatically unfairly dismissed contrary to s.100(1)(c) of the Employment Rights Act 1996, "ERA". The Tribunal reconvened on 29 November 2019 for the purposes of determining matters of remedy.

2. Mr Korn for the Respondent asked the Tribunal to deal in its judgment on remedy with the ***Polkey*** issue[1] (ie whether the Claimant would have left his employment in any event irrespective of the actions of the Respondent). In this regard, the Respondent relied upon two separate contentions, namely (a) that based on the evidence of Mr Parrott (Contract Manager, Demolition Department), the Claimant would have left his employment of his own volition in any event, and (b) that based on the evidence of Mr Bailey (Managing Director), the Claimant was guilty of misconduct in the way he carried out his work, such that would have led to his dismissal. Strictly speaking, contingency (b) might be more accurately described as an argument that the Claimant's compensation should be reduced on the grounds of contributory fault within the meaning of s.123(6) of the ERA.

Evidence and Material before the Tribunal

3. The Claimant gave oral evidence. The Respondent called Mr Bailey to give evidence. Each witness provided a statement. As before, the witness statements were taken by the Tribunal "as read" and treated as their evidence in chief.

4. The Tribunal was provided with a remedy bundle **[R2]**, and a copy of a letter dated 27 November 2019 from Charles Lovell & Co, the Respondent's accountants, to the Respondent's solicitors **[R3]**. The Respondent also produced a skeleton argument **[R4]**, and extracts from "Employment Tribunal Remedies" (Korn and Sethi) (4th Edn.) **[R5]**.

Polkey and Contributory Fault

5. Issues relating to ***Polkey*** and contributory fault can be dealt with at either the liability or the remedy stage. The Tribunal actually resolved the matters referred to at paragraphs 6 and 7 below when deliberating on matters relating to liability, but did not record its findings in this regard in its liability judgment.

6. The Tribunal found that during the course of his employment, the Claimant suggested to Mr Parrott (Contract Manager, Demolition Department) that, given the distances he travelled, it would be useful if he could occasionally work from home. He was not actively seeking employment elsewhere. He was well remunerated in his work with the Respondent and did not wish to leave.

7. Mr Bailey suggested that the Claimant would have been dismissed because he did not complete certain work tasks. Written evidence to support this contention was lacking. The Tribunal found that there was no suggestion whilst the Claimant was working for the Respondent that he would be dismissed on such grounds.

8. In the circumstances, the Tribunal concluded that there was an insufficient evidential basis upon which to make any ***Polkey*** reduction from the

[1] ***Polkey v AE Dayton Services Ltd [1988] ICR 142***.

compensation to be awarded to the Claimant based on either of the two contingencies referred to at paragraph 2 above, or to reduce his compensatory award pursuant to s.123(6) of the ERA.

Compensatory Award - Basis of loss of earnings calculation

9. The parties were not agreed as to the basis upon which the Claimant's loss of earnings should be calculated. The Claimant maintained that the loss should be calculated by reference to the earnings he made during the period he worked for the Respondent. The Respondent contended that the calculation should be based upon the earnings he would have received had he been treated as an employee (ie in accordance with the substance of the Tribunal's findings on the liability issues).

10. The Tribunal accepted the Respondent's argument that the multiplicand to be used for the purposes of the loss of earnings claim had to be consistent with its finding that the Claimant was employed by the Respondent, and that it would be wholly artificial to treat him in a way which was inconsistent with that finding. The relevant figures in respect of the various elements of the compensatory award are set out in the relevant paragraphs below.

Compensatory Award - Period of loss and Mitigation

11. The parties were not agreed as to the period of loss for the purposes of the compensatory award.

12. The Claimant's last day at work with the Respondent was 20 April 2018. He received pay in lieu of notice covering the period up to and including 5 May 2018. He managed to find alternative employment with Oracle Solutions, "Oracle", on 2 July 2018. In his witness statement he stated that he continued in that employment until the end of October 2018. In his Schedule of Loss it was stated that he remained employed by Oracle until the end of December 2018.

13. The Claimant told the Tribunal that upon obtaining work with Oracle, he stopped looking for work. He said that the reason for this was that he wanted to focus on his new employment.

14. At the end of 2018, the Claimant took the opportunity to have an operation to deal with a long standing back problem. He subsequently found temporary work with Omega Environmental, "Omega", for 2 weeks commencing on 8 April 2019. It was the Claimant's position that the basis period for the compensatory award should be 12 months.

15. The Respondent pursued a range of arguments to the effect that the Claimant had failed to mitigate his loss. The Respondent also argued that there should be "cut-off" date for the purposes of the loss of earnings claim of 2 July 2018, the date upon which the Claimant entered employment with Oracle.

16. The Tribunal concluded that the loss of earnings claim should be limited to 40 working days, namely the period between the Claimant being paid up by the

Respondent in terms of monies in lieu of notice (5 May 2018) and starting in new employment (2 July 2018). As stated above, it was urged upon us on behalf of the Claimant that the Tribunal should deal with this matter on the basis of an umbrella period of loss of 12 months, and that the compensation "clock" should be held to have continued to run beyond the date upon which the Claimant's employment with Oracle ended, notwithstanding that he had left that job, had an operation (through a clearly unavoidable medical condition), and had taken another temporary position.

17. The Tribunal considered the matter with care, and based its approach on the Claimant's own evidence, to the effect that when he obtained the first "new job" in July 2018, he had simply stopped looking for work. The Tribunal fully understood the Claimant's approach in this regard, and indeed concluded that he should be commended for focusing on such matters, rather than focusing on his claim for compensation, but if his state of mind, upon taking that first job, was as indicated, the Respondent cannot be held liable for his ongoing losses.

18. The Tribunal calculated that the appropriate figure for loss of earnings is, therefore, £6,587.04.

Compensatory Award - Loss of Statutory Rights

19. The parties were not agreed as to whether the Claimant was entitled to an award for loss of statutory rights. Mr Korn for the Respondent submitted that the function of the award for loss of statutory rights is to compensate an individual who has lost the right to make an unfair dismissal claim against a future employer, and will not regain that right until he or she has acquired two years' continuous service with such an employer. His essential submission was that the Claimant in fact had lost nothing in this respect, because he had succeeded with a claim of *automatic* unfair dismissal, the only claim of unfair dismissal he could bring against the Respondent because of his lack of sufficient continuous service for the purposes of making an *ordinary* unfair dismissal claim, and that therefore his loss was nil. Mr Passman for the Claimant submitted that in this context, "statutory rights" are not restricted to unfair dismissal rights, in that they include rights to statutory notice of termination.

20. The Tribunal approached this aspect on the basis that there was a valid claim for loss of statutory rights, notwithstanding that it accepted the Respondent's argument that the Claimant had not lost the protection to claim unfair dismissal because he did not have that protection in the first place.

21. The right to minimum notice is a statutory right under s.86 of the ERA. It takes an employee at least one month to accrue or acquire the right to any form of statutory minimum notice. Once acquired, that right is not, certainly in the initial stages, as "valuable" (in financial terms) as the statutory right to claim unfair dismissal, but it is in principle a loss which in the judgment of the Tribunal should form the basis of compensation. The Tribunal considered that the appropriate figure was £250.00.

Compensatory Award - Loss of Benefits

22. There was only one benefit for the Tribunal to consider, namely the provision of a "company car". A vehicle was provided to the Claimant during the course of his engagement with the Respondent and there were two issues which fell to be determined in relation to this aspect, namely (a) the basis of use, in other words, the question of private usage of the vehicle, and whether it was permissible to conduct any form of apportionment exercise as between private use and business use, and (b) the actual calculation of loss.

23. Mr Korn submitted that in fact there should be no apportionment because the Claimant did not give evidence in this regard and as the burden of proof rested upon him, there was no material for the Tribunal to work on.

24. The Tribunal disagreed with Mr Korn that there was a bar to the conducting of an apportionment exercise. The Tribunal felt able to take judicial notice of the fact that there are 7 days in the week, that 2 of those days comprise the weekend, and that it would be arbitrary and artificial in the extreme to expect that an employee with a "company car" sitting outside his house would, on a Saturday morning, look at that vehicle and say to himself that he must not touch it because it was a Saturday and he was not at work. The Tribunal did accept, however, that the apportionment exercise required some care.

25. Doing the best it could, the Tribunal adopted as the base figure for the calculation the agreed monthly contract hire figure of £631.23 (for the company car provided during the Claimant's employment with the Respondent). The Tribunal allowed 2 months, applying a discount of 75% to account for business use. The calculation is, therefore, 25% of (2 x £631.23), ie £315.62.

Section 38 Employment Act 2002 - Failure to provide written particulars

26. The Claimant brought a claim under one of the jurisdictions listed in Schedule 5 to the Employment Act 2002. The Respondent did not provide the Claimant with a statement of employment particulars. The Tribunal must, therefore, subject to s.38(5) of the 2002 Act ("exceptional circumstances"), increase the award by "the minimum amount" and may, if it considers it just and equitable in all the circumstances, increase the award by "the higher amount" instead. The minimum amount is 2 weeks' pay. The maximum amount is 4 weeks' pay. There is no middle ground, it is either the higher or the lower figure. There is a statutory maximum of £525 in respect of a week's pay.

27. It was urged upon us on behalf of the Claimant that he had pressed the issue of not having particulars with the Respondent. The Respondent contended that the Claimant had not pressed the issue. It was further prayed in aid on behalf of the Respondent that it was hardly surprising that a written statement of particulars of employment had not been provided, given that neither party regarded the other as part of an employment relationship.

28. No particulars of employment were provided. Whether the Respondent considered that the Claimant was an employee or not, in its judgment on the

liability issues, the Tribunal concluded that he was. The fact that the Respondent may have concluded, wrongly, that the Claimant was not an employee, cannot be laid in the Claimant's path as an obstacle to an award under s.38. The Tribunal concluded (a) that there no "exceptional circumstances", and (b) that it was bound to make an award under s.38 of the 2002 Act, but (c) that it would not be just and equitable to award the higher amount. The award under this head is, therefore, £1,050.00.

ACAS Code Uplift (or reduction)

29. There was an issue as to whether the Claimant's compensation should be subject to adjustment (upwards or downwards) for breach of the ACAS Code of Practice, subject to a maximum of 25%. This issue required consideration of the following aspects:

    (a) Are the relevant provisions engaged in the first place (s.207A of the Trade Union and Labour Relations (Consolidation) Act 1992, "the 1992 Act") ?.

    (b) Did the Respondent act unreasonably ?

    (c) If the answer to the above two questions is in the affirmative, what is the relevant percentage for the purposes of the uplift ?

    (d) What is the uplift to be applied to, ie what is the base figure to which the relevant percentage is applied ?

    (e) Should there be a reduction from compensation because the Claimant did not invoke any form of appeal procedure ?

30. The Tribunal resolved the above issues as follows:

    (a) The relevant provisions were engaged.

    (b) The Respondent act unreasonably. No form of procedure whatsoever was adopted.

    (c) The relevant percentage for the purposes of the uplift should be 10%. In all fairness, as the parties could be said not to have dealt with each other as employer/employee, it could also be said that for the Respondent to have adopted some form of procedure would have been artificial. The Tribunal has borne this in mind in (a) reducing what the uplift would otherwise have been, and (b) applying no reduction in relation to the award (see paragraph 30(e) below).

    (d) Having considered the relevant statutory provisions, including s.124A of the ERA, the Tribunal concluded that the percentage figure it had to apply the uplift to was the award of compensation so far calculated (the compensatory plus the s.38 award) and not simply the compensatory award.

(e) The Tribunal made no reduction from compensation because the Claimant did not invoke any form of appeal procedure (see paragraph 30(c) above).

31. Adding the three elements of the compensatory award to the award under s.38 produces a figure of £8,202.66. 10% of that sum is £820.27.

32. The total sum the Respondent is ordered to pay the Claimant is, therefore, £9,022.93.

Signed by: Employment Judge Gilroy QC

Signed on: 18/12/2019