



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110169/2019

Held in Glasgow on 6 February 2020

Employment Judge: M Sutherland (sitting alone)

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Robert Flannigan

**Claimant
In Person**

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**Michael O'Shea t/a
Cornerstone 360**

**Respondent
No appearance and
No representation**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that –

- (1) The Respondent was in breach of contract for failure to pay notice pay and is ordered to pay the Claimant the sum of £2,640.
- (2) The Claimant was unfairly dismissed and the Respondent is ordered to pay to the Claimant the sum of £10,887.50.
- (3) The Claimant was not provided with a statement of employment particulars and the Respondent is ordered to pay to the Claimant the sum of £880.

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REASONS

Introduction

1. The Claimant presented a complaint of unfair dismissal, failure to give a statement of employment particulars and unlawful deduction from wages.

2. The Claimant appeared on his own behalf. The Respondent did not lodge a response and did not enter an appearance.
3. The Claimant gave evidence on his own behalf.

Findings of Fact

- 5 4. The tribunal makes the following findings of fact –
5. The Claimant was employed by David Riley from 28 August 1992 until July 2019. The Claimant was employed by him as a bartender working at the pub Carrigans. The pub lease was then transferred to Punch. There were then various changes of tenant and a name change to The Cornerstone. Latterly
10 the Respondent took over the pub business on 24 June 2019. Following each and every change of owner and leaseholder, the fittings, equipment and stock of the pub were transferred across, the pub continued to trade as before, and the staff and customers were retained. The Claimant was continuously employed by the various pub owners and tenants and worked continuously in
15 the pub as a bartender.
6. The Claimant was summarily dismissed by text on 24 July 2019 without reason, warning, prior procedure or notice. The Respondent initially suggested that he might be redundant but the pub has continued to trade following his dismissal. The Respondent latterly raised issues with his conduct
20 but without reasonable foundation.
7. The Claimant was employed to work 22 hours a week at a rate of £10.00 an hour (gross) as at the date of termination. The Claimant was not issued with a written contract or statement of employment particulars. The Claimant was 56 old when his employment was terminated.
- 25 8. The Claimant has taken reasonable steps to find suitable alternative employment following his dismissal which he expects to secure shortly.
9. The Claimant has not been in receipt of benefits.

Relevant law*Continuous employment*

10. Under Section 218 of the Employment Rights Act ('ERA') 1996 if a business or an undertaking is transferred from one person to another, the period of employment of an employee at the time of the transfer in the business or undertaking counts as a period of employment with the transferee and the transfer does not break the continuity of the period of employment.
11. Under Regulation 3 of the Transfer of Undertakings (Protection of Employment) ('TUPE') Regulations 2006 there is a relevant transfer of an undertaking or part of an undertaking to another person where there is a transfer of an economic entity which retains its identity. An economic entity is an organised grouping of resources which has the objective of pursuing an economic activity.
12. Under Regulation 4 of TUPE Regulations 2006 except where an employee objects, a contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, shall have effect after the transfer as if originally made between that person and the transferee.

Statement of terms and conditions

13. Section 38 of the Employment Act 2002 applies where the Employment Tribunal makes an award to an employee and, when the proceeding began, the employer was in breach of his duty to the employee to issue to the employee of a statement of main terms and conditions of employment.
14. Where section 38 applies the Tribunal must make an award in favour of the employee of a minimum amount of two weeks' wages and, if the Tribunal considers it just and equitable in all the circumstances to do so, it must increase the award to the higher amount of four weeks' wages.

Statutory Notice

15. Under Section 86 of the ERA 1996 an employee is entitled to one week's notice for each year of continuous employment up to a maximum of 12 week's notice.
- 5 16. A claim for statutory notice may be brought as a contract claim under Article 3 of the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994. Under Article 7 a contract claim must be brought within 3 months of the effective date of termination.

Unfair Dismissal

- 10 17. Section 94 of Employment Rights Act 1996 ('ERA 1996') provides the Claimant with the right not to be unfairly dismissed by the Respondent.
18. It is for the Respondent to prove the reason for his dismissal and that the reason is a potentially fair reason in terms of Section 98 ERA 1996. At this first stage of enquiry the Respondent does not have to prove that the reason
15 did justify the dismissal merely that it was capable of doing so.
19. If the reason for his dismissal is potentially fair, the tribunal must determine in accordance with equity and the substantial merits of the case whether the dismissal is fair or unfair under Section 98(4) ERA 1996. This depends
20 whether in the circumstances (including the size and administrative resources of the Respondent's undertaking) the Respondent acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee. At this second stage of enquiry the onus of proof is neutral.
20. Any provision of a relevant ACAS Code of Practice which appears to the
25 tribunal may be relevant to any question arising in the proceedings shall be taken into account in determining that question (Section 207, Trade Union and Labour Relations (Consolidation) Act 1992). The ACAS Code of Practice on Disciplinary and Grievance Procedures provides in summary that –
- a. *Employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or
30 confirmation of those decisions.*

- b. *Employers and employees should act consistently*
- c. *Employers should carry out any necessary investigations, to establish the facts of the case.*
- d. *Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made.*
- e. *Employers should allow employees to be accompanied at any formal disciplinary or grievance meeting.*
- f. *Employers should allow an employee to appeal against any formal decision made*

21. Compensation is made up of a basic award and a compensatory award. A basic award, based on age, length of service and gross weekly wage, can be reduced in certain circumstances.
22. Section 123 (1) of ERA provides that the compensatory award is such amount as the Tribunal considers just and equitable having regard to the loss sustained by the Claimant in consequence of dismissal in so far as that loss is attributable to action taken by the employer. Subject to a Claimant's duty to mitigate their losses, this generally includes loss of earnings up to the date of the Final Hearing (after deducting any earnings from alternative employment), an assessment of future loss of earnings, if appropriate, a figure representing loss of statutory rights, and consideration of any other heads of loss claimed by the Claimant from the respondents.
23. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA") provides that if, in the case of proceedings to which the section applies, it appears to the Tribunal that the claim concerns a matter to which a relevant Code of Practice applies, and the employer has unreasonably failed to comply with the Code in relation to that matter, then the Tribunal may, if it considers it just and equitable in all the circumstances, increase the compensatory award it makes to the employee by no more than

a 25% uplift. The ACAS Code of Practice on Disciplinary & Grievance Procedures is a relevant Code of Practice.

A week's pay

24. Under Section 221 of the ERA 1996 where an employee has normal working hours, and where their pay does not vary either with the time of that work (shift work) or the amount of the work done (piece work), a week's pay for the purpose of calculating redundancy pay, holiday pay and notice pay is the amount which is payable if the employee works those normal working hours.

Discussion and decision

10 *Continuous employment*

25. The Cornerstone pub amounted to an organised grouping of resources which had the objective of pursuing an economic activity. The fittings, equipment, stock, staff and customers of the pub were transferred to and from the various owners and tenants. There was the transfer of an economic entity which retained its identify on each transfer. Accordingly, there was a transfer of an undertaking under TUPE Regulations 2006 through the various owner and tenants to the Respondent.

26. The Claimant was assigned to the organised grouping of resources and/or employees that transferred to the Respondent. The Claimant's contact of employment had the effect after the transfers as if originally made between the Claimant and the Respondent. Accordingly, the Claimant had 27 years of continuous service at the date of termination.

A week's pay

27. The Claimant had normal working hours, his pay did not vary with the time of that work or the amount of the work done, and accordingly a week's pay for the purpose of calculating his entitlement is the amount which is payable if he worked those normal working hours, namely £220 a week (gross).

Statement of Particulars

28. The Claimant was employed for over 27 years and did not in that time receive any statement of employment particulars. It is considered just and equitable to make the higher award of £880 equal to 4 week's pay.

5 *Statutory Notice*

29. The Claimant is entitled to one week's notice for each year of continuous employment up to a maximum of 12 week's notice. The Claimant has 27 years of continuous service and is therefore entitled to 12 week's notice. Accordingly the Respondent is due to pay the Claimant notice pay in sum of £2,640 (gross)
10 (£220 x 12 weeks).

30. It is for the Respondent to account to HM Revenue and Customs for income tax and National Insurance Contributions in respect of the award of notice pay.

Unfair dismissal

15 31. The Claimant was dismissed by the Respondent without reason, warning, notice or procedure. The Claimant's dismissal was accordingly unfair. The Claimant took adequate steps to mitigate his losses in the period up to and including February 2020. The Claimant expects to secure alternative employment shortly and is not seeking compensation for future losses.

20 32. The Claimant is entitled to a basic award in sum of £6,050 (£220 x 20 years (capped)) + (£220 x 7.5 years (service age 41 and over x 1/2)).

33. The Claimant is entitled to a compensatory award in sum of £3,520 (£220 x 16 weeks (28 weeks from dismissal until date of hearing less 12 week notice period compensated separately) plus £350 in respect of his loss of statutory
25 rights.

34. Given that issues of conduct were raised the dismissal was one to which the ACAS Code applied. The Respondent wholly and unreasonably failed to comply with the ACAS Code of Practice on Disciplinary & Grievance

Procedures. It is considered just and equitable in all the circumstances to increase the compensatory award by 25% to £4,837.50.

35. The Claimant was not receipt of benefits. Accordingly, the Employment Protection (Recoupment of Job Seeker's Allowance and Income Support) Regulations 1996 do not apply to this award.

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Employment Judge : M Sutherland

Date of Judgment : 13 February 2020

Date sent to parties : 13 February 2020

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