



EMPLOYMENT TRIBUNALS

Claimant Mr DJ Parnall

Respondent Aluminium Castings Limited

Heard at: Exeter

On: 6 February 2020

Before:

Employment Judge Goraj

Members Mrs P Skillin
Mr T Smaldon

Representation

Claimant: did not attend

The Respondent: Mr S Glazsher, solicitor

RESERVED REMEDY JUDGMENT PURSUANT TO THE LIABILITY JUDGMENT SENT TO THE PARTIES ON 8 JUNE 2018

THE UNANIMOUS JUDGMENT OF THE TRIBUNAL IS that: -

1. The respondent's application to dismiss the claimant's claim for compensation pursuant to Rule 47 of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the 2013 Rules of Procedure") is dismissed.
2. The claimant is awarded compensation in the sum of £2,000 for injury to feelings pursuant to section 49 (2) of the Employment Rights Act 1996 in respect of his successful complaint of post termination detriment in breach of section 47 B of the Employment Rights Act 1996.

REASONS

Introduction

1. This judgment is a remedy judgment following a liability hearing on 30 and 31 May 2018 at which the Tribunal delivered an oral judgment by which the Tribunal (a) dismissed the claimant's complaint of unfair dismissal pursuant to section 103 A of the Employment Rights Act 1996 ("the Act") and (b) upheld the claimant's complaint of post termination detriment pursuant to section 47 B of the Act. The oral judgment was confirmed by a summary judgment which was sent to the parties on 8 June 2018 ("the Judgment"). Following a request by the claimant, the Tribunal sent written reasons to the parties on 10 October 2018 ("the Reasons").
2. This Judgment was the subject of an unsuccessful appeal by the claimant to the Employment Appeal Tribunal against the dismissal of his complaint of unfair dismissal pursuant to section 103 A of the Act. The parties were advised by the EAT by a letter dated 12 December 2018 that, pursuant to Rule 3 (7) of the EAT Rules of Procedure, the EAT did not propose to take any further action regarding the appeal as it considered that it had no reasonable prospect of success.

The composition of the panel

3. This Hearing was conducted by the same panel which determined the liability hearing as identified above. At the case management preliminary hearing on 14 September 2018, referred to further below (which was convened for the purposes of the listing of a remedy hearing and associated matters) the respondent's representative, who had represented the respondent throughout the proceedings, drew to the Tribunal's attention a possible conflict of interest with regard to the future involvement of Mrs Skillin in the remedy hearing in that her daughter had obtained employment with the firm solicitors for whom he worked.
4. Following further clarification of the position, the Tribunal subsequently confirmed in a letter to the parties dated 3 June 2019 that it was satisfied that there was no reason why Mrs Skillin should not remain as a member of the panel determining remedy as her daughter had not joined the firm in question until after the liability hearing (subsequently confirmed as commencing employment on 5 July 2018) and further, in any event, worked in an unrelated part of the practice. The parties were given an opportunity to raise any objections to Mrs Skillin's proposed continued participation in the remedy hearing but none were received by the Tribunal. The Tribunal was further subsequently informed that the claimant's representative who had represented the respondent at the liability hearing in May 2018 left the relevant practice

in November 2018 at which time the retainer in this case was transferred to his successor firm.

5. In the Tribunal's letter to the parties dated 29 November 2019, the Tribunal mistakenly advised the parties that the Mrs Skillin would not be a member of the panel.
6. The Tribunal explained the position to the respondent at the commencement of the remedy hearing including that it was satisfied that:- (a) there was no reason why Mrs Skillin should not continue to sit on the panel as there was no conflict of interest in the light of the position set out above and (b) further the Tribunal would not be properly constituted without Mrs Skillin's participation as the Tribunal did not have the written consent of the parties to proceed with 2 members only. The respondent agreed with the assessment of the Tribunal regarding such matters.

The non – attendance of the claimant and the continuance of the Hearing.

7. The claimant did not attend this hearing. The Tribunal nevertheless, decided to proceed with the remedy hearing for the reasons explained below.

Background to the remedy hearing

8. Following the liability hearing, the Tribunal convened a telephone case management hearing to clarify the outstanding issues and to list the matter for hearing. In the subsequent Case Management Order dated 17 September 2018 ("the Order") the Tribunal in brief summary :- (a) recorded that the claimant contended that he had suffered psychiatric injury by reason of the post termination detriment (b) made various directions requiring the claimant to provide further details of such claim and supporting medical evidence (c) listed the remedy hearing on 2 alternative dates (in October and December 2018) depending on whether or not the claimant continued to pursue a claim for psychiatric injury and (c) explained to the claimant the difficulties which he was likely to encounter in pursuing a claim for psychiatric injury in the light of the available information. As far as the Tribunal is aware, the claimant has not complied with any of the directions contained in the Order (including with regard to the provision of any further information relating to any claim for alleged psychiatric injury).
9. The claimant subsequently requested that the remedy hearing (and preparation therefor) be stayed pending the outcome of his appeal to the EAT. This requested was granted by the Tribunal.
10. Following the claimant's unsuccessful appeal to the EAT the Tribunal took steps to relist the remedy hearing including by way of a letter dated 3 June 2019 in which the Tribunal confirmed that the matter

would be listed for hearing for one day in June 2019 to determine remedy in respect of the claimant's successful detriment claim.

11. The Tribunal was subsequently advised by the respondent in June 2019 that it understood that the claimant had received a custodial sentence for 22 months in respect of an unrelated matter.
12. The Tribunal decided, notwithstanding the objections of the respondent, to postpone the remedy hearing in June 2019 as it appeared likely, in the absence of any recent correspondence from the claimant and his notified imprisonment, that the claimant not had received the notice of the remedy hearing.
13. Following further enquiries, the Tribunal was informed that the claimant was in custody in HMP Exeter and wrote to him on 9 August 2019 c/o of the Governor regarding his outstanding claim for compensation and informing him of the Tribunal's proposal to deal with the matter by way of written representations. The Tribunal also enclosed a copy of key documents and correspondence.
14. The Tribunal did not receive a response from the claimant and therefore sent a letter dated 29 October 2019 advising the claimant in summary, that in the light of his failure to pursue his claim for compensation, it proposed to strike out his claim for compensation subject to any objections to be received within 28 days.
15. The Tribunal was contacted by the claimant's mother and subsequently received a letter from the claimant dated 12 November 2019 objecting to the proposed strike out of his claim for compensation and advising the Tribunal of his imprisonment in HMP Dartmoor.
16. The Tribunal wrote to the claimant by letter dated 29 November 2019 at Dartmoor Prison advising him, in summary, that :- (a) his claim for compensation would not be struck out (b) that having regard to the overriding objective, it was not in the interests of justice for there to be any further delay in resolving the matter and the case would therefore be listed for a remedy hearing and (c) that if the claimant was unable to attend the hearing because he remained in custody he was directed to serve written representations in support of his claim for compensation which would be limited to injury feelings as he had failed to respond to earlier directions concerning a possible claim for psychiatric injury.
17. The claimant did not respond to the Tribunal's letter dated 29 November 2018 and did not attend the hearing today.
18. The respondent wished to proceed with the remedy hearing including in summary, on the following grounds that:- (a) there had already been a considerable delay in concluding this matter which went back to events in the summer of 2017 and that it was therefore in the interests of justice/ the overriding objective for the matter to be resolved without

further delay and (b) that the claimant had been served with notice of the hearing at his last notified address and given an opportunity to submit written representations (which he had failed to do).

19. Having given the matter careful consideration including in particular: - (a) the long history of the case (b) the opportunities which the claimant had been afforded to progress his claim for compensation, including by way of written representations (in the event of his continuing imprisonment) and (c) balancing the interests and contentions of the respondent regarding the resolution of the matter, the Tribunal was satisfied that it was appropriate, and in accordance with the overriding objective to proceed with the Hearing notwithstanding the absence of the claimant.

The respondent's preliminary application pursuant to Rule 47 of Schedule 1 to the 2013 Rules of Procedure

20. Following the decision to proceed with the Hearing, the respondent applied, in the light of the claimant's non-attendance at the Hearing for the claimant's claim for compensation to be dismissed pursuant to Rule 47 of Schedule 1 of the 2013 Rules of Procedure.

21. In summary, the respondent relied in support of such application on the following matters :- (a) the provisions of Rule 47 of Schedule 1 of the 2013 Rules of Procedure entitled a Tribunal, if appropriate having regard to the matters identified in that Rule, to dismiss the claimant's claim for compensation in the light of his non-attendance (b) although the likely reason for the claimant's non-attendance was his continuing imprisonment the claimant had been offered an opportunity to submit written representations in such circumstances (c) the claimant had represented himself at the liability hearing and there was no reason why the claimant could not therefore have dealt with the remedy hearing by way of written representations (d) the issue of remedy had been outstanding since 1 June 2018 during which time the claimant had failed to comply with the directions of the Tribunal for the provision of further information relating to his claim for compensation (including in respect of any claim for psychiatric injury) including as directed in particular by the Order and (e) the claimant had failed to provide any written representations in support of his claim.

22. Having given careful consideration to all of the matters referred to above (including the provisions of Rule 47 of Schedule 1 of the 2013 Rules of Procedure), the Tribunal was satisfied that it was not appropriate, in all the circumstances of the case, to dismiss the claimant's claim for compensation. When reaching this conclusion the Tribunal took into account in particular the following matters, namely :- (a) the claimant had succeeded at the liability stage in respect of his claim for post termination detriment pursuant to section 47 B of the Act (b) that it was highly likely in the light of the claimant's letter dated 12 November 2019 together with the information provided by the

respondent concerning the length of the claimant's sentence that the claimant was still in prison and was therefore unable to attend the remedy hearing and (c) the respondent had not previously made any application to strike out the claimant's claim for compensation in respect of any failure by the claimant to comply with the terms of the Order/any other directions of the Tribunal and (d) the Tribunal was satisfied, having regard to the contents of the Reasons and other documentation which was available for the purposes of the liability hearing, that it was possible to proceed with the claimant's claim for compensation in respect of the established post termination detriment notwithstanding his absence. The Tribunal therefore went on to determine the claimant's claim for compensation as addressed below.

Background to the claimant's claim for compensation

23. In brief summary, the Tribunal has reminded itself in particular of the following: -

- (1) The claimant worked for the respondent, who specialises in the manufacture of aluminium castings, initially as an agency worker and subsequently as an employee, between 24 May and 21 June 2017.
- (2) Following a dispute with an agency worker at the respondent's premises on 19 June 2017 (during which the claimant was threatened with violence) (paragraph 17 of the Reasons) the claimant made 2 protected disclosures (one to the respondent and one to the police) prior to his dismissal regarding such incident (paragraph 3 of the Reasons).
- (3) The Tribunal decided at the liability hearing that although it was satisfied that the claimant had made the above protected disclosures it was not also satisfied that the claimant had at the relevant time the necessary genuine and reasonable belief that they were made in the public interest (paragraphs 39 – 40 of the Reasons). The claimant's claim pursuant to section 103 A of the Act was therefore dismissed.
- (4) The claimant made a further, post termination disclosure to the police on 22/23 June 2017 regarding the incident which the Tribunal accepted was a protected public interest disclosure for the purposes of sections 43 B and F/ G of the Act including as it accepted that the claimant's primary reason for contacting the police at that time was that the agency worker involved in the above mentioned incident might act in a similar manner towards other staff or the public (paragraphs 3,4, 27, and 45 of the Reasons).
- (5) The Tribunal was also satisfied that (a) the claimant had established the alleged post termination treatment upon which

he relied namely, that the respondent had subsequently misrepresented to the police the position regarding the claimant's status and the alleged termination of the agency worker's position (b) the claimant's protected public interest disclosure to the police on 22 / 23 June 2017 had a significant influence on the respondent's response to the police and further that the respondent gave misleading information to the police in order to encourage the police to close down their investigation and (c) that the claimant had established that he had suffered a detriment for the purposes of section 47 B of the Act namely that the claimant had a reasonably held belief that two of the factors which the police took into account when deciding not to pursue their investigations further was the misleading information provided by the respondent (paragraphs 28, 29, 45 – 48 of the Reasons).

(6) The Tribunal was further satisfied that (a) the claimant was caused considerable distress by reason of what he described in his email to the respondent dated 28 June 2017 as "this whole ordeal" which included that the respondent had described to the police that the claimant was an agency worker ((page 39 of original hearing bundle) and paragraph 49 of the Reasons).

(7) The respondent failed to establish for the purposes of remedy that the claimant had acted in bad faith in respect of the claimant's post termination disclosure on 22/ 23 June 2017 (paragraph 51 of the Reasons).

24. When determining the claimant's claim for compensation in respect of the established post termination detriment identified above the Tribunal has had regard to the available information including in particular :- (a) the claimant's witness statement and bundle of documents which were provided for the purposes of the liability hearing (including the claimant's schedule of loss) (b) the Reasons and (c) the contentions of the respondent as summarised below. The Tribunal has also taken into account that the claimant presented his claim form to the Tribunals on 3 October 2017.

The contentions of the respondent

25. The respondent contended in summary as follows:- (a) the claimant had only succeeded on one limited element of his claim – the main element of his claim relating to his dismissal was unsuccessful (b) the post – termination detriment was not the primary cause of any distress caused to the claimant (paragraph 23 (6) above) – the primary cause of any distress related to the claimant's dismissal and loss of employment (c) the £10,000 claimed by the claimant in his original schedule of loss (as contained in the liability hearing bundle) for injury to feelings makes no reference to the established post termination

detriment (d) whilst the respondent accepts that the Tribunal is entitled to make an award for injury to feelings in accordance with **Virgo Fidelis Senior School v Boyle 2004 ICR 1210 EAT** the Tribunal is not required to make such an award (section 49 (1) (b) of the Act) and (e) in any event, the amount of any award is what the Tribunal considers to be just and equitable in the circumstances having regard to the infringement complained of and any “loss” which is attributable to the relevant detriment and (f) in all the circumstances any award should be at limited to the lowest end of the lower band of Vento.

THE LAW

26. The Tribunal has had regard in particular to the following statutory and associated provisions/ legal authorities namely:- (a) sections 47 – 49 of the Act (b) the authority of **Virgo** referred to above (c) the guidance contained in the Court of Appeal judgment in **Vento v Chief Constable of West Yorkshire Police 2003 ICR 318 CA** and the associated Presidential Guidance from the President of the Employment Tribunals dated 5 September 2017 (in respect of claims presented on or after 11 September 2017).

THE CONCLUSIONS OF THE TRIBUNAL

27. Having given careful consideration to all of the matters referred to above the Tribunal is satisfied that (a) it is appropriate to make the claimant an award of compensation for “injury to feelings” pursuant to section 49 (1) (b) of the Act and (b) it is just and equitable in all the circumstances of the case (including having regard to nature of the established detriment and “loss” attributable to such detriment for the purposes of section 49 (2) of the Act) to make such an award on the basis of the available information notwithstanding the non- attendance of the claimant / absence of any written representations. The Tribunal is further satisfied that having regard to all the matters referred to below it is appropriate, in all the circumstances, to award the claimant the sum of £2,000 for injury to feelings in respect of the established post termination detriment identified above.

28. When reaching the above conclusions, the Tribunal has had regard in particular to the following: -

- (1) The findings of the Tribunal contained in the Reasons and at paragraph 23 (3) – (6) above including in particular: - (a) the misrepresentation of information to the police by the respondent in response to the claimant’s protected public interest disclosure and (b) “the great deal of distress” caused to the claimant “by this whole ordeal” referred to in the claimant’s email to the respondent dated 28 June 2017 (page 39 of the original bundle and paragraph 31 of the Reasons).

- (2) Although the claimant's original schedule of loss (which was not updated by the claimant) (at page 81 of the liability bundle) contained a figure of £10,000 for injury to feelings in accordance with the Vento guidelines there was no explanation of if or how this related to the established post termination detriment. Further, the schedule of loss contained no identifiable claim for financial losses attributable to the post termination detriment.
- (3) The claimant has not provided any evidence of any psychiatric injury attributable to the post termination detriment notwithstanding that he was directed by the Order (17 September 2018) to provide any such supporting evidence.
- (4) The Tribunal is satisfied, on the available evidence, that the misrepresentation of information by the respondent to the police regarding the status of the claimant and the alleged termination of the agency worker's contract was a serious matter which caused the claimant distress. However, the Tribunal has also taken into account that (a) it has received no oral or written evidence from the claimant relating to any further impact of the post termination detriment and (b) that the reference to "a great deal of distress" (paragraph 31 of the Reasons and pages 38- 39 of the liability bundle) also refers to the "whole ordeal" which appears to relate in the light of the contents of the email to not only the post termination detriment but also to the wider events including the claimant's dismissal (in respect of which the claimant's claim was unsuccessful).
- (5) The Tribunal is satisfied that although the respondent's misrepresentations to the police were serious and caused the claimant distress (a) it was a one-off incident and (b) there is no evidence of any further or ongoing loss (including injury to feeling) which is attributable to such detriment.
- (6) In conclusion, the Tribunal is satisfied, doing the best that it can with the available evidence, that for all the reasons referred to above (a) the claim for compensation falls within the lower band of Vento and (b) that an appropriate figure, having regard to the distress caused to the claimant but the absence of any further established injury to feeling attributable to the post – termination detriment, is £2,000 which sum the claimant is accordingly awarded.

Case number 2420695.2017

Employment Judge Goraj

Dated: 5 March 2020

Judgment sent to parties: 6 March 2020

FOR THE TRIBUNAL OFFICE