



EMPLOYMENT TRIBUNALS

Claimant: Mr K Richards

Respondent: David Smith T/A Future Joinery & Shop Fitters

Heard at: Cardiff

On: 10 and 11 March 2020

Before: Employment Judge A. Ross

Representation

Claimant: Mrs. C. Riggott

Respondents: In person

JUDGMENT ON REMEDY

1. The Respondent shall pay the Claimant £28,690.98 assessed as follows:

1.1. Unpaid wages of £670.87 plus statutory uplift of £167.71;

1.2. Compensation for unfair dismissal of:

1.2.1. Basic award: £3,750;

1.2.2. Compensatory award: £24,102.40

(a) Prescribed period: £9,041.84;

(b) Future loss: £8,140.08;

(c) Loss of statutory rights: £500;

(d) Statutory uplift under section 207A Trade Union and Labour Relations (Consolidation) Act 1992: £4,420.48;

(e) Increase under section 38 Employment Act 2002: £2000.

REASONS

Evidence and findings of relevant fact

1. I heard oral evidence from Claimant. He confirmed that he believed the figures in his Schedule of Loss at A39 were accurate. He was cross-examined by the Respondent. During this cross-examination, the Respondent made fresh allegations about the Claimant and the other joiners receiving cash sums from jobs, which the Respondent had received no money from. The Claimant denied this.
2. The Respondent again put to the Claimant that his bad workmanship had caused the Respondent loss; and asked why he should pay for it. The Claimant denied it and explained he had had nothing to do with any defect on work on a conservatory.
3. Again, I found the Claimant to be a reliable witness on matters of fact and I accepted his evidence.
4. The Respondent gave oral evidence. He made the new allegations about the Claimant and other joiners getting cash for jobs, which they split between themselves. This was denied by the Claimant. I accepted the Claimant's evidence, not least because this allegation had never been raised before, but also because I found that the Claimant was telling the truth.
5. The Respondent's evidence was short; he did not address the specific items claimed in the Schedule of Loss, save to deny that the Claimant earned £12.50 per hour. The Respondent repeated his complaints about the alleged bad workmanship. He did not give evidence to demonstrate any failure by the Claimant to mitigate his loss, nor that any *Polkey* deduction should be made.

Gross pay

6. I found the Claimant's gross pay to be £500 per week. This was because:
 - 6.1. The Claimant gave oral evidence to this effect.

6.2. The Claimant had pleaded in his ET1 that he worked 40 hours per week basic, at £12.50 per hour, which he confirmed in evidence. The ET3 admitted the hours alleged, and did not challenge the hourly rate.

6.3. The payslips showed the hourly rate of £12.50 per hour throughout his employment by the Respondent and the former employer companies.

Loss of earnings to date

7. I found that the Claimant's net pay for the Respondent, when not in receipt of SSP, was £410 per week. I found that this figure was just and equitable, by estimating from the payslips for 6.4.18 and 21.4.18, neither of which were precisely for 80 hours per fortnight; none of the payslips covering a two week period for work prior to May 2018 were for exactly 80 hours, with some showing overtime and some showing fewer hours (and the Claimant explained that he sometimes had to go for medical appointments about his knees).
8. The Claimant has been a joiner machinist all his life; he has never worked in an office and described that he would not know how to. He has searched for machinist joiner jobs in the Port Talbot and Bridgend areas using the internet. He has applied for 20 roles, involving the same type of work, but of a less heavy nature, which is necessary because of his knee problems. He has not been appointed to any. The fact that he needs an operation to replace his other knee has counted against him. It is likely that his age (63) has played a factor, in that employers were more reluctant to employ him than another machinist when they learned that he will have to have a further knee operation and given that he is due to retire in 2022.
9. The Claimant received Universal Credit for the period from 25 January 2019 until July 2019 when he was awarded Incapacity Benefit. He had continued to receive this Benefit at the rate of £420 per month up to the date of this hearing. This equates to receiving Incapacity Benefit of £96.92 pw.
10. The Claimant accepted that he would have suffered no loss between 17 June 2019 when SSP would have expired up to the date that he was fit to work again.
11. On his evidence, the Claimant was unfit for work until around 1 September 2019, due to recovery time from his knee operation. The Claimant had found

that he could not survive on £420 per month and that he was looking for work from about 1 September 2019 to stop his debts rising. He explained that it had been intended that he would have an operation on his other knee towards the end of 2019, but the operation had been postponed by the hospital. However, he was due to go back to hospital for a pre-operation appointment in mid-April 2020, with the operation to follow around six weeks later. The Incapacity Benefit had therefore been continuous.

Conclusions

12. The parties made brief oral submissions, which I do not need to summarise.

(1) Compensation for unfair dismissal

A. Basic award:

13. The Claimant is entitled to a Basic award of: $5 \times 1.5 \times 500 = \text{£}3,750$

B. Compensatory award:

14. There was no blameworthy or culpable conduct by the Claimant. There was no justification for reducing basic or compensatory awards under s122 or s123(6) Employment Rights Act 1996 on this basis. The Respondent's allegation of poor workmanship was not made out; indeed, I concluded that it was groundless. At the remedy stage of the hearing, the Respondent produced no contemporaneous documentary or other evidence to show the Claimant was responsible for any defective work, nor of any investigation into any alleged loss suffered by the Respondent.

15. Given that the Respondent did not show that the Claimant was dismissed for capability reasons, nor that he had any reasonable grounds to believe that the Claimant was lacking in capability or responsible for poor workmanship, I concluded that no *Polkey* deduction should be made.

16. I concluded that no deduction to the compensatory award should be made under s.123(1) ERA on the evidence and submissions presented to me.

Prescribed period: Loss of earnings to date

17. Had he not been dismissed, the Claimant would have received 20 weeks sick pay from the effective date of termination to 17 June 2019. This amounts to £1,841.
18. I concluded that it was just and equitable to award loss of sick pay in full and loss of earnings to date from 1 September 2019.
19. The prescribed period is from 25 January 2019 to 11 March 2020.
20. The loss of earnings over this period is:
Statutory Sick Pay £1,841
Plus loss from 1 September 2019: 23 weeks x £410 = £9,430

Less Incapacity benefit of 23 weeks x £96.92 = £2,229.16

Total loss of earnings over prescribed period: £9,041.84.

Future Loss of earnings:

21. The Claimant has been unemployed for over six months now. In view of his age, his experience in only one type of job all his life, the fact that he now requires lighter work (albeit of the same type), and the required further knee operation, I concluded that it would be just and equitable to award a further 26 weeks loss of earnings. I estimate that he could mitigate his loss once he has recovered from the worst effects of his second knee operation,
22. I noted that he was a skilled worker and that he now had the declaration of unfair dismissal to support his future applications. However, I concluded that the above factors were likely to mean that he would need to continue his search for a new job for a further 6 months. This is the estimate given by the Claimant himself; and I concluded that he was experienced enough to know the state of the job market in his field of work.
23. I concluded that the Claimant would mitigate his loss entirely by finding suitable employment by 9 September 2020.
24. I calculated this future loss of earnings to be: 26 weeks x £410 = £10,660.

25. However, I decided that it was likely that he would continue to receive Incapacity Benefit over this period, given the need for his further knee operation and the recovery required from that operation. Therefore, I subtract from the subtotal figure for future loss of earnings $26 \times £96.92 = £2,519.92$.

26. This produces a final figure for future loss of earnings of £8,140.08.

Loss of statutory rights

27. I assess the value of the loss of Statutory rights at £500. This is equivalent to about 1 week of gross pay, which is just and equitable.

Statutory Uplift

28. The Claimant is entitled to a statutory uplift. In this case, where the Respondent's stated reason for dismissal was incapability due to poor workmanship, I concluded that a 25% uplift would be appropriate. There was a complete failure by R to follow any part of the ACAS Code.

29. I assess the statutory uplift at £4,420.48.

Increase in compensatory award under section 38 EA 2002: Failure to provide a statement of terms and conditions

33. The Respondent has controlled a number of companies over a relatively long period. Although a business employing less than 25 workers, from what I read and heard, the Respondent is an experienced businessman. After all, he instructed consultants to file his ET3.

34. In this case, the Respondent never made any attempt to give the Claimant a statement of terms, despite the number of times that the Claimant was employed by different companies and by his sole trader business.

35. In my judgment, on the evidence that I heard, there was no mitigation for this breach. Moreover, the facts of this case demonstrate precisely why a statement of terms is required, so that employees may enforce the rights within their contract or point to the figure that they are entitled to receive as gross pay.

36. I consider that it would be just and equitable to award the Claimant a further 4 weeks pay under section 38 Employment Act 2002. This equates to £500 x 4 = £2,000.

Summary of unfair dismissal award

30. The total award for unfair dismissal is therefore £27,852.40 which comprises of:

- 30.1. Basic award: £3,750;
- 30.2. Compensatory award: £24,102.40

(2) Unlawful deduction from wages

31. The unpaid wages were agreed at £670.87.

32. Applying the statutory uplift of 25%, the uplift award under this head of claim is £167.71.

(3) Breach of contract: notice pay

32. No separate award is required for breach of contract because of the compensatory award for unfair dismissal; the Claimant may not have double recovery.

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Employment Judge A. Ross
Date: 19 March 2020

JUDGMENT SENT TO THE PARTIES ON 31 March 2020

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FOR THE TRIBUNAL OFFICE