



EMPLOYMENT TRIBUNALS

Claimant: Mr E Swaby
Respondent: Langham Homes Limited
Heard at: Reading **On: 10 August 2020**
Before: Employment Judge Gumbiti-Zimuto

Appearances

For the Claimant: Mr JF Neckles (Trade Union Representative)
For the Respondent: Mr P McKane (Financial Director)

JUDGMENT

- (1) The respondent is ordered to pay to the claimant the sum of £11, 350.06 in compensation for unfair dismissal.
- (2) The claimant has permission to amend his claim to include a claim for breach of contract- notice pay. The respondent has permission to amend the response to include the contention that the claimant has been paid his notice pay.
- (3) The claimant's remaining complaints namely; detriment pursuant to section 12 of the Employment Relations Act 1999, direct race discrimination, race harassment and breach of section 10 of the Employment Relations Act 1999 are postponed and adjourned to a date to be fixed with a time allocation of three days. The parties are to send to the employment tribunal their dates to avoid for listing of the hearing within 7 days of this judgment being sent to the parties.

REASONS

1. At the start of proceedings, the respondent made an application to strike out the claimant's claim on the grounds that the claim was not being actively pursued and the claimant had failed to comply with the employment tribunal's orders. We refused the application. Our conclusion was that both parties had been in breach of the employment tribunal's orders on preparation for the hearing, that the respondent had been guilty

of the more serious breach, a fair hearing is still possible and the claimant having had judgment on liability in his claim for unfair dismissal it was not in the interests of justice for the claimant's claims to be struck out.

2. We made an order that the claimant's remaining complaints namely; detriment pursuant to section 12 of the Employment Relations Act 1999, direct race discrimination, race harassment and breach of section 10 of the Employment Relations Act 1999 are postponed and adjourned to a date to be fixed with a time allocation of three days. The parties are to send to the employment tribunal their dates to avoid for listing of the hearing within 7 days of the date on which this judgment is sent to the parties.
3. The Tribunal then proceeded to consider the claimant's remedy hearing in respect of unfair dismissal. We heard evidence from the claimant and oral submissions were made by the claimant's representative and by Mr McKane who represented the respondent. It became clear during the consideration of the remedy relating to unfair dismissal that the claimant was saying that he was not paid notice pay and the respondent was stating that he had been paid notice. The claimant does not seek to claim notice if it has been paid and the respondent wishes to pay the claimant for his notice period if it has not been paid. The parties were not able to resolve this dispute one way or the other, there was no documentation that supported the conclusion one way or the other. With the agreement of the parties the claimant was given permission to amend his claim to include a complaint of breach of contract. The respondent has permission to amend its response to contend that the payment has been made. There is no need for any further pleading from either party. The matter is to be considered at the final hearing of the claimant's remaining complaints. In view of what has been said on behalf the parties to us today we hope that there will be no need for a further hearing on this breach of contract issue and either the breach of contract claim will be conceded, and payment made or the claim withdrawn.
4. The claimant is age 53 and at the date of his dismissal he was 51. There was an issue in dispute between the parties as to the correct date of his employment starting. The claimant says that the correct date is 19 January 2014 the respondent contends that it is the 19 January 2015.
5. The respondent relied on the date inserted in the claimant's contract of employment which referred to his continuous employment commencing on 19 January 2015 signed in 2017. The document relied upon contains a mark at the point where reference is made to the date of the commencement. The claimant states that this is because the claimant had pointed out in 2017 when the contract was signed that the start date was wrong but while this was acknowledged at the time it was never put right. The claimant's evidence is the only evidence that we have on this issue. The claimant says that it was simply an error of recording, he does not

take issue with the remaining features of the contract. Mr McKane was not an employee of the respondent when the claimant was employed, and he made his challenge to the claimant based on what is recorded in the 2017 contract.

6. The Tribunal accept the claimant's evidence that the recorded date in the 2017 contract is wrong and the correct date that the claimant started his employment was 19 January 2014. We note that at the time the document was signed that he pointed out it was incorrect, further we note that in his oral evidence the claimant gave a convincing account for why his recollection is to be preferred to the date in the document, the claimant was able to align his start date with a project which the respondent was working on in 2014.
7. The claimant was first employed as a labourer and fork-lift driver, then later as a crane operative, then later still as a supervisor and latterly at the end of his employment as a site manager.
8. The claimant's gross weekly pay was £848.92, his net weekly pay was £621. The respondent made contributions to the claimant's pension, the claimant's evidence which was not challenged was that these were in the region of £112 per month.
9. The claimant explained how he needed a car for work and stated that his monthly expenses claim for petrol was in the region of an average of £600. The claimant is not entitled to claim in respect such sums which did not amount to a loss that he is entitled to recover in compensation. However, he relied on this in support of the contention that a car was necessary for his work and to explain why notwithstanding it is not reflected in the written contractual terms the claimant was in receipt of £400 per month in respect of a car allowance.
10. The claimant's evidence in respect of car allowance was challenged by the respondent's representative. The Tribunal note that the respondent's representative merely challenged the claimant's position with the observation "we only have your word for it" no alternative position was put, or evidence called to contradict the claimant's account. The Tribunal accept the claimant's evidence on this point and consider that this is a loss of benefit that the claimant is entitled to recover in compensation.
11. Since his dismissal the claimant has found new employment with Quinn London Limited, his employment started on 18 September 2018. The claimant was therefore unemployed from 24 June 2019 until that date. The claimant was referred to documents showing the claimant's efforts to find work and the Tribunal is satisfied that the claimant has mitigated his loss, it is not said that the claimant has failed to do so.

12. The respondent in its response accepts that the claimant was dismissed in a manner which failed to comply with the ACAS code of practice. This Code is designed to help employers, employees and their representatives deal with disciplinary and grievance situations in the workplace.
13. Further the claimant asked for an appeal, the claimant was told that his appeal would be heard by Miss Kristina Landles. Miss Landles was PA to the Managing Director Mr Tony Pidgley who was the person who dismissed the claimant. Miss Landles had delivered to the claimant his dismissal letter. The other person to hear the appeal was someone called Mr Nick Parsley, he was a land buyer who was not involved in day to day running of the company. The Code provides that "the appeal should be dealt with impartially and, wherever possible, by a manager who has not previously been involved in the case"¹. Miss Landles would not have been a suitable person to conduct the appeal if it was to comply with the Code but possibly Mr Parsley may have been an appropriate person to conduct an appeal. The claimant asked to be represented by his union and provided the respondent with dates when he and his representative were available. However, the respondent did not set up an appeal and ignored the claimant's correspondence.
14. The claimant's contract of employment makes reference to disciplinary procedures which were not followed and also makes reference to a staff handbook which was not provided to the claimant.
15. The claimant's new employment provides him with an income in a sum which is greater in terms of simple basic pay than the claimant's previous employment with the respondent (including pension and car allowance). The conclusion of the Tribunal is that the claimant was not suffering any loss after the 18 September 2018.
16. The claimant in our view should recover a sum equivalent to one-week basic pay in compensation for the loss of his statutory rights.
17. Basic award: The claimant is entitled to a basic award in the sum of £3048.²
18. Compensatory award: We make award to the claimant for the loss of his statutory rights in the sum of £849.92.
19. Loss of earnings: The claimant was unemployed from the date of his dismissal on the 25 June 2018 until the 18 September 2018. In respect of the unfair dismissal claim we make an award for the claimant from the 25 July 2018 (the day after the claimant's notice period expired) until 18

¹ Paragraph 27 of Code of Practice 1

² £508 (statutory weekly maximum Pay on 25 June 2018) x 4 (complete years of continuous employment) x 1.5 (multiplier having regard to the claimant's age)

September 2018 (55 days). In that period of time the claimant suffered a loss of net salary in the sum of £4865.92. In the same period the claimant's loss in terms of car allowance was £723.29 and pension £202.52.

20. In the period after the claimant started his new employment the claimant has not suffered any continuing financial loss arising from his dismissal, we therefore do not consider that a compensatory award for the period after the claimant found new employment is just and equitable.

21. The claimant's total compensatory award is therefore £6641.65.

22. We have gone on to consider whether this is a case where an increase in the award of compensation pursuant to section 207A Trade Union and Labour Relations (Consolidation) Act 1992 is appropriate. We consider that it is. We consider the respondent's failure to comply with the ACAS Code in this case egregious.

23. The claimant was dismissed without any procedure being followed the respondent not only ignored the claimant's contract of employment but it failed to comply with the ACAS code of conduct or do anything that resembles a fair procedure. In making a deposit order in this case Employment Judge Anstis included the following passage taken from the respondent's response:

"It is admitted no procedure was followed."

24. The respondent's conduct is aggravated by the fact that when the claimant indicated a desire to appeal and then requested a date at which his union representative could attend the respondent ignored the claimant. We consider that the increase in the award pursuant to section 207A should be the maximum 25%. The compensatory award is therefore increased by £1660.41.

25. The total compensatory award: £8302.06.

26. The respondent is ordered to pay to the claimant the sum of £11,350.06 comprising of a basic award in the sum of £3048 and a compensatory award (including a section 207A increase) of £8302.06.

Employment Judge Gumbiti-Zimuto

Date: 12 August 2020

Sent to the parties on: 7/9/2020

.....
For the Tribunals Office

Note

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

Public access to employment tribunal decisions:

All judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the Claimant(s) and Respondent(s) in a case.