



# EMPLOYMENT TRIBUNALS

**Claimant:**  
Mr I Pilcher

v

**Respondent:**  
Mr Wayne Albert Saunders t/a  
Domino Menswear

**Heard at Cambridge  
by cloud video  
platform**

**On:** 21 September 2020

**Before:** Employment Judge Finlay (sitting alone)

## **Appearances**

**For the Claimant:** In person

**For the Respondent:** No attendance or representation

# RESERVED JUDGMENT

The claimant is entitled to a redundancy payment of £6,300 from the respondent.

## REASONS

### **The hearing**

1. The claimant appeared in person following the case management discussion by telephone at 11:00 am. He gave sworn evidence today and I have also taken into account the sworn evidence he gave to the tribunal at the preliminary hearing on 19 September 2019. He had filed a written statement and a bundle of documents. The respondent relied on his response to the claim which had been prepared by his solicitors at the time.

### **The claim**

2. Following a preliminary hearing in September 2019, the only remaining issue to be determined was the question of whether the claimant is entitled to a redundancy payment. This complaint was presented out of time such that the tribunal would not have jurisdiction to hear it unless section 164(2) of the Employment Rights Act 1996 (ERA) applies. The claimant also needed to establish that he had been dismissed by reason of redundancy,

the respondent claiming that the reason for dismissal was 'some other substantial reason' as referred to in section 98 (1) (b) ERA.

3. The claimant was born on 19 January 1955. It was agreed that he worked for the respondent from July 1993 until 24 December 2017 which is the relevant date for the purposes of this claim. He commenced early conciliation in March 2018, but did not present his claim until 3 August 2018. It is agreed that he earned £210 per week and his statutory redundancy payment therefore would amount to £6,300 if his claim succeeded.

### **The facts**

4. Having heard the evidence of the claimant and considered the relevant documents I make the following findings of fact on the balance of probabilities.
5. The respondent owned Domino Menswear, a men's clothing store in Witney, Oxfordshire. The claimant worked for the respondent in the store for over 20 years. He was a store assistant but also managed the store in the respondent's absence. The respondent relied on the claimant to a considerable extent. The claimant dealt with finances and correspondence on his behalf. The claimant and the respondent have known each other for some 40 years. The respondent was the claimant's best man at his wedding.
6. The lease of the shop was due to come to terminate at the end of December 2017. The landlord had proposed a significant rent increase which the claimant knew that the respondent would not accept. The respondent looked for alternative premises and found a potential new shop in Abingdon. The claimant visited the site with the respondent. In November and December 2017 Domino Menswear held what was described as a 'relocation sale', but by mid November 2017 it was clear to the claimant that the respondent would not be relocating to Abingdon. The claimant knew that the respondent was not responding to the landlord of those premises nor was he taking any active steps towards agreeing a lease. In addition, the claimant's knowledge of the respondent's finances was such that he believed that the respondent would not be able to afford to pay for the dilapidations at the Witney store and rent in advance at the Abingdon store.
7. The respondent closed the Witney store on 24 December 2017 and did not reopen elsewhere. The claimant worked up until that date, carrying out his normal duties. He also undertook a couple of jobs for the respondent shortly afterwards, but on a voluntary basis as a favour.
8. In October 2017, the claimant was arrested for allegedly downloading child pornography. The police visited the respondent's store to search for evidence and told the respondent why the claimant had been arrested. Once he had been released, the claimant returned to work and told the

respondent that he had been a 'prat' and that he had been suffering from stress. He offered to resign and to leave there and then, but the respondent did not accept his resignation and instead re-assured him.

9. The precise dates when this occurred in October 2017 are not agreed and a number of different dates have been put forward both by the claimant and the respondent. Although I do not believe it is crucial to the issues to be determined, I find from what I have heard and read that it is most likely that the claimant was arrested on 5 October and offered to resign on 6 October. In the response, the respondent states that the visit from the police was on 19 October and that the offer to resign was made 'on or about' 19 October. However, he also says that the claimant was arrested on 17 October, but it seems unlikely that the police would then wait two days before visiting the claimant's workplace. Having heard from the claimant, on balance I accept the dates he gave, which were that he was arrested on 5 October and offered his resignation on 6 October.
10. The respondent's case is that he "gave verbal notice to the claimant of his dismissal on or around 19 October 2017". The claimant disputes this and maintains that at no time did the respondent ever tell him that he was dismissed or was to be dismissed. I accept the evidence of the claimant. I note that although the respondent makes the statement quoted at paragraph 23 of the grounds of resistance, he has given no further information about this conversation. I note that the response was drafted by solicitors and would have expected them to have provided more information about the dismissal in what is otherwise a lengthy and thorough pleading.
11. I also note that elsewhere in the response, the respondent refers on more than one occasion to having "effectively" dismissed the claimant, which is an unusual adverb to use in this context. I read it as meaning that there was no direct communication of dismissal, rather than the word being used in the sense of "successfully". An example is in paragraph 6: "*It is agreed that the claimant's employment ended with the respondent on 24.12.2017, but that the claimant had been effectively dismissed some two months earlier and that his last working day would be 24.12.2017.*"
12. I find as a matter of fact that the respondent did not ever tell the claimant that he was dismissing him. The claimant knew by mid-November (when it was clear that the Abingdon alternative was not being pursued) that his employment would end when the Witney store closed on Christmas Eve. I accept that it is unusual for an employer and employee not to have discussed the end of the employee's employment in more detail, but it may not be so surprising in the context of the very long and previously friendly relationship between the two.
13. The claimant heard no more from the police until March 2018 when it was confirmed that the matter was going to trial in the criminal courts. By this point he had obtained alternative employment, which he lost once he was convicted in May 2018 (receiving a non-custodial sentence). A report of

the court case appeared in the local newspaper, showing the claimant standing outside the respondent's store with the Domino Menswear logo prominently displayed. This was the first media coverage of the claimant's crime.

14. Both parties agree that on 24 December 2017, the respondent said to the claimant: "*don't worry, I will see you alright.*" I do not, however, accept the claimant's assertion that this meant that the respondent accepted that the claimant was redundant and would be paying a redundancy payment to the claimant.
15. The claimant had given evidence on 19 September 2019 as to the steps he took prior to presenting this claim to the employment tribunal. For ease of reference, I have set out the relevant extract from that judgment below:

*"The claimant then gave evidence on oath. He told me, and I accept, that his last day of work was 24 December 2017. Early in the new year, he went to the Citizens Advice Bureau who suggested he contact ACAS and the Insolvency Service. The claimant duly did contact ACAS and believes that he received his early conciliation certificate in February or March. It should be noted here that a copy of that certificate is not, and never has been, available to the tribunal.*

*Having received his early conciliation certificate, the claimant went back to ACAS. He believes, and I accept, that this would have been in around March 2018. The Citizens Advice Bureau told him to go forward to the employment tribunal. The claimant acknowledged that he was told about the time limits for making the application. The claimant had access to the internet between that time and August 2018.*

*The claim was presented on 3 August 2018. I asked the claimant to explain why he had waited for a further four months before doing so. He confirmed honestly that he was not focusing on the employment Tribunal time limits at that time and was hoping that he could resolve the matter either through the Insolvency Service or with the assistance of ACAS. It was only when it became absolutely clear to the claimant that this would not happen that he did institute these proceedings."*

16. At the hearing today, the claimant confirmed that he did not at any time write to the respondent claiming a redundancy payment from him. He did not know that to do so within six months would have stopped time running against him and he felt that there would be no point in asking for the redundancy payment from the respondent in writing as the respondent would not respond by paying.

## **The Law**

17. Section 135 ERA provides that an employer shall pay a redundancy payment to any employee of his if the employee is dismissed "by reason of redundancy." Section 162 ERA sets out how to calculate that payment.

18. By section 139, a dismissal is by reason of redundancy if it is wholly or mainly attributable to the fact that the employer has ceased to carry on the business for which the employee was employed or to carry on that business in the place where the employee was so employed.
19. Under section 163, where there is a dispute regarding an employee's right to a redundancy payment, there is a presumption that the employee was dismissed by reason of redundancy.
20. Under section 164, an employee will not be entitled to a redundancy payment unless he has, before the end of the period of six months beginning with the relevant date, made a claim for the payment by notice in writing given to the employer or made a claim to the employment tribunal. However, under section 164 (2), the employee is not deprived of his right to the payment if during the following six months, he has made a claim for the payment by notice in writing given to the employer or made a claim to the employment tribunal AND it appears to be just and equitable that he should receive a redundancy payment.
21. Under section 164 (3), when determining whether it is just and equitable that the employee should receive a redundancy payment, the employment tribunal is required to have regard to the reason for the failure by the employee to take the requisite steps and all the other relevant circumstances.
22. Finally, section 140 provides a further exception where the employer is entitled to terminate the employee's contract of employment summarily by reason of the claimant's conduct.

### **Conclusions**

23. Applying the relevant law to my findings of fact my conclusions are as follows.

#### Reason for dismissal. Was the claimant dismissed by reason of redundancy?

24. The claimant's case is that his employment terminated because the respondent closed the shop where he worked and provided no alternative work location. The respondent's case is that the claimant was dismissed because of his misconduct and the associated reputational damage to his business (paragraph 7 of the grounds of resistance).
25. The respondent points to the fact that Domino Menswear had specialised in menswear clothing including wedding hire for young children. This inevitably involved young children attending the store to be measured and for and fitted with new clothes, a duty which the claimant carried out. Given the nature of the charge against the claimant, the respondent states that it was inconceivable that any new store in Abingdon could go on to be a successful venture. He maintains that this, together with a perceived

difficulty in finding a suitable 'replacement' for the claimant in Abingdon was the reason why he did not open a new store in Abingdon, and not the financial issues noted by the claimant. The respondent argues that had the claimant not committed the criminal offence, the respondent would have opened in Abingdon and the claimant would still have been employed.

26. My conclusion is that the claimant was dismissed by reason of redundancy and that his dismissal was wholly or mainly due to the closure by the respondent of the place where the claimant worked. I arrive at this conclusion for the following reasons:

26.1. It is a fact that the Witney store closed on 24 December 2017. That was the claimant's (only) place of work.

26.2. The suggestion that the claimant would not have been offered employment at an alternative location because of potential reputational damage does not affect the primary position which is that the respondent closed down his business completely on that date. He did so because he did not want to pay the increased rent demanded by the landlord. Even if the respondent had opened in Abingdon, he would still have ceased to carry out his business at the place where the claimant was employed to work and the dismissal would have been by reason of redundancy.

26.3. Even after becoming aware of the charges against the claimant, the respondent continued to explore an alternative location for his store in Abingdon. No action was taken by the police between late October and 24 December 2017 and the respondent's knowledge of the potential reputational damage remained constant over that period. If the real reason why the respondent did not pursue the Abingdon alternative was the actions of the claimant, he would not have explored that alternative after he had been advised of the criminal charges. It is far more likely that the respondent abandoned the Abingdon alternative because of financial issues.

26.4. Whilst I fully appreciate that the business could have been subjected to considerable reputational damage once the nature of the claimant's crimes became public knowledge, this did not happen until May 2018.

26.5. For these reasons, the respondent has failed to rebut the presumption that the claimant's dismissal was by reason of redundancy.

**Jurisdiction. Does the claimant have the right to a redundancy payment?**

27. The claimant failed to take any of the steps required by section 164 ERA, until he presented his claim to the employment tribunal on 3 August 2018. The initial six month period expired on 23 June 2018 and his claim is therefore 'out of time' by approximately six weeks, such that he has no

right to a redundancy payment, unless it appears to the tribunal that it is just and equitable that he should receive it.

28. I have noted the reasons for the claimant's delay. He should not have relied upon the Insolvency Service or ACAS in order to resolve the situation. However, I do not consider that the cogency of the evidence was affected by the six week delay. The delay in hearing the claim since August 2018 is not down to the claimant in any way and the claimant's delay in presenting the claim did not impact upon the parties being on an equal footing or affect the ability to deal with the case justly and fairly.
29. Weighing up the prejudice to the claimant of not receiving the payment against the prejudice to the respondent of having to pay it, I find the balance is in favour of the claimant, particularly as the merits of the claim are in the claimant's favour.
30. Finally, lest it be argued by the respondent, I do not consider that the fact that the claimant was subsequently convicted of a criminal offence means that it is not just and equitable for him to receive a redundancy payment. No doubt the respondent could have dismissed the claimant fairly in May 2018, but he chose not to dismiss the claimant when he became aware of the circumstances of that offence in October 2017 and instead dismissed him by reason of redundancy when closing his business in December 2017.
31. For completeness I should add that in relation to section 140 ERA, the respondent has not sought to rely on this exception and even if the circumstances of the claimant's dismissal fulfilled the criteria in that section, the respondent has not sought to persuade the tribunal that he could have terminated the claimant's employment summarily.

Calculation of redundancy payment

32. The claimant was aged 38 when he commenced work for the respondent. He worked for the respondent for 24 years, over 20 of which were after he became 41. It is common ground that he earned £210 per week. He is therefore entitled to a redundancy payment of  $£210 \times 20 \times 1.5 = £6,300$ .

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Employment Judge Finlay

Date: 27 September 2020

Judgment and reasons  
Sent to the parties on:

.....16<sup>th</sup> Oct 2020.....

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For the Tribunal Office

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