



EMPLOYMENT TRIBUNALS

Claimant:

Respondent:

Mr Hynes

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**Western Logistics and
Haulage Limited**

Heard at:

Via CVP

On:22 September 2020

Before:

Employment Judge Milner-Moore

Appearances

For the Claimant: In person

For the Respondent: No attendance

JUDGMENT

1. The claimant was entitled to a statutory redundancy payment and is awarded the sum of £5,512.50.
2. The claim for breach of contract succeeds; the claimant was dismissed without the requisite notice. The claimant is awarded the sum of £4,148 as compensation for breach of contract.
3. The claimant was unfairly dismissed by the respondent.
4. Pursuant to sections 118 to 126 of the Employment Rights Act 1996, the claimant is awarded compensation for unfair dismissal as follows:
 - 4.1. A basic award in the sum of £0
 - 4.2. A compensatory award in the sum of £992

The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations do not apply to this award.

5. The claimant was not paid the amounts due to him under regulation 14(2) of the Working Time Regulations 1998 in relation to accrued but untaken annual leave.

6. The claimant is awarded the sum of £888 in respect of his accrued but untaken annual leave.

REASONS

1. The claimant brings claims of failure to pay a statutory redundancy payment, breach of contract (in relation to the failure to give notice of dismissal), unfair dismissal and of failure to pay him for untaken holiday to which he had accrued entitlement at the termination of his employment. The claimant produced a small bundle of documents and gave evidence in support of his claims. The respondent did not enter a response and did not participate in the hearing.
2. In light of the COVID 19 pandemic, the hearing took place via CVP. There were no technological difficulties with the conduct of the hearing.

Facts

3. I made the following factual findings:
 - 3.1. The claimant began his employment with the respondent on 30 January 2012. The claimant was employed as a recovery driver. He worked 12 hours a day, 6 days a week, earning a weekly wage of £830 (gross) and 593 (net) and a daily rate of £118.40 (net).
 - 3.2. The respondent is a haulage company. The claimant has been informed that the company has ceased to trade. However, a check of the records of Companies House reveals that the company is still active (a petition to strike it from the register having been paused) and there is no evidence of any insolvency proceedings which would be a bar to this litigation.
 - 3.3. On 27 June 2019, the claimant was informed by Mr Preston, an owner and director of the company, that the claimant's hours were to be reduced from 12 hours a day to 8 hours a day. The claimant made clear that he objected to this attempt to change his contract of employment. He attempted to discuss this with Mr Preston but Mr Preston avoided such discussions.
 - 3.4. On 24 July 2019, Mr Preston informed the claimant that he was being made redundant on the grounds that the respondent's business would be closing down. He was told that he would receive his notice pay, his outstanding holiday pay and that he would be paid to the end of the month.
 - 3.5. The claimant was entitled to 28 days holiday a year. As at the termination of his employment the claimant had accrued entitlement to 16.5 days annual leave and had taken only 9 days leave.
 - 3.6. The claimant received his normal pay to the end of July but received no notice pay or holiday pay and received no redundancy payment.
 - 3.7. When his employment was terminated, the claimant was 55 years of age and had seven years' service with the respondent.
 - 3.8. The claimant submitted his ET1 on 13 October 2019.
 - 3.9. The claimant was unemployed between 24 July and 4 September 2019. He claimed no social security benefits during that period. The claimant

secured a new job on 4th September 2019 and now receives a higher hourly rate of pay but works for fewer hours a week. He is earning less in total than he did before. However, he has no plans to move on from that role or seek a role with higher pay. He enjoys his new role and feels that he is doing well there.

Law

4. The definition of redundancy is set out at s139 of the Employment Rights Act 1996

139 Redundancy.

(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—

(a) the fact that his employer has ceased or intends to cease—

(i) to carry on the business for the purposes of which the employee was employed by him, or

(ii) to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business—

(i) for employees to carry out work of a particular kind, or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish.

5. Whilst redundancy is a potentially fair reason for dismissal (section 98(2) of the ERA) it is nonetheless necessary to consider whether the dismissal was fair within the meaning of section 98(4) of the ERA.

98 General.

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(ba)

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(2A)

(3) In subsection (2)(a)—

(a) “capability”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) “qualifications”, in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(3A)

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

6. In the context of a redundancy dismissal, fairness generally requires that, at a minimum, an employer warn the employee that they are at risk of redundancy, consult during the redundancy process, operate a fair selection process and consider alternatives to redundancy (**Williams v Compair Maxim**). An employee dismissed for redundancy with over two years qualifying service is entitled to a statutory redundancy payment, to be calculated by reference to section 162 of the ERA. A person, such as

the claimant, who was over the age of 41 throughout his employment, is entitled to 1.5 weeks' pay for each year of employment, with the week's pay being capped by reference to section 227 ERA.

7. Where an individual is unfairly dismissed the compensation payable is determined by reference to sections 118 to 126 ERA. A successful claimant is to be awarded a basic award and a compensatory award. The basic award is calculated in the same manner as a statutory redundancy payment and is to be reduced by the amount of any statutory redundancy payment awarded to him or her (sections 119 and 122 ERA). The compensatory award is to be:

“such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer” (section 123(1) ERA).

8. In deciding what compensation is just and equitable it is open to a Tribunal to reduce compensation to reflect the likelihood that had a fair procedure been followed a fair dismissal could have taken place and, where appropriate, to limit compensation to the length of time that a fair procedure would have taken (**Polkey v Dayton**).
9. Section 86 ERA sets out the formula by reference to which the statutory minimum notice period is calculated (one week's notice for each year of service after the first two years, subject to a maximum of 12 years). Any employment contract which is silent as to notice, or specifies a shorter period of notice, is deemed to include the statutory minimum notice period.
10. Section 14 of the Working Time Regulations 1998 provide for an individual to be compensated for untaken annual leave entitlement to which has accrued at the date of dismissal.

“Compensation related to entitlement to leave

14.—(1) This regulation applies where—

(a) a worker's employment is terminated during the course of his leave year, and

(b) on the date on which the termination takes effect (“the termination date”), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13(1) differs from the proportion of the leave year which has expired.

(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).

(3) The payment due under paragraph (2) shall be—

(a) such sum as may be provided for for the purposes of this regulation in a relevant agreement, or

(b) where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula—

$$(A \times B) - C$$

where—

A is the period of leave to which the worker is entitled under regulation 13(1);

B is the proportion of the worker's leave year which expired before the termination date, and

C is the period of leave taken by the worker between the start of the leave year and the termination date.

(4) A relevant agreement may provide that, where the proportion of leave taken by the worker exceeds the proportion of the leave year which has expired, he shall compensate his employer, whether by a payment, by undertaking additional work or otherwise.

Conclusions

11. The claimant accepts that he was dismissed for redundancy and has not suggested that there was any alternative motivation for his dismissal. I find that the reason for dismissal in this case was redundancy, in light of the respondent's expressed intention to close his business. The claimant was an employee with seven years' continuous service as at the date of his dismissal. I therefore find that the claimant was entitled to a statutory redundancy payment.
12. Whilst redundancy is a potentially fair reason for dismissal. I find that the claimant's dismissal was unfair on the basis that, even for a small employer, the procedures adopted by the respondent fell entirely outside the range of reasonable responses to a redundancy situation. The claimant was dismissed without any warning or consultation or any selection process or consideration of alternatives to dismissal. I have concluded that had the respondent operated a fair process it is likely that

the claimant would have been fairly dismissed, but that a fair process, operated by a small employer, would have taken two weeks.

13. I find that the dismissal was a breach of contract. The claimant was dismissed without the 7 weeks' notice to which he was entitled and without pay in lieu of notice. He was dismissed without being paid for 7.5 days annual leave to which he had accrued entitlement but which he had not been able to take when summarily dismissed.
14. The claimant has submitted a schedule of loss. He does not seek compensation for any ongoing loss of earnings in relation to the disparity between his total earnings in his new job and the amount that he earned working for the respondent. He seeks his statutory redundancy pay, notice pay and holiday pay.
15. The claimant is entitled to a statutory redundancy payment calculated as follows:
 - 15.1. 7 (years service) x 1.5 (all service over the age of 41) x £525 (the claimant's weekly pay being capped at the relevant maximum) = **£5,512.50**.
16. The claimant is entitled to notice pay of **£4,148** (7 x £592.61).
17. The claimant is entitled to compensation for unfair dismissal calculated as follows:
 - 17.1. Basic Award - **£0** as the statutory redundancy payment cancels out the basic award.
 - 17.2. Compensatory Award- **£992** in total calculated as follows:
 - 2 weeks' pay to reflect the likely duration of a fair process (2x £592.61) = £1,185
 - 6 weeks' pay to cover the period until 4 September 2019 when claimant began his new employment (6 x £592.61) = £3,555.66

This gives a combined total of £4,740 from which notice pay is to be deducted and to which compensation for loss of statutory rights is to be added.

 - Deduct Notice pay - £4740- £4148 = £592
 - Add compensation for loss of statutory rights - £400= £992
18. The claimant is entitled to compensation for his 7.5 days untaken annual leave in the sum of **£888** (7.5 x daily rate of £118.40)

Employment Judge Milner-Moore

Date: 6 October 2020.....

Sent to the parties on: ..13th Oct 2020.....
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For the Tribunals Office

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