Case Number: 3400693/2013
3401518/2013

EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr P Strickland **v** **1. Kier Infrastructure and Overseas Limited**
2. Kier Dubai LLC

Heard at: Watford by CVP **On**: 17 November 2020

Before: Employment Judge Manley

Appearances
For the Claimant: In person
For the Respondent: Mr I Hare QC

RESERVED JUDGMENT

1. The claimant is entitled to the sum of £32,163.09 for the respondents' failure to give notice of termination of his contract.

2. The agreed sum due to the claimant for holiday pay is £10,773.24.

3. The claimant is entitled to be reimbursed for the costs of his flights for his family back to the UK in the sum of £2,164.52.

4. The claimant is entitled to the sum of £983.87 for baggage return to the UK.

5. The total sum owing to the claimant is £46,084.72. To that will be added 15 per cent for the respondent's unreasonable failure to follow the ACAS Code of Practice in relation to grievance procedures. That sum is £6,912.70.

6. The total entitlement of the claimant is £52,997.42.

7. The sum ordered to be paid by the respondents to the claimant is £25,000. This is because the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, limits the payment a tribunal can award to £25,000 under paragraph 10. It is therefore ordered that the respondents pay the sum of £25,000 to the claimant.

8. The claimant did not act unreasonably in the conduct of the proceedings in November 2013 and no order for costs is made.

REASONS

Introduction and issues

1. As can be seen from the case numbers, this matter has a long history. Some of the background to the cases is set out in a telephone case management summary from a preliminary hearing on 22 July 2020. In summary, the claimant brought two claims against these two respondents and others. At a hearing in October 2014, the claimant's claims for all statutory claims of unfair dismissal, whistleblowing, race discrimination, religious discrimination, victimisation and failure to provide written terms and conditions of employment were struck out for want of territorial jurisdiction. What remained were breach of contract claims for wrongful dismissal (notice pay), unpaid holiday and flight and relocation costs.

2. Various appeals have followed from the October 2014 judgment and matters have taken some time to return for finalisation.

3. At a preliminary hearing in July 2020, it was recorded that the respondents conceded liability for these remaining breach of contract claims. Although there may be some matters still before the Employment Appeal Tribunal, the matter was listed for this to be determined.

4. It was therefore listed for a remedy hearing set out at paragraph 1 of the orders as follows:

> *"This matter has been listed for a hearing as to remedy in respect of the claimant's claims of wrongful dismissal, holiday pay, reimbursement of expenses and relocation costs.*
>
> *The respondent's costs application of 17 January 2014 will be heard at the same time"*

5. It was intended that the same judge would deal with that matter but, in the event, he was unable to do so. I was the judge appointed to consider the issues above.

6. At the commencement of this hearing I therefore clarified with the parties that the matters to be considered were:-

   6.1 Wrongful dismissal,
   6.2 Holiday pay,
   6.3 Expenses,
   6.4 Relocation costs

7. In discussion with the parties, it was clarified that the matter which falls under "*expenses"* relates to the flight costs, and "*relocation costs*" relates to shipping or "*baggage*" as they appear in the Staff Handbook.

8. Matters were slightly complicated because the claimant might have understood that other items such as pension losses and bonus were to be considered but, after a short discussion, it was clarified that this hearing was to decide remedy for those matters (as above) which had been raised in the claim form. It was also clear that the claimant had claimed an Acas uplift for the alleged failure to follow a grievance procedure and this was also something that I needed to determine, the respondent's representative conceding that it had been raised. Finally, I dealt with the respondents' historical costs application from 2014.

Matters in dispute

9. It seemed sensible to set out here what appears to be in dispute for the matters I need to determine.

10. Dealing first with notice pay, it is agreed that the period of notice was three months. The respondents' case is that the claimant is entitled to his basic salary for that period which is the sum of £20,912.50, being his annual basic salary of £83,650 divided by 12 and multiplied by 3. That annual basic salary is agreed.

11. The claimant's case on this is that he is also entitled to various sums for the loss of other benefits during the notice period. These include the value of free accommodation; the use of a car and fuel and utilities. In his schedule, at page 1 of the bundle of documents that he produced to me, he has shown his calculations based on page 15 of the bundle for those costs. The question for me therefore is whether the damages which arise from the breach of contract are for basic salary alone or for basic salary plus the financial loss associated with those benefits.

12. As far as holiday pay is concerned, it is agreed that the sum due for this is £10,773.24. There was a discussion at some point as to whether that was a breach of contract or unlawful deduction of wages claim but it seemed clear that it can only be considered as a breach of contract claim given that all the statutory claims have been struck out for want of jurisdiction.

13. There is a dispute about the level of expenses due which relate to flights. The respondents' case is that the Staff Handbook limits the cost of flights to those which are the most commercially viable and that is £1,961. The claimant's case is that he upgraded to business class using his flight points at no extra cost and that was the most commercially viable and cost £2,164.52. I indicated to the parties that, for reasons of proportionality and the passage of time, given the difference is around £200, I did not intend to spend too long on this aspect of the claim.

14. There is also a dispute about the amount to be recouped for the shipping of the claimant's baggage home. The respondents point to the contract which says that the limit is 3 cubic metres. The claimant shipped considerably more than that. The claimant's case is that he spent over £6,000 because he had had to buy furniture which he then shipped home. He said there was a verbal agreement to this effect as the accommodation was unfurnished when the agreement was that it would be furnished. The respondents' case

is that the amount due is £983.87, based on what 3 cubic metres would have cost, using the sum the claimant paid for a larger shipment .

Acas uplift

15. This matter did not arise until somewhat late in the hearing but, as indicated, the respondents agreed that the claimant had claimed it and we therefore had some discussion on it. The claimant's case is that he put in a grievance in February 2013; it was acknowledged but not dealt with in any way whatsoever even though he went sick a few weeks later, and later resigned. On his case, the respondents failed to follow their own grievance procedure. He says the uplift should be 25 per cent.

16. The respondents' case is that they accept that there was a grievance but that the claimant became ill and then resigned and it was not appropriate for them to continue. They say there should be no uplift at all but if there is it should be limited to 10 per cent.

Costs

17. Finally, there is the respondents' application for costs. It arises from a postponed hearing in November 2013 where, in essence, counsel's fees had been incurred but there had to be a late postponement because of the length and density of the claimant's witness statement. That, the respondents say, shows that the claimant acted unreasonably in the conduct of the proceedings, particularly as he was represented by solicitors at that time. The claimant had also resisted a postponement application made before the hearing. The claimant objects to an order for costs; many of the reasons for such objection are set out in three letters from his solicitors appearing in his bundle of documents between pages 71-78.

The relevant facts

18. The findings of fact with respect to the claimant's employment history have already been set out in the reserved judgment from the hearing in October 2014.

19. In summary, the claimant was employed for several years with either one or other of the respondents (it does not matter which) between 1997 and 2007 working in the UK. In 2007, he went to work for another company in the Middle East living in Dubai. He was offered employment again with Kier in January 2009. A number of contractual agreements were made and his employment began with Kier on 19 April 2009. There may have been various emanations of the contract which I do not need to go into at this point. The relevant one is that in place at the end of the claimant's employment.

20. Contractual terms to which I was referred and there are those which apply to the claimant's contract at the point he left the business are contained in the Staff Handbook. It is agreed that they have contractual effect. The Staff Handbook appeared in the bundle of documents provided to me by the respondents between pages 124 and 149. Only a few sections from that

lengthy document are relevant to my considerations. The first is the section on termination of employment at clause 13. This reads as follows:

> *"Unless an employee has been notified otherwise in writing, the following will apply:-*
>
> *(a) By the employer*
> *(i)-*
> *(ii)-*
> *(iii)-*
> *(iv) If the employment is terminated by the company the employer will be paid bonus in accordance in accordance with clause 4, return travel and baggage expenses in accordance with clauses 32 and 34 and leave entitlement is accordance with clause 11 unless sub-clause 13 (a) (iii) or (vi) applies."*

21. Sub clauses (iii) and (vi) relate to dismissal without notice.

22. Clause 25 is the grievance procedure. It begins as follows:

> *"(a) Objectives*
>
> *The procedure is designed to settle any grievances that an individual employee may have concerning his employment as close as possible to the point of origin.*
>
> *Initially the employee should set out the grievance to his immediate superior or to his immediate superior's manager in writing.*
>
> *If a satisfactory resolution of the grievance is not possible then the formal stages of the procedures are available to the employee."*

23. It goes on to say that the employee is entitled to representation, and that there are various stages, including at Stage 1 that *"The employee will be given the opportunity to fully present his grievance to the department or site manager. An answer will normally be given within 7 days."*

24. I was asked to look at clause 34 which relates to accommodation and furniture. This clause says:

> *"The company will provide the employee during his employment in the zone of operations with bachelor/married furnished accommodation or an allowance at the company's option.*
>
> *Where the company provides free accommodation, it will be furnished to the guideline standard indicated below and will reimburse the reasonable cost of utilities, excluding telephone call, unless stated to the contrary in the letter of appointment."*

There is then some detail about accompanied or unaccompanied staff.

25. Clause 35 is entitled "*Baggage"* and 35(a)(ii) deals with married staff and reads: "*Sea freight max volume 3.0cu metres."*

26. Various disputes arose which it is not necessary to go in to but in February of 2013, the claimant sent a grievance to the employer. He received an acknowledgement but that matter was taken no further. In March the claimant went on extended sick leave resigning in June 2013. No steps were taken to deal with the grievance beyond the acknowledgement.

27. It is not disputed that the claimant's accommodation was paid for by the respondent who also paid electricity, water, telephone and for a car. The claimant's bundle of document had, at page 15, a list of these expenses. Between July 2011 to June 2013, the rent was expressed in UAE dirham and amounted to 190,000 UAE dirham per year. The claimant's most recent schedule of loss has translated that into pounds sterling in the sum of £40,860 per annum. He has also used the electricity and water bills to arrive at a sum of £1,855 per year; the cost of fuel at £120 and the amount he has put in for the car is the cost of a rental car at £2,167 for the year.

28. Whilst the claimant agrees that his salary at the end of his employment was £80,650, these additional benefits make the total salary package £128,652 which, when divided by 12 and multiplied by 3, gives a three monthly gross amount of £32,163.09. The claimant did not work during that three-month period after he terminated his employment and returned to the UK.

29. As far as the flights are concerned, the respondents point to clause 33 of the Staff Handbook which states:

> *"Subject to clause 14 the company will provide at its expense:-*
>
> *(a) Reasonable travel costs from and to the employee's home in the UK to the international airport for overseas departure.*
>
> *(b) The cheapest commercially available airfare for the employee and his family to and from the international airport for overseas departure and the territory on commencement and termination of the tour."*

30. As indicated, the dispute between the parties was whether the claimant and his family's flights which, as a matter of fact, amounted to the sum of £2,164.52. The claimant's case on that is set out in his witness statement which it is accepted was served late but explains it in this way. It is that the business class flights were paid for using the claimant's Emirates Skyward points and that it was free and that the amount paid was the cheapest rate. The respondents have based their assessment on the cost of the claimant's son's flight. The claimant says that his son flew at a different time by an economy flight and his flight was cheaper because it was in June rather than July.

31. The claimant's family also had to make arrangements to relocate and take furniture and other belongings home. The contractual arrangement is for the respondent to pay for three cubic meters. There is a difficulty here because the claimant gave very late evidence that he had had a conversation with Mr Andrew Keir which he sets out at paragraph 21 of his witness statement which alleges that it was agreed that they would pay for the belongings to be shipped back. The respondents make the point that this evidence was only produced well after the deadline for witness statements to be exchanged and they have had no opportunity to check with Mr Keir whether he agrees with that evidence. I was cautioned against taking too much account of this very late evidence.

The law

32. This is a claim for breach of contract. My duty is therefore to consider what the contract says and apply the wording of that contract to the factual situation. Clearly, there are some significant differences in this case. Many words have been spoken and written in this case so it is sometimes difficult to find the section of the many, many pages which relate to these narrow issues. There are still some differences between the parties. However, it is the Staff Handbook which applies to most of the circumstances of this case although I will need to decide whether that had been varied in any way such as to change any of the provisions in it, in this case, to benefit the claimant. I was not referred to any case law with respect to how I should interpret the contract.

33. Rather surprisingly, there is no record of the parties, representatives or judges making a reference to the fact that the Employment Tribunals (Extension of Jurisdiction) Order 1994 limits the amount that I can award to £25,000. I reminded the parties of that and I think it is right to say that the claimant was perhaps a little taken aback. However, that is the position and I referred him to the relevant paragraph of that order which puts that limit on it. The claimant asked whether I would do the calculation before I applied the limit and I said that that would be the process. Whilst it might seem to make some of the orders rather academic, I am still required to find reasons for what I determine.

34. I also need to consider the provisions of s.207(a) of the Trade Union and Labour Relations (Consolidation) Act 1992 which provides for me to uplift ay award where there has been an unreasonable failure to follow a relevant Code of Practice. Schedule A2 includes a breach of contract claim. In this case the relevant Code of Practice is the one that relates to a grievance. Section 207A says the award should be no more than 25 per cent and should only be awarded if I consider it just and equitable to do so.

35. Finally, there is an application for costs under Rules 74 to 78 of the Employment Tribunal Rules of Procedure 2013. Rule 76 says that I may make a costs order where:

> *"a party has acted vexatiously, abusively, disruptively, or otherwise unreasonably in either the bringing of the proceedings (or part) or the way the proceedings (or part) have been conducted."*

36. This should be dealt with in two stages. First, I should determine whether there has been any unreasonable conduct in the way in which the claimant has conducted the case. If I find there was such unreasonable conduct, I then must decide whether to make an order, where I may take into account, under Rule 84, the paying party's ability to pay.

Conclusions

Wrongful dismissal

37. I find that the claimant is entitled to damages which should include sums for some of the benefits he would have benefitted from had he been given the correct notice. I do not accept, as argued by the respondents, that the clauses in the Staff Handbook make it clear that only basic salary will be paid. As I understand the respondents' submission on this point, it is that the implied term that an employee will always be paid is one which applies and there is no express term needed to that effect.

38. It is a fairly straightforward interpretation of a contract that the notice period, which it is agreed was three months, will cover salary and benefits for that period given that they are clearly of financial benefit to the claimant. The loss of those financial benefits were losses flowing from the breach of contract. The details of the claimant's calculations were not challenged. The claimant is therefore entitled to damages for the wrongful dismissal in the sum of £32,163.09.

Holiday pay

39. This is a breach of contract claim. It cannot be considered as an unlawful deduction of wages claim as the statutory claims have all been struck out many years ago for want of jurisdiction. The sum due to the claimant for this is the agreed sum of £10,773.24.

Flights

40. I am prepared to accept the claimant's evidence that he paid the same amount for business class using points and that he did get the cheapest commercially available flight in accordance with his contract for himself, his wife and on a different date, his son. The sum due to him for this is £2,164.52.

Relocations expenses-baggage

41. It is quite clear to me that the contractual provision for this is clearly set out at clause 35 of the Handbook. Although the claimant has argued that more should be awarded to him because of some agreement that varied that contractual position, this evidence was provided very late without an opportunity for the respondent to challenge it. What is more, many years have passed since any such discussion took place and it is without specificity and entirely unclear to me that the claimant would be able to succeed in saying that this was a variation such as to entitle him to claim the

full amount that he paid for taking the furniture home. In the circumstances it is this contractual provision that has been breached and the calculation carried out by the respondent in the sum of £983.87 is accepted by me as being the amount due.

42. This means that the total sum due to the claimant for damages for breach of contract is £46,084.72.

43. I next have to consider the Acas uplift. I am satisfied that it is undisputed the claimant lodged a grievance which, beyond acknowledgement, went no further. This is an undisputed failure to follow the ACAS Code (and indeed the respondents' own procedure). The respondents seek to argue that this was appropriate because the claimant went on sick leave although this was some weeks after he presented the grievance. In my view, that is not a sufficient reason for the respondents not to take some steps in the grievance procedure and it is an unreasonable breach of the Acas Code by the respondent. Having considered all the circumstance, I find that it is just and equitable to increase the award by 15 per cent. 15 per cent of £46,084.72 is £6,912.70, making a total due to the claimant of £52,997.42.

44. However, the claimant has now been informed and it is quite clear that the limit has to be applied to that under the Extension of Jurisdiction Order of 1994. I can therefore only order that the respondents pay the sum of £25,000 to the claimant.

45. Finally, I address the issue of costs. As indicated the respondents say that the claimant's long witness statement led to a postponement and relisting of a hearing in late 2013. Their case is that they incurred costs in applying for postponement and the brief fee to counsel as she could not do the reconvened hearing in March because she was then on maternity leave. I have considered the application made by the respondents which appears at page 59 of the respondents' bundle and the claimant's previous solicitor's letters in response.

46. To put it as succinctly as I can, it appears to me that this was litigation that was complex in 2013 and obviously has carried on for some years thereafter. I can see that the respondents were aware that the bundle of documents for the 2013 preliminary hearing was extensive, although I do not agree with the claimant's then solicitors' letter that it would have been possible to complete the matter within the day.

47. I cannot decide at this late stage that all that is the claimant's fault. It seems to me that it is possible that the respondents should have been aware earlier that it was likely to need longer than a day given what they already knew about the extent of the pleadings and so on. I do not consider that it amounts to unreasonable behaviour in the context of this hard fought and contentious litigation. There being no unreasonable conduct, I do not go on to make a costs order. Even if there were unreasonable conduct, I would not have been inclined to make an order so many years after the event.

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Employment Judge Manley

Date: 9 December 20

Sent to the parties on: 10 December 20

For the Tribunal Office