



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr P Brazier

**Respondent:** Red Top Ltd t/a Simon Marden Estate Agents

**Heard at:** London South Employment Tribunal (by remote video hearing)

**On:** 14 January 2021

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

## Representation

Claimant: In person

Respondent: Mr S Bray (owner)

# REMEDY JUDGMENT

## It is the judgment of the Tribunal that:

1. The Claimant is awarded a basic award of £3,048 and an award under s.38 of the Employment Act 2002 of £2,032.
2. No compensatory award is made.
3. The Respondent must pay the Claimant the total sum of £5,080.

# REASONS

## INTRODUCTION

1. By a judgment given on 29 November 2019, I found that the Claimant had been unfairly constructively dismissed and that there should be no reductions to any compensatory award pursuant to the principles in Polkey or for contributory fault. I determined that any compensatory award should be increased by 25% due the Respondent's failure to comply with the ACAS Code, and that the

award to the Claimant shall be increased by four weeks' pay pursuant to s.38 of the Employment Act 2002 ("EA").

2. A remedy hearing was due to take place on 22 October 2020. Prior to the remedy hearing the Respondent applied for reconsideration of the judgment on the basis that new information had come to light showing that the Claimant had committed gross misconduct during his employment and therefore he should not receive any compensation. The gross misconduct alleged was that the Claimant had personally accepted a cash payment from a purchaser to take a property off the market, and he had also given the keys to the purchaser before completion. The Claimant denied taking any fee and disputed acting improperly in respect of the keys.
3. At the hearing on 22 October I confirmed that it was unnecessary for the judgment to be reconsidered because it was open to the Respondent to argue at the remedy hearing that it was not just and equitable for any compensatory award to be made. This was not a matter that had been determined in my earlier judgment.
4. In part because of confusion in the correspondence from the Tribunal about whether the remedy hearing would be going ahead on 22 October, it was agreed that the hearing would be adjourned to today.
5. The amount of the basic award is not in dispute. The Claimant is entitled to an award of six weeks' pay (capped at £508), i.e. £3,048.
6. The Claimant claims a compensatory award of £11,291. This is on the basis that the job he started immediately after leaving the Respondent had a lower salary (£25,000 a year, as compared to £35,000), and there were two periods of around a month each when he was not earning anything because he left his employment due to the stress and embarrassment caused by Mr Bray unlawfully circulating information about his past. The Claimant obtained a job at an equivalent salary to that he received at the Respondent in July 2019.
7. The sole issue to be determined is the amount of the compensatory award. The following matters are in dispute:
  - 7.1. Did the Claimant commit an act of gross misconduct during his dismissal which, if the Respondent had known about it at the time, would have resulted in his dismissal?
  - 7.2. To what extent was the Claimant's loss of earnings "in consequence of the dismissal in so far as that loss is attributable to action taken by the employer" (s.123(1) of the Employment Rights Act 1996 ("ERA")) and/or has the Claimant made reasonable efforts to mitigate his losses?
8. I heard evidence from the Claimant and, on behalf of the Respondent, from Simon Bray and Philip Cunningham-Sykes.

## **FACTS**

9. It is not in dispute that during the Claimant's employment with Respondent, in the early part of 2017, he handled the sale of an empty property belonging to an elderly woman who had moved to a care home. The house was ultimately purchased by Ian and Philip Cunningham-Sykes.
10. Mr Bray gave evidence that he was asked to attend the property in August 2020 in order to value it. While he was there the Cunningham-Sykeses told him that the Claimant had taken a cash payment from them of £250 to reserve the property, and that the Claimant had asked them to meet him on Hailsham High Street to hand over the money.
11. The Cunningham-Sykeses produced a joint witness statement for this hearing. The statement says that their original offer of £250,000 was accepted, but the Claimant told them they would need to act quickly because another couple were interested in the house. The Claimant then told them that for a fee of £250 he would make sure no-one else viewed the property and he would remove it from the market, saying it was under offer. The Claimant told them not to come into the office with the £250, and that he would meet them in the town centre to hand over the money. A few weeks before exchange the Claimant told them that the vendor wanted a further £4,000 or they would consider another offer. The Cunningham-Sykeses agreed to increase their offer. The Claimant gave them a set of keys to the house two weeks before completion in case they wanted to move things in earlier, but said not to mention this to anyone at the agency. The statement says "We had both felt a little used and deceived by him throughout the whole process".
12. The Claimant put to Philip Cunningham-Sykes in cross-examination that he had concocted his evidence because the Claimant and his wife had been good friends with him and Ian, and they were angry with the Claimant for breaking off contact. The Claimant also suggested the Cunningham-Sykeses had been "coerced" by Mr Bray into giving evidence, perhaps by Mr Bray agreeing to waive his fee for selling their property. Philip Cunningham-Sykes strongly disputed those allegations. He denied any close friendship with the Claimant and his wife. He said Mr Bray attended their property to value it in August 2020. Philip and Ian had become aware that Claimant had left the agency and mentioned to Mr Bray they had had issues with the Claimant. Mr Bray asked them to elaborate and they told him what they said in their statement. Philip Cunningham-Sykes said he had been reluctant to come to the Tribunal because it was "not his fight", but he had been entirely honest. He said Mr Bray was charging them a fee for selling their house.
13. Mr Cunningham-Sykes gave further details in his oral evidence about the payment and the keys. He said it was during a telephone call with Ian that the Claimant said he could take the property off the market for the £250 fee. He could not remember the exact date of the conversation. He and Ian agreed to the proposal because they were desperate to secure the property. They gave the Claimant the money in cash in the high street, and the Claimant gave them keys to the property on the same occasion. They dropped the keys back at the office. This happened two or three times before exchange. Some time after the £250 payment, the Claimant mentioned a competing offer and suggested they increase their offer by £4,000. Mr Cunningham-Sykes's understanding was that a family member of the vendor was pushing for a higher price. The Claimant

put to him that if they had paid £250 to take the property off the market, one would expect them to have queried the need to increase their offer later. Mr Cunningham-Sykes said they accepted what the Claimant told them and agreed to increase the price. After exchange the Claimant gave them the keys and they kept them until completion.

14. The Claimant, in his evidence, denied suggesting or taking any cash payment. He also denied giving the Cunningham-Sykeses the keys before exchange. He accepted he may have given them the keys for a short time between exchange and completion, but this was only for cleaning. He claimed that it was common for this to happen, even without a key undertaking from a solicitor, and despite the risks relating to squatting and insurance.
15. In his witness statement the Claimant said he never took the property off the market, and could not have done so as it was a probate sale. He accepted in cross-examination, however, that he was mistaken about that; the vendor was in fact alive at the time and he was dealing with a family member who had power of attorney. There was therefore no difficulty with taking the property off the market.
16. The Claimant included in the bundle a large number of whatsapp messages between him and Ian Cunningham-Sykes between March 2017 and May 2018. They are very friendly and informal messages. The main topic of discussion is the house purchase, but they also shared holiday photos and discussed having dinner and drinks together.
17. On the date of exchange, 9 August 2017, the following messages were sent:

Ian: All exchange move in 5days !!  
Still OK 2pick keys up  
2morrow !! Do we need 2 drop  
them off 2 u every day ?? Or  
can we hold on 2them ?? X

Claimant: Hi Ian, Phillip & Jenson,  
congratulations!!  
Of course it's okay to collect  
the keys in the morning,  
although officially the keys  
should be in the office  
overnight, you can keep hold of  
them and I'll pretend you've  
brought them back at the end  
of each day.

Ian: OK that would be great !!  
Because we only have a few  
days 2get it sort and we might  
have 2 do some stuff cleaning  
and things after Philip has  
finished work ?? Really sorry  
but he's got 2 work ?? X

Claimant: Look forward to seeing you in the morning

Ian: Aw thanks ur a supper star and we love you guys for being u X

18. There is no mention in any of the messages in the bundle of any cash payment to take the property off the market.
19. As to the Claimant's loss of earnings, he said in his evidence that he commenced employment with Crane and Co in July 2018, immediately after leaving the Respondent. The salary was £25,000 a year. Very soon after starting with Crane and Co, the director, Mike Crane, told the Claimant that Mr Bray had been circulating information about the Claimant's past (a spent conviction, details of which are not relevant to my findings of fact), to him and to a potential client. Because of the stress and embarrassment of this the Claimant had decided to seek employment elsewhere. He left Crane and Co in early October 2018. By the end of October he had not yet found alternative employment and Mike Crane asked if he would like to return. The Claimant accepted and recommenced employment from 5 November 2018. In February 2019 the Claimant heard of more people whom Mr Bray had circulated the information to. Again, this caused stress and anxiety and in June 2019 the Claimant resigned again. By that stage he had secured his current job, in Eastbourne, which commenced on 26 July 2019.

## LAW

20. Section 123 ERA provides:

**Compensatory award.**

Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall 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.

21. It is well established that the Tribunal is entitled to take into account misconduct that comes to light after dismissal in considering what amount is "just and equitable" (W Devis and Sons Ltd v Atkins 1977 ICR 662, HL). In doing so the Tribunal must have regard to the actual losses sustained by the employee.

## CONCLUSIONS

22. There is a straight factual dispute about whether the Claimant suggested and took a cash payment to take the property off the market. There is also a dispute about whether the Claimant ever gave the keys to the Cunningham-Sykeses to visit the property unaccompanied before exchange. It is not in dispute that he gave them the keys after exchange, but the Claimant does not accept that there was anything wrong with doing so. I must resolve these matters on the balance of probabilities.

23. The Claimant argues that Philip Cunningham-Sykes's evidence is not credible, noting that he was vague about the dates. He also relies on the fact that there is no mention of the payment in the whatsapp messages and the fact that the Cunningham-Sykeses did not query the need to increase their offer, which they surely would have done if they had paid £250 for the property to be taken off the market. He also says that the continuation of friendly messages from Ian, including invitations to arrange drinks together, is inconsistent with the contention that they felt "used and deceived". Philip Cunningham-Sykes's explanation for this was that Ian is extremely friendly with everyone. He also said that the payment was always understood to be to stop viewings and remove the property from the websites for a few days, which is what happened.
24. I place considerable weight on Philip Cunningham-Sykes's evidence. The Claimant has made an extremely serious allegation that he concocted the entire story and gave false evidence under oath, possibly for financial gain. It is true that he was somewhat vague about the dates, but that is unsurprising given that the events in question happened almost four years ago. His evidence was, despite that uncertainty, detailed, clear and consistent. There was no need for him to become involved, but having given the information to Mr Bray he has stuck to his account. The only cause for any doubt about his evidence was the point about having to increase their offer after making the £250 payment, but he answered that satisfactorily. The Claimant told them that a family member of the vendor was pushing for a higher price, and they accepted that. That is not something that would have been in the Claimant's control, so there would have been no cause for complaint about the £250 payment.
25. On the other hand I do have concerns about the Claimant's credibility on this issue. His statement placed heavy reliance on the fact that this was a probate sale, but that is not correct. I accept that this could have been an innocent mistake, but it completely undermines the point that he would not have been able to take the property off the market. Secondly, the Claimant said in the whatsapp messages on 9 August that he would "pretend" the Cunningham-Sykeses had given them keys back each night. That is clear evidence that he knew they were not meant to have the keys overnight. It also suggests that the Claimant was prepared to act in a way he knew was either unlawful or at least not approved by his employer. The Claimant's evidence that it was common for keys to be given out in this way was not credible. If, as he says, it was strictly for cleaning only, one would expect the Claimant to have made that explicit in the whatsapp messages, and there would have been no need for the Cunningham-Sykeses to have the keys for the whole period between exchange and completion. Ian's message referred to "cleaning and things", which the Claimant did not query and nor did he specify what was allowed. As an estate agent of considerable experience I find the Claimant would have known that handing over keys on a permanent basis between exchange and completion was, at the least, a serious irregularity. His evidence to the contrary casts doubt as to his credibility generally.
26. Overall, I consider it so unlikely that Mr Cunningham-Sykes would invent such specific allegations and put himself through attending the Tribunal, and lying under oath, that I would need good evidence of a malicious motive to find that he did so. The idea that he and his partner were somehow hurt by the ending of a friendship is nowhere near sufficient, especially given that the friendship

hardly went beyond whatsapp messaging. I could not accept, based on speculation alone, that Mr Bray coerced or bribed Mr Cunningham-Sykes. Given my concerns about the Claimant's credibility I consider it more likely that Mr Cunningham-Sykes is telling the truth.

27. On the balance of probabilities I find that the Claimant suggested and took a cash payment to take the property off the market and he handled the keys to the property in a way that he knew was improper by allowing the purchasers to keep the keys between exchange and completion. I do not make any finding about keys being given out wrongly prior to exchange because the evidence on this was not entirely clear and I accept the Claimant's point that it is unlikely he would do this and take the risk of it coming to light when the Cunningham-Sykeses returned the keys to the office.
28. The Claimant does not dispute that if he took the cash payment, that would be gross misconduct and Mr Bray would have dismissed him if he had known about it. As to the keys issue, he does not accept any wrongdoing by handing over the keys after exchange. I have already found that the Claimant must have known that what he did would not have been sanctioned by the Respondent otherwise he would not have had to "pretend". I find it would certainly have been treated as misconduct. It is unnecessary to make a finding as to whether it would, on its own, have resulted in the Claimant's dismissal.
29. Having found that the Claimant committed an act of gross misconduct that would have resulted in his dismissal, had the Respondent known about it at the time, I must consider what amount of compensatory award is "just and equitable in all the circumstances having regard to the loss sustained by [the Claimant] in consequence of the dismissal in so far as that loss is attributable to action taken by the employer".
30. I accept that the Claimant did sustain loss as a result of being unfairly dismissed. He had to accept a job at a lower salary for a time. There are questions, however, about whether he made reasonable efforts to mitigate his losses. It is not clear why he felt compelled to resign in October 2018, given that he then continued in the same job for a further 7 months. It may have been distressing that Mr Bray was, it seems, unlawfully circulating information about him, and it is understandable that the Claimant would want to seek employment in another town as a result, but the Claimant has not provided any evidence of his efforts to seek alternative employment at that time, and it is difficult to understand why he would resign before having secured another job.
31. Even if the Claimant's actual losses from the dismissal (and other action taken by his employer) was the full amount claimed by the Claimant, in view of my findings I would not consider it just and equitable to make any compensatory award. The Claimant will receive a basic award and an award under s.38 EA. Given that he would have been lawfully dismissed if Mr Bray had known what he knows now, it would not be fair for the Respondent to have to compensate the Claimant any further.

## **POST-SCRIPT**

32. The day after the remedy hearing, Mr Bray emailed the Tribunal to ask if the £250 he repaid to the Cunningham-Sykeses could be offset against the amounts awarded to the Claimant. The answer is no. Such “off-setting” can only take place where the Tribunal is considering a breach of contract claim and the Respondent brings an employer’s contract claim. This is not such a case.

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Employment Judge Ferguson

Date: 18 January 2021