



EMPLOYMENT TRIBUNALS

Claimant: Mr K Teasdale

Respondent: Springhead Ales Limited

Heard at: Nottingham (Remotely by CVP)

On: Wednesday 9 September 2020

Before: Employment Judge Blackwell (sitting alone)

Representatives

Claimant: In person

Respondent: Ms Saunders, Representative

RESERVED JUDGMENT

1. The claim of unfair dismissal succeeds but in accordance with Section 123 subsection 1 of the Employment Rights Act 1996 (the 1996 Act) it would be just and equitable to reduce the amount of the compensatory award by 60% to reflect the chance that a fair dismissal would have occurred.
2. The claim for a redundancy payment fails and is dismissed.
3. Pursuant to Sections 92 and 93 of the 1996 Act. The Respondents concede that they failed to provide a written statement of reasons for dismissal and therefore the Claimant is awarded 2 weeks' pay capped to the statutory maximum at the relevant time which equates to £1,050.
4. Pursuant to Section 38 of the Employment Act 2002 the Respondent having conceded that it failed to issue written particulars of employment the Claimant is awarded the minimum amount, again the sum of £1,050.
5. The claim of breach of contract for failure to pay travelling expenses fails and is dismissed.
6. By consent the claim of arrears of wages in respect of holiday pay succeeds and the Respondent is to pay to the Claimant the sum of £144.00

RESERVED REASONS

1. Mr Teasdale represented himself and gave evidence on his own behalf. I also took into account one paragraph of a witness statement of Mrs H Teasdale. Ms Saunders represented the Respondents and she also gave evidence. I also took into account a written statement of Mr K Mutch. There was an agreed bundle of documents and references are to page numbers in that bundle.

Issues and the law

2. The first issue was whether Mr Teasdale had sufficient continuity of service to bring a claim of either unfair dismissal or for a Redundancy Payment.

3. That issue was described in paragraphs 8 to 15 of the case management summary of Employment Judge Adkinson sent to the parties on 27 April 2020:

“The claim

8. The case was due to be tried today at Lincoln. Due to the Covid-19 pandemic that hearing could not proceed.

9. The claim is one of ordinary unfair dismissal and for a redundancy payment. There are ancillary claims for holiday pay, a failure to provide written reasons for dismissal and a failure to provide written particulars of employment.

10. Originally the claimant was an employee of Springhead Fine Ales Limited. It was his mother’s company. In June 2018 that company went into administration but continued to trade. He was the head brewer when that company went into administration.

11. A Mr Dyke acquired the business equipment and IT in October 2018. The respondent carried on the business from November 2018. The respondent says that is when the claimant commenced employment.

12. The respondent denies therefore that the claimant has sufficient qualifying period of employment. The business transfer agreement does not refer to the Claimant’s employment transferring, but only to business equipment and IT. However, the respondent today accepted that the claimant continued to do the same job throughout the administration and takeover at the same site in essentially the same business. There is no suggestion on the papers that the business itself ever stopped.

13. Until 29 July 2019 the claimant worked for the respondent, still as a master brewer. He was dismissed by the respondent. The respondent confirmed today that the reason that the respondent relies on is capability. However, the respondent accepts it did not follow any capability procedure. When it dismissed him, it explained it was because of cost. Today the respondent said that by cost, it meant that his mistakes cost the company too much money.

14. I took the opportunity to express some provisional views. They are based on the papers on the file and on what the parties said at the hearing. I have of course heard no evidence and not seen any documents, which may mean that my views are wrong and unreliable. It is only after a trial that the Tribunal can decide what the facts are and apply the law to those facts.

15. I expressed the view that it is very difficult to understand how in the circumstances the respondent can sensibly argue that the claimant's employment did not transfer to them under the **Transfer of Undertakings (Protection of Employees) Regulations 2006 regulation 3(1)(a)** when read in light of **Cheesman v R Brewer Contracts Ltd [2001] IRLR 144 EAT.**"

4. Sensibly in the light of Employment Judge Adkinson's comments, Ms Saunders on behalf of the Respondents conceded that there had been a relevant transfer as between Springhead Fine Ales Limited and the Respondent and a consequence of that was that Mr Teasdale had continuity of employment beginning from 27 March 2008 up to his dismissal on 22 July 2019 which is the effective date of termination.

Remaining Issues and the Law

Unfair dismissal

5. It is for the Respondent to prove a potentially fair reason for dismissal in accordance with Sections 98(1) and (2) of the 1996 Act:

"(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,

(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."

6. On examining both the response form and in particular at page 30, paragraph 10 and on page 31, paragraph 11 and paragraph 6 of Ms Saunders's witness statement it is clear that the reason being advanced by the Respondents is one of conduct. It is well established law that a reason for dismissal is:

“a set of facts known to the employer or it may be a belief held by him, which caused him to dismiss the employee.”

Mr Teasdale's case is that either the reason for dismissal was redundancy as a cost saving exercise and/or it was done to avoid dealing with a grievance raised by Mr Teasdale a matter of days before his dismissal.

7. If a potentially fair reason is made out it is then for the Tribunal to determine whether the dismissal was fair having regard to subsection 4 of Section 98 of the 1996 Act:-

“(4) [F5Where] 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.”

8. Given that the Respondents believed at the time of Mr Teasdale's dismissal that he had insufficient service to bring a claim of unfair dismissal they proceeded on that mistaken basis and undertook no procedure whatsoever simply inviting Mr Teasdale to a meeting at which without warning he was dismissed. Ms Saunders properly now concedes that as a consequence the dismissal is unfair.

Polkey

9. Applying Section 123(1) of the 1996 Act:-

“(1) Subject to the provisions of this section and sections 124 [F1, 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.”

It is for the Tribunal to consider whether a dismissal would have occurred had a fair procedure been adopted and to express that chance as a percentage. The Tribunal's job is to draw upon its industrial experience of circumstances such as this and to construct from evidence not from speculation, a framework which is a working hypothesis about what would have occurred had the Respondent behaved differently and fairly.

Conclusions

Reason for dismissal

10. I accept that there are contradictions in both the Respondent's pleaded case and Ms Saunders's witness statement and I remind myself it is for the Respondent to show a potentially fair reason for dismissal. What then was in the employer's mind. Ms Saunders was a straightforward witness and it was clear from her witness statement on which she was cross examined that the reasons for dismissal in summary were as follows:-

- (a) A failure of Mr Teasdale to manage the brewery to the standard to be expected of a Head Brewer.
- (b) A failure to obtain the necessary audit in time.
- (c) An incident where Mr Teasdale left the premises unsecured.
- (d) A consistent failure of time keeping.
- (e) Misuse of the petty cash.

She also said which is supported by correspondence (see for example Ms Saunders's e-mail of 30 May at pages 78 and 79) that she had lost trust in his ability as a Head Brewer.

11. Mr Teasdale's case is firstly that the decision to dismiss him was one of cost saving and therefore the reason for dismissal was redundancy. However a replacement Head Brewer was recruited and began his service in December 2019. Ms Saunders's evidence was also that Mr Mutch was relied upon to a degree to fulfil the duties of Head Brewer albeit in the capacity as a consultant and not an employee.

12. Mr Teasdale also asserted in the alternative that the reason for dismissal was the fact that he had raised a grievance immediately before his dismissal and that the Respondent did not wish to deal with it.

13. On balance I am satisfied that the reason for dismissal was conduct, a potentially fair reason for dismissal because I accept Ms Saunders's evidence which is supported by contemporaneous documents as to what was in her mind at the time she decided to dismiss Mr Teasdale.

Fairness and Polkey

14. Given that the Respondents have properly conceded that the dismissal was unfair for want of any proper procedure I now need to consider whether if a fair procedure had been followed a dismissal would have occurred. Mr Mutch's written statement is a prolonged critique of Mr Teasdale's conduct as Head Brewer. However Mr Mutch did not give evidence and I only give such weight to his evidence as a statement unsworn and unchallenged by cross examination should be given. Ms Saunders properly conceded throughout that she had no brewing experience herself and was reliant upon Mr Mutch's expertise to judge Mr Teasdale's conduct as Head Brewer. Mr Teasdale gave evidence to the effect that Mr Mutch was biased against him and did his best to denigrate Mr Teasdale.

15. I turn to the matters set out by Ms Saunders as the factual basis for the dismissal. Firstly a general failure of Mr Teasdale to manage the brewery effectively. Again there is much to support that conclusion in the evidence of Mr Mutch. For example photographs attached as appendices to Mr Mutch's report showing a very poor standard of cleanliness were put to Mr Teasdale and he accepted that they showed an unacceptable state of affairs which plainly were in breach of a number of health and safety and food regulations. I note in that regard that Mr Teasdale in his paragraph 12 of his witness statement says:

“Furthermore it is not my job to clean the brewery, only to have it cleaned. The person whose job was to clean it was Nathan Johnstone and I am sure that he would have cleaned it had the necessary resources been made available.”

16. In cross examination that statement was put to Mr Teasdale and he accepted that it was his duty to manage Mr Johnstone and to see that the brewery was cleaned to an appropriate standard. He also accepted that he was late in ordering the necessary chemicals for the cleaning process.

17. The next matter set out in Ms Saunders's witness statement was the length of time it took to pass the FSQ audit. Ms Saunders's evidence was that she insisted upon Mr Teasdale working from the Respondent's Walsall office so that the necessary paperwork could be carried out with the support of Mr Mutch. She took that action because of the delays in the completion of the audit. That evidence was unchallenged by Mr Teasdale though he did make the general complaint that Mr Mutch had moved the goal posts in terms of the audit. In that regard I note that Mr Teasdale both in his witness statement and in cross examination conceded:

“That he had not been working to his own high standards for some months.”

18. The next matter complained of was a failure to keep to standard working hours, something imposed by Ms Saunders so that he worked in line with other employees. It is common ground that Mr Teasdale was warned on a number of occasions as to his time keeping.

19. The next matter is that on one occasion Mr Teasdale left the premises unsecured. Indeed he left the premises with a door wide open. There was a disciplinary hearing in that regard and Mr Teasdale admitted that conduct.

20. The final matter relied upon by Ms Saunders was misuse of the petty cash system. Mr Teasdale denied any such misuse.

21. It is also clear from Ms Saunders's evidence that she had lost trust in Mr Teasdale which is unsurprising giving his admission that he had not performed to the requisite standard for some months.

22. I recognise that Ms Saunders by bringing in Mr Mutch and by insisting that Mr Teasdale worked some 2 to 3 days per week at the Walsall office made changes which ruffled Mr Teasdale's feathers. However they were changes that the Respondents were entitled to make and for Mr Teasdale to adapt to. I am satisfied that to a degree he did not.

23. On balance on this evidence I believe that had a fair procedure been followed there is a 60% chance that a fair dismissal would have ensued and thus the compensatory award will be reduced accordingly.

Failure to provide written reasons for dismissal

24. The Respondents accepted that Mr Teasdale had made a written request for such reasons in accordance with Section 92 of the 1996 Act and they had not provided them. It therefore follows that Mr Teasdale is entitled to the award of 2 weeks' pay capped at the statutory maximum of £525.00 which applied at the time of the dismissal.

Failure to provide statement of terms and conditions

25. Again the Respondents conceded that they had not done so. I have the ability to award either the minimum amount ie 2 weeks' pay or the higher amount of 4 weeks' pay. Given that Mr Teasdale was able to rely upon the written contract of employment put in place by his mother whilst he was an employee of Springfield Fine Ales Limited and in particular to do so to show that he was entitled to further holiday pay, I am of the view that the minimum amount is appropriate.

Holiday pay

26. Ms Saunders once she had seen paragraph 12 of Mrs Teasdale's written statement properly conceded that Mr Teasdale was entitled to the sum of £144.00 in respect of arrears of holiday pay.

Unpaid travel expenses

27. Mr Teasdale clarified the claim by saying it was in respect of travelling expenses between his home and the brewery. Ms Saunders said that she had given notice that such expenses would no longer be paid and that of course is in accordance with general practice in that employers do not pay home to place of work expenses where that place of work is fixed. It was common ground that Mr Teasdale continued to be paid expenses for his journeys from Walsall.

28. Mr Teasdale's claim in this regard fails for two reasons, namely that he was given notice that such expenditure would no longer be met and further he has provided no evidence of his actual expenditure.

Remedy

29. There will need to be a remedy hearing unless the parties can come to term in the meantime. I would remind Mr Teasdale that he is not entitled to either “compensation for injury to feelings (middle range)” or “compensation for anxiety and stress”. The purpose of the hearing is therefore to consider whether:-

(a) A further deduction for contributory conduct in accordance with Section 122(2) in respect of a basic award and Section 123(6) in respect of the compensatory award having regard to any contributory conduct which led to the dismissal and;

(b) The amount of the compensatory award generally which will include the notice period

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. There will be a remedy hearing held remotely commencing at 10:00 am on Friday 8 January 2021 with a duration of 3 hours. Joining instructions will be provided in due course.

2. Mr Teasdale is to provide to the Respondents and to the Tribunal a schedule of loss detailing the financial losses he has incurred as a consequence of the dismissal. Such schedule of loss is to reflect any earnings he has received from other employment since his dismissal. That schedule is to be served by not later than 13 November 2020.

3. The Respondent shall serve on Mr Teasdale and the Tribunal by not later than 4 December a counter schedule setting out where they disagree with Mr Teasdale’s schedule of loss.

NOTES

(i) **The above Order has been fully explained to the parties and all compliance dates stand even if this written record of the Order is not received until after compliance dates have passed.**

(ii) **Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.**

(iii) **The Tribunal may also make a further order (an “unless order”) providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.**

(iv) **An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative. Any further applications should be made on receipt of this Order or as soon as possible. The attention of the parties is drawn to the Presidential Guidance on ‘General Case Management’:**

<https://www.judiciary.gov.uk/wp-content/uploads/2014/08/presidential-guidance-general-case-management.pdf>

- (v) The parties are reminded of rule 92: “*Where a party sends a communication to the Tribunal (except an application under rule 32) it shall send a copy to all other parties, and state that it has done so (by use of “cc” or otherwise). The Tribunal may order a departure from this rule where it considers it in the interests of justice to do so.*” If, when writing to the tribunal, the parties do not comply with this rule, the tribunal may decide not to consider what they have written.

Employment Judge Blackwell

Date: 28 September 2020

JUDGMENT/ORDERS SENT TO THE PARTIES ON

29 September 2020

FOR THE TRIBUNAL OFFICE

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