



EMPLOYMENT TRIBUNALS

Claimant: MS N HANIS

Respondent: PROMO CONCEPTS LTD

Heard at: Croydon (by cloud video platform)
On: 15 January 2021

Before: Employment Judge Nash (sitting alone)

Appearances

For the Claimant: Ms G Nicholls of counsel
For the Respondent: Mr G Hine, solicitor

REMEDY JUDGMENT

1. The Respondent shall pay to the Claimant a Basic Award of **£525** in respect of her unfair dismissal.
2. The Respondent shall pay to the Claimant a Compensatory Award of **£16,671.66** in respect of her unfair dismissal. This includes a sum of £13,993.42 for loss of earnings, which includes the sum of £2678.24 referable to the Claimant's pension.
3. The Respondent shall pay to the Claimant the sum of **£2,211** as damages for breach of contract by failing to pay commission for December 2019 and for January 2020. The sum is awarded net of statutory deductions.
4. There is no award for notice pay.
5. The Respondent shall pay to the Claimant the sum of **£335.34** as damages for breach of contract in respect of holiday pay. The sum is awarded net of statutory deductions.
6. The compensatory award is increased by 10% for failure to comply with the ACAS Code pursuant to Section 207A(2) TULR(C)A 1992 in the sum of **£1,667.17**.
7. The award for breach of contract is increased by 10% for failure to comply with the ACAS Code pursuant to Section 207A(2) TULR(C)A 1992 in the sum of **£254.63**.

8. The awards are increased by the minimum amount of two weeks pay – being **£1,050** - pursuant to s38 Employment Act 2002.
9. Accordingly, the total payable to the Claimant by the Respondent under this judgment is **£22,714.81**.
10. The recoupment provisions apply.
11. The prescribed element of this award is **£13,993.42**.
12. The prescribed period is from **20.2.20 to 15.1.21**.
13. The non-prescribed element is **£8,721.38**.

REASONS

1. This was a remedy hearing following the liability hearing on 27 and 28 October 2020.
2. As to witnesses, the Tribunal heard from Mr S Taylor, the Respondent's Managing Director and from the claimant.
3. The Tribunal had sight of a remedy bundle.

Issues

4. With the parties, the Tribunal discussed the issues as to remedy. The parties agreed that the tribunal should firstly determine the length of time the claimant would have been employed by the Respondent had she not been unfairly dismissed. In effect, the respondent was asking the tribunal to make a deduction to the loss of income award, on the basis that, absent the unfair dismissal in February 2020, the claimant's employment would have been lawfully terminated shortly afterwards.

The Facts

5. The Respondent's case, in essence, was that Covid-19 had had a very significant adverse impact on its business, which was selling promotional goods, gifts and the like. Accordingly, the Respondent would have been unable to keep the Claimant in employment for any significant period after she was dismissed. Specifically, her employment would have come to an end on or around 23 March 2020, absent the unfair dismissal. This would have been a lawful dismissal.
6. The Respondent's evidence was that only four out of about 13 staff, including one who was not on the books, remained in employment with the Respondent by December 2020. Save for Mr Taylor, all were on furlough.

7. However, there was no satisfactory corroborating evidence for this and there was no good explanation as to the lack of this evidence. The Tribunal was provided with 12 P45s, (considered below). However, these P45s did not match up with the number of terminations stated by the respondent. There were no dismissal letters or other documents going to these terminations. In respect of those employees stated to be on furlough, there was no furlough documentation, in circumstances where the furlough scheme requires very considerable documentation.
8. As to the 12 P45s, there were difficulties with the Respondent's evidence. There were straight forward factual errors in Mr Taylor's witness statement. At paragraph 4 he stated that, between the termination of the Claimant and 20 October 2020, the respondent had issued twelve P45s to various employees. These were in the bundle. However, and Mr Taylor was questioned thoroughly on this point, many, if not most, of these P45s did not relate to March to October 2020. Several were from 2019. In cross-examination Mr Taylor was remarkably unwilling to accept that as a matter of simple logic, dismissals occurring in 2019 cannot have been directly related to Covid 19.
9. Accordingly, the documents relied on by the Respondent did not show or demonstrate what the Respondent said they showed – that it had dismissed 12 employees between March and October 2020. There was no explanation why, if the Respondent had dismissed these members of staff, there was so little evidence of this. The respondent had provided various P45s to the tribunal and there was no good explanation why it could not have therefore provided all the 12 P45s for these terminations.
10. There were further issues with these P45s. The dates of termination on the P45s, varied, for instance from July 2019. It was the respondent's case that the employees were terminated on these various dates. However, there was no satisfactory explanation as to why the dates on which the P45s were signed off and, it was assumed sent to the Revenue, were all 12 November 2020.
11. The explanation by Mr Taylor in cross-examination was that the payroll system was in some way responsible for this discrepancy. However, this was a bare assertion with no back up explanation or evidence. There was no good explanation as to why this had not been dealt with in Mr Taylor's witness statement, or by a letter from those responsible for payroll.
12. In the view of the Tribunal, P45s are significant documents and businesses can face consequences if they mislead or provide false information to HMRC. Accordingly, the Tribunal accepted that the P45s were signed off and sent to HMRC on 12 November 2020, as stated on the face of the documents.
13. In addition, in seeking to establish that the claimant would have been dismissed in March 2020, the Respondent's evidence was that the business had suffered a down-turn, prior to the lockdown in March 2020. However, there was very little if any corroborating evidence of this. In the grounds of resistance, which were prepared much closer to March 2020, and in the

witness statement for the liability hearing, there was no reference to any business down-turn. These documents were drafted in circumstances where the Respondent was seeking to justify the dismissal of the Claimant.

14. According to Mr Taylor's statement, the Respondent was trading at a loss in October 2019. The only documentary evidence relied upon by the respondent was its Unaudited Financial Statement for the year ending October 2019. The Statement showed that the respondent in October 2019 had just under £850,000 cash in the bank. The respondent's assets were greater in value than its liabilities. Mr Taylor, the respondent's sole director and secretary, was cross examined on this point and was unable to explain. Whilst the tribunal accepted that it is not impossible that a business can have handsome financial reserves whilst trading at a loss, at least in the short term, it was difficult to establish this without satisfactory evidence.
15. Further, there was no corroborating evidence as to the financial state of the Respondent from February 2020, when the Claimant was dismissed, to date. There was no explanation as to why there were no accounts or information going up to October 2020, even if this might be in a draft or preliminary form. For instance, there was no letter from the accountants giving their professional opinion. As Claimant's Counsel submitted, bank statements might have been provided to give the tribunal at least some documentary evidence as to the financial state of the respondent after October 2019.
16. The Respondent further stated that the claimant was employed in a small and discrete part of the business. Although a replacement was taken on following the claimant's dismissal, this person was dismissed in March 2020. There was, however, little or no corroborating evidence as to this. The respondent pointed to a P45 in the bundle as being that of the claimant's replacement. However, there no other evidence, for instance, an offer letter, employment contract or dismissal letter.
17. Reviewing the state of the evidence, the Tribunal accepted that the Respondent's overall case was not implausible – there was no dispute that Covid 19 and lockdown have had a serious adverse impact on many businesses. However, the tribunal was faced with an unexplained failure by a represented party to provide the sort of evidence which one might expect to be easily available to corroborate the respondent's account.
18. This was in the context of evidence provided by the Respondent, which was plainly inconsistent with the respondent's case, for instance, the P45s which did not match the account in Mr Taylor's witness statement.

The Law

19. The Tribunal took the view that it, in effect, had to reconstruct what might have been. This was not dissimilar to the exercise carried out in a so-called *Polkey* deduction. The tribunal bore in mind the guidance on *Polkey* deductions given by the then President of the Employment Appeal Tribunal in *Software 2000 Ltd v Andrews and ors 2007 ICR 825, EAT*. The tribunal reminded itself that it must determine the financial loss caused by the

dismissal, by determining how long the claimant would have been employed, absent the unfair dismissal. According to Elias P (as he then was):-

'The question is not whether the tribunal can predict with confidence all that would have occurred; rather it is whether it can make any assessment with sufficient confidence about what is likely to have happened, using its common sense, experience and sense of justice. It may not be able to complete the jigsaw but may have sufficient pieces for some conclusions to be drawn as to how the picture would have developed. For example, there may be insufficient evidence, or it may be too unreliable, to enable a tribunal to say with any precision whether an employee would, on the balance of probabilities, have been dismissed, and yet sufficient evidence for the tribunal to conclude that on any view there must have been some realistic chance that he would have been. Some assessment must be made of that risk when calculating the compensation even though it will be a difficult and to some extent speculative exercise.'

Applying the Law to the Facts

20. The difficulty for the tribunal was that it was dissatisfied with the respondent's explanation as to furlough, dismissals and headcount in 2020, plus the explanation as to the respondent's financial situation in general. Therefore, this left relatively little evidence from which it might reconstruct what might have happened had the claimant not been unfairly dismissed.
21. The Tribunal took the view, on the balance of probabilities, that it was more likely that not that the Respondent's business would have run into difficulties due to Covid-19 / lockdown after March 2020. The question is what effect this would have had on the claimant's employment, and when.
22. The tribunal took the view that it should weigh the only documentary evidence it had as to headcount – the P45s - significantly in the balance. It had found that the respondent sent at least 12 P45s to HMRC on or around 12 November 2020. This, in the absence of other reliable evidence, was consistent with the Respondent taking some sort of steps as to headcount in November 2020. It was consistent with the respondent addressing its mind to the question of headcount and dismissals in November 2020.
23. The Tribunal, on the balance of probabilities, thought that the most likely scenario was that the Claimant would have been put on furlough within a short time and probably within no more than a week of when the Furlough Scheme started. The Tribunal, relying on its knowledge as a specialist Tribunal, took into account that it had seen this in a significant number of other cases. Continuing to employ the claimant on furlough would have been much less financially burdensome to the respondent. Accordingly, it was more likely than not that her employment would have continued for some time.
24. By Autumn, summer holidays were over, the lockdown had been eased for some time, although there were concerns of its being reimposed. By this time,

the respondent, on the balance of probabilities, would have had considerably more information as to the effect of Covid and lockdown on the economy and its own financial situation and prospects. Well over six months would have passed since the start of lockdown. In the view of the Tribunal, it was more likely than not that by this time, the respondent would have started to give significant thought to the long-term headcount situation.

25. The tribunal had found that the respondent was giving thought and/or taking steps as to headcount by 12 November 2020 when it sent 12 P45s to HMRC. Accordingly, the Tribunal determined that the claimant would have been dismissed fairly by reason of redundancy by 12 November 2020.

Remedy

26. Once the tribunal had made its determination as to when the claimant's employment would have lawfully terminated, there was an adjournment for the parties to agree the awards, consequential upon this finding. The figures in this remedy judgement are those agreed by the parties in this context. For the avoidance of doubt, the respondent's agreement to the figures in this judgement was expressly without prejudice to its right to dispute the tribunal's finding as to the likely date of termination of the claimant's employment.

Employment Judge Nash

Date: 10 April 2021

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