RM

EMPLOYMENT TRIBUNALS

Claimants: **Nigel Stanley**
Kathleen Hunter

Respondent: **Stratsmore Investments Limited**

Heard at: **East London Hearing Centre On: 11 May 2021**

Before: **Employment Judge S Knight**

Representation

Claimants: Not in attendance, unrepresented

Respondent: Not in attendance, unrepresented

JUDGMENT

1. **The First Claimant was unfairly dismissed by the Respondent.**

2. **The Respondent is ordered to pay the First Claimant £5,472.48.**

3. **In respect of the First Claimant, for the purposes of the Employment Protection (Recoupment of Benefits) Regulations 1996:**

   (1) The total monetary award for unfair dismissal is £2,903.

   (2) The prescribed element is £0.

   (3) The prescribed element relates to 16 September 2020 to 11 May 2021.

   (4) The amount by which the total monetary award for unfair dismissal exceeds the prescribed element is £2,903.

4. The Second Claimant's claim is postponed. Case management orders will follow.

REASONS

Introduction

The parties

1. The First Claimant was employed by the Respondent between 24 April 2014 and 15 September 2020 as a Bar Manager. The Second Claimant was also employed by the Respondent. The Respondent runs a hotel.

The claims

2. The First Claimant claims for:

   (1) Unfair dismissal;

   (2) 6 weeks' notice pay;

   (3) 9 weeks' redundancy pay;

   (4) 4 days' holiday pay; and

   (5) Arrears of pay for 28 hours and 2 weeks' furlough.

3. The details of the Second Claimant's claims are not clear.

4. On 1 October 2020 ACAS was notified under the early conciliation procedure. On 1 November 2020 ACAS issued the early conciliation certificate. On 16 November 2020 the ET1 Claim Form was presented in time.

Procedure, documents, and evidence heard

Procedure

5. This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was "***V****: video whether partly (someone physically in a hearing centre) or fully (all remote)*". A face-to-face hearing was not held because it was not practicable due to the COVID-19 pandemic and no-one requested the same.

Preliminary issue: non-attendance

6. There were 2 claimants in this case. Their claims were due to be heard together.

7. On 9 January 2021, the papers in the claim were sent to the Respondent. On the same date, all parties were informed of the hearing of the claim, including how to access the hearing.

8. The ET3 was due on 6 February 2021. No ET3 was presented.

9. On 22 March 2021 the Tribunal wrote to the Respondent to remind them of the proceedings and the requirement to file a response. The letter was copied to the Claimants. It stated as follows:

> "Under rule 21 of the above Rules, because you have not entered a response, a judgment may now be issued. You are entitled to receive notice of any hearing but you may only participate in any hearing to the extent permitted by the Employment Judge who hears the case."

10. None of the parties attended the hearing of the claim.

11. I checked with the Tribunal administration, who informed me that no information had ever been received from the Respondent. I satisfied myself that they were informed of today's hearing. Aside from the ET1, no information had been received from either Claimant. Again, I satisfied myself that they were informed of today's hearing.

12. Rule 47 of the Employment Tribunal Rules of Procedure provides:

> "47. If a party fails to attend or to be represented at the hearing, the Tribunal may dismiss the claim or proceed with the hearing in the absence of that party. Before doing so, it shall consider any information which is available to it, after any enquiries that may be practicable, about the reasons for the party's absence."

13. I had regard to the Court of Appeal case of *Roberts v Skelmersdale College* [2004] IRLR 69. Although it was decided under the old rules, there is sufficient similarity between the two rules that it remains good law. The following principles emerge (so far as they apply to new rule 47 and the non-attendance of a Respondent):

    (1) The rule confers a very wide discretion (¶ 14);

    (2) The rule does not impose on an Employment Tribunal a duty of its own motion to investigate the case before it, but the Employment Tribunal should consider the material already before it (¶ 15);

    (3) The Tribunal has a discretion to require the present party to give evidence, but no duty to do so (¶ 16);

    (4) Before making a decision the Tribunal shall have regard to the information required under the rule (¶ 16).

14. I also had regard to the Overriding Objective, as set out in rule 2 of the Employment Tribunal Rules of Procedure. I had regard to all factors contained within rule 2, but particularly "*(d) avoiding delay, so far as compatible with proper consideration of the issues*".

15. I concluded that the Respondent was aware of today's hearing and had offered no reason for their non-attendance. I noted the Respondent's failure to provide

an ET3 or respond to any Tribunal communications.

16. I concluded that the letter sent to the Respondent and copied to the Claimants on 22 March 2021 was capable of leading them to believe that judgment may be entered in their favour without any need for them to attend the hearing. I therefore concluded that it would be unfair in those circumstances to strike out their claims.

17. In respect of the First Claimant's claim, I concluded that the ET1 contained enough information to resolve his claim. However, the version of the ET1 which was provided to the Tribunal does not contain enough information to resolve the Second Claimant's claim. This may be because of the way in which data is dealt with by the Tribunal's systems, not because the Second Claimant failed to provide the information.

18. I concluded that in respect of the First Claimant, the hearing should proceed today in the absence of the Respondent.

19. However, I concluded that in respect of the Second Claimant, the hearing would have to be postponed so that sufficient information could be received to allow the claim to be determined.

Documents

20. I was provided with the ACAS early conciliation letter and the ET1 claim form. I decided the case on the documents provided.

Relevant law

21. Section 94 of the ERA 1996 provides that an employee with sufficient qualifying service has the right not to be unfairly dismissed by their employer.

22. Section 98 of the ERA 1996 provides insofar as is relevant:

> "(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— […]
>
> > (c) is that the employee was redundant[…]
>
> (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. […]"

23. In *Beatt v Croydon Health Services NHS Trust* [2017] EWCA Civ 401; [2017] IRLR 748; 23 May 2017 Lord Justice Underhill stated that the "reason" for a dismissal is the factor or factors operating on the mind of the decision-maker which causes them to take the decision to dismiss or, as it is sometimes put, what "motivates" them to dismiss.

24. Circumstances in which there is a dismissal by reason of redundancy are set out in section 139 ERA 1996 as follows insofar as is relevant:

"(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— […]

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

(i) for employees to carry out work of a particular kind […]

have ceased or diminished or are expected to cease or diminish. […]

(6) In subsection (1) *"cease"* and *"diminish"* mean cease and diminish either permanently or temporarily and for whatever reason."

Unauthorised deductions from wages

25. Sections 13 to 27B ERA 1996 sets out the statutory basis for a claim of unauthorised deduction from wages.

26. "Wages" is widely defined. According to section 27(1) ERA 1996, it includes "*any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise*".

Findings of fact

27. The First Claimant was employed by the Respondent between 24 April 2014 and 15 September 2020. He worked 34 hours per week.

28. His gross monthly pay was £1,157. His net monthly pay was £857.

29. His gross weekly pay was £267. His net weekly pay was £197.77.

30. Due to the COVID-19 pandemic, the First Claimant was placed on furlough. There is no evidence that his pay was reduced. On 12 August 2020 he was told to prepare for reopening on 24 August 2020. However, on 24 August 2020 a meeting was held at which the Respondent said that the opening date had been

missed, but all the staff were to return from furlough.

31. On 15 September 2020 the First Claimant received a letter, posted on 14 September 2020 and dated 1 September 2020, stating that he was being made redundant with immediate effect. There was a genuine redundancy situation.

32. The Effective Date of Termination was 15 September 2020, when the Claimant received notice of his summary dismissal.

33. Despite attempting to contact the Respondent, the First Claimant has received no information about what he is owed.

34. At his date of termination the First Claimant had worked for 28 hours for which he had not been paid, relating to 28 August 2020 to 10 September 2020.

35. At his date of termination the First Claimant had 4 days' holiday outstanding.

36. The First Claimant was dismissed without notice.

37. The First Claimant was 58 years old at the date of termination.

Conclusions

Liability

38. No reason other than redundancy has been identified for the Claimant's dismissal. There was a genuine redundancy situation. As such, I conclude that the reason for the Claimant's dismissal was redundancy. This is a potentially fair reason for dismissal.

39. However, the procedure that was adopted was plainly unfair. The Claimant was notified of his dismissal without prior notice of the redundancy situation. The notice was dated 2 weeks before he received it, and was posted the day before he received it.

40. As such, the dismissal of the Claimant was unfair.

41. At the date of termination the Claimant had worked for the Respondent for 6 full years. He was entitled to 6 weeks' notice of dismissal. He received none. As such, the dismissal of the Claimant was in breach of contract.

42. The Claimant was made redundant. He was entitled to 9 weeks' redundancy pay. That was not paid. As such, the Respondent failed to make a redundancy payment.

43. At the date of termination the Claimant had accrued 4 untaken days' leave. This is ⅘ of a week. The Respondent did not pay the Claimant for those days' untaken leave. As such, the Respondent made an unauthorised deduction from wages and failed to pay holiday pay.

44. At the date of termination the Claimant had worked for 28 hours for which he had not been paid. Further, he was on furlough for 2 weeks, for which he was not paid. There is no evidence of his furlough pay differing from his normal pay. The Respondent did not pay the Claimant his wages. As such, the Respondent made an unauthorised deduction from wages.

Remedy

45. In respect of unfair dismissal, the Claimant is entitled to a Basic Award and a Compensatory Award.

46. The Basic Award is the same as the redundancy payment that was due. It is 9 x a week's gross wage. **This is a Basic Award of £2,403**.

47. The Compensatory Award is composed of a Prescribed Element (which compensates for losses up to the date of the hearing) and a Non-Prescribed Element (which compensates for other losses).

48. The Claimant has not claimed for any past loss of earnings.

49. **The Prescribed Element is £0.**

50. The Claimant will be awarded £500 for loss of statutory rights / statutory protection.

51. The Claimant has not claimed for any other losses.

52. **The Non-Prescribed Element is £500**.

53. Therefore, the **total award for unfair dismissal is £2,903.**

54. The Claimant was entitled to 6 weeks' notice. That is **notice pay of £1,602**.

55. The Claimant was entitled to redundancy pay of £2,403. No separate award can be made for this as it is covered by the Basic Award.

56. In respect of holiday pay, the Claimant is entitled to ⅕ of a week's pay. That is **holiday pay of £213.60**.

57. The Claimant's worked but unpaid hours are calculated as $^{28}⁄_{34}$ of a week. He is also entitled to 2 weeks' furlough pay. That is 2 $^{28}⁄_{34}$ x 267. That is **arrears of wages of £753.88**.

58. Therefore, the **total award is £5,472.48** which is made up of:

    (1) £2,903.00 for unfair dismissal;

    (2) £1,602.00 for notice pay;

    (3) £0.00 for redundancy pay;

    (4) £213.60 for holiday pay;

(5) £753.88 arrears of pay.

Employment Judge Knight

11 May 2021