EMPLOYMENT TRIBUNALS

Claimant: Mr M Dyer

Respondent: Robert Sheppard Construction Limited

Heard at: Cardiff by CVP **On:** 21st May 2021

Before: Employment Judge G Duncan

Representation
Claimant: Mr Arthur, Solicitor
Respondent: Mr Johns, Counsel

JUDGMENT

It is the decision of Employment Judge Duncan that:

1. The Claimant was unfairly dismissed by the Respondent.

2. The Respondent was in breach of contract by dismissing the Claimant without recognition of a six month notice period.

3. The Claimant's claim for breach of contract in respect of unpaid bonus pay is not well founded and accordingly dismissed.

4. The Claimant's claim for unpaid holiday pay has been withdrawn and accordingly dismissed.

5. In light of the Tribunal's findings below, the Respondent is ordered to pay the Claimant the net sum of £13,803.15 by consent.

6. The Respondent shall pay the Claimant's costs of the postponement of Day 1 of the final hearing in the sum of £500.

REASONS

Introduction

1. This document should be read alongside the written reasons in respect of liability. The matter was originally listed on 6 and 7 May 2021 and it had been my intention to hand down written reasons in respect of liability in advance of the hearing listed on 21 May 2021. Unfortunately, this was not possible due to the pressure of time and I accordingly sent a finalised version of the written reasons to the parties at approximately 11am on the 21 May 2021. I allowed parties an hour to consider my decision before granting further time so to allow the parties to attempt to reach an agreement in respect of quantum. Having allowed until approximately 12:45pm for the parties to consider their respective positions, it became clear that there was little scope for an agreement to be reached in light of my findings.

Issues

2. The Respondent, by way of written submissions, had advanced the case that the Claimant, in light of my subsequent findings, was not entitled to the full period of notice pay on the basis that the Claimant had obtained new employment relatively soon after dismissal and had therefore mitigated his loss. It was asserted that the Claimant was therefore only entitled to the difference between the income in his employment with the Respondent and that of his new employment. In short, the Claimant's case was that he was entitled to the full unpaid period of five months to reflect the fact that the Respondent had already paid the Claimant for the one month notice period.

3. At approximately 12:45pm, I expressed my initial view that the principles of **Norton Tool Co Ltd v Tewson [1972] IRLR 86**, otherwise known as the "Norton Tool Rule", may apply. Neither party had specifically addressed this issue within the written submissions filed. I therefore adjourned over the lunch period so to give both parties an opportunity to consider their positions in respect of the same and to refer me to any case law that may assist me determine the issue.

4. Following the lunch adjournment, the Respondent invited the Tribunal to grant an adjournment so to allow for further written submissions. It was suggested that the issue was a discrete point of law that carried substantial importance in this case and would have a considerable impact upon the level of the award. The Claimant invited the Tribunal to proceed to consider remedy. I determined that it would not be proportionate to adjourn in the circumstances. In correspondence with the parties, the Tribunal had already clarified that the hearing would be listed to consider remedy and any application for costs. Both parties were therefore granted sufficient notice of the potential issues. I expressed the view that parties could prepare their respective submissions over the course of a further adjournment and that we would utilise the remaining 2.5hrs of Tribunal time to determine the issue. I expressed my concern that to adjourn, cause additional expense to the parties, use additional Tribunal resources and incur further delay was

not proportionate to the discrete issues upon which I needed to be addressed.

5. At approximately 3pm, parties confirmed that they had been afforded sufficient opportunity to prepare their respective oral submissions. I was helpfully sent an extract from Harvey's and referred to relevant cases as referred to below.

Submissions

6. Mr Johns, on behalf of the Respondent, invited me to consider that Norton Tool had been applied in a haphazard manner over the years but that the principle is to uphold good industrial practice. He stated that the purpose is to ensure that employers that comply with notice obligations are advantaged when compared to those that do not comply, as opposed to the freestanding principle that this is a freestanding benefit to Claimants. He suggests that the case of **Babcock FATA Ltd v Addison [1987] 2 All ER 784** makes it clear that the Norton Tool Rule is a general principle and not one to be applied as a rule of law. He states that the principle is to ensure that the employer pays such sums as good industrial practice requires and sums earned by way of mitigation should not be taken into account to set off that sum. He invites me to consider that it is a matter of fact and degree and that, in this particular case, where the employer was financially struggling and laying off other people, if the Respondent were considering good industrial practice it is likely that he would have placed the Claimant on garden leave or require him to work out his notice period. He suggests that in doing so the payments to the Claimant would have been paid out over the notice period rather than payable in one lump sum. He submits that, in this case, had the Respondent appreciated that the notice period were six months, then he would not have paid up front and would have requested that the Claimant go on garden leave.

7. Mr Johns also advances the argument that the caselaw does not consider a situation where the dismissal is procedurally unfair and he invites me to distinguish this case from the principle in Norton Tool. He states it is important that this is not a case where the dismissal is substantively unfair but instead procedurally unfair and the failure on the part of the Respondent can be fairly rectified by the Tribunal recognising that the Claimant is owed for the period it would have taken to implement a fair process of redundancy. He states that the loss suffered is as a result of the breach of contract and not the unfair dismissal. He states that this is clear as Norton Tool does not apply to a breach of contract. The Respondent therefore states that where there is a procedural failure, the Claimant is only able to recover under normal principles relating to the mitigation of loss.

8. In summary, the Respondent therefore considers that the Norton Tool principle can be distinguished and/or, in this case, the exceptionally long notice period should not apply where the Respondent is in financial difficulty and it would therefore not be good industrial practice.

9. Mr Arthur, on behalf of the Claimant, disagrees with the submissions made on behalf of the Respondent. He states that it is relevant that the Respondent has always sought to hide behind a notice period that has now

been confirmed to be incorrect. He states that there was no garden leave and that dealing with the hypothetical situation of payment in lieu or garden leave does not assist the Tribunal. He states that the Tribunal has found that the Claimant was unfairly dismissed and, accordingly, he is entitled to the full six month period less one month paid. He refers me to the cases of **Everwear Candlewick Ltd v Isaac [1974] ICR 525** and **Vaughan v Weighpack Ltd [1974] ICR 261.** He submits that the cases further demonstrate that the Claimant is entitled to the full notice period.

Decision

10. I do not propose to rehearse the written reasons behind my decision relating to the relevant notice period but it is correct to highlight that the Tribunal found that the Claimant's notice period was six months. It is accepted that the Claimant gained new employment very soon after the termination of employment.

11. I have regard to the principles distilled from the case of Norton Tool, that case was clear, in my view, in that where there is an unfair dismissal, the Claimant may be entitled to compensation covering the period from the date of dismissal to the end of the notice period, notwithstanding that he had obtained further employment.

12. I have regard to the principles in **Langley v Burlo 2007 ICR 390**, in which the Court took the view that the Norton Tool principle still applied within a narrow compass. It states that the Norton Tool principle is of limited scope and applies where an employee has been deprived of his or her full contractual notice, remains fit and able to work, and secures new employment during the notional notice period. In such a case, the employee's new earnings during that period do not have to be set off against his or her losses when calculating the compensatory aware.

13. I have been referred to the case of Babcock confirming that the general principle is applicable but not as a rule of law entitling full wages for the notice period in every case. The employer should pay such sums as good industrial relations practice requires. Where however the full wages for notice period would be in excess of the sum which an employer on dismissing ought to in good industrial practice pay, mitigation will apply with respect to this excess. It is for the Tribunal to make such a determination on the facts of each case.

14. In this particular case, I have regard to the fact that I found the Claimant credible in his evidence relating to the fear that the Respondent may treat him unfairly and may terminate employment on a whim. I have regard to the fact that I found that the Claimant specifically sought to protect himself against that risk by requesting a longer notice period. I have also considered that the Respondent failed to engage in good industrial practice in recognising the correct notice period at the time of dismissal and that the Respondent's failure to have regard to the relevant notice period may have impacted upon the manner in which Claimant was treated as part of the redundancy decision making process.

15. In my view, this is a case where good industrial practice demands that the Claimant receive the full notice period and that there should not be a reduction to reflect his swift reemployment. The Claimant did not want to leave, he had specifically requested the six month period of notice and he had no guarantee of employment following termination.

16. In my view, good industrial practice demands that the full notice period is reflected. It cannot amount to good industrial practice for the Respondent to deny the existence of a six month notice period through poor record keeping, swiftly conclude a redundancy process in an unfair manner and to thereafter hide behind an assertion that it would not be good industrial practice for the Claimant to receive the full notice period. I prefer the submissions made on behalf of the Claimant that the principle permits the Claimant to receive compensation for the full six months.

17. I have considered the articulate submissions made by Mr Johns inviting me to distinguish between substantively unfair dismissal and procedural dismissal. Having reviewed the relevant authorities, no such distinction has been made by the EAT or Court of Appeal. Further, I have not been referred to any particular case that supports the contention that there should be a distinction drawn. In my view, the relevant consideration is that the dismissal was unfair, not that it was procedurally unfair and may potentially be rectified by the Tribunal. The recovery of the Claimant's notice pay was a consequence of the Respondent unfairly dismissing the Claimant. In my view, the Claimant is therefore entitled to the notice pay period in line with good industrial practice.

Award

18. Following my determination of the issue above, and in light of my findings made in the written reasons in respect of liability, the parties engaged in further negotiation. It was agreed that the Claimant should not be entitled to recover the additional wages that would have been due if the Respondent had undertaken a fair process. It was agreed that this would represent a double recovery for the Claimant. It was therefore agreed that the total payable by the Respondent to the Claimant is £13,803.15 net. This is the agreed figure to reflect five additional months of notice pay.

Costs

19. The Claimant pursues an application for costs in the sum of £6,500.

20. I set out the relevant procedural history within my written reasons relating to liability. I do not propose to rehearse the history save for to state that the Respondent changed their position regarding a key issue in the case at 5pm on 5 May 2021. The change of position, and application made, presented no opportunity for the Claimant to give instructions prior to the hearing and little opportunity to prepare for cross-examination of the Respondent's witnesses in light of the changes. The Claimant had already been hampered in terms of preparation as a result of the hearing on 4 May 2021 allowing the further statements to be adduced, only for those statements to be subject to further substantial amendments.

21. The Claimant's submissions are contained within the written submissions filed in advance of the hearing. In response, the Respondent states that the reason for the change in position was to assist the Tribunal. He states that the application was quite properly made by the Respondent's solicitor and advance notice was given. The Respondent resists the costs application generally and points to the Respondent's success in defending a number of issues.

22. I find that as a consequence of the Respondent's change of position the hearing was unable to proceed on Day 1 and it was necessary to adjourn overnight.

23. I have had specific regard to the fact that, in my view, a reasonably prudent Respondent would have realised during the course of the proceedings that the 2015 contract did not originate from 2015 but instead a date after 2017 when the Respondent's HR company became involved. This change of position is nobody's fault other that the Respondents and this fits into the wider disarray that I found to exist within the Respondent company, certainly prior to 2017.

24. In my view, the Respondent acted unreasonably in the manner that they conducted themselves in respect of this aspect of the proceedings pursuant to rule 76(1) of The Employment Tribunals Rules of Procedure 2013.

25. I have considered the second limb of the Claimant's application relating to a defence with little or no prospect of success. Firstly, the Respondent was successful in defending the claim relating to car payments and the bonus payments. Secondly, those elements were closely bound by the factual matrix relating to the notice pay and unfair dismissal. Whilst the Claimant rightly questioned the evidence, it is my view that the prospects were not so low or non-existent to justify a costs order on that basis. On the papers that I was faced with on Day 1 of the hearing, it was not clear to me where the truth lied. It was, in my view, entirely reasonable to run the case that the Respondent did, even if the handling of the statements late in the day amounted to unreasonable behaviour. I remind myself that the multiple changes of position, and the evidential disarray, was one of the factors that went in favour of the Claimant when considering my findings. That late change of the Respondent invertedly assisted the Claimant.

26. As a third limb, it is asserted that the Respondent displayed unreasonable conduct in respect of the contractual terms between the parties and that Respondent witnesses must have lied. I did not make such a finding in my judgment, instead I considered that the Respondent's evidence was as a result of shambolic internal processes, poor record keeping and effectively the Respondent witnesses guessing as to what took place in 2015. I accepted that they were doing their best to advance their case on that issue. I therefore do not find that the conduct as a whole was unreasonable to the extent alleged.

27. In my view, it is necessary to make a costs order limited to the time lost on Day 1 and the inability to hear oral evidence. Had we started the hearing, it was likely that we would have heard all of the oral evidence on Day 1 with submissions and judgment on Day 2. The Respondent's late change of

position directly led to the additional Day 3. In my view, costs should be limited to the cost incurred as a consequence of the extra day.

28. Mr Arthur provided a careful breakdown of the £6,500 claimed for costs. He explained that the three days hearing had amounted to costs in the sum of £1,500. I therefore assessed the costs incurred as a result of the additional day as £500.

Employment Judge **G Duncan**

Date 27 May 2021

REASONS SENT TO THE PARTIES ON 2 June 2021

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FOR EMPLOYMENT TRIBUNALS Mr N Roche