



EMPLOYMENT TRIBUNALS

Claimant: Mr T McNamara

Respondent: CM Faraday Building Contractors Limited

Heard at: Manchester (by CVP)

On: 11 August 2021

Before: Employment Judge Phil Allen
(sitting alone)

REPRESENTATION:

Claimant: Mr K McNamara (father)

Respondent: Ms E Evans-Jarvis, Consultant

REMEDY JUDGMENT

The judgment of the Employment Tribunal (as sent to the parties on 16 August 2021) was as follows:

1. The respondent must pay to the claimant a basic award for unfair dismissal of **£1,839.71** within 14 days of the date of this Judgment.
2. The respondent shall pay to the claimant a compensatory award of **£9,192.32** as compensation for unfair dismissal, within 14 days of the date of this Judgment.

Written reasons having been requested by the respondent, the written reasons below are provided.

REASONS

Introduction

1. The claimant was employed by the respondent as a builder or labourer. He was employed for over eight years until his dismissal on 9 November 2019.
2. In a Judgment sent to the parties on 20 April 2021, following a liability hearing heard on 6 and 7 April 2021, the Tribunal found that the claimant had been unfairly dismissed by the respondent. The Tribunal also found that:

- a. the compensatory award should be reduced by 20% due to **Polkey** (that is whether the claimant would have been fairly dismissed in any event);
- b. the compensatory award should be increased by 20% because the respondent had unreasonably failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures;
- c. the compensatory award should be reduced by 25% due to contributory fault; and
- d. the basic award should be reduced by 25% due to contributory fault.

The Issues

3. Orders were made for various steps to be taken undertaken regarding remedy, and they were sent to the parties on 20 April 2021. Amongst the steps ordered:

- a. The claimant was to provide a schedule of loss by 4 May 2021;
- b. respondent was to provide a counter schedule of loss and detail where the schedule was not agreed by 18 May 2021;
- c. Documents were to be exchanged by 1 June 2021;
- d. The respondent was to prepare a bundle for the remedy hearing by 8 June 2021;
- e. Witness statements for any witnesses were to be sent to the other party by 15 June 2021; and
- f. If either party wished to rely upon written submissions, they had to be provided to the other party and the Tribunal by no later than 8 August 2021.

4. The respondent did not comply with the orders. The claimant did and he also ultimately prepared a bundle of documents for the hearing. The respondent prepared a counter-schedule which it only provided on the morning of the hearing.

5. This conduct of the proceedings by the respondent was completely unacceptable. It meant that the issues could not be considered in advance of the hearing and it potentially placed the claimant at a disadvantage, particularly as someone represented by his father, who has no legal experience, when the respondent was represented by an organisation with significant experience. I agreed that the claimant had been somewhat ambushed, which is what his representative said at the hearing. Nonetheless it was entirely appropriate for the respondent to be able to challenge at the hearing the remedy to be awarded and to challenge what was claimed by the claimant, and therefore the Tribunal fully considered the respondent's submissions as they were made in the course of the hearing.

6. The issues to be determined were the amount of the basic award due and the amount of the compensatory award due.

7. Some elements were agreed. The basic award was agreed as £1,839.71. The amount to be awarded for loss of statutory rights was agreed as £500.

8. The issues to be determined in the remedy hearing related to the compensatory award for unfair dismissal and, in particular, what amount should be taken into account from the claimant's earnings as a sole trader as mitigation of loss.

9. The claimant contended that he should receive losses for a sixty five week period.

The Hearing

10. The claimant was represented by his father, and the respondent was represented by Ms Evans-Jarvis, a consultant.

11. The claimant had prepared a witness statement, but it was not necessary to take into account the evidence he would have given as those matters were not in dispute. The respondent was not contending that the claimant had failed to mitigate his loss by working on a self-employed basis, it was contending that he had mitigated his loss as a result of the figures provided.

12. Each of the representatives made oral submissions. The claimant had prepared a written submission document in accordance with the Tribunal's orders.

13. After an adjournment to consider Judgment, the claimant's representative was asked two further questions to clarify issues. One of those questions related to the period for which invoices had been provided for the claimant's self-employed work. That question identified that the parties had been considering different periods when calculating loss and mitigation (in summary): the claimant to the substantive hearing on 6 April 2021; and the respondent to the remedy hearing (or at least a longer period than the claimant). As a result, a further adjournment was taken to provide the claimant time to look at the payslips and establish what he said his net losses were. Further brief submissions were heard from each of the representatives.

14. Judgment on remedy was sent to the parties on 16 August 2021. The respondent requested written reasons on 18 August 2021 and, accordingly, these written reasons are provided, as requested.

Findings of Fact

15. The claimant was dismissed by the respondent on 9 November 2019.

16. The claimant subsequently obtained work as a self-employed contractor.

17. The claimant had collated the invoices raised by him for the period to the substantive hearing. He had worked 1467 hours and received £19,742.50. The claimant claimed losses only for the 65 week period to the substantive hearing – which the Tribunal agreed was a sensible and appropriate period for calculating the loss arising from the dismissal.

Earnings lost (prior to mitigation)

18. The losses arising from the claimant ceasing to be employed by the respondent (prior to mitigation) were agreed earlier in the hearing as £28,989.35 (the

figure claimed by the claimant). However, that agreement was withdrawn when the confusion over the periods claimed was identified. The claimant relied upon the gross loss figure of £433 per week, plus 3% employer pension contributions. The respondent contended that the net loss was £348.14 when the average net pay was calculated using the final four payslips (each of which covered a two week period). However, as was identified and agreed, that figure omitted the employer and employee pension contributions, which should be included when calculating net loss, and that raised the figure to £379.09. Over 65 weeks, that resulted in a total loss figure of £24,640.85, which the Tribunal found to be the claimant's lost earnings as a result of dismissal, for the period claimed.

Earnings in mitigation

19. The claimant had presented in his schedule of loss the income he had received over 65 weeks (£19,742.50). The respondent contended that if this was applied to 84 weeks, the income would be greater. However, as the claimant was claiming only 65 weeks of loss, the figure received by the claimant in that period was the sum to be taken into account as mitigation. That was a pre-tax figure, the claimant not having yet paid any tax.

20. It was the case that the claimant earned a higher hourly rate, when he actually worked when self-employed, than the rate he earned with the respondent. However, the hours which he worked fluctuated, unsurprisingly for someone working self-employed. That did not mean that the claimant had not appropriately mitigated his loss.

21. The Tribunal was also presented with a list of costs. The majority of those were costs appropriately incurred by someone when working on a self-employed basis. They were costs incurred as overheads by the claimant as a result of being self-employed. Those costs (utilising the 65 week period, based upon the annual costs recorded in the document at appendix C), were as follows:

- a. Tools £437.50;
- b. PPE £218.75;
- c. Insurance £625; and
- d. Accountancy fees £687.50.

22. Taking those figures together, the Tribunal found that £1,968.75 should appropriately be deducted from the amount the claimant had received as income from working self-employed over the 65 week period, meaning that his mitigation figure was reduced to £17,773.75.

23. The claimant also claimed that pension contributions should be taken into account when looking at his mitigation, but those contended contributions were not genuinely losses and were not awarded (lost pension contributions from the respondent having already been factored into the total loss calculated at paragraph 18).

24. The claimant also claimed the costs of running a van and identified a number of costs incurred in operating the vehicle. The Tribunal found that those costs were

not genuinely the costs of being self-employed, they were the costs arising from owning a vehicle and therefore the Tribunal found that it was not appropriate to take them all into account as presented when calculating the claimant's loss. However, amongst the figures identified, the claimant claimed that he had undertaken 12,000 miles in the van for the business and he claimed 15p per mile fuel costs. Those costs were not charged to his clients and therefore were a cost incurred in providing the services which should be taken into account in mitigation. The Tribunal also found that the HMRC rate of 45p per mile should be used to appropriately reflect the depreciation and other costs involved in the van being used for business use. Accordingly, £5,400 was also to be deducted from the mitigation earnings, reducing the sum earned in mitigation to £12,373.75. The Tribunal did not re-calculate the figure on the schedule to reflect the 65 week period as the mileage claimed appeared to be for the whole period (but the Tribunal also used the higher HMRC rate for the whole mileage amount as it reflected a 65 week period, a lower rate would have applied to some of the mileage if it had reflected only a year).

25. The respondent submitted in relation to the costs, that that as they were tax deductible they would not in reality cost the claimant the amount claimed (or arguably anything at all). However, as the invoices listed were pre-tax, any tax impact would be to the claimant's detriment overall and it was not appropriate to alter the figures to take account of any tax impact.

Other sums claimed

26. The claimant also claimed a number of elements as additional costs (appendix D). It was confirmed by the claimant's representative that, save for the loss of statutory rights, the elements claimed were the costs of conducting the proceedings, not losses for the claimant as a result of the unfair dismissal. Those matters accordingly were not taken into account when calculating losses. As no costs award was sought or made, they were not recoverable.

Tax

27. In relation to tax, the claimant's representative submitted that the amount which the claimant had earned whilst self-employed was a gross figure and not a net one. There is likely to be some tax due from the claimant, however it was impossible on the information available to the Tribunal for it to identify at the hearing what that tax would be. It may be that the level of tax is low. The Tribunal could only consider the evidence before it, and therefore the decision made was based upon the invoices provided and the amounts those invoices demonstrated that the claimant had received.

Benefits

28. The claimant neither claimed nor received any benefits following his dismissal.

The Law

29. In terms of the compensatory award, this is governed by sections 123 and 124 of the Employment Rights Act 1996. The amount of the award shall be such amount as the Tribunal considers 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 respondent. The basic function of compensation is to compensate for the loss actually suffered, not to penalise the employer for its actions, nor to give a gratuitous benefit to the employee. The overriding duty imposed on the Tribunal is to award what is just and equitable in the circumstances.

30. The parties each made submissions and what they said was considered by the Tribunal even where it was not expressly referred to in the judgment. Neither party in their submissions relied upon any specific case law.

Findings

31. The Tribunal found that the claimant had taken reasonable steps to mitigate his loss and that the losses claimed for the period to the substantive hearing was an appropriate period for which losses should be awarded.

32. The claimant's lost earnings as a result of his dismissal from the respondent for the period claimed (without considering mitigation), as explained at paragraph 18, were £24,640.85

33. As explained above, the figure which was taken into account in mitigation as a result of the claimant's earnings whilst self-employed, was £12,373.75

34. Deducting the earnings to date (£12,373.75) from the earnings which the claimant would have received from the respondent (£24,640.85), resulted in the claimant's losses to date being **£12,267.10**.

35. The claimant was also entitled to **£500** for loss of statutory rights, as agreed.

36. Adding together those two figures, the claimant's total potential compensatory award was therefore **£12,767.10**.

37. Applying the adjustments which were recorded in the Judgment (see paragraph 2):

- a. the compensatory award was reduced by 20% due to **Polkey**. As a result, the potential figure was reduced to £10,213.68;
- b. the compensatory award was increased by 20% because the respondent had unreasonably failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures. As a result, the potential figure was increased to £12,256.42; and
- c. the compensatory award was reduced by 25% due to contributory fault. As a result, the compensatory award was calculated as **£9,192.32**.

38. As this figure fell below the statutory cap, the provisions of section 124 of the Employment Rights Act 1996 did not reduce the award. The recoupment provisions did not apply.

Summary

39. The basic award was **£1,839.71** The compensatory award was **£9,192.32**. The total amount payable as compensation for unfair dismissal was **£11,032.03**.

Employment Judge Phil Allen

Date: 1 September 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON

2 September 2021

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