



THE EMPLOYMENT TRIBUNALS

Claimant: Mr Anthony Oram

Respondent: Barrier Ex Limited (In Administration)

Heard at: Newcastle upon Tyne Hearing Centre (by CVP)
On: Tuesday 19th October 2021

Before: Employment Judge Speker OBE DL sitting alone

Representation:

Claimant: In Person

Respondent: No attendance no appearance

JUDGMENT

1. The claimant's claim of unfair dismissal (constructive) is well-founded and is successful.
2. For unfair dismissal the respondent shall pay the claimant a basic award of £2,421.
3. For unfair dismissal the respondent shall pay a compensatory award in the sum of £17,062.51.
4. The breach of contract (failure to pay notice pay) claim and the claim for unauthorised deduction from wages and the claim for holiday pay are all dismissed.

REASONS

1. This was a claim brought by the claimant representing himself and alleging unfair dismissal, breach of contract and failure to pay holiday pay. The case had been the subject of a number of preliminary hearings by telephone before Employment Judge Martin on 9th March 2021, Employment Judge Arrullendran on 5th May 2021 and before myself on 22nd July 2021. An application by the claimant to amend his claim and to add a respondent had been refused by Employment Judge Arrullendran.

2. Although the respondent Barrier Ex Limited had filed a notice of appearance through solicitors it had subsequently been confirmed that following the respondent going into administration, neither the respondent nor their solicitors nor the administrator would be appearing or playing any further part in these proceedings. The administrator had given consent for the proceedings to continue.
3. Mr Oram had supplied a lengthy bundle of documents for this present video hearing running to two hundred and forty-two pages and had provided an earlier bundle of documents to the tribunal for the hearing before Employment Judge Arrullendran and that bundle included a schedule of loss to which the claimant made reference at this hearing.
4. The claimant gave evidence himself and relied upon a detailed witness statement running to nine pages (fifty-three paragraphs). He also relied upon a witness statement by Steven Lee, formerly managing director of the respondent company. Mr Lee supported the claimant's claims generally and in particular with regard to the existence of the claimant's contract of employment with the respondent. It is a matter of record that Mr Lee had also made a tribunal claim of unfair dismissal against the respondent and in relation to that claim no response had been filed. Employment Judge Shore on 8th June 2021 entered a judgment in favour of Mr Lee to the effect that his claims of unfair dismissal and breach of contract were well-founded and successful, that no response had been presented by the respondent and that on the basis of information provided, the respondent was ordered to pay the claimant a basic award of £2,152, a compensatory award capped at one year's gross salary of £55,000 and for breach of contract (failure to pay notice pay) the sum of £25,000 capped by the maximum amount that the tribunal could award for breach of contract claims. A further award was made with regard to unauthorised deduction from wages.
5. The claimant, Mr Oram, had asked that his claim could be heard and dealt with on the papers in the same way as that of Mr Lee but the tribunal did not grant that request and could not agree this bearing in mind that a detailed response had been filed by the respondent disputing the claimant's claims. On that basis it was necessary for the matter to be set down for the present hearing in relation to which I had made case management orders to prepare for this hearing.
6. The essential facts based upon the evidence produced by Mr Oram including substantial documentation and exchange of e-mails were found to be as follows:
 - 6.1 The claimant was initially employed in the role of technical director of Barrier LED Limited, his contract being dated 26th October 2016. Barrier Ex Limited was then merged with Barrier LED Limited in March 2018 and the claimant became technical director of Barrier Ex Limited, the respondent in these proceedings. He was provided with a updated contract of employment by Barrier Ex Limited, that document being dated 5th March 2018 and being signed by Steven Lee, managing director and Robert Bowles, director, on behalf of the respondent and by the claimant himself. That contract of employment confirmed continuity of employment from 1st August 2016. The contract also provided at clause 23 detailed provisions with regard to intellectual property ownership and the fact that the company proposed to

recognise the contribution of the claimant, his work and expertise and that he would be allocated shares. Particulars of the intended share allocation were set out in detail and these shares were to provide the additional remuneration for the claimant's new role in order that the claimant should receive benefit for the products being developed through his efforts.

- 6.2 Despite the claimant chasing the matter up with Robert Bowles, the allocation of shares did not proceed formally although he received assurances that this would be developed.
- 6.3 Towards the end of 2019 Robert Bowles became ill and this affected his active participation in the management of the company. A number of meetings took place as to company affairs and these were affected by the fact that Steven Lee suffered a personal bereavement.
- 6.4 As at 25th April 2020 Chris Bowles, the son of Robert Bowles, undertook the position of running the company and over the next few days documents were produced which Steven Lee was requested to sign and by virtue of which Chris Bowles and his wife would receive significant positions within the company. There were considerable misgivings as far as the claimant was concerned and a florid exchange of e-mails, the important points of which were that Chris Bowles was denying the existence of the claimant's contract of employment with the respondent company and was making demands that the original of such contract if it existed should be handed over to Chris Bowles as well as the claimant's laptop which it was alleged belonged to the company and various other allegations and demands. These produced a fraught situation and ultimately led to the claimant, after threatening to do so, writing a letter of 12th March addressed to the directors of the respondent company stating that as a result of conduct towards him, by or on behalf of the company, he was resigning with immediate effect but would serve out his three months contractual notice up to 12th March 2020.
- 6.5 In the letter of 12th March the claimant referred to "disgraceful events" since 25th February 2020 and to the fact that trust had been breached in a way that was no longer recoverable. Reference was also made to the lack of confirmation of the shareholding of the claimant and the allegations which had been made by Chris Bowles against the claimant.
- 6.6 Chris Bowles then informed the claimant that his company car which was a term of his contract could no longer be insured and that it was to be returned despite the fact that the claimant was serving his notice.
- 6.7 The claimant was then informed that he was to serve gardening leave during his notice and then was told that he was to be suspended and the subject of disciplinary proceedings. These did not take place before 12th June and ultimately Chris Bowles proceeded with these in the claimant's absence and subsequently suggested that the claimant had been guilty of gross misconduct.

- 6.8 As from 12th June the claimant was no longer considered an employee of the company. By that stage he had already issued his employment tribunal claim based upon the anticipated termination of contract on 12th June.
7. Having considered the evidence of the claimant, supported by the statement of Steven Lee, it was necessary to determine whether the claimant had been dismissed by way of constructive dismissal or whether he had been the subject of an actual dismissal purported to be undertaken by Chris Bowles on behalf of the company.

8. The Law

Employment Rights Act 1996 Section 25 (1) "for the purposes of this part an employee is dismissed by his employer if (and subject to subsection 2 only if)

- (a) the contract under which he is employed is terminated by the employer (whether with or without notice)
- (b) he is employed under a limited term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract or
- (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

The leading case is *Western Excavating (ECC) Limited v Sharp* 1978 IRLR27 CA Per Lord Denning MR. An employee is entitled to treat himself as constructively dismissed if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound one or more of the essential terms of the contract. The employee in those circumstances is entitled to leave without notice or to give notice. The conduct in either case must be sufficiently serious to entitle him to leave at once.

9. There are a number of complex issues with regard to the formation of the company, the appointment or otherwise of various directors, designations or dismissals which were taking place and the actual realities of the appointment of some of the directors and the shareholdings. These are matters which may well be the subject of other legal proceedings but are not within the jurisdiction of the employment tribunal.
10. For the purposes of the present case, as in all unfair dismissal cases, the first question to determine is whether the claimant was dismissed. This is often a matter which is conceded even if the question of unfairness is not. The claimant at some point was in two minds as to whether he was continuing to argue constructive dismissal or actual dismissal. However, it was confirmed at today's hearing that his claim is one of constructive dismissal and this appears to be the correct reading of the circumstances and the order of events.

11. It is clear that the claimant did resign from his employment by his letter dated 12th March 2020 in which he states in the clearest terms that he is bringing his employment to an end and, in accordance with the law, and as he was entitled to do, to indicate that he was intending to honour his contractual notice.
12. It is noted in various e-mails from Chris Bowles that he was denying the existence of the claimant's contract of employment. I am entirely satisfied that the claimant did indeed have a legal contract of employment in place as previously mentioned, that being the document produced to the tribunal. The denial of the existence of the contract and the challenging of its efficacy was the most flagrant breach by the respondent of the employment's contract and that, together with the other allegations, threats and demands which were being made of the claimant, also amounted to a significant breach of the duty of trust and confidence which should exist between employer and employee. In these circumstances I find that the claimant was entitled to resign from his employment and treat himself as constructively dismissed and I therefore find that the claim of constructive unfair dismissal is well-established and properly founded and is therefore a successful claim.

The losses

13. The claimant had provided a schedule of loss dated 15th October 2020 and although this contained a number of calculations, I was not provided with much of the information which should be provided to support a financial claim based upon unfair dismissal. In particular there was no calculation of a week's pay, no pay slips or schedule of earnings provided and no documentary evidence with regard to certain aspects of the claim. Furthermore following the claimant's departure from the respondent company there was no detailed evidence with regard to efforts by him to mitigate his loss by applying for other employment but there was the general statement that this all occurred during the Covid 19 pandemic and that there were clear difficulties in the claimant being able to obtain other employment. It was stated that he was in receipt of jobseeker's allowance and that at the end of the period when that money was to be paid to him, he decided to become self-employed. He was making a claim for continued partial loss between what he earned with the respondent and what he was able to earn on a self-employed basis but unfortunately no documentary evidence or other evidence was provided with regard to his work on a self-employed basis and this presented difficulty in making any realistic calculation with regard to any actual continuing loss. Accordingly, in calculating whether compensation should be paid to the claimant it has been necessary to take a broad brush approach which is never the most desirable way of reaching conclusions as to whether money is properly and legally payable. As against this the claimant has realistically stated at various stages that he understands that the respondent is in administration and that he holds out no hope of recovering any actual compensation from the company. He has already recovered monies from the government scheme in view of the insolvency of the respondent and it is necessary for me to take that into account in the calculations which I make as follows:

Unfair dismissal

Basic award effective date of termination 12.06.2020. Age at EDT 45.
Number of total years' service 3

$$3 \times 1\frac{1}{2} = 4\frac{1}{2} \times \text{£}538.00$$

Basic award £2,421.00

Compensatory award
Past loss of earnings

Net pay £2,631.31

1½ months up to 12th June 2020 = £3,946.96 less sum of ££2,409.45 received this from the Government Insolvency Fund leaving balance of ££1,537.51

The claimant had requested four months past loss of earnings but this was not in accordance with the evidence provided and accordingly 1½ months is appropriate loss.

Company car

The claimant was seeking four months loss of the use of his car at £450.00 per month. However, on the evidence only two months loss could be justified and accordingly for this head the sum awarded is 2x £450.00 = £900.00.

Bonus

The claimant was seeking bonus of £225.00 per month for four months. The evidence as to entitlement to this bonus was sparse but on the basis of what was provided it was reasonable to award loss of bonus for the first six months of 2020 as such bonuses had been paid in previous years. Therefore the sum of £900.00 was awarded under this head.

Future loss of earnings

In his schedule the claimant was seeking ongoing loss of £3,306.31 per month as well as continuing loss in relation to his car and bonus. He also estimated that the loss would continue for twelve months and that although he is a skilled worker the local job market was difficult largely due to the Covid 19 pandemic and he argued that the average period of unemployment in the area was six months but that he had also been affected due to depression in the job market. The evidence as to the total amount of continuing loss was unclear. The claimant had not provided details of attempts to mitigate his loss, of particulars of any jobs applied for or how it had come about that he had set up his own company and become self-employed. No figures were provided as to the income from that business; the claimant stated that he was not drawing a regular income but had been unclear as to what was happening to the fruits of those labours. The claimant suggested that he had remained in this uncertain state whilst he was receiving job seekers allowance for six months. Applying a fair consideration to the evidence, an award of four months loss of earnings is reasonable in all the circumstances and this is awarded in the

sum of £13,225.24. For loss of statutory rights the conventional sum of £500.00 is awarded under this head.

Uplift for failure to follow ACAS code

Taking into account the circumstances outlined in the evidence the fact that there is a finding of constructive unfair dismissal it is not appropriate to award any uplift.

Wrongful dismissal – notice pay

The claimant had confirmed in his schedule of loss that he would only be seeking an award under this heading if he did not receive a compensatory award for loss of earnings during the notice period. As an award has been made in relation to earnings during the notice period it is not appropriate to award separately in respect of alleged breach of contract and accordingly this claim is dismissed.

Holiday pay

The claimant confirmed that he had made a claim in respect of outstanding holiday and had received the sum of £934.00 from the insolvency service and accordingly no award is made for this.

Total compensation

Basic award £2,421.00

Compensatory award

- (i) net past loss of earnings £1,537.51
 - (ii) future loss of earnings £13,225.24
 - (iii) loss of use of car £900.00
 - (iv) loss of bonus £900.00
 - (v) loss of statutory rights £500.00

Total compensatory award £17,062.74

Note, the claimant received the sum of £2,409.45 from the insolvency service in relation to pay due to him from 1st May 2020 to 12th June 2020, this being the notice period.

EMPLOYMENT JUDGE SPEKER OBE DL

**JUDGMENT SIGNED BY EMPLOYMENT
JUDGE ON 27 October 2021**

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