



EMPLOYMENT TRIBUNALS

Claimant: Mr S O'Brien
Respondent: Pride Scaffolding Ltd
Heard at: East London Hearing Centre
On: 14 January 2022
Before: Employment Judge Burgher

Appearances

For the Claimant: In person
For the Respondent: Mr M Winthrop, Solicitor

RECONSIDERATION REMEDY JUDGMENT having been sent to the parties on 17 January 2022 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

Issues

1. At the outset of the hearing the following issues were identified as relevant for consideration of remedy:

- 1.1 Whether the Claimant has taken reasonable steps to mitigate his loss
- 1.2 Whether there should be any reduction to compensation for *Polkey*
- 1.3 Whether there should be any adjustment to compensation for failing to comply with the ACAS code on disciplinary and dismissal procedures
- 1.4 Whether there should be any reduction to the award for conduct
- 1.5 Whether there should be a separate award for failure to provide written particulars.

Evidence

2. The Claimant gave evidence on his own behalf. The Respondent called:
 - 2.1 Mr Terry Fletcher, Director;
 - 2.2 Ms Jacqueline Sheekey, Operations Manager; and
 - 2.3 Mr Darren Page, Transport Manager.
3. All witnesses gave evidence under oath and were subject to cross examination and questions from the Tribunal.
4. I was also referred to relevant pages in an agreed hearing bundle consisting of 154 pages

Facts

5. I have found the following facts from the evidence.
6. The Respondent is a scaffolding company operating in London and the South East on a variety of public and private building contracts. The Respondent employed a total of 25 staff of which 7 are HGV drivers, 14 scaffolders and 4 administrative staff.
7. By letter dated 3 April 2014 the Claimant was provided an offer letter as a Contracts Supervisor. The letter outlined the main terms of employment and stated that detailed terms would be sent in a contract of employment to follow. The offer letter did not provide the start date of continuous employment or any provisions relating to the sick pay, pension or notice requirements. No detailed contract of employment was sent to the Claimant.
8. The Claimant accepted that he had no right for personal use of company vehicle and this was the exception rather than the rule. I accept that the Claimant received bonus in 2018 and that everyone received a bonus of varying amounts.
9. The Claimant commenced employment with the Respondent as a Contracts Supervisor on the 7 April 2014. During his evidence the Claimant emphasised that he was employed as a Contract Supervisor not a Transport Manager as contended for by Mr Fletcher. I accept Mr Fletcher's evidence that after a few months of the Claimant's employment the Claimant assumed duties of Transport manager and was given a pay increase to reflect this. There was no written contractual record of this change. As Transport Manager, the Claimant's duties involved visiting and inspection of sites to erect scaffolds, liaising with contractors and operatives, keeping a record of all transport undertaken, including downloading all TACO readings every three months and the rest of the record keeping needed for the Respondent's 8 HGVs.
10. Having considered the evidence I conclude that the Claimant was given a written warning on 16th of July 2018 for failing to ensure returning of job sheets and for leaving office early. The Claimant apologised to Mr Fletcher, he lived in Stevenage and sought to avoid the traffic commuting home from his place of work in North East London.

11. The Claimant received a further written warning on 19th of February 2019 again for leaving early without completing his daily tasks.

12. I've been referred to evidence that the Claimant was not effective or efficient in undertaking his tasks. the Respondent had to engage an external contractor to assist the Claimant to manage any inspections by VOSA or haulage accrediting organisations. Following his dismissal, Mr Page the new transport manager discovered some serious shortcomings in the Claimant's paperwork. Reference was made to the failure to download the tachograph of driver Mr Lock between 17 June 2019 and 28 November 2019 (drivers tachographs should have been recorded been at least every 3 months) and the failure to record Post MOT Inspections for the Respondent's HGV at least every 10 weeks as required.

13. Mr Fletcher gave evidence that the Claimant was informed that he was required to attend an operator licences awareness training course which was booked on the 13 November 2019 the course being scheduled for the 12 December 2019. On the evidence before me I conclude that the course was booked for Mr Fletcher to attend not the Claimant. in any event I accept the Claimants evidence that he attended the office on the 11 December 2019 and Mr Fletcher told him to attend the training course the next day. the Claimant was concerned the training course which ran from 9 till 5 was outside his working hours and was South of London which would have taken him far longer to have commuted to from his home. Later, that evening, the Claimant sent a text to Mr Fletcher saying he would be unable to attend the training course the following day As he had a family event that evening, the Claimant suggested that he attended the next training course nearer to his home in Peterborough on 17 January 2020.

14. On the 12 November 2019 the Claimant attended for work, Mr Fletcher raised the cost of the Claimant not attending the course, the Claimant again offered to go on an alternative course in January 2022 and offered to pay for his attendance himself. Mr Fletcher told the Claimant that he should just call it a day, remove his belongings and leave the keys and the company phone on the desk.

15. No notice was given, no disciplinary process was followed, and no right of appeal was offered to the Claimant.

16. I accept that the Claimant looked for alternative work and was unable to secure alternative employment due to limited prospects in the job market as a result of the Covid-19 lockdown. The Claimant Secured alternative work, albeit at a lesser salary, on the 30 September 2020

Law

17. I considered sections 120, 122 and 123 of the Employment Rights Act 1996 in respect of remedy.

18. I considered the parties helpful written and oral submissions. The Claimant was ably assisted in his written submissions with the assistance of the Stevenage CAB.

Conclusions

19. In view of my findings of fact, the law and having considered the parties submissions my conclusions are as follows.

20. The Claimant has taken reasonable steps to mitigate his loss.

21. I do not conclude that a fair process would have resulted in the Claimant's dismissal at all and make no *Polkey* reduction in this regard. The Claimant was not at fault for declining to go to a last minute course south of London. His explanation and proposal to do the course in January 2020 was entirely reasonable. No disciplinary, never mind dismissal ought to have ensued in these circumstances.

22. However, I conclude that the Respondent's business required someone who was far more efficient and effective as a Transport Manager than the Claimant. Training was one element of this, as was the Claimant's attitude. Given the serious shortcomings subsequently discovered in the Claimant's paperwork I conclude that the Respondent would have lost trust in continuing to retain the Claimant as a Transport Manager by 29 July 2020 having regard to opportunity to improve and any necessary training effect to be assessed. The Claimant's losses are limited to this date.

23. I award the Claimant the sum of £1000 in respect of bonus for 2019 but I make no award for loss of company vehicle.

24. There was a wholesale failure by the Respondent to engage with the ACAS disciplinary and dismissal process. Whilst the Respondent is a small employer, I do not consider that this excuses their total disregard of good industrial practice. I make a 25% uplift.

25. I do not conclude that there should be any reduction to the award for the Claimant's conduct. The Claimant was not at fault for declining to go to a last minute course south of London. His explanation and proposal to do the course in January 2020 was entirely reasonable. No disciplinary, never mind dismissal ought to have ensued in these circumstances.

26. The Respondent failed to provide the Claimant with written particulars of employment. There was an offer letter with some main terms but not subsequent contract of employment or contractual updated recording the Claimant's Transport Manager role. I award 2 weeks pay in this regard.

27. Schedule A below sets out the award calculation breakdown for the Claimant's wrongful and unfair dismissal claims.

28. The Respondent is therefore ordered to pay the Claimant the total sum of £23,284.54 in respect of his claims. This consists of:

- 28.1 £21,201.84 for unfair dismissal
- 28.2 £2,082.70 for wrongful dismissal.

29. The recoupment provisions apply

Prescribed period	17/01/2020 to 23/02/2021
Compensation cap	not applied
Total award	£23,284.54
Prescribed element	£17,549.44
Balance	£5735.10

SCHEDULE A - CALCULATION BREAKDOWN

1. Details

Date of birth of Claimant	22/10/1958
Date started employment	07/01/2014
Effective Date of Termination	12/12/2019
Period of continuous service (years)	5
Age at Effective Date of Termination	61
Date new equivalent job started or expected to start	29/07/2020
Remedy hearing date	14/01/2022
Date by which employer should no longer be liable	29/07/2020
Contractual notice period (weeks)	5
Statutory notice period (weeks)	5
Net weekly pay at EDT	416.54
Gross weekly pay at EDT	537.00
Gross annual pay at EDT	27,924.00

2. Basic award

Basic award	3,937.50
Number of qualifying weeks (7.5) x Gross weekly pay (525.00)	
Total basic award	3,937.50

3. Damages for wrongful dismissal

Loss of earnings	2,082.70
Damages period (5) x Net weekly pay (416.54)	
Total damages	2,082.70

4. Compensatory award (immediate loss)

Loss of net earnings	11,621.47
Number of weeks (27.9) x Net weekly pay (416.54)	

Plus loss of statutory rights	350.00
Plus loss of commission and/or bonus	1,000.00
Total compensation (immediate loss)	12,971.47
5. Adjustments to total compensatory award	
Plus failure by employer to follow statutory procedures @ 25%	3,242.87
Compensatory award before adjustments	12,971.47
Total adjustments to the compensatory award	3,242.87
Compensatory award after adjustments	16,214.34
6. Failure to provide written particulars	
Number of weeks (2) x Gross weekly pay (525.00)	1,050.00
Total	1,050.00
7. Summary totals	
Basic award	3,937.50
Wrongful dismissal	2,082.70
Compensation award including statutory rights	17,264.34
Total	23,284.54
AFTER COMPENSATION CAP OF £27,924.00 (GROSS ANNUAL PAY)	23,284.54

Employment Judge Burgher
Dated: 2 February 2022