



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4120664/2018
Held in Glasgow on 13 August 2019
Employment Judge: Rory McPherson

Mr C Kerr

Claimant
Represented by:
S Wilson -
Solicitor

GM Pub Limited

Respondent
No appearance and
No representation

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that:

- (1) the claimant was dismissed in breach of contract (in respect of notice pay) and the respondent is ordered to pay damages to the claimant in the sum of **Four Thousand and One Hundred and Seventy Seven Pounds and Sixty Eight Pence (£4,177.68)**; and
- (2) the respondent is ordered to pay the claimant the monetary award for unfair dismissal in the sum of **Eleven Thousand Five and Eighty Six Pounds and Sixty Five Pence (£11,586.65)**. As there is not a prescribed element of this award this sum is payable immediately to the claimant
- (3) both those sums are payable immediately to the claimant.

REASONS

Introduction

Preliminary Procedure

1. The claimant presented his claim on 21 September 2018.
2. Absent an ET3 being presented, a Rule 21 judgement was issued dated 13 November 2018 and sent to the parties on 13 November 2018.
3. The respondent sought reconsideration of that judgment and a late ET3 was presented on 8 January 2019 and reconsideration was granted.

4. Case Management Orders for a Final Hearing scheduled for 25 June 2019 were issued to the parties on 26 February 2019.

5. At that Final Hearing on 25 June 2019 the claimant attended with his solicitor. There was no appearance from that respondent. In the absence of the respondent the Final Hearing of 25 June 2019 was adjourned and having regard to the terms of Rule 47 of the 2013 Rules, that hearing was adjourned and a new Final Hearing was appointed for 13 August 2019 and specific Orders were made. No subsequent explanation for the respondents non attendance was provided.

6. Further and following correspondence by the claimant's representative to the Tribunal, the Tribunal wrote to the respondent in correspondence dated 29 July 2019 to the respondent. The respondent responded to that correspondence on 1 August 2019 which response was received by the Tribunal on 5 August 2019.

7. The respondent was provided with Notice of Hearing and Orders granted by the Tribunal on 25 June 2019 by correspondence issued the Tribunal to the respondent dated 30 June 2019 issued to the respondent's Company House registered address. That Notice of Hearing and Orders included confirmation of the new and adjourned Final Hearing date of 13 August 2019.

8. The respondent was, separately, and again notified of the new Final Hearing by the Tribunal in correspondence dated 5 July 2019 issued to the respondent's Company House registered address. That Tribunal letter of 5 July 2019 set out that the respondent was responsible for making sure all the witnesses they wanted to call could attend the hearing and know the date and time of the hearing. The respondent was further notified in that letter that unless there wholly exceptional circumstances, no application for postponement due to non availability of witnesses or for other reasons would be granted.

9. At this hearing the claimant was again represented by his solicitor. The respondent was not in attendance and not represented. No communication had been received from the respondent notifying of any reason for non-attendance. Having made such enquiries as were in all the circumstances reasonable, having regard to the procedural history of this case, including Rule 47 and the overriding objective, including seeking to ascertain whether the respondent was elsewhere in the building, the hearing proceeded in the absence of the respondent.

Evidence

10. The Tribunal heard evidence from the claimant. The Tribunal was referred to a number of documents throughout the hearing and where relevant I identify those documents below.

Findings in fact

11. The respondent's registered address is as set out above.

12. At previously scheduled Final Hearing on 25 June 2019 the claimant attended with his solicitor. There was no appearance from that respondent. In the absence of the respondent the Final Hearing of 25 June 2019 was adjourned and a new Final Hearing was appointed for 13 August 2019 and a Note with specific Orders were made and issued to both parties That note made specific

reference to the respondent's non attendance, the overriding objective and the possible impact of the ACAS Code in relation to any award. No explanation for the respondent's nonattendance was subsequently provided by the respondent.

13. Following correspondence by the claimant's representative to the Tribunal, the Tribunal had written to the respondent on 29 July 2019. The respondent responded on 1 August 2018 which correspondence was received by the Tribunal on 5 August 2019.

14. The respondent was provided with Notice of Hearing and Orders granted by the Tribunal on 25 June 2019 by correspondence issued the Tribunal to the respondent dated 30 June 2019 was issued to the respondent's Company House registered address. That Notice of Hearing and Orders included confirmation of the location and date of the new and adjourned Final Hearing date of 13 August 2019.

15. The respondent was, separately and again, notified of the new Final Hearing by the Tribunal by correspondence dated 5 July 2019 issued to the respondent's Company House registered address. That letter of 5 July 2019 set out that the respondent was responsible for making sure all the witnesses they wanted to call could attend the hearing and know the date and time of the hearing. The respondent was further notified in that letter that unless there were wholly exceptional circumstances, no application for postponement due to non availability of witnesses or for other reasons would be granted.

16. At the outset of this hearing it was noted that the respondent was, again, not in attendance and not represented. At this hearing the claimant was again represented by his solicitor.

17. No communication had been received from the respondent notifying of any reason for non-attendance. Having made such enquiries as were in all the circumstances reasonable, against the background of this case, including seeking to ascertain whether the respondent was elsewhere in the building, this hearing proceeded in the absence of the respondent.

18. The claimant's continuous employment with the respondent commenced on 1 September 2001 . In particular the claimant was engaged at the licenced public bar operating as the Swan Bar in Eaglesham (the bar) since that date without a break in his continuous employment.

19. While the claimant's National Insurance Record for the tax year April 2009 to March 2010 suggested that his employment has not been continuous, the claimant had worked continuously in that year. It is accepted that due to a change in the operational ownership of the bar that then operators of the bar that year had not fully reflected his continuous period of employment in reports and/or contributions made on behalf of the claimant to HMRC.

20. The claimant was initially employed as a waiter and had over time been promoted to the role of Bar Manager. The claimant held that post in from the start of 2018. In addition to being the Bar Manager the claimant was the designated person (the designated person) at the premises holding the relevant regulated Personal License required for the supervision of, or otherwise authorising the, the sale of alcohol on the premises.

21. As the designated person the claimant had certain personal responsibilities in

connection with the sale of alcohol on the premises.

22. The respondent had taken over the operation of the Swan Bar together with its then approximately 17 staff including the claimant in or around January 2017. A staff meeting was held by the respondents in January 2017 with the staff and while a draft form of written terms and conditions was suggested as being available no actual written terms of employment were provided to the claimant at that meeting or subsequently.

23. The claimant had not been provided with any written terms of employment by the respondent.

24. During his period of employment, the claimant was not provided by the respondent with an opportunity to join a pension scheme.

25. In June 2018 to July 2018 the claimant's net weekly pay was £348.35 as reflected in 3 wage slips provided to the claimant in June 2018.

26. During the evening of Saturday 7 July 2018, the claimant was advised by a colleague, a D Heath, that a customer on the premises had been notified previously that they were "barred". Reflective of the claimant's role as Bar Manager and as the designated person, the claimant supported his colleague's position in declining to serve the customer. The claimant carried on with his shift. The claimant became aware that evening that his colleague D Heath's employment was terminated by the respondent. The claimant towards the end of his shift on Saturday 7 July 2018 was asked by the respondent owner to provide his keys for the premises and was advised he should leave. It was not clear at this time what the respondent's reason was and there no communication suggesting that any formal action was being taken. The claimant was unaware of whether the respondent owner's actions were meant suggest any form of reprimand or equivalent action.

27. The claimant phoned the respondent owner on several occasions on Sunday 8 July 2018 initially without receiving a response. On obtaining a response the claimant was simply advised to come to work on Monday 9 July 2018.

28. On attending for work for his usual shift on Monday 9 July 2018 the claimant was called into a meeting with the respondent owner and was advised that he had been sacked with immediate effect for insubordination. The claimant had not been advised that he was due to attend a disciplinary hearing. He was not advised of any right to be accompanied. He was not advised of the nature of any allegations against him and had attended work on Monday 9 July 2018 expecting to work his usual shift. During his meeting the claimant was not advised of any right of appeal. No written notice of the outcome of the meeting was issued to the claimant. No notice of any right of appeal was issued to the claimant.

29. Following the termination of the claimant's employment the claimant was paid outstanding net pay to the date of termination and outstanding holiday pay being £822.62 on 13 July 2018 shown on wage slip dated 13 July 2018. The claimant was not paid statutory notice pay.

30. The claimant wrote to the respondent on 17 July 2018 stating that *7 refer to my dismissal on the 9th July and write to inform you that I wish to appeal that decision. I have not received written reasons for my dismissal nor have I*

received my P45. Please arrange to send both items to me as soon as possible. I consider that the decision to dismiss was unreasonable and without justification. I was not guilty of any misconduct. I look forward to hearing from you."

31 . The claimant did not receive any response from the respondent and he was not offered any opportunity to attend any appeal against the decision to dismiss.

32. Following the termination of his employment the claimant did not receive any state benefits.

33. The claimant sought and obtained alternative employment initially through a job agency working as a warehouse operator from 18 August 2018 earning £9.22 per hour. The claimant subsequently secured full time employment with Royal Mail as of 3rd September 2018 earning £290.00 net per week.

Submissions

34. The claimant solicitor confirmed the claimants' position in informal submissions and by reference to updated schedule of losses provided for the purpose of this hearing.

Breach of Contract and Unfair Dismissal

Reduction under Polkey principle.

Relevant Law

35. The Tribunal is required to consider whether it is appropriate to make any deduction under the principle derived from **Polkey v AE Dayton Services Ltd** [1988] ICR 142, which requires an assessment of the possibility of a fair dismissal had the procedure adopted been a fair one. That requires an assessment of whether in all the circumstances a fair dismissal could have been decided upon by a reasonable employer.

Reduction under Polkey principle.

Discussion and Decision

36. In these circumstances no reasonable employer would have dismissed. The issue was one of conduct. It is considered that no reasonable employer would have dismissed in the circumstances of this case, the claimant as a personal licence holder had personal responsibilities including relating to the sale of alcohol on the respondent premises.

Relevant Law

Has the claimant contributed to the dismissal?

37. ERA 1996 s 122(2) provides in relation to basic awards that *"Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.*

38. ERA 1996 s 123 (6) provides in relation to compensatory awards that

“Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding. ”

(4) In the Court of Appeal decision in **Nelson v BBC (No 2)** [1980] ICR 110 (**Nelson**) LJ Brandon stated that “an award of compensation to a successful complainant can only be reduced on the ground that he contributed to his dismissal by his own conduct if the conduct on his part relied on for this purpose was culpable or blameworthy”.

Discussion and decision

Had the claimant contributed to the dismissal?

39. In the circumstances of this case I do not consider that the claimant’s conduct was culpable or blameworthy. The claimant’s actions reflected his role as the designated person and Bar Manager.

The claimant’s losses:

Breach of Contract

Notice Pay, Relevant Law, Discussion and Decision

40. Section 211 of the Employment Rights Act 1996 (ERA 1996) provides that “(1) An employee’s period of continuous employment for the purposes of any provision of this Act —

(a) (subject to [subsection] (3)) begins with the day on which the employee starts work, and

(b) ends with the day by reference to which the length of the employee’s period of continuous employment is to be ascertained for the purposes of the provision

(3) If an employee’s period of continuous employment includes one or more periods which (by virtue of section 215, 216 or 217) while not counting in computing the length of the period do not break continuity of employment, the beginning of the period shall be treated as postponed by the number of days falling within that intervening period, or the aggregate number of days falling within those periods, calculated in accordance with the section in question.”

41 . Section 86 of ERA 1 996 provides for the minimum period of notice. There was no basis for the respondent to have failed to give notice. The claimant was dismissed in breach of contract (in respect of notice pay) and the respondent is ordered to pay damages to the claimant in the sum of 12 weeks’ notice x £348.14 being **£4,177.68**.

Relevant Law

Adjustment of award resulting from failure to comply with Code of Practice

42. Section 207(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A 1992) provides for an adjustment in unfair dismissal awards of up to 25% where there has been an unreasonable failure to comply with the ACAS Code. The ACAS Code of Practice on Disciplinary and Grievance Procedures came into effect on 1 1 March 2015: Code of Practice (Disciplinary

and Grievance Procedures) Order 2015.

Basic Award

Relevant Law, Discussion and Decision

43. Section 119 of ERA 1996 sets out the provision for a basic award. The claimant is entitled to a basic award of **£5,710.50**.

Compensatory Award

Relevant Law

44. Section 123(1) of ERA 1996 provides " ... *the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer*".

Mitigation of Loss

Relevant Law

45. Section 123(4) ERA 1996 provides that in ascertaining the loss "*... the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.* "

46. I have reminded myself that in **Cooper Constructing Ltd v Lindsey** [2016] ICR D3 the Honourable Mr Justice Langstaff (President) (**Cooper**) confirmed that a Claimant does not have to prove that he has mitigated his losses

Provision of terms and conditions

Relevant Law

47. In terms of s11 ERA 1996 each employee is entitled to receive from his employer not later than two months after the beginning of the employee's employment a written statement of the major terms upon which he is employed. The Employment Act 2002 provides as s127 that where the matter is before the Tribunal, it is required to increase an award by at least 2 weeks' pay and may if it is just and equitable increase that award to 4 weeks' pay.

Recoupment of benefits

Relevant Law.

48. The Employment Protection (Recoupment of Jobseekers Allowance and Income Support Regulations 1996 (the Recoupment Regs 1996) applies where the claimant had been paid a recoupable benefit. The claimant did not receive a recoupable benefit.

Compensatory Award Discussion and Decision

49. The claimant is entitled to a Compensatory Award.

Discussion

Mitigation of Loss

50. There was no evidence that the claimant had failed to minimise her loss.

51. The claimant secured alternate secured paid employment by 3 September 2018 however the claimant continued to suffer a limited comparative weekly wage loss while is reasonable calculated at £58.00 from 3 September 2018. In all the circumstances, I am satisfied that the claimant mitigated his loss.

52. The claimant was entitled to 12 weeks' statutory notice pay being (12x £348.14). I consider that it is just and equitable to calculate his weekly loss beyond the notice period to the date of this hearing August 2019 (being 44 weeks) as being **£2,552.00**.

53. I consider that it is just and equitable to award the claimant **£500** for loss of statutory rights having regard to the full circumstances of this case.

54. The claimant was not provided with a written statement of the terms of his employment. As such the claimant is entitled to 2 weeks' pay. In all the circumstances it is considered just and equitable to increase that to 4 weeks' pay. The claimant is entitled to an increase to reflect the failure of the respondent to issue statement of particulars of employment (£348.14 x4) **£1,392.56**

55. The claimant is entitled to pension loss for the period of loss. From the wages slips it is apparent that the respondents had not paid employer pension contribution required in terms of section 3 of Pensions Act 2008 and I am satisfied that the claimant was not offered the opportunity to join a Pension Scheme or otherwise opt out of same and thus by reference to the 4th edition (August 2017) of the Principles for Compensating Pension Loss the pension loss arising from the unfair dismissal is reasonably calculated by the claimant at £256.36

56. The ACAS Code sets out the standard of reasonableness and fairness for handling disciplinary issues and grievances. The Code suggests that in disciplinary matters, the employer should carry out an investigation, inform the employee, hold a meeting with the employee, at which the employee may be accompanied and at which the employee should have the opportunity to respond and then the employer should decide on appropriate action and give the employee an opportunity to appeal. The Code applies to dismissal in this case. There was a significant failure on the part of the respondent in terms of its obligations under the ACAS Code. I am satisfied that the respondent's failure was unreasonable. In all the circumstances it is considered just and equitable that an uplift to the compensatory award of 25% be awarded.

57. The total Compensatory Award including the uplift is £5,876.15

58. The claimant did not receive any recoupable benefits in terms of Reg 8 of the Recoupment Regs 1996.

59. The total compensation award for unfair dismissal is (£5,710.50 plus £5,876.15)

£11,586.65 and is payable immediately.

Expenses of Hearing

Relevant Law

60. On behalf of the claimant it was submitted that consideration should be given to an award of expenses as against the respondent.

61. The issue which arises for the Tribunal is whether or not any of the circumstances set forth in Rule 76(1) apply:

76.(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that —

(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or
(b) any claim or response had no reasonable prospect of success.

62. While the respondent did not attend this hearing and indeed did not attend the previous notified Final Hearing, on balance at this time, I do not consider that it is appropriate to exercise discretion to make an award of costs.

63. The Court of Appeal, in **Scott v Russell** [2013] EWCA Civ 1432 (**Scott**), cited with approval, the definition of vexatious given by Lord Bingham in **Attorney General v Barker** [2000] 1 FLR 759 (**Barker**), that the hallmark of a vexatious proceeding is that whatever the intention of the proceedings may be, its effect is to subject the other side to inconvenience, harassment and expense out of all proportion to any gain likely to accrue, and that it involves an abuse of the process of the court, which is significantly different from the ordinary and proper use of the court process.

Conclusion

64. The claimant is awarded the sums set out above.

Employment Judge: R McPherson
Date of Judgment: 14 August 2019
Entered in register: 21 November 2019
and copied to parties