



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4107188/2019

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Held in Glasgow on 28 October 2019

Employment Judge: J D Young

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Mr Gary Davidson

**Claimant
In Person**

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Dunskey Sporting Club Ltd

**Respondent
Not present and
Not represented**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Judgment of the Employment Tribunal is that the respondent shall pay to the claimant:-

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- (i) The sum of **Seven hundred and fifteen pounds (£715)** in respect of the failure by the respondent to provide a statement of written reasons for dismissal to the claimant;
- (ii) The sum of **Ten thousand six hundred and sixty six pounds (£10,666)** being the amount of compensation due to the claimant arising out of the unfair dismissal of the claimant by the respondent being made up of a basic award of £1432 and compensatory award of £9234;
- (iii) The sum of **One thousand two hundred and forty six pounds (£1246)** in respect of pay due to the claimant for holidays accrued to him but untaken to date of termination of his employment;

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- (iv) The sum of **One hundred and seventy eight pounds (£178)** in respect of sums due to the claimant on breach of a contract term.

REASONS

Introduction

- 5 1. In this case the claimant presented a claim to the Employment Tribunal on 20
May 2019 complaining that he had been unfairly dismissed and seeking
compensation. He also made claims for a redundancy payment; notice pay;
holiday pay and "other payments". No response was received from the
respondent after service on it of the claim form. A final hearing was then fixed
10 on the claims made and the respondent advised of the date of the hearing by
letter of 29 August 2019. No appearance or representation was made by or
on behalf of the respondent at the final hearing.
- 15 2. At that hearing I heard evidence from the claimant. He produced documents
being correspondence between the Dumfries and Galloway Citizens Advice
Service and the Managing Director of the respondent; exchange of
communication between the claimant and the Managing Director over
January/February 2019; letter of 28 February 2019 to the claimant terminating
his employment with immediate effect from 28 February 2019. From the
evidence led and relevant documents produced I was able to make findings
20 in fact.

Findings in Fact

- 25 3. The claimant was originally employed on the Dunskey Estate, near Portpatrick
by the Orr Ewing family. He was employed as an Underkeeper with effect
from 1 April 2014. The family granted a lease of the shooting rights on the
estate to third parties. The contract of employment of the claimant and the
then Head Gamekeeper was transferred initially to Artemis Sporting Ltd and
then the respondent. The claimant's period of continuous employment with
the respondent therefore commenced 1 April 2014 by virtue of the TUPE
Regulations.

4. The claimant's role was to look after the pheasants/partridges on the estate and run the shoots. He would have responsibility for organising personnel such as beaters and loaders for the shoot. His Statement of Terms and Conditions of contract with the respondent indicated that his normal place of work would be the Dunskey Estate and that he would be entitled to reside in the Main Lodge "for the better and more convenient discharge of his duties". That was not a tenancy but a licence to occupy on a notice of not less than 4 weeks. The respondent was responsible for maintaining that property. The claimant was entitled to 28 days' holiday in the holiday year between 1 January and 31 December in each year of employment inclusive of 8 Bank and public holidays.
5. In the course of time Michael Baker was appointed Head Gamekeeper and friction developed. That resulted in an abusive argument between them in January 2019. The claimant raised a grievance in respect of his treatment. No grievance meeting was held but the claimant received a message on 8 February 2019 to the effect that his grievance had not been upheld and that there was a right to appeal that decision. The claimant did so that day. No appeal hearing was held but the claimant received a message on 9 February 2019 indicating that there was to be no change in the decision made. The claimant then sent a long message to the Managing Director indicating that he considered this treatment was unfair and by letter of 28 February 2019 he was advised that his employment was terminated "without notice in accordance with Clause 15.3 of your Contract of Employment dated 29 June 2018". No particular reason was given for the termination. Prior to the termination no disciplinary or other hearing was held with the claimant.
6. The claimant was also advised in that letter that the respondent would "make a payment in lieu of notice to you", but no payment of notice was made. However, a final salary payment for the period up to 28 March 2019 was paid subject to deduction of tax and national insurance. There was also deducted an advance which had been made to the claimant.
7. The letter of 28 February 2019 further indicated that the claimant would be reimbursed for any "genuine expenses claims". The claimant put in a claim

for expenses of (i) £178 being the fee for renewing his firearms certificate and (ii) £100 paid for him booking on a "loaders course" which he had been advised to go to by the respondent prior to termination of employment. Those sums were not reimbursed.

- 5 8. The letter of 28 February 2019 also advised the claimant that he required to vacate the Main Lodge premises no later than 28 March 2019 and return all property belonging to the respondent to Mr Baker by 20 March 2019.
9. The claimant was then advised that the accommodation at the Main Lodge was required by a new employee and he required to vacate the property by
10 22 March 2019.
10. The claimant had taken 5 days' holiday in the holiday year 1 January 2018/31 December 2018 and no holidays in the holiday year commencing 1 January 2019 until date of termination.
11. He considered he had an entitlement to gratuities paid by those taking part in
15 the daily shoots. He knew that the Head Gamekeeper collected the gratuities and that he was responsible for making those payments. He considered that there was £3,000 of gratuities due to him given the number of days shoot and the minimum gratuity anticipated from each shooter.
12. By letter of 1 March 2019 the Dumfries and Galloway Citizens Advice Service
20 requested that the respondent provide written reasons for dismissal of the claimant but no response was received either to that letter or a reminder of 29 March 2019.
13. At termination of employment the claimant's pay ran at the rate of £1,550 per
25 month gross which brought out a net monthly payment of £1,350. He was aware that the benefit to him of the accommodation was in the sum of £500 per month being the amount of rent the property would command on a let.
14. He had been able to find alternative employment with effect from 15 April
30 2019. He had been taken on as a permanent employee after a trial period. His net pay from that employment averaged £1,500 per month. He would hope that his earnings from his new employment would reach the wage he

had received from the respondent (including benefit of the accommodation) within 18 months of commencement of that employment.

Conclusions

15. There are a number of complaints which require to be dealt with in this case.

5 **Right to written statement of reasons for dismissal**

16. By Section 92 of the Employment Rights Act 1996 an employee is entitled to be provided by his employer with a written statement giving particulars of the reasons for the employee's dismissal. This arises if the employee's contract is terminated without notice. That was the case here. A statement should be
10 provided within 14 days of the request. No written statement was provided to the claimant after written request and reminder.

17. Where there has been an unreasonable failure to provide such a statement then a Tribunal "may make a declaration as to what it finds the employer's reasons were for dismissing the employee" and "shall make an award that the
15 employer pay the employee a sum equal to the amount of 2 weeks' pay".

18. In that respect therefore the sum due to the claimant for failure to provide a written statement of reason for dismissal is £71 5 being two weeks' gross pay.

Complaint of unfair dismissal

19. In the absence of any reason given for dismissal of the claimant it is not
20 possible to make any positive finding in that respect. It might be inferred from the documents that the reason for dismissal arose out of the friction between the claimant and the Head Gamekeeper resulting in an abusive altercation in January 2019.

20. However, given the respondent has chosen not to enter the proceedings there
25 is no information available as to the legitimacy of the dismissal. The claimant's position was that he considered that the respondent was never keen on him and his colleague (the former Head Gamekeeper, Mr Diamond) being transferred by virtue of TUPE into the employ of the respondent and that led to life being made difficult with unwarranted accusations.

21. In any event where an employer fails to show a potentially fair reason for dismissal Tribunals are not obliged to ascertain the real reason if there is insufficient evidence to do so. Given there was no response from the respondent in this case it could not be said that there was sufficient evidence to demonstrate the real reason for dismissal. That in itself would render the dismissal unfair.
22. Additionally, of course if an employer can demonstrate a potentially fair reason for dismissal then the Tribunal must consider whether the employer acted reasonably in dismissing the employee for the reason given. An integral part of "reasonableness" is an employer taking appropriate procedural steps prior to dismissal. The ACAS Code of Practice on disciplinary procedures, effective from 11 March 2015, requires an employer to establish the facts; inform the employee of the problem; hold a meeting with the employee to discuss the problem; allow the employee to be accompanied at the meeting; decide on appropriate action; and give a right of appeal. In this case there is no evidence of procedural steps being taken to establish the facts and inform the employee; hold a meeting at which the employee is accompanied and then decide on appropriate action. That would render the dismissal unfair.
23. In those circumstances therefore there is a finding that the dismissal was unfair under s 98 of the Employment Rights Act 1996.

Remedy

24. The claimant seeks compensation by way of remedy for the unfair dismissal. A failure to follow the ACAS Code is not only relevant to the question of liability but also to the assessment of compensation. Where there has been a failure to follow the ACAS Code then a Tribunal can increase an award of compensation by up to 25% "if it finds that the employer has unreasonably failed to follow the code". Section 207A of TULR(C)A.

*Compensation**Basic award*

25. Compensation is made up of a basic award and a compensatory award. The basic award is the equivalent of a statutory redundancy payment. The award is to compensate the employee for loss of job security caused by the unfair dismissal. In this case the claimant was aged 31 years at date of termination of employment. His weekly wage (gross) ran at the rate of £358 and he had at date of termination 4 complete years of service. That puts the basic award in the sum of $4 \times £358 = £1,432$.

10 *Compensatory award*

26. The claimant's remuneration package at termination was made up of his net wage of £1,350 per month with the additional benefit of £500 per month in respect of the tied accommodation making total net sum of £1,850 per month. He was paid wages to the end of March 2019. He was then out of work for 2 weeks before finding other employment from 15 April 2019 and so his net loss in that period was £925.

27. In the further employment he is paid at the rate of £1,500 per month making the net difference of £350 per month. It was reasonable to estimate that he would have future loss over a period of 18 months from 15 April 2019 before coming to equality in terms of the pay he received with the respondent. Accordingly, that future loss amounts to $18 \times £350 = £6300$.

28. Section 123(2)(a) of the Employment Rights Act 1996 expressly states that assessment of an employee's loss shall be taken to include any expenses reasonably incurred in consequence of the dismissal. That may include removal expenses if the employee has to move out of tied accommodation. In this case the claimant did require to move out of the tied accommodation to another property. It would seem appropriate to award the sum of £750 in respect of removal costs.

29. Additionally, an employee who has been unfairly dismissed will lose a number of statutory employment protection rights most notably the right not to be

unfairly dismissed until he has worked for a 2-year period with a new employer. It would appear that the sum of £400 would be an appropriate amount to award in that respect.

- 5 30. The total of those sums is £7695. That includes any notice pay rights as the calculation has been made from the date that the claimant was last paid by the respondent namely up to 30 March 2019.

Adjustments to compensatory award

- 10 31. There was no evidence to conclude that had the respondent in this case adopted a proper procedure by way of disciplinary process involving intimation of the matters of concern; and the opportunity of a hearing in which the claimant was represented prior to taking any decision that dismissal would have been inevitable. In those circumstances no reduction is made to the compensatory award on the basis that those steps would have made no difference to the outcome. The burden of proof in this respect would be on the employer and there was no response from the respondent.

- 15 32. As indicated where an employer fails to comply with the ACAS Code then an increase in compensatory award can be made of no more than 25%. In this case there was a failure to follow the Code in respect of disciplinary action. The Code is aimed to encourage such procedure within the workplace. It would seem appropriate to make an increase of 20% in the compensatory award (Section 207A of TULR(C)A does not apply to basic awards). That would make the total compensatory award £9234.

- 20 33. No benefits were paid to the claimant and so the Recoupment Regulations are of no effect.

25 **Holiday pay**

- 30 34. Holiday pay is covered by the Working Time Regulations as those are interpreted in accordance with the Working Time Directive and Article 31(2) of the Charter of Fundamental Rights. In terms of the European Court decisions on Working Time, Article 7 and Article 31(2) of the Charter of Fundamental Rights preclude national legislation by which a worker who has

not taken his or her full entitlement to leave during the leave year automatically loses the untaken part “without prior verification of whether the employer had in fact enabled him to exercise that right, in particular through the provision of sufficient information”. In other words, the employer must not merely permit the taking of leave if the worker asks (and pay for the leave if taken) but also take steps to ensure that the worker does not, by failing to take the leave, lose it. The European Court comments that employers should not have to force employees to exercise their rights to take leave before the end of a leave year; but the worker “must be regarded as the weaker party” and it is therefore “important to avoid a situation which the burden of ensuring that the right to be paid annual leave is actually exercised rests fully on the worker”. That leads to the conclusion that the employer is required... “to ensure specifically and transparently, that the worker is actually in a position to take paid annual leave to which he is entitled, by encouraging him, formally if need be, to do so”. The burden of proof is on the employer (*Max-Planck v Shimizu C - 684/16 [2019] 1CMLR 1233*). Tribunals have to interpret the Working Time Regulations to give effect to this decision. Accordingly, there must be disapplied any domestic regulation which prevents leave from being carried over in cases where the employer has not taken sufficient steps to ensure that leave is not lost inadvertently, even in cases where the employer is a private party.

35. In this case there was no evidence of any encouragement or requirement by the employers that the claimant take leave in the leave year 1 January - 31 December 2018. The evidence from the claimant was that he had taken 5 days of leave of the 28 days’ leave entitlement leaving a balance of 23 days. In accordance with the European decisions he is entitled to carry that forward into the following leave year entitlement and to be paid in lieu of holiday pay entitlement at termination of employment.

36. He stated that he had taken no days holiday in the period 1 January - 28 February 2019 being an entitlement to 5 days’ accrued holiday (4.66 rounded up to 5).

37. Thus, at termination he had an entitlement to 28 day's holiday pay in respect of accrued but untaken holidays being the net sum of £1,246. ($£1,350 \times 12 = £16,200 + 52 = £311.53$ per week $\times 4 = £1,246$). That is the net amount due and the respondent would require to account to HMRC for any tax and NI due.

5 Other payments

38. The Employment Tribunal's Extension of Jurisdiction (Scotland) Order 1994 enables a Tribunal to make an award in respect of a claim of an employee for sums due on breach of a contract term. In this case the claimant indicated that he was due sums for the renewal of his firearm certificate (£78) and fee for attending a course at the behest of the respondent (£100) for which they have not paid. There was an obligation within the termination letter that the respondent would pay reasonable expenses incurred. These expenses appear reasonable in relation to the employment of the claimant. In those circumstances the sum of £178 is awarded.

39. The position on gratuities appears to be that the Head Gamekeeper was responsible for the collection and then distribution of gratuities and this was a matter outwith the province of the respondent. While there may be sums due in respect of gratuities to the claimant it is not an award that it is possible to make against the respondent.

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Employment Judge: J Young
Date of Judgment: 13 November 2019
Entered in register: 14 November 2019
and copied to parties

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