



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4100185/2020

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Held in Glasgow on 15 July 2020 by written submissions in chambers

Employment Judge: D Hoey

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Mr R McCormack

**Claimant
Represented by:
Himself**

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Handmade Stairs Ltd

**Respondent
Represented by:
Not present**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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1. The respondent shall pay the claimant damages in the gross sum of **£440** in respect of the failure to pay the claimant 1 week's notice to which he was due (the claimant being entitled to 2 week's statutory notice and having only received 1 week's gross pay);
2. The claimant was unfairly dismissed and the respondent shall pay the claimant compensation as follows:
 - a. A basic award in the sum of £880 and
 - b. A compensatory award in the sum of **£12,458.64**.

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The Employment Protection (Recoupment of Job Seeker's Allowance and Income Support) Regulations 1996 apply. The total unfair dismissal award is £13,338.64. The prescribed element is £11,568.64. The prescribed period is from 19 November 2019 until 15 July 2020. The excess of the grand total over the prescribed

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element is £1,770. The annex to this judgment explains the operation of the Recoupment Regulations.

3. The remaining claims are ill founded and are dismissed.

REASONS

Introduction

1 In a claim form presented on 14 January 2020 the claimant indicated that he
had been employed from 1 February 2017 until his summary dismissal on 5
November 2019. Early conciliation had commenced on 1 December 2019
10 with the certificate being issued on 1 January 2020. The claimant ticked the
boxes unfair dismissal, redundancy and notice pay. He also stated that there
were "issues" with regard to deductions purported to be made from his pay
(as evidenced in his pay slip) which had not reached the pension provider.

15 The claim is undefended

2 No response form/ET3 was lodged on behalf of the respondent. The claim
was therefore undefended.

3 In the absence of a response from the respondent, while the rules would allow
a judgment to be issued if it were possible to do so from the information
20 provided, an in-person hearing had been set down for 7 May 2020 to allow
the claimant to provide the further information to provide judgment. In light of
the health pandemic that hearing had been changed to a telephone hearing.

Progressing the claims

25 4 Only the claimant attended the preliminary hearing at which the claimant
confirmed that his claims were for (1) notice pay (and he sought one week
given he had been paid one week in lieu and had worked 2 full years), and

(2) unfair dismissal (since his dismissal had been summary with no forewarning in respect of which he sought a basic award and a compensatory award). He had raised an issue as to unpaid wages as to pension contributions but this had not been clear and he was instructed to provide further information to enable a determination to be made as to whether this fell to be considered an unlawful deduction from his wages or not.

As it was not possible to make a decision during that hearing from the information provided the claimant was directed to provide a written statement and supporting documentation setting out the steps he had taken to find another job and why he had chosen to become self employed together with further details as to the sums claimed, including the position regarding pension.

Submissions

The claimant submitted a detailed statement setting out his position in respect of what he had done to mitigate his loss following his dismissal together with details in respect of the claims before the Tribunal.

The claimant seeks 1 week's notice pay, compensation for unfair dismissal and made representations that the sum paid into his pension was £111.04 less than his payslips suggest.

The respondent had also sent an email to the Tribunal the day before this hearing stating that the claimant had been dismissed for "several reasons" including lack of work, workmanship and attitude. The respondent stated that he was employed after the company was set up in March 2018 but dismissed in November 2019 when work had "slowed" and the respondent was unable to continue to pay his wages.

The respondent also stated that the claimant's employment had begun afresh following the respondent taking control of the business and the respondent believed that he had only taken on the website and machinery. He was told by the administration staff that he should urgently seek legal advice.

10 During the course of my consideration of this matter today the respondent
sent a further email to the Tribunal stating that the respondent had “issues
with the claimant’s workmanship” although the respondent described the
claimant as capable. The respondent stated that they were unaware that the
5 claimant had not found full time employment as they understood he had been
working “since they made him redundant”.

Issues

11 The issues to be determined in this case are as follows:

- ID a. **Notice pay:** is the claimant due one week’s pay in respect of his notice
(given he says he was employed for over 2 years and was only paid
one week’s notice)?
- b. **Unfair dismissal:** Was the claimant unfairly dismissed and if so what
compensation should be awarded?
- 15 c. **Unlawful deduction of wages:** Was there any claim in respect of
which the Tribunal had jurisdiction in connection with the claimant’s
argument that deductions made from his wages for pension purposes
had not been remitted to the pension provider?

12 I note that the claimant refers to issues regarding delay in issuing his P45 and
20 P60 and his wage slips but it appears that the claimant received his pay slips
(albeit belatedly). The Tribunal does not have jurisdiction to deal with delayed
issuing of a P45 and P60. The claims being advanced are therefore those as
set out in the case management preliminary hearing note as I have set out
above.

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Findings in fact

13 The Tribunal makes the following findings in fact from the evidence presented
to the Tribunal.

14 The claimant was engaged as a stair joiner for a period of over 2 years. While he was originally employed by a different company but with a similar name, Handmade Stairs (Scotland) Limited, the respondent purchased the claimant's then employer's website and machinery and the claimant's
5 employment transferred to the respondent without any interruption. There was no break in employment during the sale.

15 The claimant was not issued with a written statement of particulars in respect of his employment.

16 On 5 November 2019 the claimant was summarily dismissed. There had been
10 no procedure or warning and he was paid one week in lieu of notice.

17 Following his dismissal the claimant sought alternative work and claimed (and was paid) job seeker's allowance from January 2020. He applied for jobs via the job centre and visited several carpentry and joinery companies around Glasgow and Ayrshire.

18 He trialed a job in December which did not work out but this led to the
15 claimant renting workshop space and setting up a self employed. The area of work in which the claimant is involved is more likely to result in an income where the claimant can provide his services as a self employed individual rather than as an employee given the position of the job market.

19 The claimant earned the sum of £290 by way of profit from his self employed
20 work up to 28 May 2020.

20 The claimant is confident that he can sustain a living from the approach he has taken.

21 The claimant had authorised the respondent to make deductions from his
25 wages to be paid into a pension (by operation of law). Some of those payments although stated in his wage slip to be paid to the pension provider were retained by the respondent.

22 The claimant's gross pay with the respondent prior to his dismissal was £440 per week. His net weekly pay was £361.52.

Law

Notice pay

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19. Under section 86 of the Employment Rights Act 1996, an employee is entitled to be given a minimum period of notice to terminate the contract (unless the employer was entitled to terminate the contract without notice, such as in cases of gross misconduct).

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20. For the claimant, given he has 2 complete years of employment, he is entitled to 2 week's statutory notice. Failure to pay said notice when due would amount to a breach of contract in respect of which an award could be made.

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Unfair dismissal

21. In order to claim unfair dismissal, an employee requires to have 2 year's service: section 108 Employment Rights Act 1996.

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22. Under section 218(2) of the Employment Rights Act 1996 where a business or undertaking is transferred from one person to another person the transfer does not break continuity of employment.

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23. In terms of section 98 of the Employment Rights Act 1996:

"In determining whether the dismissal of an employee is fair or unfair, it is for the employer to show: -

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(a) the reason (or if more than one, the principal reason) for the dismissal; and

(b) that it is either a reason falling within subsection 2 or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.”

5 24. Potentially fair reasons for dismissal include conduct, capability and redundancy.

25. Section 98(4) of the Employment Rights Act 1996 states:

io “Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer): -

15 a. depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and

20 b. shall be determined in accordance with equity and the substantial merits of the case.”

26. It is for the employer to show that there was a potentially fair reason to dismiss and the Tribunal must then decide whether the statutory wording is satisfied to assess whether the dismissal was fair or not. If the employer fails to show
25 that there was a potentially fair reason, the dismissal is unfair.

27. A successful claimant is entitled to a basic award (section 119), which is calculated in a similar way to a redundancy payment.

30 28. Section 123(1) provides for a compensatory award which is 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.

The Tribunal needs to assess how long the employment would have continued and ensure any compensation is just and equitable. A Tribunal should also consider whether the claimant contributed to the dismissal, to any extent, any reduce the award accordingly.

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29. Ultimately the compensatory award should be such amount that is just and equitable.

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30. A compensatory award is capped at a maximum of 52 week's gross pay (or £86,444 if less).

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31. If a claimant has received certain benefits, including Job Seeker's Allowance (as in this case), the Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 apply. This means that the respondent must retain a portion of the sum due until the relevant Government department has issued a notice setting out what the claimant is to be paid and what is to be refunded to the Government.

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32. Where a written statement of particulars has not been provided to a claimant, an award made by the Tribunal can be increased by 2 week's pay or 4 weeks in terms of section 38 of the Employment Act 2002 if it is just and equitable to do so.

Unlawful deductions

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33. In terms of section 13 of the Employment Rights Act 1996, it is unlawful to pay to the employee, by way of wages, a sum less than that which is properly payable in terms of the contract of employment. The Tribunal is able to make a declaration as to what the unlawful deduction was and order the respondent to pay to the claimant said deduction. If the claimant has authorised the deduction, the deduction is not unlawful.

Decision and reasons

5 34. I shall deal with each claim in turn.

Notice pay

23 I have found that the claimant did have 2 year's service. While the respondent
10 may have purchased the web site and machinery from the claimant's previous
employer, the claimant also transferred. In other words his employment
(which included his previous service) transferred.

24 The information presented by the claimant showed that his employment was
continuous. The information from the HMRC suggested that the claimant's
15 employment had continued. The claimant stated that he had continuous
employment and there had been no break during the sale. There was no
basis (or evidence) to dispute that. From the information before the Tribunal
I am satisfied that the claimant's employment was continuous and that he
therefore had more than 2 year's service.

20 25 The fact that equipment and the website from the previous employer was
purchased together with the fact that the claimant's employment continued
uninterrupted, is highly likely to have resulted in the Transfer of Undertaking
(Protection of Employment) Regulations 2006 applying to transfer the
claimant's employment. Such a transfer can occur even if there is a break in
25 service.

26 In any event, the information before the Tribunal shows that the claimant's
employment subsisted for over 2 years. He is therefore entitled to 2 week's
notice. As he was paid only one week the respondent is due to pay the
claimant 1 week's notice pay, in the gross sum of £440.

30 27 The gross sum is awarded given the impact of the taxation regime upon the
award.

Unfair dismissal

28 From the information before the Tribunal there was no fair reason shown for the claimant's dismissal. There was no procedure that led to his dismissal. His summary dismissal was unfair. The respondent did not enter a response
5 to defend the claim nor provide any evidence to support a finding that the dismissal was fair. There was no suggestion of any process being followed that could support a finding of a fair dismissal. From the information before the Tribunal, the claimant was unfairly dismissed.

29 The claimant is therefore entitled to a basic award in the sum of 2 week's pay, namely 2 x £440 which amounts to £880.
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30 A compensatory award must be such sum that is just and equitable so far as flowing from the dismissal. Any award must be just and equitable ensuring that the claimant does not receive more by way of compensation that he would have received had he not been unfairly dismissed. The object of the
is compensatory award is to compensate the claimant for financial losses as if he had not been unfairly dismissed. It is not designed to punish the employer for wrongdoing.

31 I have considered the position carefully. Awarding compensation is naturally speculative and I must consider the information that is before me. It is
20 important also to be mindful of the economic reality. The respondent also raised issues as to the quality of the claimant's work and yet stated that he was a capable employee. There was also a suggestion that the claimant had been dismissed due to cash flow issues.

32 The reason why the claimant was dismissed appears to relate to cash flow
25 but I have no information before me to show why it was fair to dismiss the claimant on 5 November 2019 as opposed to take some other (lesser) action, such as dismiss another employee.

33 The compensatory award must be such amount that is just and equitable. Taking matters in the round I consider that there is a real likelihood that the
30 claimant would have been fairly dismissed at some point. I have decided that

5 it is just and fair to award compensation for 32 weeks. I have chosen that as an end point to his losses rather than applying a percentage reduction to reflect the chance his employment might have ended fairly, or that his earnings from his new positions may have equalled if not exceeded what he would have earned had he continued to work for the respondent, all in an attempt to ensure that compensation which is awarded is just and equitable as best I can.

34 I do not find that the claimant contributed to his dismissal to any extent.

10 35 His compensatory award includes therefore 32 week's net pay (32 x £361.52) which is £11,568.64.

36 I also award the sum of £300 in respect of the loss of statutory rights.

37 Given the claimant was not issued with a statement of particulars I award him 2 week's pay, namely 2 x £440 which is £880. I do not consider it just and equitable to award him 4 week's pay under this head.

15 38 The income the claimant received by way of mitigation, namely £290, falls to be deducted from the sums due.

39 The total compensatory award is therefore £12,458.64.

40 The recoupment regulations apply to this award given the claimant was in receipt of relevant benefits.

20 41 The prescribed element is £11,568.64. The prescribed period is from 19 November 2019 (the expiry of the notice period) until 15 July 2020 (the end point of his losses). The total unfair dismissal award is £13,338.64. The balance is £1,770.

25 **Unlawful deductions**

42 Having considered the papers provided by the claimant, it is clear that the claimant had authorised a deduction from his salary. That deduction was for the purposes of pension. The deduction was made but the sum was not

remitted to the pension provider. As the deduction was authorised, the deduction is not unlawful.

43 I find that the Tribunal does not have justification to determine the claim in
respect of pension deductions, said deductions having been authorised. The
5 claimant's remedy is with the statutory regulator.

Summary

44 In summary the respondent shall pay to the claimant:-

(1) Notice pay in the gross sum of £440;

10 (2) Compensation in respect of his unfair dismissal for the following:

a. A basic award in the sum of £880; and

b. A compensatory award in the sum of £12,458.64

(3) The recoupment regulations apply to the unfair dismissal award. The
prescribed element is £11,568.64. The prescribed period is from 19
15 November 2019 until 15 July 2020. The total unfair dismissal award is
£13,338.64. The balance is £1,770.

(4) The remaining claims are not well founded and are dismissed.

Employment Judge: David Hoey
Date of Judgment: 21 July 2020
Entered in register: 23 July 2020
and copied to parties

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