EMPLOYMENT TRIBUNALS

Claimant: Mr D Agnew

Respondent: SJAJ Plumridge Ltd

Heard at: **Bristol (by video-CVP)** **On:** **28 February 2022**

Before: **Employment Judge Livesey**
Mrs D England
Mr K Ghotbi-Ravandi

Representation
Claimant: In person (supported by his mother and father, Mr and Mrs Taylor)
Respondent: Mr Plumridge, owner/Director

JUDGMENT

1. The Claimant was dismissed as redundant and is entitled to a redundancy payment in the sum of £3,038.75 from the Respondent.

2. The Claimant was dismissed in breach of contract without notice and is entitled to compensation from the Respondent in the sum of £2,707.44.

3. The Claimant was unfairly dismissed by is entitled to no separate award. Accordingly, the recoupment provisions no not apply.

4. The Claimant's complaint of discrimination on the grounds of disability is dismissed.

5. When proceedings were begun, the Claimant had not been provided with a written statement of employment particulars and it is just and equitable to award the higher amount specified within section 38 of the Employment Act 2002. Accordingly, the Respondent is to pay the Claimant will the further sum of £935.00.

6. There shall be no enforcement of this Judgment until the period of 28 days from the date that it has been sent to the parties has elapsed.

REASONS

1. Claim

1.1 By a Claim Form dated 21 August 2020, the Claimant brought complaints of unfair dismissal, discrimination on the grounds of disability, breach of contract relating to notice and for a redundancy payment.

2. Evidence

2.1 The Claimant gave evidence in support of his case, as did his mother, Mrs Taylor. Mr Plumridge gave evidence in support of the Respondent's case.

2.2 The Claimant produced a small bundle of documents, C1.

3. Background

3.1 At an initial Case Management Preliminary Hearing which was held by telephone on 9 February 2021, Employment Judge Roper listed another Preliminary Hearing to determine a number of preliminary issues, but he also clarified and recorded the issues in the case more broadly (see paragraph 38 of his Order and paragraph 1 to 5 within it).

3.2 At a further Preliminary Hearing held before Employment Judge Goraj on 2 November 2021, she determined that the effective date of the Claimant's dismissal had been 19 July 2020 and that the claim had therefore been issued in the Tribunal in time. She also determined that the Claimant had been the subject of a TUPE transfer on or around 1 January 2020 and that he had continuous service from 21 March 2007 until 19 July 2020.

3.3 The Judge gave a direction for the Respondent to explain its non-attendance at the hearing before her by 2 November 2021. It failed to do so but the Tribunal took no further action in that respect.

3.4 Directions were issued for the preparation of the final hearing. The Claimant prepared a hearing bundle and witness statements, but nothing was received from the Respondent. The CVP link was sent to all the parties on 25 February 2022, communications with the Respondent having been to the email address which he had provided in the Response.

3.5 The Respondent did not attend this hearing initially but, part way through, the Tribunal was informed that Mr Plumridge had attended in person at the Exeter Hearing Centre at Keble House. Steps were taken for him to join the hearing and a CVP link was established in the Exeter Combined Court Centre for that purpose.

3.6 Mr Plumridge explained his lack of activity on the basis that emails had been put into his junk folder by his email provider. He had only found out about the hearing because Peninsula had cold called him to see if you wanted representation at the hearing which they had seen had been listed. He then telephoned the Bristol office and he thought that he was advised to attend Exeter in person, even though the hearing was listed by video. He explained that he had had a similar experience in Australia of having given evidence from a court building in Perth by video to a hearing in Melbourne.

3.7 Having heard the explanation for his non-attendance and for his attendance in person in Exeter, the Tribunal was satisfied of its accuracy, but the way forward then had to be determined.

3.8 Mr Plumridge had two primary options; to continue with the hearing or to apply to postpone it. Having appreciated the nature of the Judgment which had been given by Employment Judge Goraj in November 2021, he wanted this hearing postponed so that he could appeal and/or challenge it. I made it clear that this Tribunal could not go behind it. Having pointed out, however, that if that challenge was unsuccessful and that the matter would then be relisted for this hearing, both parties were content that we proceeded on the basis that any judgment that we entered would have been unenforceable for 28 days to enable the Respondent to apply to have Employment Judge Goraj's judgment reconsidered, if so advised.

4. Facts

4.1 The Tribunal reached the following factual findings on the balance of probabilities. Any page references in these Reasons are to pages within the hearing bundle C1 unless otherwise stated.

4.2 The Respondent runs the Dockside Café, Exmouth. The Respondent is owned and/or operated by Mr Plumridge.

4.3 Employment Judge Goraj determined that the Claimant's employment commenced on 21 March 2007. No written particulars were issued to him at that point or at any time subsequently.

4.4 Mrs Ewings operated the café until January 2020. She paid the Claimant cash in hand and did not deduct tax and/or national insurance. In January 2020, Mr Plumridge, Mrs Ewings' son, having returned from a long period overseas in Australia, took over the business. He candidly said that he knew nothing of how his mother had run the business before him but he did know that no proper payroll had been run. He therefore established one. He accepted that he took over the business as the Claimant's employer.

4.5 In the first weeks of 2020, the Claimant was earning £233.75 gross per week for 27½ hours work (£8.50 per hour [33]). There was a slightly higher wage shown for the first week in January on the one payslip that was produced within the bundle [67], but the Claimant's wage then settled down to that regular figure, which equated to £225.62 net per week.

4.6 Before the Covid-19 pandemic, the Claimant believed that 10 staff were employed at the café. Mr Plumridge confirmed that there were indeed six employees on the payroll (including the Claimant) and four weekend staff, described as 'youngsters' who worked on Saturdays and Sundays.

4.7 When the pandemic struck in March and the country went into lockdown, the Claimant believed that the café did not shut but continued to provide takeaway food and drink. The Respondent stated that it did shut and that all staff were 'laid off' at that time. It was clear that Mr Plumridge thought that 'laying them off' was the same as dismissing them. Employment Judge Goraj's judgment dealt with the Claimant's knowledge of the situation at that point.

4.8 Mr Plumridge then attempted to obtain furlough money without success. He was made aware that the application had failed in mid-April because the business had not traded for long enough to have been eligible.

4.9 The Tribunal concluded that Mr Plumridge's account in respect of the closure of the business was more likely to have been accurate, not only because the Claimant had no direct knowledge of the situation and Mr Plumridge did, but also because our understanding of the situation which prevailed at the time was that all businesses were required to close completely, at least initially.

4.10 The café reopened in June for takeaways. Mr Plumridge, Mrs Ewings and one of their god-daughters, a 15 year old only named as 'Daniela', worked there at that time. The café reopened fully in July, but none of the original staff who had been working there at the start of 2020 returned at that stage. We were told that one original member of staff returned to work later.

4.11 A meeting was held at the café at which the Claimant's position was clarified, hence Employment Judge Goraj's finding that the effective date of dismissal was at that point. The Claimant had not been to the café prior to the date of that meeting and has not been back since. Although there had been some discussion about him returning to work during the meeting, he was very upset that the Respondent had failed to maintain contact with him between March and July and did not feel able to return to work.

4.12 The Claimant obtained new work on 9 April 2021. He now has a seasonal job with Haven Holidays and works for nine months each year between March and November. He works 40 hours per week at £8.50 per hour and earns £340 gross per week, approximately £293 net per week.

5. Conclusions

5.1 Redundancy payment

5.1.1 It was agreed between the parties that the Claimant had been dismissed by reason of redundancy. It was further agreed that he had not received a redundancy payment and, as a result of Employment Judge Goraj's judgment, such a payment was to have been calculated as follows;

£233.75 x 13 years service x 1 (the Claimant was born in July 1989) = **£3,038.75**

5.2 Breach of contract relating to notice

5.2.1 It was further agreed that the Claimant had not received any notice pay upon his dismissal. The Claimant had not received alternative earnings in mitigation of his loss in the notice period. The calculation was therefore as follows;

£225.62 x 12 weeks = **£2,707.44**

5.3 Discrimination on the grounds of disability

5.3.1 The act of discrimination which the Claimant complained of was his dismissal, an allegation of direct discrimination under section 13 of the Equality Act, as set out in paragraph 3 of Employment Judge Roper's Order of 9 February 2021.

5.3.2 The Tribunal considered the test within this section and s. 23. We approached the case by applying the test in *Igen v Wong* [2005] EWCA Civ 142 to the Equality Act's provisions concerning the burden of proof, s. 136 (2) and (3).

5.3.3 In order to trigger the reversal of the burden, it needed to be shown by the Claimant, either directly or by reasonable inference, that a prohibited factor may or could have been the reason for the treatment alleged. More than a difference in treatment or status and a difference in protected characteristic needed to be shown before the burden would shift. The evidence needed to have been of a different quality, but a claimant did not need to have to find positive evidence that the treatment had been on the alleged prohibited ground; evidence from which reasonable inferences could be drawn might suffice. Unreasonable treatment of itself was generally of little helpful relevance when considering the test. The treatment ought to have been connected to the protected characteristic. What we were looking for was whether there was evidence from which we could see, either directly or by reasonable inference, that the Claimant had been treated less favourably than others not of his disability, because of his disability. No one was treated differently. In fact, it might have been argued that the Claimant was treated more favourably by the Respondent's later dismissal of him.

5.3.4 In this case, we were not satisfied that the Claimant was treated any differently from the rest of the workforce. All of the staff were dismissed. It appeared that the Claimant may not have been aware of his dismissal in March when the others were 'laid off', but the clarification of his position in July put him in the same position as his colleagues.

5.3.5 There was no other evidence from which we could draw the inference that the Claimant's dismissal had been on the grounds of his disability and that claim was dismissed.

5.4 Unfair dismissal

5.4.1 Although it was agreed that the Respondent had a fair reason for dismissal, redundancy, the fairness of the dismissal nevertheless fell to be dealt with under s. 98 (4).

5.4.2 The circumstances which prevailed at the beginning of the national lockdown were unique, but the Respondent's failure to communicate effectively with the Claimant until July rendered the dismissal unfair on a procedural basis; there was no consultation or any form of satisfactory procedure or clarity of communication adopted in line with good industrial practice.

5.4.3 The decision in *Polkey-v-AE Dayton Services* [1988] ICR 142, however, introduced an approach which required a tribunal to reduce compensation if it found that there was a possibility that an employee would still have been dismissed even if a fair procedure had been adopted. Compensation could have been reduced to reflect the

percentage chance of that possibility. Alternatively, a tribunal might have concluded that a fair of procedure would have delayed the dismissal, in which case compensation could have been tailored to reflect the likely delay. A tribunal had to consider whether a fair procedure would have made a difference, but also what that difference might have been, if any (*Singh-v-Glass Express Midlands Ltd* UKEAT/0071/18/DM).

5.4.4 It was for the employer to adduce relevant evidence on this issue, although a tribunal should take notice of any relevant evidence when making the assessment. A degree of uncertainty was inevitable, but there may well have been circumstances when the nature of the evidence was such as to make a prediction so unreliable that it is unsafe to attempt to reconstruct what might have happened had a fair procedure been used. However, a tribunal should not have been reluctant to have undertaken an examination of a *Polkey* issue simply because it involved some degree of speculation (*Software 2000 Ltd.-v-Andrews* [2007] ICR 825 and *Contract Bottling Ltd-v-Cave* [2014] UKEAT/0100/14).

5.4.5 In these circumstances, the Tribunal was left in no doubt that a fair procedure would not have made a difference to the actual outcome in the case. The Respondent was not able to furlough its employees and their dismissal was inevitable. It had no income to pay them. Had a fair procedure have been adopted in this case, the Claimant ought to have been dismissed significantly *earlier* than July 2020, but he would still have been dismissed.

5.4.6 The Claimant was not entitled to a basic award, because we had awarded him a redundancy payment. He was not entitled to a compensatory award for the reasons set out in paragraph 5.4.5 above and because, in those circumstances, it was not just and equitable to have done so.

5.5 <u>Failure to provide written particulars of employment</u>

5.5.1 It was accepted that the Claimant had not been issued with written particulars of employment by Mrs Ewings or her son upon transfer, a period of 13 years. A tribunal had to consider the position under section 38 of the Employment Act 2002 in such circumstances. Given the amount of time that the situation had been allowed to persist, we considered that it was just and equitable for the higher amount to have been awarded and the Claimant was therefore entitled to 4 weeks pay (£233.75 x 4); **£935.00**.

5.6 Finally, the Claimant had given evidence which supported the possibility of a further unlawful deductions from wages claim being mounted in relation to the non-payment of salary between March 2020 and the effective date of termination in July 2020. However, such claim had actually been raised in the Claim Form, nor had one been identified by Employment Judge Roper at the first case management hearing nor had any application been made to add one by amendment.

Employment Judge Livesey

Date_28 February 2022_____

JUDGMENT AND REASONS SENT TO THE
PARTIES ON 08 March 2022
By Mr J McCormick

FOR THE TRIBUNAL OFFICE