



EMPLOYMENT TRIBUNALS

Claimant: Mr S Kilroy

Respondent: The Community Inclusive Trust

Heard at: Midlands (East) Region by Cloud Video Platform
On: 25 April 2022
Reserved to 3 May 2022

Before: Employment Judge Blackwell (sitting alone)

Representation

Claimant: Mr N Hamilton, Solicitor
Respondent: Mr S Hoyle, Legal Consultant

RESERVED JUDGMENT

The decision pursuant to a merits decision sent to the parties on 23 February 2021 is the Claimant is entitled to the following awards:

1. A Basic Award pursuant to Section 119 of the Employment Rights Act 1996 (the 1996 Act) of £14,224.00.
2. A Compensatory Award pursuant to Section 123 of the 1996 Act of £33,893.68.
3. The Respondent is therefore Ordered to pay to the Claimant the total sum of £48,117.68.

RESERVED REASONS

Introduction

1. Mr Kilroy brought a claim for constructive unfair dismissal pursuant to Section 95(1)(c) of the Employment Rights Act 1996 which was upheld by a Judgment sent to the parties on 27 April 2019. The Respondent (The Trust) applied for a reconsideration, which was decided on the papers and confirmed the original decision by a Judgment sent to the parties on 27 June 2019. The Trust appealed that Decision and the EAT upheld the Appeal and remitted the matter to the same Tribunal. By a decision sent to the parties on 25 February 2021, Mr Kilroy's claim of constructive unfair dismissal was upheld. The Trust again appealed to the Employment Appeal Tribunal but the appeal was dismissed on

16 December 2021; the Sealed Order sent to the parties on 25 January 2022.

2. A Remedy Hearing was therefore listed requiring an updated Schedule of Loss and Counter Schedule. There was also an Order that there be an agreed bundle of documents requiring the Claimant to send two copies to the Tribunal at least three working days before the Hearing. There was also an Order requiring any witness statement also to be provided to the Tribunal. In fact, the Remedy and Mr Kilroy's remedy statement were not provided until 10 am on the date of the postponed Hearing, namely 25 April 2022. Mr Kilroy seeks compensation and that compensation falls into two parts, the basic award and the compensatory award.

The Basic Award

3. Findings of Fact

- 3.1 Mr Kilroy was born on 1 June 1961.
 - 3.2 The effective date of termination was 23 October 2018.
 - 3.3 Mr Kilroy's gross weekly pay was £948.40. His net pay was £697.39.
 - 3.4 The statutory cap on a week's pay at the effective date of termination was £508.00.
 - 3.5 The parties therefore arithmetically agree the basic award at £14,224.00.
4. In his written counter schedule /submissions, Mr Hoyle on behalf of The Trust says as follows:-

"The Respondent agrees the calculation of the basic award, however based upon the Claimant's statement at para 3, it is averred that the decision that "I had no future with the Respondent" prior to the bringing disciplinary proceedings was the actual driving force behind the Claimant's resignation post reinstatement as he chose at that time to bring forward his early retirement and the disciplinary process gave him the vehicle or at least the nudge to do it. The Claimant was 57 years old and planning to retire at 60, which is much less than the 65 years that an ordinary person of his age group might expect to retire, or much older than that had he been younger. Given that the Respondent's conduct simply gave him the nudge to bring matters forward and engage in an enterprise that would not see him out of pocket, the Respondent avers that the basic award be reduced by a percentage not less than 50%, ie £7112.

If however the Tribunal agrees with the Respondent that the Claimant has withheld financial information or has made little or indeed no effort to prove his financial position, then the Respondent avers that the basic award be reduced by 100%."

Paragraph 3 of Mr Kilroy's statement reads as follows:-

“The Phoenix Academy was to be absorbed into the Respondent and the various meetings up to my suspension drove me to the conclusion that I had no future with them. The allegations against me involved dishonesty and at the date of my dismissal, no ruling had been made in this respect. I was required to return to work on a final warning but, by this time, it was clear I had no future with them and I regarded myself as constructively dismissed.”

5. Unlike Mr Hoyle, I see no inconsistency in that paragraph with the evidence that Mr Kilroy gave at the original Hearing. I also pointed out to Mr Hoyle that the only relevant provision appeared to be subsection (2) of Section 122 of the 1996 Act:

“(2) 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.”

6. I also pointed out to Mr Hoyle that subsection (2) relates to the conduct of the Claimant before the dismissal. He then asserted that Mr Kilroy prior to the dismissal had declined The Trust’s efforts to bring about a compromise which would have ended Mr Kilroy’s employment.
7. In this context, the Claimant’s conduct needs to be both culpable and blameworthy. As Mr Kilroy put it both in his original statement and in cross-examination, he wished to clear his name against the allegations made against him, so refused the Trust’s offer. In my judgement, such conduct cannot be said to be either culpable or blameworthy. Thus, in my view, there are no grounds for a reduction in the arithmetically agreed basic award and Mr Kilroy is entitled to a basic award of £14,224.00.

Compensatory Award

8. The relevant statutory provision is Section 123 of the 1996 Act and in particular subsection (1):

“(1) Subject to the provisions of this section and sections 124, 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.”

9. We established at the beginning of the Hearing that the principal issue between the parties was mitigation of loss. It is common ground that with effect from 9 April 2019, Mr Kilroy went into business as an art dealer.
10. It is also common ground that Mr Kilroy had from February 2002 operated an eBay business account and had made 6,096 sales since 2002, which amounts

to approximately one sale per day.

11. Mr Kilroy described this dealing as merely a hobby and that he had made no profit. He had merely sought to cover his costs. I have to say that such activity in my judgement equates to far more than a hobby.
12. It is also common ground that other than trading as an art dealer, Mr Kilroy made no other efforts to mitigate his loss.
13. Mr Kilroy also accepted in cross-examination that it is likely that in time he could have obtained teaching or lecturing work at a lower salary than that which he enjoyed at the time of his dismissal.
14. I indicated that I proposed to follow the guidance set out in the case of ***Gardiner-Hill v Roland Berger Technics Ltd [1982] IRLR 498*** in that an Employment Tribunal should ask itself:-
 - (i) what steps were reasonable for the Claimant to have to take in order to mitigate his or her loss;
 - (ii) whether the Claimant did take reasonable steps to mitigate loss; and
 - (iii) to what extent, if any, the Claimant would have actually mitigated his or her loss if he or she had taken those steps.
15. It was also common ground that it is for the wrongdoer, ie The Trust, to show that Mr Kilroy had acted unreasonably in failing to mitigate. Mr Hoyle submits that not only was Mr Kilroy's decision to become a self-employed art dealer unreasonable but he also delayed too long in taking that step. Mr Kilroy's evidence was that he did not seek work in the teaching profession for two reasons. One, that he would have been obliged to disclose the allegations made against him. Mr Hoyle repeatedly put to Mr Kilroy that there were no such allegations hanging over him. However, in my judgment, Mr Kilroy would have been bound to disclose to a new employer his suspension, his dismissal and his reinstatement with a final written warning on capability grounds.
16. The second reasons advanced was that:-

“... the first year created so much stress, resulting in having to seek a doctors help and support that any employment would have been a difficult task to contemplate at the time. In the first year I was neither capable of seeking other employment nor self-employment, living mainly on savings I had accumulated.”
17. Mr Kilroy accepted in cross-examination that he had produced no medical evidence to support his contention that he was too stressed to seek work.

18. As I understand the Authorities, the question to be answered is: “Was it unreasonable for Mr Kilroy to make the choices he did in his particular circumstances”? The burden of proof is with the Trust to show that Mr Kilroy’s conduct was unreasonable.
19. On balance, I do not consider that The Trust has discharged that burden of proof. I accept that there were other choices open to Mr Kilroy which he chose not to pursue. However, I accept his evidence that his treatment at the hands of The Trust had rendered him incapable of seeking alternative employment for the period from the effective date of termination to 9 April 2019. On balance, I also find that it was not unreasonable, given his age and seniority, for Mr Kilroy to turn to self-employment as an art dealer in all of the circumstances of the case.
20. However, the matter does not end there because there is also a dispute as to the income Mr Kilroy earned from his art dealing. The burden of proof is now on Mr Kilroy to establish the loss he has sustained in consequence of the dismissal insofar as the loss is attributable to action taken by the employer. In my view that is the difference between the net earnings which Mr Kilroy would have had, ie £697.39 per week as against the profit he made in his art dealing business, such profit being assessed after proper costs and expenses are deducted. During cross-examination, Mr Hoyle did not appear to accept that proposition and I invited him to return to it in submissions. He did not.
21. In terms of the trading as an art dealer, Mr Kilroy traded under two names, but the business was solely in his name and was not a limited company or partnership or any other form of legal entity. He said in his statement:- “*In the first year of trading, 2019-2020, on a turnover of £31,680 my profit was £11,289*” and he refer to pages 15 and 16 of the bundle. “... *in the second year of trading, 2020-2021, on a turnover of £76,080 my profit was £12,820*” and again refers to pages 31 and 32 in the bundle. That is the entire extent of the evidence produced by Mr Kilroy.
22. Mr Hoyle observes that the documents which Mr Kilroy states were submitted online to HMRC are unsigned, are stamped “*Copy only - Do not send to HMRC*” and appear to be incomplete. Further, there is no statement made by the accountancy firm who are said to have submitted the returns on Mr Kilroy’s behalf, namely TJ Bookkeeping and Accounts. Mr Hoyle also refers to the without prejudice letter that he sent to Mr Hamilton on 20 December 2021 (see pages 35 and 36) in which he asked for further evidence of the trading position of Mr Kilroy’s art dealing enterprise.
23. Since that letter was further pursued by Mr Hoyle, Mr Hoyle should note that his reference to a cheque that was eventually cashed by Mr Kilroy relates to wages that it is common ground were owed between 23 July and 22 October and therefore has no relevance to the compensatory award Mr Kilroy is seeking.
24. I would have expected to see the trading account prepared by Mr Kilroy’s accountants. I would also have expected to see a trading bank account since it would always be prudent to separate the art dealing enterprise from Mr Kilroy’s domestic accounts. Neither has been produced.

25. In my view, therefore, Mr Kilroy has not discharged the burden of proof on him to show the losses that he has suffered because the material he has provided is inadequate to meet that standard of proof.
26. As I understand Mr Kilroy's Schedule of Loss, he has indicated that he expects in the tax year 2021-2022 to earn at least as much as he would have done had he still been in The Trust's employment. But, again, he provides no evidence to support that view. He is claiming loss for the years 2019/2020 and 2020/2021. I accept his evidence that no business reaches its full potential in its first year and that there are costs of setting it up, though again I have seen no such evidence as to set up expenses.
27. What is common ground is that Mr Kilroy is an expert in art; has a substantial collection of art work and, as set out above, has dealt in art for many years through eBay, which remains his trading medium.

Therefore doing the best I can on the basis of that evidence, it would be just and equitable to award Mr Kilroy the following:-

1. Total loss for the period claimed in the Schedule of Loss, namely 30 October 2018 to 4 April 2019 = £15,621.54.
 2. 50% loss for the year 5 April 2019 to 4 April 2020 = £18,132.14.
28. I do not consider that it would be just and equitable to make a further compensatory award beyond April 2020 because there is insufficient evidence to support it.
29. In the Schedule of Loss, Mr Hamilton seeks an uplift pursuant to Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992. All of the alleged failures detailed in the Schedule of Loss appear to relate to the appeal following the original dismissal which led to Mr Kilroy's reinstatement. Mr Hamilton made no submissions on the matters and it is not for me to make his case for him. I therefore decline to make an uplift.

Polkey

30. In his written submissions, Mr Hoyle says:-

"In addition, the Claimant's significant statement at paragraph 3 of his remedy hearing witness statement case new light upon his intentions and overall approach to the situation that followed his suspension. It is apparent that he would have resigned even if he had not been subjected to disciplinary proceedings. The Respondent therefore asks the Tribunal to have Polkey in contemplation. The Claimant had three years until he intended to retire, however indicates that he was planning to leave sooner than this."

As a matter of law, Mr Hoyle is right that if there is evidence that the contract of employment would have ended at a date after the effective date of termination,

then the compensatory period must end at that point. Unfortunately for Mr Hoyle, there is no such evidence. As referred to above in paragraph 5, I see nothing inconsistent in paragraph 3 of Mr Kilroy's remedy evidence and the evidence that he gave in the first hearing.

31. Further, Mr Hoyle repeatedly put to Mr Kilroy that he had intended to retire early. Mr Kilroy's evidence, which I accept, was that he had always intended to retire at the age of 60 and would have done so had not the chain of events which began in January 2018 which led to his dismissal and then reinstatement had not taken place. There will therefore be no **Polkey** deduction.
32. In summary, therefore, it would be just and equitable to make a compensatory award of £33,803.68 made up as follows:-
 - (a) Total loss for the period 23 October 2018 to 4 April 2019 = £15,261.54.
 - (b) Partial loss for the period from 5 April 2019 to 4 April 2020 = £18,132.14.
 - (c) Loss of statutory rights £500.

Total: £33,893.68.

Employment Judge Blackwell

Date: 21 May 2022

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