



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101919/2022

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Held via Cloud Video Platform (CVP) in Glasgow on 26 October 2022

Employment Judge M Robison

10 **Mr C Keenan**

**Claimant
In person**

15 **ROK Agency Ltd**

**Respondent
No response**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Judgment of the Employment Tribunal is that:

1. the claimant does not have the protected characteristic of disability and therefore claims under the Equality Act 2010 are dismissed;
2. the respondent shall pay to the claimant the sum of £1,047.50 in respect of
25 arrears of wages for the month of December 2021;
3. the respondent shall pay to the claimant the sum of £241.61 in respect of notice pay; and
4. the respondent shall pay to the claimant the sum of £475.75 in respect of untaken holiday on termination of employment.

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REASONS

1. The claimant lodged a claim in the Employment Tribunal on 4 May 2022, claiming unfair dismissal, disability discrimination, redundancy payment, arrears of pay, unpaid holiday pay and breach of contract (notice pay).

- 2. No ET3 defence was lodged although the Tribunal did receive correspondence from Mark Harper, the liquidator for the respondent, which is now in voluntary liquidation. No defence having been lodged however, this claim proceeds as undefended.
- 5 3. Where a claim is undefended it is possible to issue a judgment without a hearing, and to that end Employment Judge Hoey directed that further information should be provided. The claimant did provide further information, but too late to postpone the telephone case management preliminary hearing which took place on 13 July 2022 and was presided over by Employment
io Judge Porter.
- 4. During the course of that hearing, the claimant confirmed that he was not pursuing a claim for unfair dismissal or a redundancy payment (given he has less than two years' service). The claimant was advised to lodge vouching in regard to mitigation (in regard to the disability discrimination claim) and further
15 evidence of his claims for notice pay, unpaid wages and holiday pay.
- 5. He advised that he was insisting on his claim for £12,500 for "share realisation". EJ Porter stated in her note that "if the claimant is io insist on this claim then he must produce evidence of his entitlement to this sum which should include, as a minimum, evidence of his contractual entitlement to a
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- 6. The claimant produced some further documentation and a schedule of loss.
- 7. This hearing was then listed to take place by video. Unfortunately, the claimant did not lodge a file of productions for the hearing. The Tribunal had some documents on file which were referred to. During the hearing, the
25 claimant referenced a number of additional documents which he said that he had forwarded in response to the directions of EJ Hoey. Unfortunately, those documents had not been passed to me.
- 8. I decided in those circumstances to allow the claimant further time to lodge those documents again and any additional documents which he believed
30 would support his oral evidence. The claimant produced further documents

on 17 November which the Tribunal could not access. He forwarded the documents again on 22 November 2022 in a format which could be assessed.

9. Given the limitations of his evidence in regard to proof of disability status, I also invited the claimant to lodge a medical report from his GP, which he duly did, dated 8 November 2022.
10. I heard oral evidence from the claimant only.

Findings in fact

11. On the basis of the evidence heard and the documents lodged, I make the following findings in fact.
12. The claimant commenced employment with the respondent at the beginning of July 2020. He was invited to join the company as the managing director by CEO of the respondent, Mr Ruari O'Keefe.
13. The claimant was appointed a director of the company at that time.
14. The claimant made an arrangement with Mr O'Keefe relating to a stakeholding in the respondent company. This was confirmed in an e-mail from Mr O'Keefe to the claimant dated 29 July 2020, which stated only as follows:
- "I am happy to name you as a director with 45% shares/stakeholding in ROK Agency and there is currently no outstanding debts that I'm not aware of in the accounts sent prior to this e-mail".
15. No contract or agreement relating to shareholding was entered into. No contract of employment or any contract of engagement was drawn up setting out terms and conditions in writing. In particular, no agreement was reached on payment of notice.
16. Initially, the company occupied premises in Edinburgh, but they moved to Glasgow in or around May 2021. This was following the claimant having discovered that Mr O'Keefe was involved in a personal relationship with one of the staff.

17. The claimant subsequently became aware that Mr O'Keefe was having a personal relationship with a member of staff in the Glasgow office. This came to light when it was ascertained that Mr O'Keefe and this member of staff had been on holiday together in October 2021 .
- 5 18. Staff raised their concerns about the relationship with the claimant and they lodged a number of grievances. The claimant felt that he owed a duty of care to the staff and he found the situation uncomfortable so he raised the issue with Mr O'Keefe. As a result, the claimant's relationship with Mr O'Keefe broke down.
- 10 19. Dealing with these concerns caused the claimant to suffer stress and anxiety and his mental health deteriorated.
20. The claimant went on sick leave in or around 15 December 2021. At that time there was no requirement to provide a sick note, and he did not provide one to Mr O'Keefe, although he had attended his GP on 13 December 2021.
- 15 21. Although he was absent on sick leave, he continued to work, liaising with staff and clients.
22. At that time, given their relationship had broken down, he was having conversations with Mr O'Keefe regarding breaking up the company with the
- 20 the staff were aware of this upheaval and requested updates. The claimant found this stressful.
23. On 7 January 2022, Mr O'Keefe e-mailed the claimant to advise that he was terminating the claimant's contract with immediate effect due to gross misconduct. This was based on the claimant's communications with staff
- 25 which he considered had caused them a considerable degree of anxiety and stress.
24. The claimant responded disputing this and said that he thought as a director that he had a duty of care to the staff; that he wanted to leave but felt he had stay for the sake of the staff.

25. Latterly the claimant was paid £1,047.50 net per month. The claimant was paid until the end of November 2021 . He was paid a further £75 following his dismissal on 7 January 2022.
26. The respondent's holiday year ran from January to December. The claimant, along with the other staff employed by the respondent, was entitled to 31 days holiday per year. He had taken 10 days in July and 5 in December, so had outstanding leave of 16 days.
27. The claimant has not secured alternative employment. He is in receipt of benefits. He has sought alternative employment either setting up on his own account or work in marketing.
28. The claimant consulted his GP in July 2020, December 2021 and April 2022 regarding an anxiety and stress reaction, when he described poor sleep, feeling anxious and stressed and less able to cope with additional pressures and work. He was prescribed short term hypnotic in December 2021 and April 2022. His GP prescribed medications for anti-anxiety/depression on 17 July 2020, 13 August 2020 and 20 April 2022.

Tribunal deliberations and decision

Disability discrimination claims - disability status

29. The claimant in this case claims disability discrimination. The claimant asserts that the real reason he was dismissed was because of his disability of stress and anxiety. Specifically, he asserted that Mr O'Keefe took advantage of him being on sick leave as an easy way out of the relationship.
30. In order to pursue a claim for disability discrimination under the Equality Act 2010 the claimant must first prove that he is disabled.
31. The relevant provision of the Equality Act is section 6 which states that to qualify for protection a person must have a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day to day activities.

32. The claimant lodged a medical report to support his contention that he was a disabled person for the purposes of the Equality Act.
33. *In J v DLA Piper* [2010] IRLR 736, the EAT held that the Tribunal should consider the effect of the condition rather than focus on the medical diagnosis; and recognise the distinction between clinical depression and depression as a reaction. This is routinely made by clinicians, the latter being a short-lived reaction to particular adverse circumstances. This is sometimes described as medicalisation of a work issue/problem, which is not likely to amount to a mental impairment.
34. While it is often not clear from a medical report which condition is being described, here the report indicates that he was suffering from “anxiety and stress reaction”.
35. When asked about the impact on his day to day activities, he stated in evidence: “I suffered from anxiety because the burden [of running the company] fell on my shoulders. I had to deal with everything including the staff. I had to make them aware of developments without divulging the details to them. I could not do this and my job as well. RO’K was taking holiday and golf days and avoiding the staff. I was the only person who could answer their questions. There was a lot of hearsay about what was going on. All their
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and found it very hard to be present; I was not fully mentally present. Then a lot of clients left in December and January. I suffered anxiety and because of the nature of the job we would both network in the city centre and attend the same bars and restaurants and I did not want to speak to clients at that time, which was when I began to get threatening letters from his lawyers. I found it was a lot to deal with on his own. My overall anxiety factors were huge”.
36. The claimant produced a number of Whatsapp messages confirming that he had raised the issue of stress with Mr O’Keefe, and that he had done so 129 times. These broadly describe a reaction to work situations. He also lodged a number of Whatsapp messages when staff mentioned stress.

37. It is clear from the claimant's evidence and from the GPs report that the claimant was suffering stress and anxiety which was a reaction to "additional pressures and work". It is apparent then that the anxiety and stress was a medicalisation of work problems. There is no evidence that the claimant was suffering from an impairment which might be described as clinical depression.
38. In any event, any impairment must in any event have a "substantial and long-term" impact on a claimant's day to day activities. There was little evidence to support the conclusion that the impact of the impairment was either substantial or long term.
39. Although "substantial" means "more than minor or trivial", in this case there was little evidence even to support that low threshold. Although the claimant had consulted his GP, he continued to work and it was not until December 2021 that he went off sick. Even then he said that he had continued to work. He makes little or no reference to the impact on his day to day activities, beyond avoiding socialising with clients.
40. The only effects referenced in the GP report are "poor sleep, feeling anxious and stressed" and that he is "less able to cope with additional pressures and work". It could not then be said that the impact of his condition on his ability to carry out day to day activities was substantial.
41. Even if it were to have accepted that any stress or anxiety suffered by the claimant could be said to amount to an impairment, and even if it could be said that the effect on day to day activities was more than minor, the evidence that it was not long term, in the sense of extending 12 months or more, was not definitive.
42. Although the GP had mentioned that he had consulted her in July and August 2020 (that is when the claimant started work), the next consultation appears to be in December 2021, just shortly before the claimant's employment was terminated, indicative of a short term condition.

43. The claimant has not therefore established that he had a disability in respect of anxiety at the relevant time. That being a prerequisite for his claim under the Equality Act, the claim for disability discrimination must be dismissed.

Arrears of pay

5 44. The claimant's evidence was that he was paid until the end of November 2022. He was not dismissed until 7 January 2022. He claims his monthly wage of £1,047 which was not paid to him at the end of December.

45. The claimant having been dismissed on 7 January 2022, I find that he is entitled to his agreed salary for December 2021 being £1,047.

10 46. Although he was paid £75 on 4 January 2022, his position was that related to an advance on holiday pay, rather than arrears of wages.

Notice pay

47. The claimant claimed one month's pay in respect of notice pay. However, he confirmed that there was no contractual agreement regarding notice pay.

15 48. In such circumstances, the claimant is only entitled to statutory notice pay. Section 86 of the Employment Rights Act 1996 sets out the relevant law relating to the statutory right to minimum notice, which states that for
20 years the minimum notice pay is one week. Given that he had less than two years' service, the claimant is entitled to one week's net pay, that is £241.61.

Holiday pay

49. The holiday year ran from January to December. I accepted that the claimant was entitled to 31 days holiday each year, on the basis of evidence that this was the entitlement in all of the staff's contracts of employment.

25 50. The claimant advised that he had taken 10 days in July and 5 days in December, and that he was therefore due payment on termination for the balance, namely he is due 16 days holiday pay.

51. On the basis of a daily rate of £34.42, the claimant would therefore be entitled to £550.75.

52. The claimant's evidence was that the payment that was made in January 2022 of £75 was in respect of holiday pay. Consequently, after deduction of that sum, the claimant is due the sum of £475.75.

Share realisation

53. The claimant also sought the sum of £12,500 for "share realisation". As noted above, the claimant had been advised by EJ Porter that if he were to insist on this claim then he must produce evidence of his entitlement.

10 54. I would therefore have expected to see a contract or some other written agreement regarding his entitlement, but also evidence about how such a sum was arrived at.

55. In oral evidence, he said that he was due to get 45% of the value of company. In support of that evidence, he lodged an e-mail he had received from Mr O'Keefe, which stated, "I am happy to name you as a director with 45% shares/stakeholding in ROK Agency".

56. Subsequent to the hearing, the claimant lodged e-mails in which Mr O'Keefe stated that "ROK was initially my company and you were brought in by me at a later date. In fact it remains my company - you are not in fact a shareholder (although there was a conditional agreement to give you shares it was not implemented); this needs to be regularised and resolved as an issue separate from your employment".

57. The claimant had no further documentation upon which he could rely on support his contention that he was due to receive 45% stakeholding in the company.

58. However, even if he had been able to produce evidence to support that, there was no valid evidence which could support his claim for the sum of £12,500 as an unlawful deduction from wages (or as a breach of contract).

59. He suggested that his pay was less than the minimum wage and he was working for such a low salary on the basis that he would take equity out in the future. While he claims £12,500 being the remaining balance of one year's salary, he had simply calculated that on the basis of what he thought he should be due (rounded down). He has judged this against much higher salaries of managing directors, supported by a screenshot showing the average salaries of managing directors in Glasgow and Scotland. This was apparently to support his contention that the pay rate was unfair. However, no evidence was lodged or led beyond that assertion to support any view that the claimant was contractually entitled to receive pay of £12,500.
60. Indeed, the claimant accepted in evidence that it was a figure which he had "plucked out of the air" because otherwise it would not be fair or reasonable to be paid such a low salary.
61. It also apparently did not in any event bear a relationship to the value of the company or the value of any shares that he might have been due. When asked about the valuation of the company, he said that there was no real valuation of the company, that it had not submitted accounts for this year, although the respondent is now in any event in voluntary liquidation.
62. The claimant did however subsequently lodge what he said was an evaluation of the company by accountant in Scotland. Although no details were given of his credentials. The claimant provided a spreadsheet entitled "ROK estimated maintainable earnings". It is not clear how the sums there relate in any way to the sum of £12,500 claimed by the claimant.
63. In any event, in the accompanying e-mail Mr Rennie says that, "this valuation represents a valuation on the basis the company had not ceased trading and is only for a guide to show a loss of earnings as a result of the business ceasing trading. This valuation is no longer relevant on the basis the company is now going through a liquidation process".
64. Without a contractual term which entitled the claimant to receive shares but in any event without any accurate valuation of what he says is due to him, and

with no evidence of any additional salary that he was due to receive, the claimant has failed to prove that he has any entitlement to the sum sought.

65. I appreciate that the claimant believes that he was underpaid for what he did and that he had worked at that rate in the expectation that he would receive a share in the company to compensate for the low wage he was receiving. While that may well be unfair, without evidence to support any contractual entitlement, this Tribunal cannot find that the claimant is due to receive that or any additional sum from the respondent. In these circumstances, the claimant's claim for "share realisation" must be dismissed.

10 **Employment Judge: M Robison**
Date of Judgment: 24 November 2022
Entered in register: 28 November 2022
and copied to parties

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