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EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

AND

Respondents

Mr A Harris

M G Seven Ltd (trading as Gainsborough Flower)

Heard at: London Central Employment Tribunal

On: 13 January 2023

Before: Employment Judge Adkin

Representations

For the Claimant: Ms K McCarthy, McKenzie Friend

For the Respondent: Ms E Afriyie, Legal consultant

JUDGMENT

- (1) The Respondent shall pay the damages for unfair dismissal pursuant to the Employment Rights Act 1996 of **£5,610.78**.
- (2) The Respondent shall pay **£176** for unlawful deduction from wages pursuant to section 13 of the Employment Rights Act 1996 in respect of unpaid furlough pay.
- (3) In the claim for notice pay (breach of contract) **no separate award is made.**

REASONS

Procedural matters

1. This hearing was an in person hearing in Victory House.

2. The Claimant did not produce any evidence nor a witness statement despite three separate orders of the Employment Tribunal to do so and was not allowed to provide new evidence at the remedy hearing for reasons given orally.
3. I heard evidence from Mr Sager the Director and manager of the Respondent.
4. I received a remedy bundle of 88 pages prepared by the Respondent.

Award for unfair dismissal

Basic award

5. The basic award I have calculated using the weekly gross pay of £325.67 conceded in the Respondent's counter schedule of loss at page 87 of the remedy bundle.
6. $25.5 \times £325.67 = £8,304.59$
7. There is a reduction of 50% under section 122(2) ERA 1996 following the Tribunal's judgment of 2 March 2022. ($£8,304.59$ less 50% =) **£4,152.29**;

Compensatory award

8. The Claimant's schedule of loss dated 3 September 2021 states:

"The claimant claims he has been unable to find work or apply for work due to the depression and anxiety caused and or exaggerated by the unfair disciplinary process and the unfair dismissal and therefore unable to achieve a similar salary as he was paid by the respondent. The Claimant by virtue of the unfair dismissal has lost confidence in the work environment which together with the above factors has caused ill health and financial hardship

The Claimant claims that the process of the unfair dismissal was not lawful no notice or communication was made the claimant was lawfully in lockdown during the period of which the Respondents seeks to rely as breach of contract.

The Claimant was suffering from injury of which occurred during work hours the van used for work was that of the Claimants and was in repairs of which the respondent was aware the respondent has possession of the Van which has caused further loss of earnings in respect of mitigating being unable to seek work without transport

As a direct result of the Respondent unfairly dismissing the Claimant during a period of sickness following a non-fault accident during the working day the Claimant was unable to of received the relevant statutory sick benefits or any relevant benefits within the insurance policy of which was held in the claimant's name and the respondent being a named driver

The claimant caring for his father during the period of Covid was self-isolating which the Respondent was made aware when the Government of lifted some restrictions

The Claimant was unaware of any breach or alleged failure to attend work as no such law allowed or made the nature of the Respondent business to be open or functioning during the period alleged

The Respondent claimed furlough which was not communicated or discussed which has never been paid the Claimant has not been paid in full since January 2020

9. Despite being directed by the Tribunal three times to file witness evidence dealing the reasons why he could not work, the Claimant did not comply with the Tribunal's order.
10. I must therefore deal with the compensatory award based on the evidence I have. There is a duty on any claimant to take reasonable steps to mitigate that loss.
11. I accept that in the period between the dismissal of 5 May 2020 and 25 May 2020 the Claimant had involvement in the care for his terminally ill father, which was no doubt further complicated by the circumstances of the early period of the pandemic and a understandable lead to shield his father. Thereafter I accept that in the aftermath of his father's death, the Claimant would not reasonably be expected to be seeking employment. I note that a couple of weeks later, by 7 June 2020 the Claimant was sufficiently composed to put in a claim for to the Employment Tribunal. This suggests to me that he had begun to deal with matters other than those family matters.
12. I am not persuaded that on the balance of probabilities the Claimant could not drive from June 2020 onward because of the accident in February 2020.
13. This was a time during the pandemic when there were a large number of roles for delivery drivers given a very significant increase in home deliveries. While I accept Ms McCarthy's submission that it was a difficult time and the implication that it would have been difficult for the Claimant to find work, he was a delivery driver. I find that the Claimant could with reasonable diligence have obtained another delivery role by the beginning of August 2022, i.e. approximately 2 months after presentation of the claim form or 3 months of termination.
14. Assuming that the Claimant could or should have mitigated his loss within 3 months given the availability of delivery work at that time during the pandemic, suggests a figure of 3 months' net pay £3,446.73.

Pension

15. It can be seen from the Claimant's pay slips immediately before his termination that a regular employee contribution of £31.63 was deducted from his gross pay of £1,302.64. This represents approximately 2.4% of gross pay. I am not going to make a separate award for employee contributions since these were deductions from
16. As to employers' pension contributions, this has been hotly contested during these proceedings, out of all proportion to the likely value. The Respondent's position is that the Claimant has the ability to login to NEST the auto-enrol pension and see the contributions made. The Claimant appears to have been unable or unwilling to do this and points out that the Respondent should have the figures, just as the Respondent has provided payslips. Indeed during the course of the hearing Mr Sager was able to access employer contributions to other employees on his smartphone, which rather underlines that he could have easily provided this documentation. I declined to start looking through Mr Sager's mobile telephone during the course of the hearing. Both parties have had ample opportunity to produce documentary evidence as to the position on pension contribution.
17. Mr Sager confidently told me that the employer contribution was greater than the employee contribution and initially confirmed that it was 3%. A bit later in the hearing, not during the course of his evidence, he said that he made a mistake and it was 0.3%. This figure seems low.
18. Doing the best I can, in an absence of proper documentation, which either side could have provided but did not, I find that the combined employer and employee pension contributions amounted to 5%. In those circumstances I am going to increase the net pay figure of £3,446.73 by 5% to reflect pension contributions, making £3,619.07.

Loss of statutory rights

19. I have added to the figure of £3,619.07 an award for loss of statutory rights of £250 to give £3,869.07 to which deductions should be made, as set below.

Applying deductions/increases to compensatory award

20. I have applied two deductions and one increase to give effect to the judgment made on 2 March 2022.
21. 25% reduction of the compensatory award under the principle in *Polkey v AE Dayton Services Ltd* [1987] IRLR 503 to reflect the possibility that a fair dismissal might have taken place in any event, i.e. a deduction of (25% of £3,869.07 =) £967.27, giving sub-total of £2,651.80.
22. 10% increase in compensation for unfair dismissal under s207(A) TULRC(A) 1992 to reflect an unreasonable failure to comply with the ACAS code of practice i.e. an increase of (10% of £2,651.80 =) £265.18, giving sub-total of £2,916.98.

23. 50% reduction of the compensatory award pursuant to section 123(6) ERA to reflect the extent to which the Claimant caused or contributed the circumstances of his dismissal i.e. a deduction of (50% of £2,916.98 =) £1,458.49, giving final figure for the compensatory award of £1,458.49.

Total award for unfair dismissal

24. Adding the basic award (less deductions) of £4,152.29 to the compensatory award (to which deductions applied) giving £1,458.49 gives a total award for unfair dismissal of **£5,610.78**.

Furlough pay

25. In respect of the claim furlough pay (unlawful deduction from wages pursuant to section 13 of the Employment Rights Act 1996) the Claimant has failed to produce an updated schedule of loss and failed to produce a witness statement. Neither the Claimant nor Ms McCarthy could provide a calculation or even suggest a figure for furlough pay at the remedy hearing, even when I underlined that the burden was on the Claimant to show the loss and that in default of this I would simply accept the concession put forward by the Respondent.
26. Based on a concession from Mr Sager the Respondent's Director made during the course of the remedy hearing, I award **£176** for furlough pay.

Damages for breach of contract (notice pay)

27. The claim for damages for breach of contract arising from non-payment of notice pay on termination is claimed as 4 weeks, which based on a gross weekly pay of £325.67, gives a figure of £1,302.68.
28. This figure overlaps with the compensatory award for unfair dismissal. The Claimant cannot double-recover and accordingly there will be **no separate award for breach of contract**.

Employment Judge Adkin

Date 16 January 2023

WRITTEN REASONS SENT TO THE PARTIES ON

16/01/2023

FOR THE TRIBUNAL OFFICE

Notes

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the Claimant (s) and respondent(s) in a case.

The parties may request written reasons for any decisions given orally in the hearing, provided that this is done within 14 days of the date that this document was sent to them.