



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101904/2023

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Held in chambers in Glasgow on 18 May 2023

Employment Judge D Hoey

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Mr T Palczynki

Fourth Claimant

JH Transport Limited

Respondent

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JUDGMENT

Rule 21 of the Employment Tribunal Rules of Procedure 2013

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1. The judgment of the Employment Tribunal is that the fourth claimant was unfairly dismissed.

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2. The fourth claimant is entitled to a basic award of **THREE THOUSAND SEVEN HUNDRED AND ELEVEN POUNDS AND FIFTY PENCE** (£3,711.50) and a compensatory award of **EIGHT THOUSAND FIVE HUNDRED AND EIGHTY NINE POUNDS AND FOURTEEN PENCE** (£8,589.14).

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3. The total award is therefore **TWELVE THOUSAND THREE HUNDRED POUNDS AND SIXTY FOUR PENCE** (£12,300.64)

4. The recoupment regulations do not apply to this award.

5. The remaining claims are dismissed.

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REASONS

1. The fourth claimant had raised a number of claims. The respondent had not defended the claims. While there was a proposal to strike the respondent from

the companies house register that process had been paused. There was no suggestion of any ongoing insolvency proceedings.

2. A case management preliminary hearing had been fixed to progress the claims. The respondent chose not to attend or be represented at that hearing and the claims proceeded as undefended.
3. Following the case management preliminary hearing the Tribunal issued a Note to the fourth claimant and respondent setting out in clear terms what sums the fourth claimant sought and why. The Note was served on the respondent to allow any comment, which failing it was possible that a judgment may be issued without the need for a hearing in the absence of any defence to the claims. No response was received from the respondent to that Note.
4. In the absence of any response to the Note it is possible to issue a judgment from the material available.

15 **Facts**

5. From the material before the Tribunal it is possible to make the following findings.
6. The respondent ceased to pay wages due to the fourth claimant in respect of work done and ceased all contact.
7. The fourth claimant had been dismissed as a result of the respondent failing to pay him for work done. The fourth claimant treated himself as dismissed (and the respondent did not defend the claim where the claimant asserted he had been dismissed). The failure to provide him with work, pay him wages or engage with him had amounted to a dismissal.
8. There was no process or attempt to engage with the fourth claimant prior to the respondent's decision to cease to provide him with work or pay him wages for work done as required in terms of his contract. The failure to pay wages and provide work was a fundamental breach of contract.

9. The fourth claimant argued that he had been dismissed, there being no work provided by the respondent nor engagement and an absence of wages. At the hearing the claimant confirmed that he was in fact claiming unfair dismissal only, and he was content that all the sums he sought were included in this award. The respondent had not defended the claim and there was no evidence to challenge the fourth claimant's assertion that he had been dismissed. There was no procedure ordinarily associated with a fair dismissal.
10. The fourth claimant was 44 years old with net weekly pay of £673.38.
11. Wage loss amounted to 23.29 weeks giving loss of £15,680.13. The fourth claimant's pension loss was £23.29 x 23.29 weeks yielding £551.87.
12. The fourth claimant earned £8,142.86 during the relevant period which mitigation falls to be deducted.
13. The total losses amount therefore to £8,089.14.
14. The claimant was not in receipt of any statutory benefits.

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Law

15. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996. An unfair dismissal claim can be pursued only if the employee has been dismissed as defined by Section 95. Section 95(1)(c) which provides that an employee is dismissed by his employer if: "the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."
16. The principles behind such a "constructive dismissal" were set out by the Court of Appeal in **Western Excavating (ECC) Limited v Sharp** [1978] IRLR 27. The statutory language incorporates the law of contract, which means that the employee is entitled to treat himself as constructively dismissed only if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no

longer intends to be bound by one or more of the essential terms of the contract.

- 5 17. The term of the contract upon which the claimant relied in this case was the express term relating to payment of wages. Failure to pay wages can amount to breach of an express term that would entitle the employee to resign.
18. In order for the employee to be able to claim constructive dismissal, four conditions must be met:
- 10 a. There must be a breach of contract by the employer.
- b. That breach must be sufficiently important to justify the employee resigning, (or the last in a series of incidents which justify his leaving).
- c. He must leave in response to the breach and not for some other, unconnected reason. The breach should be a reason in the sense of
- 15 played a part in the resignation (but does not need to be the principal cause – **Wright v North Ayrshire Council** [2014] IRLR 4).
- d. The claimant must not delay too long in terminating the contract in response to the employer's breach, otherwise he may be deemed to have waived the breach and agreed to vary the contract, called
- 20 affirmation.
19. If the employee leaves in circumstances where these conditions are not met, he will be held to have resigned and there will be no dismissal.
- 25 20. A dismissal also arises where the employer ends the contract of employment.
21. A successful claimant is entitled to a basic award (section 119), which is calculated in a similar way to a redundancy payment.
- 30 22. 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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23. Ultimately the compensatory award should be such amount that is just and equitable.

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24. 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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Decision and discussion

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25. The fourth claimant set out that he had been dismissed and was seeking compensation. The respondent had not defended that claim and there was no basis to challenge the fourth claimant's assertion that the failure to provide him with further work, pay him wages for work done or engage with him had amounted to a dismissal. The fourth claimant was therefore dismissed.

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26. The fourth claimant's dismissal was unfair, there being no process or attempt to engage with the fourth claimant prior to ceasing all contact and failing to engage with the claimant. The failure to pay wages and provide work was a fundamental breach of contract. The fourth claimant was therefore dismissed and the dismissal was unfair.

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27. The fourth claimant is entitled to compensation for his unfair dismissal.

28. In respect of the basic award (which is comparable to a redundancy payment) the fourth claimant was 44 years old with weekly pay of £673.38. The multiplier would be 6.5 given the claimant's age and the applicable statutory cap on a week's pay is £571. The basic award is therefore £3,711.50.

29. In respect of the compensatory award, the fourth claimant earned £673.38 per week with the respondent. His losses run for 23.29 weeks giving loss of £15,680.13. The fourth claimant's pension loss is £23.29 x 23.29 weeks yielding £551.87. The fourth claimant earned £8,142.86 during the relevant period which sum falls to be deducted. The total losses amount therefore to £8,089.14. He is also due £500 in respect of loss of statutory rights.
30. As the fourth claimant had not been in receipt of any statutory benefits the recoupment regulations do not apply.
31. The fourth claimant confirmed he was not seeking any further sums and the respondent is ordered to pay to the fourth claimant the foregoing sums.

15 **Employment Judge: D Hoey**
Date of Judgment: 18 May 2023
Entered in register: 18 May 2023
and copied to parties