



THE EMPLOYMENT TRIBUNAL

SITTING: at London South (by CVP)

BEFORE: Employment Judge Tueje

BETWEEN:

LEON CROSSKEY

Claimant

-and-

TREVOR SYMES

Respondent

ON: 30th August 2023

Appearances:

For the Claimant: Mr Martin Phillips MBE (lay representative)

For the Respondent: Did not attend

JUDGMENT WITH REASONS

Judgment

1. The claim for unfair dismissal is well-founded and is allowed. The Respondent is ordered to pay to the Claimant compensation of £10,441.42, calculated as follows:
 - 1.1 A basic award of £7,607.00.
 - 1.2 Loss of statutory employment rights assessed at £500.
 - 1.3 Holiday pay of £2,874.42, representing 9 days annual leave.
2. The claim for wrongful dismissal is well-founded and is allowed. The Respondent is ordered to pay to the Claimant compensation of £3,832.56.
3. The Respondent failed in his duty to provide the Claimant with a written statement of the main terms of employment pursuant to section 1 Employment Rights Act 1996. Under section 38 of the Employment Act 2002 the above award is increased, and the Respondent is ordered to pay the Claimant the sum of £1,277.52, being four weeks' gross pay.
4. The Respondent is ordered to pay the Claimant an additional uplift

assessed at 25%. The uplift is payable pursuant to section 207A Trade Union & Labour Relations (Consolidation) Act 1992 because the Respondent unreasonably failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015. The amount of the uplift is £2,121.11.

Reasons

Introduction

1. The Claimant was employed by the Respondent as a boatman from 1st June 2007 until he was dismissed by a text message sent on 4th December 2022. The Claimant contends this was an unfair dismissal, that it was also a wrongful dismissal, and that Respondent failed to pay him holiday pay which he had accrued but not taken by the date of his dismissal.
2. The Respondent has not responded to the claim: he did not submit an ET3 response form, and he has not replied to documentation sent to him by the Claimant's representative or the Tribunal service regarding this case. The Respondent did not attend the final hearing of the claim.

The hearing

3. The final hearing was listed on 30th August 2023 at 10.00am. It was heard by Cloud Video Platform.
4. Immediately before the hearing began, and as the Respondent did not attend the hearing, the Tribunal made a number of enquiries.
 - 4.1 Firstly, the Tribunal established a letter dated 22nd February 2023 was posted to the Respondent notifying him that the Claimant had made a claim against him. The letter requested the Respondent completes an enclosed ET3 Response Form, and return it to the Tribunal service by 23rd March 2023.
 - 4.2 The Tribunal's records show on 17th July 2023 it wrote to the parties notifying them the Respondent had not returned a response form, that a hearing was due to be held on 30th August 2023, and requesting additional information from the Claimant.
 - 4.3 On 30th August 2023, the Tribunal service telephoned the Respondent at 10.04am, leaving a voicemail message notifying him the hearing had been due to start at 10.00am.
 - 4.4 The Tribunal service also e-mailed the Respondent at around 10.06am on 30th August 2023 reminding him the hearing had been due to begin at 10.00am that morning.
 - 4.5 The Tribunal service telephoned the Respondent again at 10.28am, leaving a voicemail message notifying him that the hearing had been due to begin at 10.00am.

5. After receiving confirmation at 10.44am from the Tribunal's administrative staff that there was no response from the Respondent to the e-mail and telephone messages, I proceeded with the hearing in his absence. I was satisfied that the Respondent was aware of the date and time the hearing was due to take place, and that he had the relevant information to contact the Tribunal service to obtain the link for the hearing if he wanted to. I was also satisfied that in accordance with rule 47, such enquiries as it was practicable to make had been made, and it was therefore reasonable to proceed in the Respondent's absence.
6. In considering the claim, I had the following documentation:
 - 6.1 The ET1 claim form.
 - 6.2 A document titled "*Grounds of Claim*".
 - 6.3 A Schedule of Loss claiming damages of £17,832.31.
 - 6.4 Text messages exchanged by the Claimant and Respondent in December 2022.
 - 6.5 The Claimant's pay slip dated 25th November 2006 issued by the Respondent.
 - 6.6 The Claimant's pay slip dated 25th April 2020 issued by the Respondent.
 - 6.7 An e-mail from the Claimant's representative sent on 22nd May 2023 to the Tribunal service, copying in the Respondent. Amongst other things, the e-mail clarified the Respondent was the Claimant's employer.
7. I heard oral evidence from the Claimant, given under affirmation. He adopted the claim form and grounds of claim as his evidence in chief.
8. I announced my decision on liability and quantum at the end of the hearing. I confirmed a written decision and reasons would also be sent to the parties.
9. My decision is set out in paragraphs 1 to 4 of the judgment above. My reasons for that decision are at paragraphs 10 to 47 below.

Issues for the Tribunal

10. Before hearing evidence, I clarified the issues in this claim with the Claimant's representative. Those issues were as follows:

Unfair Dismissal

11. Was the Claimant dismissed?
12. What was the reason or principal reason for dismissal? The Respondent implies the reason was redundancy.
13. If the reason was redundancy, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the

Claimant. In particular did the Respondent adequately warn and consult the Claimant.

Wrongful Dismissal

14. If the Tribunal finds the Claimant was dismissed, what notice was he entitled to.
15. Did the Respondent pay the notice pay the Claimant was entitled to.

ACAS Code of Practice 1: Disciplinary and Grievance Procedures (2015)

16. Did the Claimant raise a grievance.
17. If so, did the Respondent fail to deal with the grievance in accordance with the above ACAS Code of Practice.
18. If the Respondent failed to comply with the ACAS Code of Practice, was that failure unreasonable.
19. If the Respondent unreasonably failed to comply with the ACAS Code of Practice, is it just and equitable to award an uplift, and if so, what percentage.

Written Statement of Terms

20. Did the Respondent breach his duty to provide the Claimant with a written statement of the main terms of his employment in accordance with section 1 of the Employment Rights Act 1996.
21. If so, was the Respondent in breach of his duty at the date these proceedings were brought.

Findings of Fact

22. The following findings of fact were reached on a balance of probabilities, having considered the witness evidence, including documents referred to in that evidence, and taking into account my assessment of the evidence.
23. Only findings of fact relevant to the issues, and those necessary to determine the issues, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. I have not referred to every document that I read and/or was taken to in the findings below, but that does not mean it was not considered if it was referred to in the evidence and was relevant to an issue.
24. The Claimant was born on 2nd December 1976. On 1st June 2007, he began working as a boatman. His hours varied according to the tides, but he typically worked a 37-hour week. He worked alongside a friend, and they were both employed by the Respondent.
25. The Claimant was furloughed from 9th May 2020. During which period he

became unwell. He was subsequently signed off work by his GP, who provided fit notes from March 2021, which certified the Claimant was unfit for work. The Respondent paid the Claimant statutory sick pay until September 2021, when he asked the Claimant to return to work. However, as his GP certified that he was still unfit for work, the Claimant remained on sick leave.

26. Towards the end of November 2022, the Claimant's GP confirmed he was fit to return to work. Accordingly, the Claimant sent the Respondent a text message which read:

Hi mate how's it going iv been to the docs and they said I'm for work again I'm just waiting for my fit note to come and then i will be ok to come back in about 2 weeks time

27. By a text sent on 4th December 2022, the Respondent replied as follows:

Sorry Leon there is no work I am on the verge of packing up.

28. Therefore, the Claimant never returned to work for the Respondent.
29. On 14th December 2022 the Claimant's representative wrote to the Respondent setting out the Claimant's grievance regarding his dismissal. The Claimant received no response from the Respondent regarding his grievance.
30. The Tribunal received the claim form on 17th February 2023. After acknowledging receipt of the claim form, and notifying the Respondent that a claim had been made against him, a rule 21 judgement was issued on 17th July 2023. This notified the parties that as the Tribunal had not received a response form, it may decide the claim without a hearing, but needed the Claimant to provide further information to determine whether a hearing was required. The parties were also notified that the hearing, listed on 30th August 2023, would remain listed unless the Tribunal decided otherwise.
31. The Claimant gave oral evidence at the hearing: I asked him what if anything he knew about whether the Respondent was still in business. The Claimant's evidence was that his friend and former colleague still works for the Respondent. His friend had told the Claimant that in addition to doing his own job, he now has to do the Claimant's old job as well. The Claimant has been informed by others that the Respondent is still operating his business. Furthermore, the Claimant has recently seen the Respondent in his port uniform, indicating he continues to operate his business.

The Law

32. Unfair Dismissal

32.1 To establish a dismissal is fair, an employer must show the employee was dismissed for one of the potentially fair reasons specified at section 98 of the Employment Rights Act 1996. Those potentially fair reasons include that the employee was redundant.

- 32.2 Redundancy can include where employment ends because a business closes down.
 - 32.3 Where an employer makes redundancies, he is required to warn and consult employees.
 - 32.4 For a redundancy to be fair, a genuine redundancy situation must have arisen.
33. Wrongful Dismissal
- 33.1 Where an employee is dismissed, they are entitled to the notice period set out in their contract of employment, providing the contractual period is not less than the notice period at section 86 of the Employment Rights Act 1996.
 - 33.2 If there is no contractual provision or it is less than the notice period at section 86 of the 1996 Act, the employee is entitled to the notice period in that section.
34. ACAS Code of Practice 1: Disciplinary and Grievance Procedures (2015)
- 34.1 By section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, where an employer has unreasonably failed to comply with the ACAS Code of Practice relating to certain specified claims brought by an employee, the employment tribunal may award the employee an uplift of no more than 25%.
 - 34.2 The specified claims referred to at paragraph 34.1 above include claims regarding unfair dismissal and wrongful dismissal.
35. Statement of Terms
- 35.1 By section 1 of the Employment Rights Act 1996, on or before the start of their employment, an employee is entitled to a written statement of the main terms of employment.
 - 35.2 Where an employee has succeeded at an employment tribunal in certain specified claims brought against their employer, section 38 of the Employment Act 2002 applies.
 - 35.3 The specified claims referred to at paragraph 35.2 above include a claim for unlawful dismissal.
 - 35.4 By section 38 of the 2002 Act, if the employer is in breach of section 1 of the Employment Rights Act 1996 on the date the employment tribunal proceedings begin, the Tribunal must award the employee either two or four weeks' pay unless there are exceptional circumstances which would make such an award unjust or inequitable.

Conclusions

Unfair Dismissal

36. I find that the Claimant was unfairly dismissed for the following reasons:
- 36.1 The Respondent's 4th December 2022 text message was the dismissal. The Claimant's prior text message informed the Respondent that, after a period of sick leave, he would be fit to return to work in the near future. However, the Respondent told him not to do so. In fact, having offered to return to work, the Claimant never did so. That was because of the Respondent's text message, and that is why I find the Claimant was dismissed by the Respondent by that text message.
 - 36.2 The Respondent's text message does not provide an express reason for the dismissal, but it is implied that the reason is redundancy. The Respondent claims there is no work for the Claimant, and that he's on the verge of packing up. That must be a reference to packing up the business.
 - 36.3 Ordinarily, where no work is available for an employee and/or the business closes down, that would be a redundancy situation. However, to be a genuine redundancy situation, there must in fact be insufficient work or a winding up of the business. In this case, there was neither. The Claimant's unchallenged oral evidence was that from his direct knowledge, and what he had been told by others, the Respondent's business continues to operate. Furthermore, the Claimant's duties are now being carried out by his friend, in addition to his friend's own work. This indicates that there is work for the Claimant, but it's being carried out by someone else. Accordingly, I find this was not a genuine redundancy situation.
 - 36.4 If I am wrong, and this was a genuine redundancy situation, the Claimant states he was not warned nor was he consulted about redundancy. He was informed by the brief text sent on 4th December 2022. The burden is on the Respondent to show the dismissal was fair, however, the Respondent has not adduced any evidence in response to the claim. Therefore, I accept the Claimant's evidence that he had no or no adequate prior warning or consultation, and first became aware of the dismissal when he received the Respondent's text message. His evidence is consistent with the wording in the exchanged messages. In the absence of a fair redundancy process, evidenced by the failure to warn or consult the Claimant, my alternative finding is, if the reason or principal reason for the dismissal was redundancy, the redundancy was unfair.

Wrongful Dismissal

37. As I have found the Claimant was dismissed by the text message sent by the Respondent on 4th December 2022, and I have found the Claimant had no

prior warning of the dismissal, I conclude he was dismissed without notice.

38. There was no express agreement between the parties as to the period of notice the Claimant was entitled to. Therefore, the Claimant's notice entitlement is governed by section 86 of the Employment Rights Act 1996. By section 86(1)(c), as the Claimant was employed for 16 years he was entitled to 12 weeks' notice.
39. It follows that as the Claimant was entitled to 12 weeks' notice, but was dismissed without notice, he was not given the required notice, meaning this was a wrongful dismissal.

ACAS Code of Practice 1: Disciplinary and Grievance Procedures (2015)

40. The Claimant's case is on 14th December 2022 his representative submitted a grievance regarding his dismissal. It's also the Claimant's case that the Respondent did not respond to the grievance.
41. Paragraphs 33 to 45 of the ACAS Code state an employer must deal with an employee's grievance, and they set out how the grievance should be dealt with. As the Claimant's unchallenged evidence is that a grievance was submitted which the Respondent failed to deal with, I find the Respondent failed to comply with the ACAS Code.
42. The Respondent has not submitted evidence explaining the reason he failed to comply with the ACAS Code. Therefore, without any explanation justifying the Respondent's failure, I find he unreasonably failed to comply with the Code.
43. Accordingly, in all the circumstances, it would be just and equitable to award an uplift in light of the Respondent's unreasonable failure to comply with the ACAS Code.
44. I assess the appropriate uplift to be 25%. There has been a complete failure to acknowledge or engage with the Claimant's grievance. The Claimant's grievance was also about a serious matter, namely his dismissal. Therefore, I consider the maximum uplift is appropriate.

Written Statement of Terms

45. The Claimant's unchallenged evidence is that he had an oral contract of employment, and was never provided with a written statement of the main terms of his employment.
46. Accordingly, I find the Respondent failed to comply with section 1 of the Employment Rights Act 1996. I have not seen any evidence of exceptional circumstances that would justify me refusing to increase the Claimant's award. Therefore, I make an award under section 38 of the Employment Act 2002.
47. I consider it is just and equitable to award four weeks' pay. The Respondent

has failed to provide a written statement regarding any of the main terms of the Claimant's employment. I also take into account that the Claimant has been employed by the Respondent for 16 years, and throughout that time, there has been a failure to comply with section 1 of the 1996 Act. This is a fundamental breach of the statutory provision. Therefore, in my judgment, it's appropriate to make the maximum award.

Employment Judge Tueje

Date: 26th September 2023