EMPLOYMENT TRIBUNALS

Claimant: Mr M Chrissi

Respondents: (1) Heimish Fish Limited

Heard at: Watford Employment Tribunal (via CVP) **On:** 9 May 2024

Before: Employment Judge Tuck KC
Mr T Maclean
Mr S Bury

Appearances:

For the Claimant: Ms Millin, Counsel.
For the Respondents: Miss Martin, Counsel.

Remedy Judgment

1. The claimant is awarded **£5680** compensation for wrongful dismissal.
2. The claimant is awarded **£7028.25**compensation for unfair dismissal.
3. Total award: **£12708.25**

REASONS

1. By a judgment sent to the parties on 27 February 2024 (having been given orally with reasons on 12 February 2024) the tribunal upheld claims for unfair and wrongful dismissal, and awarded £5003.30 compensation for unlawful deductions from wages, failure to provide written reasons for dismissal and failure to provide written statement of particulars of employment.

2. Our findings in relation to unfair dismissal (given orally on 12 January 2024) were as follows:

1. The Claimant asserts that he was dismissed on 22 February 2021 by Mr Piekarski telling him that “David doesn’t want you”. We have also accepted that Mr Piekarski told the claimant that he considered “the ball to be in [his] court”. We have considered whether there was ambiguity and what a reasonable employee would understand. We have had careful regard to the text messages sent by the Claimant on 22 and 23 February 2021. The Claimant was seeking a clarification of his status, and looking for answers on 23 February 2021. This is not consistent with him having understood himself to have been dismissed the previous day. We are not therefore satisfied that the Claimant has shown that he was dismissed by the First Respondent on 22 February 2021.

2. We have therefore next considered whether the Claimant was constructively dismissed.

3. We are satisfied that the Respondent did breach the Claimant’s contract of employment by taking insufficient action to address the Claimant’s ongoing complaints – both of discrimination and of issues which fall short of discrimination.

4. We do not find there was a breach of contract by failing to pay the Claimant for January nor in relation to the Claimant’s absence from work in February. However, the Respondent’s comments on 22 February 2021 did, in the terms expressed in the list of issues, “add to the breach”.

5. In February 2021 there was ambiguity about the Claimants employment status; it was incumbent on the Respondent to clarify this ambiguity by saying whether the Claimant was on paid leave, furlough or whether they had understood him to be resigning by not turning up to work. He had 12 years of service; even if he had simply not attended for 17 days, the ET would expect a reasonable employer to take steps to enquire about the intentions of the employee. Telling him that David did not want him in the shop, and that the ball was in his court did not provide sufficient clarity; it was very unclear what Mr Piekarski wanted the Claimant to do or say to enable his return to work.

6. We accept the failure to address ongoing work complaints and to provide clarity as to his status in February 2021 amounted to a breach of the term of trust and confidence; it seriously damaged the relationship between the parties. This was a fundamental breach.

7. The Claimant set a deadline for a response from Mr Piller by midday on 24 February. Not having received any reply we find

that the Claimant resigned in response to the fundamental breach. The Claimant was therefore constructively dismissed.

8. The respondent relies on the potentially fair reason of SOSR – a breakdown in relations with other employees. We accept that this was the reason (or the principal) for dismissal, and is a potentially fair reason.

9. The ET does not accept that the Respondent acted reasonably in treating that as a sufficient reason for dismissal in all the circumstances. Whilst this is a small employer, there was no attempt to engage in a fair employment process to seek to address issues between the employees in any formal way. The dismissal was accordingly unfair.

10. We do not however in making this finding, conclude that the difficulties between the Claimant and the fishmongers /Mr Andrei were entirely the fault of the latter. Indeed, the altercation on 27 January 2021 began with the Claimant calling Mr Andrei a thief when Mr Piekarski had told the Claimant that this was not the case and he should “leave it”. Similarly, some of the complaints the Claimant was raising against the fishmongers were incredibly petty – such as the changing of his screen saver, while others were exaggerated such as the alleged shoulder barging on 27 January. Others, such as allegations of racist name calling were much more serious, and there were some efforts on the part of Mr Piller to address them, including the meetings of July 2019 and September 2020.

11. The ET will need to hear evidence on “Polkey”, and what would have happened had a fair procedure been followed. We also need to consider “contribution”, i.e. whether the Claimant contributed to his dismissal.

ISSUES

3. The issues for this remedy hearing were as follows:

    a. Wrongful dismissal
        i. The ET having found that the Claimant had eight years complete service, the parties agree he is entitled to eight weeks’ notice of £170 net per week making a total of **£5680.**

    b. Unfair dismissal:
        i. What financial losses has the dismissal caused the claimant?
        ii. Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

iii. If not, for what period of loss should the claimant be compensated?
iv. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
v. If so, should the claimant's compensation be reduced? By how much?
vi. If the claimant was unfairly dismissed, did they cause or contribute to dismissal by blameworthy conduct?
vii. If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
viii. Does the statutory cap of fifty-two weeks' pay or [£105,707] apply?

4. The basic award is agreed in the sum of **£5111**. (9.5 weeks x maximum weeks pay of £538). The Respondent says that this sum should be reduced by reason of the Claimant's conduct; the Claimant says it should be awarded in full.

Evidence.

5. The tribunal received a remedy bundle consisting of 158 pages along with statements from Mr Chrissi and Mr Piller. Both witnesses were cross examined.

6. The claimant contended that he would not have left his employment with the Respondent, and that the higher rate of pay he was on at the EDT had not been for a six month trial period, but had been at the same rate since May 2019. He said he had not seen the payslips before us in the bundle until this court case commenced, and that the only payslips he had ever seen were those when he asked Mr Piller for documents to evidence his income to secure a mortgage in late 2020.

7. He says that since his dismissal, he has not received any state benefits. He has continued to work for Hatzola ambulance service as he had during his employment with the Respondent. It did appear he had worked more hours/shifts in 2022 and 2023 than in 2020 and 2021. He had not applied for any jobs as either a driver, nor in a shop or office. He wanted to pursue self employment.

8. The claimant said that he had worked alongside a key cutter for a year to 'learn the trade', on an unpaid basis – save that he took some time out to care for his grandmother on the death of his grandfather. He said that the reference in his liability statement to learning the trade of a locksmith was an error as he had completed the 3 day course some time ago; further he said that the reference to retraining as a plumber was incorrect. He said that at some point in 2023 he decided to work alongside a friend of his, Mr Houssein in the business of property renovation. He said that for around 18 months he has been attending work on an unpaid basis in order to

learn how to lay floors, skirting boards and door frames. He said that Mr Houssein had a company called Tasarim Ltd, and that he was made a director of that company in February 2024, but since then Mr Houssein has been abroad so “nothing has happened”.

9. On 24 January 2024 Mr Piller had a friend telephone the claimant to ask about his services in property restoration. The claimant said he had teams ready to start work, and said while his partner had over 35 years experience he had three years in the business. He said “we do the bigger stuff, but we also do the smaller stuff because at the moment we’re in, we’re in Golders Green and I’m doing a Jewish person’s house in Golders Green… he’s got a £20million house…. We just done the whole inside”. The Claimant said he was exaggerating to try and win business, both in relation to his experience and how much work he had. The said that Tasarim Ltd had not started trading and could not tell us which company he was doing free work for, in order to “learn his trade”.

10. Mr Piller gave evidence that the Claimant had contributed to the awful atmosphere which had come about, notably instigating the altercation with Mr Andrei on 27 January 2021 when calling him a thief. He contended that in light of previous attempted mediations, the claimant, whilst a good worker, would have been dismissed. Mr Pillar said the situation was so untenable Mr Piekarski was contemplating leaving the business, and the relationship had effectively broken down such that dismissal would have been decided upon in short order. He said the claimant contributed to his dismissal by his behaviour in the workplace. He said that it seemed to him that the claimant “would take any opportunity whatsoever to complain about various colleagues”.

11. As to the Claimant’s rate of pay, Mr Pillar repeated the evidence he had given at the liability hearing, that the higher rate of pay was to assist the claimant in getting a mortgage and for a fixed period of six months.

12. Mr Pillar also disputed that the claimant had sought properly to mitigate his losses, pointing to the thousands of jobs listed for drivers and office administrators in London, and arguing that a year training to be a key cutter and 18 months to lay floors, all unpaid, was untenable.

Submissions

13. Ms Martin submitted that the claimant would have been dismissed within two weeks of the EDT, on notice. She said it was notable he refused to accept responsibility for any of the disputes with his colleagues. She said that his mitigation efforts were (a) wholly unreasonable, and (b) that his evidence he had earned nothing was completely untenable. She said that the ACAS Code – mentioned in the schedule of loss – did not apply as this was not a conduct dismissal.

14. Ms Millin said that the ACAS code was in play because of the grievance of 10 July 2019 and an uplift should be awarded. She said that he was clearly on the higher rate of pay as a permanent increase to salary, so losses accrued at that rate. In relation to Polkey she said that the approach should be as per ***Compass Group v Ayodele*** *[2011[IRLR 802* asking how long the claimant would have continued in employment but for dismissal – to be assessed on a balance of probabilities, and then asking what might have occurred if a fair procedure was followed – with the Respondent bearing the burden of proving they would have dismissed. She said that there should be zero contribution as everyone had been involved in the January 2021 altercation.

Law

15. We have had regard to sections 118 to 124A of the Employment Rights Act 1996, and to section 207A of the Trade Union and Law Reform Consolidation Act 1992. We have also considered the principle from ***Polkey v Dayton Services Ltd*** [1987] IRLR 50 – whether with a fair procedure dismissal may have resulted in any event.

16. We considered ***Compass Group v Ayodele***, which is concerned primarily with the way in which a requested extension to employment when someone reached retirement age should be approached under the Employment Equality Age Regulations 2006. The employer submitted to the EAT that in considering quantum, the ET, in line with ***Polkey*** ought to have considered the chance of any extension being granted if it had been properly considered. Underhill J (as he then was) noted that the employer had not put that in issue nor led evidence or submissions on it. He said if an employer wishes to rely on a chance of earnings being lost at an earlier stage than contended for by a claimant, it was for them to raise the issue and lead evidence on it.

Conclusions on the issues

17. The tribunal accepts that the atmosphere within the Respondent's shop had become 'toxic', noting that the Claimant had left in January 2021 being unable to cope and had asked for some time off, and accepting that Mr Piekarski had reached the point of threatening to quit. Ongoing employment of the claimant and all the other workers was not tenable for this small business, particularly as previous mediation efforts had failed.

18. The Tribunal does accept that some of the issues the claimant was raising – such as the presence of alcohol in a workplace with sharp blades - were serious. We also accept that inappropriate and discriminatory language had (albeit historically) been used towards the Claimant. Nevertheless the Respondent was not in a position where it could find that the dysfunctional atmosphere was the fault of the fishmongers, and would not, quite simply,

have been able to continue trading if it dismissed all of its fishmongers and other staff in order to retain the claimant.

19. Doing the best we can, we find that the Respondent would have fairly dismissed the Claimant within six weeks of the EDT (21/2/21). We find this because they would have had to take advice, arrange a meeting, issue a notice of dismissal, and we consider an appeal would have been likely thereafter. This would have taken much longer than the two weeks Ms Martin advocated for.

20. There is a dispute between the parties as to whether the higher rate of pay the Claimant had been receiving since at least October 2020 was only for a fixed term to assist him getting a mortgage or until an assessment was completed about increases in business turnover, or whether it was a permanent increase. We find that regardless of which is the correct position, the Respondent would not have reduced the Claimant's rate of pay prior to his dismissal.

21. We find that notice would have been for SOSR, and the claimant would have been entitled to notice.

22. We do not find that the Claimant unreasonably failed to mitigate his losses during the six week period with which we are concerned.

23. We have considered next the question of contribution. We find that the Claimant did contribute to the breakdown of relationships with his colleagues, but to a smaller degree than Ms Martin contended. We have considered in turn the relevant conduct, whether it was objectively culpable or blameworthy, whether it contributed to dismissal and if so to what extent. We have also thereafter stepped back to consider what is just and equitable to avoid penalising the claimant both under Polkey and contribution.

24. In relation to contribution, we consider that the conduct of the claimant which was objectively culpable was his frequent complaints about his work colleagues, calling them "clowns" and escalating minor issues such as his screen saver being changed, and also his instigating the altercation on 27 January 2021 by calling a colleague a thief when he had been expressly told not to pursue the issue. All of this was culpable, and did contribute to the Claimant's dismissal. As to the extent of contribution, we have also have in mind that the Claimant was seeking to ensure the best service for the Respondent's customers and, for example by his installation of CCTV was seeking to bring about an improvement in behaviour in the shop. Again, doing the best we can, our assessment is that the claimant contributed to his dismissal to the extent of 25%. We apply this to both is basic and compensatory awards.

25. Finally we have considered Ms Millin's submission as to whether there was a failure to comply with an ACAS Code. She accepted that the disciplinary provisions do not apply to dismissals for SOSR, but sought to argue the grievance code of practice had ben invoked in July 2019. We do not accept that it was, and in any event this complaint from the Claimant led to a mediation meeting. It was a historic matter well before this claim was presented, and is outwith the scope of s207A(2) and/or (3).

26. Our conclusion therefore is the claimant is entitled to:

    a. A basic award of £5111 reduced by 25%.
    b. A compensatory award of six weeks net pay (6 x £710) £4260 reduced by 25%.
       SUB TOTAL: £9371 – 25% **£7028.25**
    c. Notice pay of **£5680.**
    d. **We therefore award: £12708.25**

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Employment Judge Tuck KC.
9 May 2024.
Sent to the parties on:

25/6/2024

For the Tribunal Office:

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