



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH by CVP

BEFORE: Employment Judge Truscott KC
Mr R Baber
Mr S Sheath

BETWEEN:

Mr P Hatch

Claimant

AND

AD2000 Windows Limited

Respondent

ON: 17 June 2024

Appearances:

For the Claimant: In person

For the Respondent: No appearance or representation

JUDGMENT

The unanimous judgment of the Tribunal is:

1. That the claimant was wrongfully and unfairly dismissed.
2. The respondent is ordered to pay the claimant compensation comprising a basic award, a compensatory award and damages for wrongful dismissal totalling £79231.41.
3. The respondent is ordered to pay the claimant unpaid commission of £3,273.97
4. The respondent is ordered to pay the claimant mileage costs of £111.75.
5. The respondent is ordered to pay the claimant's costs of £5428.75 plus VAT of £1085.75 being £6514.50 under rule 76 (1) (a) of the Employment Tribunals Regulations 2013.

REASONS

PRELIMINARY

1. The Tribunal convened to address the claim of unfair dismissal and disability discrimination and the issue of any award of compensation to the claimant. The respondent's notice of appearance and counter claim were automatically dismissed by the Tribunal on 14 November 2023. This is set out in the Tribunal's Order dated 31 January 2024
2. The respondent was notified of this hearing.
3. In the course of the hearing, the claimant withdrew his claims based on disability discrimination.
4. The Tribunal heard evidence from the claimant. The Tribunal was also provided with a bundle running to 272 pages to which reference will be made as necessary.

FINDINGS of FACT

5. The claimant was employed by the respondent as from 23 August 2010 until 31 May 2022.
6. The claimant was treated unfairly by Mr Hewitt of the respondent and resigned as a consequence. Having given his notice of resignation, the respondent dismissed him with immediate effect.

LAW

Compensation Taxation

7. Following the **Gourley** principle, the Tribunal must take care that its approach to tax does not put the claimant in either a better or worse financial position that if the dismissal had not occurred. Where the award will be taxed under section 401 ITEPA 2003, the Tribunal must gross up that part of the award which will fall to be taxed.
8. Section 401 applies to payments in connection with the termination of a person's employment. The first £30,000 are tax free in any tax year, and tax will be paid on sums in excess of that amount. Neither is subject to employee national insurance. The relevant year for consideration of the tax burden is the year in which the claimant will receive the payment. In this case we make the assumption that will be the tax year 2022/23.
9. The amounts to be included in the calculation for section 401 purposes are loss of statutory rights, past financial loss, and damages for wrongful dismissal.

Costs

10. The power to award costs is contained in the Tribunal Rules, which sets out the definition of costs at rule 74(1). Rule 75(1) provides that a costs order includes an

order that a party makes a payment to another party “in respect of the costs that the receiving party has incurred while legally represented”. The circumstances in which a costs order may be made are set out in rule 76 and relevant to this application is rule 76(1) which provides as follows: “A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that (a) a party (or that party’s representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or (b) any claim or response had no reasonable prospect of success.” The procedure by which the costs application should be considered is set out in rule 77 and the amount which the Tribunal may award is governed by rule 78. In summary, rule 78 empowers a Tribunal to make an order in respect of a specified amount not exceeding £20,000, or alternatively to order the paying party to pay the whole or specified part of the costs with the amount to be determined following a detailed assessment. Rule 84 concerns ability to pay and reads as follows: “In deciding whether to make a costs, preparation time or wasted costs order and if so in what amount, the Tribunal may have regard to the paying party’s (or where a wasted costs order is made the representative’s) ability to pay.”

11. In **Gee v. Shell UK Limited** [2003] IRLR 82 CA, the Court of Appeal confirmed that it is a fundamental principle that costs are the exception rather than the rule and that costs do not follow the event in Employment Tribunals. This was confirmed in paragraph 8 of **Vaughan v. London Borough of Lewisham** [2013] IRLR 713 EAT. At paragraph 25, Underhill J. (as he then was) observed that:

“the basis on which the costs threshold was crossed was not any conduct which could readily be attributed to the appellant's lack of experience as a litigant' [but was] 'her fundamentally unreasonable appreciation of the behaviour of her employers and colleagues”.

12. When making a costs order on the ground of unreasonable conduct, the discretion of the tribunal is not fettered by any requirement to link the award causally to particular costs which have been incurred as a result of specific conduct that has been identified as unreasonable (**McPherson v. BNP Paribas (London Branch)** [2004] ICR 1398, Mummery LJ (at para 40):

'The principle of relevance means that the tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of the discretion, but that is not the same as requiring [the receiving party] to prove that specific unreasonable conduct by [the paying party] caused particular costs to be incurred”.

13. In **Barnsley Metropolitan Borough Council v. Yerrakalva** [2012] IRLR 78 CA, at para 41:

'The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had”.

14. Rule 84 provides a discretion whereby tribunals may have regard to the paying party's ability to pay. The fact that a party's ability to pay is limited does not, however, require the tribunal to assess a sum that is confined to an amount that he or she could

pay according to **Arrowsmith v. Nottingham Trent University** [2012] ICR 159, at para 37. In **Arrowsmith**, the Court of Appeal, in upholding a costs order of £3,000 made by an employment tribunal against a claimant of very limited means, commented that:

“[h]er circumstances may well improve and no doubt she hopes that they will” (per Rimer LJ).

15. In **Oni v. UNISON** UKEAT/0370/14/LA, the Employment Appeal Tribunal confirmed that rule 76 imposes a two-stage test on the Tribunal. The first stage being whether the circumstances of Rule 76 are engaged and if so secondly, the Tribunal must determine whether to make the award of costs.

16. Further guidance is provided in **Keskar v. Governors of All Saints Church England School and Another** [1991] ICR 493 EAT. The Employment Appeal Tribunal held:

“The question whether a person against whom an order for costs is proposed to be made ought to have known that the claims he was making had no substance, is plainly something which is, at the lowest capable of being relevant, and we are quite satisfied from the decision itself, in the paragraph which I have read and need not repeat, that the industrial tribunal did have before it the relevant material, namely that there was virtually nothing to support the allegations that the applicant made, from which they drew the conclusion that he had acted unreasonably in bringing the complaint. That in our view, does involve an assessment of the reasonableness of bringing the proceedings, in the light of the non-existence of any significant material in support of them, and to that extent there is necessarily involved a consideration of the question whether the applicant ought to have known that there was virtually nothing to support his allegations.”

18. In determining whether to make a cost order, the Tribunal must go through a three-stage procedure (see paragraph 25 of **Haydar v Pennine Acute NHS Trust** UKEAT 0141/17/BA). The first stage is to decide whether the power to award costs has arisen, whether by way of unreasonable conduct or otherwise under rule 76; if so, the second stage is to decide whether to make an award, and, if so, the third stage is to decide how much to award.

DISCUSSION and DECISION

19. The Tribunal accepted the evidence of the claimant in relation to the merits of his case. The claimant resigned with notice but was dismissed immediately with no notice. The Tribunal decided that the respondent had not established a reason for dismissal and that the claimant was unfairly dismissed.

20. The Tribunal also decided that he had been wrongfully dismissed as he had been dismissed without notice in circumstances where he was entitled to notice.

21. The Tribunal decided that the claimant did not contribute to his dismissal and was entitled to compensation up to the date of the hearing. The Tribunal accepted his losses as set out in his schedule of loss as clarified in evidence. The claimant at times

provided gross figures so, if used, the Tribunal netted them back and then grossed them up as shown in the later calculation.

22. The Tribunal also decided to award the claimant the sums outstanding to him at the end of his employment namely outstanding commission and mileage.

23. The Tribunal decided that the respondent had behaved unreasonably throughout the process leading to the hearing and that it should make an award of costs to the full extent of the schedule of costs prepared by the claimant’s solicitors. Not only did the respondent not attend any of the Preliminary Hearings listed by the Tribunal which resulted in additional costs for the claimant in having to fund Counsel representation for the additional Preliminary Hearing, the respondent has also failed to comply with any of the Case Management Orders that have been made throughout the proceedings. The cost schedule with supporting documents shows the amount due as £5428.75 plus VAT.

Wrongful dismissal.

24. The claimant was dismissed without notice in circumstances where he was entitled to statutory notice. Based on the statute he was entitled to 11 weeks’ notice. Accordingly, he is entitled to £9440.42 being 11 weeks at £858.22 net per week.

Compensation
Basic award

25. The claimant is awarded a basic award of £9421.50 being 16.5 x the weekly pay limited to £571.

Compensatory award

26. The Tribunal awarded £500 loss of statutory rights.

27. The claimant is awarded £81,530.90 being his loss for the period after his notice expired until the hearing (£858.22 x 95) less mitigation by his self employed income in 22/23 of £18,244 and 23/24 of £37806.31. These latter figures were gross so the Tribunal netted them to a total of £42,037.73. He is also awarded £10,530.04 being loss of employer’s pension contributions of £99.34 over 106 weeks. The total is £50523.21. The Tribunal was not invited to award any loss after the date of the hearing.

28. The Tribunal grossed up the awards assuming a 25% marginal rate and a £30,000 tax free allowance.

Compensatory award	£50523.21
Basic award	£9421.50
Wrongful dismissal	£9440.42
Total	£69385.13
Deduct tax free £30,000	£39385.13
Grossed up amount	£79231.41 (£69385.13 +£9846.28)

29. The statutory cap does not apply to this compensatory award under section 117(1) and (2) Employment Rights Act and section 123. The applicable statutory cap is the lower of the current figure of £105,707 or 52-weeks' gross pay (as defined in sections 220 to 229 ERA. 52 week's gross pay is £61,955.92.

Interest

30. Interest is not awarded within the calculation but becomes payable in the event the award is not paid.

ACAS uplift

31. No award was made as no grievance had been made to the respondent.

Employment Judge Truscott KC

Date 25 June 2024