

EMPLOYMENT TRIBUNAL

13 SEP 2017

RECEIVED TODAY Claim No. 14/2017

IN THE EMPLOYMENT TRIBUNAL

BETWEEN:

PETER CARLTON

Claimant

-AND-

MERSEY CASTLE SCAFFOLDING LIMITED

Respondent

AWARDS JUDGMENT

For the Claimant: Kathryn Moran, Litigaid Law
For the Respondent: No appearance (no Response entered)

Background

1. The Claimant filed a Claim Form received 23 May 2017 claiming unfair dismissal, arrears of notice pay and disability discrimination. He stated that if his Claim were successful, he wanted compensation and an apology. The Claimant claimed that he had been employed as a scaffolder by the Respondent from 2 August 2010 to 24 February 2017 and that his gross earnings were £492.00 per week. He is 66 years old.
2. In his Details of Claim, the Claimant claimed that he had suffered an accident at work, injuring his ankle, on 26 June 2015 and was absent from work thereafter. He obtained sick notes up until 3 January 2017, after which he was medically advised that he was fit to return to work but in an office-based position due to his injury. The Details of Claim state expressly that the Claimant was "*unable to return to work as a scaffolder*". In the ETB Termination Form dated 24 February 2017 given to him by the Respondent, the reason for dismissal given is: "*Peter has been off sick since June 2015. We have not been able to contact him as his last certificate was for 3-[1]-17 and he has made no contact*". This is disputed in the Claimant's Details of Claim. The Claimant's claim for unfair dismissal is based on the Respondent's failure to follow any kind of reasonable or fair disciplinary/dismissal procedure.

3. On 24 May 2017, the Claim Form and Details of Claim were sent to the Respondent by the Tribunal by email and, further to a telephone call from the Respondent's director, Mr David Kelly, by post to an address he had provided. No Response was received from the Respondent within the prescribed 21 days or at all.

4. On 13 July 2017, the Tribunal emailed Mr Kelly as follows:

"Effect of non-presentation or rejection of response, or case not contested (Please read attached)"

To date we have not received any Response from [stet] which was emailed and posted to you on the 24 May 2017 and further emails sent on the 20 June 2017 and 29 June 2017 in respect of the above mentioned claim.

The Chairperson appointed Ms Gabrielle O'Hagan will issue judgement accordingly. You are entitled to Notice of Hearing see Rule 21(3).

Please advise available date in which you will be able to attend."

5. A hearing was listed for 17 July 2017. Mr Kelly emailed the Tribunal to say: "Sorry I'm not in Gibraltar on that day". The hearing was re-listed for 17 August 2017. The Respondent did not respond to the re-listing notice email.

6. On 25 July 2017, I handed down a Rule 21 Judgment that: (1) the Claimant's claim of unfair dismissal was well founded and succeeded; and (2) the Claimant's claim for notice pay was well founded and succeeded. I also Ordered: (i) the Claimant to file and serve full particulars of his claim of disability discrimination and any facts and contentions relevant thereto; (ii) the Claimant to file and serve a Schedule of Loss with supporting documentation, and evidence relevant to remedy; and (iii) that the preliminary hearing fixed for 17 August 2017 to be to decide any part of the Claimant's Claim which had not been determined by the Judgment and for any outstanding remedy matters.

7. On 15 August 2017, Litigaid Law emailed the Tribunal to advise that the Claimant had been informed that "Mr Kelly has closed down his business, Mersey Scaffolding Ltd and has sold off all his business assets ...". On 16 August 2017, Mr Kelly emailed the Tribunal to say: "Sorry yes I will be there, however Mersey Castle has ceased trading". On 17 August 2017, before the hearing, he emailed as follows: "... due to the fact there is no longer any Mersey Castle, it has ceased trading I therefore no longer see the point in [the Claimant's] claim, Mersey Castle has no employees, no work and no monies, so I regret to inform you I will not be attending today, you can get me via phone if needed". In response to a query from Litigaid Law, Mr Kelly followed this up by email on 17 August 2017 with a longer account of the status of the Respondent, repetition of the ETB Termination Form reason for the dismissal of the Claimant (sickness absence for 2 years, uncertified at the end of that period), an apology to the Tribunal and an offer to help the Claimant in any way he could.

8. The hearing took place on 18 August 2017. Ms Kathryn Moran of Litigaid Law appeared for the Claimant. The Respondent did not attend. No submissions or skeleton arguments had been filed prior to the hearing. No documentation had been

filed by the Claimant further to the 25 July 2017 Orders, but a Schedule of Loss and evidence were handed up by Ms Moran in the course of the hearing. She also stated that the Claimant was not owed any pay for accrued but untaken holiday at termination, that the Claimant remained unemployed, and that he had not received any unemployment benefit.

9. At the hearing, Ms Moran confirmed that the Respondent company was still extant (not in liquidation or struck off). In response to a question from me as to what the Claimant was seeking, given the Respondent's apparent financial position, Ms Moran said that the Claimant was nevertheless seeking a remedy judgment. At the conclusion of the hearing, I reserved judgment.

The law

Employment Act ("the Act")

10. Section 70(3) provides that where the Tribunal finds that the grounds of an unfair dismissal claim are well-founded and does not make a recommendation for a claimant to be re-engaged by the employer or engaged by a successor or associated employer (under Section 70(2) of the Act), *"the tribunal shall make an award of compensation, to be paid by the employer to the complainant, in respect of the dismissal"*.
11. Section 71 provides:-

"Awards.

71. Where an Employment Tribunal makes an award of compensation for unfair dismissal under section 70 the award shall consist of-

(a) a basic award, and

(b) a compensatory award,

such awards to be calculated in a manner to be prescribed by the Minister in Regulations."

Employment Tribunal (Calculation of Compensation) Regulations 2016 ("the Regulations")

12. Regulation 2 provides:-

"Basic award.

2.(1) The amount of the basic award provided in section 71(a) of the Employment Act, shall be £2,200 or such higher amount as calculated by-

- (a) *determining the period, ending with the effective date of termination, during which the employee has been continuously employed,*
- (b) *reckoning backwards from the end of that period the number of years of employment falling within that period, and*
- (c) *allowing the appropriate amount for each of those years of employment."*

13. Under Regulation 1(2), the appropriate amount is:

"i. one and a half weeks' pay or three times the weekly minimum wage, whichever is the greater, for a year of employment in which the employee was not below the age of forty-one".

14. Regulation 3(1) provides:-

"3.(1) Subject to the provisions of this Regulation, the amount of the compensatory award shall be such amount as the Employment 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."

Awards

15. In the circumstances of this case, in particular that the Respondent is no longer trading and that the Claimant has not sought re-employment, I do not think it practicable or in accordance with equity to make a re-employment recommendation under Section 70(2) of the Act.

Basic award for unfair dismissal

16. Under Regulation 1(2), I make a basic award to the Claimant of £4,428.00, which is one and a half week's pay (of £492.00, as evidenced by the Claimant's payslips) multiplied by each year of the Claimant's employment (six). (This is slightly higher than the figure reached by using the Regulation 1(2) minimum wage calculation, based on minimum wage at termination.)

Compensatory award for unfair dismissal

17. The compensatory award must reflect: *"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"*. In my judgment, this means that not only should net wages be used to calculate the compensatory award, but also that the award will take into account all sums a claimant would have received as wages had they remained employed (of which there is a reasonable expectation of receipt), rather than contractually stated remuneration.

18. In this case, I have held that the Claimant's claim for unfair dismissal was well-founded and succeeded. If he had not been unfairly dismissed, the Claimant's

employment would have continued indefinitely beyond the actual termination date. However, at the termination date, the Claimant had been on nil pay for some time, having exhausted his sick pay entitlement. He would not be entitled to be paid again until he returned to work. It is therefore my finding that the Claimant sustained no loss of wages in consequence of the dismissal, since he would have received no pay if he had continued to be employed and remained on sick leave (bearing in mind the admission in his Details of Claim that he would be unable to return to work as a scaffolder. (In respect of this finding, I have referred to Royal Bank of Scotland v Doherty (UKEAT/0307/14) and Avia Technique Ltd v Kalia (UKEAT/0382/12/JOJ)).

19. I note the Claimant's claims and Ms Moran's submissions that the Claimant could have returned to work on light or office duties and that it was for the Respondent to assist him in this regard. Such issues are however more relevant to a discrimination claim with the statutory duty to make adjustments, but the Claimant has not pursued a discrimination claim. In respect of an unfair dismissal compensatory award, which is calculated by reference to the loss actually sustained by a claimant, I cannot put much weight on these kind of submissions, even in the context of loss of potential future earnings, since they must be based on the hypotheses that the Respondent would have available alternative work, which the Claimant would have been able to do, and that the Respondent would have offered the Claimant such employment.
20. The Claimant does not claim any other loss save for wages and I therefore find that no loss was sustained in consequence of the dismissal and make a nil compensatory award.

Pay in lieu of notice

21. I have held that the Claimant's claim for notice pay was well founded and succeeded. But pay in lieu of notice by its nature relates to the period prior to, at or directly following the date of termination. As described in connection with the compensatory award (above), at termination the Claimant was not receiving any pay. By way of analogy, had the Respondent in February 2017 given the Claimant a period of notice of termination, or pay in lieu, the Claimant would not have received any pay for that period. I therefore assess pay in lieu of notice as nil.

Costs

22. In the Claimant's Schedule of Loss, the Claimant claims costs under Regulation 61. However, this was not particularised any further in the Schedule and the application was not substantiated or pursued by Ms Moran any further in writing or at the hearing. I therefore decline to make any Order as to costs.
23. In summary, I make the following awards of compensation to be paid by the Respondent to the Claimant:
 - (i) a basic award of £4,428.00; and
 - (ii) a nil compensatory award,

totalling £4,428.00.

Gabrielle O'Hagan

**Gabrielle O'Hagan, Chairperson
13 September 2017**