**Case Number: 1600469/2016**

# EMPLOYMENT TRIBUNALS

**Claimant:** **Mr Hugh Jones**

**Respondents** **Graig Shipping PLC**

**Heard at:** **Cardiff** **On: 12 January 2017**

**Before:** **Employment Judge P Cadney**
**Members:**
**Representation:**
Claimant: In Person
Respondent: Mr R Barker

# JUDGMENT

The judgment of the tribunal is that:-

The claimant's claim of unfair dismissal is not well founded and is dismissed.

## REASONS

1. By this claim the Claimant originally brought claims of unfair dismissal, unpaid notice pay and unpaid holiday pay. In respect of the unpaid notice pay and holiday pay on 5 January 2017 the Respondent paid to the Claimant a gross payment of £4665.88 which netted down to £2962.26. This represented a shortfall in the Claimant's original notice pay of £349.62 and payment in lieu of holiday pay in respect of 30.33 days of accrued but untaken holiday.

2. Accordingly the only claim remaining for me to consider is that of unfair dismissal, which arises in unusual circumstances.

3. The Respondent is a family owned business which operates from headquarters in Cardiff with an office in Shanghai. There are two separate elements of the

business, the first is an investment side which invests in shipping structures or in ships itself. This part of the business has been loss making since the 2008 financial crash. The second element of the business is the services side which provides services to clients in industry such as the supervision of the building of ships providing crewing, repairing, insurance services and consultancy services in respect of the condition of ships.

4. The Claimant was employed by the Respondent initially as company accountant from 19 October 2006 with his title and role later becoming that of Group Accountant in October 2007. The events which are relevant for my consideration began in September of 2009 when the Claimant went off work sick. In October 2009 a medical report identified problems with the Claimant's knee and hip. By January 2010 the Claimant had informed the Respondent that the problem could not be cured by an operation and there was no solution in sight.

5. This bought into play an income protection benefit which the Respondent provided as part of the contract of employment to its employees. After two years service subject to the conditions of the policy being satisfied, the policy paid out 75% of basic salary which was paid to the Respondent to be passed onto the employee. In February 2010 Aviva notified the Respondent that in its view the Claimant's condition did not prevent him from being able to carry out his role and therefore he wasn't eligible to receive income protection benefit under the policy. This decision was maintained and confirmed in a letter of 17 September 2010 which resulted in a meeting on 30 September 2010 in which the Claimant confirmed that he could not return to work for the Respondent on any basis and that he intended to challenge Aviva's decision to deny him the benefits under the policy. The Respondent discussed the position with the insurance broker and it was confirmed that in order to be eligible under the policy the Claimant needed to remain employed by the Respondent and accordingly the Respondent decided at that stage to retain the Claimant in employment pending his challenge to Aviva's decision.

6. Following an assessment by a Consultant Orthopaedic Surgeon on 28 February 2011 Aviva changed its position to the extent that the Claimant would be entitled to a proportionate benefit on the basis that its view was that the Claimant could return to work on a part time basis. However as was set out in a letter of the 15 March 2011 the Respondents position was the role could only be carried out on a full time basis and proposals for terminating the Claimant's employment by agreement were set out.

7. In July 2011 the Claimant supplied further medical evidence to support his contention that he was completely unable to perform his role and on 3 August 2011 Aviva confirmed its position. In August 2011 by exchange of letters both the Respondent and the Claimant appeared to agree that his role could not be carried out part time and in addition it was the Claimant's position that in any event Aviva were wrong and that he was not medically fit to work part time in any event even if the work could be carried out part time.

8. On 19 August 2011 the Respondents agreed to continue the Claimant's employment whilst he pursued a complaint to the Financial Ombudsman in respect of Aviva's decision. Nothing then happened until July 2013 when the

Claimant informed the Respondent that he was still awaiting the outcome of the Ombudsman's decision. That decision which was sent out on 6 November 2013 and upheld the claimant's position that the medical evidence indicated that he was not capable of performing even a part time role. As a consequence Aviva accepted the Ombudsman's decision, paid the Claimant's benefits in arrears from the point at which the 26 week waiting period had expired and proceeded to pay him henceforward under the terms of the policy.

9. However this arrangement lasted a very short time as Aviva had developed suspicions about the level of the Claimant's disability and in a letter dated 23 July 2014 set out the observations of a surveillance contractor together with the representations the Claimant had made as to his condition to Dr McNamara and asserted that the two were inconsistent. Aviva had sent the surveillance evidence both to Dr McNamara and an orthopaedic specialist Dr Marsden who had both concluded that in the light of it that the Claimant was fit to return to work on a full time basis. Some of the observations were captured on video and the video footage was supplied to the Respondent. The Claimant's position was then, and remains now, that the assessment of his disability based upon the observations and the video evidence was inaccurate in that neither properly represented his overall state of disability.

10. At this stage a dispute arose as to whether the Claimant could or could not move around during the course of the day. The Respondents position as set out to Aviva, and before me today, is that whilst the Claimant's job was desk based he was free to get up and move around at any time and that the Respondent placed no restrictions on his ability to do so. For completeness sake the Claimant's evidence is that whilst he accepts that this is correct, and that no limitations were placed by the Respondent on his ability to move around whilst at the office, in reality the requirements of the job meant that he would need to spend a long time sitting at his desk and at his computer and that although there was no formal prohibition on him moving around whenever he wanted to, in reality it was unrealistic and the needs of the job did not permit it.

11. There was further correspondence between Aviva and the Claimant in the early part of 2015. The Claimant again complained to the Financial Ombudsman about Aviva's withdrawal of benefit. On 1 September 2015 the Financial Ombudsman concluded on this occasion that it was fair for Aviva to terminate the payment of the benefit on the basis of the conclusion was reached by Drs McNamara and Marsden. As a result by September of 2015 the Claimant had, subject to potential litigation, exhausted all lines of appeal in relation to the withdrawal of benefit by Aviva.

12. The Respondents position as at the autumn of 2015 was that the Claimant had only been employed from 2010 as a formality, "notionally" as the Respondents put it, in order to allow him firstly to pursue his claim against Aviva which would have been valueless unless he had remained in employment and then permitted him to remain in employment in order to allow him to receive the benefits under the policy. His employment was notional in the sense that as was known by all parties he was not fit and had not been fit effectively since 2009 to perform his role either on a full time or a part time basis. Accordingly on 23 October 2015 the Respondent wrote to the Claimant to state that his employment would terminate

with immediate effect. On 26 October the Claimant replied stating that he had not yet received a copy of the Financial Ombudsman's decision and that he intended to appeal anyway and that he wanted his employment to continue. As a result on 20 November the Respondent wrote to the Claimant saying that in the light of the earlier correspondence and his intention to appeal that his employment would continue pending any final determination by the Ombudsman.

13. On 26 January 2016 the situation appeared to crystallize in respect of the benefit claim but altered significantly in respect of other aspects of the Claimant's employment. A letter from the claimant stated "*I have received the final decision of the Ombudsman's service regarding my complaint about Aviva. The Ombudsman has not upheld my complaint and has decided that Aviva acted reasonably in terminating my claim. I do not accept the decision and I may take my complaint to court. However it is now certain that Aviva will not be making any further payments to me through the normal process of the scheme. On 4 December 2015 I had revision surgery on my hip. The operation went well and my recovery progress is good. The view of the Consultant Surgeon is very positive and it is probable that I will be able to return to work in the near future. I plan to return to work in March 2016.*"

14. It is right to point out at this stage that the Respondent is extremely suspicious of the Claimant's integrity and good faith in a number of respects. Firstly the Respondent shares the view taken by Aviva and the Ombudsman that the surveillance evidence and the video footage appears wholly inconsistent with the Claimant's description of his own symptoms and that causes them therefore to doubt the accuracy of the Claimant's description of those symptoms and therefore the honesty of his claim (although the Respondent never reached a concluded view about this). In addition they were clearly extremely suspicious about what has been described at various points as the Claimant's "miraculous recovery" which coincided almost exactly with the final decision as to his claim. They point out that prior to the 26th January the claimant had not given either the respondent or Aviva the slightest hint that there was any prospect of recovery. In evidence before me the Claimant was asked why he had not notified the Respondent earlier about the operation in December. His evidence was that it had been decided by his Consultant in or about June or July 2015 that an operation which could remedy the problem was now possible and that it was eventually undertaken in December of 2015. Prior to that point he did not want to tell the Respondent as he feared the Respondent would pass the information to Aviva. When asked why he would not want the information passed to Aviva the Claimant explained (somewhat unconvincingly it must be said) that he had always intended to tell Aviva in the event that his appeal was successful that he had had the surgery, but he did not want to tell them in advance because he did not know whether the surgery would be successful and he only wished them to discover if and when surgery had been successfully carried out. He therefore did not tell either Aviva or the Respondent that there was at least a prospect of some level of recovery from his previous symptoms. For the avoidance of doubt, however, the respondent's ultimate decision did not turn on the claimant's credibility and nor does the outcome of this a hearing and I have not been asked to make any specific finding about those matters.

15. Following receipt of that letter on 1 February 2016 the Respondent invited the Claimant to a meeting to consider termination of his employment. That letter set out concerns being "*The proposal also reflects the fact that you have not worked for Graig for over six years, but the business and the role of group accountant has changed fundamentally in the interim and that even if your Consultant's optimism is well placed, and I hope for your sake that it is, your are in effect asking us to extend the six year absence by another one to two months at least*."

16. The decision maker was Mr Chris Davies who had been the Claimant's line manager throughout his employment and who was the Finance Director of the Respondent. At paragraph 66 of his Witness Statement he sets out three areas of concern he had prior to the meeting. In summary the first was whether the Claimant could perform the role for which he was employed having been absent for over six years. If he were able to do so, it would require him to have maintained his accounting expertise in that six years and he would need to understand the very significant differences in the business and its accounting practices during that time. Secondly there was unsurprisingly no specific vacancy to which the Claimant could return to as, the Respondent understanding the Claimant to be permanently unable to perform his role, had been appointed a Mr Gerald Philpott initially on a temporary basis in September 2009 to fulfil his role and subsequently full time. Moreover at the time the accounting team was diminishing in size rather than increasing as is evidenced by the fact that when Mr David Tobin resigned in the early part of 2016 he has not been permanently replaced. The third element was doubts as to the Claimant's integrity and whether he could really be trusted. However it was only the first and second of those two which ultimately resulted in the decision to dismiss.

17. The notes of the meeting of 10 February 2016 the accuracy of which is not in dispute include the following:-

    CD – Have you maintained your CPD over the last six years in accountancy? HJ – No, not a great deal. I have been doing small bits and pieces. I am treasurer for the choir. I have been involved in looking after my parents and my wife's parents. As far as accountancy is concerned I have not been very much involved.

    CD – Given that it is a senior role and a challenging market I have concerns in your ability to pick up where you left off. What is your understanding of Graig Shipping and what we are doing or how we are now structured? HJ – Having visited the website I am aware of Idwel Marine Consultancy and that you have moved into the layout business but can't remember off hand. CD agreed that the costs of consultancy was a new part of the business but the layout business was discontinued in 2011.

    CD asked – Have you been in touch with any of your work colleagues? HJ – No.CD – Do you understand how the finance team is structured? HJ – No. Only what I've seen on the website.

    CD – The website is one route. You could have searched Companies House website or asked me. Do you have any understanding of our financial performance? HJ – No. Up until a few months ago I had no intention of returning to work, but the situation has changed. HJ – I have to respond to your questions

about the organisation. I appreciate that things have changed. I have a good history of learning. I am confident that in a short period of time I could pick things up. I accept that I would be like a fish out of water to start with in the short term.

18. As a result Mr Davies considered the Claimant's contention firstly that he could return to work and secondly that he could within a short time effectively get back up to speed both with accounting practice and with the nature of the business was naïve. As Mr Davies puts it at paragraph 71 of his Witness Statement "*He had been absent for over six years and knew we were concerned about his ability to slot back into the business. He had not come to the meeting in any way prepared for it or given any thought as to how the practical issues that would arise if he returned to work could be overcome. He had no questions for me about, and showed no interest in, changes in the business and how this affected the scope of his old role. In effect his case was simply that he was now fit to return to work and would like to do so. Although he said he appreciated our position, other than suggesting in broad terms a phased return to work, or different duties, he had nothing to say about our concerns*."

19. Mr Davies took the view that the Claimant had not allayed his concerns. On 12 February sent a letter which stated "*Having considered carefully the points I regret to advise that I am unable to accommodate your request to return to work for the following reasons, (1) an absence of over six years (2) the fact that we only ever agreed to maintain your employment notionally so that you could pursue your PHI claim and we were very clear on this to you over the years (3) your statement in 2010 that you did not feel able to return to work for Graig in any capacity leading us to make alternative arrangements to cover your role and the needs of the business (4) your acknowledgment that your role could not be carried out on a part time basis and that you intended to seek part time work locally (5) the fact that even if your Consultant's optimism is well placed you will not be fit for work for at least another one or two months and (6) the fundamental changes to your role since you were first absent and your acknowledgment during our meeting that you have not kept abreast of financial regulations and were unaware of the current financial position of the company*." He was dismissed with 9 weeks notice which as set out above in fact was in error of one week too short.

20. The Claimant appealed and his appeal was heard by Mr Phillip Atkinson who is the Group Technical Director. Mr Atkinson's position is that that places him at the same level within the business as Mr Davies and that he was perfectly able if he wished to do so to overturn Mr Davies's decision. The Claimant does not accept this. The Claimant's initial position was that in fact Mr Atkinson was subordinate to Mr Davies.As the hearing went on his position altered slightly in as much as he suggested that even if Mr Atkinson was correct that he was formally a Director and therefore formally at the same level as Mr Davies, Mr Davies had been in the company for much longer and had been a Director for much longer and therefore in reality Mr Atkinson was not as senior as Mr Davies and this was not in reality a proper appeal.

21. The Claimant had on 20 February 2016 set out his Grounds of Appeal. One of which was that he did not accept that his employment was notional. He reiterated that he would be able to return to work on 7 March, that he was able to offer

flexibility including a phased return and a different role and repeated that he would effectively be able to get up to speed with the financial regulation and the company's position itself relatively quickly. Mr Atkinson's decision effectively took the form of a review and he concluded following an appeal hearing which took place on 2 March 2016 that nothing had effectively changed which would provide a reason to overturn Mr Davies's decision. As he sets out at paragraph 17 of his Statement, "*Frankly I thought Hugh's position was misguided. The role of group accountant was a crucial one with significant responsibilities. He would have been absent from work for over six years during which time Graig had evolved significantly and new accountancy standards had been introduced. I was aware of the significant efforts made by the corporate accounts team in Hugh's absence to familiarise themselves with the new systems Graig had introduced and the substantial amount of time this had taken*" and at paragraph 18 he states, "*As it was I did not see how we could accommodate the return of someone who refused to acknowledge there were any problems arising out of his proposed return and had made minimal effort to convince us he was ready and able to return*." As a consequence the appeal was dismissed.

Conclusions

22. The Respondent submits that this is an unusual case, but one which is potentially fair in that it falls within some other substantial reason for termination of employment within the meaning of Section 98(2) of the Employment Rights Act 1996. It appears to me that that is correct and that this is a potentially fair dismissal.

23. The question then is whether a dismissal is fair within the meaning of Section 98(4). In respect of procedure the only complaint is the allegation that Mr Atkinson was insufficiently senior to afford the Claimant any genuine appeal. In my judgment that complaint is misplaced. I accept that Mr Atkinson was at the same level within the company as Mr Davies and as a Director and not one who was formerly concerned with the area in which the Claimant worked he was in my judgment sufficiently independent to be able to come to a conclusion as to the appeal. In any event for the reasons set out below, in my judgment the decision to dismiss on any analysis fell squarely within the range of reasonable options open to the Respondent and nothing that was said on appeal altered that fundamental position.

24. The Respondent submits that the reasons for dismissal are self evident from the sequence of events set out above and can be summarised as follows: firstly, but for the need to retain him as an employee in order to allow him to retain benefits under the Income Protection Policy, the Claimant would have been dismissed approximately six years earlier on the basis that as he and the Respondent both agreed, he was permanently (as it was understood at the time) unable to fulfil his role whether on a full time or part time basis. But for the existence of the Income Protection Plan it follows automatically that his employment would have been terminated at some point probably in the early part of 2010. The Respondents were entitled to take into account when considering whether to dismiss an employee the fact that he had not and had not in reality been engaged to provide any service to them for a period of six years.

25. Secondly, Mr Davies was entitled to come to the conclusion that in the absence of the Claimant having maintained Continuing Professional Development and on his own acceptance that he had not kept up with accounting practice for a period of some six years, that the idea that he could get up to speed within a very short period of time was misplaced. Thirdly and in a related point, in any event it was entirely reasonable to conclude that where there is an individual who has been employed to perform the job the Claimant previously carried out, and is performing that job perfectly well that it is not reasonable to require an employer to dismiss that person in order to allow them to continue the employment of someone who had not performed that role for six years. Furthermore there was in reality no alternative role available for the Claimant. The Respondent was not recruiting and was in reality seeking to reduce the size of its accounting team.

26. Put simply, if it was reasonable to take the view that the Claimant could not return to his previous role and if there was no other role to which he could be allocated, the only conclusion is that his employment would have to be terminated.

27. The Claimant's case in reality amounts to an assertion that there is no such thing as notional employment. An employee is either an employee or not and that having decided to keep him on for whatever purpose that the Claimant was an employee of the Respondent with all of the rights that pertain because of that. He could not be treated as a second class citizen simply because the purpose of maintaining his employment was to allow him to receive benefits under an income protection policy. The Respondent both could have and should have found him work to do once he had recovered sufficiently to return to work in March 2016.

28. However in my judgment the claimant's arguments amount in the end to the proposition that having maintained his employment (for whatever purpose) the respondent was obliged to create a job for him when he became fit enough to return. Unfortunately for the claimant there is no obligation to create a job in these circumstances, and the respondent's submissions, as set out above, are in my view unassailable. It was in my judgment on any analysis entirely reasonable to conclude that the Claimant could not return to his former job and in the absence of any alternative actually being available the decision to dismiss falls squarely within the range reasonably open to the respondent. In those circumstances the decision to dismiss in my Judgment was fair within the meaning of the Employment Rights Act 1996.

29. I should make one final point. In the Claimant's witness statement he appears to advance the proposition that he believed that his dismissal was unfair, in part because he believed that the Respondent had effectively colluded with Aviva to ensure the withdrawal of benefits. This appears to include an assertion that the Respondent misled Aviva by accepting that there was no restriction on the Claimant moving around during his employment. For the reasons given above the Claimant asserts that this, whilst technically true, certainly does not reflect the reality of his role as the Respondent knew or should have known. In the course of the hearing however, the Claimant asserted that he was intending to bring further legal action against either Aviva or the Respondent in respect of what he

considers to be a breach of the Respondents legal obligation to support him in his claim against Aviva rather than to undermine it and that he did not seek in this Tribunal any finding of fact as to whether as a matter of fact the Respondent did or did not collude with Aviva in terminating his benefit payment under the policy. Accordingly I have not addressed that in this Judgment and for the avoidance of doubt I make no findings about those allegations.

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Employment Judge P Cadney
Dated: 10 February 2017

JUDGMENT SENT TO THE PARTIES ON

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS

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**NOTE**:
This is a written record of the Tribunal's decision. Reasons for this decision were given orally at the hearing. Written reasons are not provided unless (a) a party asks for them at the hearing itself or (b) a party makes a written request for them within 14 days of the date on which this written record is sent to the parties. This information is provided in compliance with Rule 62(3) of the Tribunal's Rules of Procedure 2013.