



THE EMPLOYMENT TRIBUNALS

Claimant: Mr P Flemming

Respondent: Kingly Solicitors Ltd. t/a Coles Solicitors (in voluntary liquidation)

Heard at: Newcastle CFCTC (By CVP) **On:** 1 February 2021

Before: Employment Judge Newburn

Members:

Representation:

Claimant: In person

Respondent: No attendance

JUDGMENT

1. The Claimant's claim for breach of contract brought under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 succeeds in respect of the Claimant's claim for notice pay and holiday pay.
 - 1.1. unpaid notice; the net sum of **£259.38** for the Claimant's notice pay and **£40.24** in respect of Employer's pension contributions.
 - 1.2. holiday pay, **£2,547.33** for 20.5 days' pay in lieu of untaken holiday; This is a gross award and the Claimant shall be liable to the Inland Revenue for any payments of tax and national insurance thereon;
2. The Respondent has made an unauthorised deduction from the Claimant's wages and is ordered to pay the Claimant the gross sum of **£1,837.29**, plus a further **£120.72** representing employer's pension contributions. This is a gross award and the Claimant shall be liable to the Inland Revenue for any payments of tax and national insurance thereon.
3. The Claimant's claim for unfair dismissal is well founded. However, no compensation is due to the Claimant in respect of his unfair dismissal because:

- 3.1. The Claimant has received a statutory redundancy payment and therefore no basic award is payable.
- 3.2. No compensatory award is due as there was a 100% chance that the Claimant would have been dismissed had a fair redundancy procedure been followed. Accordingly, the compensatory award is reduced by 100% pursuant to the principles in Polkey v A E Dayton Service Limited 1988 ICR 142.
4. This makes a total award of **£4,804.96**.
5. The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 do not apply to these awards.

REASONS

The Issues

1. The issues to be determined in this case were as follows:
 - 1.1. What was the Claimant's notice period?
 - 1.2. Was the Claimant paid for that notice period?
 - 1.3. If not, was the Respondent entitled to dismiss without notice?
 - 1.4. Did the Respondent fail to pay the Claimant for annual leave the Claimant had accrued but not taken when his employment ended?
 - 1.5. Did the Respondent make unauthorised deductions from the Claimant's wages and if so, how much was deducted?
 - 1.6. Was the Claimant unfairly dismissed?
 - 1.7. If so, had a proper procedure been followed by the Respondent, what are the chances that the Claimant would have been dismissed in any event?
 - 1.8. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply to any of the Claimant's claims?
 - 1.9. Did the Respondent or the Claimant unreasonably fail to comply with it?
 - 1.10. Is it just and equitable to increase or decrease any award payable to the Claimant?
 - 1.11. If so, by what proportion, up to 25%?

The Hearing

2. The Claimant's claim was one of multiple claims brought against the Respondent company. Evidence in respect of the Claimant's claim and the claims of 7 other employees were heard together.
3. At the start of the hearing I was provided with an up to date Excel spreadsheet which comprised a table confirming the claims that each Claimant was making against the Respondent.
4. I was also provided with one bundle of evidence amounting to 240 pages in respect of each Claimant's case against the Respondent. The bundle contained each Claimant's witness statement, schedule of loss, and documentary evidence.
5. To this bundle, I admitted further evidence from the Claimants amounting to an additional 27 pages which was inserted at the end of the bundle, making the total bundle 267 pages. In relation to the Claimant's claim, that additional evidence comprised 5 payslips inserted as pages 246 to 250 of the bundle, and 2 letters from the Insolvency Service dated 19 October 2020 and 22 October 2020 inserted as pages 251 to 253, and 254 to 265 respectively. I considered all of the evidence submitted by the Claimant and heard his evidence on oath.
6. Despite the fact that the Respondent is in voluntary liquidation, the Claimant confirmed that he wished to obtain a judgment.
7. There was no evidence that any stay of this claim had been obtained under section 112 of the Insolvency Act 1986.

Findings of Fact

8. The Respondent carried on business as a solicitors' practice operating from multiple offices across the North of England. The Claimant was employed for the Respondent firm of Solicitors from 2 January 2016 as a Solicitor initially working 5 days per week, however reducing this to 4 days per week in 2019.
9. The Claimant was unable to locate a copy of his employment contract as it had remained in the offices further to the shut down and he was unable to access the same. The bundle contained contracts of employment from the other Claimants employed with the Respondent at pages 77 and 167. The Claimant gave oral evidence on the terms of his contract where no documentary evidence regarding a term of his contract was available.
10. The Claimant's payslips at pages 246 to 250 of the bundle showed that the Claimant's earnings. The figures taken from these wage slips demonstrated that the Claimant earned:

10.1. Pay:

- | | |
|-----------------|-------------------------------------|
| 10.1.1. Monthly | £3,875.00 gross and £2,804.44 net; |
| 10.1.2. Weekly | £894.23 gross and £647.18 net; and, |
| 10.1.3. Daily | £223.56 gross and £161.79 net. |

10.2. Employer's pension contributions:

- 10.2.1. Monthly £174.38;
- 10.2.2. Weekly £40.24; and,
- 10.2.3. Daily £10.06.

11. The Respondent employer's pension contributions were unclear from the Claimant's payslips, however the Claimant and all Claimants in the hearing gave evidence in their schedule of loss that employer's pension contributions were 4.5%. I accepted this figure and I calculated the Claimant's employer pension contributions accordingly.
12. On 12 August 2020, the Respondent company was subject to an intervention by the Solicitors Regulation Authority ("SRA") resulting in the immediate shutdown of all of the Respondent's offices. There was no warning, consultation, or notice of redundancy given to the Claimant, as the offices were immediately closed further to the intervention on 12 August 2020.
13. The Claimant was dismissed by reason of redundancy on 12 August 2020.
14. The Claimant confirmed he received his final pay to the end of July 2020. Further to this payment the Respondent did not pay the Claimant in respect of the following:
 - 14.1. his notice pay;
 - 14.2. accrued but untaken holiday; and,
 - 14.3. arrears of pay for the period 1 August 2020 to 12 August 2020.
15. Dealing with those payments in turn:

Notice pay:

16. Contracts of employment for the employees working as Solicitors for the Respondent demonstrated that Solicitors employed with the Respondent were entitled to 3 months' notice on termination of their contracts.
17. I found that the Claimant was entitled to 3 months' notice on termination of his contract, and the Claimant did not receive any payment from the Respondent in respect of his contractual notice period.
18. The Respondent did not make any payment to the Claimant on termination of his employment in relation to his notice pay.

Holiday pay:

19. Contracts of employment from the Respondent's other employees in the bundle demonstrated that the Respondent company holiday year ran from 1 January 2020 to 31 December 2020.
20. The Claimant confirmed that upon reducing his work to four days per week it was agreed he was entitled to 23 days annual leave per year, this was not prorated.

21. I accepted the Claimant's evidence that the Respondent had agreed to carry over nine days leave from the 2019 leave year for the Claimant as the Claimant had not been able to take them during that year and that he had taken three days leave in the 2020 leave year.
22. The Claimant therefore had 23 days accrued but untaken holiday as at the date of his termination of employment. The Respondent did not make any payment to the Claimant in respect of this annual leave.

Arrears of pay:

23. In April 2020, the Respondent company changed the payment day of the Claimant's wages, so that instead of being paid on or around the last day of the month, the Claimant was paid on or around the 25th of the month. The Claimant's payslips from April 2020 onwards demonstrated that the Claimant was paid on or about the 25th of each month thereafter. The Claimant accepted that this payment represented payment for the entire month and not payment up to the 25th of that month only.
24. The Respondent did not make any payment to the Claimant in relation to the period of 1 August to 12 August 2020 and there was no authorised reason for the Respondent to withhold this payment from the Claimant.

Payments received by the Claimant:

25. The Claimant received the following sums from the Redundancy Payments Service:
 - 25.1. Statutory redundancy; £3,228.00;
 - 25.2. Holiday pay: £2,035.65 gross and £1,472.08 net;
 - 25.3. Notice pay: £538.00 gross and £387.80 net; and,
 - 25.4. Arrears of pay: £845.43 gross and £618.81 net.
26. The Claimant found alternative employment on 20 August 2020 with another firm of solicitors.
27. The Claimant's claim for a compensatory award included a claim for loss of statutory rights.

The Law

Breach of Contract

28. Under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 a Tribunal can award a Claimant damages for breach of contract where the claim arises or is outstanding on termination of employment. The cap of the award that a Tribunal can make is currently £25,000.
29. The measure of damages in contract is a sum of money the payment of which will place the Claimant in the position that he would be in but for the breach.

Unlawful deductions:

30. Section 13(1) Employment Rights Act 1996 ('the Act') provides:

"13 Right not to suffer unauthorised deductions.

- (1) *An employer shall not make a deduction from wages of a worker employed by him unless—*
 - a. *the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or*
 - b. *the worker has previously signified in writing his agreement or consent to the making of the deduction. that a worker has the right not to suffer unauthorised deductions from wages."*

31. In University of Sunderland v Droussou UKEAT/341/16 the Employment Appeal Tribunal held that pension contributions paid by the employer constitute remuneration for the purposes of calculating a week's pay because the statute does not require payment to be made to the employee, and pension contributions are as much a reward for work as salary.

Redundancy

32. The definition of redundancy is set out in section 139 of the Act:

- "(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—*
 - (a) the fact that his employer has ceased or intends to cease—*
 - (i) to carry on the business for the purposes of which the employee was employed by him, or*
 - (ii) to carry on that business in the place where the employee was so employed, or*
 - (b) the fact that the requirements of that business—*
 - (i) for employees to carry out work of a particular kind, or*
 - (ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,*

have ceased or diminished or are expected to cease or diminish."

Unfair Dismissal

33. The test for an unfair dismissal is set out in sections 98(1), (2) and (4) of the Act as follows:

- "(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show:*

- (a) the reason (or, if more than one, the principal reason) for the dismissal; and,
- (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it:

.....

(c) is that the employee was redundant,

.....

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and,

(b) shall be determined in accordance with equity and the substantial merits of the case."

Compensation

34. Section 123(1) of the Act provides:

- "(1) Subject to the provisions of this section and sections 124, the amount of the compensatory award shall be such amount as the 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.
- (2) The loss referred to in subsection (1) shall be taken to include—
 - (a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and
 - (b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.
- (3) The loss referred to in subsection (1) shall be taken to include in respect of any loss of—
 - (a) any entitlement or potential entitlement to a payment on account of dismissal by reason of redundancy (whether in pursuance of Part XI or otherwise), or

(b) *any expectation of such a payment, only the loss referable to the amount (if any) by which the amount of that payment would have exceeded the amount of a basic award (apart from any reduction under section 122) in respect of the same dismissal.*

(4) *In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.”*

35. The Polkey principles set out in Polkey v AE Dayton Services Ltd [1987] IRLR 503 HL confirm that where a Tribunal finds that a dismissal was unfair, it must go on to consider the chance that the employment would have terminated in any event, had there been no unfairness. The Tribunal should make a percentage reduction in the compensatory award which reflects the likelihood that the Claimant would have been dismissed in any event.

ACAS Uplift

36. Section 207A Trade Union and Labour Relations (Consolidation) Act 1992, provides:

“(1) *This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.*

(2) *If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—*

(a) *the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,*

(b) *the employer has failed to comply with that Code in relation to that matter, and*

(c) *that failure was unreasonable,*

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.”

Conclusions

37. Based on the findings of fact above and considering the relevant law as it applies to the agreed issues I conclude as follows:

Notice Pay

38. In breach of contract the Claimant was dismissed without notice in circumstances where the Respondent has failed to demonstrate that it was entitled to so dismiss him.
39. The Claimant was contractually entitled to receive 3 months' notice.
40. The Claimant obtained further employment on 20 August 2020 this being 1 week after his dismissal. The Claimant was therefore out of employment for the period of 1 week, amounting to £647.18 at his net weekly pay.
41. The Claimant is entitled to the employer's pensions contributions that he would have earned from the Respondent during this period in the sum of £40.24.
42. The Claimant is therefore entitled to £647.18 less the net sum of £387.80 received from the Redundancy Payments Service in respect of notice pay, this being a total sum of **£259.38**.
43. The Claimant is entitled to **£40.24** in respect of employer's pension contributions for this period.

Holiday pay

44. The Claimant is entitled to 23 days annual leave per year and his contract was terminated 32 weeks into the leave year.
45. The Claimant had accrued 14.5 days at the date of termination of his employment and had carried over 9 with the agreement of the Respondent from the 2019 leave year. The Claimant had taken 3 days leave in the 2020 year and is therefore entitled to 20.5 days leave.
46. In breach of contract the Respondent failed to pay the Claimant in respect of his accrued but untaken holiday pay on termination of his employment.
47. The Claimant is therefore entitled to £4,582.98 (this being 20.5 x gross daily pay of £223.56) less £2,035.65 gross sum received from the Redundancy Payments Service in respect of holiday pay, this being a total sum of **£2,547.33**.

Unpaid wages

48. The Claimant was not paid for the period 1 August 2020 – 12 August 2020, this being 12 days at the Claimant's gross daily rate of pay of £223.56.
49. There was no lawful reason for the Respondent to withhold this payment and the Claimant's claim of unlawful deduction of wages succeeds.
50. The Claimant is entitled to £2,682.72 less £845.43 received from the Redundancy Payments Service, this being a total sum of **£1,837.29**
51. The Claimant is entitled to Employer's pensions contributions for this period from the Respondent in the sum of **£120.72**, this being 12 days at a daily rate of £10.06.

Unfair dismissal and Polkey

52. I find the Claimant's dismissal was procedurally unfair.
53. The Claimant's claim for unfair dismissal succeeds, however the Claimant's basic award is extinguished by the statutory redundancy payment received from the Redundancy Payments Service.
54. If the Respondent had followed a fair redundancy procedure, the Claimant would still have been dismissed by reason of redundancy on 12 August 2020, as this was the date that the Respondent's offices were all immediately closed further to an intervention by the SRA.
55. Accordingly, the Claimant's compensatory award for unfair dismissal is reduced by 100% pursuant to Polkey.

ACAS Uplift

56. As redundancy was the reason for dismissal the ACAS Code of Practice on Discipline and Grievance does not apply to the Claimant's unfair dismissal claim and there is no uplift for unreasonable failure to comply with its provisions.
57. With respect to the Claimant's claims for breach of contract and unauthorised deductions from wages, in the circumstances of this case, the Respondent would not have reasonably been in a position to engage with the ACAS Code of Practice on Disciplinary and Grievance in order to resolve any grievances raised after 12 August 2020. As such, I find that there was no unreasonable breach of the Code and do not award any uplift in respect of the Claimant's claims for breach of contract and unauthorised deduction from wages.

Summary

58. The Respondent shall pay to the Claimant:
 - 58.1. Notice pay in the net sum of **£259.38**;
 - 58.2. Holiday pay in the gross sum of **£2,547.33**;
 - 58.3. Pay in respect of unauthorised deduction of wages in the sum of **£1,837.29**;
 - 58.4. Pay in respect of Employer's pension contributions in the sum of **£160.96**.
59. The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 do not apply to these awards.

EMPLOYMENT JUDGE NEWBURN

**JUDGMENT SIGNED BY EMPLOYMENT
JUDGE ON 1 March 2021**

.....

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the Claimant(s) and Respondent(s) in a case.

Format of the Hearing

The hearing was conducted by the parties attending by Cloud Video Platform. It was held in public in accordance with the Employment Tribunal Rules. It was conducted in that manner because a face to face hearing was not possible in light of the Government Guidance in connection with the coronavirus pandemic and it was in accordance with the overriding objective to do so.