



EMPLOYMENT TRIBUNALS

Claimant: Mr P Chapman

Respondent: Truro Sawmills Ltd

Heard at: Exeter

On: 5 and 6 November 2020

Before: Employment Judge Smail
Members Mrs S Long
Ms R A Clarke

Representation

Claimant: Mr N Moore, Counsel

Respondent: Mr A Wright, Director

JUDGMENT

1. The Claimant's claims of unfair dismissal and disability discrimination are dismissed.

REASONS

1. The Claimant was employed by the Respondent latterly as a Saw Doctor/Fitter between 7 November 2005 and 13 November 2018, some thirteen years. The Respondent company operates a high-tech sawmill dealing with substantial quantities of large heavy timber. The Claimant's responsibilities included the changing of saw blades and maintenance of the equipment.
2. On 20 March 2018, the Claimant suffered an accident when operating a Rinehart automated cut saw. He lost two phalanges of the non dominant left hand index finger. The accident is the subject of a personal injury claim. The Respondent has made it clear to us that liability is not admitted. That matter will in due course be the subject either of settlement or a court hearing. We have deliberately not sought to make any finding in respect of the circumstances of the accident.

3. The Respondent inevitably has conceded that the Claimant is left with a disability within the meaning of the Equality Act 2010. It is not of course complete lack of capacity in the left hand but there will be a significant reduction in the range of capacity particularly in respect of fine movements.
4. The original issues in the case as determined by Employment Judge Roper at a preliminary hearing on 23 October 2019 are set out at Appendix 1. However, there were evidential developments in the full merits hearing before us. First, the contract was tainted with illegality and so could not be enforced for the purposes of unfair dismissal. Secondly, at all relevant times, the Claimant did not want to return to the Respondent whether with adjustments or at all.

Illegality

5. Mr Moore the Claimant's Counsel felt under professional obligation to make it clear to the Tribunal that the Claimant had knowingly participated in a payment arrangement whereby, since assuming responsibilities as a saw doctor in summer 2015, he has received an extra £200 per month in cash in relation to which no tax or National Insurance has been deducted. We respect Mr Moore for this. The amounts did not appear on his payslips or in other tax documentation. Similarly, along with other employees he has received £40 in cash each Saturday he works. Again, in relation to which no tax and National Insurance has been deducted. The admitted position in front of us is that the Claimant has been knowingly participant in this.
6. The Respondent has denied the practice but does not provide evidence of tax and National Insurance being paid in respect of these sums. The Claimant presents his case with these admissions about being paid in cash. We know also that compensation in the Schedule of Loss was sought in respect of loss of these payments.
7. The Claimant brought a claim for notice and holiday pay in the County Court. This was dealt with in the smalls claims court on 23 August 2019 at Truro. There, we are told, the District Judge felt able to sever the cash payments from the declared payments and awarded the balance of outstanding notice and holiday pay on that basis. The Respondent had paid the bulk of those amounts between notice of issue of the claim and the hearing of it, meaning a relatively modest amount was left for the District Judge to deal with. That position of the District Judge in the small claims court does not bind us as to how we should approach the potential illegality in respect of the claims upon which we have to adjudicate. We are aware that in the small claims court speedy pragmatic decisions have to be taken in the limited amount of time available.
8. Mr Moore has helpfully referred us to the relevant law. We find as in Hall v Woolston Hall Leisure Limited [2000] IRLR 578 Court of Appeal applying Leighton v Michael [1996] IRLR 67 EAT, and making reference to cases including Newland v Simons and Willer (Hairdressers) Limited [1981] IRLR 359 EAT, that it is appropriate to take a different approach to (1) the unfair dismissal claim on the one hand and (2) the disability discrimination claim on the other.

9. By being a knowing participant in the fraud on the HMRC, we conclude that it is a proportionate response not to permit the Claimant to pursue his unfair dismissal claim relying, as it does, on enforcing his contract of employment. That contract is tainted with illegality. We apply Patel v Mirza [2017] 1 ER 197 in the Supreme Court in arriving at that conclusion. The public policy we identify is the interest in employees paying their taxes. Accordingly, we dismiss the Claimant's claim of unfair dismissal.
10. In contrast, we entertain the Claimant's claims of disability discrimination, the essence being the public and statutory interest in tackling discrimination which is separate from enforcing simply a contract of employment.

The Disability claims

11. Turning then to disability discrimination. A most unusual feature of this claim is, as we find, that the Respondent wanted the Claimant back either in his old role or in an adjusted role. We accept from Mr Wright that this was his position and he communicated it. We also accept from Mr Wright that the message he was receiving from the Claimant at the relevant time was that the Claimant did not wish to return.
12. Quite properly the Respondent arranged for an Occupational Health report which was dated 24 September 2018. It was compiled by Dr Tellam, a Consultant Occupational Physician. He met with the Claimant and his wife in Truro that day. He writes the following:

“Mr Chapman is a right-handed gentleman. The amputation has been repaired to just below the first knuckle of his left non dominant index finger. There is reduced movement of approximately twenty to thirty degrees in the stump and the skin is hypersensitive. Mr Chapman is still having to wear a protective cover. The wounds are well healed.

Mr Chapman continues to experience pain in the area of his finger but he states this can radiate up his arm. He finds that cold environments exacerbate his symptoms.

We discussed the current work situation. Mr Chapman feels unable to resume the duties of “Saw Doctor”. We also discussed other potential opportunities within his current employment. However, due to the cold environment, Mr Chapman feels he would not be able to cope with the duties. There was also the ongoing psychological element with a perceived fear of further injury. Overall due to a combination of physical and psychological health symptoms, at present Mr Chapman would likely not feel capable of returning to his role inside a reasonable time frame and taking into account Mr Chapman's personal feelings, a return to work at Truro Sawmills also seems unlikely in the foreseeable future. Mr Chapman is currently in the process of applying for universal credit having exhausted his sick pay. He has been awarded industrial injuries disablement benefit at sixteen percent.

As there are significant barriers to his return to work with his current employer, overall, I believe separation may be in Mr Chapman's

health's best interest. Hopefully, this will assist his overall recovery and facilitate his future ability to resume other gainful employment".

13. Having sent an invitation to a capability meeting on 29 October 2018, in a full and proper HR format, with view to a meeting on 2 November 2018, the Claimant sent in what is said to be a without prejudice letter dated 31 October 2018. The letter was not at first in the bundle but it was clear that the Tribunal would not have been able to make sense of the factual sequence unless a redacted copy of the letter was adduced. In the event, the parties agreed to this. The letter attached a doctor's assessment for the purposes of the claim for industrial injuries disablement benefit. That was the first time Mr Wright saw this report. It had been prepared on 16 August 2018 but 31 October was the first time he saw it.

14. The conclusion of the assessment compiled by Doctor Reilly was as follows:

"The customer had previous hand injuries but with full recovery and no previous bone injuries. He worked in a manual job prior to the index accident and these past conditions are not assessed as he was functioning well at the time of the accident.

In the index incident on 16 August 2018, he sustained a traumatic amputation of the left index finger with the loss of two phalanges. He had a surgical repair which has healed well. He has ongoing physiotherapy every four weeks and takes daily medication for pain in the left hand/forearm. The stump is sensitive to cold and touch.

He experiences psychological effects after the accident with low mood and low self esteem. He has side effects from pain medication which affected his ability to drive safely. He is not required treatment for mental health issues but pain has been recently changed".

15. That assessment was added to the Occupational Health report that Mr Wright already had but the without prejudice letter went further in these terms. The letter is headed "Without prejudice, ongoing absence from work and future employment" it is signed by Mr Chapman. The first thing he does is to attach the report to which we just made reference and it is introduced in this way:

"The report also shows, though there has been some improvement, it is very unlikely that I will at least in the short term be able to return to the same role I previously held due to the injuries incurred.

I have spoken with my family and think that in return for me entering into an agreement over my future with Truro Sawmills which I believe would draw matters to an amicable conclusion I would accept from you an ex gratia payment [and the amount is redacted] in relation to the termination of my employment. This ex gratia payment would be in addition to the other amounts that you owe me which are twelve weeks statutory notice, three days bank holidays accrued whilst I was off sick, eight days holiday carried over from last year and not taken, twenty-four days holiday for 2018, including annual leave accrued on sick leave. I think that under the circumstances this would be the best approach for both parties to move forward from this.

Please let me know by the end of the week if this proposal is acceptable. If it is not, then please contact me regarding rescheduling of the meeting as I would like to arrange for someone to accompany me to a meeting and would need time to arrange this. If a meeting is still due to take place, I would also appreciate a breakdown of the issues that you would like to discuss in relation to my health as there are certain aspects such my psychological wellbeing that I may find difficult to discuss with you”.

16. Mr Wright had proposed a meeting on the 2 November 2018, that was cancelled because he, Mr Wright, was ill with blood poisoning. The mode of communication of that cancellation is unclear but could well have been by telephone or by text. It does not appear to have been by email.

17. After receipt of the without prejudice letter, on 12 November 2018, Mr Wright emailed the Claimant via his sister:

“Can you please give me a date you will be able to attend a new meeting. Ideally it will need to be after the sawmill closes to ensure that there are no interruptions. I am free Wednesday, Thursday or Friday this week”.

18. This was the second time Mr Wright had offered a meeting, the first being in the original capability letter. That meeting, of course, had been cancelled. The Claimant’s response to this was sent by his sister that same day saying:

“From your email today, I am not sure if you have received the email below with the letter from Pete. Please can you confirm receipt?”

19. The response was to refer to the without prejudice letter.

20. A combination of that response, together with the Occupational Health report, and Doctor Reilly’s assessment for industrial injuries disablement benefit, and the terms of the without prejudice letter led Mr Wright, we find, to believe that the Claimant was not proposing to return.

21. On 13 November 2018, he wrote as follows addressing the Claimant’s sister who was acting on behalf of the Claimant:

“Dear Marie

Thank you for your letter. I understand that Pete will not be able to attend a capability meeting. This is a shame as it would allow several issues to be discussed.

I therefore have to inform you that Pete’s employment at Truro Sawmills is now terminated as of 2 October 2018 on capability grounds. These details are set out in evidence supplied by yourselves and Doctor Tellam. There is no need to provide any future sicknotes. It remains for me to wish Pete all the best in the future and to settle the final sums owed”.

22. Mr Wright sets out what he believes he owes by way of holiday pay and notice pay and he concludes the email by saying:

“Please get back to me if you disagree with any of the above information”.

23. There is a response from the Claimant’s sister on 16 November 2018. She writes:

“Just to let you know that Pete is disappointed with your offer as set out in your email below and is seeking further advice on the matter”.

24. In the Tribunal’s judgment it is most significant that the Claimant does not get back to Mr Wright and say “hold on a minute I do want to attend a capability meeting: I do want to come back whether in my original job or in an adjusted job”. Instead the reference is to be disappointed about the financial offer.

25. The Tribunal finds on the balance of probability that at all relevant times the Claimant was concerned with compensation flowing from the accident in the personal injury claim that had been started and did not intend to return. In evidence he told us, and we accept, that he was under pressure not to return from his family, to what was regarded as a hazardous workplace. That may be an entirely reasonable position. It may be entirely relevant to the reasonableness of his position in the personal injury claim which we know is running parallel to these proceedings but we fundamentally reject the Claimant’s position that he wanted to or would have returned at any relevant time to this Respondent.

26. It is our judgment that the position now adopted before us in this disability discrimination claim is artificial because we reject the Claimant’s position that he wanted to return. It is clear to us that there was a job for him to do at the Respondent. The Claimant had valuable expert skills as a saw doctor. His not returning caused the Respondent significant difficulties. There was a job for him to do but he did not want it.

27. We read the Occupational Health report, and note the terms of the without prejudice letter, and note significantly that there was no challenge to Mr Wright’s email of 13 November, notwithstanding a passage that if there was any information that was incorrect in that email the Claimant was to correct it, and part of that email was Mr Wright’s understanding that the Claimant was not going to attend a capability hearing.

28. Again, we find the Claimant’s position before us is an artificial one. The proper forum for determining the dispute between these parties is the County Court in the negligence action. It is that claim which better reflects the Claimant’s position bearing in mind our finding that he did not intend to return to this Respondent.

Conclusions

29. Addressing then the specific legal issues set out in Employment Judge Roper’s list of issues. First the Claimant may not claim unfair dismissal because the contract was tainted with illegality. Secondly, the premise behind the disability discrimination claim, namely that the Claimant wanted to return to this Respondent, whether with adjustments or at all, is rejected fundamentally by us as a matter of fact: he did not. Mr Wright did attempt to consult the Claimant with regards to his capability. He did afford the Claimant

opportunity to discuss possible adjustments. The Claimant did not want this. The reason the Claimant was dismissed was because Mr Wright understood that the Claimant did not wish to return and the Claimant did not disabuse him of that fact. Had the Claimant been interested, the Respondent would have - in terms of the reasonable adjustments pleaded - afforded time to consult with the Claimant and reschedule the capability hearing. He would have offered him alternative employment. Insofar as any new training was required, that would have been afforded; and if psychological issues needed to be addressed, we see no reason that Mr Wright would not have addressed them. And hearing which was not already provided would have been supplied. Mr Wright wanted him back. The Claimant did not want to go back.

30. The natural place for the adjudication of the Claimant's actual position is not before us. It is the County Court in his personal injury action.

Employment Judge Smail

Dated: 20 November 2020

Judgment sent to parties: 25 November 2020

FOR THE TRIBUNAL OFFICE

Appendix 1

His is an extract from the issues section of Employment Judge Roper's Case Management summary dated 23 October 2019 case 1400897/2019

The issues

1. The Employment Judge recorded that the issues between the parties which will fall to be determined by the Tribunal are as follows:
 2. Unfair dismissal claim
 - 2.1 What was the reason for the dismissal? The Respondent asserts that it was a reason related to capability which is a potentially fair reason for section 98(2) Employment Rights Act 1996.
 - 2.2 Did the Respondent hold a genuine belief as to the Claimant's incapability on reasonable grounds and following as reasonable an investigation as was warranted in the circumstances? The burden of proof is neutral here but it helps to know the Claimant's challenges to the fairness of the dismissal in advance and they are set out in more detail in subparagraphs 9 (a) to (j) inclusive in the Claimant's Amended Particulars of Claim.
 - 2.3 Was the decision to dismiss a fair sanction, that is, was it within the range of reasonable responses open to a reasonable employer when faced with these facts?
 - 2.4 If the dismissal was unfair, did the Claimant contribute to the dismissal by culpable conduct? This requires the Respondent to prove, on the balance of probabilities, that the Claimant actually committed the misconduct alleged.
 - 2.5 In the event that the Respondent's procedure was unfair, can the Respondent prove that if it had adopted a fair procedure then the Claimant would have been fairly dismissed in any event, and if so to what extent and when?
3. Section 15 EqA: Discrimination arising from disability
 - 3.1 The allegations of unfavourable treatment as "something arising in consequence of the Claimant's disability" falling within section 39 EqA are set out in paragraph 16 of the Amended Particulars of Claim which in short are (a) the Claimant's dismissal; and (b) failure to consult the Claimant with regards to his capability prior to his dismissal; and (c) failing to afford the Claimant opportunity to discuss possible adjustments. No comparator is needed.
 - 3.2 Does the Claimant prove that the Respondent treated the Claimant as set out above?

- 3.3 Did the Respondent treat the Claimant as aforesaid because of the “something arising” in consequence of the disability?
 - 3.4 Does the Respondent show that the treatment was a proportionate means of achieving a legitimate aim?
 - 3.5 Alternatively, has the Respondent shown that it did not know, and could not reasonably have been expected to know, that the Claimant had a disability?
4. Reasonable adjustments: section 20 and section 21
- 4.1 Did the Respondent apply the following provisions, criteria and/or practice (‘the PCPs’) generally, namely: PCP 1: requiring the Claimant to return to work in his original role and/or PCP 2: requiring the Claimant to work in a cold environment.
 - 4.2 Did the application of either PCP put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that he was unable to return to work in his original role and/or to work in a cold environment.
 - 4.3 Did the Respondent take such steps as were reasonable to avoid the disadvantage? The burden of proof does not lie on the Claimant, however it is helpful to know the adjustments asserted as reasonably required and they are identified in sub-paragraphs 19 (a) to (e) of the Amended Particulars of Claim and which in short are as follows:
 - 4.3.1 Affording time to consult with the Claimant and rescheduling the capability hearing; and
 - 4.3.2 Offering alternative employment; and
 - 4.3.3 Offering training for other roles; and
 - 4.3.4 Offering mentoring and/or support to address the psychological impact of the amputation; and
 - 4.3.5 Providing heating and/or thermal clothing
 - 4.4 Did the Respondent not know, or could the Respondent not be reasonably expected to know that the Claimant had a disability or was likely to be placed at the disadvantage set out above?

5. Remedies

If the Claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy. There may fall to be considered reinstatement, re-engagement, a declaration in respect of any proven unlawful discrimination, recommendations and/or compensation for loss of earnings, injury to feelings, and/or the award of interest.