



EMPLOYMENT TRIBUNALS

Claimant: Mr M Hilditch

Respondent: Oldham Athletic (2004) Association Football Club Limited

Heard at: Manchester

On: 27 February 2020

Before: Employment Judge McDonald
(sitting alone)

REPRESENTATION:

Claimant: In person

Respondent: Not in attendance

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim of unfair dismissal succeeds. The respondent is ordered to pay the claimant the following amounts free of any deductions for tax or national insurance:
 - (i) Basic award of £3,836.38.
 - (ii) Compensatory award of £7,000.00.
2. Together that means a total sum of £10,836.38.
3. The claimant's claim of wrongful dismissal succeeds but no award is made for that since it is already included in the compensatory award.
4. The Recoupment Regulations do not apply.

Note: Reasons for the judgment were given orally at the hearing and requested in writing by the claimant.

REASONS

1. This was the claimant's claim that he had been unfairly dismissed by the respondent from his post of Designated Safeguarding Officer. That was a part time role which the claimant carried out for the respondent while working full time for the Prison Service.
2. I gave judgment and oral reasons at the hearing and the claimant requested those reasons in written form. I apologise to the parties that my absence from the Tribunal for various reasons, exacerbated by the consequences of the recent pandemic lock down, have led to it taking longer than anticipated to provide these reasons in written form.

Non-attendance by the respondent

3. The respondent had taken part in proceedings via its legal representatives to the extent of filing a response to the claim; being involved in preparation of a bundle of documents for this hearing ("the bundle") and preparing written statements for two of its witnesses (Mark Sheridan who was then the respondent's Company Secretary and Wendy Noble who was employed by the Oldham Athletic Community Trust working alongside the respondent). The respondent's legal representatives were certainly aware of the hearing having been sent the notice of hearing on 12 November 2019.
4. There being no attendance for the respondent at 10 am the clerk to the Tribunal telephoned the respondent's legal representatives. She was told that they were no longer involved in the matter and they subsequently emailed to confirm that they were no longer acting. The Tribunal also attempted to contact the respondent, both by telephone and by emailing the email address on the claim form which was that of Mark Sheridan. They bounced back because it appears that Mark Sheridan has now left the respondent.
5. I checked with the claimant whether he had had any recent contact from the respondent and he confirmed that he had been in text contact with the respondent's Chief Executive Natalie Atkinson just over two weeks before the Tribunal hearing. Given the Tribunal's attempts to contact the respondent, the fact that its representative in November had received notification of the hearing of today's date I was satisfied that the respondent was or should have been aware of the proceedings and of the hearing. In the absence of any application to adjourn from the respondent I decided the appropriate course of action, taking into account the overriding objective and the need to avoid delay, was to proceed with the hearing in the respondent's absence.

The issues and conduct of the hearing

6. In his claim form the claimant had indicated that he was seeking a payment of notice pay and a redundancy payment. However, at the hearing he confirmed that it was unfair dismissal rather than a redundancy payment he was claiming. He provided me with a Schedule of Loss which set out the amounts being claimed in relation to the unfair dismissal claim but also in relation to a breach of contract.

7. The complaints made were:
 - a. Unfair dismissal
 - b. Breach of contract
 - c. Failure to provide a written statement of particulars of employment.
8. That breach of contract claim related to notice pay. The claimant had been employed by the respondent for some 20 years and therefore was entitled to a statutory minimum of 12 weeks' notice. As I record later he was actually dismissed without notice.
9. In deciding how to conduct the hearing I had regard to the guidance of the Court of Appeal in the case of **Roberts -v- Skelmersdale College (2003) EWCA Civ 954**, the Court of Appeal made it clear that when a party fails to attend a hearing, the Employment Tribunal Rules of Procedure ("the ET Rules") do not impose on the Tribunal a duty of its own motion to investigate the case before it. I have in reaching my decision had regard to the claimant's claim form; the respondent's response form; the documents in the bundle; the witness statements of Mark Sheridan and Wendy Noble and the oral evidence which was given by the claimant at the hearing.
10. In reaching my decision on the case I have taken into account that the absence of the respondent's witnesses means that there was no opportunity for them to be cross examined and so I can give their written statements less weight compared to the sworn oral evidence given by the claimant.

Relevant Law

11. Section 94 of the Employment Rights Act 1996 ("ERA") gives an employee the right not to be unfairly dismissed by their employer. To qualify for that right an employee usually needs two years continuous service which the claimant has in this case.
12. In determining whether a dismissal is unfair it is for the employer to show that the reason, or, if more than one, the principal reason for dismissal is one of the potentially fair reasons set out in Section 98(2) of the ERA or some other substantial reason justifying dismissal. The respondent's response form in this case suggested at paragraph 14 of the grounds of response that the respondent was justified in terminating the claimant's employment for gross misconduct and incapability.
13. Where an employer has shown a potentially fair reason for dismissal whether the dismissal is then fair or unfair depends on whether in the circumstances of the case the employer acted reasonably or unreasonably in treating it as sufficient reason for dismissing the employee. The Tribunal has to decide that in accordance with the equity and the substantive merits of the case (section 98(4) ERA). When it comes to deciding whether an employer has acted fairly the Tribunal must apply the band of reasonable responses test, i.e. not substitute its own decision for that of the employer but decide whether no reasonable employer could have acted in the way that the respondent did.

14. When it comes to conduct dismissals, the Tribunal has to have regard to the leading case of **BHS -v- Burchell (1978) IRLR 379** which sets out a three part test, namely:-
 - (i) Did the employer have a genuine belief in the employee's guilt;
 - (ii) Was that belief based on reasonable grounds;
 - (iii) Were those grounds formed from a reasonable investigation.
15. Remedy, if the dismissal is unfair, consists of two elements. The first is the "basic award" calculated by reference to a week's pay, length of service and the employee's age during those years of service. The second element is a compensatory award. This is such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the claimant in consequence of the dismissal (Section 123(1) of ERA). A just and equitable reduction can be made to that compensation where the unfairly dismissed employee could have been dismissed at a later date, or if a proper procedure had been followed. This is the so called **Polkey** reduction, named after the House of Lords decision in **Polkey -v- A E Dayton Services Limited 1988 ICR 142**.
16. In addition, where the Tribunal finds the dismissal was to any extent caused or contributed to by any action of the claimant it shall reduce the compensatory award by such proportion as it considers just and equitable having regard to that finding.
17. Other factors relevant to the amount of the compensatory award are the power to increase compensation between 10 and 25% if there has been a failure to comply with the ACAS code of practice on disciplinary and grievance matters and a requirement on the Tribunal under Section 38 of the Employment Act 2002 to an employee either two weeks' pay or four weeks' pay where the Employment Tribunal finds that the employer has failed to provide the statement of terms and conditions of employment required by Section 1 of the Employment Rights Act 1996.
18. When it comes to notice requirements the statutory minimum notice requirement from an employer terminating the employee's employment is one week for each year of service up to a maximum of twelve weeks. That is set out at s.86 of ERA.

Findings of Fact

19. The claimant had been employed by the respondent as its Designated Safeguarding Officer (DSO) from 1 September 1998. His case is that he was dismissed on 10 January 2019 without notice. The respondent's case was less clear. According to the response form the employment terminated on 31 January 2019. Paragraph 10 of the response form suggested that the claimant and the respondent mutually agreed that the claimant would be removed from the role of DSO.

20. I make the following findings of fact having heard the claimant's evidence, read the respondent's witness statements and considered the documents in the bundle.
21. On 10 January 2019 the claimant was called to a meeting with Mark Sheridan by way of a text message. The claimant made notes of that meeting at page 175 of the bundle. In his oral evidence, which I accept, the claimant says those notes were made shortly after the meeting took place. The claimant's evidence was at that meeting he was told by Mr Sheridan that his job had "gone" and that he was no longer required by the club. The claimant said that Mr Sheridan said that the role would henceforth be done by Ms Noble and he also referred to a poor audit by the English Football League of safeguarding at the club. At that meeting the claimant's evidence was that he asked for and handed over the laptop he had been given by the respondent.
22. Mr Sheridan's statement contradicted this version of events. He said that on 10 January he informed the claimant that he would be taking over safeguarding in preparation for the next audit and that Wendy Noble would be in charge of the safeguarding phone during that period. In brief, Mr Sheridan's version of events is that the claimant reacted with relief and understanding to Mr Sheridan's taking over the role, explaining that he had had difficulty managing the workload of being a DSO while also working as a Prison Officer. Mr Sheridan's evidence in his witness statement was that "the claimant agreed the role needed to be a full-time position and he would vacate it".
23. I prefer the claimant's version of events. Putting aside the fact that the only evidence from Mr Sheridan was in written form whereas the claimant's evidence was given on oath, notes of the meeting of January and the surrounding documents seemed to me to corroborate the claimant's version of events:
 - a. First, the claimant's notes of the meeting are very clear that Mr Sheridan told the claimant that his job had gone.
 - b. Second, there is then a text message dated 11 January 2019 (page 179) from the claimant to Mr Sheridan. This says that the claimant has been in touch with ACAS who have asked him to ask Mr Sheridan to send him the reasons for his dismissal.
 - c. Third, there was also in the bundle at page 186 a letter from the claimant to Mr Sheridan dated 21 January 2019. This was a letter sent to Mr Sheridan in which the claimant asked him to provide him with a full and clear explanation as to why he had been dismissed or a letter setting out the reasons in writing. The claimant's evidence, which I accept, was that that letter was sent recorded delivery.
24. There was a subsequent meeting between Mr Sheridan and the claimant on 23 January 2019. This was when the claimant went to the club to drop in the club's safeguarding mobile phone. This was the phone which anyone with a safeguarding concern could contact the DSO.

25. There were notes of that meeting at page 176 and 177. The claimant told me in evidence that those notes had been made shortly after that meeting. I accept that evidence. Those notes record Mr Sheridan saying that he had given the reasons for dismissal at the meeting on 10 January, namely the poor EFL safeguarding audit of the respondent. The notes then say that Mr Sheridan denied that the claimant had been dismissed and suggested he had offered the post of fulltime Safeguarding Officer to the claimant but that he had turned it down. The claimant's notes record the claimant as saying that if he had been made that offer then he might well have considered it as he was close to retirement from the Prison Service. I did not hear evidence from Mr Sheridan.
26. I find that the notes of that second meeting add more weight to the evidence from the claimant that he was indeed dismissed on 10 January 2019.
27. Based on the evidence I heard and read I find that the respondent did dismiss the claimant without notice on 10 January 2019. I find that there was no investigatory or disciplinary process leading up to that dismissal – he was simply called to the meeting by text and then dismissed.
28. The respondent's case is that the reason for the dismissal was that the claimant was guilty of gross misconduct or incapability. Based on the documents I read the basis of that allegation is really two-fold.
29. First, the respondent says that the audit carried out by the English Football League as a result of a safeguarding visit in 2018/19 "failed" the club. As I understand it the contention is that the failure was so severe as to entitle the respondent to dismiss without notice and without carrying out any form of investigation or preliminary steps prior to the dismissal itself. A copy of the EFL safeguarding visit report was included in the bundle at pages 77 to 92 and it was also attached as an exhibit to the witness statements from Mr Sheridan and Ms Noble. In the absence of the respondent I did not hear any submissions about the report in detail but I note that a number of the categories the respondent was assessed against are marked as partially met (Amber), others as not met (Red) and some as fully met (Green). As Mr Sheridan notes in his statement the EFL did not want to shut the respondent's academy down. The report is not on its face sufficiently damning for me to be able to conclude that the respondent would have been entitled to dismiss the claimant for gross misconduct or terminate his employment immediately through incapability.
30. Second, the respondent suggested that there were other reasons why it would have been entitled to dismiss the claimant. Its documents referred to three months' worth of emails on the claimant's laptop which he had failed to open. There were blurred screen shots from that laptop of pages 142 and 143. I accept that they did seem to show unopened emails. The claimant accepted that there would have been unopened emails on his laptop. He explained that the laptop he was given was a very old one and needed repair. There were in the bundle at pages 183 and 184 text message exchanges between the claimant and Richard Cooper, the then Chief Executive of the respondent which confirmed that the laptop needed repairing but that there were delays in getting it repaired. On the basis of those documents and his oral evidence I

accept the claimant's case that the reason he had not been able to access his emails on the laptop was because it needed repair and was for a time unusable.

31. I also accept the claimant's evidence given under oath that he was not given a statement of terms and conditions of employment as required by Section 1 of ERA. The claimant told me that the only contract of employment of any form he was given was a letter from Neil Jey the Chief Executive of the respondent around 2005/2006 (page 185 in the bundle) which confirmed his taking up the role of DSO Officer, the salary payable and that he would be provided with a laptop and a mobile phone. I find that letter does not satisfy the requirement of s.1 of ERA omitting as it does details required by the ERA such as a statement of when the claimant's continuous employment began and notice requirements.

Conclusions

32. I find that the claimant was dismissed with immediate effect without any disciplinary proceedings being carried out, that dismissal being on 10 January 2019. I do not accept that there was sufficiently clear evidence before me that the claimant would inevitably have been dismissed, either because of the outcome of the EFL audit or for failing to check his emails.
33. Applying the law to those facts, even if I accepted that the respondent had shown a potentially fair reason for dismissal, i.e. conduct or capability, it does not seem to me that there is any evidence that they carried out any kind of fair procedure before deciding to dismiss the claimant. In those circumstances I find that the claimant was unfairly dismissed by the respondent.
34. The respondent's response form suggested that if I did find that there was an unfair dismissal then any compensation should be reduced because the claimant would inevitably have been dismissed for gross misconduct. As I have said I have not found evidence to support that submission. When it comes to deciding to reduce compensation on the Polkey basis there must be some clear evidence on which to base a reduction. I find that there is no ground for making a Polkey reduction.
35. I find that the respondent was in breach of contract by failing to give the claimant 12 weeks' notice of dismissal.
36. I also find that the claimant was in breach of its obligations under Section 1 of the Employment Rights Act 1996 by failing to provide a Statement of Particulars of Employment setting out the details required by s.1 ERA.

Remedy

37. The claimant had provided a Schedule of Loss relating to his claim. He told me in evidence that he had received payment from the respondent for the month of January 2019 therefore any loss of earnings relating to his dismissal started from 1 February 2019. The position is that he has not found a similar role to the role he carried out for the respondent and therefore his losses in that regard continue. He does have a full-time role at the Prison Service still, a

role which he had alongside the role he was carrying out for the respondent. The continuation of that role therefore doesn't lead to any extinguishing of his loss of earnings from the Safeguarding Officer role.

38. Having taken into account the evidence I heard and in particular the claimant's submission that the kind of role which he carried out for the respondent would be a difficult one to find elsewhere, I do think in this case that it is appropriate to award compensation, not only to the date of the Tribunal but also for a further twelve months. It was accepted that the gross weekly pay of the claimant was £134.61.
39. In terms of the basic award:
- a. the claimant had worked for the respondent for in excess of twenty years which is the maximum number of years length of service which can be taken into account.
 - b. the claimant's gross pay was £134.61
 - c. he was 58 at the date of termination of employment.
 - d. by my calculation that meant that there were seventeen years to be taken into account when he was 41 years or older and therefore three years to be taken into account where he was younger than that.
 - e. the multiplier to be applied to the basic award means that seventeen of the years should therefore be calculated at 1.5 times the weekly pay and three years at 1.0 times the weekly pay.
 - f. that makes a total amount of £3,836.38.
40. When it comes to the compensatory award:
- a. the claimant's pay slip showed that his net pay for a 31-day month was £466.73, dividing that by 31 and then multiplying by 7 I get a net weekly pay figure of £105.39 which is the net pay on which I base the compensatory award.
 - b. from the date of the loss beginning which is 1 February 2019 to today's date 27 February 2020 is 56 weeks at £105.39, that makes a total of £5,901.84,
 - c. I have decided that it is appropriate to award future loss of twelve months given the specialist nature of the role. In those circumstances I have awarded twelve months x £466.73 per month, which makes £5,600.76.
 - d. in addition to that I make an award for loss of statutory rights of £500,
 - e. that makes a total before various adjustments of compensatory loss of £12,002.60.

- f. from that amount must be deducted the payment received from the respondent of £5,600.72 which gives a figure of £6,401.88.
 - g. the claimant submitted that the amount of the award should be increased by 25% because there had been in this case a failure to follow the ACAS disciplinary and grievance code. I accept that submission, it is clear that there were no preliminary steps carried out prior to the dismissal and in the absence of any evidence from the respondent as to whether that failure was wilful or due to ignorance I must base my decision on the evidence I have seen and read that seems to simply involve a complete disregard of the need to follow any procedure before dismissing the claimant, I therefore award the maximum of 25% uplift for failure to comply with the ACAS code. Applying that 25% to the figure of £6,401.88 gives a figure of £8,002.35.
 - h. In addition, I found that there was a failure to provide terms and conditions as required by Section 1 of the Employment Rights Act 1996, although it is quite limited I do accept that the respondent did at least in Mr Joy's letter set out confirmation of employment, the then salary and some very basic terms. On that basis I award the lower amount of two weeks' pay rather than the maximum amount of four weeks' pay for the failure to provide the statement, that means a figure of £269.22. Adding that together, that gives a figure of £8,271.57 for the compensatory award. However, that compensatory award is subject to the statutory maximum cap of twelve months gross pay set out in Section 124(1) of the ERA.
 - i. In this case the claimant's gross monthly pay of £583.33 multiplied by 12 is £7,000. That means the maximum compensatory award I can award is £7,000 and I make that award. Adding that to the basic award that means that the total award which I am ordering the respondent to pay the claimant is £10,836.38.
41. In terms of the claim of wrongful dismissal I have accepted that the respondent did breach the claimant's contract by failing to give the required twelve weeks' notice. However since that period is already covered by the compensatory award I make no further award of compensation in relation to that breach.

Employment Judge McDonald

17 April 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON

21 April 2020

FOR THE TRIBUNAL OFFICE

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NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: **2402967/2019**

Name of case: **Mr M Hilditch** v **Oldham Athletic (2004)
Association Football
Club Ltd**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: **21 April 2020**

"the calculation day" is: **22 April 2020**

"the stipulated rate of interest" is: **8%**

For the Employment Tribunal Office