EMPLOYMENT TRIBUNALS

Claimant:
Ms Debra Coleman

Respondent:
Oakforest Joinery Contractors Ltd (sued as Oak Forest Joinery Contractors Ltd)

Heard at: Leeds (by CVP in public) **On: 14 January 2022**

Before: **Employment Judge R S Drake**

Representation:

Claimant: In Person
Respondent: No Attendance

JUDGMENT

1. The Claimant has established that, and I declare that she is entitled to a Redundancy Payment of **£2,293.50.**

2. The Claimant was unfairly dismissed; I award her Judgment and the Respondent shall pay her the sum of **£2,264.00** in respect of Compensatory Award as scheduled below; Any entitlement to a Basic Award is subsumed within the calculation of her Redundancy Payment entitlement.

3. The Claimant was dismissed in breach of contract without notice, and I award her, and the Respondent shall pay her unpaid notice pay for 11 weeks notice entitlement in the sum of **£1,529.00**.

4. In the absence of evidence of disability or causal connection between alleged disability and dismissal, the Claimant's claim of direct disability discrimination fails and is dismissed.

REASONS

5. At the start of the hearing I noted that two parties were named as Respondents by the Claimant, the first being a limited company and the second being the trading name of an unidentified proprietor, whom I later

learned and found is and was a Mr Basharat Khan. I concluded that neither of the two Respondents could be permitted to resist the claims as they had not filed Responses (in form ET3) within the time limited for doing so under the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 Schedule 1. Anybody appearing today for any of the Respondents could only contribute to the procedure to the extent permitted by me if I thought it necessary in the interests of justice.

6. Mr Basharat Khan became able to login to the hearing shortly after it commenced, and I permitted him to respond to questions about points of fact argued as such by the Claimant, and in particular to assist me in identifying which Respondent employed the Claimant as at the date of termination of her employment and therefore which if any should remain in the proceedings. I therefore heard evidence not only from the Claimant but also Mr. Khan.

Findings of Fact

7. I made the following findings of fact based on the evidence before me:-

7.1 The Claimant was first employed on 30 June 2010 as a designer by Mr Basharat Khan when he traded as Oak Forest Interiors, an unincorporated sole-proprietorship business, so that as at termination of her employment on 20 July 2021, she had achieved just over 11 completed years of service all of which at an age exceeding 41 years of age;

7.2 In early 2020, Mr Basharat Khan became unable because of illness to run his business and therefore he says and I accept that, when he entered into an IVA, through the medium of his son Mr Irfan Khan, the Respondent (properly titled and now cited above as “Oakforest Joinery Contractors Ltd”) took over Mr Basharat Khan's business which it continued to run as a subsidiary trading arm together with other trading names; in terms therefore, I found that the correctly titled Respondent was the Claimant’s employer as at the date of termination of her employment and that this finding was supported by the fact that Mr Irfan Khan wrote to the Claimant on 20 July 2021 purporting to act for under behalf of the Respondent and using its name, terminating the Claimant’s employment; the record of this termination was complicated to some extent by the fact that the Claimant’s P45 referred to a totally different trading arm, “Oak Forest Bedrooms”, but I conclude that this was merely a trading name used by the Respondents and that it was still the correctly titled Respondent which was the Claimant’s employer;

7.3 After the COVID19 Pandemic lockdown commenced 23 March 2020, the Claimant was put on furlough on 4 May 2020 but the Respondents and its subsidiary trading arms failed to pay her the sum of £544 furlough pay right up to and beyond the date of termination of her employment; Accordingly, when Mr Irfan Khan tried to persuade the Claimant to return to work in summer 2021, she refused to do so until her outstanding furlough pay was paid, despite which Mr Irfan Khan told her that if she did not return to work her employment would be terminated;

7.4 There is nothing in the evidence before me to show that the

Claimant's physical impairment of Crohn's disease and any other related conditions were in any way the cause of the termination of her employment which was communicated in writing to her by Mr Irfan Khan in the manner described above;

7.5 Shortly after termination of her employment, the Claimant received the outstanding £544 furlough pay due to her, but though she had worked more than 11 years, she did not receive 11 weeks' notice or pay in lieu; all of the evidence points to the likelihood that termination of employment was because of the Claimant's decision not to return to work, whether or not that decision was justifiable; termination was not caused by any issues relating to alleged disability, but it was certainly without notice, without warning, and without consultation; I find for reasons of application of law set out below that dismissal was because of redundancy;

7.6 I find that had the Claimant been given 11 weeks' notice, it would have expired at about the time she commenced receiving Universal Credit which was 6 October 2021; the most recent average monthly payment of UC amounts to a weekly rate of £75 pounds leaving a shortfall between that rate and her weekly net pay of £139.00, and that the continuing loss for a period of a further 41 weeks (a full year less 11 weeks' notice) totals £2,624;

7.7 If she had worked her notice or been paid in lieu, she would have received a net sum of £1,529.00;

7.8 Having been employed 11 complete years all of which over the age of 41, in respect of redundancy she should have been paid by the Respondent 1.5 weeks pay for each completed year of employment based upon a net weekly rate of £139.00 and thus she should have received a total of £2,293.50 as redundancy paid;

Law and its Application

8. Section 98 ERA provides 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 in within subsection two 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) …. (*not relevant here*) …*

*(3) …. (*not relevant here*) …*

(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 reasons shown by the employer –

(a) depends on whether in the circumstances including the size and administrative resources of the employers 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"

4 in this case the Respondent had not filed an ET3 Response and therefore could not take part in defending the claims. Accordingly, they could not fulfil the requirements of section 98(1) and prove what their reason was for dismissal, so therefore I can find that the dismissal was unfair because consideration of the rest of the section becomes unnecessary if the Respondent fails at the first hurdle as it does in this case.

5. Awards of compensation for unfair dismissal are calculated in two parts by sections 119 and 123 ERA. in this case any Basic Award is subsumed and therefore extinguished by any entitlement to a redundancy payment as it is calculated in much the same way. I deal with this in the subsequent paragraph. the right to a Compensatory Award is to cover the pure wage loss an employee suffers as a result of losing their employment, but it is limited to loss of wages and to a maximum of 12 months. However, this has to take account of any benefits received and whatever entitlement an employee has to pay in lieu of notice. Accordingly in this case I have concluded on the evidence that notice would have expired at about the time the Claimant became entitled to claim Universal Credit. Her entitlement to this benefit reduces the ongoing weekly wage loss to £64 per week running from the date such benefits started to the anniversary of dismissal and therefore a total of 41 weeks. I calculate that 41 week at £64 pounds per week produces an entitlement of £2,624.

6. There exists a statutory presumption of redundancy where an employer cannot prove a reason for dismissal. Section 163(2) ERA provides as follows:-

"*for the purposes of any reference to an Employment Tribunal an employee who has been dismissed by his employer shall unless the contrary is proved be presumed to have been so dismissed by reason of redundancy*"

Accordingly, where this presumption applies as it does in this case the claimant is entitled to a declaration in her favour as to her right to a redundancy payment and I therefore make such a declaration.

7. Section 86(1) ERA provides for a minimum period of notice entitlement upon termination of employment as follows:-

"*The notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more –*
(a) is not less than one week notice if her period of continuous employment is less than two years
(b) is not less than one weeks' notice for each year of continuous employment if her period of continuous employment is two years or more but less than 12 years and
(c) *is not less than 12 weeks' notice if her period of continuous employment*

is 12 years or more"

In this case the Claimant comes within paragraph (b) and having been employed for 11 complete years she was entitled to receive 11 weeks' notice or pay in lieu, but she received neither. The Respondent dismissed the Claimant because it says (today via Mr Basharat Khan) she refused to return to work when lockdown was relaxed. The reason she relies upon for not returning to work was the Respondent's failure to pay outstanding furlough pay which I find amounts to a fundamental breach of contract by the Respondent which therefore justified not returning to work. Such refusal, justifiable as it was, cannot now be relied upon by the Respondent for not giving her the statutory minimum notice or paying her in lieu and therefore the failure to do either amounts to fundamental breach of contract again. Accordingly, I find that she is entitled to damages amounting to the value of the pay in lieu of notice she should have received which was 11 weeks net pay at the rate of £139 per week totalling £1,529.00

8. Having found that the Claimant has not produced any medical evidence, or evidence of causal connexion between her condition and her dismissal, I found it impossible to conclude that she had faced any form of direct disability discrimination and I therefore dismiss her claim under this head.

Employment Judge R S Drake

Signed 14 January 2022