G.182/50

Case number: 2700838/2011 and 2701156/2011

EMPLOYMENT TRIBUNALS

Claimant: **Mr PA Jessemey**

Respondent: **Rowstock Ltd (1)**
Mr J Davis (2)

Heard at: **Reading** **On: 14 November 2011**

Before: **Employment Judge Hardwick**
Members: Mrs CM Baggs and Mr A Mancey

Representation:
Claimant: Solicitor: P Archer
Respondent: Consultant: Mr G Jones

JUDGMENT

1. The Claimant was unfairly dismissed pursuant to the provisions of Section 98ZG Employment Rights Act 1996.

2. Pursuant to Section 207A Trade Union and Labour Relations (Consolidation) Act 1992 the compensatory award is uplifted by 10% for a failure by the Respondent to comply with the ACAS Code of Practice.

3. The award of compensation for unfair dismissal which includes the 10% uplift is £19,390.11, details of which are set out in the Schedule to this Judgment.

4. The Respondents unlawfully discriminated against the Claimant by reason of his age, contrary to Section 13 Equality Act 2010. The Tribunal awards the sum of £3,000 for injury to feelings together with interest on the award of £12.62 jointly and severally against both Respondents.

5 The first Respondent is ordered to pay to the Claimant 4 week's pay, capped at the statutory weekly sum of £380, in the sum of £1,520 under the provision of Paragraph 11 to Schedule 6 of the Employment Equality (Age) Regulations 2006 for a failure to comply with the duty of notification contained in Paragraph 2 of Schedule 6.

6. Pursuant to Section 38 Employment Act 2002 the first Respondent is ordered to pay to the Claimant 2 week's pay in the sum of £760 for failing to comply with the Notification of Employment Particulars requirement in Section 1 Employment Rights Act 1996.

7. All these sums, including the interest award of £12.62, amount to £24,682.73.

8. The claim of post employment victimisation is dismissed.

REASONS

1. The Issues

1.1. The Claimant was dismissed by the Respondent on 10 January 2011 just before his 66th birthday. He maintained that he was dismissed because of his age and that accordingly the dismissal was unfair. He stated that it was also age discrimination, contrary to Section 13 Equality Act 2010.

1.2. At the Hearing, the Respondent said that the principal reason for the dismissal of the Claimant was in relation to his retirement. The Respondent also conceded that it had not complied with the statutory retirement procedures contained in Schedule 6 Employment Equality (Age) Regulations 2006.

1.3. While the Claimant was looking for work it came to his notice that the Respondents had provided a reference to Brook Street Bureau. The reference was unfavourable and the Claimant maintained it was an act of victimisation by reason of him bringing employment Tribunal proceedings in relation to his dismissal.

2. Witnesses and Documentations

2.1. The Tribunal heard evidence for the Claimant from:

2.1.1. The Claimant himself (C1).

2.2. For the Respondent from:

2.2.1. Mr J Davis (Director).

2.3. The Tribunal had before it:

2.3.1. Hearing bundle (D1 – 39)

2.3.2. Claimant's Schedule of Loss (CII 1 – 20).

2.3.3. Claimant's Summary of Case (CIII)

2.3.4. Witness statements of both witnesses referenced above.

3. The Facts

3.1. The Claimant commenced his employment with the Respondent as a car body repairer on 5 March 2008. The Tribunal heard that the Respondent was a small business engaged in the sale of new and second hand Nissan automobiles. It also carried out servicing, maintenance and body repair work. It had 2 places of business with around 7 employees in each.

3.2. The Claimant attained the age of 65 on 17 January 2010 and was wondering whether this would affect his employment. He stated that he asked the workshop manager Mr Craig Spiers what the policy was for workers over the age of 65. He said that this was made as a casual enquiry at work and recalled Mr Spiers saying that as far he knew there was no age limit and there was nothing to worry about.

3.3. Mr Davis in his witness statement said that there was a discussion with Mr Spiers whereby it was agreed that the Claimant's employment would continue for a period of 12 months but the company would not expect to agree a further extension.

3.4. This formed part of the Respondents' Response and the Claimant in his statement said that that version of a conversation did not happen and was untrue.

3.5. On 10 January 2011 the Claimant was called into Mr Davis' office and he wished him a happy birthday. The Claimant said that it was explained to him that the company did not employ people over the age of 65. He said that he asked if there was any work he could do and was told it would cost too much in insurance premiums to continue employing him. He was given 2 week's notice and was told he was free to leave and receive a payment in lieu of notice. He left the workplace that day.

3.6. The Claimant sought advice from the Citizens Advice Bureau and following a letter from them to the Company Mrs Davis (also the wife of the Second Respondent) in her capacity as Company

Secretary wrote to the Claimant on 14 January 2011 (D32) stating that the company "did not employ manual workers after the age of 65 for health and safety and quality reasons and that he was 65 on 17 January 2010."

4. Submissions

4.1. Mr Jones said that the primary reason for the termination of the Claimant's employment was retirement and he conceded that the notification provisions had not been complied with. However, it was not a willful attempt to circumvent these regulations, it was the company's ignorance. Mr Davis saw the Claimant's retirement as a solution to a number of issues. He pointed out that if the Respondent had adhered to the notification procedures it could have given the Claimant 6 month's notice and he would have retired by 10 July 2011. Also the Respondent could have made the Claimant redundant which would have cost a lot less. There had been a drop off of work. The Claimant had not been replaced. There should be no claim for future losses and as regards injury to feelings this should be in the lower band of Vento. There was no victimisation in respect of the reference provided. The Claimant was merely upset that it was an unfavourable reference. This was the view of the employer and not victimisation. The reference to impending Employment Tribunal proceedings was in response to the question "were there any other relevant matters?" It was as the Respondent's Director had stated in evidence, it was a factual matter. As regards compensation of 8 week's pay for failure to carry out the notification procedures under the Age Regulations this was part and parcel of the general claim and this would be double recovery. It was not just and equitable to make an award.

4.2. Mr Archer for the Claimant provided a written Summary of Case (C3) to which he spoke. He said that at the Hearing the Respondent's Director had said bad things regarding the Claimant's work record which were not in the witness statement or even in the Response to the proceedings. The Claimant provided impressive evidence on mitigation. It was wholly hypothetical that if the Respondent had followed the statutory procedures, the Claimant's employment would have been terminated in 6 months time. £8,000 for injury to feelings was in his view a modest assessment.

5. Conclusions

5.1. The claim for unfair dismissal is abundantly clear. The Respondent has conceded that the principal reason for the dismissal was the retirement of the Claimant. It also conceded that there had been a

failure to comply with paragraph 2 of Schedule 6 to the 2006 Age Regulations. The Respondents, in the circumstances, seemed to accept that the dismissal would be unfair. Whether or not they in terms made that acceptance, it is manifest to the Tribunal that under the provisions of Section 98ZG Employment Rights Act 1996 the dismissal is automatically unfair.

5.2. Having found that the Respondent unlawfully dismissed the Claimant because of his age it follows that his claim of age discrimination under the Equality Act 2010 must succeed.

5.3. As regards the reference provided we find that this was an act of victimisation. It was a particularly poor reference made on 8 February 2011 to Brook Street Bureau (D35 – 36). It stated when requested whether they would reemploy the applicant, the answer given was no because of an attitude and age. In answer to questions: "was he able to work as part of a team;" "was he able to work under pressure;" "was he flexible, willing to accept instructions from those in authority;" and "was he able to work at a satisfactory standard," the boxes ticked were all no. In answer to the question "please add any other comments which you think might be relevant" the Respondent stated "we are in current industrial tribunal dispute."

5.4. This compares significantly to another reference, given to the same bureau by the Claimant's former employer of 8 years from 1999 to 2007, that said they would reemploy the Claimant and that the boxes marked negative by the Respondents were all marked by the answer yes in this reference.

5.5. We are clear that the reason for the reference submitted by the Respondents was because the Claimant was pursuing Employment Tribunal proceedings. As the Claimant's solicitor put it "No employer would hire on such a reference supplied." In relation to commenting upon the impending Tribunal proceedings, Mr Davis said that it was factually correct and was a relevant matter. In the Tribunal's view Mr Davis must have known that such a comment on a reference would deter virtually any employer from offering employment.

5.6. However, because of the drafting of the Equality Act 2010 the Tribunal cannot consider any remedy for this victimisation. Section 108 provides that it is unlawful to discriminate against or harass anyone in a relationship that has ended. By virtue of Section 108(7) conduct is not a contravention of this section (i.e. relationships that have ended) insofar as it also amounts to victimisation. Accordingly the claim for post employment victimisation fails as it is not rendered unlawful by Section 108.

5.7. As regards compensation for unfair dismissal we reject the Respondent's argument that the Claimant could have been dismissed by adherence to the statutory procedures. We prefer the evidence of the Claimant in relation to the casual conversation with Mr Spiers that in effect there was no need to worry because there were no procedures. A letter was put in from Mr Spiers (D39) stating his version of the conversation was that he told the Claimant that the company did not engage manual workers after the age of 65. The Respondent did not field Mr Spiers to give evidence. In any event this is at odds with the assertion of Mr Davis that it was agreed that his employment would continue for a further 6 months. Indeed the Company Secretary, having been approached by the Citizen's Advice Bureau on 14 January (D32), stated "the company did not employ manual workers after the age of 65 for health and safety and quality reasons." This is at odds with any arrangement that the Claimant would stay on for 1 year only. We consider that the decision to terminate the Claimant's employment arose only around the end of 2010/2011 and the Claimant was simply given 2 week's notice. In our view the Claimant was a credible witness and we preferred his version.

5.8. As regards mitigation we agree with his solicitor that the Claimant was actively seeking work. He said that he had had 4 day's work from a firm called Moore Sidecurtain Liners Ltd. He had tried to obtain work but none was available. He left his phone number and they rang him because one of their sprayers was sick and asked him to help out. He did 4 day's work and was paid £200 by cheque. He gave credit for those earnings in his Schedule of Loss.

5.9. Mr Davis gave evidence that on Saturday he went to the workshop of that company and the workshop foreman said that the Claimant had been employed and worked there for a few weeks and resigned because he could not handle the work. No evidence in relation to this was produced. The Respondent's representative stated that although the Claimant specified his job applications this was surprisingly not referred. The Claimant said it was only 4 day's work and he gave credit for those earnings on his Schedule of Loss.

5.10. We prefer the Claimant's evidence on this. We noted that he had diligently tried to find work and if he had been employed for a period by Moore Sidecurtain Liners Ltd we consider that he would have stuck with it having regard to the difficult work prospects and the personal financial situation he and his wife were in. They still had a mortgage running until 2015 and the Claimant's wife was in poor

health and wished to reduce her hours which was a difficulty in view of the Claimant's loss of job.

5.11. The onus is on the Respondent to show on the balance of probabilities a failure to mitigate. They have come nowhere near to doing that and we were impressed with the efforts the claimant had made to find work. He is now doing part-time work which is from August which has reduced his claim for losses and he is still actively pursuing other paid work. Of course the reference provided by the Respondent would have been distinctly unhelpful had he approached any of Brook Street's clients. The Respondent had raised certain matters at the Hearing relating to the quality of the Claimant's work but nothing had been put in the pleadings or indeed in the witness statement. There were no disciplinary or performance proceedings that had taken place against the Claimant during his time of employment with the Respondent.

5.12. We consider in the present difficult climate and with the Claimant's age that it will be difficult to secure work and consider it appropriate to award future losses in the sum of 6 months. The Claimant's side had claimed 12 months.

5.13. Turning to injury to feelings, the Claimant had made a claim for mid-range Vento. We cannot accept that. Whilst the nature of the imparting of the news to the Claimant was insensitively brusque the Claimant was aware of the possibility of his employment not continuing for a significant time because he had broached the subject of his employment status with his supervisor. He had been told that there was nothing to concern him but realistically the Claimant must have been aware that sometime in the not too distant future the question of his continuing employment might arise. Nevertheless it was upsetting to him and it was manifest to the Tribunal that it was a clear case of age discrimination albeit an act of omission rather than commission because the Respondent was ignorant of the requirements on them. We put the compensatory award in the first band of Vento and assess it in our view reasonably to reflect the injury to the Claimant in the sum of £3,000.

Employment Judge Hardwick

JUDGMENT SENT TO THE PARTIES ON
7 December 2011

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS

SCHEDULE

Compensation for unfair dismissal

Basic Award

3 weeks pay at statutory maximum of £380	£1,140

Compensatory Award

The Claimant did not fail to mitigate his losses

Immediate Losses

From 24 January 2011 to 1 August 2011 6.22 months at net monthly earnings of £1,374 Less £200 earned as casual work	£8,346
From 2 August to 14 November 2011 (date of the Hearing) 3 and 13/30ths months at net monthly losses of £874	£3,073
Total for Immediate Losses	£11,347.01
Future Losses	
6 months at £874	£5,244
Compensatory Award	£16,571
Plus uplift of 10%	£1,659.10
Total Compensatory Award	£18,250.11
Total Award for Unfair Dismissal - Basic and Compensatory Award	£19,390.11