



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr L Almeida

**Respondent:** Curzon Street Partners Limited

**Heard at:** London Central      **On:** 11-13 April 2017

**Before:** Employment Judge K Welch

## Representation

Claimant: Mr J Taylor (Counsel)

Respondent: Mr E Williams (Counsel)

# RESERVED REMEDY JUDGMENT

1. Following the Judgment as to liability which was given orally to the parties on 13 April 2017, the Respondent is ordered to pay to the Claimant the total sum of **£10,886.66** calculated as follows:

2. Unfair dismissal

Basic award (1 x 5 x £479)	£2,395.00
Less 35% reduction for contributory conduct	(£838.25)
Compensatory award	
(i) Loss of earnings to 31.3.17	£16,298.70
(ii) Loss of statutory rights	£450.00
Total compensatory award	£16,748.70
Less 35% reduction for contributory conduct	(£5,862.05)
<b>TOTAL AWARD</b>	<b>£10,886.66</b>

3. The Recoupment Regulations 1996 do not apply to the award for unfair dismissal.

Employment Judge Welch

11 May 2017

## REASONS

1. Following a decision, given orally on 13 April 2017, that the Claimant had been unfairly constructively dismissed, the Claimant gave further oral evidence concerning remedy, which was tested by cross examination and from questions from me. The Respondent did not adduce oral evidence concerning remedy although there was before me an agreed bundle relating to remedy.
2. The Claimant's date of birth is 29 October 1975 and at the time of his dismissal, he was 40 years old and had been continuously employed for 5 years.
3. The Claimant gave evidence, which I accepted, that he was not fit to undertake work until October 2017. Therefore, he would only be entitled to Statutory Sick Pay ('SSP') at the then rate of £88.45 from the date of his dismissal until 30 September 2017, save for 1 week of full pay in accordance with section 87 of the Employment Rights Act 1996 ('ERA').
4. It was agreed between the parties that the Claimant's net pay per week was £584.
5. The Claimant has claimed no benefits since his dismissal, relying upon his own savings and loans from family and friends.

6. The Claimant's evidence was that he had contacted and attempted to gain employment through his contacts within the industry, having previously obtained employment this way. Although unsuccessful, I accept his evidence that he attempted to get an alternative personal chef role.
7. There was evidence of some applications within the remedy bundle, although these did not show the full extent of the Claimant's applications. I accepted his evidence, tested by cross examination, that some of his applications were not evidenced within the bundle, since they were submitted online or through mobile phone applications with agencies he had registered for. I further accept that the Claimant regularly looked for suitable roles on various websites, including caterers.com. On some occasions, he contacted agencies who he had already registered with, so that his CV was considered for a vacancy he had seen advertised.
8. The Claimant gave evidence that he had no recent hotel chef experience, since he had not worked in a hotel for 5 years, since he had joined the Respondent. Although he had worked in a hotel for 15 years prior to that date, before he had his young family. He also was concerned that the split shift work commonly used in hotels would have prevented him from any form of family life with his young children. The Claimant confirmed that he had not approached any hotels to see whether there were any posts which may have been suitable.
9. The Claimant had attended an interview with a school in Harrow, but had not been successful.
10. I am satisfied that the Claimant had attempted to look for alternative work and had not necessarily considered only roles in catering.
11. The Respondent submitted that the Claimant had failed to mitigate his loss and had been unreasonable in his approach to obtaining alternative employment since he had

not applied for any chef positions within hotels. The Respondent further contended that the Claimant had been working in Little Mumbai restaurant and had not declared any earnings from this.

12. The Claimant contended that he had attempted to mitigate his loss as evidenced by his applications referred to both orally and contained within the remedy bundle.

13. In brief, the relevant law I have considered concerning remedy is as follows:

“Section 122(2) ERA Basic award: reductions

(2) Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.”

14. The compensatory award is provided by section 123 ERA:

“123(1) Subject to the provisions of this section and sections 124, 124A and 126, 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.

123(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” .....

“123(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”...

“123(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.”

15. In considering whether the Claimant had mitigated his loss, I had regard to the case of Savage v Saxena [1998] ICR 357 (EAT) which approved the test in Gardiner-Hill v Roland Berger Technics Ltd [1982] IRLR 498 where it said that “the tribunal ought to have carried out the following analysis:

- (1) Identify what steps should have been taken by the appellant to mitigate his loss.
- (2) Find the date upon which such steps would have produced an alternative income.
- (3) Thereafter reduce the amount of compensation with the amount of income which would have been earned.”

16. I consider that the Claimant ought to have approached hotels within a reasonable area of his home to ascertain what (if any) vacancies there were for chefs and whether there were any roles which were appropriate for him in his personal circumstances.

17. If the Claimant had done this, once his health had improved (ie from 1 October 2016), on the balance of probabilities, I believe that he would have obtained alternative employment in 6 months, taking into account his individual circumstances. There are many catering jobs available in hotels, and whilst I consider that his lack of a reference for the last 5 years would affect his chances of obtaining alternative employment, I still consider that he would have been able to find work at a similar level and with similar remuneration within 6 months. Therefore, taking into account the vacancies that were evidenced within the remedy bundle, and I consider that the Claimant has failed to adequately mitigate his loss.

## **Conclusion**

18. I consider that the Claimant should be awarded compensation for loss of earnings up until 31 March 2017 (being 6 months from the date that he was fit to work). From this date, I consider that he should have obtained alternative employment, at a similar rate to that which he was employed by the Respondent, and therefore no further amount for loss of earnings should be awarded.

19. In relation to the amounts awarded for the loss of earnings, I have calculated these as follows:

19.1.	Loss of earnings 1 week's full pay 14.8.16 to 21.8.16	£584.00
	Loss of SSP 14.8.16 to 30.9.16 (6 weeks at £88.45)	£530.70
	Loss of earnings 1.10.16 to 31.3.17 (26 weeks at £584)	£15,184.00
	TOTAL:	£16,298.70

20. Turning to the adjustment of compensation which both parties requested in line with the other's alleged failure to comply with the ACAS code of practice on Discipline and Grievance. I do not find that the Respondent unreasonably failed to follow the ACAS code of practice in relation to "disciplinary situations", and further do not consider that it would be just and equitable to increase the compensation awarded in these circumstances as allowed under section 207A Trade Union Labour Relations (Consolidation) Act 1992 ('TULRCA).

21. I also do not consider that the Claimant unreasonably failed to follow the ACAS code of practice in relation to his failure to bring a grievance in respect of his resignation. It was clear that the Respondent was going to dismiss in any event, and I do not consider that it would be just and equitable to reduce his compensation in these circumstances, other than the reduction already ordered in respect of his contributory conduct.

22. Therefore, no adjustments will be made as regards section 207A TULRCA.

23. I have adjusted the basic and compensatory awards in light of my findings in the substantive judgment relating to the Claimant's contributory conduct.

24. The amount awarded is lower than the cap for compensatory awards and therefore, no further adjustment is necessary.