



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH

BEFORE: EMPLOYMENT JUDGE CORRIGAN
(Sitting Alone)

BETWEEN:

Mr J G Counday

Claimant

AND

Asda Stores Limited

Respondent

ON: 15 February 2017

Appearances:

For the Claimant: Mr R Oulton, Counsel

For the Respondent: Mr S Crawford, Counsel

RESERVED REMEDY JUDGMENT

The Judgment is that:-

1. The Claimant is awarded compensation for unfair dismissal of £8332 to be paid by the Respondent to the Claimant.
2. This award consists of:

Basic award	£2450
Compensatory award	£5882
Consisting of:	
Loss of earnings	
1 September 2016 to	
15 February 2017	£4,656
Future loss	£776
Loss of statutory rights	£450

3. Recoupment does not apply to this award.

REASONS

Introduction

1. By the Judgment dated 22 March 2017, sent to the parties on 28 April 2017, the Claimant was found to have been unfairly dismissed. It was also determined that the Respondent should reimburse the Claimant's fee of £1,200.
2. The Claimant having confirmed that he did not seek re-employment on 11 May 2017 the Employment Judge proceeded to determine compensation based on evidence heard on 15 February 2017 and the representations made by the parties' representatives on that date.

Issues

3. The issues agreed with the parties at the outset were:
 - 3.1 What is the Claimant's entitlement to a basic award?
 - 3.2 What are the Claimant's loss of earnings?
 - 3.3 Did the Claimant contribute to his dismissal?
 - 3.4 If the dismissal was procedurally unfair is there a chance he would have been dismissed fairly in any event?

I note that the Claimant makes reference to an application for costs in his witness statement but no such application was included in the list of issues or advanced before me by his representative so I have not considered this.

Relevant facts

4. There was a dispute in relation to the Claimant's weekly pay but it was agreed by the parties to proceed on the basis the Claimant's gross and net pay was £194 per week. The Claimant was employed from 24 July 2002 to 28 July 2016 (14 years). The Claimant's date of birth is 12 September 1982 so at the date of dismissal he was 33 years old.
5. The Claimant was dismissed on 28 July 2016 but had expected to be on his career break until the end of August 2016.
6. He had not found alternative employment prior to the hearing on 15 February 2017. It is a period of 24 weeks from the end of his career break until the

hearing.

7. Although he said he had made a handful of applications for similar employment at employers such as Sainsbury's, Tesco and the Co-op, his evidence in relation to the documentation suggested he had started one or two applications but these had not been completed as they required him to upload a copy of his passport whereas his passport was still with the Home Office. He said he needed the original passport to take up employment. His passport was returned the week before the hearing and he expected to be able to find similar employment quickly now that it had been returned, although not necessarily at the same hours and he might have to change his family life. The shifts at Asda were at night and fitted around his wife's employment on the Underground.
8. He felt that having to say that he had been dismissed for "gross misconduct" from his employment of 14 years would also have affected his prospects. In fact the Respondent summarily dismissed him but did not make reference to gross misconduct.

Relevant Law

9. The compensation awarded upon a finding of unfair dismissal consists of a basic award and a compensatory award (section 118 of the Employment Rights Act 1996). The basic award in this case is calculated in accordance with section 119 of the Employment Rights Act 1996. Section 123 provides that 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 the loss is attributable to the employer.
10. Section 123 (4) makes clear that the employee is under a duty to reasonably mitigate his or her loss.
11. Section 122(2) provides for the possibility of a reduction in the basic award where the tribunal considers any conduct of the Claimant before the dismissal was such that it would be just and equitable to reduce the basic award. Section 123 (6) provides that where the tribunal considers that the dismissal was caused or contributed to by any action of the Claimant it shall reduce the award by such proportion as it considers just and equitable. The Claimant's conduct must be culpable or blameworthy (*Nelson v BBC (No 2)* [1980] ICR 110).

Conclusions

What is the Claimant's entitlement to a basic award?

12. Based on the Claimant's age and length of service the multiplier is 12.5 weeks and his weekly pay was agreed to be £194 per week giving a basic award of

£2,450.

What are the Claimant's loss of earnings?

13. The Claimant's loss of earnings from 1st September 2016 to the date of the hearing were £4,656 (£194 x 24 weeks). The Claimant accepted he would obtain work in the near future now he had his original passport and renewed visa.
14. The Respondent's representative asserted that the Claimant had not reasonably mitigated his loss and that he should have obtained alternative work within three months given the sector he was employed in and that his loss of earnings should be capped at three months. There was no evidence supporting that assertion, other than the Claimant's acceptance that he expected to find a job promptly now that he had his original passport.
15. I accept that the Claimant had not made many applications. However I also accept that, where the application is done online and there is an expectation that the applicant upload a copy of their right to work documentation, not having his passport in his possession or an in date visa was a significant disadvantage. Indeed this is a significant disadvantage whether or not the application is made online.
16. Therefore although I accept that the Claimant did not make many applications, I also accept his reservations about making applications in his circumstances and am not satisfied that he has behaved unreasonably.
17. There is also no evidence before me that had he made more applications he would have been successful given he did not have an original passport or original in date right to work documentation. Given the Respondent themselves did not use the Employer Checking Service available in relation to the Claimant who had 14 years good service with them it is not just and equitable to assume a different employer would do so in respect of a new prospective employee in the Claimant's circumstances (which include his having been summarily dismissed after 14 years' service in relation to his right to work documentation). I am not therefore satisfied that on the balance of probability more applications would have led to an employment offer prior to receipt of his passport and renewed visa from the Home Office.
18. I accept though that he is likely to be successful in the near future.
19. In all the circumstances I do not consider it just and equitable to reduce the Claimant's loss of earnings up to the hearing date but consider it just and equitable to limit future loss to four weeks to allow for the process of obtaining work giving a figure for future loss of £776 (£194 x 4).
20. Given the Claimant's long service I consider an award of £450 to be an appropriate award of loss of statutory rights.

Did the Claimant contribute to his dismissal?

21. I found the dismissal was well outside the range of reasonable responses,

and that on the balance of probability the Claimant had provided sufficient evidence of his in time visa renewal application for the Respondent to conduct further checks with the Home Office. I am not satisfied that the Claimant committed any conduct that would justify reducing his award. In particular I did not find the specific request that he provide his visa application itself to have been a reasonable instruction given its nature as a sensitive personal document. The failure to provide this was not a failure to follow a reasonable instruction.

If the dismissal was procedurally unfair is there a chance he would have been dismissed fairly in any event?

22. I found the dismissal substantively unfair and I do not consider there is a chance that the Claimant could have been fairly dismissed in any event on the same date.

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Employment Judge Corrigan
12 July 2017