



EMPLOYMENT TRIBUNALS

Claimant: Mr I Martland

Respondent: D W Lynn Limited

HELD AT: Manchester

ON: 23 May 2017

BEFORE: Employment Judge Barker

REPRESENTATION:

Claimant: Mr A Mellis, Counsel

Respondent: Mr R Rees, Consultant

JUDGMENT having been given to the parties on 23rd May 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. In a decision of this Tribunal on 6 March 2017 Mr Martland succeeded in his constructive unfair dismissal claim against the respondent and was also awarded two weeks' pay for a failure on the part of the respondent to provide a complete statement of employment particulars in accordance with section 38 of the Employment Act 2002.
2. The purpose of this hearing was to determine the amount of compensation to be awarded to Mr Martland for unfair dismissal.
3. At the start of the hearing the parties' representatives confirmed that they had agreed the amount of the basic award to be awarded to Mr Martland. The parties had also agreed the sum of £500 for loss of statutory rights to be awarded to Mr Martland.
4. Four remaining issues to be determined were set out at the start of the hearing, as follows:
 - (1) Is Mr Martland entitled to loss of earnings for the period following his dismissal, that is 27 July 2016 to 24 February 2017, when he was receiving

Employment Support Allowance? The legal test is: but for the actions of the respondent, would the claimant have been able to carry on working? The losses must flow from the dismissal and not the manner of the dismissal. Mr Martland is entitled to a just and equitable amount which in the circumstances of this case needs to take into account any previous mental health problems that Mr Martland may have had.

(2) The issue of mitigation of losses. The question for the Tribunal to decide is whether Mr Martland acted unreasonably in mitigating his losses. The burden of proof is on the respondent to demonstrate that Mr Martland acted unreasonably. The Employment Appeal Tribunal decision of **Cooper Contracting Limited v Lindsey** sets out the tests to apply in relation to this issue. A Tribunal is cautioned against adopting too stringent a test. It is not for a claimant to prove that he has been reasonable, the test is for the respondent to show that he has been unreasonable.

(3) What were the actual amounts earned by Mr Martland in his alternative employment, as a painter and decorator, and what can it be said that he will earn in the future?

(4) What is the period of future losses? At what point will it be either just and equitable for the respondent to cease compensating Mr Martland, or at what point would he earn sufficient for his losses to have been fully mitigated?

5. The Tribunal heard from evidence from Mr Martland. He had provided a witness statement and gave further evidence under oath. There were also documents in mitigation relating to his new work and a letter from his GP in relation to his health.

6. Turning to the first question, which is whether, during the period when Mr Martland was receiving Employment Support Allowance, he was unfit for work. Is he entitled to loss of earnings for this period or merely statutory sick pay? The question for the Tribunal is: but for the actions of the respondent in dismissing Mr Martland, would he have remained at work and been able to work during that period?

7. It is clear from the evidence of Mr Martland and his GP's letter in February 2017 that Mr Martland is generally someone who is of an anxious and nervous disposition. He told me that he was anxious in group situations and that he prefers working alone. He described how he had experienced stress and anxiety during a period of uncertainty over his job security at the respondent when the issue of redundancy had been raised several years ago. He said that the period of stress most recently began on 18 July 2016 and lasted for some time afterwards. Mr Martland said that this began over the issue of the reduction in work at the respondent. There had been a discussion over whether Mr Martland would be entitled to a redundancy payment from the respondent, and as to whether he would be working only three days a fortnight.

8. When I asked Mr Martland what caused that anxiety, he said that it was from fear for his future financial security, and to do with changing his job at his age, which is approaching 50. He has also done the same job for a considerable period of time, approximately 25 years. The letter from his GP describes "...a long history of anxiety

and depression which has significantly worsened since being dismissed from his job", which corresponds with Mr Martland's evidence under oath, which was that he had managed to contain his anxiety while he remained at work, but that the anxiety was greatly worsened by fear for his future financial security immediately before and then in the period after his dismissal.

9. Taking all of the evidence before me into account, I find that Mr Martland was unable to work due to anxiety and his admitted over-reliance on alcohol for approximately a month immediately after his dismissal. This was caused by the respondent's actions. Nevertheless, he was still able to function somewhat during that time. There was a text in the bundle on page 96 from 10 August 2016 which demonstrated that he was making some attempts at seeking alternative employment during that time. After this period of incapacity, Mr Martland began actively seeking work in earnest.

10. It is not automatically the case that receiving ill health benefits means that an individual is wholly unable to work or look for work, and as has been shown in Mr Martland's case for most of the period while he was receiving ESA he was looking for work and taking steps to start his own business.

11. His evidence was that he had researched driving jobs and made plans to start a burger van business. From about November/December 2016 onwards, while he was still receiving ESA, he was renovating the burger van he had bought. He had renovated it along with his partner but when the anxiety to do with taking his hygiene exams became too much he sold the van in early 2017 and used the money to buy a decorating van and start his decorating business.

12. In conclusion, I find that it was the stress of losing his job that caused the notable increase in his ill health and mental health problems, and that but for the behaviour of the respondent Mr Martland would have carried on as he had done previously, which was to manage his anxiety and to carry on working with no periods of absence. He is therefore entitled to loss of earnings for the period covered by his Employment Support Allowance.

13. The second issue for the Tribunal to decide is that of mitigation of loss. The burden of proof is on the respondent. The question is, has Mr Martland acted unreasonably in his attempts to mitigate his losses? No evidence was advanced by the respondent as to how the claimant ought to have mitigated his losses differently. There was no evidence of what alternative jobs Mr Martland could have done that would have mitigated his losses more effectively and there was no evidence that he could have taken certain steps that by a certain point in time that would have mitigated his losses more fully. As is clear from the case law the burden of proof is on the respondent to demonstrate a failure to mitigate, and on the balance of probabilities they have not done so.

14. As part of an assessment of what is just and equitable generally in relation to the award of compensation to Mr Martland, I have also taken into account his preference for working alone. He said he dislikes and gets anxious talking on the phone. He would have found it extremely difficult to do a job that involved working in a large group of people, such as working in a supermarket for example. I have also taken into account the fact that he has been in one line of work for 25 years, so he

does not have a wide range of skills or experience on which to base his job search. It was reasonable of him to try to establish a different line of work to re-establish his earning capacity. He tried a burger van venture, and when that did not work he switched to another venture and in fact he was working and earning money from the decorating business by the end of February 2017. I do not find that he has acted unreasonably in the manner in which he has mitigated his losses.

15. Turning then to the final two questions: firstly what were the actual amounts earned by Mr Martland in his business? His evidence was that he keeps approximately 80% of the amounts earned by him. In the future he said he would invest in more equipment, such as some long ladders and more of a stock of supplies so that he would not have to turn down jobs because of a lack of equipment. He mentioned he had turned down three external decorating jobs because he had not had long enough ladders or a roof rack for his van.

16. Secondly, what period of future loss is it just and equitable to compensate Mr Martland for? He was earning £220 per week. He has been earning in recent periods approximately £100 per week and keeping approximately £80 of that. He told me he has bookings for the next two weeks. I assume that with the money that he is going to receive he will invest in more equipment and therefore take on a wider range of jobs. I also note from the evidence that has been before me over the last two hearings that Mr Martland has a strong work ethic. He is currently working on average two or three days a week. He previously worked four days a week but also took on additional overtime, so with the stress of the case behind him and a financial investment, I find he has the capacity to increase the amount of work that he does.

17. I find that it is appropriate to fix his period of future loss at 52 weeks from the date of dismissal. Mr Mellis had asked for the period of losses to extend 69 weeks from the date of dismissal, however 52 weeks is a just and equitable point to focus on, because of Mr Martland's ability now to increase the work he does. He will have the investment and the time to be able to do so.

18. 52 weeks' losses at a weekly wage of £220 a week was agreed by the parties' representatives to be £11,440. From that I have deducted 22 weeks at £80, the amount that Mr Martland has earned to date, which is £1,760.

19. He is estimated to earn a further £80 a week over the next nine weeks to the week commencing 24 July, that is a further £720 in mitigation. He had financial losses in total from the date of dismissal for a year of £11,440. When the amounts earned in mitigation are deducted from that, the compensatory award that will be awarded to Mr Martland is £8,960.

20. Loss of earnings is £8,960 plus the basic award of £4,559.88 plus loss of statutory rights of £500 plus the two weeks' pay for the failure to comply with the requirements of the section 1 statement of £440, gives a total award of compensation payable by the respondent to the claimant of £14,459.88. This is subject to recoupment of the Employment Support Allowance by the respondent to the relevant benefits authorities, but that will take place separately and does not affect the amount awarded by the Tribunal in this judgment.

Employment Judge Barker

6th July 2017

REASONS SENT TO THE PARTIES ON

17 July 2017

FOR THE TRIBUNAL OFFICE