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THE EMPLOYMENT TRIBUNALS

Claimants

Respondent

(1) Mr I Yousaf
(2) Ms Y-N Wang

v

Merrill Corporation Limited

Heard at: London Central

On: 31 August 2017

Before: Employment Judge Goodman

Representation:

Claimants: In Person

Respondent: Ms I Ferber, Counsel

JUDGMENT

The Judgment of the Tribunal is as follows:

1. The Respondent is ordered to pay the First Claimant, Imran Yousaf a basic award of £2,395 and a compensatory award of £10,216.10, total £12,611.11.
2. The Respondent is ordered to pay the Second Claimant, Ms Ying-Nan Wang a basic award of £3,832 and a compensatory award of £13,385.46, total £17,217.46.

REASONS

1. Today's hearing was to decide remedy for the Claimants. Judgment was sent on 16 June 2017 to the effect that the Respondents had unfairly dismissed both of them. Written Reasons were sent to the parties on 28 July 2017.

2. To decide the issues today, the Tribunal heard evidence from:-
 - Imran Yousaf, the First Claimant
 - Y-N Wang, the Second Claimant
 - Lee Jackson, Managing Director of City Elite Recruitment Limited, who gave particular evidence on recruitment of staff for visual data rooms.
 - Megan Katzanevas, the Respondent's Human Resources Director with 17 years experience in HR in particular outsourcing and recruitment.
3. There was a bundle of 680 pages. Many of these consisted of job advertisements. Neither side was able to provide the Tribunal with the total number of jobs advertised or had conducted any analysis. Witnesses agreed that several of the jobs to which they were taken in the bundle were not suitable for either Claimant.
4. The evidence concluded at the end of the first day, and judgment was reserved to save the costs of further attendance.

Basic Awards

5. This part was uncontentious.
6. Mr Yousaf was just short of 6 years employment when his employment terminated on 11 October 2016. Applying a cap on a week's pay at £479 he is entitled to 5 weeks or £2,395.
7. Ms Wang had been employed for 8 complete years when she was dismissed on 21 October 2016, and again her pay is subject to the weekly cap at £479. Her basic award is £3,832.

Compensatory Awards

8. Both Claimants worked 3 days a week over weekends, on nightshifts totalling 34½ hours a week.
9. Mr Yousaf was paid £35,980.00 gross per annum, plus a shift allowance of £8,995.00 per annum.
10. Ms Wang was paid slightly less, £35,328.00 per annum, plus a shift allowance of £8,832.00.
11. Mr Yousaf took home £2,518.66 per month, or £581.23 per week, and Ms Wang £2,649.61 per month or £611.50 per week.
12. In addition, the Respondents made a contribution to pension of £20.76 (Mr Yousaf) and £20.88 (Ms Wang) per week.
13. Mr Yousaf only worked weekends because the Respondent had asked him to, and it was well paid.
14. Ms Wang worked weekends because she had a young child and this working arrangement enabled her to spend daytime hours with her child. In the evidence, the picture was more nuanced. Until April 2016 her husband ran a business from home and in effect provided childcare when she was at work. In April 2016, he opened a restaurant, which took him out of the house especially weekend evenings, and at that point the child was sent to her grandparents in China. She returned at the end of July 2016 because she was going to start school in the autumn when she was 5. Ms Wang's employment ceased in October 2016; until then neighbours helped out with childcare on Friday and Saturday evenings when she was at work and her husband at the restaurant, and she gave them presents in return. Since then Ms Wang has not worked outside the house except she sometimes spends 2 hours on a Saturday evening helping in her husband's restaurant, if she can get a babysitter.

15. So, to sum up, Mr Yousaf had no particular preference for work on any day of the week or hour of the day, but Ms Wang was restricted by childcare needs. It is relevant to both of them that weekend working was significantly better paid because of the unsocial hours.
16. The evidence of Lee Jackson was that VDR (Virtual Data Rooms) is a very niche market. There are a number of competitors. He would not have expected any difficulty in placing either Claimant, having seen the CV of both of them. He said Merrill (the Respondent) had a good reputation, and anyone who had worked for Merrill for a number of years, as they had, would have been a desirable candidate.
17. He gave no specific evidence about how many such roles had been advertised since October 2016. There was an advertisement in the bundle for a similar job with a competitor, but it was at a slightly more senior level. Mr Jackson also thought that a strong background in customer support, a transferable skill, would mean that there would be a wide range of other opportunities open to both. Most companies offer new recruits training on their own systems, and people who have project management skills that are desirable and transferable.
18. Some of the jobs advertised in the bundle, for example those requiring a knowledge of commercial flooring, or experience with a Housing Association, would not be suitable for either Claimant, neither would technical IT jobs requiring knowledge of SQL Software. There were other, more general posts and he would not expect difficulty in placing either Claimant in work had they wanted it.
19. As for the restriction to part time work, he noted that Ms Wang's first language is Mandarin Chinese. The undisputed evidence was that a number of finance related institutions in London are within the Asia Pacific market, where evening and night work are required because of time differences, and where a skill in Mandarin would be desirable even if it was not mentioned as

a requirement. For that reason he would not have anticipated she have difficulty, despite any restriction on hours in replacing her job with Merrill.

20. On training, Ms Katzanevas made the point that Merrill have always employed staff from very diverse backgrounds, looking for their skills rather than particular knowledge. She added that they have little staff turnover, perhaps because they are a good employer, perhaps because they pay well.
21. The Tribunal observes that, unlike many unfairly dismissed employees, these Claimants are unlikely to have experienced any difficulty on the market because of the reason for leaving their last employer. This has not been put to the test, as neither Claimant ever looked for alternative employment.
22. In Ms Wang's case, she had gone to Merrill after obtaining a 2.2 maths degree at Southampton University, which had included one year's work experience at J P Morgan Chase. She always had it in mind to be a teacher, and when she lost her job with Merrill, she decided to revisit this plan, because it would also fit with having a child about to start primary school. On her evidence there are two ways now to qualify as a maths teacher, either to take a one year post graduate certificate of education, or to take a two year traineeship involving working in a school and being paid. These traineeships are obtained by application to UCAS; the application process begins in "February/March every year for September start". She intended to apply in 2017, but in February 2017 she became pregnant, and her expected date of delivery is the end of November 2017. This suggests that conception occurred in March, at a point when she had not in fact made an application though the deadline may have passed. Without more specific information it is not possible to know how her knowledge of her pregnancy tied in with the dates for a UCAS application. There was no other evidence of either.
23. As it would assist a successful application to have teaching experience, she began to volunteer at the daughter's primary school, which she does from 9-12 on weekdays in term time. This fits with her daughter's hours, as she leaves school at 2.45pm. She also bought some maths books to refresh her

knowledge - there is an order form in the bundle placed on 26 September 2016, showing that she was considering this plan even before the termination of her employment.

24. She is working with year 6 in a primary school. On qualifying she hopes to work with a secondary school. Her knowledge of English and of general European culture is, she feels, insufficient to be adequate to a primary school teacher.
25. While on the 2 year training course, she would be paid £22,000 as a new maths teacher. Thereafter there is a scale depending upon experience and responsibility. She said that maths teachers do not get additional pay supplements or incentive payments.
26. She now proposes to apply through UCAS in February or March 2018 with a view to starting training in September 2018. In the meantime, had she remained with Merrill, she would have been entitled to maternity pay, 6 weeks at 90% of all pay, 7 weeks at 90% of basic pay, then half basic pay for another 17 weeks, followed by 8 weeks at basic statutory maternity pay, 38 in total.
27. Ms Wang has disclosed details of her bank statement. She and her husband maintain a joint bank statement for personal use. There is a business account for the restaurant. Although the Claimant does not work in the restaurant, because her English language skills are better than those of her husband, she has a bank card for this account and will use it to make payments or transfers to their joint account of what by description sound like his drawings. The exact amount drawn by card depends on whether restaurant receipts were largely in cash or by card. Some cash is retained to pay staff. Although she works 2 hours in front of house in the restaurant on Saturday night when she can get a babysitter, she denied receiving payment for this.

Mr Yousaf

28. Several years ago Mr Yousaf completed 2 years of an Economics and Accounting degree at London Metropolitan University. He explained how he had found it difficult to pursue his studies when he was effectively working full-time while studying to cover costs. He obtained Part 1 of the ACCA accounting qualification, and had intended to pursue Part 2 but has not done so. He has a solid career of various public service jobs, involving customer assistance before working for Merrill. Most of these were with the Office of Public Guardian, which he left when the office moved to Birmingham. He then had a period of work with ACAS, but resigned because he found the work undemanding. He was unemployed for about 3 months before he started work for Merrill.
29. On leaving Merrill, his evidence was that he decided to set up in his own business, so as no longer to be subject to the decisions of others, such as to move his job to Birmingham (GPA), or to cut his holiday pay (the Respondent). He would take back control and be self-employed. He worked as a driver for Uber for 13 weeks from 7 November to 13 February. Gross revenues over the period were £3,961.76. His earnings, after fixed costs of car rental, insurance and petrol (shown always as £30.00 per week) fluctuated, such that in some weeks he had a net income of £307.22, but in others (and in particular the period 26 December onward, he seems never to have covered his costs. The spreadsheet does not show the number of hours he committed to driving in this period. The total of his net profit from this activity over the whole period was £971.76, averaging just under £70 per week, though gross revenue suggests he drove for many more hours in the first four weeks than after Christmas.
30. Mr Yousaf had, in September 2015, registered a business called Punj Foods Limited. He said the intention was that his wife would cater for events on a commercial basis, but she did not in fact trade, at least until September 2016, when the first accounts were filed at Companies House. The directors were himself and his wife until March 2017, when his sister was added, and she became Company Secretary in place of the Claimant. Also in March

2017, the Claimant registered another company called Tikka Tuk Limited. This was another catering business, separately registered to protect the name. This business has traded using the account at Barclays Bank for Punj Foods.

31. The bank accounts show that the Claimant transferred money from his own account with Natwest to another account at TSB (for which no statements have been disclosed), and from there to the business account held at Barclays. He has spent £10,000 setting up the business, which largely appears to relate to the cost of purchasing and customising a van. He also claims £4,315.38 for running costs, insurance and petrol. There is no account for receipts by cash or card on the business, nor of the purchases of meat, salad, rice and so on. This, he says, is because he used cash receipts from the business to buy the materials. Despite having some basic accounting training, he had not sorted the receipts or prepared accounts. He was unable to say what his receipts from sales were, or the expenses, or even to estimate the net profit from the business. There was no business plan or cash flow projection. The schedule of loss shows a “net weekly salary” of £100 per week, but he agreed that this was plucked from the air, because he is simply unaware of the figures for income and expenditure in the business. Meanwhile, household expenses are pooled with his mother where he and his wife live, and his mother has taken over paying some of the bills that the Claimant used to pay. The business sells food on Wednesdays from a van at Tower Hill: this requires 2 days of preparation. He has recently obtained a licence in Hackney, and hopes to trade there on a further 3 days per week. He contributes the slow development of the business since giving up Uber driving in the early part of this year to the need to prepare for this case.

Relevant Law

32. Section 123 of the Employment Rights Act 1996 provides that “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 insofar as that loss is attributable to action taken by the employer". This may include "any expenses reasonably incurred by the complainant in consequence of the dismissal", and loss of any benefit which he might reasonably expect to have had but for the dismissal. A compensatory award is limited by Section 124 to a person's week's pay (including pension contribution) multiplied by 52, or £78,962, whichever is lower.

33. The core issue is the Respondent's assertion that neither Claimant has taken any steps to mitigate their loss. It would not, they argue, be just or equitable to order compensation for loss since dismissal.
34. The Employment Appeal Tribunal guidance to Tribunals on how they should approach this issue, is to ask what steps it had been reasonable for the Claimant to take to mitigate his or her loss, what steps the Claimant did in fact take, and if the Claimant had taken those steps, would the loss have been mitigated. *Archbold Freightage limited v Wilson [1974] IRLR 10*, says that a Claimant fulfils the duty to mitigate if he "acted as a reasonable person would do if he or she had no hope of seeking compensation from his or her previous employer".
35. The Tribunal must look at all the circumstances, and not accept the subjective view of the Claimant as to what was reasonable, as it is an objective assessment. It is for the Respondent to show that the Claimant acted unreasonably.
36. Where an employee has taken himself off the job market in order to undergo training or re-education following dismissal, that could be a failure to mitigate; it is a question for the Tribunal whether the employee acted reasonably in taking this step. It might depend on the state of the labour market generally and the Claimant's prospects of obtaining work without retraining. *Mullarkey v Up the Creek Limited EAT 263/95* states that a failure to mitigate does not mean that the period of compensation comes to an end. The Tribunal must

judge when the employee ought to have obtained fresh employment at a similar level.

37. With regard to Claimants who decide to set up in business, again the decision is whether this is a reasonable one for Claimants to take. It was reasonable in *Gardiner Hill v Roland Berger Technics Limited [1982] IRLR 498* where a 55 year old Management Director with 16 years experience in a specialist business decided to market his expertise rather than seeking alternative employment. It is also reasonable in cases where employees had tried unsuccessfully to obtain alternative employment and then decided to set up on their own.
38. Applying this law to the particular circumstances of each Claimant these are the conclusions:

Ms Wang

39. On the evidence to the Tribunal, it is very likely that Ms Wang would have been able to obtain other work at a financial institution or one servicing such institutions within London had she looked for work, and this includes being restricted to being on nights, so that she could spend time with her child during the day. Evidence not contested shows there is a great deal of customer service advice work about, and that her Mandarin speaking skill would make her attractive to any firm with an Asia-Pacific business, even if no jobs have been advertised requiring a Mandarin speaker. She would have been desirable from her CV. As Ms Wang has not looked for work, she has no evidence with which to gainsay this assessment.
40. There is some evidence to suggest that Ms Wang's decision to retrain as a teacher is due to her changing childcare arrangements, with her husband's involvement with the business and her child starting school. It is not clear that persisting with neighbours' assistance on a goodwill basis would have been sustainable long term. This is reinforced by the fact that the Claimant did not look even for temporary work to supplement her income which she

could have undertaken for some time before her pregnancy need be disclosed to others (around June 2016.)

41. In the Tribunal finding, Ms Wang has not taken reasonable steps to mitigate her loss. Between October and June she could have done alternative work, which she could have maintained while keeping volunteering at a level that would provide a suitable track record to boost her prospects of a successful application for teacher training. It was agreed she took no steps at all to look for work at any level.
42. Had the Claimant looked for work, would she have been able to mitigate her loss? One point that is clear is that both Claimants were very well paid for the relatively short hours, given the substantial weekend shift supplement. She may have had to work quite hard, and it may have taken some time, to get work that was at least as well paid. Had she started looking for work when given notice towards the end of September, she may have obtained work then. As Christmas approached, companies would be less keen to recruit. Had she looked for work, it can reasonably be anticipated she would have found some work by the end of January 2017. After that, it is not clear that she would have been able to obtain work at a comparable rate of pay immediately. There was plentiful work available at £23,000 per annum, but plausibly, allowing for unsocial hours, she should have been able to obtain better paid work by the beginning of May 2016, by which time it will have been 10 months since she was given notice of dismissal. By that time she would have had plenty of opportunity to look for work, and as discussed she is an attractive candidate on the job market.
43. Giving the Claimant a full loss on 22 October 2016 – 31 January 2017, 14 weeks at £611.51 per week produces £8,561.14. For the next 13 weeks, the difference between her actual gross pay at Merrill of £44,160 per annum against entry level £23,000 per annum, assuming no uplift for unsocial hours, makes a gross difference in pay per annum of £21,160. For 13 weeks that is £5,290, and after deducting 20% basic rate tax, that is £4,232. The total for loss of earnings, full and partial is £132,793.14.

44. The Claimant has lost the benefit of an employer contribution to her pension, £20.88 per week. Neither side provided information about pension arrangements: it seems likely that this is a defined contribution scheme. Most employers associated with the financial industry offer some kind of pension, and under auto-enrolment by now almost all employers are obliged to provide some kind of pension. In the absence of any further evidence or information from the Claimant about this, I assume that there is a loss for the 14 week period of £20.88 which would end at the beginning of February 2017 when she ought reasonably to have found alternative work. Adding a further £292.32 for pension contributions, the total compensatory award, together with an award for loss of statutory rights at £300 (and the Claimant has lost her statutory rights regardless of the failure to mitigate) the total award is £13,385.46.

Mr Yousaf

45. Turning now to Mr Yousaf, the first question is what steps a reasonable Claimant would have taken to mitigate his loss. On the face of it, it was reasonable immediately to apply for other work in the financial sector. There is no evidence to suggest that to abandon his work in client and customer support which he had pursued ever since University, is reasonable by reason of the labour market and his inability to obtain such work. It was in the nature of protest or a lifestyle choice, to prefer the freedoms of self employment.
46. What steps did the Claimant take to mitigate his loss? – The answer is none, bar his period of Uber driving to tide him over, and he does not seem to have devoted many hours to driving after mid-December. The Claimant has not attempted to mitigate his loss. It can be expected, on the evidence, that he would have found alternative work and in due course work that was at least as well paid as at Merrill. Unlike Ms Wang, he was not restricted to working unsocial hours, and could have worked ordinary week-day hours. His accounting background will have dressed up his CV, but not made any practical difference to his work opportunities. He objected to sales roles including “support sales”, which the Respondent says are after-sales duties,

but in any event his objection to sales and marketing roles is hard to understand when he is engaged in a retail business which involves him, albeit on his own behalf, in constant sales and marketing activity. He had a good CV, long periods of employment with substantial employers, and while excluding roles which required technical knowledge of IT which he did not have, or specific experience, in the housing sector or flooring, there are still many basic level customer service advisor jobs and more substantial project manager roles which he could have undertaken. It is more than likely that he would have obtained work soon.

47. As with Ms Wang, the Tribunal's finding is that Claimant could and should have found employment by the end of January 2017. Unlike Ms Wang, the Claimant has much wider scope in hours, and could increase his pay by working unsocial hours, or weekdays. It is reasonable from the limited evidence available to think that by six months from dismissal, that is by mid-April 2017, so a further 10 weeks, the Claimant will have found work at pay comparable to his income from Merrill. So, assessing the compensatory award for Mr Yousaf, there is 14 weeks of full loss at £581.23 per week, £8,137.22. To this is added the difference between £44,975 and £23,000 per annum, divided by 52, over 10 weeks, less 20% tax, a figure of £3,380. There is 13 weeks of pension contribution at £20.76 per week, so another £269.88, and loss of statutory rights at £300; total £12,087.86. From this should be deducted £971.76, his net earnings from Uber, and £900 for his claimed salary from the business. Although £100 is plucked from the air, it is the Claimant's estimation and there is none better. The compensatory award is £10,216.10.

Costs and Preparation Time

48. The Claimants devoted considerable space in their witness statements to estimations of the time spent preparing for the case. In discussion it became clear that there was no application under Rule 76 for costs or preparation time. The evidence was introduced to demonstrate that they had been handicapped in their search for work by the need to devote considerable

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periods of time to preparation. The Tribunal does not accept that this prevented their search for work – they did not try to search for work.

Employment Judge Goodman

25 September 2017