



# EMPLOYMENT TRIBUNALS

## BETWEEN

**Claimant:** Mr R Magee

**Respondent:** Secretary of State for Justice

Heard at: London South

On: 13 October 2017

Before: Employment Judge Freer  
Members: Mrs R Bailey  
Ms Y Batchelor

### Representation

Claimant: In person  
Respondent: Mr J Feeny, Counsel

## JUDGMENT ON REMEDY

It is the judgment of the Tribunal that the Respondent shall pay to the Claimant the sum of £15,613.36 comprising a Basic Award of £5,247.36 and a Compensatory Award of £10,366.00.

Written reasons were requested by the Respondent and are supplied below.

## REASONS

1. These are the written reason for a judgment on remedy that the Respondent shall pay to the Claimant a sum of £15,613.36 comprising a Basic Award of £5,247.36 and a Compensatory Award of £10,366.00.
2. These reasons are produced at the request of the Respondent. Oral reasons were given at the hearing.
3. The Claimant gave evidence on his own behalf. There was no witness evidence, or documents challenging mitigation, produced by the Respondent.

**The relevant law**

4. The Tribunal was not referred to any legal authorities by the parties. The concise summary of the law below cites well-established cases to highlight the relevant principles.
5. The statutory provisions relating to remedy for unfair dismissal are set out in sections 112 to 127 of the Employment Rights Act 1996 (“the Act”). In essence, if no application for reinstatement or re-engagement is made by the Claimant, an award of compensation shall consist of a Basic Award and a Compensatory Award, subject to statutory limitation on maximum amounts.
6. The Basic Award is calculated according to a statutory formula based on a week’s pay (which is subject to a statutory cap), the number of complete years of employment at the date of dismissal and a multiplier based on the Claimant’s age at the date of dismissal.
7. The Compensatory Award is: “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”.
8. The Compensatory Award is also subject to a statutory cap of a year’s gross pay or £78,962 (for dismissals after 6 April 2016) whichever is the lower.
9. The Compensatory Award is limited to making good the Claimant’s financial loss. The Tribunal cannot bring into its calculations any consideration of punishment for the employer or feelings of sympathy for the Claimant. The Compensatory Award is confined to compensating only proven financial loss. (see **Morgans –v- Alpha Plus Security Limited** [2005] IRLR 234, EAT).
10. So far as possible, the Tribunal should use the facts at its disposal in order to reach an accurate assessment of compensation, but it is also recognised that a Tribunal will often be compelled to adopt a ‘broad brush’ approach (see **Norton Tool Company Ltd –v- Tewson** [1972] ICR 501, NIRC).
11. Section 123(4) of the Act provides: “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”.
12. The judgment in the case of **Savage –v- Saxona** [1998] ICR 357, EAT, recommended a three-step approach to determining whether a Claimant has failed to mitigate their loss: (1) identify what steps should have been taken by the Claimant to mitigate their loss; (2) find the date upon which such steps would have produced an alternative income; (3) thereafter reduce the amount of compensation by the amount of income which would have been earned.

13. It may not be reasonable to expect a Claimant to take the first job that comes along, especially one attracting lower pay than the Claimant might reasonably expect to receive.
14. In particular, a Claimant does not necessarily have to lower their sights immediately in seeking new employment with regard to the kind of job for which they are prepared to apply (**Orthet Ltd –v- Vince-Caine** [2005] ICR 374, EAT).
15. On the other hand, undue delay in accepting some type of work on the hope of receiving a better offer may result in compensation being reduced.
16. A Claimant can claim any partial loss arising from the acceptance of suitable, though less well paid, employment.
17. The effect of the dismissal on the Claimant may well be of relevance in determining whether there has been a failure to mitigate.
18. The burden of proof is on the Respondent to show that the Claimant has failed to mitigate loss (**Fyfe –v- Scientific Furnishings Ltd** [1989] ICR 648, EAT). The Tribunal is under no duty to consider the question of mitigation unless the Respondent raises it and provides some evidence of a failure to mitigate.
19. A Claimant who has been unfairly dismissed, unless reinstated or re-engaged, will lose a number of statutory employment protection rights that are dependent on the Claimant having remained in employment for a qualifying period. Most notably, a Claimant will lose the right not to be unfairly dismissed unless they have obtained two years continuous employment. Accordingly, the Tribunal can award a sum to reflect a Claimant's loss of statutory rights.

## Conclusions

20. Two matters were agreed between the parties at the commencement of this hearing 1) the amount of the Basic Award of **£5,247.36** and 2) the rate of pension loss.
21. The Respondent accepted at the conclusion of Mr Magee's evidence that the Claimant had mitigated his loss for the 11 weeks unpaid period between the effective date of termination and the new employment he secured on 18 December 2016. The Tribunal agrees. There is no evidence put forward by the Respondent on the matter of mitigation and the burden of proof is on the Respondent in that respect.
22. The Tribunal has been referred to a schedule of loss compiled by the Claimant dated 11 October 2017 and also a counter-schedule of loss by the Respondent.

23. The Tribunal concludes that Mr Magee, a litigant in person, was clearly not sure what he may have been deciding to with regard to the figures and periods in question as part of the compensatory award and future loss in his revised schedule of loss.
24. With regard to that schedule, Mr Magee received some advice from solicitors to the effect that he could not claim for losses until his anticipated retirement at age 70, as he had wished, because the statutory cap applies. His earlier schedule of loss left the matter at large as he wished to claim for the longest period possible. It was clear today that Mr Magee has no material understanding of what sums can be claimed and how they may be calculated. This is not meant in any pejorative sense. Mr Magee is not a lawyer.
25. Also, it is not correct to describe the losses as 'future losses' as set out in the schedule of loss. It is 'immediate loss' until today's hearing and 'future loss' after this hearing. The Claimant's schedule of loss is confused over loss of earnings in respect of the 11 week period up to his new employment and a 12 month period of 'future loss' and whether they are intended to be concurrent or consecutive.
26. There are also errors in the Respondent's counter-schedule of loss.
27. Therefore, the Tribunal does not consider itself bound by sums of money and periods of time set out in the respective schedule and counter-schedule of loss. Such an approach is not only legally correct it is also in accordance with the overriding objective.
28. The Tribunal has referred itself to the statutory provisions and that any Compensatory Award is to be made on the basis of what the Tribunal concludes is just and equitable in all the circumstances having regard to the loss sustained by the Claimant in consequence of the dismissal in so far as that loss is attributable to the Respondent.
29. The Tribunal gave careful thought to the matter and concludes in all the circumstances that it is just and equitable to award 11 weeks loss of earnings to Mr Magee up to the time of his new employment *plus* 12 months loss of earnings in addition to that period.
30. Given that the Respondent has produced no evidence to challenge the Claimant's mitigation of loss and the Claimant still has a differential in pay between what he earns now and earned with the Respondent which arises from his dismissal, the Tribunal took some time to consider whether in fact it would be just and equitable to award losses for a longer period, subject to the statutory cap.
31. However, the Tribunal concludes that such an award adequately addresses immediate loss of earnings up to this hearing and a short period of future loss moving forward. It is also consonant with the 11 week period and 12 month period referred to in the Claimant's schedule of loss.

32. There was no evidence advanced by the Respondent with regard to the Claimant's mitigation of loss, or probably more importantly the period of loss during which mitigation might have occurred.
33. The schedule of payments that have been presented to the Tribunal by the Respondent includes within those months of payments, periods of non-term time during which Mr Magee was not working and not being paid. We conclude therefore that the Respondent had an opportunity to cross-examine the Claimant on non-term time mitigation of loss.
34. Therefore the sums the Tribunal has calculated using that period of award of 11 weeks plus 12 months are as follows:
35. The 13 weeks' pay in lieu of notice of has already been paid by the Respondent to the Claimant, therefore the 11 week period is in respect of the remaining period up to which the Claimant secured new employment.
36. The Tribunal concludes that this should be calculated using the net weekly pay which is £209.52. It is calculated on net pay, not gross pay, and therefore the acceptance by the Respondent of the sum of £3,206.72 in the counter-schedule of loss is not correct in our view.
37. The calculation is  $11 \times £209.52$  which gives a figure of **£2,304.72** for the 11 week period up until the Claimant's commencement of employment on 18 December 2016.
38. With regard to the additional 12 month period and immediate loss of earnings up to the date of this hearing, the Tribunal concludes that earnings the Claimant earned or would earn during that period is £4,971.08, which is the total on the schedule of payments produced by the Respondent from the Claimant's disclosed payslips up to 25 July 2017. Also, the evidence Mr Magee has given to the Tribunal is that he has worked three nights in the past nine weeks, which we calculate as 36 hours multiplied by a net hourly rate of £8.14p (derived from the schedule of payments) which gives a sum of £293.04.
39. Therefore, the sum of money the Tribunal estimates from the evidence that Mr Magee would have earned from his new position until this hearing is £5,264.12.
40. There remains a nine-week period to complete the twelve-month period awarded, which multiplied by the average net weekly rate of £171.42 (again taken from the schedule of payments) gives a total of £1,542.78.
41. Accordingly, the Claimant's earnings in that year period the Tribunal calculates as being £6,806.90.
42. Deducting that sum from the annual net pay the Claimant would have received from the Respondent, which from the counter schedule of loss is

- £10,894.92, gives a total loss of earnings to the Claimant during that twelve-month period of **£4,088.02**.
43. The total loss of earnings awarded is therefore £2,304.72 plus £4,088.02, giving a total of £6,392.74.
  44. The Tribunal has then adjusted the pension loss to the Claimant to reflect the 12 months +11 week period (63 weeks). Therefore, the Tribunal took the method of calculation that was uncontested between the parties in respect of a twelve-month period of £3,031.90, divided by 52 and multiplied by 63, which gives a total of **£3,673.26**.
  45. The Tribunal also awards a sum for loss of statutory rights of **£300**.
  46. The Tribunal accepts the Respondent's submissions that there is no uplift in respect of the ACAS Code. The ACAS Code does not apply in the circumstances, but even if it did the Respondent did not fail to comply.
  47. Therefore, the total Compensatory Award is the 11 week payment of £2,304.72, plus the of the twelve-month period of £4,088.02, plus the loss of pension sum of £3,673.26, plus £300 loss of statutory rights. This gives a total Compensatory Award of **£10,366.00**.
  48. There is no statutory cap to apply as this sum is below the Claimant's gross annual wage of £15,159.50.
  49. Added to the Basic Award of £5,247.36, gives a total sum payable to the Claimant by the Respondent of £15,613.36.
  50. The Claimant has paid fees to the Tribunal to pursue his claim, which he can now reclaim from HMCTS under the scheme in place, details of which can be found on this link: <https://www.gov.uk/government/news/opening-stage-of-employment-tribunal-fee-refund-scheme-launched>.

Employment Judge Freer  
Date: 02 November 2017