



# EMPLOYMENT TRIBUNALS

**Claimant:**

Mr A Hoggins

and

**Respondent:**

Recruitment Solutions  
(Services) Limited

**Remedy Hearing held at:** Reading

**On:** 16 January 2018

**Before:**

Employment Judge Vowles

**Appearances**

**For the Claimant:**

Ms K Boakes, counsel

**For the Respondent:**

Mr R Morton, solicitor

## REMEDY JUDGMENT

1. BY CONSENT the Claimant is awarded **£21,924.36** in compensation for Unfair Dismissal. An agreed calculation of award is attached to this Judgment.
2. The Employment Protection (Recoupment of Benefits) Regulations 1996 apply to the above award for loss of earnings. The dates of the period to which the prescribed element is attributable are 1 November 2016 to 26 February 2017. The prescribed element is £8,309.60. The monetary award is £21,924.36. The amount by which the monetary award exceeds the prescribed element is £13,614.76.
3. Reasons for this Judgment were given orally at the hearing. Written reasons are also attached at the request of the Respondent.

## REASONS

### Introduction

1. This is a remedy hearing following the full merits hearing on 8 August 2017. In a reserved judgment dated 20 September 2017 the Claimant was found to have been unfairly dismissed.

### Evidence

2. I heard evidence on oath from the Claimant and read documents in a remedy bundle and in the original full merits hearing bundle. I heard helpful

submissions from Mr Morton for the Respondent and from Ms Boakes for the Claimant.

### **Issues**

3. The Claimant's rates of pay and dates of employment have been agreed between the parties in an amended schedule of loss. Three areas of disagreement remain between the parties.
4. First, whether the Claimant has mitigated his loss under section 123(4) Employment Rights Act 1996. Second, what, if any, increase should be awarded for unreasonable failure to comply with the ACAS Code of Practice under section 207A Trade Union and Labour Relations (Consolidation) Act 1992. Third, what increase should be awarded in the compensatory award under section 38 Employment Act 2002 for failure to provide an updated statement of employment particulars under section 4 Employment Rights Act 1996.
5. For the avoidance of doubt, there is no application by the Respondent for a reduction in the compensatory award under the principle in Polkey or by way of contributory conduct.

### **Findings of fact**

6. The Claimant was employed by the Respondent from 7 January 2013 until he was dismissed on 5 October 2016 from his employment as a Recruitment Consultant earning £32,000 per annum. The effective date of termination was 31 October 2016.
7. During October 2016 the Claimant worked for one week as an agency worker for the Respondent but further work was, he said, then denied him.
8. In mid-November 2016 he got married and spent two weeks away on honeymoon. Thereafter, in the period December 2016 to February 2017, he had decided not to seek any further employment in the recruitment industry. He never enquired about or applied for such work but sought jobs in the leisure and fitness industries. He was unsuccessful but eventually secured part-time employment with UPS on 27 February 2017 as a sorter/loader at a salary of £11,190 per annum. He said that he sought promotion internally thereafter within UPS and did not seek any alternative work outside UPS. No promotion within UPS has to date been forthcoming.
9. In June 2017 the Claimant applied to join Test Valley police force as a Police Constable. He received a provisional offer on 17 November 2017 with a start date of 12 March 2018 subject to medical and fitness tests which he is confident in passing. His starting salary will be £19,977 per annum.

10. Accordingly, at the date of this hearing 16 January 2018, the Claimant is employed part-time by UPS awaiting the start of his police career on 12 March 2018.

### Mitigation

11. Section 123(4) of the Employment Rights Act 1996 provides that:

*(4) In ascertaining the loss sustained by the claimant, 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.*

12. In Archbold Freightage Ltd v Wilson [1974] IRLR 10 it was said that:

*“The dismissed employee’s duty to mitigate his or her loss will be fulfilled if he or she can be said to have acted as a reasonable person would do if he or she had no hope of seeking compensation from his or her previous employer.”*

13. In Savage v Saxena [1998] ICR 357 the Employment Appeal Tribunal recommended a three step approach to determining whether an employee has failed to mitigate his loss:

*“1. Identify what steps should have been taken by the claimant to mitigate his or her loss.  
2. Find a date upon which such steps would have produced an alternative income; and  
3. Thereafter reduce the amount of compensation by the amount of income which would have been earned.”*

14. The burden of proof rests upon the Respondent to show a failure to mitigate by the Claimant.

15. In determining whether an employee has sufficiently mitigated his loss, much will depend on variables such as local levels of unemployment, whether the employee’s skills are readily transferable to other available employment, and the personal characteristics of the employment.

16. In Tandem Bars Ltd v Pilloni [2012] EAT/0050/12 the Employment Appeal Tribunal stressed that rather than concentrating on what the employee actually did to find work, the Tribunal’s focus should be on the steps that were reasonable for him or her to take in the circumstances.

17. I am required to consider what steps were reasonable for the Claimant to take in his prevailing circumstances. His personal circumstances are as follows. He is now 29 years of age. He is fit, intelligent and clearly motivated to succeed. He does not have a car and says that there is no public transport in his village. In my view it is not reasonable to expect

suitable alternative employment to be available in his village, and it is not unreasonable to expect him to purchase a car to assist in mitigating his loss. He holds a driving licence.

18. I do not consider that his marriage or his honeymoon made any significant impact on his ability to mitigate his loss. Indeed, the Claimant said that he made an application for a job whilst on honeymoon.
19. It is wrong to say that the Respondent has not produced evidence of job opportunities sufficient to satisfy the burden of proof regarding the Claimant's duty to mitigate his loss. Evidence was given on oath in cross-examination by the Claimant on these matters and the documentary evidence in the two bundles was not challenged.
20. The Respondent has produced 11 job adverts during the period 27 March 2017 to 21 April 2017 for Recruiting Consultants and Trainee Consultants. All the jobs appear to be within commuting distance of the Claimant's home in Abingdon. The salaries range from £17,000 to £30,000 per annum. In cross-examination the Claimant confirmed that if he was seeking further employment in the recruiting industry it is likely he would be qualified for at least some of those jobs and that he would be interested in applying for them.
21. It was also wrong to suggest that he would fail due to a lack of necessary sales training or experience or performance. The evidence at the full merits hearing was that during 2015, and previously, the Claimant was very successful in his role as a Consultant and it was his reduced sales performance in the first 9 months of 2016 which gave rise to his dismissal. Before that, he had a proven track record of excellent performance.
22. In my view it would have been reasonable for the Claimant to have sought employment in his field of expertise of Recruitment Consultancy before looking elsewhere for what would inevitably be lower paid jobs. Consultant and Trainee Consultant jobs were clearly available in March and April 2017. It is reasonable to assume that similar vacancies were available both before and after that period, which is simply a snapshot period.
23. Making an estimate on the available evidence before me, I find that, given his track record of success in 2015 and before, it was likely he would have been successful had he applied for some of those jobs. He failed, however, to even test the market by researching vacancies and making formal applications rather than making a couple of informal enquiries of former colleagues. In cross-examination he accepted that three of his former colleagues who were still working at the Respondent when he left, have themselves also left and since secured employment as Recruitment Consultants.
24. In these circumstances, I find that the Claimant has failed to fully mitigate his loss. If he had taken reasonable steps, he could have successfully

secured an alternative position within the recruitment industry. He could and should have done so no later than 30 April 2017, that is 6 months after his dismissal. If he had done so, taking account of his previous experience and the positions and salaries available, I estimate that by that date, he would have secured one of those positions earning at least £23,000 per annum.

25. Thereafter, it is likely that with the hard work and dedication of which he is clearly capable, he would have achieved his former salary of £32,000 or thereabouts within the next 6 months, that is by 30 September 2017 which is approximately one year after his dismissal.
26. I therefore find that it is just and equitable to award full loss of earnings for the period 1 November 2016 to 30 April 2017. Then to award the difference between £23,000 and £32,000 per annum for the next 5 months up to 30 September 2017. I make no award for future loss of earnings and the Claimant will have to give credit for his actual earnings during those periods.

#### **Failure to comply with ACAS Code of Practice**

27. As set out in paragraph 37 of the Tribunal's judgment, there was no process followed regarding the dismissal and there was no offer of an appeal. But there was some capability process which preceded it. There were at least two meetings at which the Claimant was warned about his performance, warned about the consequences of failure to improve, and given some opportunity to improve although of course that opportunity was unreasonably cut short.
28. There was an unreasonable failure to comply with the Code of Practice, but not a complete failure. It is just and equitable to award a 15% increase for unreasonable failure to comply with the ACAS Code of Practice.

#### **Failure to Give an Updated Statement of Employment Particulars**

29. This failure under section 38 Employment Act 2002 is admitted. There was a duty under section 4 Employment Rights Act 1996 to provide an updated statement of employment particulars but again, not a complete failure. The Claimant had the original statement and it was on promotion to Recruitment Consultant between the dates of October 2013 to February 2015 that the failure occurred. This was not a case where there was a complete failure to provide any particulars of employment, nor was it a case where the Claimant had asked for particulars and they had been refused. It is just and equitable to award 2 weeks' pay for that failure.
30. Those are my findings and my decisions. Given those decisions on mitigation and increases under section 207A and section 38, I suggest that I could leave the parties to agree the detailed calculations.

31. Following the hearing the parties presented an agreed calculation of award, a copy of which is attached to this judgment.

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Employment Judge Vowles

Date: 30/1/ 2018

Sent to the parties on:

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For the Tribunal Office