EMPLOYMENT TRIBUNALS

Claimant: **Mr S Cummins**

Respondent: **Mears Ltd**

Heard at: **Leeds** **On: 25 September 2018**

Before: **Employment Judge T R Smith**

Representation

Claimant: In person
Respondent: Ms Howitt (Solicitor)

RESERVED JUDGMENT

1 The Respondent is ordered to pay the Claimant a basic and compensatory award totalling £15614.81 together with an additional award of £13,563.42. The total sum payable by the Respondent to the Claimant is £29178.23.

2 The provisions of the Employment Protection (Recoupment of Jobseekers and Income Support) Regulations 1996 as amended do not apply.

REASONS

Documents

1 The Tribunal had before it: -

1.1 A bundle of documents consisting of 128 pages.

1.2 A statement of Mr Garry Jamieson, lodged on behalf of the Respondent.

1.3 A statement of the Claimant.

1.4 The Respondent's written submissions.

2 The Tribunal heard oral evidence from both Mr Cummins and Mr Jamieson.

Background

3 On 8 January 2018 the Tribunal determined that the Claimant was unfairly dismissed by the Respondent, but caused or contributed to his dismissal as to 50% ("the liability hearing").

4 The matter was listed for a remedy hearing on 27 March 2018.

5 On 27 March 2018, after the Tribunal had explained to the Claimant the orders it could make in compliance with the provisions of section 122(2) of the Employment Rights Act 1996 ("ERA 96"), the Claimant indicated he wished the Tribunal to consider reinstatement and/or reengagement

6 The Respondent had not been forewarned that the Claimant would seek such a remedy, either in the claim form or in any subsequent correspondence. In the circumstances the Respondent applied for, and was granted, an adjournment with a consequential costs order in its favour.

7 The Tribunal gave directions.

8 On 11 June 2018 ("the first remedy hearing") the Respondent was ordered to reinstate the Claimant on terms set out therein. In essence the Respondent was to pay the Claimant £7,415.85, make payment into the pension scheme as if the Claimant had not been dismissed, subject to the Claimant paying the employee contributions, and for the order to be complied with by Monday, 2 July 2018.

9 At the first remedy hearing it was agreed that there was a two-stage test in relation to reinstatement. The Respondent was entitled to argue practicability both at the initial stage, and again at stage 2 if reinstatement order was made but the Respondent failed to comply with the same.

10 On 28 June 2018 (page 51) the Respondent informed the Claimant that it was not prepared to reinstate him.

11 At the hearing today the first part of the proceedings addressed what is known as the section 117 ERA 96 question.

12 Section 117 of the ERA 96 provides as follows: -

"(1) An [employment tribunal] shall make an award of compensation, to be paid by the employer to the employee, if –

(a) an order under section 113 is made and the complainant is reinstated or reengaged, but
(b) the terms of the order are not fully complied with

(ii) subject to section 124 … the amount of compensation shall be such as the tribunal thinks fit having regard to the loss sustained by the complainant in consequence of the failure to comply fully with the terms of the order.

(2) (AA) There shall be deducted from any award under subsection (i) the amount of any award made under section 112(5) at the time of the order under section 113.

(iii) subject to subsections (i) and (ii) … if an order under section 113 is made but the complainant is not reinstated or reengaged in accordance with the order, the tribunal shall make –

(a) an award of compensation for unfair dismissal (calculated in accordance with sections 118 to [126], and

(b) except where this paragraph does not apply, an additional award of compensation of [an amount not less than 26 nor more than 52 weeks pay]

to be paid by the employer to the employee.

(4) Subsection (3)(b) does not apply where –

(a) the employer satisfies the tribunal that it was not practicable to comply with the order".

(b) The Tribunal was therefore concerned with the submission under section 117(4) of the ERA 96, that is the stage 2 argument. At stage 2 the burden is upon the Respondent to prove that it was not practicable to comply with the order.

13 Impracticability is a question of fact for the Tribunal, not a matter of whether the employer's views fall within a band of reasonable responses.

14 At stage two the question of practicability is a question of objective fact and the Tribunal should not substitute its commercial judgment to that of the employer – **Port of London Authority v Payne [1993] EWCA Civ 26.**

15 The mere fact that the Tribunal held it was practicable to reinstate at the first remedy hearing is not binding on the Respondent at stage two. The stage one determination is provisional.

Findings of fact in respect of practicability

16 The Respondent had a contract with Leeds City Council to provide a responsive repairs service.

17 Under the terms of that contract Leeds City Council could require the Respondent to replace an employee. The contract bears careful study. The document produced was originally between Leeds City Council and Morrison Facilities Services Limited. It is not disputed that the Respondent now stands in the shoes of Morrison Facilities Services Limited.

18 Paragraph 7.9 of the contract reads (page 64): -

> *"The contractor shall replace any person who in the sole opinion of the employer's contract manager … is not a fit and proper person to be afforded access to the Dwellings, … within 24 hours of receiving a written demand to do so from the employer. Provided always that such a written demand is reasonable and that, save where the employer requires the removal of any person for safety, security or operational reasons, the employer shall first discuss any concern with the contractors and shall afford the contractor reasonable opportunity to meet such concerns".*

19 It is not disputed that the Claimant worked on the Respondent's contract with Leeds City Council.

20 Mr Jamieson is employed by the Respondent as head of business improvement. He was contract manager and principal contact between the Respondent and Leeds City Council.

21 The Respondent relied upon an e-mail from Mr Robert Gorre, "repairs manager, safeguarding lead officer – response of repairs" sent to Mr Jamieson on 26 June 2018.

22 The e-mail (78) in essence thanked Mr Jamieson for the update as regards the Employment Tribunal's judgment to reinstate Mr Cummins. Mr Gorre stated he was aware of the circumstances of Mr Cummins' dismissal. He stated that tenants were required to comply with a number of core values including that they must not behave antisocially, cause a nuisance or harass other people. Leeds City Council required its partners to comply with similar standards. Mr Gorre stated that the Claimant had failed to demonstrate those standards while working with Mears and Leeds City Council would not "under any circumstances" allow the Claimant to be reemployed on any of Leeds City Council's contracts.

23 This e-mail was written following telephone discussions between Mr Jamieson and Mr Gorre. No note was kept of that discussion.

24 There was no other written correspondence.

25 Mr Jamieson accepted that he was friendly with Mr Gorre.

26 Mr Jamieson accepted that he had not provided Mr Gorre with the judgment from the liability hearing. Mr Gorre therefore could only be aware of the circumstances of the Claimant's dismissal from the perspective of the Respondent, which the Tribunal had found to be unfair.

27 He had also not provided Mr Gorre with the Tribunal's judgment from the first remedy hearing. Mr Gorre had written the e-mail based solely by what he had been told by Mr Jamieson.

28 Mr Jamieson did not suggest that he had even read the judgment of the Tribunal from either the liability hearing or first remedy hearing to Mr Gorre.

29 Mr Jamieson accepted in cross-examination that had the Claimant been successful in his internal appeal there would have been no discussion with Mr Gorre.

30 Mr Gorre was not aware that the Claimant had a long and unblemished disciplinary record.

31 He did not know that the person the Claimant had called "a wanker" was a person who Leeds City Council classed as, according to their own records, *"Very violent person was abuse [sic] towards two members of staff at Morley NHO. Do not visit alone".* He therefore had no information to the attitude of the tenant or the considerable provocation the Tribunal found the Claimant faced.

32 Although Mr Gorre does refer in his e-mail to being aware of the circumstances of Mr Cummins' dismissal Mr Jamieson accepted that he was only aware of information given to him by Mr Jamieson.

33 The burden of proof is upon the Respondent at stage 2.

34 Other than the e-mail from Leeds City Council no witness was called to support the Respondent's position.

35 The Tribunal is not satisfied that the Respondent discharged the burden of proof that falls upon it.

36 The Tribunal has reached this conclusion principally because there is no cogent evidence Leeds City Council were aware of all the facts.

37 In addition, Mr Jamieson, despite knowing of the Tribunal's judgement did not challenge Mr Gore on whether his demand was reasonable and did not make any representations to Mr Gorre in accordance with the contract.

38 The Tribunal noted the Respondent had other contracts but accepted Mr Jamison's evidence that it was impracticable to re-instate the Claimant for the reasons he gave.

39 The Tribunal concluded that on the basis of the evidence presented to the Tribunal the burden had not been discharged.

40 It follows therefore that the Tribunal then went on to consider the issue of an additional award of compensation. An additional award of compensation is between 26 to 52 weeks.

41 The Respondent made submissions as to what was an appropriate figure although expressly conceded (paragraph 35 of the written submissions) that mitigation and/or contributory fault was not to be considered. The Respondent's case, however, was that at the date of the first remedy hearing the Claimant was not working and therefore a week's pay should be assessed as nil.

42 The Tribunal has a discretion as regards whether to award 26, 52 or any figure in between by way of an additional award. The Tribunal has concluded that an award at the bottom end of the range is appropriate. It has come to this conclusion because the Respondent has not demonstrated a complete wilful defiance. It did make inadequate enquiries for reasons already outlined but the Tribunal is not satisfied it has surmounted the statutory test. An award of 26 weeks is therefore appropriate.

43 The Tribunal does not accept that there should be an award of 26 weeks' pay at a nil rate. Whilst the Tribunal found had the Claimant been reinstated he would have been receiving contractual sick pay it would have been exhausted just before reinstatement. That does not in the Tribunal's judgment mean the award should be assessed on no weekly pay whatsoever. The purpose of section 117(3) is to act as a positive incentive for an employer to comply with a reinstatement order. Had the Claimant been reinstated in accordance with the Tribunal's order the Claimant would have been working and receiving full pay together with all other contractual benefits for the further reasons set out later in this judgement

44 The award should therefore be based upon 26 weeks gross pay. Gross pay was £521.67 per week. The weekly cap does not apply. This figure is agreed by the Respondent (60).

45 The additional award is therefore **£13,563.42** (26 weeks x £521.67).

Compensatory award

46 The second part of the hearing dealt with the Claimant's basic and compensatory award. The statutory provisions dealing with a basic award are found in sections 119 to 122 ERA 96. The provisions as regards to a compensatory award is found in sections 123 to 124 ERA 96.

Findings of fact re compensation

47 The Claimant was born on 3 March 1958. He is therefore aged 60.

48 His continuous employment began on 1 March 2009.

49 The effective date of termination was 12 May 2017.

50 The statutory cap on a week's pay as at the effective date of termination was £489.

51 The Claimant's net weekly salary was £380.30 immediately before the effective date of termination.

52 The Claimant was employed as a plumber. He only had a certificate for basic plumbing skills.

53 Basic plumbing skills are assessed at level 2.

54 A level 3 plumber is classified as gas safe. This means they can work on boilers. A level 2 plumber cannot.

55 A CSCS card is issued to a fully qualified plumber, that is a person who has reached level 3.

56 The Tribunal accepted that the Claimant did not have a CSCS card as a holder required an advanced plumbing qualification which the Claimant did not have.

57 No evidence was put before the Tribunal as to how much it would cost to acquire the necessary qualifications. The only helpful evidence on the point came from Mr Jamieson who indicated that he had considered seeking to upskill the Claimant, but to retrain him as a qualified gas engineer would take approximately 18 months.

58 Some plumbers are classed as multi skilled. In order to be classed as multi skilled a plumber must have in addition a minimum of NVQ level 2vcarpentry/joinery skills. From the evidence before the Tribunal such plumbers are in some demand as kitchen fitters.

59 Again, no information was before the Tribunal as to the cost of undertaking an NVQ Level 2. The most helpful evidence, again, came from Mr Jamieson who indicated it would take approximately 24 months to obtain such a qualification.

60 Prior to termination the Claimant had a good sickness record. He had been absent twice in two years prior to termination. The total absence was between 6-10 days. The first occasion was due to a bereavement and the second due to an infection.

61 Although the Claimant had a back operation in 1988 he had never had time off from his employment with the Respondent due to a bad back.

62 Since termination the Claimant has been supported by his children and his own savings. He did not believe in claiming benefits. He has not received Jobseekers Allowance, Income Related Employment Support Allowance, Income Support or Universal Credit.

63 The Claimant suffered depression following dismissal which was not diagnosed until December 2017 (83).

64 Although diagnosed with depression the Claimant did arrange for approximately 250 flyers to be distributed in late 2017 in order to seek work. They produced no work.

65 In December 2017/early January 2018 the Claimant signed up with Hayes Recruitment.

66 In April 2018 the Claimant started searching the website Indeed Jobs for employment.

67 In June 2018 he signed up and started searching the website Total Jobs.

68 The Tribunal is satisfied from the evidence presented by the Respondent that there are numerous vacancies for either multi skilled plumbers or fully qualified plumbers who can undertake heating engineering. The Claimant is neither.

69 The Tribunal is satisfied that the Claimant has made numerous job applications, certainly after March 2018 but without success.

70 Although a fit note was issued to the Claimant in March 2018 it indicated the Claimant was fit to work with some adjustments. The Claimant's case, and the Tribunal accepted it, was that he asked his GP to support a return to work.

71 The Tribunal reminded itself that the Claimant could only recover losses that are attributable to action taken by the Respondent. The Tribunal has noted the case of **Devine v Designer Flowers Wholesale Florists Sundries Limited [1993] IRLR 517 EAT**. In that case the employee's dismissal caused her to suffer anxiety and depression which rendered her unfit for work. The EAT held that the fact that the employee's incapacity was caused by the unfair dismissal did not necessarily mean that the employee was entitled to compensation for the whole of the period of incapacity. It was for the Tribunal to decide how far an employee's losses were attributable to action taken by the employer and to arrive at a sum that was just and equitable.

72 The Tribunal applied those principles.

73 The Tribunal have taken careful note of the Claimant's previous sickness record.

74 The Tribunal have noted the Claimant had no history of depression.

75 The Tribunal is satisfied that this was a Claimant who had never been dismissed in 40 years of work. It is satisfied that the illness would not have manifested itself but for the dismissal.

76 The Tribunal have concluded that the illness, namely the Claimant's depression, was caused by the dismissal and not by the manner of the dismissal itself.

77 The Tribunal is satisfied that the Claimant's illness was not such that he could not start to consider work in late 2017 and certainly by March 2018 was keen to be signed off by his doctor so he could seek work.

78 The Tribunal had reminded itself that it is for the Claimant to take reasonable steps to mitigate his losses suffered as a consequence of the unlawful act. That said the burden of proving a failure to mitigate is on the Respondent – see **Fyfe v Scientific Furnishings Limited [1989] IRLR 331**.

79 It is insufficient for the Respondent merely to show that the Claimant failed to take a step that it was reasonable for the Claimant to take: rather the

Respondent must show that any failure was unreasonable. The Tribunal in looking at mitigation have considered what steps the Claimant should have taken to mitigate his loss, whether it was unreasonable for the Claimant to have failed to take any such steps and if so, the date from which an alternative income would have been obtained. The Tribunal concluded looking at the evidence in totality that the Respondent had not demonstrated the Claimant had failed to mitigate his loss

80 The Tribunal firstly dealt with the issue of the failure of the Claimant to obtain, or to start to obtain further qualifications. It was not unreasonable for him to not to do so. In evidence that he was effectively impecunious and dependent upon his children is credible and whilst he did not make any direct enquiries it is not implausible that the cost of such courses would be expensive.

81 The Tribunal does, however, accept that obtaining further qualifications will assist the Claimant but notes that such qualifications will take, on the Respondent's own evidence, between 18 to 24 months to obtain. The Tribunal is also conscious that the Claimant is not far from state retirement age. He is not to be criticised for any failure from now on to obtain further qualifications

82 The second aspect the Tribunal looked at was the bundle of jobs placed before it by the Respondent. The Claimant is entitled to say with justification that many of those adverts relate to either multi skilled plumbers or plumbers who have qualifications to install or service central heating.

83 Further, some vacancies required the Claimant to have his own van. The Claimant did not have a van. A van was provided by the Respondent.

84 That said, studying the documentation (85 to 104) there is some evidence that there are potential vacancies available to the Claimant. By way of illustration only, although there are others, there is an advertisement for three plumbers in Barnsley earning £23,735 per year. They are required to be qualified to level 2. The Claimant was qualified to level 2. The Tribunal noted the salary was somewhat lower than enjoyed by the Claimant. The Claimant's gross salary was £27,126.36 per annum.

85 Doing the best it can the Tribunal concluded that the Claimant would obtain alternative employment by November 2018 although earning less than he currently earnt, with a gross salary difference of approximately £3400. The Tribunal noted that the Claimant had progressed with the Respondent despite his limited qualifications and considered that the chances of the Claimant progressing with a future employer to a sum approaching his former salary would take 18 months.

86 The Claimant had the benefit of contributory pension. It was not a defined benefit scheme. The Respondent paid £180.84 into the pension per month. Given that the Claimant is reasonably close to retirement the Tribunal worked on the contribution method in assessing loss.

87 The Tribunal has no evidence before it as to what pension a future employer would supply to the Claimant. It would be at least the state minimum but might

be more given the apparent shortage of plumbers. A great deal would depend upon the nature of the Respondent's future employer. Doing the best it can and bearing in mind the Respondent's scheme is generous, the Tribunal have worked on an ongoing pension loss of £120 per calendar month ceasing in May 2020 (18 months' time)

88 The Claimant's losses are therefore as follows: -

Basic award

89 The basic award under section 119 is agreed at **£5,868.**

90 The Tribunal determined that there was contributory conduct which occurred prior to dismissal which it placed at 50%. There should therefore be a deduction under section 122(2) ERA 96 of 50%. The net basic award is therefore **£2,934**.

91 In terms of the compensatory award the Tribunal first of all dealt with the prescribed element, that is the loss of wages from the effective date of termination to the date of assessment.

92 The calculation is therefore, 12 May 2017 to 25 September 2018.

93 The time period is 71.2 weeks which must be multiplied by the Claimant's net pay of £380.30. This produces a total of **£27,077.36.**

94 The Claimant is entitled to arrears of pension contributions from 12 May 2017 to 25 September 2018 which the Respondent accepted had not been paid.

95 This produces an approximate figure of **£2576.97.**

96 The total is therefore £27077.36 + £2576.97 = **£29654.33**

97 There must then be deducted from this sum the 50% for contribution under section 123(6) ERA 96. This then produces a total of **£14827.16**.

98 There must however be deducted from this sum the payment already made by the Respondent of £7,415.58.

99 This produces a total of **£ 7411.58** (£14827.16 - £7415.58).

100 Turning to the non-prescribed element the Tribunal awards future loss of wages of 9 weeks' pay.

101 The future loss is therefore 9 weeks x £380.30 which produces a total of **£3,422.70**. which is when the Tribunal estimated the Claimant will get another job.

102 He will also have pension payments of £180.84 pm for 9 weeks which totals **£375.59.**

103 The total until he obtains alternative employment is therefore **£3798.29**.

104 The Claimant then has an ongoing loss of £3400 per annum for a period of 18 months. Assuming the Claimant is a basic rate tax payer (and there was no evidence to the contrary) the net loss is 78 weeks x £52.31 which produces a total of **£4080.18.**

105 The Claimant has lost pension contributions being the difference the Respondent would have paid and the sum the Tribunal has estimated the Claimant will receive with a new employer. The sum is 18 months x £120 = **£2160.**

106 The Tribunal allows the Claimant £500 for loss of statutory rights.

107 The future loss is therefore £3,798.29 + £4080.18 + £2160 + £500 which produces a total of **£.10538.47**

108 Again, there must be a reduction of 50% to consider contributory fault producing a future loss of **£5269.23**.

109 The total therefore is £2,934 + £7411.58 + £5,269.23 = **£15614.81.**

110 This is below the statutory cap under section 124(1) of the ERA so no further adjustment is required.

111 There should however be added to this sum the additional award of **£13,563.42** which is unaffected by contribution.

112 The total sum therefore payable to the Claimant is £15614.81 + £13,563.42 = **£29178.23.**

113 As the total sum is under £30,000 the tribunal does not need to do any grossing up for sums over £30,000.

Employment Judge T R Smith

Date: 26 October 2018