



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Ms D Cullinane

and

Respondent

Leidos Europe Limited

Hearing held at Reading on 30 & 31 August 2018 – full merits hearing
20 December 2018 – remedy hearing

Representation

Claimant: Mr R Preston, partner
Respondent: Mr T Brown, counsel

Employment Judge

Mr S G Vowles (sitting alone)

JUDGMENT having been sent to the parties on **17 January 2019** and reasons having been requested by the Claimant in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. This is a remedy hearing following on from the liability full merits hearing held on 30 and 31 August 2018.
2. Today, I have heard evidence on oath from Ms Noon-Jones on behalf of the Respondent and from Ms Cullinane, the Claimant. I have also read documents set out in a folder provided by the parties.
3. Some of the issues I have to consider today were determined on 31 August 2018 at the end of the liability hearing. That is, matters relating to contributory conduct and any Polkey reduction and any reduction for failure to comply with the ACAS Code of Practice. I decided at that time that there should be a 20% reduction in the compensatory award for the Claimant's failure to lodge an appeal against her dismissal.
4. The evidence today has focussed on the Claimant's duty to mitigate her loss by seeking alternative employment. I should say that my task has been made more difficult, and this hearing more protracted, by the Claimant's failure to comply with the case management order made at the end of the hearing on 31 August 2018. She has provided no good reason why she has failed to do so. She has not been penalised for the failure, but I should record it in my decision.

5. The Claimant was dismissed on 17 August 2017. So far as mitigation is concerned, the relevant law is as follows.
6. Section 123(4) of the Employment Rights Act 1996 states:

(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 applied to damages recoverable under the Common Law of England and Wales.
7. In the case of 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.
8. 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 loss. (1) identify what steps 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, (3) thereafter reduce the amount of compensation by the amount of income which would have been earned. The burden of proof rests upon the Respondent to show a failure to mitigate by the Claimant. In determining whether an employee has sufficiently mitigated loss, much will depend on variables such as levels of unemployment, the employee's skills, whether they are readily transferable and the personal characteristics of the Claimant and the employment.
9. Then finally, in Tandem Bars v Piloney [2012] EAT0050/12 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.
10. The Claimant gave evidence regarding her efforts to secure alternative employment between September 2017, the month after she was dismissed, and October 2018 when she finally started gainful employment. She accepted that she applied for jobs only with the Ministry of Defence (MOD) and made no other applications. She said that she was offered a job and indeed had a job with the MOD in September 2017. The evidence has shown that not to be so. She stated that a different job came up and she applied for that on 4 July 2018. She started gainful employment on 29 October 2018. She was not employed in the meantime.
11. The Claimant said that the Respondent was in part responsible for the delay in her starting work with the MOD due to not providing a reference for her regarding her security clearance. Again, I find that was not so. There is no evidence to support that suggestion. The Claimant provided some emails between her and the MOD and it is clear that security clearance was not the reason for the delay. It was that there were

recruitment authority problems within the MOD. The Claimant knew as early as September 2017 from the email correspondence that there were problems with getting recruitment authority within the MOD and she did not start gainful employment with the MOD until 29 October 2018. The Claimant however still applied for no other jobs outside the MOD. When asked what she was doing during this period, she said she was mostly sitting at home.

12. The Respondent has shown that there were many vacancies for suitable jobs matching the Claimant's skillset between November 2017 and September 2018 and those jobs were within easy commuting distance of the Claimant's home. The Claimant did not challenge Ms Noon-Jones' evidence that these vacancies were available or that they were suitable and appropriate or that they were jobs which she could have applied for.
13. I find that there was no impediment to the Claimant seeking out and applying for such jobs as had been identified by Ms Noon-Jones, details of which are set out in the bundle of documents. There were over 18 jobs which she had identified during that period as being suitable.
14. Not only were there no impediments to the Claimant applying for alternative employment outside the MOD. There was no evidence that she had any problems with a reference from the Respondent. There was evidence that she had no problems with commuting distance. Indeed, she was content to commute to Bristol at one point. Now finally in her current job, she commutes from Oxford to Andover. There was no evidence regarding any health problems intervening as she had earlier stated.
15. Ms Noon-Jones' witness statement made clear that the Claimant had a high and varied skillset which would have made her suitable for many of the managerial and/or supervisory jobs which had been identified.
16. I find that the Claimant could reasonably have been expected to research and apply for some of the jobs which were available and identified between September 2017 and February 2018. It was clear, although the Claimant wished to secure employment with the MOD, that by early December 2017 at the latest there were serious problems with her recruitment to that organisation. If she had then looked outside the MOD from December onwards, based on Ms Noon-Jones' evidence, she would have secured suitable alternative employment at a salary commensurate with the salary which she was earning at the Respondent no later than the end of February 2018, which is just over six months after her dismissal.
17. In view of her lack of effort in seeking suitable alternative employment during those six months, and restricting herself to seeking only MOD employment, I do not find it is just and equitable to ask the Respondent to compensate her for any period of loss of earnings after February 2018.
18. Also, in the circumstances which have been described in the evidence before me today, I do not consider it is just and equitable to compensate the Claimant for any of the expenses she has claimed as they do not fall

within the ambit of being incurred in consequence of the dismissal.

19. Accordingly, my award is as follows:

Basic Award is agreed at

13.5 x £489	£6,601
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Compensatory Award

Loss of Earnings 28 weeks x £529.81 (18 August 2018 – 28 February 2019) (includes Notice Pay for wrongful dismissal)	£14,835
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Loss of Statutory Rights	£500
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£15,335

Reduction of 20% for unreasonable failure to comply with the ACAS Code of Practice	£3,067
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£12,268

TOTAL AWARD

£18,869

Employment Judge Vowles

Date: 6 March 2019

Sent to the parties on

8 March 2019

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For the Tribunal office