EMPLOYMENT TRIBUNALS

Claimant: Mr D Gardner

Respondent: FTL Technology

HELD AT: Leeds **ON:** 6 February 2019

BEFORE: Employment Judge D N Jones

REPRESENTATION:

Claimant: In person
Respondents: Ms A Smith

JUDGMENT having been sent to the parties on 15 February 2019 and written requests having been requested by the claimant in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the tribunal provides the following

REASONS

1. I heard evidence from Mr Gardner, the claimant and Mr Hewitt, the Managing Director of the respondent. There were few issues in dispute between the parties, Mr Gardner agreed with the calculations submitted to him by Ms Smith, in respect of the sums he had previously earned, and it was agreed that the differential in pay could be calculated by way of comparative gross earnings which would reflect the same differential of net pay.

2. The issues which were to be determined were:
   [i] what bonus would the claimant have received in the current year had he remained in the employment of the respondent?
   [ii] would it have been reduced as a consequence of him being likely to have received a disciplinary sanction for the matters which led to his dismissal?
   [iii] would he have been likely to have received a bonus in future years?

[iv] what compensation should the claimant receive for any future losses of earnings having regard to whether he could reasonably mitigate his losses?

3. 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 it is attributable to action taken by the employer. With regard to the principles relating to mitigation, the burden falls on the respondent to establish that the claimant did not reasonably mitigate his loss.

4. I find that when the claimant lost his employment with the respondent he registered with a number of agencies online, Monster.co.uk, Indeed.co.uk, Reed.co.uk, Jobsite.co.uk and Totaljobs.com. His search for work bore fruit in that within six weeks he had been engaged by GCS Recruitment, with a company called Advanced Welding, and he commenced on a contract paid at £8.64 per hour. That contract was terminated on 20 July 2018 but the claimant received a job within a fortnight advertised by Qualtech Resourcing with John Cotton Group Limited. He commenced working there from 2 August 2018. The work is shift work which is not the claimant's preference and he has continued to seek alternative work which is not shift work and has a higher salary.

5. The differentials in pay are set out in the Schedule and the claimant has a shortfall of about £2,000 per annum. He has submitted a document which records a continuing search for work from 19 April 2018 to the end of January 2019. Although not very legible I am satisfied that he has applied for a large number of posts, in excess of 20, during that period, but unsuccessfully. Some of the posts which he has applied for were on better remuneration. The respondent has submitted a large number of vacancies within 20 miles of the claimant's home in Dewsbury with posts of a similar nature to that which he holds or held. Ms Smith says they are jobs in which Mr Gardner could take advantage of the skills which he has developed and the qualifications he has obtained in fork lift driving with the respondent. Some of those posts have a higher rate of pay than he received with the respondent albeit many involve shift work.

6. I am satisfied in respect of the bonus payment that the respondent would have been likely to have paid the claimant a bonus this year. That is calculated as 15% of his income. It is a discretionary bonus, but that bonus was paid last year and the targets which are to be met for employees to receive such a bonus were met in the year 2018. I am also satisfied that, it being a discretionary bonus, the respondent would have reduced it by 25% as it has done for other employees for disciplinary matters. Other reductions have also been made for employees who have had a poor attendance, reflected in a low Bradford score. I am satisfied that it would have been likely that the claimant would have had a 25% reduction from his bonus because of disciplinary action which would probably have been taken in respect of the matter which led to his dismissal. A sanction short of dismissal, had he not been unfairly dismissed, would have had the consequence of reducing the 21 March 2019 bonus that would have been paid had he remained in employment.

7. I am satisfied that the claimant has made reasonable attempts to mitigate his losses. He immediately looked for work. It is not surprising that he was not able immediately to extinguish any continuing losses of earnings. He would have faced the difficulty of seeking work when he had been dismissed for an act of gross misconduct, which he would have to explain if asked at interview.

8. I am satisfied that not only did he reasonably mitigate his loss in respect of the first post he obtained but also, within a fortnight, he had found other work and he had taken another job, notwithstanding it was not to his liking because it was shift work. I am satisfied that the claimant could not reasonably have extinguished the losses up to the present date. He has made a reasonable search for alternative suitable work. Given the evidence he has produced about his search for work, I am satisfied that he would have taken up an alternative job if it had been available.

9. I therefore find that the claimant should be compensated to the date of this hearing in respect of past loss of earnings and differential losses.

10. In respect of the future the claimant seeks a loss of twelve months differential in pay. I am satisfied that with his energy and diligence he will find alternative work. It may be that he will find it involves shifts. I accept the submission of Ms Smith that it would not be reasonable of the claimant to refuse to take such a job if it were available; indeed he has not done so. I have no doubt that if he found a job which had the same or greater remuneration that that of the respondent, notwithstanding it might be shift work, he would take it. Having regard to the vacancies which have been illustrated by the respondent, I find that the claimant will probably find alternative work to extinguish the continuing losses after six months.

11. In respect of any future bonus I accept the submission of Ms Smith that it is wholly speculative as to whether the respondent would meet its targets for the relevant year for the claimant to receive a bonus. Given the speculative nature of whether a bonus would be paid for the next financial year I am not satisfied that the claimant would have a reasonable chance of recovering such a sum.

12. Although I have not been addressed upon it I have considered the appropriate sum for loss of statutory rights to be £500.00.

13. In respect of the Preparation Time Order application, Mr Gardner argued that the respondent had been unreasonable or abusive in its conduct of the proceedings in setting out in its response form the argument that his claim had no reasonable prospect of success. I am not satisfied that in making that comment the respondent did act unreasonably or abusively. When setting out their claims, parties tend to set them out at their highest and comment critically, where appropriate, on the case of the opposing party. This is not an untypical aspect of the adversarial nature of such proceedings. The rules allow the tribunal to strike out a case if it has no reasonable prospect of success. The reference by the respondent to that, was a reference to such a potential application. Although it was not an application the tribunal acceded to, it was permissible of the respondent to identify the grounds on which it might pursue such it. Even taking into account the fact that the claimant was a litigant in

person, I do not find the threshold for making a preparation time order, in rule 76, has been met.

Employment Judge D N Jones
Date 13 March 2019