EMPLOYMENT TRIBUNALS

Claimant: **Mr D Spence**

Respondent: **Grimsby Institute of Further and Higher Education**

Heard at: **Lincoln** **On:** **Monday 3 December 2018**

Before: **Employment Judge Moore**

Members: **Mrs J Rawlins**
Mr W Dawson

Representation

Claimant: **Mr Rozycki of Counsel**
Respondent: **Ms Barry of Counsel**

JUDGMENT having been sent to the parties on 2 February 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Background

1. In a Judgment dated 30 October 2018 the Tribunal upheld the Claimant's claim for unfair dismissal contrary to S103A of the Employment Rights Act 1996. A remedy hearing was listed for 3 December 2018. The Claimant gave evidence and there was an agreed remedy bundle which ran to 317 pages. Additional documents were also produced on the day which extended the bundle to 342 pages.

Issues

2. The issues between the parties was in respect of mitigation and the period of loss being sought by the Claimant. The Claimant's position was that he was seeking loss until he reached 70 years of age. The Respondent's position was that he should have mitigated his loss within 6 months of dismissal or in the alternative that losses to the date of the remedy hearing were adequate.

The Law

3. S123 Employment Rights Act ("ERA") 1996 provides (relevant sections only):

123 Compensatory award

(1) Subject to the provisions of this section and sections 124 [, 124A and 126] 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 in so far as that loss is attributable to action taken by the employer.

(2) The loss referred to in subsection (1) shall be taken to include—

(a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and

(b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.

……

(4) 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.

4. S207A of the Trade Union and Labour Relations (Consolidation) Act 1992 provides:

207A Effect of failure to comply with Code: adjustment of awards

(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.

(2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b) the employer has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.
…….

(4) In subsections (2) and (3), "relevant Code of Practice" means a Code of Practice issued under this Chapter which relates exclusively or primarily to procedure for the resolution of disputes.

5. Schedule A2 provides that S207A applies to awards made under S111 ERA 1996.

Agreed facts

6. The parties agreed the following:

a) At the time of the remedy hearing the Claimant was 63 years of age;
b) There was no entitlement to a basic award;
c) The Claimant's net annual salary was £24,269.00;
d) The Claimant's weekly annual salary was £466.71.

Findings of Fact

7. We made the following findings of facts on the balance of probabilities.

8. The Claimant was dismissed with immediate effect on 30 June 2017. He was paid three month's pay in lieu of notice. Prior to the Claimant's dismissal he had agreed to reduce his hours (with the Respondent) to a four-day week from September 2017. It should be recorded that there were no issues whatsoever of safeguarding or conduct issues with the Claimant.

9. In June 2017, prior to his summary dismissal, the Claimant had applied for a teaching post at the TAG Academy which was another school within the Respondent group of schools. He withdrew the application on 11 June 2017 having been reassured at a meeting between himself and Mr Campbell on 9 June 2017 that his position was secure. Following his protected disclosure and concerns about his treatment thereafter he applied to reinstate his application to the TAG Academy on 17 June 2017. He attended an interview on 21 July 2017 with the headteacher Mr Thundercliffe and was verbally offered and accepted the job. On 27 July 2017 Mr Thundercliffe withdrew the job offer. He informed the Claimant in an email that he had been informed by HR because of past performance issues at GIFHE (the Respondent), the offer of employment must be withdrawn. The position was a 5 day per week position. Had the Claimant not been unfairly dismissed this position would not have been withdrawn and the Claimant would have commenced in this role. We accepted the Claimant's evidence that he would been willing to work the five-day week role at the TAG Academy notwithstanding that he had previously asked to drop to four days a week. We accepted his evidence that his position had changed and that he was keen to secure work following his summary dismissal.

10. The Claimant signed up to a number of agencies in his attempts to secure work. He was found a position by an agency called Teaching Personnel at Huntcliff School, but this offer was withdrawn following receipt of a reference from Mr Stephen Butler, HR Director for the Respondent. The Tribunal had sight of this reference. The Claimant had been rated as average in the grading boxes for five categories. Mr Butler had not answered the question "*Would you re-employ"*? On 27 September 2017 a Ms Olive of Teaching Personnel emailed Mr Butler to ask if there were any safeguarding queries with the Claimant and Mr Butler replied the same date advising there were none. Ms Olive confirmed to the Claimant on 29 September that due to the reference they had received from the Respondent they were not in a position to clear him for work and as a result he would not be put forward for the position at Huntcliff School. Ms Olive goes on to say:

"The reference states that reason for leaving employment was due to termination of employment and Grimsby Institute have not given, nor are they

willing to give an explanation for the termination, and it is because of this that I am not able to be able to clear you for work at this stage."

11. The Claimant also signed up with Tradewind Recruitment. Mr Butler provided a reference to this agency dated 28 September 2017. It rated the Claimant as "satisfactory" in the different categories. It stated his reason for leaving was "termination of employment". Mr Butler did not answer the question "*Would you have this candidate work for you again*".

12. The Claimant signed up with The Education Network agency. Mr Butler completed a reference on 23 March 2018. The Claimant was graded as satisfactory. On a separate sheet which had in block capitals at the top "ALL QUESTIONS MUST BE ANSWERED FOR SAFEGUARDING" Mr Butler put a line through the question "*Would you re-employ this candidate*" and did not complete the box where, if the answer was no, he was asked to say why. We find in the context of the questions specifically being designated as safeguarding that a failure to answer would have created an impression there were safeguarding issues. On the same date Mr Butler confirmed in an email to the Education Network there were no issues with the Claimant's teaching ability. On 29 March 2018 the agency asked the Claimant if he was taking the Respondent to an employment tribunal and for what reason. On 3 April 2018 the agency confirmed they would not be able to register the Claimant until the outcome of the employment tribunal.

13. The Claimant signed up with the Smile Education agency. We had sight of an email from this agency dated 23 March 2018 which stated they could not work with the Claimant until the 'safeguarding issue' had been cleared. The Claimant immediately challenged this assumption and asked why they had this impression but the Tribunal did not see any follow up correspondence.

14. The Claimant's evidence was that he became worried that schools and agencies may assume he had committed some form of gross misconduct or there was a safeguarding issue. The Claimant pointed to the email he had received from the Smile Education agency and that Teaching Personnel had raised this directly with Mr Butler. He therefore decided to await the outcome of the Tribunal before applying for any more teaching work as he did not want to create a reputation in the education sector that he had been dismissed on such grounds. We find in light of what he was told by a number of agencies that this was a reasonable position to have taken.

15. The Claimant subsequently widened his search for work outside of the education sector. He registered with ten employment agencies. He applied for 150 jobs between August 2017 and November 2018 ranging from Laundry Operative to car sales. He was not successful in obtaining any employment.

16. The Respondent produced evidence of a number of roles they asserted the Claimant should have applied for as evidence he had failed to mitigate his loss. These were advertised after the employment tribunal hearing which decided in the Claimant's favour. The Claimant had submitted CV's for two of the roles (John Whitgift and Havelock) and had not received a response. The Claimant had not applied for most of the other roles due to

the commute involved although he accepted under cross examination that he would be prepared to commute to Skegness which is a 50 – 60-mile round trip per day.

17. Following the Tribunal hearing the Claimant re-applied with Teaching Personnel who contacted Mr Butler. Mr Butler initially referred them to his reference that had been provided in September 2017 but when pressed for a reason for the Claimant's dismissal he contacted the Claimant with some proposed wording. After an exchange Mr Butler agreed to include in the reason for termination wording an acknowledgement of the Tribunal finding of unfair dismissal for whistleblowing albeit with a disclaimer. The Claimant was concerned about the addition of the disclaimer but in our experience, this was a fairly standard disclaimer used when providing references. A subsequent reference also using this wording was provided to Realise Education.

Retirement age

18. There was a dispute between the parties as to when the Claimant intended to retire. The Claimant can draw a state pension from 2021 when he reaches 66 years of age and losses were claimed to this date on the Claimant's original schedule of loss. The Claimant produced an amended schedule of loss which stated he was due to retire at 70 years of age. His reason for a change in position was at the time of providing original instructions for the schedule of loss, he had forgotten about the situation with his mortgage which had been extended until he was 69 years of age to coincide with his wife's retirement hence the reason he needed to work until 70 years old.

Current position

19. Following the Tribunal judgment, the Claimant sent CV and letters to nine schools within travelling distance but has not secured a position. He re-contacted the agencies and Teaching Personnel notified him of a 3 day per week contract from 5 December 2018 until Christmas, but it did not proceed for reasons unknown. In respect of the possibility of supply teaching the busy period is January to April with an average daily rate of £110.00.

Conclusions

Mitigation

20. We have taken into account that there was evidence that the Claimant was informed by at least one agency that he should await the outcome of the Employment Tribunal before seeking teaching work and what has persuaded us in particular is that there was evidence before the Tribunal that other agencies had made assumptions that there was some safeguarding issues and/or gross misconduct issues. In those circumstances we find it was reasonable for the Claimant to have decided not to widen his use of agencies beyond the 4 agencies with whom he tried and failed to secure employment out of concern this impression should not spread wider. We also consider that the Respondent hampered the Claimant's search for employment in the manner in which they

completed the reference requests. We see no reason why the Respondent could not simply have informed referees that they had a difference in opinion with the Claimant's teaching methods. Instead the refusal to answer questions and referring to a termination of employment created an impression there was something amiss which was unfair on the Claimant.

21. Furthermore, in the question of mitigation the Claimant reasonably in our view extended his search for employment outside of his profession to the extent of unskilled roles. We were satisfied on the evidence he had applied for the 150 jobs. For these reasons we find that the Claimant has not failed to mitigate his loss.

Period of Loss

22. We have concluded that the Claimant should be awarded full losses from the date of dismissal on 30 June 2017 until 21 January 2019 at which point in our view the Claimant should be in a position to obtain supply teaching work. The reasons we have settled on this date are as follows. January to April is the busy time for supply teaching in the academic year. The Claimant is an experienced maths teacher, which are in short supply. His maturity has not prevented him securing employment to date and now he has the Tribunal judgment and an agreed reference acknowledging the reason for his termination of employment we assess he should be able to secure supply work from this time.

23. We make the loss based on a 5 day a week calculation. We have done so as we assess that but for the dismissal the Claimant would have been employed at the Tag Academy on a 5 day a week role.

24. From 21 January 2019 we find that the Claimant is likely to find supply teaching work for 3 days a week and we have taken a broad brush approach and applied a wage that he will find work at £110.00 per day which is the midpoint the Tribunal heard evidence as to what a typical supply teacher may earn depending on the type of position available. We find that the Claimant is likely to work in a supply role until 21 July 2019; the beginning of the summer term. We award a full period of loss for the 6 weeks over the summer of 2019 at which point we find that the Claimant's losses will crystallise as we find that it is likely that the Claimant will obtain permanent employment from the beginning of the new academic year in 2019 for the same reasons as set out above in paragraph 22.

25. We set out the loss as follows.

a) 30 June 2017 - 3 December 2018 = 74 weeks and 3 days, minus the 12 weeks' pay in lieu of notice that the Claimant was provided. This equates to the sum of £29,216.04.

b) 3 December 2018 - 21 January 2019 we apply a full weekly loss at £466.71, a 7-week period equating £3,266.97.

c) 21 January 2019 - 21 July 2019 this equates to a 26-week period and we have deducted 4 weeks for Easter and two half terms; an ongoing loss for 22 weeks @ £136.71 which totals £3,007.62.

d) For the 4-week period of loss (full loss is sustained as the Claimant will not obtain supply teaching during half term and the Easter weeks) at £466.17 per week totals £1866.84

e) We then apply a 6-week loss for the summer period 6 * £466.71. totals £2800.26.

26. The total loss therefore is £40,157.73.

ACAS Uplift

27. We have carefully considered the parties submissions in respect of the Claimant's claim for an uplift to his compensatory award for the Respondent's failure to follow the ACAS Code of Practice on Disciplinary and grievance procedure ("the ACAS code"). The ACAS code applies to a list of claims contained in Schedule A2 of the Trade Union Relations and Consolidation Act 1992 and the claim of unfair dismissal is one to which the code applies. Therefore, if there has been a breach of the code then it is possible that the Tribunal can apply such an uplift.

28. The Claimant submitted that there was a wholescale breach in the procedure when the Claimant was dismissed. He was not informed of the problem and notified in writing about the alleged misconduct or poor performance, whilst there was a meeting held it was to inform the Claimant of his summary dismissal and he was not allowed to set out his case. He was not given the right to be accompanied or provided with an opportunity to appeal.

29. The Respondent accepted that this was a case where the ACAS code had not been complied with. However, the reason was that the Claimant had less than two years' service and this was the reason the code was not followed. The Respondent was entitled to not "go through the hoops" if they so wished and it was not unreasonable to have followed the code.

30. We carefully considered how the finding that the principle reason for the Claimant's dismissal was that he had made a protected disclosure against the reasons put forward for the Respondent failing to follow the code. The Respondent were frank about the reasons. The submissions were that they did not follow the code as they did not believe they had to as the Claimant had less than two years' service. How should this be considered in the light of the finding the Claimant had been dismissed for raising a protected disclosure?

31. As a Tribunal we were aware from our collective experience that where an employee has less than two years' service, employers often dispense with the Code requirements as the consequences only come into play if an unfair dismissal claim is brought. If an employee has less than two years' service then the employer may take a view, as the Respondent did here, that there is no need to follow it. However, in cases such as this where the Claimant had made a protected disclosure, the Respondent must bear the risk of a subsequent claim that succeeds and the impact that dispensing with the Code could have. The Code does not require a minimum period of service.

32. There was a wholescale failure to follow the Code. However, this does not mean that a 25% maximum uplift should automatically be applied. This would lead to an uplift of over £10,039 having regard to the size of the compensatory award.

33. We have concluded that there should be an uplift to acknowledge and compensate for the failure to follow the Code of 10%. This is the amount we have concluded is just and equitable in all the circumstances. This amounts to £4,015.00.

34. In relation to grossing up and interest the Tribunal did not have time to reach conclusions and calculations. We advised the parties to inform the Tribunal if they could not agree and a further remedy hearing would need to be listed to determine these remaining amounts.

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Employment Judge Moore

Date 15 March 2019

REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE