EMPLOYMENT TRIBUNALS

Claimant: Mr L Osborne

Respondent: Colas Limited

Heard at: North Shields **On:** 31 May 2018
8 June 2018
(in Chambers)

Before: Employment Judge Morris
Mr M Brain
Mr D Morgan

REPRESENTATION:

Claimant: Ms J Callan of Counsel
Respondent: Mr L Rogers, Solicitor

JUDGMENT ON REMEDY

The unanimous judgment of the Employment Tribunal is as follows:

1. In respect of the claimant's complaint that the respondent discriminated against him, as a disabled person, by treating him unfavourably because of something arising in consequence of his disability, the respondent is ordered to pay the claimant compensation in the sum of £8,173.97.

2. In respect of the claimant's complaint that his dismissal by the respondent was unfair, the respondent is ordered to pay the claimant compensation in the sum of £350.

3. The Recoupment Regulations do not apply to the awards of compensation referred to above.

REASONS

Representation and Evidence

1. The claimant was represented by Ms J Callan of counsel who called the claimant to give evidence. The respondent was represented by Mr L Rogers,

solicitor, who called Ms Caroline Hayward, employed by the respondent as HR Business Partner, to give evidence on its behalf.

2. In addition to the agreed bundle of documents that had been before the Tribunal at the hearing as to liability, it had before it a small number of new documents that related exclusively to remedy, which were either exhibited to the claimant's witness statement or handed in at the hearing.

Consideration and Findings

3. At the commencement of the remedy hearing, in accordance with section 112(2) of the Employment Rights Act 1996 ("the 1996 Act") the Tribunal explained to the claimant what orders might be made in the circumstances of it having found that he had been unfairly dismissed, and asked whether he wished the Tribunal to make an order for reinstatement or re-engagement or an order for compensation to be paid to him by the respondent. He opted for an order of compensation to be made.

4. The Tribunal heard and considered evidence from and on behalf of the parties and submissions of the parties' representatives in respect of many aspects of the approach to assessing compensation to be paid to the claimant in accordance with both the 1996 Act and the Equality Act 2010 ("the 2010 Act") in respect of his losses arising from the unfair dismissal and disability discrimination as previously found by the Tribunal.

5. Notwithstanding that the Tribunal had found in favour of the claimant in each of these two respects, any heads of compensation that overlap cannot be awarded twice: see section 126 of the 1996 Act. The approach that the Tribunal has adopted is to consider those issues relating to loss first under the 2010 Act and then to consider whether any loss has not thereby been addressed in respect of compensation that might be ordered under the 1996 Act. We leave a consideration of compensation for injury to feelings until the end of these Reasons.

6. First, however, it is appropriate that the Tribunal should record that, in accordance with rule 62(4) of the Employment Tribunals Rules of Procedure 2013, it does not consider it to be proportionate to the significance of many of the issues in respect of which the Tribunal heard evidence or was addressed in submissions for it to address all of those issues. The Tribunal adopts this approach because of its fundamental conclusion referred to below that, in light of its earlier findings that are recorded in the Judgment and Reasons in respect of liability in this case, which were sent to the parties on 8 May 2018, any loss of income suffered by the claimant as a result of the respondent's discrimination against him or unfair dismissal of him was entirely attributable to him. Those earlier findings include as follows:

(1) As recorded in paragraph 6.29 of those earlier Reasons, Mr Robert Cummings contacted the claimant by telephone and told him that his employment could continue on the same terms and conditions but the claimant declined that offer.

(2) As recorded in that same paragraph, Mr Robert Cummings telephoned the claimant a second time and asked if he was sure, whereupon the claimant confirmed once more that he was.

(3) As recorded at paragraph 6.30, Mr McCartney also told the claimant at this time that he could be kept on rather than being made redundant, but he responded that he would rather take his redundancy package.

(4) As recorded at paragraph 6.31 (having recited the finding that the claimant had spoken at this time to both Mr Robert Cummings and Mr McCartney) it accepted the evidence given on behalf of the respondent as to the offers of continued employment being made to the claimant, which it recorded was forceful and persuasive.

7. In her closing submissions the claimant's representative submitted that the Tribunal had found that Mr McCartney did not make the offer of continued employment, which was only made by Mr Robert Cummings. For the avoidance of doubt the Tribunal clarifies (if such clarification is needed) that it was satisfied then, as it is now, that Mr McCartney did make the offer of continued employment: indeed as is recorded in paragraph 6.30 of the earlier Reasons, the claimant confirmed that Mr McCartney did say that he could have his job back.

8. The Tribunal returns below to this fundamental point that any loss of income suffered by the claimant was entirely attributable to him but, in that context, first considers it appropriate to address two particular matters that were advanced before it repeating, however, that that will be done briefly given the point made above regarding proportionality and its fundamental conclusion as to loss of income.

9. First, there is the issue of what might be termed ‘general mitigation’: ie. mitigation other than by accepting the specific offers of continued employment that the Tribunal has found were made to the claimant by Mr Robert Cummings and Mr McCartney.

10. On the evidence before it the Tribunal is satisfied that the claimant did not do what would have been reasonable for him to do to secure alternative employment. By way of example, much of the work previously done by the respondent, which it had lost giving rise to the redundancies in the first place, had passed to two companies operating locally that were referred to during the hearing as being Costains and HW Martin, but the claimant had not applied for employment with them. Also, he had not registered with any employment agencies other than, he said in oral evidence, Premier, albeit that is not referred to in his witness statement.

11. In light of the claimant’s evidence, the Tribunal considers that his failure to do what might reasonably have been expected of him in this regard was probably due to the claimant having convinced himself that, given his physical injury and the possibility of a further operation some time in the future, he would not have secured such employment. The Tribunal acknowledges that that might have been the reality of the situation but, equally, the claimant did have an obligation at least to have tested that assumption by trying other courses of action such as are mentioned above. Further, the Tribunal heard no evidence that the claimant had sought any alternative employment in what might be described as a more sedentary job or, indeed, any job that might have come within his abilities at the time. In fact, it is apparent from the Jobcentre activity history submitted by the claimant at the remedy hearing that his Jobcentre account setup was completed on 19 September 2017 and that he effectively started seeking alternative employment on that system from 18 October 2017, which continued to 28 February 2018. The only evidence before the

Tribunal, however, is that at the Jobcentre the claimant saved only eight drivers' jobs during the period 31 October 2017 to 28 February 2018; and it might be thought that a driving role would not be particularly appropriate for someone suffering from an injury to his right ankle. Other than that, one enquiry was made on the claimant's behalf by a Jobcentre adviser with a wind turbine company in January 2018 and the claimant attended one interview for a traffic management role with a company, Samuel Knight International Limited, which responded that it was not in a position to make him an offer due to the circumstances around his fitness levels and injured ankle.

12. Further, the claimant's evidence was that he had only accessed the Jobcentre website and not any of the alternative employment opportunities websites.

13. In summary of this first particular matter, the Tribunal repeats that it is not satisfied that the claimant did what it would have been reasonable for him to do to secure alternative employment.

14. The second matter is that evidence was presented and submissions were made regarding the period of loss in respect of which the Tribunal was referred to and considered the letter from Mr Torres of 1 March 2018, which had been before the Tribunal at the liability hearing.

15. The evidence of the claimant was that he had had a further operation on his ankle on 21 May 2018 and that second phase surgery was also anticipated, perhaps in 9-12 months' time. Estimates of recovery times from those operations varied. The claimant considered that he would be fit to return to full duties within 6-9 months following each of the two operations, whereas Mr Torres' estimates (albeit having made it clear that it was impossible to predict with any certainty what the recovery periods would be) were 4-6 months from the first operation and 6-9 or 9-10 months from the second.

16. It would be entirely speculative for the Tribunal to make calculations in respect of the period of loss and although it would have grappled with that if necessary (**Software 2000 Ltd v Andrews [2007] IRLR 568**), it is not proportionate for us to do so on this occasion given our fundamental finding referred to above that the Tribunal is unanimous in finding that the loss of income suffered by the claimant as a result of both his unfair dismissal and disability discrimination was wholly attributable to him.

17. Turning to address that fundamental finding, the 2010 Act provides at section 124(2) that the Tribunal may, amongst other things "order the respondent to pay compensation to the complainant". No statutory provision is made as to the factors that might bear on the assessment of that compensation. In particular, unlike the equivalent provision of the Disability Discrimination Act 1995, there is no reference to approaching the order to pay compensation on a just and equitable basis. That said, the Explanatory Notes to the 2010 Act do not suggest that it is intended to effect change but generally is to replicate the effect of provisions in previous legislation. There is such statutory guidance in the 1996 Act, however, where it is provided in section 123(4) that the duty of a person to mitigate his loss applies.

18. An issue arises in this respect, however, in that it is well established that the duty to mitigate only arises after dismissal. As such a refusal of offers made before the employment was terminated cannot amount to a failure to mitigate. As was said in the decision in **Savoia v Chiltern Herb Farms Limited [1981] IRLR 65** in the

EAT, "A complainant before an Industrial Tribunal does not have to show that he took steps in mitigation before he was actually dismissed". Similarly, in the decision of the EAT in **F & G Cleaners Limited v Saddington and Ors [2012] IRLR 892** it was stated that the duty to mitigate did not arise in that case as the offers of self-employment had been made before the date of dismissal.

19. In this case the claimant was given notice of dismissal in writing by a letter of 26 April 2017 (page 163):

> "At the meeting on 18 April 2017 it was regrettably confirmed that nine weeks' notice of the termination of your employment due to redundancy was being issued and that your last day of employment with Colas would be Tuesday 20 June 2017."

20. The claimant was, however, required to work out his period of notice to that date of 20 June 2017, subject to his commencing annual leave (from which he did not return to work) on 5 June 2017.

21. The question arises, therefore, as to whether the claimant was dismissed on 26 April or 20 June 2017, and therefore whether the duty to mitigate arose on the earlier or later of those dates. The Tribunal was completely satisfied, both as a matter of law and drawing upon the industrial relations experience of the non-legal members, that it was the earlier of those dates. As such, the duty to mitigate arose then and was applicable when the offers of continued employment were made twice by Mr Robert Cummings and once by Mr McCartney, which the claimant rejected.

22. The Tribunal is alert to the principle that in certain circumstances it can be reasonable for an employee to decline an offer of continued employment or renewed employment (see, for example, **Symonds t/a Symonds Solicitors v Redmond-Ord [2014] ICR D6**) but, despite the powerful arguments of the claimant's representative to the contrary, the Tribunal is not satisfied that in this case the claimant was reasonable in refusing the three offers of continued employment that were made to him; those offers being made to continue in the same work, at the same site, at the same rate of pay, on the same other terms and conditions of employment and without any break in continuity of employment. Had there been any doubt in the minds of the Tribunal members in this respect it would have been removed by the claimant's own evidence at the liability hearing that on or around 3 June 2017 he was approached by Mr McCartney who told him that he could have his job back if he wanted it and the claimant had accepted that suggestion. The Tribunal is satisfied that if the claimant accepted Mr McCartney's offer of continued employment (as is his evidence) it is to be inferred that he was content to continue to work for the respondent and, therefore, that his refusals of the offers to do so were unreasonable.

23. For the above reasons, therefore, the Tribunal is unanimous in finding both that the claimant failed to mitigate the loss that arose from his dismissal and that the loss of income that he has suffered is attributable solely to him. Thus, for those reasons:

a. with reference to the 2010 Act, the Tribunal declines to exercise the discretion contained in section 124(2)(b) to order the respondent to pay compensation to the claimant;

b. with reference to the 1996 Act,

i. the loss that the claimant suffered was not "attributable to action taken by the employer" (section 123(1) of the 1996 Act) – (and see **Simrad Ltd v Scott [1997] IRLR 147**), and, alternatively or additionally,

ii. the claimant failed to mitigate the loss that arose from his dismissal (section 123(5) of the 1996 Act).

24. That is an end to this aspect of the matter of considering compensation to be awarded to the claimant in respect of loss (with one exception to which we return below) but, for completeness, we also address the alternative submissions made on behalf of the respondent and replied to on behalf of the claimant.

25. First, that the claimant contributed to his dismissal and loss, reference being made to section 123(6) of the 1996 Act. In that subsection reference is made to the Tribunal finding "the dismissal" being to any extent caused or contributed to by any action of the claimant. We have found above that the dismissal of the claimant occurred on 26 April 2017, that being the date of the letter that was sent to him confirming that dismissal, which is the date accepted by both parties as the date of termination of the employment; and the Tribunal does not seek to upset that consensus. We note, however, that that letter states that at the meeting with the claimant on 18 April 2017 it had been confirmed to him that notice of his employment being terminated was being issued.

26. If the Tribunal is right in finding, as it has done above, that that date of 26 April was the date of dismissal, it follows that the claimant's refusals of the offers of continued employment cannot impact on that dismissal in a causative way. If we were to be wrong in that earlier decision and the dismissal date is 20 June 2017 it follows that the claimant's refusals of the three offers of continued employment that were made to him do impact upon that dismissal on that later date, and the Tribunal is satisfied for the above reasons that any such dismissal on that date was wholly caused by the actions of the claimant in that regard and, if it had been necessary for it to do so, it would have reduced the amount of the compensatory award attributable to the loss of income by 100%.

27. Other aspects of contribution were raised during the remedy hearing including the claimant not having challenged the scores that were awarded to him in the redundancy selection exercise and not having appealed the decision that he should be dismissed. Given our finding above, that the claimant did fail to mitigate his loss and that any such loss was not attributable to action taken by the respondent, it is considered, once more, not to be proportionate for us to delve into these further questions, except to note that in **Lock v Connell Estate Agents [1994] ICR 983** the EAT held that a failure to pursue internal appeal procedures following dismissal cannot constitute a failure to mitigate loss.

28. We adopt this approach also to the other submission made on behalf of the respondent that an adjustment should be made to any compensation awarded to the claimant in respect of his loss of income on the basis of the Law Reform (Contributory Negligence) Act 1945 or, alternatively, by reference to the just and equitable considerations contained in section 123(1) of the 1996 Act. In that regard, however, we note the decision of the EAT in **Soros v Davison [1994] ICR 590** to the effect that section 123(1) only applies to pre-termination conduct that does not come

to light until after the dismissal: matters arising after termination (for example the claimant's refusals of offers of continued employment) cannot be taken into account as a basis for a just and equitable reduction of compensation.

29. In summary, therefore, in relation to loss of income, the Tribunal does not award any compensation to the claimant in respect of his successful claims of discrimination under the 2010 Act or unfair dismissal under the 1996 Act.

30. For completeness, neither does the Tribunal make a declaration or a recommendation in accordance with section 124(2)(a) or (c) respectively of the 2010 Act; it being noted that, in any event, the claimant did not seek either of those remedies.

31. There is, however, one aspect of the compensatory award due to the claimant under section 123 of the 1996 Act. That is the one exception to which reference is made above and is compensation due to the claimant in respect of what is traditionally known as the 'loss of his employment rights'. In this regard the Tribunal awards the claimant a sum of £350.

32. Finally, in respect of compensation for the claimant's unfair dismissal the Tribunal records that any basic award that might otherwise have been awarded to the claimant is reduced to nil in accordance with section 122(4) of the 1996 Act given that he received a redundancy payment in pursuance of Part XI of that Act. This was accepted by the claimant in terms, "Claimant has received payment in respect of his redundancy so no claim is made under this head."

33. The Tribunal now turns to consider compensation for injury to feelings and does so applying the general principles in **Prison Service and ors v Johnson [1997] ICR 275** and the guidance provided in the decision in **Vento v Chief Constable of West Yorkshire Police (No. 2) [2003] IRLR 102 CA** (as updated) and subsequent case law including **Simmons v Castle [2012] EWCA Civ 1288** but not applying the Presidential Guidance issued on 5 September 2017 given that the claimant presented his claim on 10 August 2017.

34. The Tribunal has considered all the evidence that was put before it in this regard at both the liability and remedy hearings. It notes that in the witness statement of the claimant in respect of the latter hearing, the claimant records that when he discovered that his absence due to his injury had not been left out for the purposes of the redundancy selection exercise he was "very annoyed" and that when he heard that he was to be made redundant he "felt let down by Colas". Those expressions of how the claimant felt at the time, which he makes in his witness statement prepared, presumably, with careful thought and the advice of his solicitors, are important; although the Tribunal also brings into account his oral evidence at the remedy hearing that he was "devastated", albeit also noting that he accepted that he did not challenge his redundancy selection scoring or pursue an appeal against his dismissal.

35. As found at paragraph 27(a) of the Reasons arising from the liability hearing, the Tribunal is satisfied that the respondent discriminated against the claimant when he was dismissed. That was the claimant's assertion and the Tribunal accepted it. Additionally, however, that discrimination arose from the earlier event when the claimant was not awarded any points in relation to the criterion of attendance, which resulted from his absence from work due to the injuries he suffered in his motorcycle

accident and at the time of that absence he was disabled. The Tribunal also brings that into account (as recorded in paragraph 27(b) of those Reasons).

36. All in all, the Tribunal is satisfied that compensation in the mid-band of **Vento** is appropriate and has quantified that compensation at £7,500 as being as accurate a reflection as can be made in such circumstances of the injury to the claimant's feelings arising from the respondent's discrimination.

37. At the remedy hearing the claimant's representative had calculated that a period of 400 days had passed between the date of the act of discrimination (namely the claimant's dismissal on 26 April 2017) and the day of the remedy hearing. Time has passed since then and the Tribunal now (ie. on 8 June 2018) calculates that period to amount to 410 days.

38. *Statement of Interest* – Applying the usual rate of interest of 8% to the above award produces a figure of £673.97 and, therefore, a total award in respect of injury to the claimant's feelings of £8,173.97 is made.

39. The respondent is ordered to pay to the claimant compensation of £8,523.97 in total comprising the above awards in respect of injury to feelings of £8,173.97 and a compensatory award (limited to the claimant's loss employment rights) of £350.

Employment Judge Morris

Date: 3 July 2018