EMPLOYMENT TRIBUNALS

Claimant: Mr L Banham

Respondent: BOC Limited

HELD AT: Manchester **ON:** 7 May 2019
17 May 2019
(in chambers)

BEFORE: Employment Judge Feeney
Mrs C Jammeh
Mr S Anslow

REPRESENTATION:

Claimant: Mr A O'Neill, Solicitor
Respondent: Mr J Wynne, Counsel

JUDGMENT ON REMEDY

The unanimous judgment of the tribunal is that the claimant is awarded in compensation for unfair dismissal £40,179.20

RESERVED REASONS

1. By a judgment promulgated on 21 August 2018 the claimant succeeded in his claim for unfair dismissal and the matter was listed for remedy today.

Issues

2. The issues in this case are:-

Basic Award

(1) When did the claimant's employment start with the respondents, 14 July 1999 or 18 April 2001;

Compensatory Award

(1) Would the claimant have continued in employment with the respondent until retirement.

(2) If not, when would the claimant have continued in employment with the respondent and why;

(3) Has the claimant mitigated his loss, in particular:-

(i) By training as a barber and subsequently running a less than lucrative barber's business;

(ii) By not applying for suitable alternative work;

(iii) By not pursuing the job opportunity with Air Products in August 2017.

(iv) Has the claimant accurately accounted for his earnings since 2017;

(v) Should ESA housing benefit and council tax allowances be accounted for i.e. should they be deducted from any award?

Witness and Documents

3. The claimant gave evidence on his own behalf and there were no other witnesses. Additional documents were provided, in particular an email and job description for the role with Air Products. There was also references made by the claimant in evidence regarding his appointment diary for his barber's business but this had not been disclosed in advance and it was not entered into evidence. During the hearing the claimant's solicitor also obtained and produced an altered copy of a letter from the claimant's accountant which was in the bundle.

Tribunal's Findings of Fact

4. The Tribunal's findings of fact are as follows:-

4.1 The claimant was dismissed by the respondent on 5 August 2016 and his appeal failed on 9 September 2016.

4.2 The claimant subsequently suffered an episode of depression. He had not had an episode since September 2015. Following his dismissal, he claimed ESA (a disability based benefit) until 31 March

4.3 He did not apply for any jobs except that towards the end of 2016 he applied for a job with Air Products, basically the respondent's only rival which was also in the same locality. The additional documents disclosed included the following email from Mr Abbott, On Site

Temporary Labour Relations Manager, Talent Acquisition, Air Products of 22 August 2017 which said:-

> "Hi Lee
>
> I can confirm that I have arranged your interview with Mark Hitchen at 9 am tomorrow. I have attached a job description Mark will go through the duties and role in more detail with you, some additional information on the role is below. To complete all rolls agreed and the union agreement, cylinder sorting, cylinder filling, cylinder picking, cylinder loading. The position would start on a day shift 8 am to 4 pm but could transform into shifts 6 – 2 / 2-9.30 pm, full FLT license required, pay rate £8 per hour for the first three to four months then on the same rate as full time employees but no bonus will be paid during the term of the contract. 39 hours per week, Monday to Friday, overtime may be required at the weekends.
>
> Please let me know if you have any questions at this stage and best of luck tomorrow. Feel free to call me with your feedback."
>
> We note that the job description actually said "ability to drive forklift trucks in a safe and efficient manner".

5. We note that the we had no explanations regarding why the claimant did not hear from Air Products until August 2017 if in fact he had sent his CV off in December 2016. The claimant did say however that he was wary of working in a management hierarchy after what had happened to him as he perceived his problems at BOC as connected to managers taking a dislike to him. He also felt he could end up dealing with a company like the respondent who simply did not seem to believe that he had a medical problem and would go to great lengths to try and show this.

6. The claimant also in answers to questions and in response to the fact that the respondents had put in the bundle many jobs which required fork lift truck qualifications stated that he did not have a fork lift truck qualification. However, the claimant was not aware of this until he made further enquiries in connection with this hearing and discovered (although he had no corroborative evidence) that the fork lift truck qualification he had from the respondents was in house and was not a generic fork lift truck qualification that he could take to other employers. He did not know this earlier as in his job centre commitment statement dated 12 June 2017 he stated that he was looking for FLT work and had the qualification.

7. The claimant did not say that he did not follow up the Air Products job because he did not have a FLT license but partly because he did not want to put himself into, in effect, another managerial hierarchy like the respondent's.

8. In addition, the claimant said that because the wage was so low, certainly in the initial period and they were only offering temporary work he would lose his benefits. It would also take him away from trying to establish himself as a barber which process he had begun in April 2018. However, the email from Mr Abbott did not say how temporary the position was and the impression was that it was highly

likely that after the first three or four months the claimant would continue on full rates and at all times be able to do overtime.

9. In relation to the claimant's barbering the claimant trained to be a barber in April 2017 at a cost of £1,095 for the training course which he borrowed. He did do some work at two places Moorside Barbers and Dukes. The claimant only earnt at these roles £570 and he advised that he was owed £450 amount unpaid from Dukes but had not made any effort to recover this money.

10. Of further note in relation to the claimant's job centre commitment form is the fact that the claimant indicated he was willing to travel for work for 90 minutes and that he had suitable skills for driving jobs, whereas in evidence he said he did not want his travel to work time to be more than when he worked for the respondent which was 10 minutes.

11. Following working for these two enterprises the claimant did not work again until December 2017 when he was able to secure a lease on a shop in Swinton. The lease began on 9 February but he started on 1 February paying £100 a week in rent. He initially only worked two days a week. From April he was full time.

12. The claimant produced bank statements which showed some transactions but he said he paid his rent cash and that not all his cash payments and receipts were recorded in his bank statement but his appointment book indicated how many haircuts etc he had performed and this would match the income he had declared.

13. The claimant provided a letter to his solicitor from his accountant setting out his earnings as a barber however this was ambiguous and during the course of the hearing the claimant's solicitor rang the accountant and obtained a "corrected letter". The first letter said

> "I can confirm Mr Lee Banham went self-employed in February 2018 as a Barber, from February to 31 March 2018 Lee made a net profit of £1,460 as per his SSA302 which has been agreed by HMRC. At your request I have detailed Lee's income and expenses for the period 1 April 2018 to 28 February 2019 from Lee's information he gave me.
>
> Income £6,972.50
>
> Expenses £5,272.07
>
> Current net profit £1,700.43
>
> Lee's main expenses is the rent of his chair which is £100 a week, on top of that he also has expenses for material and signage and advertising.
>
> The second letter said:-
>
> "I can confirm Mr Lee Banham went self-employed in February 2018 as a Barber, prior to this he received self-employed income whilst training with a shop. The previous letter was worded incorrectly. For the year ending 5th

> April 2018 Lee made a profit of £1,460 as per his SA302 which has been agreed with HMRC.
>
> At your request I have detailed Lee's income and expenses for the period 1 April 2018 to 28 February … "
>
> The rest of the letter was the same.

14. Regarding the claimant's work the respondent cast doubt on whether the income he had recorded was correct as it was agreed that most payments for haircuts would be in cash. Further from the first letter it appeared he had made a large profit in two months of barbering when he was only working 2 days a week and then much less when he was full time. However, we find that the claimant's account of what he earnt was truthful. The claimant said this was accounted for by rent and obviously implication from the second letter from the Accountant, this accounted for all earnings received in the tax year 2017 to 2018.which would include earnings from Moorside and Dukes. The claimant also pointed out he had much higher expenses for setting up the shop in terms of advertising signs, and supplies. He accepted that he was not very busy now working full time from April 2018 but he was hopeful that business would increase or he would consider moving to a shop with greater footfall. He believed his potential turnover in barbering could be £50000 a year.

15. In respect of other matters. the claimant claimed that salary rises of 2% a year as stated by the respondent were inaccurate and that a higher salary rises had been awarded. In the claimant's Schedule of Loss, he argued that the average net wage at the respondent was as follows:

31 October 2016 to 31 August 2017	£637.21
1 September 2017 to 31 August 2018	£650.48
1 September 2018 to 7 May 2019	£663.49

16. In relation to pension loss the claimant stated and it was not disputed that he was in a final salary pension scheme with BOC, his pension at dismissal was £7,973.64. Had he stayed with the respondent until retirement another 22 years at least it would have been £21,941.64. At this point in time his pension retirement projection was £9,063.13.

17. The respondent's contribution to his pension was 20% which was relevant because the Tribunal had to decide if we award pension loss whether to award it on a simple or complex basis. This is referred to in the law section below.

18. The claimant also advised he had borrowed £40,000 from his parents and had borrowed from friends.

19. In relation to benefits the claimant received Employment Support Allowance of £73.10 to March 2017 and Job Seekers Allowance from April 2017 until April 2018. This was also paid at £73.10. The claimant received £42 in Working Tax Credits from the beginning of July 2018 until 17 November 2018. The claimant had also applied for Universal Credit and has been allocated £317.82 for housing benefit. He

stated therefore that his benefits since dismissal were £5,242.32 for ESA and JSA. The Universal Credit of four months at £317.82 being £1,271.80.

20. The claimant also stated that most of the jobs the respondent had put forward would not benefit him financially, he would lose all his benefits including housing benefit. He received £400 approximately per month in housing benefit depending on his earnings and received a discount of £100 each month on his council tax, which equates to £500 per month. The claimant stated that it would not be financially viable to take a job on the level of salary indicated in the jobs referred to by the respondent. Most of the jobs the respondent put forward were on £10 per hour which would roughly be gross £3,200, net £1681 approximately. However, having made that calculation the claimant's complaint (whether per se legitimate or not) that he could not afford to come off benefits appeared implausible and we do not accept it.

21. The claimant had not applied for any jobs since his dismissal other than as recorded above.

22. An issue also arose regarding length of service. The respondent produced a document recording the claimant's periods of working for them which showed a three-month gap from the end of December 2000 to 18 April 2001 and accordingly submitted that any periods of employment before that should not count towards continuous employment. The claimant agreed with these records in tribunal. The respondent requested we review our original judgment and substitute the April 2001 date as the date for the beginning of the claimant's employment.

The Law

Review Jurisdiction

23. Reconsideration of judgments is contained in rule 70 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. It says that:

> "(70) A Tribunal may, either on its own initiative or on the replication of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration the decision may be confirmed, varied or revoked. If it is revoked it may be taken again.
>
> (71) Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing within 14 days of the date on which the written record or other written communication of the original decision was sent to the parties, or within 14 days of the date when the written reasons were sent out (if later) and shall set out why reconsideration of the original decision is necessary.

<u>Process</u>

(72) An Employment Judge shall consider any application made under rule 71:

(i) If the Judge considers there is no reasonable prospect of the original decision being varied or revoked the application shall be refused and the Tribunal shall inform the parties of that refusal. Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the Judge's provisional views on the application.

(ii) If the application has not been refused under paragraph (i) the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (i), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further representations.

(iii) Where practicable the consideration under paragraph (i) shall be by the Employment Judge who made the original decision or, as the case may be, chaired the full Tribunal which made it, and any reconsideration under paragraph (ii) shall be made by the Judge or, as the case may be, the full Tribunal which made the original which made the decision. Where that is not practicable the President, Vice President or Regional Employment Judge shall appoint another Employment Judge to deal with the application or, in the case of a decision of a full Tribunal, either shall direct that the reconsideration be by such members of the original Tribunal as remain available or reconstitute the Tribunal in whole or in part."

Unfair dismissal compensation

24. In an unfair dismissal case a claimant is entitled to at least two awards, one is the basic award Section 118(1)(a) of the Employment Rights Act 1996 and secondly a compensatory award Section 118(1)(b) intended to compensate the employee for financial loss suffered as a result of the unfair dismissal. This is subject to a current maximum of £86444 (not including the basic award) or one year's gross pay whichever is the lower.

Basic Award

25. Basic award is calculated in units of a weeks' pay as defined in Section 220 to 229 of the Employment Rights Act 1996 and is dependent on the employee's age and length of continuous service. The basic award in this case was agreed save for whether the claimant's service began from 14 July 1999 or the 18 April 2001 and whether pension contributions should be included in the calculation of basic pay

Compensatory Award

26. Section 123 of the 1996 Act requires an Employment Tribunal to have regard to the loss incurred by the employee as a result of the dismissal.

27. In 2003 the cap was introduced on unfair dismissals so that if a year's salary is a lower amount than the statutory cap only a year's salary will be applied. Section 124(1)(a) 1996 Act states that the statutory limit shall be the lower of

- a maximum amount of £ 86444 as of today's date

- the product of 52 months multiplied by a week's pay of the employee concerned

There was an issue as to whether basic pay should include employer pension contributions. The case of *University of Sunderland vs Droussou EAT 2017* established it does although this case is being appealed. The respondent reserved their position on this point.

28. There can be no double recovery and therefore the Tribunal should take into account any payments made by the employer to the employee - in this case the claimant was paid notice pay.

29. Compensatory award is divided into the following heads of compensation: -

29.1 Immediate loss of earnings i.e. loss between dismissal and the hearing at which the Tribunal decides on compensation;

29.2 Future loss of earnings i.e. estimated loss after the hearing;

29.3 Expenses incurred as a consequence of the dismissal;

29.4 Loss of statutory employment protection;

29.5 Loss of pension rights.

Recoupment Provisions

30. Under the Employment Protection (Recoupment of Benefits) Regulations 1996 an employer is required to deduct from any award made sums received by the employee for Job Seekers Allowance, income related employment and Support Allowance, Income Support or Universal Credit, the employer has to pay this amount to the Department of Work and Pensions in order that they can recoup social security payments, however in this case there was an issue as to whether other payments should be simply deducted from the award, in particular the respondent relied on a case *Morgan's -v- Alpha Plus Security Limited* in this case the Tribunal had deducted the full amount of Incapacity Benefit that the claimant had received from their Compensatory Award. The EAT upheld this award on the grounds that if no deduction were made for receipt of benefits which would not have been paid had the applicant remained in employment and which were not recoverable the applicant

would recover more than his loss and that accordingly the applicant had to give credit for the total amount of Invalidity Benefit he had received.

31. The claimant on the other hand quoted *Savage -v- Saxena EAT 1998*, the majority of the EAT in that case held that the starting point in assessing compensation was Section 123(1) which provides 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 that loss is attributable to action taken by the employer. Under common law principles account must be taken of sums to which the injured party would not have been entitled had it not been for the injury, however the majority of the EAT thought that housing benefit did not fall within that rule because it was not sufficiently approximate to the loss sustained in consequence of the dismissal insofar as that loss is attributable to the employer's actions. The payment of housing benefits results from the inability of the claimant to meet reasonable housing needs from his or her resources, it is paid in respective of the needs of the household, not the individual and in their view differed markedly from the Invalidity Benefit. In addition, it was noted that the 1987 Housing Benefit Regulations then in force contained provisions whereby housing benefit could be recovered where employees were awarded unfair dismissal compensation.

32. The parties could not advise us what the current situation is however it appears that the 2006 Regulations do refer similarly to unfair dismissal compensation, and therefore should not be taken into account by the Employment Tribunal when assessing unfair dismissal. The situation is now complicated by Universal Credit which includes different elements of benefits including recoupable and non-recoupable benefits, and therefore the Tribunal has to distinguish between the separate elements coming together to form Universal Credit.

33. In relation to the other principles to be applied to the compensatory award any earnings from new employment should be offset. The Tribunal must also assess future loss, this is obviously subject to some speculation and dependent on the evidence provided.

Mitigation

34. An employer can argue in remedies hearing as they did here that a claimant has failed to properly mitigate their loss, the burden of proof is on the employer, Section 123(4) of the Employment Rights states:-

> "in ascertaining the loss, 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 …."

35. In *Savage -v- Saxina 1998 EAT* as referred to above, the EAT also recommended a three-separate approach to mitigation: -

(i) Identify what steps should have been taken by the claimant to mitigate his or her loss;

(ii) Find the date upon which such steps would have produced an alternative income;

(iii) Thereafter reduce the amount of compensation by the amount of income which would have been earnt.

36. Therefore, the usual practice is to estimate a date on which the claimant should have obtained a job had they properly sought to mitigate their loss. Mitigation can be argued in relation to jobs that were suitable that the claimant failed to apply for or the failure to accept the job offered or as is also relevant here the change of an unreasonable change of career. Where an employee's decision on a decision to embark for example on a course has been held to be unreasonable the Tribunal needs to judge when the employee ought to have obtained fresh employment at a similar level, *Mullarkey -v- Up The Creek Limited EAT 1995*. In *Simrad Limited -v- Scott EAT 1997*, the Tribunal had decided an employee acted reasonably in re-training as a Nurse, the EAT held however that her losses from the date she started her course were too remote to be attributable to the actions of the employer however this does not sit very easily with the Milarki approach in a situation where the employee's decision is deemed to be reasonable.

37. In *Software 2000 Limited -v- Andrew and Others 2007 EAT* a number of principles were enunciated by the then President Mr Justice Elias which include

- In assessing compensation for unfair dismissal, the Employment Tribunal must assess the lost flowing from that dismissal which will normally involve an assessment of how long the employee would have been employed but for the dismissal.

- If the employer contends that the employee would or might have ceased to have been employed in any event had fair procedures been adopted the Tribunal must have regard to all the relevant evidence, including any evidence from the employee for example to the effect that he or she intended to retire in the near future.

- There will be circumstances where the nature of the evidence for this purpose is so unreliable that the Tribunal may reasonably take the view that the exercise of seeking to reconstruct what might have been so riddled with uncertainty that no sensible prediction based on the evidence can properly be made, whether that is the position is a matter of impression judgment for the Tribunal.

- However, the Tribunal must recognise that it should have regard to any material and reliable evidence that might assist it in fixing just and equitable compensation even if there are limits to the extent to which it can confidently predict what might have been; it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.

- A finding that an employee would have continued in employment indefinitely on the same terms should only be made where the evidence to the contrary is so scant that it can effectively be ignored.

Pension Loss

38. In relation to pension loss the Tribunal generally makes a separate calculation. Pension loss is generally claimed on the basis that given the current climate it is highly unlikely that an individual in a final salary scheme would be able to replicate that in another job as certainly most private sector companies have closed their final salary schemes. The period of compensation for pension loss can be longer than the period of compensation for loss of earnings as it may seem an individual could obtain another job but not that they could obtain another job with pension loss.

39. Recently, the Presidential guidance enunciated new principles in relation to pension loss dividing up two approaches, one is the simplified approach and the other is the complex approach or substantial loss approach. The Presidential guidance states in paragraph 4:-

> "insofar as loss of occupational pension rights are concerned the principles identified category of "simple cases" in such cases the Tribunal will exclusively use a contributions method to assess a claimant's net pension loss, this method requires the Tribunal to aggregate the contributions that, but for the dismissal, the employer would have made to the claimant's pension scheme during the period of loss that has been identified, this approach will invariably be adopted in cases where the claimant's lost pension rights relate to a defined contribution scheme including a scheme into which the claimant was automatically enrolled, it will also be adopted in some cases where the lost pension rights relate to a defined benefits scheme, for example those cases where the period of loss relates to a relatively short period or where the application of the monetary cap on compensation or a very large withdrawal factor means it will be disproportionate to engage in complex analysis 2

40. Paragraph 5 states "the principles identify a category of complex cases, these are cases for which the contributions method is not suited, in general a case will be complex:-

> "If the claimant's lost pension rights derive from a defined benefit scheme (including final salary schemes and CARE schemes) and the loss relates to a longer period). Complex cases include but are not limited to career loss cases."

41. Generally speaking in respect of the substantial loss approach the guidelines advocate that the use of the substantial loss approach be restricted to those cases where the claimant was a long-standing employee in a stable job whose age meant he or she would be unlikely to looking to move.

42. Further, from the guidance at 5.41 states:

> "many cases featuring a loss of defined benefit pension rights will not be suitable for the contributions method, we call this complex case, they are those cases where the period of loss cannot be categorised as short or which for some other reason involve a potentially significant quantifiable loss".

Parties Submissions

Claimant's Submissions

43. The claimant submitted primarily that he would have continued working for the respondent for the rest of his career and that his earnings and pension loss should reflect the same subject to the statutory cap. He contested that he had failed to mitigate his loss as it was reasonable of him to decide to not apply for jobs that required fork lift truck licenses, the respondent had not produced jobs that were suitable which didn't require fork lift truck license. He said it was reasonable to refuse to take the Air Products job given that for the first three or four months the salary would be so low that he would be worse off than on benefits and there was no guarantee that the job would last. He stated that it was reasonable to change tact to train as a Barber as the potential earnings were up to £50,000 a year gross.

Respondent's submissions

44. The respondent submitted that the claimant would have been dismissed by the respondent in any event because of his poor attendance record, his record when working for them and his failure to find new employment suggests that he would not have met the attendance expectations of the respondent had he continued to be employed. The respondent relied on the Tribunal's judgment in this respect (paragraphs 76 and 77, 83, 90 to 92, 143 to 148, 161, 162 and 165). They submitted that had his warning been extended by another three months, it was highly likely the claimant would have been absent again as he did have a pattern of being off sick immediately a warning expired. In addition, the claimant in his own evidence had stated that he did not wish to work in a managed situation anymore due to his experience at BOC which suggests that if he had not been absent due to illness there would have been incidents relating to his managed situation which would have led to him leaving. Whilst the claimant asserted he did not want to work in a managed environment there was no medical evidence to suggest his health would deteriorate if he did.

45. In addition, it was not reasonable of the claimant not to take a job because he would or thought he would end up potentially in a worse position than on benefits although it was not accepted this would be the case in any effect.

46. The respondents submitted that the claimant had a 50% chance of remaining employed by 22nd December 2016; a further 75% chance if he was employed at 22nd December 2016 of being dismissed within a warning period by 22nd March 2017; and a further 90% chance if he was employed at 22nd March 2017 of being dismissed by 22nd June 2017. After that his chance of being employed was zero.

47. The claimant had failed to mitigate his loss by choosing to train as a Barber and persist with the business which was not providing a reasonable amount of income and in fact he had found very little work prior to renting the Swinton shop. At

the end of August 2017, he had only earnt £750 for the month and hadn't been paid another £450 for September.

48. The claimant had also failed to mitigate his loss by refusing the August 2017 offer of employment for Air Products. This was unreasonable as the increase of full hourly rates would occur within three to four months and overtime was highly likely to be offered. In addition, this broke the clause of causation of any losses suffered by the claimant.

49. The claimant also failed to mitigate his loss by failing to search for alternative work, the claimant has not produced any evidence whatsoever of applying for any job. The claimant asserts that he did not have a full FLT license but he made no effort to obtain one. In relation to his documents for the jobcentre he did state that this was the type of job he could apply for and that he had an FLT qualification and therefore at the time he felt he could apply for jobs requiring an FLT qualification as he was unaware his FLT credentials were simply in house.

50. The respondents also were concerned that the claimant's financial information was incomplete or inaccurate. They pointed out that his bank statements did not record the £100 per week cost of hiring his room (the claimant says this was paid cash). There is no record of cash payments which were received from his business, there was no record of the income from Moorside or Dukes, the accountant's profits records had to be amended in the course of the Tribunal which was very unreliable. He stated that there was money which would not show in his bank account, the respondent asserted that the claimant was running a cash business where much of the cash did not go through his account, and therefore they submitted that on the balance of probabilities it was likely he was making a lot more money than he asserted. In addition, the claimant ought to give credit for ESA, housing and Council Tax allowance.

51. The respondents submitted the simplified pension loss should apply on the basis they given that he would have been likely to have been dismissed in any event after a short period.

Conclusions

52. We find that the claimant on the balance of probabilities was unlikely to have continued in employment with the respondent for more than twelve months. We find this on the basis of findings we made in our previous decision that the claimant had a history of being absent due to sickness as soon as a warning had expired. Therefore we find that had he not been dismissed on 5 August 2016 but instead the respondent extended his warning by another three months we find that it is likely he would have survived that extension but would have been absent due to sickness again fairly soon thereafter. Following which the respondent would have been justified in following a truncated procedure, as indeed they had done to some extent originally and which we had deemed fair. In relation to if the respondent had reverted to their original plan of having an attendance target we find that on the balance of probabilities given the claimant's history he would not have met that target.

<u>Mitigation</u>

53. We find that the claimant failed to mitigate his loss in refusing to take the Air Products job in August 2017. However, by this stage we would have found the claimant would have been fairly dismissed by the respondents in any event. However, if we are wrong on that it is a relevant issue. We do not think it is reasonable for the claimant to refuse to take this job for financial reasons as he would have soon have been earning a reasonable amount. In relation to the initial four months at £8 an hour this would have been roughly £320 a week and we do not believe this was less than he would have been receiving in benefits.

54. In addition, in evidence the claimant stated that he did not wish to put himself back in a managed position given his experience at BOC, we find this was utterly unreasonable of the claimant. Firstly, his perception we find was erroneous - on the basis of our experience and the evidence - management at BOC were not 'out to get him', they were simply responding to his absence and attempting to manage it within their procedures. Even if were true there was no reasonable basis for assuming Air Products would be the same.

55. Finally, being in a managed position is the situation most employees are in (it is virtually synonymous with being an employee) and if an individual concludes that type of employment is not for them that is a personal choice which renders losses arising from that choice too remote to claim.

56. In addition, the claimant failed to mitigate his loss by applying for no jobs other than Air Products and the barbering placements. His jobcentre commitment form indicated that his depression was no bar to obtaining work although he did say he would prefer to work alone he had no evidence that working with others or in a managerial hierarchy would affect his mental health.

57. Further, the claimant said he did not want to travel further than he travelled to BOC which was ten minutes, we find that unreasonable criteria for the claimant to adopt in looking for other jobs particularly as his job centre commitment form said he was prepared to travel 90 minutes a day which is a reasonable stipulation in or view but in event proved irrelevant as the claimant did not look for other jobs.

58. Finally, in relation to the sample jobs provided by the respondent which required an FLT licence we find whilst these were not contemporaneous they were a likely indication of the jobs which would have been available throughout the period. We find it was unreasonable of the claimant never to have made any enquiries regarding obtaining an FLT license and in fact he was not aware he did not have a transferable FLT license until much later on following his dismissal yet still did not apply for any jobs requiring FLT qualifications.

<u>Further Failure to Mitigate</u>

59. The claimant also we find made a reasonable decision in seeking to acquire a new skill of barbering but failed to mitigate his loss in pursuing it sufficiently vigorously earning only £1,320 April to September 2017 and providing no evidence of seeking employment with any other barbers in a reasonable travelling distance of his home address. Further, he has chosen to now become self-employed renting his own shop, he accepts it is not in a good position and one consequence of that is limited footfall and earnings, that is the claimant's choice and represents a failure to

mitigate his loss and/or an intervening act which makes losses arising from it more remote.

Housing Benefit

60. In our view the case law regarding housing benefit is clear, housing benefit is not to be deducted because it is recoverable directly by the relevant agency and therefore we would not deduct housing benefit.

Calculation of a weeks pay

Employer's pension contributions clearly on the current law should be included in the calculation of a week's wage.

Pension Loss

61. Regarding whether to adopt the simplified or the substantial loss approach we have adopted the simplified approach given that we found the claimant would not have stayed in the respondent's employment for more than one further year.

Basic Award

62. In respect of the claimant's starting date we review our original award on the basis that the claimant agreed in evidence that he did not start working for the respondent continuously until the 18th April 2001 as he agreed he had had a three month break prior to that which broke continuity. Accordingly, his basic award is to be recalculated in the light of reduced service.

63. We set out our award below, recoupment does apply as the claimant received JSA from 7 March 2017 which is within the period we have awarded the claimant his salary losses.

Basic Award

£479 x 16 (based on service from April 2001) **7664.00**

Compensatory award

31st October 2016 to 5th August 2017
@ £637.72 net x 40 weeks 25508.80

Less earnings in the same period 24938.80

Dukes and Moorside £570

(note other earnings are outside the period we awarded losses)

Loss of statutory rights 500.00

Pension contributions

31st October 2016 to 5th August 2017

166.64 x 40	6665.60
Total	**32104.40**

64. Grossing up of the claimant's claim is required as out with the basic award the losses awarded are over £30,000 by a sum of £2,104. We propose to gross this amount up at the marginal tax rate of 20% which gives a new figure of £2,524.80 i.e. an additional amount of £410.80, therefore after the grossing up the claimant's total compensatory award is £**32,515.20.** We have no submissions on grossing up as obviously at the time of the hearing the claimant and respondent would be unaware of what we intended to award.

65. As the award is below the statutory cap and the amount of the claimant's annual gross salary which we have calculated as £43,327.44 the award can be made in full.

66. The total overall award is **£40,179.20**

Recoupment

67. The prescribed element is £24,938.80 plus £6,665.60 plus grossed up amount of £410.80 i.e. £32,015.20

68. The prescribed period is 31 October 2016 to 5 August 2017

69. The excess of the total award over the prescribed award is £8164

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Employment Judge Feeney

Date: 5 June 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

14 June 2019

FOR THE TRIBUNAL OFFICE

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number(s): **2405152/2016**

Name of case(s): **Mr L Banham** v **BOC Limited**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: **14 June 2019**

"the calculation day" is: **15 June 2019**

"the stipulated rate of interest" is: **8%**

MRS L WHITE
For the Employment Tribunal Office