



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr A Gaffar

**Respondent:** Age UK Calderdale and Leeds

**HELD AT:** Leeds

**ON:** 24 June 2019

**BEFORE:** Employment Judge D N Jones

## REPRESENTATION:

**Claimant:** Mr M Wharton, Lay Representative

**Respondent:** Mr T Falcao, Solicitor

## JUDGMENT

1. The respondent shall not be required to re-instate or re-engage the claimant as it is not practicable for it to comply with such an order.
2. The respondent shall pay to the claimant compensation for the unfair dismissal in the sum of £12,350.56 by way of a compensatory award.
3. The recoupment provisions apply. The prescribed element is £11,850.56 and the prescribed period is from 30 April 2018 to 24 June 2019. The total award exceeds the prescribed element by £500.

## REASONS

1. This is the Remedy Hearing for unfair dismissal. The claimant has sought an order for re-instatement and compensation. The respondent resists an order for re-instatement or re-engagement and has argued that the compensation the claimant is entitled to is limited because it contends he has failed reasonably to mitigate his losses.
2. I have heard evidence from the claimant and from Mrs Butland.
3. The relevant legal provisions are contained in sections 112, 113, 114, 115, 116, 117, 123 and 124 of the Employment Rights Act 1996 (ERA). In respect of re-instatement or re-engagement Section 116 requires the Tribunal to consider first

whether to make a re-instatement order and, in doing so, must consider whether the claimant wishes to be re-instated, and if he does, whether it is practicable for the employer to comply with an order for re-instatement. Also, if the complainant caused or contributed to some extent to the dismissal, would it be just to make such an order?

4. If the Tribunal decides not to make an order for re-instatement it should consider whether to make an order for re-engagement by application of similar questions. The terms of re-engagement have to be specifically set out, pursuant to Section 115, including the nature of the employment, the remuneration from the employment, the rights and privilege which must be restored and the date by which the order must be complied with, and in considering whether to order re-employment the Tribunal must consider the same factors in respect of wishes, practicability and contributory fault.

5. If the Tribunal makes neither order it shall then consider making an order for compensation payment, pursuant to Section 123 of the ERA; it must be such amount as the Tribunal considers just and equitable in all the circumstances and having regard to the loss sustained by the claimant in consequence of the dismissal, insofar as that loss is attributable to action taken by the employer, and that includes any expenses reasonably incurred by the claimant in consequence of the dismissal and any loss of benefit which he might reasonably be expected to have had but for the dismissal.

6. Section 123(7) provides that if any payment by the employer to the employee on the ground the dismissal was by reason of redundancy exceeds the amount of any basic award which would be payable, the excess goes to reduce the amount of the compensatory award. The claimant received a redundancy payment of £518 in excess of what he would have been awarded by way of a basic award. That will be deducted from the compensatory award.

7. Turning to the facts, the claimant made a number of applications for work after his dismissal on 30 April 2018 but the only recorded applications which have been produced in evidence commenced in or about September 2018. He made applications, identifiable from those records, for in excess of 20 jobs; about 26 jobs were to employers in his locality who had not advertised vacancies. The claimant made enquiries of them for any vacancies in in the administrative field. He applied for a number of jobs with the Civil Service and was interviewed for three, two by telephone and one face to face in Bradford. He was unsuccessful. They were for an administrative or advisory role.

8. The claimant applied for Job Seekers Allowance in August 2018. He received that benefit until February 2019. As a condition of receiving such a payment he was required to satisfy the Department that he was making a reasonable search for work and, to that end, he registered with an agency. He is unable to recall the name of that agency.

9. The claimant did not apply for a vacancy at a charity which was similar to that of his previous post as a Customer Advisor. That position had become vacant at the time he was notified of his appeal against redundancy. Mr Cormack notified the claimant that such a vacancy had arisen and said he would get back to him with further details. He failed to provide those details. The claimant is not currently registered with a job agency and, given he is no longer in receipt of Job Seekers Allowance, is not required to do so.

10. There are vacancies which the claimant could have applied for with associate charities, Age UK in Leeds and Bradford. He says he believed that any application to Age UK Leeds or Age UK Bradford would be jeopardised by the involvement of Mr

Cormack and the executives who run the respondent, who have a close association with their contemporaries in those organisations. I have no evidence that that would be the case, and I am satisfied that there are a large number of vacancies available through agency registration; I accept the claimant's evidence that the illustration printed out by the respondents for Customer Advisors in Bradford or West Yorkshire has thrown up a number of posts for which he would not be qualified or experienced and so would be unlikely to be recruited. That said, I am satisfied that there would be job opportunities from an agency registration.

11. Relations between the claimant and the executive officers and trustees of the respondent have all but collapsed. That is demonstrated by what has been said in this litigation, to which I shall return.

12. The respondent had an operating profit in 2017/18 of £9,000. The previous year it had had an operating profit of £6,000. In 2016/17 it had net assets of £191,000 but I have no idea how liquid any of those assets are; they include vehicles and property as well as cash in the bank. There are various streams of funding for the respondent which are renewed and often irregular. There are two significant streams of funding from the Calderdale Council and the Macmillan Charity. The Calderdale Council was due to be renewed on 30 September 2019 and it has been extended to the end of December and the Macmillan contract will be renewed or terminated on 31 December of this year.

13. In addition, the respondent benefits from legacy payments. In the last couple of years, a significant legacy in each has made the difference between an operating profit and an operating loss. The relevance of which is that planning for its staffing resource is complicated for the respondent because it is not against a background of guaranteed future income.

14. Mr Wharton argues that the respondent can professionally reorganise and create the vacancy which it made redundant by use of the respondent's reserve or by dismissing other employees. He says any suggestion that the relationship has soured is largely attributable to the respondent's manner of conducting this litigation and that the parties should be able to let bygones be bygones and proceed in an adult fashion. The respondent contends it does not have the finances to create a vacancy and that the comments made by the claimant and his representative have created considerable upset and offence such that the prospect of any trust and confidence between the parties is illusory.

15. Although the claimant wishes to be re-instated or re-engaged and has not in any way caused or contributed to his dismissal, it is not practicable for the respondent to comply with an order for re-instatement or re-engagement. It is an issue of trust; or rather the lack of it. Invariably, when an employment relationship has ended which brings the parties to the tribunal, there is a degree of animosity. In the present case, the verbal or written attacks are more extensive, sustained and personal than is usual and extend well beyond what one has come to expect. Numerous accusations levelled at the respondent were improper and without any proper basis in evidence. A choice had been made to deploy that type of strategy in the conduct of the case.

16. These are to be found in the earlier reasons as well as the correspondence to the Tribunal and between the parties, but a number of illustrations will suffice. The suggestion that the executives of the respondent had created a redundancy exercise to rid themselves of the claimant was far-fetched. It amounted to saying that the executives and trustees of the respondent had contrived a situation to remove not only the claimant from employment, but they were callously indifferent to four

collateral casualties who lost their jobs in the same exercise, driven solely by a desire to remove the claimant from the organisation.

17. The suggestion that the appeal panel had acted in a conspiracy with the executives to dismiss the appeal, without having been given the claimant's written representations was unfounded.

18. Personal accusations have been made about the executives and the charity as a whole. Mr Cormack was described as having given evasive and slippery answers, the charity had been described as carrying out "deliberate, purposeful and spiteful conduct to ensure the claimant was got rid of".

19. Central to the case was the allegation that Mr Hillyard had explained to the executives, including Mrs Butland, that the claimant had made disclosures about the appointment of Mr Cormack's wife and that had been fundamental in the decision to terminate the claimant's employment. Mr Hillyard was adamant that no such discussion between him and the executive ever took place. I entirely accepted his evidence. He received the stinging accusation, from the claimant's representative, of not being the happy daft dullard he would have us believe. He was described as destroying his own credibility by lying about the separate entity of trading and lying throughout his statement.

20. These, and many other attacks upon the claimant's would-be managers, if he were re-employed, establish, to my mind, that no meaningful employment relationship could survive to the benefit of the respondent and its client group. For the charity to operate successfully with its service users, trust between the employee and his colleagues is critical. All of the managers who would have any responsibility for the claimant have been targeted for unfair and ill-founded accusations by Mr Wharton or the claimant. For these reasons re-instatement or re-engagement would not be practicable.

21. I turn to the question of compensation. The burden is on the respondent to establish that the claimant has failed reasonably to mitigate his losses. I am satisfied it has discharged that. The claimant should have been more pro-active in applying to online agencies. I accept the submission of Mr Falcao that the claimant has the knowledge to use the internet to access the job market, given his former job with Age UK and advice he provided to the service users. I would have expected a greater number of applications for vacancies, rather than speculative requests to local employers. Not to have applied for the vacancy which was very similar to his job at the respondent, at Carers Count, could not be passed off as being Mr Cormack's fault, for not having provided further particulars of it. If the claimant had reasonably been looking for work he would have tracked down the details himself, in May of last year.

22. I must therefore consider what would have happened had the claimant reasonably mitigated his loss. Mr Wharton made a fair point that at this stage in his working life Mr Gaffar may find it more difficult than younger workers. I do not know how many people would have applied for the Carer's Count post or any of the other vacancies which have been suggested. It is by no means a foregone conclusion that, had the claimant made a better search for work, he would have been successful. Having regard to his skills, experience and the job market, had he made a reasonable search for work he would have extinguished the continuing losses one year after his dismissal, that is by 30 April 2019.

23. I found that there was an 80% chance the claimant would have been retained on a 25 hour per week contract and that is the starting point. I have to decide what the claimant's income would have been but for the dismissal, factoring in the loss of a chance.

24. That would have amounted to a gross income of £11,918 per year. The claimant would have paid national insurance of 12% on £3,494, being £419.28 and income tax of 20% on £418 of £83.60. I take a year's gross salary of £11,918, deduct those sums and I am left with £11,415.12. To that I add £953.44 pension which is 8% of the gross sum of £11,918. That leaves a sub total of £12,368.56. In addition to that I award loss of statutory rights of £500 which gives a total compensatory award of £12,868.56, but from that I deduct the agreed sum of £518, the excess over the basic award, leaving a compensatory award of £12,350.56.

25. Because the claimant has been in receipt of Job Seekers' Allowance the recoupment provisions apply. What that means is that the past loss of earnings to 30 April 2019 must be retained by the respondent, pending the issue of a certificate by the Secretary of State for Work and Pensions which will include the sum the claimant has received as Job Seekers' Allowance. The respondent will have to pay the balance, which will be the excess over the Job Seekers Allowance received, to the claimant, and it shall pay to the Secretary of State the amount received by the claimant for Job Seekers' Allowance. The respondent must pay immediately to the claimant that sum which is not attributable to past loss of earnings which is the £500 for loss of statutory rights.

Employment Judge D N Jones

Date 10 July 2019

**SCHEDULE**Loss of earnings for 12 months

From 30 April 2018 to 31 March 2019	£11,918.00
Less	
Income tax of	83.60
National Insurance contributions	419.28
Sub-total	£11,415.12
Plus	
Pension at 8% of £11,918.00 -	£ 953.44
Subtotal	£12,368.56
Loss of statutory rights	£ 500.00
Subtotal	£12,868.56
Less £518, paid in excess of the basic award	£ 500.00
Compensatory Award	£12,350.56