EMPLOYMENT TRIBUNALS

SITTING AT: **LONDON CENTRAL**

BEFORE: **EMPLOYMENT JUDGE SPENCER**

MEMBERS: **MR D SCHOFIELD**

BETWEEN: **MR J LENTON** **CLAIMANT**

AND

SAM CORPORATION LIMITED **RESPONDENT**

ON: **30th August 2019**

Appearances

For the Claimant: **Mr T Perry, counsel**
For the Respondent: **Mr. M Egan, counsel**

JUDGMENT

The unanimous Judgment of the Tribunal is that the Respondent is ordered to pay the Claimant **£65,430*** calculated as follows:

		£
Damages for wrongful dismissal		
9 weeks net pay	9,346.14	
plus 9 weeks loss of benefits	1,181.68	10,527.82
Holiday pay (11.5 days at 207.56 per day)		2,386.94
Basic Award (5868 reduced by 30%)		4,107.60
Compensatory Award		
Loss to today date	104,955.98	
Less mitigation	35,802.82	
	69,153.16	
Less 30% contribution		48,407.21
Total AWARD		**65,429.57**

* These figures have been adjusted for grossing up and the final award rounded up.

REASONS

These written reasons are given at the request of the Respondent.

1. This was a remedy hearing following the Judgment of the Tribunal, sent to the parties on 12 August 2019, that the Claimant had been unfairly and wrongfully dismissed. His claims of disability discrimination, victimisation and failure to pay a contractual bonus pay failed. The issue of holiday pay was held over to the remedy hearing.

2. Unfortunately, Mr Eggmore had notified the Tribunal this morning that he was unwell and could not attend, although he was content, subject to the parties' consent, for the hearing to go ahead in his absence. Both parties consented to the remedy hearing taking place in the absence of Mr Eggmore.

3. The Tribunal had a small bundle of documents relevant to remedy and heard evidence from the Claimant. A list of issues for the Remedies Hearing had been agreed between the parties (64C).

Findings of fact relevant to remedy

4. The Claimant was dismissed without notice on 18th January 2018 and the appeal process concluded on 12th February 2018. In February and March the Claimant pursued a number of vacancies (110 - 125). He then went to Dubai with his partner (now his fiancée). By the beginning of April the Claimant had secured work with the Wilson Dubai Tennis Academy (128). Ultimately however the Claimant was not paid for this work, as the company subsequently became insolvent.

5. The Claimant began work with Tennis 360 in Dubai on 16 June 2018. The (unsigned) contract of employment (71) provided in the bundle states that the contract was for an initial period of 2 years renewable by mutual written agreement and that his employment was subject to the satisfactory completion of a probationary period of 6 months during which his employment could be terminated by 2 months' notice. It provided for monthly remuneration (including housing allowance) of 25,000 AED (approximately £5,500) which amounted to more than his previous salary with the Respondent.

6. The Claimant's employment with Tennis 360 came to an end on 22 September 2018. The premises at which he worked were repossessed and a planned expansion to Singapore did not materialise. These were circumstances beyond the control of the Claimant. He was not given or paid for a period of notice.

7. After his employment with Tennis 360 ended the Claimant remained working in Dubai as a self-employed tennis coach. The Claimant has provided his Dubai bank accounts for the period 15th October 2018 to June

2019. In August, in a letter to the Respondent, the Claimant's solicitors stated that the Claimant was not claiming loss after the date of the liability hearing and refused to provide disclosure of further bank accounts. During the course of today's hearing the Claimant clarified that in fact he was now seeking his loss to today's date, but no future loss.

8. Although the Claimant was not wholly truthful in evidence today as to the earnings received from Tennis 360, we accept his evidence that he has not been in receipt of any income since early June 2019 as he was unable to continue to coach tennis in Dubai during June, July and August given the climate and the fact that the Claimant was having to teach on outdoor courts.

9. The Claimant had also refused to provide disclosure of his bank statements for the period April to 14th October 2018. In cross examination it became evident that the monies which the Claimant had identified as earnings from Tennis 360 had not been properly declared and that he had been earning more from Tennis 360 than was credited in his schedule of loss. Mr Perry, on behalf of the Claimant accepted this and the figures for loss during this period have been adjusted. We draw no further conclusions from the failure to provide bank statements.

10. The Claimant's schedule of loss claims £10,000 for expenses of looking for alternative employment. Beyond an invoice in the name of the Claimant's partner for car hire, the Claimant has provided no receipts to show that any monies have been expended in looking for work. While we accept, as the Claimant said, that having a car was essential in Dubai, we regard that as a living expense rather than the expense of seeking new work. There is an extract in the bundle from booking.com in relation to hotel expenses but it appears that that booking was not completed, and, in any event, we would also regard hotel accommodation as living expenses.

11. In his schedule of loss the Claimant also claims £8,000 in respect of the "bonus" that he would have received in 2019 had he remained at Dukes Meadow. We have had no evidence as to the financial performance of the Respondent in 2019 and there is no evidence that the Claimant would have received a discretionary bonus had he remained at work. Although the Claimant had received bonuses in previous years neither he nor other members of staff had received a bonus in 2018. Given the discretionary nature of the bonus and the fact that Mr Marks had concerns about the Claimant's conduct and performance we find that the Claimant would not have received a bonus in 2019.

12. It was agreed between the parties that at the time of his dismissal

    a. the Claimant's gross annual pay was £70,000
    b. the annual value of his other benefits was £6827.52p.
    c. his net weekly basic pay was £1,038.
    d. The Respondent's annual pension contribution was £2100

e. the value of his basic award was, (before any deduction for contribution) £5868
f. his statutory notice entitlement was 9 weeks

Relevant law

13. The relevant statutory provisions are set out in Sections 118-124 of the Employment Rights Act 1996. Where an employee has been unfairly dismissed, Tribunals are required to make an award consisting of a basic award and a compensatory award. The compensatory award is such amount that the Tribunal considers just and equitable, having regard to the loss sustained by the Claimant in consequence of the dismissal, insofar as the loss is attributable to action taken by the employer.

14. The calculation of loss is subject to the duty to mitigate loss. The Claimant is required to take such steps as are reasonable to mitigate the effects of having lost his job. The burden to establish a failure to mitigate loss lies with the employer. Whether an employee has done enough to fulfil the duty to mitigate depends on the circumstances of each case and is to be judged subjectively. If a Tribunal finds that an employee has failed to mitigate his loss, then it should attempt to estimate the time it would have taken to find a job had proper efforts been made and then reduce any compensation by the earnings it thinks the employee would have got from that point.

15. In assessing compensation, a Tribunal has to assess the loss flowing from the dismissal. In a normal case that requires it to assess for how long an employee would have been employed but for the dismissal. If the employer seeks to contend that the employee would have ceased to have been employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, then it is for it to adduce any relevant evidence on which it wishes to rely.

16. Section 122(2) of the Employment Rights Act 1996 provides that:

> "Where the tribunal considers that any conduct of the complainant before the dismissal (or, whether dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly."

Section 123 (6) provides that:

> "Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to the findings."

The tests in these 2 sections are different in that section 122(2) gives the tribunal a discretion to reduce the basic award on the grounds of any kind of (blameworthy) conduct on the employee's part that occurred prior to

dismissal, whereas under section 123(6) the conduct must cause or contribute to the dismissal.

18. In Nelson v BBC (No 2) 1980 ICR 110, the Court of Appeal said that 3 factors must be satisfied if the tribunal is to reduce the compensatory award by a factor to represent the Claimant's contributory conduct. The relevant action must be culpable or blameworthy, secondly the conduct must have actually caused or contributed to the dismissal and thirdly it must be just and equitable to reduce the award by the proportion specified.

19. Section 207A of the Trade Union and Labour Relations Consolidation Act 1992 provides that

> "If in any proceedings to which this Section applies it appears to the Employment Tribunal that
>
> (a) the claim to which the proceedings relate concern 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) the 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%.

Submissions

20. For the Respondent Mr Egan submitted that:

a. The Claimant obtained work at a similar or greater rate of pay with Tennis 360 in June 2018. This new permanent employment broke the chain of causation. No loss should be awarded after the date that he commenced employment (June 2018) with Tennis 360.

b. The Claimant had not mitigated his loss. In particular he had made no effort to find new employment since his contract with Tennis 360 came to an end and the Claimant could have sought further work in the UK, rather than operating as a self-employed tennis coach. It was also not reasonable to have not obtained work in the UK after May 2019 when it became too hot to coach in Dubai.

c. The Claimant had not accounted for monies earned from Tennis 360 in his schedule of loss. He had refused to disclose his bank statements for the period April to September 2018 and after May 2019. He had not been credible in evidence today.

d. In relation to the ACAS code of practice the Claimant had not attended the disciplinary or the appeal hearing. Nor had he sent any meaningful written representation to either hearing. It was the Claimant not the Respondent that had failed to comply with the ACAS code.

e. The Tribunal found that the Claimant was guilty of refusing to obey a reasonable management instruction given to him by Mr Marks not to take his partner with him on trips. The Claimant was guilty of gross misconduct and his employment would have come to an end on 18th January 2108 in any event or, at the very latest by the end of May 2018.

f. There should be a reduction in excess of 50% in any compensatory award to reflect the chance that the Claimant would have been dismissed in any event.

g. The Claimant's failure to obey Mr Marks instruction that he should not take his partner on trips was contributory conduct meriting a significant reduction in the basic and compensatory awards.

21. <u>For the Claimant</u> Mr Perry submitted that;

a. It was for the Respondent to show that the Claimant had failed to take reasonable steps to mitigate the losses suffered as a result of the dismissal and they had not done so.

b. The job with Tennis 360 did not break the chain of causation (Cowen v Rentokil Initial Facility services (UK) Ltd 2008 UKEAT/0473/07.)

c. The Claimant sought his loss to the date of the remedy hearing.

d. The Claimant should be awarded expenses incurred in looking for employment or setting up a business.

e. There should be no "Polkey" deduction. It was impossible to answer the question of what would have happened had a fair process been followed given the scale of the failings in this case.

f. The Respondent failed to comply with the ACAS code - paras 5, (requirement to conduct a reasonable investigation) 6 (requirement for disciplinary hearing and appeal to be conducted by different individuals), 18 (requirement to decide after the meeting on disciplinary action) and 27 (requirement to hold an impartial appeal). There should be a 25% uplift.

g. The conduct in disregarding the instruction not to take his girlfriend to Miami and was so minor that there would be a question mark

over whether it met the test of being culpable or blameworthy. It did not contribute to the dismissal.

Conclusions

Mitigation

22. We make no finding that the Claimant failed to mitigate his loss. In the immediate period after his dismissal (from January to March 2018) the Claimant took reasonable steps to apply for jobs, as evidenced by documents in the bundle. In April Claimant went to Dubai and began a job with Wilson Dubai tennis for which he was not paid due to circumstances outside his control. In June he got a well-paid job with Tennis 360 which also did not continue beyond September 2018 for reasons beyond his control.

23. After the Tennis 360 job came to an end the Claimant worked as a tennis coach independently. We find that was not unreasonable in circumstances where his partner was working in Dubai and he hoped and anticipated that he would be able to earn a reasonable living from doing so.

24. The period from the end of May to today's date was more difficult. On the Claimant's account he was not earning any money at all. On the other hand (as explained by Eady J in Singh v Glass Express Midlands Limited (UKEAT/0071/18) the Tribunal, in considering efforts to mitigate, should not apply too demanding a standard to the Claimant. We conclude that it was not unreasonable for the Claimant to decide not to set himself up as a tennis coach in the UK during the down period in circumstances where his life had moved to Dubai, and he was seeking to establish a business there.

Chain of causation

25. We find that the new job with Tennis 360 did not break the chain of causation. As set out in Mr Perry's submissions, the issue is whether dismissal by the Respondent could be regarded as a continuing cause of loss, after the Claimant was subsequently dismissed by Tennis 360.

26. We find that the loss after the new job was lost was still causally connected to the loss of the job with the Respondent. Although the job with Tennis 360 was expressed as a two-year contract, the Claimant was only with Tennis 360 for a short period and was in a probationary period when his employment with them came to an end. More fundamentally however it would appear that his employment at 360 had always been somewhat precarious as set out in the Claimant's witness statement, and he would not have had to accept such an uncertain prospect if he had not been dismissed by the Respondent.

Period of loss and Polkey

27. In assessing compensation, the task of the Tribunal is to assess the loss flowing from the dismissal. As set out in Software 2000 Ltd V Andrews, and Contract Bottling Ltd v Cave, this will normally include an assessment of how long the employee would have been employed but for the

dismissal. The fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.

28. As set out in the liability Judgment, we have found that Mr Marks decided to dismiss the Claimant without reasonable grounds or a reasonable investigation, and had prejudged the outcome of the disciplinary process. This was not the case where the observance of a proper procedure would merely have delayed the inevitable.

29. What would have happened had Mr Marks acted fairly? This would have required withdrawing the charges based on the Clockwork system, withdrawing the charge that the Claimant had taken unscheduled annual leave as well as the charge that there had been a loss of confidence in his coaching abilities. The issue that the Claimant was responsible for the financial problems of the tennis program was not investigated and, without more, the Claimant could not have been fairly dismissed for that reason. There was no evidence that the fault for the decline in performance was to be laid at the door of the Claimant.

30. The charges that the Claimant had not sent Mr Marks a copy of the LTA document and had taken his girlfriend on a trip despite a clear instruction not to do so remained. We find, given the long standing informal relationship between the Claimant and Mr Marks, that the Claimant would not have been dismissed had the only 2 charges been the LTA and the Miami trip, although he may have been given a warning and there may have been a cooling of the informal and friendly nature of the relationship.

31. No “Polkey” reduction should be made and we find that the Claimant’s employment would have continued for some time. The Claimant has claimed his loss to today’s date and so compensation should be calculated on that basis, subject to a reduction for contribution as set out below. No future loss is claimed or awarded.

Contribution

32. On the other hand, while (as we have said) the failure to provide Mr Marks with a copy of the LTA document was a relatively trivial matter, we do consider that the Claimant’s conduct in taking his girlfriend to Miami was conduct which was culpable (in that a clear instruction had been ignored) , and contributed to the dismissal. It added grist to Mr Marks’s general loss of trust and confidence. We find that having regard to this conduct it would be just and equitable to reduce the basic and compensatory awards by 30%.

ACAS code of practice.

33. There were clearly, as Mr Perry submits, breaches of the ACAS code of practice by the Respondent. It failed to carry out the necessary investigations and the decision was prejudged.

34. In this case however, the Claimant was also at fault in failing to engage with the process. Paragraph 12 of the code requires both employers and employees to make every effort to attend the disciplinary hearings so that

the employer can hear what he has to say and make a more informed decision. The Claimant did not do so, despite being represented by solicitors. Given that failure we have concluded that it would not be just and equitable to increase the amount of the compensatory award to reflect the failures by the employer.

35. As set out at paragraphs 10 and 11 above we make no award for expenses or loss relating to the potential for future bonuses at the Respondent.

36. Holiday pay. Following the Tribunal's finding at the liability hearing that the Claimant was entitled to carry forward holiday from one year to the next, the Respondent accepted that 11.5 days holiday were due to the Claimant at £207 per day.

37. We have assessed loss as set out above on the basis of the following:

    (i) The Claimant is entitled to 11.5 days' pay for holiday accrued but not taken.
    (ii) The Claimant did not fail to mitigate his loss.
    (iii) The Claimant is entitled to compensation from the date of dismissal to the date of today's hearing.
    (iv) The Claimant contributed to his dismissal and that contribution is assessed at 30%.
    (v) No uplift is awarded for failure to comply with the ACAS code.
    (vi) No award is made for hire car or living expenses while in Dubai.

38. The Tribunal is grateful to both counsel for their assistance with the figures and the grossing up which they agreed between them once the Tribunal had announced its decision as to the underlying basis of the calculation of loss.

39. The Recoupment Regulations 1996 do not apply to this award.

Employment Judge - Spencer

20th September 2019

JUDGMENT SENT TO THE PARTIES ON

23/09/2019

FOR THE TRIBUNAL OFFICE