EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr T Marsh **v** **Fuller Smith and Turner plc**

Heard at: London Central
On: 18 and 19 December 2019

Before: Employment Judge Hodgson

Representation

For the Claimant: Mr A Morgan, counsel
For the Respondent: Ms M Tutin, counsel

JUDGMENT (REMEDY)

1. **The respondent shall pay to the claimant a basic award of £6,846.00.**

2. **The respondent shall pay to the claimant a compensatory award of £32,588.92**

REASONS

Introduction

1. By a reserved judgment dated 17 April 2019, I found that the claim of constructive unfair dismissal succeeded. On 26 June 2019, I gave directions for the remedy hearing. The remedy hearing proceeded on 18 December 2019.

2. I heard further evidence from the claimant at the remedy hearing.

Background and issues

3. Immediately following his dismissal, the claimant commenced employment with Mitchells and Butlers at a public house in St Albans, the King Harry. This pub had no accommodation. He privately rented a property in St Albans. On 15 August 2019, the claimant started a new position as a tenant in the Victoria in Surbiton. He accepts that, as from 15 August 2019, he secured the tenancy of a pub which has accommodation for himself and his family and his salary is greater than his salary with the respondent. He claims no losses after 15 August 2019.[1]

4. I sought to clarify the issues at the commencement of the hearing. There was significant agreement between the parties, which I will come to.

5. The respondent alleges the claimant remained under a duty to mitigate his losses after he secured a position at St Alban's and alleges failure to secure a position prior to 15 August 2019 was a failure to mitigate. Further, it is alleged the costs of moving to Surbiton should not be recoverable.

6. The respondent accepts, in principle, that the claimant can recover the value of the loss of accommodation. It is respondent's case that the loss should be calculated on the basis of the actual cost of housing in St Albans, and not the cost of housing in Hammersmith.

7. The respondent takes issue with a number of the specific heads of claim and I will come to the detail of that in due course.

8. I noted, at the start of the hearing, that the claimant appeared to be seeking costs. There was no written application. I confirmed that a written application must be made, and it would be necessary for the claimant to identify the grounds for any costs order and he must confirm he was liable to pay the solicitors costs. The application for costs, to the extent it had been made at all, was withdrawn later in the hearing.

9. The claimant indicated there should be an uplift for failure to follow the ACAS Code of Practice 2015. The claimant had identified no specific breaches of the code, and I confirmed that specific breaches must be identified before the matter could be considered. Initially, the claimant indicated that he was content to leave any allegation of breach of the ACAS code until other matters relevant to the compensatory award had been decided. However, later in the hearing, all allegations of breach of the ACAS code were withdrawn.

[1] As the claimant has sought not losses after this date, I have not needed to consider the correct approach to the cost of accommodation and any ongoing potential loss after this date.

10. The following matters were agreed:

    a. The claimant's gross weekly pay with the respondent was £626.71. This gave an average net pay of £422.83. His continuous period of employment was 14 years and he was age 40 at the effective date of termination. The statutory cap on a weeks wages for the relevant period was £489 per week. There were 67 weeks from the date of dismissal to the start of the liability hearing on 27 February 2019. Thereafter there were 24 weeks until 15 August 2019, when the claimant commenced work at the Victoria in Surbiton. This is a total of 91 weeks.

    b. During his time at St Albans, the claimant had earned a net salary of £541.25, being £36,263.75 to the start of the liability hearing, and thereafter £12,990 to 15 August 2019.

    c. The claimant had occupied a three-storey, three-bedroom, Georgian house with a garden in Hammersmith. I found at the liability hearing that the cost of an equivalent rental privately was not less than £2,000. Whilst there was some argument before me that in fact the figure should be greater, no further evidence was produced, and the respondent accepts that an equivalent rental property in Hammersmith would be at least £2,000 per month.

    d. It is agreed that the claimant, when employed by the respondent, received the benefit of utility bills (gas, electricity, and water) council tax, and a TV licence.

11. There were limited factual disputes. Whilst it is accepted that the claimant lost the benefit of payment of utility bills there is very limited evidence as to the value. I received limited evidence about the claimant's expenditure in St Albans, but no direct evidence as to the likely charges in Hammersmith. The claimant stated that he believed in St Albans that his monthly outgoings were as follows: council tax £169; water - £60; electricity - £120; and gas - £100. In addition, he had purchased a TV licence at the cost of £147 per year. I was directed to only one directly relevant document which appeared to be a demand for council tax from 28 November 2017 to 31 May 2018, in a total sum of £623.59 being approximately £124.72 per month.

12. I enquired whether there was any evidence that there would be a significant difference between the utility bills applicable to Hammersmith and those applicable to St Albans. I received no submission nor evidence to suggest that the difference would be significant. I gave the respondent an opportunity to cross examine the claimant on the level of utility bills, but the opportunity was declined.

13. I have accepted the claimant's oral evidence in relation to the St Albans utility bills, save for his council tax estimate, as I have preferred

the written evidence. I accept the St Albans bills are likely to be similar to the charges in Hammersmith.

14. I find that the claimant did have the benefit of payment for his utility bills whilst working for the respondent and that this was of real value to him. The best evidence I have is his oral evidence as to the likely cost in St Albans. I therefore find that the benefits are as follows: TV licence £147 per annum; water £60 per month; electricity £120 per month; gas £60 per month; and council tax £124.72 per month.

15. The respondent agrees the costs of moving from Hammersmith to St Albans in the sum of £708. I find that the costs of moving from St Albans to Surbiton (which include the cost of packing and removal) amount £2,790. Those costs were incurred. I accept that the claimant bought his child a new school uniform for his new school in St Albans. There is a general estimate given of £120, but that is not supported by documents. I accept that some costs must have been incurred. In the absence of any specific breakdown, I will take the view that I can be confident on the balance of probability that at least £60 was spent and that is the sum which I will take into account.

16. The claimant alleges expenses of £100 for looking for new employment. It is unclear what those expenses are. He has not specifically referred to any travel expenses. Much of his active advertising and his response to adverts used the Internet and does not appear to have added to his general expenses materially. In the absence of any better evidence of specific expenses, I consider a nominal sum of £10 is established on the balance of probability.

Law

17. Section 123 Employment Rights Act 1996 provides:

> **(1) Subject to the provisions of this section and sections 124, 124A and 126 the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.**
>
> **(2) The loss referred to in subsection (1) shall be taken to include—**
>
> **(a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and**
> **(b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal. …**
>
> **(4) In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland. …**

> **(6) 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 that finding. …**

Conclusions

18. The respondent alleges that the claimant failed to mitigate his losses by failing to apply for a position earlier. At some point after obtaining employment in St Albans, the claimant used the Caterer to publicise the CV. The exact date is unclear. This allowed employers to approach him with opportunities. It also allowed him to review possible opportunities. At the time, the claimant hoped to make a success of the St Albans move. There was due to be a refurbishment of the pub, but this did not go ahead, and was a contributing factor to his ultimate decision to leave. He gave evidence that he discussed with his regional manager the difficulties he was having financially and he sought through Mitchells and Butlers confirmation as to whether there were any other opportunities, particularly relating to pubs with accommodation. However, he proceeded with those discussions cautiously, as he did not wish to undermine his position with his new employer.

19. There is evidence that in December 2018, he was approached by recruitment agency and had a number of discussions. However, in February 2019, he made a specific application for new employment. Ultimately, he was successful in securing the employment on 15 August 2019.

20. As regards his alleged failure to mitigate, there are two main principles which fall to be considered. First is whether the claimant remained under a duty to continue to seek new employment, by way of mitigation, after he had secured the position in St Albans. Second is whether he delayed seeking further opportunities and whether such deal was a failure to mitigate.

21. As to the first question, it is apparent that the claimant alleges that he should receive compensation to reimburse the costs of moving from St Alban's to Surbiton. It follows that it is his case that there was a continuing loss sustained by the claimant in consequence of the dismissal. If it were otherwise, he could not claim the removal costs of taking up employment in Surbiton. Similarly, it is the respondent's case that the claimant remained under a duty to mitigate, after he moved to St Albans by seeking better paid employment. It is implicit in the respondent's position that there was a continuing loss sustained in consequence of the dismissal.

22. There is an obligation to mitigate which is founded on the common law and incorporated as section 123(4) Employment Rights Act 1996. Whether an employee has done enough to fulfil the duty to mitigate depends on all the circumstances of each case (see for example **Johnson**

v Hobart Manufacturing Company Ltd EAT 210/89). The tribunal should not simply accept the subjective view of the claimant. It must consider all the circumstances. It is for the respondent to prove failure to mitigate. It does not necessarily follow that when a job is obtained that either there has been sufficient mitigation, or that the chain of causation has been broken. Each case must be looked at on its merits. There may, for example, be situations where an individual takes a specific job knowing that it is a step down in the hope of returning to the job market in order to secure a better position in the future.

23. Whilst there is still causation between the loss sustained and the dismissal, the obligation to mitigate may continue. Given the position adopted by both parties, which essentially is that the claimant remained under a duty to continue looking for new employment, as the consequences of the dismissal continued, it is a necessary corollary that there is a continuing loss. I therefore answer the first question in the affirmative.

24. The second question concerns whether there was undue delay in obtaining further employment. I credit the claimant's assertion that it was reasonable for him to attempt to make the best of matters with his new employer in St Albans. A refurbishment of the pub may have materially affected his position and improved his circumstances. He was entitled to spend some time seeking to consolidate his employment and better his position with Mitchells and Butlers. I do not consider any initial delay in actively seeking other employment to be a failure to mitigate. Moreover, it is clear that he did maintain a presence in the marketplace through the Caterer. He also actively considered other positions. Eventually, in February 2019 he did make an application and was successful in securing new employment in Surbiton.

25. The respondent criticises the claimant’s approach and suggests he should have gone about matters more rapidly, but has produced no direct evidence. Whilst I accept that there may be many pubs seeking managers, it is less clear to me that there are a significant number of pubs with appropriate accommodation for a family. The respondent has produced no evidence to suggest that, in relation to any brewery, there were opportunities which the claimant could reasonably been have expected to pursue. It is for the respondent to prove failure to mitigate. The respondent may contend that the claimant could have tried harder and earlier, but in the absence of direct evidence of potential opportunities, that is not sufficient. I do not find the claimant has failed to mitigate his loss.

26. It is accepted that the provision of accommodation in Hammersmith was a financial benefit for which the claimant and it falls to be compensated under section 123 Employment Rights Act 1996. The parties dispute whether the loss should be based upon the value of renting a property in Hammersmith, or the value of renting a property in St Albans. For these

purposes, it is agreed that the monthly Hammersmith rental would be £2,000 and that he paid £1,100 in St Albans.

27. The respondent's submissions say the following at paragraph 18

> **The loss of accommodation… is calculated by reference to a hypothetical value of similar accommodation in the Hammersmith area. The respondent disputes this is the correct method of calculating loss: the loss must instead be calculated by reference to the actual cost of accommodation incurred by the claimant, otherwise there would be an unjustified and substantial windfall to the claimant.…**

28. During the hearing, the respondent relied on the case of **Paggetti v Mrs J Cobb** 2002 EAT/136. That case is concerned with the calculation of the weekly wage in situations where there had been failure to pay the minimum wage, and where accommodation had been provided. It is clear that the tribunal should calculate losses on the basis of the statutory minimum wage which should have been paid. If accommodation is provided, there may be a deduction of the statutory daily rate as provided by the Minimum Wage Act. Thereafter, there is a decrease for notional tax and national insurance to give a net figure which would be the multiplicand for the purposes of loss of earnings. In addition, the actual value of the accommodation is added. The issue before me does not revolve around any allegation of failure to pay the minimum wage. All I have to decide is what is the correct approach to putting a financial value on the provision of the accommodation. **Paggetti** does not assist.

29. At the hearing, we did discuss the approach in detail, and I gave both parties an opportunity to provide further submissions and to refer me to any further case law. Both parties made further written submissions and I am grateful to them for their endeavours. The respondent referred to the case of **Lloyd v Scottish Co-operative Wholesale Society Ltd** 1973 IRLR 45. In that case, the claimant had tied accommodation for which he paid rent, but lost use of it following dismissal. He rented a council property in Inverness. His rent increased. The tribunal considered it appropriate to award the difference. It is the respondent's position that it follows what must be looked at is the actual cost of new accommodation and not the cost of the original accommodation. I do not derive that principle from this case. I see this is a case which turns on its own facts. **Lloyd** does not assist me.

30. The claimant has provided me with an extract from Macgregor on Damages (chapter 33). In particular, I am referred to paragraph 33 – 006 and the following words are relied on: "In addition there may be benefits in kind, the value of which must also be taken into account, such as rent free residence, board and lodging,…" In as far as this goes, I think it is uncontroversial. The question is, however, how is the benefit to be calculated? Is it the value to be the value of renting a similar property in Hammersmith, or the value of the actual property rented in St Albans?

31. The claimant refers to two cases **Lindsay v Queens Hotel Co Ltd** 1919 KB 1918 and **Re English Joint Stock Bank, Yelland's Case** 1860 7L.R.4 EQ.350. **Lindsay** is concerned with dismissal during notice, and whether the damages should be assessed on the balance of the notice period. This case does not assist. The **Yelland's** case does not give any specific assistance on how to approach the relevant calculation in this case.

32. The starting point is the wording of section 123(1) Employment Rights Act 1996 "The amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal insofar is that loss is attributable to action taken by the employer."

33. It is accepted that the value of housing is a loss sustained by the claimant in consequence of the dismissal and the loss is attributable to the employer's action. It follows that what I must consider is what compensation would be just and equitable in all the circumstances.

34. It is the respondent's position that awarding rent on the basis of the Hammersmith rates would be an enrichment for the claimant and therefore not just and equitable. The justification for this is the actual costs incurred by the claimant. I have some doubt about this approach. An individual who is dismissed may well face financial difficulty and constraint. In recognition of that financial constraint, an individual may be willing to take a property which he or she would otherwise not contemplate. At its extreme, an individual may move from palatial accommodation to, relatively, cheap accommodation. On the respondent's case, the loss would be limited to the cost of the cheaper accommodation. This would not, in my view, fully recognise the value of the original property, as occupied, and in that sense may be a windfall for the respondent.

35. When I consider all the circumstances in this case, I note that the liberation of, or recovery of, the unencumbered residential accommodation appears to have been a factor in the way the claimant was treated. The respondent recognised that the property was valuable, and there was at least some indication that it may be redeveloped or rented out for profit. As explained in my earlier judgment, the respondent did not proceed in that manner, albeit no specific explanation has been given as to the respondent's intent or the development of its position. Nevertheless, I cannot escape the conclusion the recovery of the accommodation occupied by the claimant was seen, first, as valuable, and second, as desired.

36. The claimant would not have left Hammersmith had he not been compelled to do so. Moreover, had the claimant had an option to stay in Hammersmith, for example by obtaining a job with a much higher salary enabling him to pay rent, he may well have done so. He did not go to St Albans because he wished to; he went to St Albans out of necessity. Part

of his reason for going to St Albans was he could not afford to rent within Hammersmith, as he did not have the financial means.

37. It follows that the value of the property and the desirability of the Hammersmith property, both from the claimant's perspective and the respondent's, were important circumstances in this case.

38. I have to consider what is just and equitable. There can be no doubt that the value of a similar property in Hammersmith was at least £2,000. The claimant was precluded from renting such property because he had no prospect of obtaining employment which would pay for it. The respondent knew that. Nevertheless, the respondent acted in a way to remove from the claimant not only from his job, but also from his home. The reality is that the respondent recovered a property which could, theoretically, be rented at the market rate. In those circumstances it seems to me that the starting point is to consider the value the property in Hammersmith, that was £2,000 per month. Would it be just and equitable to award the lower sum, being the actual rental incurred in St Albans? In my view, having regard to all the circumstances of this case, I cannot accept the assertion that in some manner this would be a windfall for the claimant. The fact that he rented a lower value property was part of his attempt to mitigate his loss, and more importantly, to secure a future for his family. Nevertheless, he had lost a valuable benefit both in terms of where he would choose to live, and the true financial benefit of the house.

39. It has been suggested that the house should be viewed as a fringe benefit. I do not accept that this is the correct approach. He had a contractual right to occupy the premises. I have noted that the respondent could have invoked a mobility clause, but it chose not to. I received no evidence about how the mobility clause could have been used. The respondent has not sought to argue that I should take into account any other properties occupied or owned by the respondent when considering the relevant rental figure. I do acknowledge that it is possible that he may have been asked to move to other premises where the value of the rental property could have been significantly less. However, the respondent has not pursued such an argument and in the circumstances, therefore, the only properties I have been asked to consider are those in Hammersmith and St Albans. I take the view that the correct rental figure to include for the purposes of the compensatory award is £2,000 per month, to award less would leave the claimant undercompensated.

40. I need to calculate the compensatory award.

41. The loss of earning for the compensatory ward extends over 91 weeks.

42. I need to calculate the weekly value of his salary and other benefits. I will add together what his wages, the values of the house and the value of the incidental benefits.

a. The weekly wage is £422.83.
b. The rental value was £461.54.
c. The weekly incidental benefits are, calculated weekly, as follows: TV licence £2.83; electricity £27.69; gas £23.08; water £13.85; council tax £28.78.

43. It follows that the total weekly remuneration, including incidental benefits is £980.60.

44. That multiplicand (£980.60) must be multiplied by the total number of weeks which is 91 giving a total of £89,234.60. From that I must deduct the sum actually earned which was £49,162.75. This gives a net figure of £40,071.85.

45. In addition, I need to add in various other items. I consider the appropriate figure for loss of statutory rights is £300. It is common ground the claimant should recover moving costs of £708. I consider the cost of moving to Surbiton is also recoverable. As noted, the claimant remained under a duty to mitigate his loss, and the causational chain has not been broken. By moving to Surbiton, he mitigated his losses fully and he is entitled to recover the cost of moving at £2,790. He should recover the cost of the school uniform £60. I must add in £10 of expenses. This gives a total of £43,939.85 for the compensatory award.

46. I need to consider grossing up. It is common ground that I must add back in the basic award of £6,846.00 to give a total figure of £50,785.85; from that I must deduct £30,000. It is agreed that the correct percentage for grossing up in this case is the marginal rate of 29.2% (£6,027.89) which is applied to the balance giving a total sum of £56,813.75.

47. Contributory fault is not alleged. No **Polkey** deduction[2] is alleged.

48. I raised with the parties whether section 38 Employment Act 2002 applied. I have received no submissions on that. I am unable to identify any specific breach of either section 1 or section 4 Employment Rights Act 1996. I therefore find that there is no award under section 38.

49. It is necessary to apply the cap. It is common ground that the cap is £626.71 x 52. This is the gross wage for a year. The claimant has not sought to argue that a week's wage has to be increased by reference to the nominal value of housing. This appears to be consistent with calculation the weekly wage pursuant to Chapter 2 Employment Rights Act 1996 (particularly section 224). The cap is £32,588.92.

50. The basic award is £6,846.00.

[2] Any deduction to represent the chance of being dismissed by any date.

51. The compensatory award is £32,588.92

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Employment Judge Hodgson

Dated: 8 January 2020

Sent to the parties on:

13 January 2020

For the Tribunal Office