



EMPLOYMENT TRIBUNALS

Claimant: Mr M Robertson

Respondent: British Telecommunications PLC

Heard at: London South (Croydon) **On:** 9/3/2020 and 10/3/2020

Before: Employment Judge Wright
Mrs C Wickersham
Mr M Sparham

Representation:

Claimant: Mr T Cooper – union representative

Respondent: Mr H Sheehan - counsel

REMEDY JUDGMENT

It is the unanimous Judgment of the Tribunal that the claimant is awarded the sum of £46,939.95.

REASONS

1. After giving oral judgment, in accordance with Rule 62(3) the claimant requested written reasons.

2. The Tribunal made some general observations about the quality of the claimant's evidence and documentation. Apart from a one sentence email (page 58), there was no evidence from the claimant in respect of injury to feelings; and that statement referred to job hunting whilst receiving treatment and there was simply no evidence of this. The medical evidence was either lacking or confusing and the claimant could not assist by way of explanation. It is correct the burden lies with the claimant in respect of any compensation he seeks and that he had to take reasonable steps to mitigate his losses. He will only be compensated for actual losses and any compensation is not intended to provide a bonus or windfall for him.

Compensation for unfair dismissal.

3. The parties have agreed a basic award of 17 weeks x £475 = £8,075.
4. For loss of statutory rights (the fact that the claimant will have to work in another role for two years before he qualifies for the right not to be unfairly dismissed) the claimant firstly contended for the sum of £350 and then for £500. The respondent submits that there is no explanation for the increase and that the sum of £350 should be awarded. There was no explanation from the claimant as to why the figure had increased from £350 and therefore the Tribunal awards that sum £350.
5. It was agreed that the claimant was paid in full during his notice period until his employment ended on 27/10/2017 and it was agreed he had suffered no loss during that period.
6. Contractually, the claimant was entitled to full pay for the first 183 days sickness absence in any rolling 12-month period. He is then entitled to half-pay for 182 days.
7. The respondent calculates and the Tribunal accepts that during the period 28/10/2017 to 21/1/2018, the claimant would have been able to work, but would have taken the suggested/recommended four weeks off, two weeks after each medical procedure he underwent. The calculation is that although the claimant would have been off work for 28 days, he would have received full pay under the sickness absence policy.

$£624 \times 12 = £7,488$

8. The claimant was then certified as unfit for work by his GP on 22/1/2018 for 12 weeks. Under the respondent's sickness absence policy, the claimant would have received full pay for one week (the balance of the 183 days, taking into account the full pay he had already received), then half pay. There was no evidence to show that the claimant became fit for

work prior to the job application which he made on 27/7/2018 and he would therefore have received half-pay for that 26-week period (after the full pay for the first week). As submitted by the respondent, it is accepted that the claimant should have claimed any benefits (Employment Support Allowance at a weekly rate of £73.10) which were available to him and so the respondent's calculation is accepted:

£624 x 1 week = £624

£312 x 26 weeks = £8,112

Less £73.10 x 27 weeks = £1,973.70

Equals £6,762.30

9. The claimant disclosed emails showing job applications for five jobs made between 27/7/2018 and 5/3/2019. There were applications for the role of field engineer or driver, which the claimant is medically unfit to carry out. The claimant said he was told by his GP not to disclose his medical history and to wait until a job offer was made to him. He was offered the driving job. The claimant said that he was desperate to return to work and in view of that, he would have taken a job which he was unfit to do. The Tribunal accepts this may have been the claimant's mind-set; the issue is however that he has failed to comply with the duty to take reasonable steps to mitigate his losses, or at least, he had not provided sufficient evidence to the Tribunal that he has taken reasonable steps. Applying for five jobs in over seven months is not taking reasonable steps to mitigate his losses. The Tribunal finds the claimant has failed to discharge the burden he is under in respect of taking reasonable steps to mitigate his losses.
10. The respondent says notwithstanding this, it is willing to accept there is some loss of earnings during this period and is willing to accept two months' loss of earnings, less Job Seekers' Allowance (of £73.10 pw) which should have been claimed.

£2,420.29 x 2 = £4,840.58

Less £316.77 x 2 = £633.54

Equals £4,207.04

£7,488 + £6,762.30 + £4,207.04 = £18,457.34 loss of wages.

11. The claimant confirmed that he is not seeking any loss from 1/4/2019 when he started his new role with Hoover.

12. The claimant claims for loss of the subsidised broadband which he received from the respondent.
13. The respondent calculates this loss to be £7 pm, rather than the £35 for 110 weeks equating to £3,850 as claimed by the claimant. There was no evidence at all from the claimant, whereas the respondent provided evidence to show the cost of broadband. The Tribunal is prepared to allow the respondent's calculation of £7 x 12 months = £84.
14. The loss of the pension benefit was agreed as £3,545.62.

Compensation for unlawful discrimination

15. In respect of injury to feelings, the respondent accepts there was some injury to feelings and submits the award should fall in the middle Vento band. The respondent quotes Tribunal case of Restarick v Portsmouth Hospitals NHS Trust (case number 3104239/2011) referred to in *Harvey* and suggests that a figure of £12,000 adjusted for inflation and therefore the sum of £14,500 is an appropriate figure to compensate the claimant in respect of his injury to feelings.
16. In the absence of anything contrary to that from the claimant, other than to say: 'Vento middle band upper quartile', the Tribunal is prepared to accept the respondent's figure and to award £14,500.
17. The other issue is interest and the period of time over which this should be awarded in respect of the injury to feelings award. The respondent submits that due to the fact the first final hearing of this matter being postponed due to lack of judicial resources, that the Tribunal should exercise its discretion and not award interest from the date of the act of discrimination to the date of this hearing, but should take into account that postponement. The claimant did not make any submissions in respect of this aspect.
18. The Tribunal finds that the appropriate period over which to award interest is from the date of the dismissal 28/10/2017 to the date of the first final hearing listed 26/9/2018, plus a period of 17 weeks to allow for the time it would have taken to list a remedy hearing, interest will therefore be calculated over a period of 453 days. The interest at the rate of 8% on the injury to feelings award of £14,500 is therefore £1,440.

Basic award (agreed figure)	£ 8,075
Prescribed element (loss of wages to date of assessment) from 28/10/2017 to 1/4/2019	£18,457.34

Loss of employment benefits (broadband)	£ 84
Loss of statutory rights	£ 350
Loss of pension benefits (agreed)	£ 3,545.62
Injury to feelings	£14,500
Interest	£ 1,440
Total	£46,451.96

Grossing up	£46,451.96
Less	£30,000
Less	£14,500
Equals	£ 1,951.96 to be grossed up

$£1,951.96 \times 1.25\%$ (the claimant's marginal rate is 20%) = £2439.95

£30,000 +
£14,500
£ 2,439.95

Grand total £46,939.95

19. Once judgment and reasons had been given the respondent made an application that the enforcement of the judgment be stayed, pending an appeal on the judgment on unlawful discrimination to the EAT. The respondent said the application was made under the Tribunal's general case management powers. When queried whether the application related to the entire sum, the respondent said that as there was no appeal against the finding of unfair dismissal, it would not seek a stay of compensation in relation to that.
20. The claimant said that the appeal would take its course and although he would rather the whole sum to be paid out, he would prefer that the unfair dismissal compensation was paid.

21. Following that application, the Tribunal decided to stay the time for compliance with Rule 65 under Rule 66 (b) for the sum in excess of £30,000 of £16,451.96 until the outcome of the appeal is known. The Tribunal reserves the right to revisit the interest calculation, however it may be the case that it does not interfere with it. Under Rule 65 the judgment takes effect from when it was announced in respect of the sum of £30,000, with the remainder stayed.

10/3/2020

Employment Judge Wright