EMPLOYMENT TRIBUNALS

Claimant: **Mr P Oldershaw**

Respondents: **(1) Bar Fibre Limited**
(2) Viaduct Leisure Limited
(3) Mission (Leeds) Limited

Heard at: **Leeds (by Skype)** **On: 16 June 2020**

Before: **Employment Judge Maidment**
Members: **Mr T Downes**
Ms GM Fleming

Representation
Claimant: **Mr A Johnston, Counsel**
Respondent: **Mr J French, Counsel**

JUDGMENT having been sent to the parties on 16 July and written reasons having been requested by the Respondents in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Issues

1. The sole issue for the Tribunal to determine at this remedy hearing was the amount which ought to be awarded to the Claimant by way of a compensatory award for his unfair dismissal. All of the other entitlements flowing from the Tribunal's liability judgment and heads of loss, including the amount of a basic award for unfair dismissal, had been agreed between the parties in advance of this hearing and, by the point of the hearing, had been paid to the Claimant.

Evidence

2. The Tribunal had before it a newly compiled remedy bundle numbering in excess of 179 pages.

3. The Tribunal heard firstly from the Claimant and then from Mr Michael Clayton, called on his behalf. Mr Michael Rothwell then gave evidence on behalf of the Respondents

4. The Claimant's evidence as to what he had done in terms of looking for replacement income following his dismissal by the respondent was accepted and the following represents the Tribunal's factual findings.

Facts

5. The Claimant's employment was terminated with immediate effect on 17 October 2018. He was 47 years of age at the time.

6. Whilst with the Respondents he was paid an annual salary of £55,000 (equating to a net weekly figure of £767.77) split across the three businesses/venues which he managed. He received in addition a pension contribution of £16.81 per week. He was also entitled to a bonus of 7% of the net profit for each of the 3 venues which he managed.

7. On his dismissal the Claimant returned from Leeds to his home city of Birmingham where he had previously been employed before joining the Respondents. His employment background was in nightclubs and restaurants. Given his falling out with, in particular, Michael Rothwell and the relatively closed nature of the club scene in Leeds (and particularly the gay scene), his decision that his future might be better away from Leeds and in a more familiar environment, where he had a greater track record and number of connections, was a reasonable one. He was able to land a small self-employed contract with immediate effect from the end of November/early December. The Claimant considered that it might take 6-12 months for him to obtain a good post but that this role might be an interim solution and bring some money in to tide him over. The Tribunal accepts that there is little recruitment in the hospitality industry just before the busiest Christmas period.

8. This work was as a hospitality consultant for the Natural Bar and Kitchen, a business owned by one of the Claimant's contacts, Michael Clayton. He was able from this to earn approximately £2000 per month, albeit with significant fluctuations.

9. The Claimant learnt that Mr Rothwell had travelled to Birmingham and had been photographed with the Claimant's former business partner, Lawrence Barton. Negative comments had appeared about the Claimant on social

media. The Claimant formed the view that Mr Rothwell was trying to blacken his name and make life difficult for him, particularly in terms of future employment. Mr Clayton's evidence before the Tribunal corroborated the Claimant's and was not materially challenged in cross examination. Mr Clayton said that that, had he not known the Claimant already, he might have just terminated his contract as he simply wanted to focus on his business without any hassle or drama. Messages he had received from Mr Rothwell had created a doubt in his mind about the Claimant, but after a conversation with the Claimant, he felt his mind had been put at rest.

10. Mr Rothwell had emailed Mr Clayton on 20 March 2019 inviting him to the Claimant's Employment Tribunal hearing and mentioning that Mr Barton would be there as he had also been in contact with him following the Claimant's dismissal. Mr Rothwell also suggested that the Claimant had taken advantage of previous employers. There followed a suggestion made by Mr Rothwell to Mr Clayton that the Claimant had taken a membership list of a club he had previously worked at.

11. The Claimant was unwell and suffered from low mood/depression from November 2018 to June 2019 as confirmed in a letter from his GP. He said this made it extremely difficult for him to look for work.

12. Whilst the Claimant carried out his consultancy work, he had also given his details to some agents to help find him a position as a brand or operations director in the Birmingham area. One of those agencies was called Recruit 123. They operated as recruiter/advertisers and the Claimant thought that they might be a step ahead of traditional employment agencies in terms of awareness of vacancies. He also registered with agencies called Heylus and Mast, who put him in touch with a business called Bitter and Twisted. In addition, he sought opportunities within the hospitality industry using platforms such as LinkedIn. The Claimant put himself forward for an Area Manager role with the pub chain, Marstons.

13. The Claimant put together a proposal to be made to Birmingham City Council to operate a Christmas market. However, due to roadworks and property development works, these did not take place during Christmas 2019.

14. The Claimant enrolled on a personal development and training course to enhance his skills in self-empowerment, focus, belief and harnessing energy to grow in business. This ran for a period of around 10 months up until January 2020.

15. The Claimant also became involved in 2019 in seeking to partner with a contact, Sam Morgan, to lead his PR team to develop a new restaurant in

Birmingham. This was due to come to fruition in February 2020 but has stalled due to the coronavirus.

16. The Claimant has also worked on developing an entertainment app which is still in progress and which he hopes may produce a significant income stream for him going forward.

17. He has also engaged the services of an individual to manage the Claimant's own online presence. He is seeking to develop a concept called PR Angels aimed at marketing PR services to third parties with a view to generating income.

18. In January 2020 the Claimant earnt £500 for hosting a Chinese New Year celebration which is something he accepted he would have done in any event in addition to his work for the Respondents.

19. It February 2020 the Claimant hosted the British Pool and Hot Tub Awards which is an annual event he is booked for, earning again the sum of £500.

20. In March 2020 he ran scholarship awards event earning £320 for hosting this event.

21. The Claimant has undertaken some other unpaid voluntary work at a community radio show to expand his profile and contacts. He has also presented at a number of award ceremonies free of charge with the same purpose.

22. In an attempt to ensure that he could earn money in sectors over which Mr Rothwell had no obvious influence, he enrolled on the NatWest Entrepreneur Accelerator Programme – which the Tribunal accepts was a significant commitment. He described this as a thorough and in-depth business platform funded by NatWest involving leading business partners to ensure entrepreneurs have the tools and support required to build successful businesses. He commenced on that program in April 2019. The programme has given him access to various networking events and training workshops which have taken up a significant amount of his time. He said that it had enabled him to build up some great relationships and potential projects which he hoped to move forward this year. This included the possibility of getting the concept for a television show he had created to air.

23. The Claimant had also agreed to enter into an arrangement with Sarah Clayton of Inspired Kollections to develop her business further. This originally had been planned to commence in September/October 2019 but the project had become delayed. Due to the coronavirus a number of the Claimant's potential income streams have had to be put on hold.

24. The Claimant accepted that the Respondents' venues were inevitably themselves significantly affected and indeed closed due to the coronavirus and therefore they were now generating no income.

25. The respondent produced evidence of positions available predominantly in the first quarter of 2020. These include 18 positions in Leeds and 11 in Birmingham. The Claimant had not applied for these positions but said (accurately) that a number of the jobs were for assistant managers and managers in areas which were not his expertise. He was looking for more senior management roles. Some of the positions involved hair and beauty where he had no experience. He was not looking for a position in Leeds and thought a comparable position there would be unrealistic given Mr Rothwell's local connections.

26. By the time of these job adverts the Claimant had made the decision to go self-employed, to take consultancy work and to pursue business projects, such as the aforementioned Inspired Kollections opportunity. He was also involved with a craft ale and dining business known as Libertas which he was still hoping to progress with a contact, James Dunphy, including in promoting city events. He had explored from October 2018 the possibility of becoming Director of Events for Mr Dunphy's pub and brewery business, but Mr Dunphy had instead ultimately decided to sell that business.

27. In these projects he was seeking to utilise the skill and contacts he had gained as part of the Nat West Entrepreneur Accelerator programme.

28. When Mr Rothwell gave evidence, he took the Tribunal through the management accounts in respect of the 3 venues the Claimant had previously had responsibility for. He confirmed, leaving aside any possibility of a discretion not to pay the bonus, what the Claimant would have received based on 7% of those figures through to March 2020. He confirmed that the busiest periods in the business were the Leeds Pride week in the first week of August and the Christmas period. He repeated the view which he had given at the earlier liability hearing that the Claimant's bonus had always been discretionary and all he had been intending then to do was to reflect this in a written contract. His position was that given the Claimant's conduct issues he would have received only his basic salary of £55,000. Whilst Mr Rothwell maintained that some of the disparaging posts and messages about the Claimant had not come directly from himself, when some of them were put to him he agreed that such actions could be categorised as purely vindictive and said that, in terms of Mr Clayton's evidence, that he was not calling him a liar, but certain (unspecified) things he had said were not true. When it was explored with him what his purpose was in trying to invite Mr Clayton to witness the Claimant's Employment Tribunal hearing, Mr Rothwell described himself as extremely annoyed with the Claimant.

29. The income earnt by the Claimant in mitigation during the period from dismissal to the date of this remedy hearing was the gross sum of £43,820, which the Tribunal equated to a net sum of £33,439. This indeed did not take full account of the costs the Claimant had occurred in pursuing his new opportunities and in his personal development. The Respondents did not dispute this amount, but contended that it represented a failure on the Claimant's part to mitigate his losses.

Principles as to mitigation of loss

30. In assessing a compensatory award, any employee must have taken reasonable steps to mitigate their losses. If the Claimant has failed to take all reasonable steps to reduce his loss, the compensatory award should be reduced so as to cover only those losses that would have been incurred, even if the employee had taken the appropriate steps.

31. The focus must be on an individual employee's particular circumstances. Whether an employee has done enough to fulfil a duty to mitigate depends on the circumstances of each case. It has been recognised that, depended on the circumstances, it may not be reasonable to expect an employee to take the first job that comes along, especially one with lower pay than the employee might reasonably expect to receive. On the other hand, undue delay in accepting something in the vain hope of a better offer may result in compensation being reduced. The effect of dismissal on the individual employee may well be a relevant matter in determining whether there has been a failure to mitigate. The reason for dismissal may also have an impact on an employee's ability to mitigate losses.

32. The onus of showing a failure to mitigate lies on the employer alleging that the employee has failed to mitigate his losses. To discharge the burden of proof, it is not enough simply for the employer to show that there were other reasonable steps the employee could have taken, but did not take. The employer must show that the employee acted unreasonably in not taking them.

33. Becoming self-employed instead of seeking new employment can amount to reasonable mitigation in cases even where opportunities for higher paid employment are available. Some employees may decide to embark on a course of re-education or training to aid their eventual search for replacement income. Removing oneself from the labour market in this way may well amount to a failure to mitigate, although again this is very much dependent upon the circumstances as, equally, such steps might be regarded as reasonable.

Conclusions

34. The Claimant lost his role with the Respondents suddenly. In the preceding couple of years, he had enjoyed a significant rise in terms of income as a result of him joining the Respondents' employment. He got his role with the Respondents through personal and business connections rather than any application process. The Tribunal accepts that, in the area of the entertainment industry in which the Claimant had experience, connections are of value and the Claimant acted reasonably in returning to Birmingham where he had the strongest connections (and in not regarding Leeds as a likely fruitful source of future employment).

35. The Claimant in fact obtained a role as a hospitality consultant quickly and carried out that work and other work throughout the 18 month period from October 2018 until March 2020. Indeed, the evidence is of him earning the not insubstantial gross sum of £43,820 equating to around £33,439 net in that period.

36. The Claimant was not content with this income. He reasonably sought out other senior manager/director level roles, including through agencies and personal contacts. He was not, however, successful.

37. There is no evidence before the Tribunal of any roles it is suggested he could have applied for in Birmingham in late 2018/2019, but which he did not.

38. The evidence of available roles provided by the respondent is in respect of roles available in early 2020 in Leeds and Birmingham where the roles are mainly ones carrying a remuneration package significantly lower than that which he previously enjoyed with the Respondents and/or involved roles and sectors which were not such close matches to the Claimant's skills and experience.

39. In any event, the Claimant sought to invest in himself and did so very seriously and in a focused way through the Nat West Entrepreneur Scheme. He did so whilst at the same time earning more money from his consultancy work and taking every opportunity to make connections and build his profile – a tried and tested method for him of gaining new opportunities.

40. He actively developed particular opportunities such that, prior to the coronavirus outbreak, he had a partnership opportunity in a business which he said could by now have realised for him a six figure income. He is still active in seeking to develop other business opportunities including in developing a pub group and an entertainment app.

41. The Claimant has not been materially hampered in his job search by his illness which he suffered following the termination of his employment. His actions in fact show significant positivity on his part, despite his clear upset at the Respondents' treatment of him.

42. He was reasonably in a state of some nervousness of working in the Birmingham nightclub/bar scene given Mr Michael Rothwell's clear attempts to undermine him. The Tribunal accepts Mr Clayton's evidence in circumstances where Mr Rothwell's own messages to him and Mr Barton show a desire to undermine the Claimant, to his obvious potential detriment in gaining new sources of income.

43. The Claimant took reasonable steps to mitigate his losses and the Tribunal does not find on the evidence that, had he taken any other reasonable steps, they would have produced a greater income.

44. The Claimant should be compensated therefore for his losses up to the date of this remedy hearing. No compensation for continuing losses beyond this date are sought.

45. Those losses should also reflect that the Claimant would have earned a continuing bonus based on 7% of the net profits of the Respondents' 3 venues. The Tribunal's Judgment as to liability addresses further the question of how the Respondents and in particular Mr Michael Rothwell saw the bonus as operating.

46. The Respondents did not see the bonus system as changing going forward. Even if the Claimant had agreed to a new contract, the evidence is in the past of rewarding the Claimant for himself rewarding the owners of the Respondents' businesses by increasing their profitability. This was regardless of purported concerns on Mr Rothwell's part about the Claimant's behaviour.

47. Even if the respondent might have gained the right contractually to withhold bonus, the Tribunal cannot speculate and conclude that this would have been actioned over the issue of safety certification or even indeed that the Claimant would have received a serious disciplinary warning. Again, the flaws in the Respondents' decision making on the Claimant's conduct are addressed in the liability Judgment.

48. Even if he had been sanctioned, the Tribunal cannot conclude that Mr Michael Rothwell would have removed the Claimant's entitlement in its entirety (as he suggests he would have done) given the Claimant's success in increasing profits. Had the Respondents possessed a discretion regarding the payment of the bonus, it could not have (lawfully) exercised

that discretion capriciously and it would have been capricious to give him no bonus at all.

49. The Claimant certainly would not have agreed to have his bonus decided potentially on a whim. The Claimant's new contract would not have come into force without his agreement and the Tribunal cannot conclude that he would have been fairly dismissed if he had refused to agree.

50. The Tribunal accepted that the income earnt by the Claimant in mitigation during the period from the end of his notice period to the date of the remedy hearing was £33,439 net (£43,820 gross).

51. The total net loss in respect of basic pay from the Respondents from the expiry of his 3 week notice period to 16 June 2020 (the date of the remedy hearing), a period of 83.5 weeks, was £64,108. From this had to be deducted the sum earnt in mitigation of £33,439. This gave a total net loss of basic wages to hearing of £30,669. The Claimant during his employment had had basic wage payments to him split equally between the Respondents. No additional period of future loss was sought.

52. The Claimant was not seeking to argue that he had suffered any loss of bonus beyond 31 March 2020, not least in circumstances where the Respondents' venues were no longer trading from then due to the lockdown necessitated by the coronavirus.

53. As regards bonus which would have been earnt, the net profit figures provided for each of the Respondents (by the Respondents) were split as between firstly October 2018 – March 2019 and then from April 2019 – March 2020. The Tribunal made a deduction of around half of the October 2018 figure to reflect the fact that the Claimant's employment ended on 17 October 2018 and the loss of earnings he was to be compensated for related to the period after.

54. For Bar Fibre the profit figures were £280,640.88 and £616,190 giving a total of £896,830.88. That gave a bonus @7% of £62,778.16 gross or £37,666.90 net.

55. For Mission the profit figures were £68,528.66 and £51,749.60 giving a total of £120,278.26. That gave a bonus @7% of £8419.48 gross or £5,051.69 net.

56. For Viaduct the profit figures were £129,629.66 and £543,857.15 giving a total of £673,486.81. That gave a bonus @7% of £47,144.08 gross or £28,286.45 net.

57. The total loss of net bonus was therefore £71,005.04. To this must be added the net loss of basic wages of £30,669. That gave a total net loss of £101,674. The Tribunal then assessed the Claimant's net loss of earnings, after applying a 25% reduction for contributory conduct, to be in the sum of £76,255.

58. On the basis of the first £30,000 being tax-free, this would necessitate a grossed up award of £107,041.67 to the Claimant before, however, then applying the statutory cap of £83,682.

59. Looking at the split between the 3 Respondents/venues with a loss of £10,223 of net basic pay in each case would give total net loss figures of:

    a. Bar Fibre - £47,889.90 less 25% = £35,917.43
    b. Mission - £15,274.69 less 25% = £11,456.02
    c. Viaduct - £38,509.45 less 25% = £28,882.09

60. The Tribunal's initial consideration was that there would be an order that the Respondents simply pay the Claimant that full amount.

61. The Tribunal then realised that there might be the potential for the Claimant receiving the benefit of more than one £30,000 tax-free amount, given that he was paid separately by each of the Respondents under, the Tribunal thought, separate PAYE reference numbers. In discussion with the parties, it was then agreed that time would be given for them to consider the correct tax position which might in turn involve consideration of whether the Respondents (or perhaps only two of them) were associated employers for the purposes of the relevant tax legislation at the date of the termination of the Claimant's employment. It was then anticipated that the parties would revert to the Tribunal with an agreed position as to how the award ought to be expressed as between the three Respondents.

62. Judgment was then issued having taken into account each party's representations and on the basis ultimately that the 3 Respondents were all considered (by agreement) to be associated employers as at the Claimant's date of termination.

Employment Judge Maidment

Date 10 August 2020