THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH by CVP**

BEFORE: **EMPLOYMENT JUDGE TRUSCOTT QC**

BETWEEN:

Mr G Cousins-Ingram **Claimant**

AND

Burgess Glass Limited **Respondent**

ON: **5 October 2020**

Appearances:

For the Claimant: **Mr R Cifonelli of Counsel**
For the Respondent: **Mr K Wilson of Counsel**

JUDGMENT

The claimant is entitled to compensation of £13,770.00 made up as follows:

Pursuant to section 118(1)(a) of the Employment Rights Act 1996, the respondent is ordered to pay the claimant a basic award of £4064.00.

Pursuant to section 118(1)(b) of the employment Rights Act 1996 the claimant is awarded a compensatory award of £7764.80.

The Tribunal has determined that an uplift of 25% of the compensatory award is appropriate in the circumstances which is £1941.20.

The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support} Regulations apply to this award. The monetary award is £13,145. The prescribed element is £9706. The prescribed period is 15 March 2019 to 5 October 2020. The monetary award exceeds the prescribed element by £4064.

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REASONS

Preliminary

1. This has been a remote hearing because of emergency arrangements made following Presidential Direction because of the Covid 19 pandemic. The form of remote hearing was fully video. A face to face hearing was not held because it was not practicable and specific issues could be determined in a remote hearing.

2. The Tribunal heard evidence from the claimant. The Tribunal had available to it a remedy bundle and written submissions from Counsel for both parties.

3. Parties were agreed as to the amount of the basic award. There was a dispute about the compensatory award and the amount of any uplift.

Findings of Fact

1. The claimant is 32 years old. He left school in 2004 at the age of 16 with no qualifications and with no training for any job. He does not have a driving licence.

2. His employment history is set out at paragraph 4 in the liability judgment. The claimant commenced employment with the respondent as a glazing assistant on 24 May 2010. The claimant was dismissed on 15 March 2019.

3. Following his dismissal, he started looking for work. There were vacancies in the glazing trade but a number of them required the applicant to have a driving licence which he did not have. He did not have a reference from the respondent. If the jobs he applied for asked him to explain his reasons for leaving employment, he explained that he was dismissed for gross misconduct. This did not make him an attractive potential employee. He did not gain employment in the trade. He did not maintain his CSCS card which would have allowed him to work on building sites.

4. He had no other experience apart from glass and glazing. He applied for jobs as a recruitment consultant as no experience was required. He was not successful.

5. He can perform basic tasks with a computer but does not own one.

6. In May 2019, his father needed a self-employed glazier/fitter to fit window frames. The claimant joined him on this basis. His earnings are shown on page 10. He plans to stay with his father’s business and take over from him when he retired.

Submissions

7. In addition to the written submissions, Counsel made oral submissions.

Law

8. Section 123 ERA 1996 provides that:

> "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".

9. The statutory cap for the compensatory award is set by s.124(1ZA). In this case, that cap is 52 multiplied by a week's pay (in respect of which the net figure should be used). The statutory cap is therefore £23,400.00 (i.e. £450 x 52).

10. In general, the losses incurred will flow from the dismissal. But this is not inevitably so, and the tribunal should award compensation only in respect of losses which are attributable to action taken by the employer. As the Scottish EAT (Lord Johnston presiding) put it in **Simrad Ltd v Scott** [1997] IRLR 147*,* the dismissal must be the '*causa causans*' of the loss and not merely a '*causa sine qua non*', i.e. it is not enough to say that 'but for the dismissal the loss would not have occurred'. Accordingly, in the particular case the EAT held that where a woman dismissed as an electrical technician had decided about a year later to retrain as a nurse, she could not claim the loss of income resulting from that decision. Although from her own point of view this was a reasonable career change, it was too remote both in time and content to be directly linked to the dismissal and to be properly treated as attributable to the act of the employer.

11. In assessing losses, the Tribunal must apply the common law rule in relation to mitigation of losses – see s.123(4) ERA 1996. The leading case is **Wilding v. British Telecommunications plc** [2002] ICR 1079 CA where it was said at [37] that:

> ''(i) It was the duty of Mr Wilding [the former employee] to act in mitigation of his loss as a reasonable man unaffected by the hope of compensation from BT as his former employer; (ii) the onus was on BT as the wrongdoer to show that Mr Wilding had failed in his duty to mitigate his loss by unreasonably refusing the offer of re-employment; (iii) the test of unreasonableness is an objective one based on the totality of the evidence; (iv) in applying the test, the circumstances in which the offer was made and refused, the attitude of BT, the way in which Mr Wilding had been treated and all the surrounding circumstances should be taken into account; and (v) the court or tribunal should not be too stringent in its expectations of the injured party'.'

12. In **Singh v. Glass Express Midlands Limited** UKEAT/71/18 (15 June 2018, unreported*)*, HHJ Eady QC (as she then was*)* set out a concise summary of the guidance given by Langstaff J in **Cooper Contracting Limited v. Lindsey** UKEAT/0184/15 (22 October 2015, unreported) on the correct approach to the question of mitigation:

> (1) The burden of proof to show a failure to mitigate is on the wrongdoer; a claimant does not have to prove they have mitigated their loss.
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> (2) It is not some broad assessment on which the burden of proof is neutral; if evidence as to mitigation is not put before the ET by the wrongdoer, it has no obligation to find it. That is the way in which the burden of proof generally works; providing information is the task of the employer.

(3) What has to be proved is that the claimant acted unreasonably; the claimant does not have to show that what they did was reasonable.

(4) There is a difference between acting reasonably and not acting unreasonably. There is usually more than one reasonable course of action open to the employee. The employer needs to show that jobs were available and that it was unreasonable of the employee not to apply for them.

(5) What is reasonable or unreasonable is a matter of fact.

(6) That question is to be determined taking into account the views and wishes of the claimant as one of the circumstances, but it is the ET's assessment of reasonableness – and not the claimant's – that counts.

(7) The ET is not to apply too demanding a standard to the victim; after all, they are the victim of a wrong and are not to be put on trial as if the losses were their fault; the central cause is the act of the wrongdoer.

(8) The test may be summarised by saying that it is for the wrongdoer to show that the claimant acted unreasonably in failing to mitigate.

(9) In cases in which it might be perfectly reasonable for a claimant to have taken on a better paid job, that fact does not necessarily satisfy the test; it would be important evidence that may assist the ET to conclude that the employee has acted unreasonably, but is not, in itself, sufficient.

13. The employee's circumstances may include the adverse position they find themselves in within the job market because of the employer's actions. This can include the stigma of being dismissed and any injury to the employee's health caused by the dismissal which may lead to their taking longer than may normally be expected to obtain a job. In **Tchoula v. ICTS (UK) Ltd** [2000] ICR 1191 EAT, the employee was held not to have failed to mitigate when he decided to retrain in a different sector. He was unable to obtain a position in the same sector in which he worked because his dismissal stigmatised him and made it difficult for him to find a position.

Loss of statutory rights

14. Usually a sum is awarded to take account of the fact that the employee will have to requalify for minimum notice rights and unfair dismissal protection. In **Daley v. A E Dorsett (Almar Dolls Ltd)** [1981] IRLR 385, the EAT held that in a time of economic recession the value of a longer notice period is more beneficial than it was, and they awarded a sum of half the employee's statutory notice entitlement. As the EAT pointed out, 'this is not a claim of lost earnings over a period … it is a claim for compensation for the loss of an intangible benefit, namely that of being entitled, in the course of one's employment, to a longer notice than might otherwise be the case'.

Recoupment of benefits

15. Where an employee has claimed social security benefits such as JSA, the compensatory award for immediate losses (i.e. losses up to the date on which remedy

is assessed) will be subject to the recoupment regime provided for in the Employment Protection (Recoupment of Benefits) Regulations 1996. Where these regulations apply, the Tribunal is under certain duties as set out in regulation 4, namely to set out in its decision: (i) the total monetary award, (ii) the amount of the prescribed element, (iii) the dated of the period to which the prescribed element is attributable, and (iv) the amount (if any) by which the monetary exceeds the prescribed element. In an unfair dismissal case, the prescribed element will be the compensatory award made for immediate losses (see the Schedule to the regulations). The effect of regulation 7 is that payment of the prescribed element is stayed pending the recoupment procedure being pursued by the Secretary of State pursuant to regulation 8.

The ACAS Code

16. Under s.207A TULR(C)A 1992, a Tribunal may increase an award of compensation by up to 25% where there has been a failure to follow the ACAS Code, and that failure was unreasonable. Such adjustment is limited to the compensatory award – see s.124A ERA 1996. It may be made if the Tribunal considers it just and equitable to make such an adjustment in the circumstances.

17. In **Credit Agricole Corporate and Investment Bank v. Wardle** [2011] IRLR 604 CA (in the context of the now repealed adjustment of awards under the Employment Act 2002 s 31) the Court stated that once the Tribunal has fixed on the appropriate uplift by focussing on the nature and gravity of the breach, but only then, it should consider how much this involves in money terms.

CONCLUSION

18. There was no dispute about the calculation of the basic award. It was agreed at £4064

19. The Tribunal decided to make a compensatory award on a just and equitable basis in the circumstances so at to compensate the claimant and not to punish the respondent bearing in mind the statutory cap and established principles in this area.

20. The respondent argued that the period of losses claimed is excessive and that there was a failure to mitigate loss. Although the Tribunal accepted the evidence of the claimant that he sought alternative employment, it did not accept that this was the position through to the date of the hearing. The Tribunal concluded that at some point when he was self-employed by his father, the claimant became reconciled to working there and taking over the business eventually and made no efforts to find other employment. The question which arises is “At what point?” The claimant was dismissed on 15 March 2019. The respondent invited the Tribunal to conclude that the claimant ought to have found work at a comparable level of remuneration within six months of his dismissal. The Tribunal concluded that this was an appropriate suggestion and concluded beyond that point it would not award compensation

23. The Tribunal awarded the claimant 8 weeks loss in respect of his notice period (450 x 8) of £3600 and a further18 weeks loss amounting to £8100 making a total of £11,700. In the period May to mid September 2019, the claimant actually earned

£4435.20 taken from page 10 up to and including the payment on 19 September 2019. The loss is £7264.80.

24. The respondent argues that the sum of £500 is excessive in reflecting loss of statutory rights and that £250 is more appropriate. The Tribunal awarded £500 because of the length of the period of employment lost.

25. The total compensatory award at this stage is £7764.80.

26. The respondent denies that there was any failure to comply with the ACAS Code. The Tribunal finds that the failure was complete. Mr Burgess dismissed the claimant then later set in motion a procedure which Counsel for the claimant accurately called a sham. The respondent was only paying lip service to the ACAS Code. In the light of this, the Tribunal determined that the uplift should be 25%, the highest percentage available to it. The award is £1941.20. This makes a total compensatory award of £9706.00 and a total monetary award of £13,770.00.

27. The claimant has received Job Seekers Allowance, accordingly the Tribunal applied the Recoupment Regulations explained on the next page.

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Employment Judge Truscott QC

Date 12 October 2020

Claimant **Mr G Cousins-Ingram**
Respondent **Burgess Glass Limited**

ANNEX TO THE JUDGMENT
(MONETARY AWARDS)

Recoupment of Benefits

The following particulars are given pursuant to the Employment Protection (Recoupment of Benefits) Regulations 1996, SI 1996 No 2349.

The Tribunal has awarded compensation to the claimant, but not all of it should be paid immediately. This is because the Secretary of State has the right to recover (recoup) any jobseeker's allowance, income-related employment and support allowance, universal credit or income support paid to the claimant after dismissal. This will be done by way of a Recoupment Notice, which will be sent to the respondent usually within 21 days after the Tribunal's judgment was sent to the parties.

The Tribunal's judgment states: (a) the total monetary award made to the claimant; (b) an amount called the prescribed element, if any; (c) the dates of the period to which the prescribed element is attributable; and (d) the amount, if any, by which the monetary award exceeds the prescribed element. Only the prescribed element is affected by the Recoupment Notice and that part of the Tribunal's award should not be paid until the Recoupment Notice has been received.

The difference between the monetary award and the prescribed element is payable by the respondent to the claimant immediately.

When the Secretary of State sends the Recoupment Notice, the respondent must pay the amount specified in the Recoupment Notice to the Secretary of State. This amount can never be more than the prescribed element of any monetary award. If the amount is less than the prescribed element, the respondent must pay the balance to the claimant. If the Secretary of State informs the respondent that it is not intended to issue a Recoupment Notice, the respondent must immediately pay the whole of the prescribed element to the claimant.

The claimant will receive a copy of the Recoupment Notice from the Secretary of State. If the claimant disputes the amount in the Recoupment Notice, the claimant must inform the Secretary of State in writing within 21 days. The Tribunal has no power to resolve such disputes, which must be resolved directly between the claimant and the Secretary of State.