



EMPLOYMENT TRIBUNALS

Claimant: Mr A Phillimore
Respondent: Bernard Olesinski Limited
Heard at: Bristol (by video) **On:** 23 & 24 November 2020
Before: Employment Judge C H O'Rourke

Representation
Claimant: Mr Boyd - counsel
Respondent: Mr Graham - counsel

JUDGMENT

1. The Respondent constructively unfairly dismissed the Claimant.
2. The Claimant's compensatory award for such unfair dismissal is reduced by 50%, subject to s.123 Employment Rights Act 1996.
3. The Respondent's counter-claim is dismissed, upon withdrawal.
4. The Respondent is ordered to pay the Claimant the sum of £15,504.94.

RESERVED REMEDY REASONS

Background

1. Having found that the Respondent unfairly dismissed the Claimant, I went on to hear evidence from the Claimant and submissions from both parties. However, those submissions concluding at 16.30 and there being insufficient time remaining to consider such and to give a reasoned judgment, I reserved judgment on remedy.
2. The Claimant had provided an updated schedule of loss (not in bundle), dated 23 November 2020 and the Respondent had provided a counter-schedule (in respect of the Claimant's original schedule) [74b]. These schedules helpfully agreed the amounts of net pay, pension contributions, the Basic Award and an award for statutory rights.

3. Summary of Claimant's Evidence. I summarise the Claimant's evidence, as follows:
- a. Following his resignation, the Claimant decided to set up his own Computer-Aided Design (CAD) and CGI business and become self-employed. He gave several reasons for this decision: that his previous role had been in a very specialised/niche area; that his contract with the Respondent contained year-long restrictive covenants, preventing him from approaching their customers, thus limiting his attractiveness to potential employers in competition with the Respondent; that the Respondent would not agree a reference confirming his head of department role and that as he lives on the Isle of Wight, his commute-range to new employment is effectively limited to the Southampton area.
 - b. That business, Onform CAD Limited, offers 3-D visualisation, design and modelling services. The Company was established in January 2019, but the Claimant said that '*before pitching for work I had to create a design portfolio. This took me 5-6 months, starting from January ...*' (WS38). (I record, at this point that it was, firstly, not in dispute between the parties that it was reasonable for the Claimant to consider the option of self-employment. I concur, for the reasons he has given, with the addition that as it appears that his position with the Respondent was his first 'proper job' after university, it would seem reasonable that that experience of employment having ended on a sour note, he would consider the alternative option of self-employment. Secondly, nor was it in serious dispute that having decided on that option, he would need time to both build up a portfolio and market his business. The Parties do dispute, however, the length of that time period.)
 - c. He commenced marketing his Company's services in June 2019 and by the date of his witness statement (November 2019), he had submitted approximately 63 proposals for work and had obtained five jobs, at a value of approximately £3609 [95-100].
 - d. Concerned about his lack of income, he applied for four jobs, as a draughtsman (or related), in mid-2019, but he was unsuccessful.
 - e. He confirmed, in cross-examination, that his total income/dividends (as opposed to turnover), to date, have been as set out in his updated schedule (£3030).
 - f. He has offered his services to a wide range of companies, to include interior design, lighting, kitchen appliances, jewellery etc.
 - g. Despite the restrictive covenants having elapsed in January 2020, he has not applied for further roles in the marine industry (some such roles having been identified by the Respondent), because, he said, he had invested time in his own business and he was hoping that that was '*coming to a point where I make more than my original salary.*' He saw this turning point as coming at the start of this year, pre the Covid pandemic, with offers from three companies of projects worth £10-15k

each, but in fact, they only realised £3000. On challenge, however, he accepted that he had no corroborating evidence of these projects and accepted that the mitigation evidence in his bundle did not go beyond 2019.

- h. He had also carried out freelance work in August and September 2019, with two invoices totalling £1900 [97].
- i. His subsequent attempts to find employment have been hampered by the Pandemic, but he has applied for approximately twenty positions (again for which there was no corroborative evidence), in gaming, website design and digitalisation. He has recently attended a second interview with a prospective employer and is optimistic that he will shortly be offered a position.

4. Respondent's Closing Submissions. I summarise these as follows:

- a. The Claimant's efforts at mitigation are highly unsatisfactory and such efforts as he has made are not supported by documentary evidence and the Tribunal is reminded that it did not find the Claimant's evidence in respect of his forwarding of the 23 December 2018 email from Princess Yachts, to his home email, to be credible (the Judgment found it '*not plausible*').
- b. He has provided no information about his Company, such as accounts, to show evidence that his actual dividends only amounted to £3k in two years.
- c. While it is accepted that he was entitled to set up his own business, two to three months would have been sufficient to set up his portfolio and after that considerably more effort would have been expected of him to market his services than was the case. His loss should, therefore, be limited to six months.
- d. His fear of the restrictive covenants did not apply in 2020, but the Claimant sat back and only after six months of losses, began to apply for significant roles and it is not satisfactory that it seems that, only now, has he obtained one.

5. Claimant's Closing Submissions. I summarise these as follows:

- a. It is trite law that it is, in fact, for the Respondent to demonstrate a failure to mitigate and such mitigation should not be 'a counsel of perfection'.
- b. It was appropriate for the Claimant to set up his own business and reasonable for him to take a cautious view as to the enforceability of the restrictive covenants. He had been 'badly burnt' by his experience with the Respondent and knew Mr Olesinski to be aggressive and therefore likely to seek to enforce such covenants, hence his need to stay out of the industry for twelve months.

- c. It is not open to the Respondent to suggest that the Claimant could have simply moved into interior design (Mr Graham pointed out that this interest is based on the Claimant's own portfolio).
- d. While, in respect of evidence as to his income, he has not provided any business accounts and albeit that it is not totally exonerating, the Respondent could, of course, have asked for disclosure of same.
- e. 'Green shoots' were appearing pre-Covid, but for obvious reasons did not come to fruition.
- f. An argument could be made that it was reasonable for him to start his business and taking into account the restrictive covenants, to assess his position after a year and to, thereafter, if appropriate, apply for other jobs. Such application process would take time, up to six months and therefore the appropriate point at which loss would cease is after eighteen months.

6. Findings. I find as follows:

- a. It was common ground (and with which I agree) that in all the circumstances, it was reasonable for the Claimant to set up his own business and to seek to 'strike out on his own'.
- b. I have no reason to doubt his evidence it would have taken him six months to set up his portfolio and marketing plan.
- c. A combination of his legitimate fear of the restrictive covenants and the need to explore opportunities for his business would render it reasonable to continue on that path for another six months. The evidence he has provided as to his actual earnings in 2019 has been sketchy and largely uncorroborated and I therefore consider that I should take, as the high point of his mitigation, for 2019, the figure of £3600 he offered in his original schedule [72].
- d. However, I consider that after nine months or so, when it will have been coming clear to him that orders were not coming in, to the degree he hoped, that he should have, by then, begun to consider alternative employment. He did not need to wait until January 2020 to do so, but could have been applying for roles from late 2019, on the expectation that if he did get an offer, which might have engaged the restrictive covenants, they would not 'bite', as any such employment would have been unlikely to have commenced before the New Year. In any event, once the covenants had lapsed, he did not, in fact, seek employment in the marine industry.
- e. His actual efforts, even allowing for Covid, have, in 2020, been distinctly lack-lustre and belated, particularly considering that he is clearly an intelligent and well-educated man, with an innovative mind and wide skill-set.

- f. On that basis, therefore, I consider that the Claimant's loss of earnings ceased at the end of December 2019.
7. Conclusion. I conclude, therefore, that the Claimant's total compensation, as set out in the attached schedule, is £15,504.94, which sum the Respondent is ordered to pay to him.

Employment Judge O'Rourke

Date: 26 November 2020

JUDGMENT AND RESERVED REMEDY REASONS
SENT TO THE PARTIES ON
08 December 2020
By Mr J McCormick

FOR THE TRIBUNAL OFFICE

Note - Reasons for the liability judgment having been given orally at the hearing, written reasons will not be provided unless a written request is presented by either party within 14 days of the sending of this written record of the decision.

Remedy Schedule

Basic Award (agreed figure) £1524.00

Compensatory Award

Loss to 31 December 2019

Basic salary 52 weeks x 572.46 £29767.92

Loss of C's pension contributions 52 x 15.67 £814.84

Loss R's pension contributions 52 x 13.06 £679.12

Loss Statutory Rights £300.00

Sub-Total £31561.88

Less

Sums provided by the Claimant as earned
in mitigation in 2019 (original schedule) (£3600.00)

Sub-total £27961.88

50% deduction (£13980.94)

Total Compensatory Award £13980.94

Grand Total (basic and compensatory) **£15504.94**