# EMPLOYMENT TRIBUNALS

**Claimant:** **Mr G Mason**

**Respondent:** **Park Holidays (UK) Limited**

**Heard at:** **East London Hearing Centre (by Cloud Video Platform)**

**On:** **16 November 2020**

**Before:** **Employment Judge A Ross (sitting alone)**

**Representation**

Claimant: Mr Hall (CAB representative)
Respondent: Mr Grant (Legal Executive)

**JUDGMENT** having been sent to the parties on 8 December 2020 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

# REASONS

1 By a Judgment promulgated on 27 October 2020, the complaints of constructive unfair dismissal and breach of contract were upheld. In addition, I invited the Respondent to make submissions to me on whether an award should be made under section 38 Employment Act 2002, which is a matter that I will return to.

2 On 9 November 2020, the Respondent filed a counter-schedule of loss with request for information and, at various points, arguments were made upon that.

3 On 10 November 2020, a revised schedule of loss was filed by the Claimant. An earlier schedule of loss had been filed which contained documents relating to a Universal Credit application and also a medical certificate.

**The Issues**

4 Turning first to the agreed figures, it was agreed that the period of employment was 8 years. In respect of net pay, it was agreed that the Claimant earned £317.58 per week. In respect of the Basic award, it was agreed that this was £4,500.

5 In addition, in respect of the sums earned by the Claimant working since the point of dismissal and this hearing, it was accepted that he had earned the sums that he gave evidence about. I will set out what these were. The Claimant confirmed that he was not seeking reinstatement or re-engagement.

6 The parties agreed that the issues before me were as follows.

6.1. What award should be made for loss of statutory rights. The Claimant claim the sum of £500 and the Respondent offered £350.

6.2. Whether any award should be made for job seeking expenses. The Claimant claimed £50.

6.3. Whether the Claimant was entitled to damages for breach of contract and if so in what amount. It was accepted that the notice period would have run from 11 March 2020 to 4 May 2020 and that the figure for notice pay would have been £2,540.

6.4. What compensatory award should be made. In respect of the prescribed period, it was agreed that this was a period of 28 weeks from dismissal until this hearing.

6.5. What future loss of earnings was the Claimant entitled to. The Claimant claimed in his revised schedule of loss six months future loss of earnings less the sums equivalent to those earned to date. The Respondent contended that the Claimant had no future loss.

6.6. Whether the Claimant had breached the duty to mitigate his loss.

6.7. The point about causation of loss relied on by the Respondent, arising from *Wright v North Ayrshire Council [2014] ICR 77*, which I shall return to.

6.8. Whether any award should be made under Section 38 of the Employment Act 2002.

7 During the course of the hearing, unfortunately, Mr Grant could not be seen on the CVP screen, but he confirmed that he could see and hear myself and Mr Hall and it was agreed that the hearing would proceed in those circumstances. In terms of the evidence, I heard oral evidence only from the Claimant, much of which was unchallenged. The Respondent did not call any oral evidence and did not produce any documentary evidence which was put to the Claimant in cross-examination. For example, it was not put to him that he should have applied for a particular role.

**Findings of Fact relevant to remedy**

8 The Claimant's evidence which I accepted as honest and reliable was that although the travel cost to the Clacton site from his home of Bradwell-On-Sea were some £80 - £90 per week, here was nil chance that he would have resigned unless the Respondent had constructively dismissed him and committed the last straw treatment as described in my judgment on liability. I found that the Claimant wanted the best for his family and he would not simply have resigned without some alternative role; but he was pushed to resign because of the constructive dismissal. After the constructive dismissal, during the equivalent to the notice period up to 4 May 2020, the Claimant did not work but at least part of that period the Claimant was unfit to work evidenced by the fit note at page 79 which showed that he was not fit to work from 3 April 2020 to 5 May 2020.

9 Prior to dismissal, the Claimant did not claim Universal credit nor Carer's Allowance. The Claimant and his wife did not know about Carer's Allowance until they were speaking to the DWP about the Universal Credit application which had been made following dismissal. The Claimant has received Universal credit and Carer's allowance from 5 May 2020 and remains in receipt of those. The figures received for Carer's Allowance and Universal Credit are as set out in the revised schedule filed by the Claimant and these were not challenged.

*The Claimant's work since dismissal*

10 The Claimant has had a HGV licence in his role with the Respondent since 2012. He pulled caravans into the correct position, levered them up and then supervised the finish of the job. He has not done lorry driving on the public highway for several years. I accepted his evidence that he would not have the confidence to do such work now.

11 In May 2020, the Claimant was approached by a long-term friend after hearing what had happened with the Claimant's employment with the Respondent. This friend was a driver with a company known as Calahams Transport. He offered to give the Claimant a call if any work came up. As a result of this contact the Claimant was offered *ad hoc* days of work for Calahams and also for Industrial Plant Hire. The two named businesses were connected being owned by a father and son team. The Claimant would make regular trips to their lorry park to keep his face in line for any work. If work came up, he would accept it; the work was *ad hoc,* as and when required. He was not an employee of either business and there was no evidence he had turned down any work. On the contrary, the evidence was that he accepted what had been offered.

12 The lorry park of these two businesses was about 40 minutes away from his home by car. This journey cost him about £12.00 a day with diesel to visit. The Claimant explained and I accepted that the two businesses lost a lot of work due to the Covid-19 lock down. The Claimant hoped to be in line to work for Calahams at or about the end of January or the beginning of February 2021 because they hoped to get a contract back involving full-time night work for tip and lorry drivers. If this work came through, it would extinguish his loss. Doing the best I can, on balance from the evidence I heard the Claimant appeared confident that he would get such work and I found he was likely to get such work. It was connected with the development of sewage treatment work in London and I considered such a project likely to proceed. In any event, if the Claimant knows that

is not to proceed, I found that he will obtain alternative work and end his loss of earnings by 1 February 2021.

13 I found that the Claimant earned the following sums in mitigation up to today. From Calahams £1,005 and from Industrial Plant Hire £2,645 which produces a total of £3,650. I found that on balance it is likely that the Claimant will continue to earn at the same rate over the period between now and 1 February 2021. Therefore, I estimate his earnings over the next 2.5 months likely to be about £1800. Any increase because of the end of the second lockdown is likely to be cancelled out by a quieter period in industry over Christmas and New Year.

14 The Claimant had not applied for any other work since dismissal. There were a number of reasons for this.

14.1 He did not consider that he had sufficient recent experience and was not in a fit state of mind or confident enough to drive on public roads around London.

14.2 On some days, he had to get his disabled daughter to the bus stop and onto a school bus so that he could not arrive at work until 9.00 or 9.30am which those companies or agencies looking for HGV lorry or tipper drivers would not want, whereas the two businesses that he did *ad hoc* work for were understanding about.

14.3 He had no confidence that the Respondent would give him a reference; although he may be mistaken about this, I find the belief was not unreasonable in all the circumstances of his treatment leading to constructive dismissal.

15. It was never put to the Claimant that he had failed to mitigate his loss or that he should have applied for a particular role. It was suggested to him in cross-examination that he could do cleaning work but the Claimant explained that the cleaning work he did was at jet washing plant and machinery which he did with Calahams, and that he could not get such work elsewhere. The Claimant had not registered with an employment agency because I found he was confident a position was going to come up with Calahams in February 2021. Moreover, I find it was not unreasonable for him to believe that no agency would be interested if he was not available to start shifts early each morning and/or work away from home. I found that had the Claimant signed up with an agency he was unlikely to have earned anymore from agency work than he had earned through his contacts with Calahams and Industrial Plant Hire for the reasons that he gave.

**The Law**

16. Turning to the law, and the Claimant's duty to mitigate his loss, it is for the employer to prove that the employee has failed to mitigate. This principle was confirmed in *Cooper Contracting Ltd v Lindsay UKEAT0184/15* in which the President Mr Justice Langstaff cautioned that a phrase such as "a duty to take all reasonable steps" is likely to lead to erroneous confusion if to generally applied. In

*Singh v Glass Express Midlands Ltd UKEAT/71/18* HHJ Eady QC set out a concise summary of the guidance on the correct approach to the question of mitigation:

11.1 The burden of proof shows a failure to mitigate is on the wrongdoer; the Claimant does not have to prove they had mitigated their loss.

11.2 It is not some broad assessment on which the burden of proof is neutral. If evidence as to mitigation is not put before the Employment Tribunal 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.

11.3 What has to be proved is that the Claimant acted unreasonably. The Claimant does not have to show what they did was reasonable.

11.4 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.

11.5 What is reasonable or unreasonable is a matter of fact.

11.6 It is the Tribunal's assessment of reasonableness and not the Claimant's that count.

11.7 The Tribunal is not to apply to 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.

11.8 The test may be summarised by saying that it is for the wrongdoer to show that the Claimant acted unreasonably in failing to mitigate.

*The causation of loss*

12. The Respondent relied on the following passage in *Wright v North Ayrshire Council [2014] ICR 77:*

> *"As to compensation we should note that where there is a variety of reasons for a resignation but only one of them is a response to repudiatory conduct, the compensation to which a successful claimant would be entitled will necessarily be limited to the extent that the response is not the principal reason. The Tribunal may wish to evaluate whether in any event the Claimant would have left employment and adjust an award accordingly. This does not affect the principle to be applied in deciding breach. It is merely to recognise that the facts have a considerable part to play in determining appropriate compensation."*

## Conclusions

13. Applying the above law and the findings of fact made to the issues outlined at the outset of this judgment, I reached the following conclusions on the issues between the parties.

*The loss of statutory rights*

14. I consider that the Claimant is entitled to £500 for the loss of statutory rights because:

14.1 He had relatively long employment with the Respondent.

14.2 He has a lack of recent HGV driving experience on public roads which could mean that is more difficult to establish secure work.

14.3 The sum awarded is only approximately 1.5 x the gross pay and less than the weekly maximum sum which might be awarded in a redundancy case or for a basic award.

*Job seeking expenses*

15. I find that travelling to the lorry park of the two businesses and keeping his face in the frame was a reasonable job-seeking expense. Mr Grant accepted if I accepted that it was a reasonable step, the cost of £50 was reasonable. I find that the Claimant did incur at least £50 in job seeking expenses through visits to the lorry park if for no other reason.

*Breach of contract damages*

16. The Claimant is entitled to damages for breach of contract. The agreed figure for notice pay is £2,540.

*Whether there should be a reduction to the compensatory award of 50% in the light of Wright v North Ayrshire Council*

17. I have read and considered the relevant point of *Wright* and especially the relevant paragraph above and I have considered the submissions of Mr Grant. The effect of the guidance in *Wright* does not mean I must reduce compensatory award by 50% as a matter of law, because of paragraph 45 of the Reasons in the Judgment on liability. I considered that the Respondent's argument demonstrates a misunderstanding of what Mr Justice Langstaff in *Wright* was trying to communicate. The point that he was trying to make is that it is a question of fact in each case. Put it another way, the principal reason for dismissal in this case was the constructive dismissal; this was not a case where there were many separate reasons for dismissal.

18. I have considered whether there should be a reduction under Section 123 of the Employment Rights Act 1996; in other words without the breach of contract, what was the percentage chance that the Claimant would have resigned in any event. I have accepted

the Claimant's evidence that he would not have resigned. I find it 100% likely that he would have stayed in his employment had he not been constructively dismissed.

*Did the Claimant breach the duty to mitigate his loss?*

19. I find that the Claimant did not breach the duty to mitigate his loss. Applying the guidance in *Singh v Cooper and Wilding v British Telecom*, my reasons are as follows:

19.1 The burden of proof to show a failure to mitigate is on the wrongdoer. The Claimant does not have to prove he mitigated his loss. The Respondent adduce no evidence that the Claimant failed to mitigate his loss. The Respondent relied on cross-examination. The Respondent failed to discharge the burden of proof upon it in this respect.

19.2 The Respondent had to prove that the Claimant acted unreasonably by failing to mitigate. The Claimant does not have to prove that he acted reasonably. There is more than one reasonable course open to an employee. On the evidence that he gave, I accepted that he would not have earned any more through agency work than he did through the work for the two contacts he had, given his responsibility to his disabled daughter who is the priority in the Claimant's home.

19.3 The Respondent did not show that jobs were available that the Claimant could and should have applied for. For example, the counter schedule alleges that the Claimant had not provided evidence to show that he had applied to other caravan parks but the Respondent never suggested any jobs that were suitable for the Claimant in those parks and which were also compatible with his weighty family commitment.

19.4 The question of what is reasonable is a question of fact. I found that it was not unreasonable for the Claimant to act as he did in his position where his family and work balance was so disrupted by the Respondent's wrongdoing. The Respondent can hardly complain that the Claimant is now seeking full-time work which accommodates that balance again. His priority is his daughter, as it always has been.

19.5 With respect, I found the Respondent's submissions misunderstood the nature of the duty to mitigate.

*Future loss of earnings*

20. I found that the Claimant was likely to work again from 1 February 2021 in full-time work and have no ongoing loss of earnings after that date. I found that the Claimant was likely to earn £1800 up to 1 February 2021. Therefore, I calculate the Claimant's loss to 1 February 2021 is as follows.

11 weeks x £317.58 = £3493.38

Less sums likely to be earned over the 11 week period £1800

Less carer's allowance which produces a total loss of £953.63

*Whether any award should be made under Section 38 of the Employment Act 2002*

21. I did not accept Mr Grant's first point which was that the email from Mr Duffy at page 43A was sufficient to amount to a statement of changes, because that would be contrary to the findings of fact in the liability judgment. However, I did accept that section 4 of the Employment Rights Act 1996 gave the Respondent one month in which to give the statement of changes. The Claimant resigned before this period ended and so was no longer an employee from that point onwards. Therefore, I make no award under section 38 Employment Act 2002.

**Summary**

22. To summarise[1], I calculate the award as follows.

23. Damages for breach of contract 2540.

24. Unfair dismissal:

24.1. Basic award £4500

24.2. Compensatory award:

Prescribed period:

24.2.1. Loss of earnings 28 weeks: £8892.24

24.2.2. Less earnings: £1005 and £2645 = £3650

24.2.3. Less Carers Allowance, 28 weeks: £1883

Non-prescribed period:

24.2.4. Loss of statutory rights: £500

24.2.5. Job seeking expenses: £50

24.2.6. Future loss of earnings: 11 weeks x £317.58 = £3493.38

24.2.7. Less sums earned in mitigation: £1800

24.2.8. Less Carers Allowance: £739.75

[1] In reading out my summary to the parties, and calculating the sums in real time at the hearing, I miscalculated the compensation due during the prescribed period (by including loss of statutory rights and job seeking expenses), which I corrected when drafting the Judgment after the hearing by adding these figures to the compensation for the non-prescribed period.

25. There should be no reduction for accelerated receipt.

26. In summary:

Basic: £4,500

Compensation for prescribed period: £3,359.24

Future losses: £1,503.63

Damages for breach of contract: £2,540

Total: £11,902.87

**Employment Judge A Ross**
**Date: 26 January 2021**