EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103605/2020 (V)

Final hearing held on Cloud Video Platform
13 and 14 January 2021

Employment Judge M Robison

Mr D Linney	**Claimant** **Represented by** **Mr I Burke** **Solicitor**
Stuart Niven & Son	**Respondent** **Represented by** **Mr T Muirhead** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the respondent shall pay to the claimant the sum of **SIX HUNDRED AND THIRTY NINE POUNDS AND FORTY THREE PENCE** (£639.43) in damages for breach of contract.

REASONS

1. This final hearing was due to take place over three days from 13 January 2021 on Cloud Video Platform.

2. By the time this case called for a hearing, the unfair dismissal and age discrimination cases had been withdrawn, and liability in the breach of contract claim, in respect of the termination of the claimant's contract of apprenticeship, had been conceded.

3. At the outset of the hearing, Mr Muirhead also conceded that the claimant was due a further two weeks' pay in respect of notice. Mr Burke conceded that the claim for loss of statutory rights was misconceived.

4. The hearing proceeded in respect of remedy only, and the focus was on the question of mitigation.

5. I heard evidence from the claimant, and although I was due to hear evidence from four witnesses for the respondent, in the end I heard evidence only from Mr Stuart Niven, general manager for the respondent.

6. Reference was made throughout the hearing to a joint bundle of productions, which I had access to in an electronic format. The documents are referred to by page number in this judgment.

Findings in fact

7. The claimant commenced work with the respondent on 25 February 2019 as an apprentice roofer (slater and tiler). He entered into an arrangement to undertake an apprenticeship under the auspices of the SBATC, and signed a tripartite agreement with an anticipated end date of 1 January 2023 (page 24). The training provider was Fife College.

8. The claimant's contract was terminated early and his employment ended on 3 July 2020.

9. Towards the end of March 2020, the claimant, along with other employees of the respondent, was put on furlough.

10. By around June 2020, due to the effects of the COVID-19 pandemic, the respondent projected that a decrease in turnover would mean that the company would make a loss that financial year. Consideration was therefore given to how costs might be reduced.

11. Following discussion with his brother, Mr C Niven, also a manager with the respondent, Mr S Niven, general manager, decided to make the claimant redundant. They took the decision to make the claimant redundant because he was the least effective apprentice. They decided that they would wish to retain the services of experienced roofers.

12. On or around 21 June 2020, Mr S Niven telephoned the claimant to advise him that he was to be made redundant. Upon being pressed for reasons why he was selected, Mr Niven told him that he had concerns about his poor time-keeping, his attitude and the fact that the quality of his work was not at the stage that would be expected.

13. This was followed up with a letter of termination dated 22 June 2020 (page 43) which stated, "further to your conversation with Stuart Niven we write to confirm that your employment with us will be terminated on 3rd July 2020. This gives you 2 weeks' notice where you will be paid full wages, we do not require you to do work during your notice period. Your final pay will include any accrued holidays due to date and will be paid into your bank on 3rd July. We would like to thank you for the services that you have given to our company and wish you every success in the future".

14. Mr S Niven did not realise at the time that the early termination of an apprenticeship agreement might represent a breach of contract.

15. The claimant got in contact with Fife College (page 88). Ms H Malcolm, MA contracts manager, spoke to Mr S Niven who confirmed that the claimant had been made redundant. She advised the claimant that he was still an apprentice with Fife College and agreed to assist in attempts to find a new employer to take over the contract (page 87). This included discussions about whether he could undertake an adult apprenticeship.

16. As advised, he sought a reference from the respondent. Mr S Niven agreed to provide a reference but that was not forthcoming (page 84).

17. The claimant lodged an ET1 claim form on 3 July 2020. The respondent received this on 8 July 2020.

18. In that claim form the claimant indicated that he had not obtained alternative employment. Mr S Niven had however heard from other employees that the claimant was seen working locally.

19. In the weeks following the claimant's dismissal, he telephoned a large number of roofing companies throughout East Fife and Dundee seeking employment. The claimant also sought to engage in self employment,

which included distributing a flyer (page 158). On 6 July 2020, he got a trial shift with a local roofer, Lee Johnstone. Nothing came of that and he did not get paid.

20. The claimant had an interview at Marks and Spencer as a shop assistant on 7 July 2020 but was not successful.

21. Thereafter he was engaged by a neighbour to do a small roofing job. He commenced the work on 24 July 2020. That morning, he was seen by employees of the respondent who drove past, and who informed Mr S Niven. Mr S Niven went to the site. He took a photograph/video. There was a verbal exchange between the claimant and Mr S Niven.

22. That same day the claimant then contacted Mrs Muriel Niven, Mr Niven's mother, who is engaged in the business, to ask why he was recording him and she advised that it was because he was taking a court action against them.

23. On 4 August 2020, the claimant received an email from ACAS stating that the respondent was offering to reinstate him. That letter indicated that the reason for offering him his job back was because of an upturn in work.

24. On 11 August 2020, this was followed up by a formal offer from the respondent's representative which stated (page 51-52): "I refer to the offer of reinstatement made to you via ACAS on or around 4/8/20 (subject to agreement on terms). We have been informed by ACAS that you have rejected the offer. The respondent now wishes to make this offer formal and leave the offer open for a further next 7 days (subject to agreement on terms). Should you decline to accept the offer of reinstatement and proceed with your claim, the respondent reserves the right to bring the existence of this offer to the attention of the Tribunal on the question of the respondent's expenses in defending this claim and/or the question of the amount of compensation you may be entitled to, on the basis that refusal of an offer of reinstatement we would argue would amount to a failure to take reasonable steps to mitigate (reduce) your losses. As you may be aware, a claimant who seeks compensation at Tribunal has a duty to take reasonable steps to mitigate (reduce) their financial losses and an offer of reinstatement is a way of reducing those losses. Whether or not a refusal

of such an offer is reasonable or unreasonable would of course be for the Tribunal to decide. If the Tribunal were to decide that a refusal was unreasonable, they would have discretion to reduce compensation accordingly. I appreciate that you are not formally represented in this case, therefore you may wish to take some advice on the content of this letter. ACAS is a source of independent advice on such matters. If I do not hear from you within the next 7 days I will assume that you do not wish to accept an offer of reinstatement (subject to agreement on terms)."

25. The claimant did not respond to this e-mail, as he had already advised ACAS that the original offer made through them was not acceptable. He understood that the respondent was already aware of his reasoning because he was made aware that ACAS had advised the respondent that he had declined the offer.

26. The claimant did not accept the offer because of what he considered to be threatening and intimidating behaviour of Mr S Niven on 24 July; a subsequent response from Mrs Niven on the telephone which he considered to be hostile; he did not believe the offer to be sincere; and he believed that it was only made because of the court action. He thought that if he returned his working life would be a "living hell". Further, given the furlough scheme was still available at that time, and they could have kept him on to gauge the situation, the suggestion that he was being offered his job back on the basis of an upturn in work did not ring true.

27. During August the claimant did some small private maintenance jobs which he got through his flyers and word of mouth. He earned £120 on 27 August and £400 on 28 August (pages 130 – 131). The other payments from self employed work were £200 on 27 July and £270 on 14 October 2020.

28. The claimant did not make any applications for employment between 7 July and 17 August 2020, on which latter date he made a number of applications for a wide range of jobs (pages 93 – 103).

29. On 24 August, the claimant was offered a trial shift as a labourer with Ian Barrett Roofing (pages 104 – 105) but that did not take place.

30. The claimant then secured employment with Aldi in St Andrews, commencing 7 September 2020. After working for three weeks, the claimant left because he disliked the job and found it too stressful. His leaving date was 25 September 2020. Although he was overpaid in error, he ought to have received £667.21 net for those shifts (that is £222.40 per week) (page 133).

31. On or around 17 October 2020, Derek Hodgens of DH Roofing got in contact with the claimant. He advised that he had some work in the coming weeks, for which he would pay £50 per day. The claimant understood this to be "cash in hand".

32. On 19 October 2020 the claimant commenced work with DH Roofing. The claimant worked for 21 days. The claimant was told at the end of his day's work on 23 November by Mr Hodgens that he was being let go because the company did not have enough work in the future and was not willing to be involved in a court case with S Niven.

33. The claimant signed on for benefits after the end of his employment on 23 November 2020. Before that, he did not want to sign on so as not to be a burden on the taxpayer and because he was hopeful of finding other work sooner.

34. In benefits, he received a payment of £31.87 on 15 December 2019 and £148.70 on 23 December 2020. From 6 January 2021, he was in receipt of £75 per week in benefits (universal credit). A condition of receipt of universal credit is that he is seeking employment.

35. Since his employment ended on 23 November 2020, the claimant has been applying for various types of jobs including some constructions jobs that were opening in St Andrews (pages 108 – 128). He has asked friends in the construction industry about openings, but he was advised that many are still on or going back on furlough.

36. The last job he applied for was on 3 December 2020. Most recently, he has made an application to join the fire service. He has made an application for a job with a roofing company in Dundee.

37. A roofer need not be qualified to reach the same standard and to be entitled to the same rate of pay as a qualified roofer which is currently £12.50 an hour. A roofer with the appropriate experience can also command this rate of pay.

38. The claimant was paid £8.55 per hour in his role with the respondent. His net weekly pay was £283. He was in receipt of auto enrolment pension at 3%.

Respondent's submissions

39. Mr Muirhead submitted that liability is admitted and the focus is on remedy. He submitted that the claimant must take reasonable steps to mitigate his losses, and the relevant losses are only those flowing from the breach which may be incurred to the end of the apprenticeship. The maximum award is £25,000.

40. Mr Muirhead submitted that the claimant was dishonest with his representative, with the ET and with the respondent in relation to the work he has undertaken since his dismissal. It was only after seeing the proof of the photographs of him at DH Roofing that he admitted he was working there, and said he had withheld that information because he was fearful of consequences because he was receiving cash in hand.

41. The claimant had started work with DH Roofing on 19 October, which is the date the first schedule of loss was submitted, and Mr Muirhead submitted that it was more likely than not that he was already aware of the job when he instructed his solicitor to prepare the schedule of loss.

42. Mr Muirhead submitted that the Tribunal should be cautious about that explanation because the claimant did not admit the full extent of his earnings until after he became aware of the photographs at which time he had already admitted he was getting paid cash in hand in the schedule of loss.

43. If he was dishonest about that then he cannot be trusted in relation to mitigation or his evidence about what he worked or earned, nor in relation to the explanation he gave for turning down the offer of reinstatement.

44. Further, the claimant's reasons for leaving Aldi were unconvincing; it was not impossible for him to have continued there until he had found something better. During the 2.5 weeks he was there he earned £676 (page 133) which is only slightly lower than what he would have been earning with the respondent. His explanation about his dissatisfaction with this line of work is not convincing, given that he applied for a retail job subsequently. Either he is not being straight about his reasons for leaving or he was going through the motions. Given how well supermarkets are doing in the current climate, it is likely he could have continued to work until he got something back in his chosen trade. Had he continued in that role then his losses would have been significantly reduced.

45. With regard to the offer of reinstatement, he invited the Tribunal to accept the respondent's evidence that it was a genuine offer. It is acknowledged that the law on apprenticeships is archaic and not particularly well known. The respondent accepted liability for the breach, and it was reasonable for the respondent to seek to reduce a significant award. It was unreasonable for the claimant to refuse: given the effect of the pandemic; the uncertainty of the job market; the fact the claimant has not worked since; his stated desire to become qualified; and the fact that he has not yet got an alternative apprenticeship.

46. The claimant gave two reasons for his refusal: the photograph of 24/7 and what was said in the phone call. He submitted that the claimant understood that the reason was redundancy at the time to support that submission. Although Mr Muirhead sought to rely on the text message at page 44, it was also noted that he did not put this to the claimant (although I now see that is referenced in Mr Niven's witness statement).

47. It was reasonable for Mr Niven to visit the claimant while on site on 24 July, given that in the ET1 the claimant alleged that he had not found new employment, but he was told the contrary by other employees. It was reasonable for him to gather evidence that the claimant was working. This is especially since it is difficult for a respondent to refute a claimant's assertions about mitigation.

48. He asked the Tribunal to accept Mr Niven's evidence about the verbal exchange on that date and that it did not represent a breach of trust; and nor did the phone conversation when dismissed; the claimant only refused the offer because he envisaged a substantial and significant award; the claimant has exaggerated to suit his own ends; his evidence about the fact that Mr Niven's mother was hostile on the phone was also unconvincing.

49. The claimant admits he made no job applications between 7 July and 17 August (page 106) and again between 17 August and 7 September, but he could have made speculative written applications to prospective employers. He could have spoken to contacts, registered with agencies, contacted the job centre.

50. He also submitted that he could have applied for jobs in other areas, and that getting a job for a firm which was located eg in Alloa did not mean that the jobs he was required to work on would be in that area.

51. Mr Muirhead noted a "flurry" of job search activity from November 2020 onward, which is submitted was likely due to pressure from his representative (rather than his family as he said) given what is said in the e-mail (page 106). The last recorded job application was 3 December, and the claimant's evidence was that he had only applied for two jobs since that time.

52. With regard to state benefits, the recoupment regulations do not apply to a breach of contract claim, but the claimant failed to reduce his losses by failing to apply for state benefits prior to 23 November. His evidence was that he is now in receipt of £75 per week and credit should be given to the respondent for this failure and compensation reduced accordingly.

53. With regard to loss of opportunity, Mr Niven's unchallenged evidence, which the claimant appeared to accept, was that experienced roofers without qualifications could earn £12.50 an hour within one to two years. The claimant submitted that he might lose the opportunity to work abroad but there was no evidence about that, and in any event such losses are too remote, the object of the training being to become qualified in the UK.

54. While there was 130 weeks of the contract to run, any compensation should take account of the refusal of the reinstatement offer, the resignation from Aldi, and the claimant's failure to obtain alternative employment.

Claimant's submissions

55. Mr Burke submitted that the Tribunal should not lose sight of the fact that the claimant has suffered a wrong here, for which the respondent has accepted liability. The claimant would not be in this position had the respondent had not acted unlawfully. The standard rules relating to breach of contract apply, including the duty to mitigate.

56. Relying on *Cooper Construction Ltd v Lindsey* EAT/0184/15, specifically paragraphs 10 to 16, Mr Burke submitted that there is no burden on the claimant to prove anything, because the burden is on the respondent. The Tribunal should take account of the claimant's state of mind in the assessment of whether he has acted reasonably. If the Tribunal is satisfied that he has done what is reasonable that is sufficient to satisfy the *Cooper* test.

57. With regard to his failure to seek alternative work between 7 July and 17 August, this is addressed in paras 9 and 10 of his statement where he states that he initially contacted local contacts and sent out flyers and to that extent was taking steps to secure income even if he was not applying for jobs. He hoped to become self employed and this is the reason he did not apply for benefits; as well as the fact that his aversion to claiming benefits; and in any event the benefits system is very difficult to navigate. He would not have been able to claim JSA after leaving Aldi, as it is only available to those who are dismissed.

58. It was not unreasonable for the claimant not to apply for the jobs which the respondent identified because all are more than one hour from his house and it would be unreasonable to expect him to add up to two hours to his working day.

59. Contrary to Mr Muirhead's submission, Indeed is an on-line jobs portal with which the claimant had registered. Traditional recruitment agencies

such as that Mr Niven referenced are not utilised by the younger generation, and indeed the claimant did not know what was being referenced when he was asked about it.

60. With regard to the offer of reinstatement, the claimant did not respond to the formal offer; but he was not represented at that time and did not understand the difference between that and correspondence with ACAS. He was however aware that his response to ACAS had been passed on from the respondent's e-mail making the offer of reinstatement. Nothing that he said had been addressed in the formal offer; and it was reasonable that he did not respond, since it finished, "If I don't hear from you will assume not accepting". Applying the *Cooper* principles, it was not unreasonable for him to refuse this offer.

61. He submitted that Mr Niven's evidence was at best confusing, if not unreliable and lacking credibility. There was no consultation about the redundancy; only one individual was made redundant; the claimant was the cheapest; and it was clearly communicated to the claimant that he was "head and shoulders" the worst. Whether Mr Niven was pushed to reveal his misgivings about the claimant is beside the point. The fact is that Mr Niven made it clear that he was selected because he was no good at his job, which Mr Niven accepted he had said.

62. With regard to the claimant's concerns about what happened on 24 July, it was more than just the fact that Mr Niven had taken a photograph but that he had entered into a verbal exchange with him. It was not unreasonable from the claimant's point of view as a young apprentice who was dismissed by his boss because he was no good at his job and who did not know or understand his motivation and who perceived him to be laughing at him. It was reasonable for the claimant to take the view that there was a breakdown of trust and confidence which is fundamental to the employment relationship, given Mr Niven had no confidence in his abilities.

63. Further Mr Niven's evidence about the reasons for the offer is not credible. It does not make sense for him to say that it was also because of an

upturn in work when his witness statement is clear that the only reason for the offer was to avoid the tribunal award.

64. Mr Burke submitted it was clear that it was not a genuine offer and the claimant was not unreasonable in refusing it. It is clear that the claimant had taken reasonable steps and the respondent had not proved that it was unreasonable as required by the *Cooper* case.

65. With regard to losses, while the claimant has been proactive in trying to find work, it is not surprising in the current climate that the claimant has not obtained employment, and that is likely only to get more difficult.

66. Mr Burke made submissions about the figures to be used in the calculation of compensation by reference to the schedule of loss, but submitted that he was seeking the maximum award. This was on the basis that even if the claimant's total earnings were to double still the compensation to be awarded would be very close to the maximum.

67. Mr Niven's confidence that the claimant will easily get another job is contradicted by his assertion that the claimant is not good at his job. While the Tribunal must speculate about future job prospects, he submits that it is reasonable to assume that it will be difficult in the current circumstances which are likely to prevail for some time. He submitted it was reasonable to assume that the claimant's losses will be significant over the years. Even if he were to get the fire service job, it will be some considerable time before he would commence following training.

68. With regard to future prospects, he submitted that it is reasonable for the Tribunal to assume having a qualification would give him an advantage in the job market.

Deliberations and decision

Observations on the evidence and the witnesses

69. Mr Muirhead asked the Tribunal to find that the claimant's evidence was not credible. This was in circumstances where the claimant admitted during evidence that he had not been entirely honest with his representative, who in turn had lodged documents with the Tribunal which

did not accurately reflect his circumstances. Indeed, I noted that in the second schedule of loss lodged (page 77) the claimant stated that he had worked for another roofing company between 9 November 2020 and 23 November but that was adjusted in the third schedule (page 166) to 21 days.

70. I accept that the claimant may have been concerned about revealing that he was getting paid cash in hand, and indeed that the employer for whom he was working would not wish that to be revealed during an employment tribunal. Mr Muirhead however pointed out that he had already revealed that before admitting the full extent of his employment with that particular roofing company.

71. Mr Muirhead's submission that the claimant having not been honest in the past meant that the evidence he gave to this Tribunal should be treated with caution. While I take that on board, I did get the impression that the claimant was being honest by the time it came to giving his evidence, which included readily conceding that he had not been honest previously, and giving an explanation for that. However, in regard to the crucial matters upon which this decision turns, I accepted the claimant's evidence, although I did agree that he emphasised or exaggerated on occasion to suit his own ends.

72. Further, contrary to Mr Muirhead's submissions that the claimant had said in cross examination that he had spoken to contacts, he submitted that this was not referenced in the schedule or the witness statement, but I note now that there is a reference to such conversations. He also submitted that the claimant could have registered with agencies such as Indeed, but I note his evidence that he was registered with Indeed and that he had applied for at least one job through them. Mr Muirhead also submitted that the claimant could have made contact with the job centre, and I now note that this is also referenced in the claimant's witness statement.

73. I found Mr Niven to be both a credible and reliable witness. While Mr Burke founded on the fact that Mr Niven had given alternative or

conflicting reasons for his decisions, I accept that he could have made decisions for a mix of reasons, including an “upturn in work”.

74. The claimant asserted that Mr Niven was variously “cheeky”, “intimidating” “hostile” and “aggressive”, which I took as examples of the claimant’s tendency to exaggerate the position, because I got no impression of that in the way that he gave evidence. For example, I accepted his evidence when he said that he did not enjoy having to tell someone that they were to be dismissed, which is understandable and I accept that he was reluctant to give details about why he had decided to terminate the claimant’s contract.

75. For these reasons, wherever there was a conflict, I preferred the evidence of the respondent.

Breach of contract

76. This is a claim only for breach of contract. The claim is pursued on the basis that the claimant was engaged on a contract of apprenticeship (rather than a contract of service). A contract of apprenticeship, which is a fixed term contract, will terminate on the date specified in the contract. It is a feature of contracts of apprenticeship that they cannot usually be terminated earlier except in cases of serious misconduct by the apprentice. The respondent has conceded that this is a contract of apprenticeship and that to terminate such a contract early amounts to a breach of contract. The normal legal principles which apply to a breach of contract apply here, and in particular the requirement to mitigate loss.

77. I take on board Mr Burke’s point that we must not lose sight of the fact the respondent is in breach and but for the respondent’s actions, this claim would not have had to be pursued. However, the only compensation to which the claimant is entitled where he has suffered a wrong, are the losses flowing from the breach. Although Mr Burke was not suggesting this, there is of course no “injury to feelings” which can be awarded in a case such as this.

Damages for breach of contract

78. I therefore came to consider damages. I accepted that in regard to damages for breach of contract the claimant would in principle be entitled to compensation for the whole of the period until the end day of the contract. That is of course subject to the principle of mitigation.

79. I accept that the claimant made considerable effort to seek alternative employment very quickly following his dismissal. I accept that he sought to mitigate his loss by seeking alternative employment between the period from 3 July through to 7 September, by contacting up to 30 roofing companies and by making other applications for jobs outwith his line of work, which for example led to an unsuccessful interview with Marks and Spencer and subsequently a job with Aldi.

80. I accept that given the claimant was seeking to set himself up as self-employed, it was not unreasonable for the claimant to not make a claim for benefits.

Offer of reinstatement

81. There is however the matter of the offer of reinstatement, which was made some weeks prior to 7 September. The claimant responded to the ACAS offer but not the respondent's formal offer, because he thought that he had already responded and did not understand that there was any difference between these two offers. I did not therefore agree that means that "the excuse that he now gives is most likely an afterthought". The claimant was not legally represented at that time. I do not think anything turns on the failure to respond to the formal offer in the circumstances of this case.

82. The claimant's position was that as a result of what was said and how it was said on the telephone when he was informed of his dismissal, the exchange on 24 July with Mr Niven and then with Mrs Niven, he no longer had the necessary trust in the respondent, such that it would be unreasonable to expect him to return.

83. Mr Niven's position was that he had not appreciated that making an apprentice redundant resulted in a breach of contract, and that he had not appreciated that he would find himself liable for an award of damages

potentially extending to the balance the contract had to run. His position was that he had never told the claimant that he would not have him back, that he had frequently had men who would leave and return so that was not uncommon, and that he could work with the claimant to improve his skills.

84. Although I noticed that the respondent also made reference to an upturn in work as a reason, which I understand was referenced in the ACAS e-mail which was not lodged, I accept as Mr Burke emphasised that Mr Niven's witness statement gave only one reason, namely "the potential award in this case". In his evidence he again referenced an upturn in work and the fact that the downturn following the resumption of work when the pandemic eased did not materialise to the extent that he had envisaged, addressed for example by bringing forward contracted work for this year.

85. I was prepared to accept that his reasoning might not be exclusively one or the other, but a mixture of reasons. Again, I did not take the view that anything turns on that.

86. While the claimant may have perceived otherwise, I did not accept that Mr Niven's interchange was inappropriate nor that the taking of photographs was unreasonable in the circumstances. However, I did understand the claimant's reluctance to return to a job where his employer at least had concerns about his performance and in particular to an employer against whom he had pursued a tribunal claim.

87. I did give consideration to whether he should at least have accepted the offer on what might be called a "trial" basis, that he could not know that his working life would be a "living hell", and I noted that he did not work closely with Mr S Niven in any event. However, I came to the view that it was highly unlikely that the necessary mutual trust and confidence which is required in an employment relationship was unlikely to be established on his return.

88. I did not however find this a self evident conclusion and I found this matter finely balanced. As is often the case, in difficult cases, it is necessary to resort to the burden of proof. I take account of the fact that the respondent bears the burden of proof in regard to mitigation. I came to the view that

the respondent had not proved that it was unreasonable for the claimant to refuse the offer of reinstatement.

Employment with Aldi

89. The claimant obtained employment with Aldi commencing 7 September 2020. The claimant explained in his witness statement why he had only worked there for three weeks. He said that he "really started to dislike it. It is not the type of environment" he could work well in. Given his mental health issues, "having to work in such a rushed environment was not settling well with [him]". He was only getting one half-hour break on a 10 hour shift "which was very stressful in itself".

90. He gave some further evidence about his mental health issues, and I did note that when questioned he said words to the effect that "if you had mental health issues, you may understand better". I did however note that no medical evidence was lodged to support his reasoning, and I did note too that in his witness statement he stated that his mental health issues were not such that they prevented him from looking for work.

91. Without dismissing his mental health issues, I do not accept that it was reasonable in the circumstances when he was under a continuing duty to mitigate his losses to give up work after only three weeks. I accepted Mr Muirhead's submission that the evidence did not support the view that it was impossible for him to continuing working there, and notwithstanding his dislike of it I did take account too of the fact, as highlighted by Mr Muirhead, that the claimant had made a subsequent application to work in retail.

92. I therefore decided that the voluntary resignation from Aldi represented a failure to mitigate loss.

Calculation of losses to the date of hearing

93. The claimant's employment was terminated on 3 July, giving only two weeks' notice. It is conceded by the respondent that he was entitled to

four weeks' notice, so that he is due a further two weeks at his net pay of £283, that is £566.

94. That takes the date to 17 July. The claimant is entitled to losses to the date of commencement of his employment with Aldi, which is seven weeks at £283 net, that is £1,981.

95. There was a lack of clarity about what he was paid at Aldi, as although the schedule of loss states that he received £811 after tax, it would appear that the correct payment is stated in the P45 which was £667 (gross and net) for three weeks of work.

96. I calculate that had he stayed on at Aldi he would be in receipt of approximately £222 net per week, whereas he was in receipt of £283 net per week with the respondent. The ongoing losses then, from his resignation with Aldi until the date of the hearing (which is 19 weeks) run at £61 per week totalling £1159.

97. From that must be deducted the sums that he earned, which it was agreed totalled £2811.

98. I take the view that Aldi would require to pay the minimum of 3% pension under the auto enrolment scheme since the claimant's pay would have been over the threshold, and therefore I take no account of pension.

Claiming benefits

99. The claimant took no immediate steps to claim benefits after the termination of his employment with the respondent. This Mr Burke submitted was for a variety of reasons. However, principally I take the view that given that the claimant was seeking to obtain self-employment, it would not have been appropriate for him to claim benefits. I take no account therefore of that decision in the calculation of loss to the date of the commencement of his employment with Aldi.

100. Following the termination of his engagement on 23 November, the claimant did make a claim for benefits. The sums paid subsequently in benefits to the date of hearing were £31.87, £148.70 and £75, that is a total £255.57.

101. Both Mr Muirhead and Mr Burke agreed that the Employment Tribunals (Recoupment of Benefits) Regulations 1996 do not apply to any award in a case of damages for breach of contract. Consequently the sums paid in benefits require to be deducted from the sums due.

Loss of prospects/opportunity/future losses

102. The claimant also seeks future losses. These are sought at the rate he would have been paid, under deduction of what he had earned, or would earn. I take the view that from future losses should be deducted the sums he could have earned at Aldi. I agreed with Mr Muirhead that had the claimant remained in employment it is more likely than not that he would have been kept on, given the impact of the pandemic on supermarkets, until he found another job.

103. I therefore take the view that losses run at the difference between what he would have been paid and what he would have earned at Aldi.

104. There is the question of how long then it would take the claimant to obtain employment as a roofer, or employment in an alternative line with similar or greater rates and prospects.

105. The claimant gave evidence that he continues to seek employment as a roofer, and that he had applied for a job in the Dundee area. It is entirely possible that the claimant will get that job, or will get another job as a roofer in early course. While I accept Mr Burke's submission that circumstances at the moment, given the pandemic, are particularly difficult, I am aware that the construction industry is still at work, and while there are many organisations in industries hard hit which are likely to fold as a result of the pandemic, common sense indicates that roofing is not likely to be one of them.

106. While I would accept that it will be difficult for him to resume his apprenticeship, I do note that there is scope to obtain an adult apprenticeship. But further I accepted Mr Niven's evidence that it is possible to achieve optimum pay rates through experience. I agree with Mr Muirhead that it is not relevant that Mr Niven thought the claimant's work was not up to standard, when the claimant did not agree.

107. There is also the possibility that he will be successful in his application to the fire service and although I did not hear evidence about it, I accept that it would be some time before any employment would commence should he get it, but then I would assume that such a career would have as good if not better prospects than that of a roofer.

108. The respondent had lodged examples of other roofing jobs which the claimant could have applied for but did not. While I take Mr Burke's point about adding at least two hours of travel to the day, I do not accept that as a reason not to apply for them, given the claimant could move closer to the job (and indeed he has recently moved to live with his girlfriend). I also accept that working for a roofing company does not mean that a roofer will go to head office, but rather will require to travel to where the work is.

109. As both Mr Muirhead and Mr Burke acknowledged during submissions, the task of the Tribunal in assessing future losses is not an easy one given the extent of speculation which is required.

110. However, I take the view that the claimant could reasonably obtain another roofing job within a further six month period, and that if he did he would then build up the experience to achieve optimum pay rates. Although I do accept the premise of Mr Burke's submission that he is more likely to get work with a qualification, I take account of Mr Niven's evidence that once he has another job and builds up the experience then he will have the potential to earn the same rates of pay.

111. I have therefore come to the view that the losses to which the claimant would be entitled would run at £61 per week. However, I require to take into account benefits received, which I understand to be £75 per week and consequently I find that the claimant has no continuing losses.

112. Summary of compensation

Head of loss	**Duration**	**Dates**	**Rate**	**Total**
Notice pay	2 weeks	3/7 -17/7	£283	£566
Loss to start of employment	7 weeks	17/7 – 7/9	£283	£1981

Continuing loss to DOH	19 weeks	25/9 – 14/1	£61	£1159
Total loss				£3706
Earnings to DOH		3/7 – 14/1		(£2881)
Benefits to DOH		23/11 – 14/1		(£255.57)
Total Compensation				**£639.43**

Employment Judge: **Muriel Robison**
Date of Judgment: **05 February 2021**
Date sent to parties: **08 February 2021**