EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT	**V**	**RESPONDENT**
Mr S Hodson		**Aluminium Vent Company Ltd**

Heard at: London South Employment Tribunal **On:** 10 February 2021

Before: Employment Judge Hyams-Parish (Sitting alone)

Representation:
For the Claimant: Mr A Watson (Counsel)
For the Respondent: Mr S Okoronkwo (Counsel)

REMEDY JUDGMENT

The Respondent is ordered to pay the Claimant compensation for unfair dismissal in the sum of **£78,662.50**[1]

REASONS

Issues and practicalities

1. This hearing was listed to determine remedy following the Claimant's successful claim of unfair dismissal.

2. The Respondent had written to the Tribunal, prior to this hearing, to postpone the remedy hearing, but withdrew this application at the start of the hearing.

[1] Refer to the schedule at the end of this document for a complete breakdown

3. The Claimant had submitted a schedule of loss prior to the hearing and the Respondent had submitted a counter schedule of loss. Whilst there was agreement as to the amount of the basic award and the fact that any compensatory award would be subject to the statutory cap, the following matters fell to be determined by me at the hearing:

   (a) Should a week's pay, for the purposes of determining the statutory cap, include in that calculation, the annual bonus?

   (b) What is the period of future loss?

   (c) Did the Claimant fail to mitigate his loss?

      i. Did he act unreasonably in setting up his own business, rather than applying for positions as an employee?

      ii. Did he act unreasonably in taking less salary than he was contractually entitled to?

   (d) Should the Claimant be compensated for loss of pension contributions?

   (e) Should there be an uplift to the compensatory award on the ground that the Respondent breached the ACAS code?

4. The Claimant's schedule of loss showed that he had incurred significant costs in setting up his business, which he contended should be set off against his income from the business, reducing his income to zero. I immediately identified that the analysis of expenses was potentially more difficult but that it could all be academic if the amount of loss determined, even without taking into account expenses, exceeded the statutory cap.

5. I therefore informed Counsel that I would approach this exercise in two stages. The first stage would involve consideration of all those matters at paragraphs 3(a)-(e) above. If that resulted in the Claimant being awarded a figure exceeding the statutory cap, it would be pointless going to the second stage, which would involve a more detailed analysis of the claim for expenses incurred by the Claimant when setting up his business. Both parties agreed with that approach.

6. For this hearing, the Claimant had provided a further witness statement. For the Respondent, a witness statement was provided by Jackie Montgomery, the wife of Ian Montgomery. Both witnesses gave evidence and were cross examined. Neither Ian or Andrew Montgomery attended this hearing or gave evidence.

Findings of fact

7. Following the termination of his employment with the Respondent, the Claimant looked at the market and concluded that senior roles in the same industry were not available either in Croydon or within a 25-mile radius of where he lived. The Claimant concluded that his only option was to set up his own company in an industry he had developed decades of expertise and experience. He had been in the heating and ventilation business, manufacturing and selling grilles and vents, for 37 years. Given his age and where he was in his career, he considered that retraining in another industry was not a viable option.

8. He formed a new company called London Vents Ltd on 2 August 2019. He borrowed £30,000 from his mother in law to start up the business, and also contributed £10,000 of his own money. The Claimant said that the total cost associated with setting up the business was £178,413.00.

9. The Claimant was employed by London Vents Ltd under a contract of employment which I was referred to at this hearing. There was no dispute that the document at page 266 of the main hearing bundle was the Claimant's contract of employment with London Vents Ltd. It stated that the Claimant's employment with the new business commenced on 1 September 2019 and that he would be paid a salary of £41,600.00. However, during this period the Claimant did not draw his full salary because the company could not afford to do so; instead the Claimant prioritised paying his staff. During the period from 1 September 2019 to the date of this remedy hearing, the Claimant received net income of £33,201.08, as opposed to the contracted net amount of approximately £48,900.00

10. The Claimant gave evidence that when employed by the Respondent, each Christmas he and other members of staff were given a Christmas bonus. He said that the amount "*wasn't set in stone but was generally an additional month's salary*". Despite this, the Claimant only gave details about two bonuses he was paid: £3,790.47 on 13 December 2017; and £10,050.00 on 18 December 2018. The Claimant was not able to produce any payslips showing the bonus payments, but he did refer me to bank statements showing deposits matching the above sums.

11. Mrs Montgomery said that the above payments were not bonuses and were unauthorized. I do not accept this. There was evidence in the bundle in which the Respondent acknowledged the bonus payments and demonstrated that they intended that the Claimant should receive them.

Conclusions, analysis and associated findings of fact

12. A schedule setting out how I have arrived the the final sum to be awarded to the Claimant is at the end of this Judgment. My reasons for awarding the

sums stated are set out below.

(a) Statutory cap and definition of a "week's pay"

13. The statutory cap which applies to a compensatory award under s124(1ZA) Employment Rights Act 1996 ("ERA") is the lower of £88,519.00 and 52 weeks' pay (uncapped). A week's pay is calculated by reference to sections 221-227 ERA and the case law interpreting those sections, in particular:

    (a) By sections 226(3) & (6) the calculation date for the s124 calculation is the date on which notice would have been given had (a) the contract of employment been terminable by notice and terminated by the employer giving such notice as is required by s.86 ERA to terminate the contract and (b) the notice expired on the effective date of termination.

    (b) By s.221(2), where the employee's remuneration for employment in normal working hours does not vary with the amount of work done in the period, the amount of a week's pay is the amount "*which is payable by the employer under the contract of employment in force on the calculation date if the employee works throughout his normal working hours in a week*".

14. In ***Econ Engineering v Dixon [2020] ICR 1331*** the EAT held that the words in s.221(2) refer to "*a sum or sums which are payable by the employer as a matter of legal obligation where that obligation arises simply because the employee has worked their normal working hours in a week*."

15. Discretionary bonuses do not normally form part of remuneration because, although the employer must act rationally and in good faith when exercising the discretion, such payments are not in reality contractual. However, where a bonus is described as discretionary but is, in fact, paid to employees on a regular basis, it may be deemed to be a contractual payment. Of course, the fact that a bonus is paid regularly does not necessarily mean that it has become contractual. If a payment remains genuinely ex gratia, it will not be included in the calculation of a week's pay.

16. Mr Watson invited me to accept that because there was an expectation that the bonus payments would be made at the same time every year, that I should accept that they were contractual payments and should be included for the purposes of calculating a week's pay pursuant to s.221(2) ERA, and therefore also for the purposes of calculating the statutory cap

17. The problem for the Claimant, however, is that he only received two payments and these were vastly different in amounts. On the one hand I was being told that the bonus equated to one month's salary, yet the bonus in 2018 vastly exceeded one month's salary.

18. I was not persuaded that these payments were anything other than adhoc discretionary bonus payments. There was no documentation stating anything about the bonuses, or their terms, with the exception of the above mentioned correspondence acknowledging that payments had been made. Only two bonus payments were made to the Claimant notwithstanding he had been employed for some years. Although the Claimant said that the bonus was an additional month's pay, this method of calculation was not consistent with the 2018 payment of £10,050.00. I concluded that whilst the Respondent intended to pay these sums, contrary to what was suggested at the hearing by Mrs Montgomery, there was not sufficient evidence for me to be satisfied that such payments had become contractual, as Mr Watson had invited me to conclude. For this reason, I did not consider that such bonuses fell within the category of payments that could be included in a "week's pay" for the purposes of s.221(2) ERA which is used to calculate the statutory cap. I concluded therefore that the statutory cap in this case is £70,000.00.

(b) Alleged failure to mitigate

19. The principles in respect of mitigation of loss are well-established, but were conveniently summarised in ***Singh v Glass Express Midlands Ltd UKEAT/71/18*** (HHJ Eady QC) as follows:

    (a) 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.

    (b) It is not some broad assessment on which the burden of proof is neutral; if evidence as to mitigation is not put before the Tribunal by the wrongdoer, it has no obligation to find it.

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

    (d) 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.

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

    (f) 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, not the Claimant's, that counts.

    (g) The Tribunal 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.

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

(i) 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 Tribunal to conclude that the employee has acted unreasonably, but is not, in itself, sufficient.

20. The principle that the Respondent must prove that the Claimant acted unreasonably was explained clearly by Sedley LJ in **Wilding v British Telecommunications plc [2002] ICR 1079** at [54] and [55]:

> ***[54]Take a not uncommon case: an employee who has been subjected to harassment at work is offered his job back with the same colleagues but with promised safeguards against repetition. He refuses it in circumstances in which the employment tribunal consider that it would have been reasonable to accept it; but they accept, too, that his decision to refuse was in all the circumstances not an unreasonable one…***
>
> ***[55] It is not enough for the wrongdoer to show that it would have been reasonable to take the steps he has proposed: he must show that it was unreasonable of the innocent party not to take them. This is a real distinction. It reflects the fact that if there is more than one reasonable response open to the wronged party, the wrongdoer has no right to determine his choice. It is where, and only where, the wrongdoer can show affirmatively that the other party has acted unreasonably in relation to his duty to mitigate that the defence will succeed.***

21. The Claimant was cross examined about his failure to mitigate. However this was simply limited to suggesting names of companies that the Respondent suggested the Claimant ought to have made applications to. There was no indication at all that any vacancies existed at those companies. I also bear in mind that the Claimant operated at a senior level and that what he wanted when employed by the Respondent was to become a shareholder. It was not therefore simply a case of the Claimant applying for any role within these companies; arguably such a senior position would be hard to come by.

22. I concluded that, given that the Claimant had spent his whole life in one field, it was reasonable for him to set up a business doing what he did with the Respondent. That is where all of his expertise and experience lay. I concluded that the Respondent did not get close to persuading me that the Claimant had failed to mitigate his loss. On the contrary, I am satisfied that he did. I therefore award the Claimant his actual losses. I also assess his future losses to be limited to one year, by which time I consider that his

business will be more successful and he will have reached pay parity with what he received with the Respondent.

23. The Claimant said that he did not draw a full salary because it was important that other employees' pay was prioritised in circumstances where the company was in its very early stages of development. I do not consider this to be unreasonable and I do not consider that by doing so, the Claimant failed to mitigate his loss. In the detailed break down of compensation in the Schedule to this Judgment, I have accounted for the sums received by the Claimant from his new business, and have made assumptions about receipts for the purposes of assessing future loss. I did not set off expenses as it made no difference to the end result bearing in mind the statutory cap.

24. The Respondent submitted that, in terms of monies earned for which credit should be given when assessing the loss, the Tribunal should take the amount the Claimant was contracted to receive. I do not agree. I conclude that it is right to give credit for monies actually received and that the correct approach was to consider whether the Claimant had failed to mitigate his loss in not taking a full salary, or whether he had acted unreasonably in not doing so. I concluded that the Claimant did not act unreasonably given the fragility of the new business at the time and the Claimant's view that it was important that he was in a position to pay his staff, not least because the future success of the business depended on him retaining those staff. However, in any event if I had used the contracted amounts both in terms of giving credit for past and future loss, it would not have affected the final amount to be awarded to the Claimant due to the statutory cap.

(c) Period of loss

25. I consider that a future loss of twelve months is appropriate in this case. This is the period of loss suggested by the Claimant.

(d) Pension loss

26. I accept that arrangements were made to enable the Claimant to receive a pension and had the Claimant not resigned, he would have received pension payments as that was clearly the Respondent's intention. I have therefore allowed for pension loss.

(e) ACAS uplift

27. Under s.207A TULR(C)A 1992, the Tribunal may increase or decrease the compensation by no more than 25% if: (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies; (b) the employer has failed to comply with that Code of Practice in relation to that matter, and (c) that failure was unreasonable.

28. When assessing the level of any uplift under s.207A, the Tribunal should first fix the appropriate uplift by reference to the nature and gravity of the breach and then, but only then, consider how much this involves in money terms and, if necessary reduce to a level which would be proportionate and acceptable: ***Credit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604 (CA).***

29. I conclude that the Respondent did breach the ACAS code by failing to deal with, what was effectively a grievance raised by the Claimant. I did not consider there to be a good reason for such failure. The Respondent essentially ignored the complaints being raised. I concluded that a 10% uplift was appropriate when considered against the sum of money which that represents.

(f) Loss of statutory rights

30. I consider that a sum of £300 is appropriate given that the Claimant is effectively employed by his own business.

31. Given the sum to be awarded to the Claimant taking into account the above findings and conclusions, it was not necessary to deal with stage 2 of this process as outlined in paragraph 5 above.

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Employment Judge Hyams-Parish
26 February 2021

SENT TO THE PARTIES ON
17 March 2021

FOR THE TRIBUNAL OFFICE

CALCULATION SCHEDULE

1. Details	

Date of birth of Claimant	18/05/1966
Date Claimant started employment	15/08/2007
Effective Date of Termination	26/04/2019
Period of continuous service (years)	11
Age at Effective Date of Termination	52
Remedy hearing date	10/02/2021
Date by which employer should no longer be liable	09/02/2022
Statutory notice period (weeks)	11
Net weekly pay at EDT	934.98
Gross weekly pay at EDT	1,346.15
Gross annual pay at EDT	70,000.00
2. Basic award	
Basic award Number of qualifying weeks (16.5) x Gross weekly pay (525.00)	8,662.50
Total basic award	**8,662.50**
3. Compensatory award (immediate loss)	
Loss of net earnings Number of weeks (93.7) x Net weekly pay (934.98)	87,607.63
Plus loss of statutory rights	400.00
Plus Pension Contributions	21,623.07
Plus Bonus	8,000.00
Less sums obtained, or should have been obtained, through mitigation	
Earnings	
London Vents (01/09/2019 to 10/02/2021)	-33,201.08
Total compensation (immediate loss)	**84,429.62**
4. Compensatory award (future loss)	
Loss of future earnings Number of weeks (52) x Net Weekly pay (934.98)	48,618.96
Plus Bonus	4,000.00
Plus Pension Contributions	12,000.00
Less sums expected to be obtained through mitigation	
London Vents (11/02/2021 to 09/02/2022)	-29,917.58
Total compensation (future loss)	**34,701.38**

Compensatory award before adjustments	**119,131.00**
5. Adjustments to total compensatory award	
Plus failure by employer to follow statutory procedures @ 10%	11,913.10
Compensatory award after adjustments	**131,044.10**
Grossed up compensatory award	**210,916.77**
6. Summary totals	
Basic award	8,662.50
Compensation award including statutory rights	210,916.77
GRAND TOTAL	**219,579.27**
AFTER COMPENSATION CAP OF £70,000.00 (GROSS ANNUAL PAY)	**78,662.50**