



EMPLOYMENT TRIBUNALS

Claimant

Mr Joga Hayes

v

Respondent

Sky Cabs Corby Limited

Heard at: By CVP

On: 18 February 2021

Before: Employment Judge M Warren

Appearances:

For the Claimant: In person.

For the Respondent: Mr Cameron (Consultant).

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was by Cloud Video Platform (V). A face to face hearing was not held because it was not practicable and no-one requested the same and all issues could be determined in a remote hearing.

JUDGMENT having been sent to the parties on 17 March 2021 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

Background

1. In this matter Mr Hayes succeeded before me in his complaint of Unfair Dismissal; the Judgment was dated 19 October 2020 and today's Remedy Hearing was fixed on that occasion. Written reasons on the liability decision were provided to the parties signed by me on 29 November 2020. In that decision, I made a finding that there would be no deductions from compensation for contribution or Polkey.

Evidence

2. This hearing was conducted remotely by CVP. I had before me a bundle prepared by Mr Cameron, for which I am grateful. I had no additional witness statements, although Mr Hayes provided a revised schedule of loss. Mr Hayes gave evidence; I asked him some questions and he was cross examined by Mr Cameron.

The Law

3. When a claimant has succeeded in a claim for unfair dismissal, the award of compensation falls into two categories. The first is in respect of a Basic Award pursuant to sections 119 to 122 of the Employment Rights Act 1996 (ERA) which provide that in the case of an ex-employee aged over 41, the Basic Award shall be a multiple of one and a half times the number of years' complete service and the individual's gross pay, (subject to a statutory maximum which has no bearing in this case).
4. The second element of the award is to compensate the claimant for losses sustained as a result of the dismissal, known as the Compensatory Award. The amount of such an award is governed by sections 123 to 126 of the ERA. Section 123 (1) states:

“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 insofar as that loss is attributable to any action taken by the employer.”
5. Section 123 (4) provides that a claimant has the same duty to mitigate his loss as would a claimant under the common law. The burden of proof lies with the employer to show that the claimant has failed to mitigate loss.
6. Langstaff J reviewed the law on mitigation in Cooper Contracting Limited v Lindsey UKEAT/0184/15 which might be summarised as follows:
 - 6.1 The burden proof is on the wrongdoer.
 - 6.2 The burden of proof is not neutral – if no evidence is offered, the employment tribunal does not have to find a failure to mitigate.
 - 6.3 What has to be proved is that the claimant acted unreasonably.
 - 6.4 There is a difference between acting reasonably and not acting unreasonably
 - 6.5 What is reasonable and unreasonable is a question of fact
 - 6.6 The views and wishes of the claimant is one factor to be taken into account, but it is the tribunal's assessment of reasonableness that counts, not the claimant's.
 - 6.7 The tribunal should not apply too exacting a standard on the claimant, he is the victim.
 - 6.8 In summary, it is for the respondent to show that the claimant acted unreasonably.
 - 6.9 It may have been perfectly reasonable for the claimant to have taken a better paid job, that is important evidence, but not itself sufficient.

7. Section 124 (1ZA) limits the amount of compensation that may be awarded for unfair dismissal to the lower of 52 week's gross pay or a specified figure which is changed annually, (currently £86,444). This is known as the Statutory Cap.

The facts

8. The relevant facts are:
 - 8.1 Mr Hayes date of birth is 5 August 1958.
 - 8.2 His employment commenced in December 2001.
 - 8.3 The effective date of termination of employment, (EDT) was 22 February 2019.
 - 8.4 His age at the EDT was 60.
 - 8.5 He had 17 years complete service.
 - 8.6 His gross pay is agreed at £240.38 per week gross, that is £12,500 per annum.
 - 8.7 His net pay is agreed at £209.30 per week.

Basic Award

9. Calculation of the Basic Award is therefore straight forward and agreed. $17 \times 1.5 \times £240.38$ is £6,129.69.

Compensatory Award

10. I award loss of Statutory Rights in the sum of £500.
11. I then turn to the question of Mr Hayes' losses to date. Mr Hayes has throughout, run two businesses in addition to his former directorship with the respondent; that is operating a cab of his own and some rented property. There was no opportunity for him to increase his income through rented property to make up for his loss of salary with the respondent.
12. With regard to the cab, it is a single vehicle. He employed two drivers who worked on a commission basis and drove during the week. Mr Hayes drove on Fridays and Saturdays. He described at the liability hearing that he found driving on a Friday and a Saturday night therapeutic. I was provided with no accounts for the income of this business.
13. I accept the evidence of Mr Hayes that after his dismissal firstly, the respondent switched him off from their system so that he could not use the respondent's facilities in order to gain fares for his cab. Secondly, that he suffered intimidation from other drivers linked to the respondent when he was using his black cab, such that already suffering from depression and anxiety, his mental ill health was aggravated and he was therefore unable

to increase his own hours to make up for the loss of income through his directorship.

14. He told me in evidence that he reported the intimidation he was suffering to the police, to the local council who licence the cabs and to the respondent.
15. As I have mentioned, there were two drivers in his employ. They had been with him for 20 and 16 years respectively. They too suffered intimidation from drivers linked to the respondent and as a consequence, they resigned from Mr Hayes' employment in February and June 2019 respectively.
16. One might have expected Mr Hayes to take the opportunity then to drive his cab in place of those two individuals and thereby make up for his loss of income. However, I accept his evidence that his mental health was such that he was unable to do so and that was caused by the respondent in the first place, in the events leading up to his dismissal and thereafter, by drivers associated with the respondent and their behaviour towards him. He was therefore unable to increase his earnings and he continued losing week on week £209.30.
17. There was an intervening event; Covid struck the country in early 2020. Mr Hayes' mother in law was diagnosed suffering from cancer. She had to be cared for by Mr Hayes and his wife and in the prevailing Covid crisis, they had to isolate. In any event, from 16 March 2020 the country of course went into lockdown. However, had Mr Hayes remained in the employment of the respondent at that time it is likely that a way would have been found for him to continue working from home and he would have continued to earn his directorship income of £12,500. His loss of earnings as a result of the dismissal therefore continued throughout that time.
18. In September 2019, Mr Hayes took the decision to surrender the licence on his cab, at least temporarily, in order to avoid the cost of renewing it and the cost of insuring and subjecting his cab to the required MOT test. He did so until all of the business with this tribunal claim and the respondent had been sorted out, because he could not justify such expense in view of the lack of income from the cab on the road. In my judgment that was a reasonable and sensible step for him to have taken and not a failure to mitigate loss.
19. In the Autumn of 2019, Mr Hayes invested in two limousines with a view to hiring them out for weddings. The timing of that could not have been worse. During the Autumn he prepared them ready for use in the Spring and Summer of 2020 and then of course the Coronavirus pandemic struck. They have laid idle throughout 2020 and to date, because no weddings are taking place or those that may have taken place during 2020 would have been with very limited numbers.

- 20. I find that Mr Hayes has not acted unreasonably and has not failed to mitigate his loss.
- 21. Mr Hayes' loss has continued to the date of this hearing. The calculations of that loss are:
 - 21.1 For the year 23 February 2019 through to 22 February 2020 – 52 weeks at £209.30 is £10,883.60.
 - 21.2 23 February 2020 to 18 February 2021 - 51 weeks at £209.30 is £10,674.30.
- 22. If one adds to that the loss of Statutory Rights figure of £500 gives a compensatory award which Mr Hayes would have received of £22,057.90. However, I have to apply to that the Statutory Cap of a years' gross salary which is £12,500 and that is all that Mr Hayes can be awarded by me in respect of the compensatory award.
- 23. There is no point in calculating future loss from today because the statutory maximum has already been exceeded.

Summary

- 24. The upshot of this is that the award of compensation for unfair dismissal is the basic award of £6,129.69 which is unaffected by the Statutory Cap together with the capped figure for compensation of £12,500 which makes a total of £18,629.69 and I will prepare a Judgment for that sum accordingly.

Employment Judge M Warren

Date: 16 April 2021

Judgment sent to the parties on
21 April 2021

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THY

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For the Tribunal office