



EMPLOYMENT TRIBUNALS

Claimant: Mr D Buchholz

Respondent: GEZE UK Ltd

Heard at: Birmingham by CVP

On: 21 April 2021

Before: Employment Judge Connolly (sitting alone)

Representation

Claimant: In person

Respondent: Mr J Forrester (Solicitor)

JUDGMENT having been sent to the parties on 22 April 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

INTRODUCTION

1. On 12 March 2021, I gave Judgment in this claim in which I held that Mr Buchholz had been unfairly dismissed by the respondent and that any basic and compensatory award would be reduced by one third to reflect his conduct. Today's hearing was therefore listed to determine remedy, including, if appropriate, whether there should be any increase in the compensatory award pursuant to **section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992** ('TULR(C)A').
2. I explained the Tribunal's powers to order reinstatement or re-engagement. I noted that Mr Buchholz had checked the box seeking such an order on his Claim Form. Mr Buchholz explained that he was, in fact, seeking compensation only. He referred me to his Schedule of Loss in the agreed bundle which included four claims and an uplift pursuant to **s.207A**:
 1. a basic award,
 2. loss of statutory rights
 3. loss of salary and the value of his company car to 19th March 2021
 4. loss of pension to 19th March 2021

3. In discussion with Mr Buchholz as to why he had limited his claim to 19 March 2021, it became clear that (a) he had obtained a new role which he would start on 1 May 2021, (b) he said it would pay in the region of £30,000 i.e. less than he had earned with GEZE and (c) although his Schedule of Loss had been prepared with the assistance of the Citizens Advice Bureau, it seemed to have been based on a mistaken apprehension that the statutory cap limited his claim to 1 year of loss in time as distinct from the monetary equivalent of 52 weeks' pay. Mr Buchholz also explained that he had not disclosed the documents relating to that employment to the respondent partly on the basis that his losses (as presented in his Schedule) ended before then and they did not appear relevant.
4. I gave the respondent the opportunity to comment on this new information. Mr Forrester indicated, that although he would take instructions, he was likely to object to any alteration in the basis of and amount of loss claimed and may seek time, including potentially an adjournment, to obtain all relevant evidence.
5. I gave Mr Buchholz the opportunity and time to consider applying to amend his Schedule of Loss. In the circumstances, Mr Buchholz took the view he would limit his losses up until 19 March 2021 as per his schedule. He informed me he had weighed all the relevant considerations, including his desire to bring the matter to an end once and for all and move on. That is therefore the basis on which I have dealt with the claim.

THE ISSUES

6. Helpfully, there was agreement between the parties on the following issues:
 - 6.1 the appropriate basic award was £8,925 before any reduction for conduct;
 - 6.2 loss of statutory rights should be valued at £525
 - 6.3 Mr Buchholz's net weekly earnings + the weekly value of his car benefit while employed by GEZE amounted to £588.35
 - 6.4 He and GEZE each contributed £1,376.16 (gross) to his pension per annum.
 - 6.5 His gross earnings over a 52 week period for the purpose of the statutory cap (**s124 ERA 1996**) was £35,779.86 (calculated using Mr Buchholz's last payslip which showed his earnings over the 12 month period to be £34,403.52 plus GEZE's pension contribution of £1,376.16, in accordance with **University of Sunderland v Ms K Drossou UKEAT/0341/16**).
7. The issues I had to decide were therefore as follows:
 - 7.1 Should Mr Buchholz's compensatory award be increased to reflect an unreasonable failure by GEZE to follow the Acas Code of Practice on Disciplinary and Grievance Procedures 2015 (the 'Acas Code')
 - 7.2 For what period after his effective date of termination to 19 March 2021 should Mr Buchholz recover his losses – GEZE contended that he had failed to mitigate his loss.

RELEVANT LAW – S.207A TULR(C)A 1992

8. Mr Buchholz submitted there should be an uplift in his compensatory award to reflect GEZE's failure to comply with the Acas Code. The Code sets out principles for handling disciplinary situations in the workplace and gives practical guidance on the appropriate steps that both the employer and employee should take and expect from each other. The code is 12 pages long and there is an 87 page non-statutory guide. By virtue of **s.207A TULR(C)A 1992 and s.124 ERA 1996** I have the power, if I consider it just and equitable in the circumstances, to increase any compensatory award to a claimant by no more than 25%. I can only do that if I consider that the respondent has unreasonably failed to comply with a provision of the Code.
9. As this issue was dealt with by submission only on the basis of the findings of facts contained in my earlier Judgment, it is convenient to deal with my conclusions on this issue here.

CONCLUSIONS S.207A

10. Mr Buchholz sought a 25% increase in his compensatory award; GEZE contended there should be no uplift. Mr Buchholz relied on my earlier finding that GEZE failed to comply with Paragraph 6 of Code, namely, that in misconduct cases, where practicable different people should carry out the investigation and disciplinary hearing. There was therefore a finding of a failure to comply in the relevant code in this case.
11. I asked myself whether that non-compliance was unreasonable, I find that it was. GEZE had the benefit of advice from an HR Department throughout this process and reasonably should have maintained the separation between the investigating and disciplining manager in accordance with the Code. It is non-compliance with an aspect of procedure which it was thought sufficiently important to include in the Code, it was unreasonable and I find it is just and equitable to award an uplift.
12. As to the extent of the same, it is right in my view to categorise the extent of the non-compliance at the very lowest end of the scale. GEZE complied with the Code in all other respects: they conducted an investigation, they held a disciplinary meeting, they accorded Mr Buchholz the right to be accompanied and they conducted an appeal. In the circumstances, I agree with Mr Forrester that the appropriate increase should also be at the very lowest end of the range and set it at 5%.
13. This means any compensatory award will be uplifted by 5% before then being reduced by one third to reflect Mr Buchholz's conduct.

RELEVANT LAW – COMPENSATORY AWARD, MITIGATION and ORDER OF ADJUSTMENTS

14. The parameters of the compensatory award are set out in **section 123 ERA 1996**. It is intended to compensate a claimant for losses arising out of the

dismissal insofar as that loss is attributable to action taken by the respondent employer. It is not to be used to punish the respondent.

15. In addition and by virtue of **s.123(4) ERA**, the same duty to mitigate one's loss applies to the Mr Buchholz as would apply to a claimant under common law. The burden of proving that Mr Buchholz has unreasonably failed to comply with his duty to mitigate lies on the employer GEZE, as the wrongdoer. Thus it is not for Mr Buchholz to prove he has mitigated his loss, it is for GEZE to prove that he has unreasonably failed to mitigate his loss. In the circumstances, providing the information on which to make any finding of a failure to mitigate is the task of the employer.
16. Mr Forrester helpfully referred me to **Cooper Contracting v Lindsey 2015 UKEAT/0184/15** on mitigation of loss. His Honor Judge Auerbach, in **Sanha v Facilicon Cleaning Services Ltd UKEAT/0250/18**, drew together the principles from the authorities including **Cooper** and the well-known case of **Wilding v BT plc [2002] ICR 179**. He summarised, firstly, that the authorities were clear and consistent that the onus is on the respondent employer to advance and make good a case that there has, for a particular reason, been an unreasonable failure to mitigate loss by claimant. Secondly, that it is not enough for a respondent to show that it would be reasonable to take some particular step, the Tribunal must be satisfied that it was in all the circumstances unreasonable not to take it. Finally, as set out in the case of **Wilding**, the Tribunal is not to apply too demanding a standard to a claimant. The claimant is, after all, the victim of a wrong and he is not to be put on trial as if the losses were his fault when the central cause is the act of the wrongdoer.
17. In terms of the order in which I should make adjustments to awards, that is set out in **Digital Equipment v Clements 1997 ICR 237 EAT** which has subsequently been modified to include, at the appropriate point, adjustments that fall to be made under **s.207A** (a section which was enacted after the decision). To calculate the compensatory award, I first ascertain Mr Buchholz's total loss in consequence of the dismissal in so far it is attributable to GEZE's actions. Deductions and adjustments are then to be strictly made in the following order (in terms of those that are or may be relevant in this case):
- deduct any sums earned by way of mitigation or to reflect failure to take reasonable steps in mitigation
 - increase by 5% for failure to comply with the Acas Code
 - apply one third deduction for contributory fault
 - gross up to allow for taxation, If applicable
 - apply the statutory cap, if applicable.

RELEVANT FACTS

18. I heard evidence from Mr Buchholz; I was referred to the agreed bundle of 93 pages, Mr Buchholz's updated schedule of laws and GEZE's revised Counter Schedule.

Mr Buchholz's Employment with GEZE

19. Mr Buchholz was born on 18th June 1972 and was 48 years of age when he was dismissed. He started working for GEZE on 9th January 2006 and therefore had 14 years' service with them at the date of his dismissal on 20th March 2020. As I said in my earlier judgement, GEZE is a company which supplies products, systems and services relating to door, window and safety technology. Mr Buchholz joined them as a member of the technical support team and he was appointed a Technical Product Manager in April 2014. In 2015 he was convicted of a criminal offence. That conviction is spent with effect from the 30th March 2021, according to Mr Buchholz. Before it was spent, it was necessary for him to declare it on any job application forms which asked about previous criminal convictions. It also precludes him from working in certain roles such as working with children or in secure environments. It was largely irrelevant to the type of work for which he was searching unless of course that work happened to be in a school for example or a secure environment.
20. When Mr Buchholz was employed by GEZE it is agreed that his net annual earnings including his car benefit were £30,594.24. This figure was calculated using the agreed figure for net salary of £26,994.24 and the car benefit of £3,600 net. Those were Mr Buchholz's own figures. On that basis, both parties agreed the net weekly loss was £588.35. In addition to that and as set out above, Mr Buchholz and GEZE each made a gross contribution of £1,376.16 per annum to Mr Buchholz's pension fund.

Mr Buchholz's Previous Employment History

21. I turn then to Mr Buchholz's employment history prior to joining GEZE. He left school with handful of GCSE's. Since that time, he has been in continuous employment bar a week or two. He started his working life with a local security company dealing with house wiring, intruder alarms, CCTV etc. He stayed with them for some 7 or 8 years. He then moved to a large well-known company which specialised in automatic doors. He stayed with them for approximately 8 years. At that point, having tired of the travelling required to visit customer sites, he became self-employed for a period of 2 years before he joined GEZE. He has no formal vocational, electrical or other qualifications other than his GCSE's. He has always relied on his proven experience to obtain his next role.

Mr Buchholz's Search for Alternative Employment

22. In the period of exactly a year since his dismissal and for which he is seeking compensation, Mr Buchholz has not obtained alternative employment. Fortunately, he has now secured a role starting in May of this year albeit apparently at a lesser salary.
23. Mr Buchholz's dismissal unfortunately coincided almost exactly with the start of what we now call the first lockdown as a consequence of the Covid 19 pandemic. He immediately registered with the Job Centre and with at least a dozen employment agencies as set out in his witness statement. He has records of the jobs for which he applied in the last 6 months but not in the first 6 months of his search. In the first few months he tells me he was picky in

terms of the work for which he applied by which it seems he meant he applied for jobs at a similar level to that which he had with GEZE. He says he applied for approximately 30 jobs in the first 3-month period. As it became clear he was not going to obtain work with the ease he had done in the past, he broadened his search.

24. In respect of the latter 6 months of his job search, he has provided details of 115 jobs for which he applied. He says that is not a complete list of all his applications but is those for which he could access the record of the advert and application on the relevant site for it was archived. He says he has made other applications but he was unable to put a reliable figure on how many. In total it seems likely that over the 12 month period he applied for in excess of 150 jobs and possibly closer to 200 roles.
25. The roles for which Mr Buchholz applied in those latter 6 months generally had a salary in excess of £24,000 or £25,000 per annum. There were in what might be loosely be termed engineering or the technical sector. They included more managerial type roles such as that held with GEZE and more technician or operative roles akin to those he held earlier in his career. He was willing to travel 1 or 1½ hours to work when traffic was clear and whatever additional time might be added to that were it in rush hour.
26. Of all the applications he has made, he has only obtained 2 interviews. He has now secured a permanent role. One putative employer informed him that they would not offer him the role or consider him for the role by reason of his criminal record.
27. GEZE has pointed to what it says is a large number of available roles in the local area generally in retail, warehousing or production. In terms of wage, they range from national minimum wage of £8.70 odd per hour to £11.00 per hour. GEZE has put in the bundle, (for example, at page 56) 1 page which refers to 200 jobs posted 30 plus days ago and (at page 62) some of the pages of 370 odd jobs from 3 days ago to 30 plus days ago etc. What they have not done is put all the results in the bundle which is understandable but means it is difficult to form a view as to for how many of those roles Mr Buchholz would be a realistic candidate. Many of those that were in bundle were not in retail or warehouse or operative roles, for example, there was pharmacy work, police work and sales work for which Mr Buchholz would be an unsuitable candidate. It was not therefore possible to get a reliable sense of the prevalence of permanent warehousing, retail or operative roles in Mr Buchholz's travel to work area. Generally, however, I accept there were a number of temporary and some permanent retail or warehouse roles paying just in excess of national minimum wage for which Mr Buchholz did not apply.
28. When questioned about that, Mr Buchholz maintained that he wanted to get a role that would be more than a temporary fix from which he would have to hop in weeks or months. He wanted to get a role commensurate with his experience and which would put him in a better position than he was on Universal Credit and which would largely and more significantly mitigate his loss. He found that he could manage financially on a combination of Universal Credit (with the associated exemptions from Council Tax and some other bills), by borrowing from a family member and by selling possessions. He preferred to do this than lower his sights too early and, as he saw it,

potentially end up in greater financial difficulty with lesser prospects of a well-paid, long term role. Mr Buchholz has chosen not to claim the expenses of looking for work, the cost of any borrowing or any interest charged on his debts. He maintains that, overall, he has adopted a reasonable approach to the mitigation of his loss.

CONCLUSIONS

Basic Award

29. The basic award is agreed and calculated as set out in the Counter-Schedule

$$(6 \times 1.5 \times \text{£}525) + (8 \times 1 \times 525) = \text{£}8,925.00$$

Loss of Statutory Rights

30. Agreed £525.00

Loss of Earnings from Dismissal to Date

31. Mr Buchholz seeks his losses limited to 19 March 2021 on the basis which I have already set out at the outset of these Reasons. GEZE contends he has unreasonably failed to mitigate his loss and the period of full loss should be limited to 3 months after which he should give credit for a job earning in the region of £20/21,000 per annum gross.

32. I take the view that Mr Buchholz was reasonably entitled to limit his search for alternative work to engineering / technical roles remunerated at £24/25,000 - £34,000 gross (which it is agreed he earned as a basic salary with GEZE). I take the view it was reasonable for him to exclude warehouse type roles at or about £20/21,000 p.a. in the first phase of his search for work. I take that view because a) I find that he was reasonable to approach his job search on the basis he would rather wait longer but hope to significantly or entirely mitigate his losses and b) a claimant applying for work is likely to be less attractive as a candidate for specialised and better paid roles if he is working in unconnected and low level work and c) thirdly and finally, I am not satisfied that GEZE has proved that it was unreasonable for Mr Buchholz to choose to borrow and sell his possessions and to hold out for better paid work rather than take up national minimum wage work (or just above) which would put him in difficulties meeting his mortgage and other commitments.

33. Ordinarily, I may well not accept that a claimant was reasonable in maintaining that position for a year. I find, however, that this has not been an ordinary year. A truly exceptional, difficult and uncertain economic environment has persisted from March 2020 to March 2021. This was exactly the time in which Mr Buchholz found himself on the open labour market. In those circumstances, I am not satisfied it was unreasonable for him to take 12 months to try and find work at £24 - £25,000 per annum or above. He was, in my view, reasonably entitled to hope and expect that, as restrictions eased, the possibility of obtaining such permanent work increased. There have, of course, been a number of false dawns when it seemed the restrictions would come to an end and companies would be back operation in a more normal

way, only for restrictions to be reinstated in the Autumn and Winter of last year.

34. In all the circumstances, I do not accept he should have applied for retail, warehouse or driving jobs as contented for by GEZE during this period. On this issue I have had regard to the observations in the case of Wilding as to the standards to be applied to a claimant who is the victim of unfair dismissal. I find that he did apply for appropriate and lesser paid technician and operative roles. I am also satisfied that Mr Buchholz did all he reasonably could to find such lower paid work during this period. I accept his evidence that he registered all relevant agencies and that he has applied for something like 150 -200 roles with very limited success. Indeed, Mr Forrester did not produce any evidence or seek to argue that there were roles in these sectors at this level for which Mr Buchholz should have but did not apply.
35. Overall, therefore, I find that Mr Buchholz was not unreasonable in taking a period of 12 months during which he lowered his sights but did not include work wholly outside his area of expertise, in an unpredictable and fluctuating economic environment.
36. I do accept that, as the 12 month anniversary approached and in advance of it, GEZE has established that Mr Buchholz should have applied his mind to an alternative strategy and should have applied for alternative work to secure income in excess of his Universal Credit and associated benefits such as to reduce his overall level of loss. Had he done so, I am satisfied that, by the date of this hearing, he would have secured the type of work to which the respondent drew my attention in documents renumarated at / about £20/21,000 but that has not proved relevant for the purpose of assessing the compensatory award as, firstly, Mr Buchholz limited his claim to a 1 year period and, secondly, he secured work paying in the region of £30,000.
37. In the circumstances, and on the basis of the above findings, I award Mr Buchholz his full loss of earning to date. Calculated as follows:

52 weeks x £588.35=	£30,594.20
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Pension Loss to date

38. The above agreed net weekly figure did not include either Mr Buchholz's pension contributions or those made by his employer. Using the agreed figures in paragraph 6.4 above, I calculate that the contributions Mr Buchholz has lost to his pension over the last year as follows:

2 x 52 x £2.46 per week =	£2,751.84
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Postscript on Losses to Date

39. Before I come to the final adjustments and summary, I would like to insert a postscript / observation on this section on loss of earnings. GEZE did not argue (probably sensibly in my view) that the fact Mr Buchholz had a criminal conviction which may have impeded his search for alternative employment broke the chain of causation in the sense that the loss which he sustained was not sustained as consequence of his dismissal. Albeit therefore that issue

is not directly relevant to my decision, I do make the following observations. It seemed a sensible approach to me because, firstly, GEZE continued to employ Mr Buchholz after he was convicted. When it dismissed him, the dismissal was therefore the primary cause of his loss rather than his conviction. Further, while I imagine the conviction made it harder to secure alternative employment, given that only one putative employer directly identified it as the reason they had not considered him for the job, it would have been difficult to prove that it was the primary cause of his lack of success. Had the point been raised, I would not have been satisfied that I could fairly or properly say that this in some way broke the chain of causation of loss flowing from the dismissal.

Adjustments

40. I have applied the adjustments and calculated the total award as follows:

Basic award (as per para.29 above)	£8,925.00	
Less one third for 'contributory conduct'		£5,950.00
Compensatory Award		
Loss of statutory rights (as per para.30 above)	£525	
Increased by 5% (s.207A),	£551.25	
Less one third		£367.50
Loss of earnings to date (as per para.37 above)	£30,594.20	
Increased by 5%	£32,123.91	
Less one third		£21,415.94
Loss of pension to date (as per para.38)	£2,751.84	
Increased by 5%	£2,889.43	
Less one third		<u>£1,926.29</u>
Total Compensatory Award		£23,709.73
TOTAL BASIC AND COMPENSATORY		£29,659.73

41. The level of award is such that it is not necessary to consider either grossing up or the application of the statutory cap. The compensatory award for loss of earnings has, however, been made net (after deductions for tax or national insurance) on the understanding that, should any sums be owed to HMRC on this payment including in respect of Mr Buchholz's notional notice period, they would be payable by GEZE.

Employment Judge Connolly

Signed on 18 May 2021