EMPLOYMENT TRIBUNALS

Claimant: **Mr William Hall**

Respondent: **London Lions Basketball Club (UK) Limited**

Heard at: **East London Hearing Centre**

On: **28 May 2021 (by Cloud Video Platform)**

Before: **Employment Judge Hallen (sitting alone)**

Representation

Claimant: Mr D. Isenberg of counsel

Respondent: No Attendance

JUDGMENT

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was V by Cloud Video Platform. A face-to-face hearing was not held because the relevant matters could be determined in a remote hearing.

The judgment of the Employment Tribunal is that the Claimant is awarded £2, 193.92 for breach of contract.

REASONS

Background

1. The Tribunal found on 13 March 2019 that the Claimant was constructively wrongfully dismissed by the Respondent, the professional basketball club for which he played in the 2017/18 season. The Respondent also made unlawful deductions from his wages for one and a half months from the start of 2018, failed to pay him holiday pay at the termination of his employment and failed to provide him with statutory written particulars of the terms and conditions of his employment.

2. Following the promulgation of the Tribunal Judgment, the Claimant appealed to the Employment Appeal Tribunal on two grounds, namely, that the Tribunal erred in law in limiting the Claimant's damages for repudiatory breach of contract to the 14-day period referred to in clause 24 of the employment contract and Tribunal erred in law in halving the Claimant's entitlement to holiday pay on the basis of the number of hours he worked on average per week. There was no appeal by the Respondent club.

3. Judge Mansfield QC, sitting alone as a Deputy High Court Judge in the Employment Appeal Tribunal (EAT) allowed the Claimants appeal on both grounds. The EAT's determination on Ground 2 (holiday pay) was not relevant to the present hearing, as, having allowed the Claimants appeal, the EAT proceeded to substitute its decision for that of the Employment Tribunal, and ordered the Respondent to pay the Claimant £1,337.54. That decision finally disposed of Ground 2. In respect of Ground 1, however, Judge Mansfield QC ordered that: "*On Ground 1, the assessment of damages for wrongful dismissal shall be remitted to the same Employment Tribunal for rehearing unless in the view of the learned Regional Employment Judge factors emerge which render such an arrangement impracticable or impossible in which case the matter be remitted to be heard by a differently constituted Tribunal as directed by the Regional Employment Judge. Such damages are to be assessed in accordance with the principles set out in the Employment Appeal Tribunal's judgment*."

4. Those principles can be summarised as follows: The starting point for an award of damages for wrongful dismissal in the case of a fixed-term contract would be "*what the innocent party, the employee, would have received over the remainder of the fixed term period*". In this case, "*the Respondent had no right to terminate the contract before the end of the fixed term period*". In this case, termination of the employment contract was a constructive wrongful dismissal. In those circumstances (i.e., acceptance of repudiation at common law), "*it was appropriate for the ET to go on to determine damages in the ordinary way…The enquiry for the ET should have been what loss did the Claimant suffer from being deprived of the right to continue to be employed for the remainder of the fixed term*".

5. On disposal, the EAT felt it was unable to conclude what the result would have been relying only on the Employment Tribunal's findings supplemented only by undisputed or indisputable facts. Certain relevant facts were clear and/or undisputed: It was clear from the Employment Tribunal's judgment that "*the rate at which wages would have accrued, and the accommodation allowance would have accrued were not in dispute between the parties*". Further, it was an undisputed fact that the end of the season was on 20 May 2019. However, "*the real difficulty in this case is mitigation*". The EAT explained: "*The Claimant accepts that he was under a duty to mitigate his loss during the period, and he gives credit for what he says in his schedule of loss were the sums that he earned. The Respondent challenged the mitigation position in its counter schedule of loss on two grounds. The arguments raised may or may not have been good ones but the problem for the EAT was that the ET made no findings whatsoever as to the Claimant's earnings, and no findings whatsoever as to whether or not his alterative earnings were reasonable mitigation or whether other or steps should have been taken.*" On this basis, the EAT remitted the matter back to the Employment Tribunal "*to make findings on the proper basis as to loss for the remainder of the fixed term*".

Remitted Remedies Hearing at the Employment Tribunal

6. On the basis of the matters set out above, there was only one issue of limited scope to be determined by the Employment Tribunal at this remitted hearing. This was recognised by the Tribunal's letter of 5 January 2021, which stated: *"The Tribunal will consider the question of the assessment of damages for the Claimant from 14 February 2018 to 20 May 2018; the Tribunal will consider submissions from both parties on this question but it will not hear any evidence, as the evidence was presented at the original hearing on 14 and 15 February 2019*." As such, the Tribunal had already heard all the relevant evidence, and was only required now to determine, on the basis of that evidence and the principles set out by the EAT, what loss was suffered by Mr Hall by his constructive wrongful dismissal over the period from 14 February 2018 to 20 May 2018.

7. At the hearing the Tribunal had before it the original bundle of documents prepared by the Claimant which contained the substantive documentation as well a supplementary shorter bundle of documents prepared by the Respondent. The Tribunal also had in front of it the witness statement for the Claimant and a witness statement in respect of Vince Macaulay, the Respondent's managing director. In addition, the Tribunal had before it a supplementary bundle produced for this remedy hearing by the Claimant, a bundle of authorities produced for this remedy hearing and the Claimant's written submissions.

Tribunal's Conclusions

8. At the beginning of the hearing the Claimant made an application under rule 47 of the Employment Tribunal Rules of Procedure for the hearing to proceed in the absence of the Respondent. This rule permits the Tribunal to proceed in the absence of a party if the Tribunal considers any information that is available to it after any enquiries that may be practicable about the reasons for the Respondent's absence.

9. The Tribunal decided to proceed in the Respondents absence on the basis that the Claimant had waited for three years since his dismissal for a conclusion to these proceedings and should not be prejudiced any further for the unexplained and justified absence of the Respondent at the hearing. Furthermore, the Tribunal inferred from the Respondents absence from the hearing that it did not intend to participate especially given the Respondents debarral from the Employment Appeal Tribunal proceedings for failure to participate in those proceedings. In addition, the Employment Tribunal file was reviewed and it was noted that the case was originally listed for the remitted remedies hearing on 25 January 2021 and was postponed on the application of the Respondent because the managing director was out of the country. The Tribunal consulted with the parties to arrange the current remedy hearing and the Respondent indicated that it would be able to attend it. It was noted that there was no application made by the Respondent for a postponement of the hearing and the Tribunal was satisfied that the Respondent was notified of the hearing. The Tribunal waited for 30 minutes at the commencement of the hearing to allow the Respondent to connect to the hearing remotely during which time the Claimant's solicitor had made email and telephone contact with the Respondent's managing director to inform him to make an urgent connection with the hearing. No such connection was made and indeed no contact was

made at all to the Tribunal to explain the Respondents absence.

10. With regard to the remaining remedies issue, as the EAT observed, the rate at which Mr Hall's wages and accommodation allowances would have accrued "*were not in dispute between the parties*". The real issue for the Employment Tribunal, therefore, was mitigation.

11. The starting point was that the burden of proof was on the wrongdoer – here the Respondent – to demonstrate that the Claimant had failed to mitigate his loss: *Cooper Contracting Ltd v Lindsey* [2016] ICR D3; *Wilding v British Telecommunications plc* [2002] ICR 1079. The Respondent's case on mitigation appeared in its Counter-Schedule of Loss at paragraph 7: "*The claimant's suggestion of mitigating his losses by signing for another club are challenged. On the basis that the claimant had refused a very generous and conciliatory offer which would have allowed him to receive a significant pay off from us as well as sign for his previous club he would have made significantly more money in the same period. Our suggestion is that the claimant took advantage of a situation in Glasgow due to a shortage of players during the Commonwealth Games to make more money whilst also claiming from us*."

12. Further, in its Written Closing statement before the Employment Tribunal, the Respondent said: '*Once Mr Hall had terminated his agreement with the Respondent, he signed for another club "almost immediately*"; "*We accept that Mr Hall should be paid for the period January through to the 19th of February when he signed for his new club but not that he should be paid any further as he made himself unemployable by working elsewhere whilst also being paid to do that work by his new employers*". "*Is it reasonable to be paid twice for the same job? In effect this is what would happen if the Claimant's argument were to succeed, not just that but in effect an identical contract*".

13. The Tribunal found that the Respondent's case on mitigation was thin and vague based on the above statements. If anything, it supported the Claimant's position – pointing out that he, prudently, and in line with his obligations to mitigate his loss, sought alternative employment promptly, and was able to secure this within a week of his resignation. That employment then commenced on 23 February 2018.

14. Insofar as the Respondent relied on any conduct or offer before the Claimant's dismissal and suggested that the Claimants' failure to accept any such offer constituted a failure to mitigate, the Tribunal found that it was not permitted to do so: the duty to mitigate arises only after dismissal: *Shindler v Northern Raincoat Co* [1960] 1 WLR 1038, 1048.

15. The Tribunal found that beyond bare assertion, the Respondent had not led an evidence-based case on failure to mitigate. The Respondent did not put its case on mitigation to the Claimant in cross examination, nor did it seek in cross-examination to undermine the Claimant's evidence on the steps he took to mitigate his losses.

16. By contrast, the Tribunal accepted the Claimants case on mitigation which was clear: He resigned on 14 February 2018, and took prompt steps to mitigate his loss, commencing the next day (by speaking to a former team-mate): He signed his contract with Glasgow Rocks on 20 February 2018, which commenced on 23 February 2018: Mr Hall's contract with Glasgow Rocks was for the remainder of the season, under which

Mr Hall would be paid £3,800 net, paid in instalments. Aside from his witness statement, Mr Hall also made this clear in his Schedule of Loss; and in his Written Closing statement. The Tribunal found that the Claimant acted responsibly and promptly to mitigate his loss. The Tribunal also found that the Respondent could not complain about the level of the Claimant's pay at his new employer: while he received £1,800 net of tax in salary (plus benefits) from the Respondent, he received £3,800 net from Glasgow Rocks – approximately £1,267 net per month. The Tribunal found that it was not unreasonable for the Claimant to accept this in the context of a mid-season transfer. Moreover, the Claimant's evidence on mitigation, including any arguments as to reasonableness, were not challenged by the Respondent in cross-examination or otherwise and the Respondent did not make any oral submissions on mitigation in its closing oral submissions.

17. The Tribunal reminded itself that that burden was on the Respondent to demonstrate that the Claimant had failed to mitigate his loss, not on the Claimant to prove that he had. For the reasons set out above, the Tribunal concluded that insofar as he was under a duty to take reasonable steps to mitigate his losses, that duty was discharged by signing with Glasgow Rocks on 20 February 2018.

18. The Tribunal also found that during his employment at the Respondent the Claimant received the benefit of a health club membership valued at £57.95 per month. This was a point on which the Employment Tribunal did not make a factual finding either way in its original judgment. On that factual question, it was the Claimant's evidence that he received health club membership as part of his employment at the Respondent, valued at around £58 per month. The Respondent's case on the issue was presented in its Counter Schedule of Loss, that the value of the Claimant's health club membership should not be included in an award "*as was provided by sponsor*". Notably, the Respondent did not challenge that the Claimant enjoyed the benefit as a result of his employment at the Respondent, but only who in fact made the payment. This latter point was irrelevant – even if the Respondent did not make the payments; they ceased as a result of the Claimant's dismissal; and were thus losses attributable to the Respondent's repudiatory breach. The Claimant's evidence on this was unchallenged by the Respondent under cross-examination, and accordingly the Tribunal accepted the Claimant's evidence.

19. Based on a finding that the Claimant's employment with Glasgow Rocks was not unreasonable mitigation, the Tribunal found that applying the 15% ACAS uplift originally awarded by the Tribunal the damages suffered by the Claimant from 14 February 2018 to 20 May 2018 constituted the following:

Losses:

Wages and accommodation allowance (£2,100 monthly = £484.62 weekly) x 13.57 weeks = £6,576.29 (net)

Health club membership (£57.95 monthly = £13.37 weekly) x 13.57 weeks = £181.47 (net)

Total loss (pre-mitigation) = £6,757.76

Total loss (post-mitigation) = £6,757.76 - £3,800 = £2,957.76

Total loss (post-mitigation, post-uplift) = £2,957.76 x 1.15 = £3,401.42

The Claimant has successfully sought recovery of the amount of £1,207.50 via enforcement action in the civil courts.

He is awarded his total outstanding loss (post-mitigation, post-uplift) of **£2,193.92**.

Employment Judge Hallen
Date: 1 June 2021