EMPLOYMENT TRIBUNALS

Claimant: Mr J Hajati

Respondent: WM Morrison Supermarkets PLC

Heard at: Manchester (in person/by CVP) **On:** 5 and 6 July 2021

Before: Employment Judge Slater
(sitting alone)

REPRESENTATION:

Claimant: In person
Interpreter (Dari): Mr S Aman
Respondent: Mr M Salter, Counsel

JUDGMENT having been sent to the parties on 8 July 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. This was a remedy hearing, following judgment that the claimant was unfairly dismissed. Judgment on liability was given orally, with reasons, on 28 April 2021 and the judgment was sent to the parties on 29 April 2021. Written reasons were not requested for that judgment.

2. The claimant confirmed, at the liability hearing, that he still wished to seek reinstatement or re-engagement. Case management orders were made to prepare the case for a remedy hearing and were sent to the parties on 29 April 2021.

3. This hearing was held partly by video conference. The claimant and I were in the Tribunal hearing room and the respondent's representative, Mr Passman and the interpreter joined by video conference.

4. I had to decide, at this remedy hearing, whether to order re-instatement or re-engagement, which was opposed by the respondent. If I did not order that the respondent should re-employ the claimant, I had to consider what compensation to order the respondent to pay.

Evidence

5. I heard evidence from the claimant and from Mr Passman for the respondent. Although I had made case management orders which allowed the claimant to provide his witness statement to the Tribunal in his first language, Dari, and the Tribunal would then arrange for its translation into English, the claimant chose to provide his statement in English.

6. There was a remedy bundle of documents in hard copy and electronic form. The documents and Mr Passman's witness statement were in English. The claimant had informed me, at the liability hearing, that he would be able to get help from his daughter to understand the respondent's statements and the documents in English which were sent to him. However, when I checked with the claimant that someone had read Mr Passman's statement to him so that he understood it, he said they had not; his daughter had meant to read it to him but she had exams and he did not have anyone else to read it to him. Mr Passman, therefore, read out his witness statement, which was interpreted sentence by sentence. When the claimant was referred to any documents, the relevant parts were read out and interpreted.

Facts

7. The claimant was employed by the respondent from 2004 until his dismissal, which took effect from 13 November 2019. He was employed at relevant times as an ambient warehouse order picker although, from 2015, it was agreed that he worked on hygiene and transport. This was an adjustment to take account of his back and neck problems.

8. It is agreed that the claimant suffered from serious neck and back problems. The claimant had returned to work in August 2019 after a lengthy absence certified by the GP for physical health problems. He then had periods of paternity leave and annual leave before starting sick leave. That sick leave started on 31 October 2019 and was certified as due to stress. It started after disciplinary proceedings had started and continued until dismissal.

9. No medical evidence has been produced at this remedy hearing to show that the claimant has been unfit for work for the period from his dismissal until now. It was necessary for Mr Salter and the Judge to ask the claimant a considerable number of questions to try to establish whether or not the claimant considered he had been unfit for work since his dismissal. The claimant said his mental health had improved since the Tribunal's decision in April, and his health was a bit better. When asked if he was saying he was still unfit for work, he said he would have to go and see if his health was better or not, and he did not know because he had not worked yet. Ultimately, in answer to the Judge's questions, the claimant said he had not applied for any jobs since his dismissal because of physical problems and because of suffering from stress.

10. On the evidence available, I am not satisfied that the claimant has been incapable of any work since his dismissal. I note that the Occupational Health report of 9 October 2019, which was the last Occupational Health report obtained, expressed the opinion that the claimant was fit to work on his current (that is adjusted) duties when he finished annual leave on 8 October 2019.

11. I find that the claimant's physical condition would have allowed him to continue working on similar duties to his adjusted role i.e. on hygiene and transport duties. I find that he was not fit to carry out the full picking and packing role.

12. I note from page 164 that, in January 2021, the claimant was informed he would be offered an appointment with a counsellor from the Stoke Wellbeing Team. He was to start therapy appointments. I accept, based on this and the claimant's evidence, that the claimant has been suffering from mental health problems. However, the evidence available to me is not sufficient for me to find that he has been unfit for any work due to mental health issues since his dismissal. As noted previously, the claimant has not applied for any jobs since being dismissed.

13. The claimant did not apply for benefits until March 2020 and has received Universal Credit for the period from 12 March 2020 until now.

14. The claimant has held some very negative views of the respondent over a considerable period. He continues to hold these views. These include a belief that the respondent treats preferentially people of Eastern European origin over people of his own ethnic origin. It was not necessary at the liability hearing to make findings of fact as to whether there was any truth in the claimant's allegations in this respect, and again I do not do so.

15. The claimant continues to blame the respondent for a number of accidents which he suffered at work. As noted at the previous hearing, he made a personal injury claim relating to the injury he suffered in 2015, and the respondent admitted liability.

16. Although the claimant had said at the previous hearing, following judgment on liability, that he was applying for reinstatement or re-engagement, it was unclear at times during this hearing whether this was something he really wanted. Eventually, after being given a number of opportunities to clarify his position and time to think about this, the claimant said he did want to go back to work for Morrisons. The hygiene or cleaning work with which the claimant was previously involved for about 50% of his time has, following his dismissal, been outsourced to a third party. An employee of the respondent who was engaged on this work transferred to the employment of the third party. The other element of the claimant's work on adjusted duties, the transport work, is still done within the respondent organisation by employees of the respondent. However, Mr Passman says the respondent is currently reviewing opportunities for improving efficiencies with this work by introducing automation, so there may be a diminished requirement for this task moving forward. LGV work, in which the claimant expressed an interest, is not done by employees of the respondent but by a third party.

17. Members of the respondent management continue to hold negative views about the claimant. I concluded, at the liability hearing, that Mr Ackroyd, Mr Vescio and Mr Passman held a genuine belief that the claimant was taking sick leave when he was not genuinely ill. I concluded that they were understandably suspicious about the claimant not having periods of sick leave during the live final written warning, although I concluded that the claimant had provided a possible plausible explanation in that he was able to take substantial periods of holiday in that time. I accept Mr Passman's evidence that members of the respondent's management do not feel able to trust the claimant.

18. The claimant completed 15 years' service with the respondent in February 2019. Had he not been dismissed, he would have received a long service award of £300 in his pay for November 2019. This would have been a one-off payment. Had he completed a further five years in service, he would then have received another one-off payment. The claimant agreed in evidence that what he described in his written statement as a Christmas bonus was, in fact, the long service award.

19. The respondent pays a discretionary profit share, or colleague bonus, to employees of the respondent. On the basis of Mr Passman's evidence, I find that in April 2020 this was 1% of pay for employees at Gadbrook. I find it was 6% in April 2021. The claimant sought payment for holidays. Payment for this would be included in his normal pay. The claimant did not satisfy me that there were any additional payments as detailed in numbers 10, 11 and 12 on page 225.

20. On page 226 the claimant referred to a gift and free food at Christmas time. He did not say what value this had.

21. I find that the claimant's gross weekly pay with the respondent was £573 and his net weekly pay was £441.75, as set out by the respondent in its counter schedule of loss. The claimant, in his claim form, gave his gross pay as £2450 per month, the weekly equivalent of which is £565.38, and his net pay as £1800 per month, the weekly equivalent of which was £415.38. I took the higher figures provided by the respondent as being more beneficial to the claimant.

The Law

22. The possible remedies for unfair dismissal are reinstatement, re-engagement or compensation. Re-instatement is going back to the same job with the respondent. Re-engagement is returning to work for the respondent in a different role. If the claimant wants to be reinstated or re-engaged I have to consider the remedies in the following order: reinstatement, re-engagement and, finally, compensation, moving on to the next remedy if I decide not to order the previous one.

23. Section 116 of the Employment Rights Act 1996 sets out things that I must consider in exercising my discretion as to what order to make. In considering whether to order reinstatement, I have to take into account whether the claimant wishes to be reinstated, and whether it is practicable for the employer to comply with an order for reinstatement. I have to do the same for re-engagement.

24. If I order reinstatement or re-engagement, I must also make an order for backpay to be paid.

25. If I do not order reinstatement or re-engagement, then the compensation to be awarded is in two parts – the basic award and a compensatory award.

26. The basic award is calculated according to a formula set out in section 119 of the Employment Rights Act 1996. This provides that there will be 1½ weeks' pay for a year of employment in which the employee was not below the age of 41, and one week's pay for other years of employment in which he was not below the age of 22. A week's pay is subject to a statutory limit which, at the relevant time, was £525.

27. In accordance with section 122(2) of the Employment Rights Act 1996, where the Tribunal considers that the conduct of the claimant before the dismissal was such that it would be just and equitable to reduce the amount of the basic award, the Tribunal may make such a reduction.

28. In accordance with the provisions of section 123 of the Employment Rights Act 1996, the amount of the compensatory award is to be such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the claimant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer. Subsection 2 provides that the loss shall be taken to include any expenses reasonably incurred by the claimant in consequence of the dismissal.

29. Rules 74-79 of the 2013 Rules of Procedure set out the provisions relating to costs and preparation time orders. Normally, costs may only be awarded where a party has acted vexatiously, abusively, disruptively or otherwise unreasonably, or where the claim or response had no reasonably prospect of success, or where there has been a postponement shortly before the hearing. However, under rule 76(5) a Tribunal may make a costs order of a type described in rule 75(1)(c). This can be made where a witness has attended or been ordered to attend to give evidence at a hearing. There is no requirement for unreasonable behaviour or any of the other types of behaviour to be able to make that type of order. Rule 75(1)(c) provides that payment can be made to another party or a witness in respect of expenses incurred or to be incurred for the purpose of or in connection with an individual's attendance as a witness at the Tribunal.

30. Dismissed employees are under a duty to take reasonable steps to keep their loss of earnings as low as possible. This is called the "duty to mitigate loss". The burden is on a respondent to satisfy the Tribunal that a claimant has not taken reasonable steps to mitigate his loss.

Conclusions

Reinstatement and re-engagement

31. Although the claimant seemed at times uncertain about his wishes, he did ultimately confirm that he wished to return to work for the respondent, despite his continuing negative views about them. I take into account this wish to be reinstated

or re-engaged by the respondent. For the reasons which follow, I conclude it would not be practicable for the claimant to be reinstated or re-engaged.

32. My principal reason for this is that I conclude that trust and confidence has broken down between the parties. This is the case from both sides. The respondent's managers do not trust the claimant, and the claimant holds very negative views of the respondent. His negative views are not restricted to a few individual managers. I do not consider that, in these circumstances, it would be practicable for the claimant to return to work for the respondent in any capacity. In addition, the hygiene duties which the claimant had been doing have now been contracted out. Although this was not the entirety of his adjusted duties, this would cause significant difficulties in finding sufficient light duties for the claimant to perform. The LGV role is not available since this is not carried out by employees of the respondent.

33. For these reasons I decline to order reinstatement or re-engagement.

Compensation

34. I, therefore, consider what compensation should be paid to the claimant.

Basic Award

35. The basic award is calculated according to the statutory formula based on the claimant's age at the effective date of termination (which was 43), his years of service (which were 15), and his week's pay, subject to the statutory maximum on a week's pay. His gross week's pay was £573 but the statutory maximum on a week's pay at the relevant time was £525. 1½ weeks' pay is given for years of service at age 41 and above, and one week's pay for years below that, but not below the age of 22. The calculation is therefore as follows: two years at 1½ weeks' pay x £525 = £1,575. The remaining 13 years are at one week's pay for each year of service, so 13 x £525 = £6,825. These two figures added together give a basic award of £8,400.

36. The respondent has submitted that the claimant's conduct was such that it would be just and equitable to reduce the amount of the basic award in accordance with section 122(2) of the Employment Rights Act 1996. I do not consider that having a suspicious pattern of absences is enough by itself to give rise to such a reduction. Having regard to the reasons for my liability decision, I do not consider that facts have been proved which establish conduct on the part of the claimant which would allow for such a reduction.

Compensatory Award

37. As I previously noted, the burden is on a respondent to satisfy the Tribunal that the claimant has not taken reasonable steps to mitigate his loss. The respondent has produced information about a number of jobs in the areas local to the claimant, similar to the warehouse job in which the claimant was employed by the respondent. However, it appears to me from these adverts that the jobs are for

the type of work that the claimant did prior to the adjustment of his duties rather than the type of work he was doing on adjusted duties.

38. Mr Salter said, in response to this point, that any new employer would have obligations towards the claimant in the light of his injuries. It is true that, if the claimant is disabled within the meaning of the Equality Act 2010, which is a matter on which the Tribunal has not been required to decide, any employer would be under a duty to make reasonable adjustments. However, it is not self-evident that it would be reasonable for a new employer to adjust the duties to provide the claimant, in effect, with a different job to that advertised.

39. I conclude, therefore, that the respondent has not satisfied me that the claimant has failed to mitigate his loss by not applying for the type of jobs which are set out in the material included in the bundle. The respondent has not suggested that the claimant has failed to mitigate his loss by not seeking any other form of employment.

40. I conclude that the respondent has not discharged the onus on it of satisfying me that the claimant has failed to take reasonable steps to mitigate his loss in the period to date.

41. I found that the claimant did not satisfy me that he has been incapable of work of any kind since his dismissal due to his mental and physical health. I conclude, however, that there may be difficulties in the claimant finding suitable work because of his physical health problems and his limited skills and experience, including limited skills in speaking and writing English. In the course of the last year, the pandemic has made obtaining work for many people particularly difficult, and there has been great competition for relatively low level work. However, the economic situation is improving. I conclude that the claimant, with reasonable efforts, should be able to obtain work with comparable pay within a further six months from today's date.

42. I conclude that the compensatory award should compensate the claimant for his basic pay and the following further elements:

(1) Employer's pension contributions at 5% of salary;

(2) The long service award of £300 which would have been payable in November 2019;

(3) Profit share payable in or around April 2020 and April 2021.

43. The claimant has not satisfied me that there were any other payments or benefits which would have been paid to him, or alternatively has not proved the value of such benefits, so I cannot include them in the calculation.

44. I conclude that an award of £400 for loss of statutory rights is appropriate.

45. The claimant wrote and spoke at length of stress caused to him and his family by the respondent's actions. As I explained to the claimant on a number of occasions, the Tribunal has no power to make an award of compensation for stress suffered because of unfair dismissal.

46. At pages 239 and 240 the claimant set out a number of expenses he says he incurred. The claimant has not provided documentary evidence of the expenses on post and photocopying. If such expenses could be considered to be expenses reasonably incurred in consequence of his dismissal and, therefore, part of the compensatory award, I do not include any amount for this in the compensation because the claimant has failed to prove the specific loss.

47. I am not satisfied that the visits to the hospital and petrol costs for that were expenses reasonably incurred in consequence of the dismissal. The letters from the hospital were about prior injuries which were not matters in dispute. The visits from Stoke to Northwich for the disciplinary and appeal hearings were prior to his dismissal. They cannot have been incurred in consequence of his dismissal.

48. I do not consider that costs for the meeting with the union prior to his dismissal were expenses reasonably incurred in consequence of his dismissal.

49. The petrol and car parking charges for attending the Tribunal I deal with under the heading of "costs".

50. The respondent argued that compensation should be reduced because of the conduct of the claimant. I do not consider that any culpable and blameworthy conduct on the part of the claimant has been proved. I do not, therefore, consider there is any basis for reducing the compensatory award for contributory conduct.

51. Mr Salter also argued that the compensatory award should be reduced in some way under what is called the "**Polkey**" principle. This would require me to consider the chances that the claimant would have been fairly dismissed either at the time he was or at a later date, if the respondent had gone about matters in a fair way. Mr Salter's arguments were based on the procedural failure I found in relation to continuing without an interpreter at the second appeal hearing. However, from the reasons I gave for my finding on unfair dismissal, this was an additional matter, adding to my conclusion already reached on other grounds that the dismissal was unfair. Mr Salter did not provide any arguments as to the basis on which I could reduce compensation under this principle, given the conclusion I had reached on unfair dismissal. This conclusion was that the dismissal was unfair because the respondent's genuine belief was not based on reasonable grounds after a reasonable investigation, and the decision to dismiss the claimant for misconduct fell outside the band of reasonable responses. I do not consider that the circumstances are such that I can sensibly recreate how the world would have been had the respondent acted fairly. I do not, therefore, consider that I can make any reduction of compensation under the **Polkey** principle and do not do so.

52. When I calculate the compensatory award the total amount of it exceeds the limit set out in section 124(1ZA) of the Employment Rights Act 1996, so I have to apply that cap. The cap applicable to the claimant is 52 weeks' pay, and there is no limit on a week's pay for this purpose.

53. Since the claimant has claimed Universal Credit, the Recoupment Regulations apply.

54. The calculation of compensation is as follows.

Loss to today's date

The prescribed element:

(1) 14 November 2019 to 6 July 2021 is 86 weeks. Loss of pay is calculated using a net weekly pay figure for these purposes. The claimant's net weekly pay was £441.75. 86 x £441.64 = £37,990.50.

(2) The long service award is £300.

(3) Profit share for April 2020 calculated as 1% of net annual pay is £230.

(4) Profit share in April 2021 calculated as 6% of net annual pay is £1,378.

(5) This makes a total prescribed element before reduction of £39,898.50.

Employer's pension contributions

(6) Employer's pension contributions at 5% of gross pay would be £28.65 per week. So, loss of employer's pension contributions to date is 86 x £28.65 which is £2,463.90.

Total loss to date

(7) This makes the total loss to date, before reduction, £42,362.40.

Future loss

(8) I am awarding future loss for 26 weeks. Loss in this period will be made up of loss of basic pay and employer's pension contributions. The loss of basic pay is 26 x £441.75 which is £11,485.50.

(9) The employer's pension contributions are 26 x £28.65 which is £744.90.

(10) The total future loss is £12,230.40.

Total compensatory award before application of the statutory cap

(11) The total compensatory award before application of the statutory cap is £54,992.80. This is the total of the total loss to date, the total future loss and £400 for loss of statutory rights.

55. This compensatory award exceeds the maximum amount I can award. The maximum compensatory award for the claimant is 52 x his gross weekly pay of £573 giving a total of £29,796.

56. The total award of compensation for unfair dismissal is, therefore, the basic award of £8,400 plus the compensatory award of £29,796 giving a total award of £38,196.

57. Because I have applied the statutory cap to arrive at the prescribed element for recoupment, I have to reduce the prescribed element by a formula. The formula is the unreduced prescribed element x a year's pay/ the unreduced compensatory award i.e. 39898.50 x 29796/54992.80 = £21,618. The prescribed element for the purposes of the Recoupment Regulations is £21,618.

Costs

58. Finally, I deal with the matter of costs.

59. The claimant has not satisfied me that any of the circumstances in rule 76(1) apply. However, I can make an award under rule 76(5).

60. Mr Salter has argued that this provision does not allow an award of costs for the attendance of a party as a witness as opposed to a witness who is not a party. However, I consider the wording of rule 75(1)(c) makes it clear that such an award can be made in respect of expenses incurred for an individual party's attendance as a witness at the Tribunal.

61. I, therefore, conclude that I can make an award of costs for the car parking and petrol expenses for the claimant and his other witnesses to attend the Tribunal, and I consider it appropriate to make such an award. The costs are as follows:

(1) For car parking – seven occasions at £32.50 each, making a total of £227.50.

(2) For petrol – six journeys at £20 each, making a total of £120.

62. The total costs to be paid by the respondent are therefore £347.50.

Employment Judge Slater
Date: 22 July 2021

REASONS SENT TO THE PARTIES ON
26 July 2021

FOR THE TRIBUNAL OFFICE