EMPLOYMENT TRIBUNALS

Claimant: Mr R Rawlings

Respondent: Pro Cam CP Limited

Heard at: Bury St Edmunds (CVP) **On:** 4 October 2021

Before: Employment Judge S Moore

Appearances
For the Claimant: Mr D Hobbs, Counsel
For the Respondent: Mr M Duggan QC, Counsel

This has been a remote hearing on the papers to which the parties/consented did not object. The form of remote hearing was CVP. A face-to-face hearing was not held because it was not practicable and all matters could be determined in a remote hearing.

JUDGMENT

(1) The Claimant's basic award is £3,150.
(2) The Claimant's compensatory award is £23,503.
(3) The Claimant's total award (allowing for a repayment from the Claimant to the Respondent of £334.62) is £26,318.

REASONS

1. This was a remedy hearing following the Claimant's successful claim for constructive unfair dismissal (sent to the parties on 7 July 2021). I heard evidence from the Claimant, and for the Respondent from Ms Diane Heath (DH), Managing Director, and I was also referred to a bundle of documents.

2. Despite the gulf between the parties at the outset of the hearing, it quickly became apparent that the issues between them were in fact relatively narrow.

(i) Matters that were common ground or agreed during the hearing

3. First, it was agreed that the Claimant's basic award was £3,150.

4. Second, it was common ground that the Claimant resigned from the Respondent on 14 June 2019 and started with his new employer, Zantra, on 21 June 2019. Furthermore, both roles attracted the same basic annual salary of £55,000 (gross) and came with like for like benefits of (i) a company car, (ii) life insurance; and (iii) private medical insurance.

5. Third, it was quickly established that the Claimant received the same pension benefits from Zantra as he had received from the Respondent, and that his pension loss was limited to the two months of July and August 2019 (before Zantra began to pay contributions towards his pension) namely £458.34.

6. Fourth, it was agreed that, had the Claimant remained employed by the Respondent, he would have received a bonus of £8,843.44 (gross) in October 2019 in respect of the 2018/19 cropping year and that he would not have been eligible to receive a comparable bonus from Zantra (or a bonus at all) because he was not employed by Zantra during the 2018/2019 cropping year.

7. Fifth, it was common ground that in addition to his agronomy role, at the time of his dismissal the Claimant was also employed by the Respondent in a mentoring role in respect of which he was paid an annual salary of £20,000 (gross) and that he had no such comparable role (or salary) with Zantra.

8. Sixth, the Claimant agreed that he had been overpaid his last salary payment by the Respondent and owed it by way of repayment, £334.62.

9. Seventh, the Claimant agreed that he had received a sum in the region of £825 (net) from Zantra in respect of commission on the sale of seeds.

10. Eighth, the Respondent did not seek to argue that the compensatory loss should be limited to a period of less than one year (to June 2020).

11. Nine, while the Claimant sought to extent the period of compensatory loss to June 2021, he did not seek to claim any loss attributable to loss of bonus payable in October 2020 (recognizing that he would not have been paid a bonus for the 2019/2020 cropping year by the Respondent even if he had remained employed by them).

(ii) Issues remaining in contention

12. First, the Claimant sought to claim £200 in respect of a claim for fuel expenses between 1-14 June 2019 (the expenses point).

13. Second, and more substantially, the Claimant sought to claim loss of salary in respect of the mentoring role between 1 July 2020 and June 2021 (the mentoring role point).

14. Third, the Claimant argued that his compensation should be increased by 25% by reason of the Respondent's failure to follow the ACAS Code while the

Respondent argued that any compensation should be reduced by 25% because of the Claimant's failure to follow the ACAS code.

15. It is convenient to address the expenses point and the mentoring role point at the outset, then calculate the compensatory award before addressing the arguments in respect of uplift/reduction.

(iii) <u>The expenses point</u>

16. The Claimant claimed £200 in respect of an expense claim for fuel he said had submitted to the Respondent in June 2019 (referable to his two weeks of employment from 1-14 June 2019). Ms Heath agreed that agronomists were entitled to be reimbursed their fuel expenses (incurred travelling between jobs) and that such expenses were typically in the region of £400-£600 per month. Unfortunately, however, this claim had only made shortly before the remedy hearing, the Claimant had no record of his claim nor of the journeys to which it related and could not remember the precise amount he had claimed for. He also said in evidence that having made the claim in June 2019, he had never subsequently chased it up. The Respondent had no record of the claim having been made.

17. In these circumstances, I am not satisfied the Claimant has proved he is entitled to be paid the £200 now claimed. The evidence establishes he had the right to be reimbursed any reasonable fuel expenses claimed from the Respondent in respect of the first two weeks of June, but a mere vague and unsubstantiated recollection of making such a claim, falls short of establishing the Claimant's right to be reimbursed the particular sum of £200.

(iv) <u>The mentoring role point</u>

18. Here the issue between the parties was whether the Claimant's mentoring role would have come to an end on 30 June 2020. The Claimant's position was that the mentoring role could only have been brought to an end on 30 June 2020 by agreement and/or that the Respondent could only have ended the role following a fairly conducted review, and that there was no evidence before the Tribunal that his performance in the mentoring role would have justified the Respondent terminating it.

19. The liability judgment refers to the relevant documentation in respect of the mentoring role. From those documents and the evidence given at both the liability and remedy hearing I find that the mentoring role was a fixed term contract for three years, initially commencing in April 2016 at a salary of £10,000 before being replaced by a further fixed term contract for three years commencing 1 July 2017 at a salary of £20,000. I note that the Claimant's letter of 5 July 2017 states "we understand that our positions have been agreed for a period of three years, after which they may be extended or withdrawn by agreement". However, I do not accept this shows that the parties agreed the mentoring contract could only be withdrawn at the end of three years with the Claimant's agreement. Such an interpretation would entirely have undermined the plainly intended 3-year nature of the agreement and no reasonable person

would have understood the parties to be contracting on this basis. Furthermore, the reference to a "review" is to a review after year one, which in the event did not happen, and there was no contractual obligation on the Respondent to formally review the mentoring agreement at the end of the three-year period. No doubt the Respondent would in fact have reviewed the situation at the end of the three year period, in order to decide whether it wanted to offer the Claimant a continuation of the arrangement, but it is abundantly clear from Ms Heath's evidence, both at the liability and remedy hearing, that the upshot of that review would have been to allow the fixed term contract to expire on 30 June 2020 as it is plain that she wanted to end the Claimant's mentoring role and payment of the associated salary at the earliest opportunity.

20. It follows from this that I find the Claimant's mentoring role would have come to an end on 30 June 2020 and therefore that he suffered no losses in consequence of his dismissal after that date.

(v) Calculation of compensatory loss

21. Calculating the Claimant's compensatory loss requires calculating the sum of his loss of bonus and loss of mentoring salary between 14 June 2019 and 30 June 2020, and subtracting from that the additional sums he earned from Zantra during the same period in respect of commission on sales of seeds etc. Mr Hobbs submitted that the most accurate way of calculating that loss was by reference to the Claimants P60s. Mr Duggan QC submitted that the sums should be calculated by reference to the Claimant's pay-slips. Although initially attracted by Mr Duggan QC's method, in view of the difficulties encountered at the hearing of identifying the relevant net figures, I have come to the view that in fact Mr Hobbs' method is the simplest and most accurate one.

22. The starting point is the Claimant's P60 in the year before his dismissal (ending 5 April 2019) which gives his gross pay as being £85,368.34. This comprised: (i) basic salary of £55,000; (ii) mentoring pay of £20,000 (iii) October 2018 bonus of £10,368.34.

23. The Claimant's P60 in the year of his dismissal (ending 5 April 2020) gives his gross pay as being £60,030.04. Save in one respect, the difference in gross pay of £25,338.30 is entirely attributable to his dismissal on 14 June 2019, being the loss of mentoring pay and loss of bonus. The one respect in which the difference is not attributable to the dismissal is the fall in bonus by £1,525 (£10,368.34 - £8,843.44) which the Claimant would have experienced if he had still been employed by the Respondent. It follows that the gross fall in income of £23,813 was attributable to the Claimant's dismissal, which if netted down by the 35% tax rate applied in that P60 (£8,335) gives a net loss of £15,478.

24. The Claimant's P60 in the year after his dismissal (ending 5 April 2021) gives his gross pay as being £53,481.92. In view of the findings above, the only part of the reduction in gross pay (compared to the tax year ending 5 April 2019) which is attributable to the Claimant's dismissal is the value of the lost mentoring payments for April, May and June 2020, namely £5,000 gross. If this sum is netted down by the tax rate 35% applied in that P60 it gives a net loss of £3,250.

25. It follows that the net loss of earnings attributable to the Claimant's dismissal is £18,728 (£15,478 + £3,250).

26. To this must be added the lost employer pension contributions in July and August 2019, which has been agreed at £458, and a sum to compensate for loss of statutory rights, which I assess as being £400.

27. It follows that the Claimant's total compensatory award is £19,586.

(vi) <u>ACAS reduction/uplift</u>

28. In reliance on s. 207A Trade Union and Labour Relations (Consolidation) Act 1992, the Claimant and the Respondent argue, respectively, that the award should be uplifted/reduced by 25%. In both cases the Code of Practice with which it is said the relevant party did not comply is the ACAS Code of Practice on Disciplinary and Grievance Procedures ("the Code of Practice").

29. Turning first to the Respondent's submissions, Mr Duggan QC argued that the Claimant should have raised a grievance in respect of the meeting of 15 April 2019 and/or the letter of 16 April 2019 and attempted to resolve matters rather than resigning, and that his failure to do so was unreasonable. I do not accept that submission. I have found that the Respondent, without reasonable and proper cause, acted in a way that was likely to destroy or seriously damage the relationship of confidence and trust between itself and the Claimant, and indeed the Claimant plainly stated that he felt he could no longer trust the Respondent (see, for example, paragraph 28 of the liability judgment). In these circumstances it was not unreasonable of the Claimant not to attempt to repair the relationship through the grievance process rather than rely on this right to resign and claim constructive dismissal.

30. Turning to the Claimant's submissions, Mr Hobbs relied on paragraph 58 of the liability judgment for the reasons why I should apply an uplift of 25%. That paragraph provides:

> "While capability or underperformance is potentially a fair reason for dismissal, the Respondent plainly did not conduct itself in a manner that was fair in all the circumstances. It ambushed the Claimant at a meeting to discuss his performance, giving him no opportunity to prepare for that discussion, there was never any exploration as regards why the Claimant's sales had declined (i.e. of the reasons why the Claimant had lost 1000 acres on 3 accounts), no consideration was given to what steps the Respondent might take to help the Claimant improve his performance (other than removing his mentoring role) and the Claimant was given no opportunity to improve his performance before the Respondent decided to remove his mentoring role and reduce his salary."

31. That finding is a summary of the findings in the liability judgment, set out in more detail at paragraphs 12-23 thereof, which show that the Respondent failed to comply with the Code of Practice, as it applies to allegations of poor performance, by failing, inter alia, to investigate the facts properly, failing to

notify the Claimant in advance of the meeting of 15 April 2019 of the Respondent's concerns about his performance, failing to give him the opportunity to prepare to answer those concerns, and failing to give him an opportunity to improve. Further, the only reasons the Respondent has given by way of justification for those failings are that Ms Heath considered the Claimant to be under performing in his agronomy role and that she considered him to be "way overpaid" (see email of 17 April 2019). This is not a reasonable justification for such a comprehensive failure of process which, even if not intentional, demonstrated, in my judgment, a somewhat callous ineptitude.

32. Accordingly, in the light of all the above I consider it would be just and equitable to uplift the Claimant's compensatory award by 20% (by reason of section 124A Employment Rights Act 1996, such an uplift applies only to the compensatory, and not the basic, award).

33. It follows the Claimant's total compensatory award is £23,503.

(vii) <u>Total Award</u>

34. Since the Claimant's basic award is £3,150, his total award, subtracting the agreed overpayment of £334.62 made in the Claimant's June 2019 pay packet, is **£26,318.**

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Employment Judge S Moore

Date: 6 October 2021

Sent to the parties on:

28 October 2021

For the Tribunal:

S. Bhudia