Sort out notice. The loss of earnings is from end of notice pay to 1.10.21. EMPLOYMENT TRIBUNALS

Claimant: Mr K Shum

Respondent: Pullmanor Ltd t/a Redwing Coaches

Heard at: Croydon by Cloud Video Platform **On:** 21 October 2021

Before: Employment Judge Nash

Representation
Claimant: Mr Bachu of counsel
Respondent: Mr Cameron, advisor

RESERVED JUDGMENT- REMEDY

1. The respondent shall pay to the claimant in respect of notice pay payable the sum of £2984.96.

2. The respondent shall pay to the claimant the sum of £5833.80 as a basic award.

3. The respondent shall pay to the claimant a compensatory award based on loss of earnings from the end of his notice period to 30.9.20.

REASONS

1. It was agreed that, pursuant to the tribunal's decision on liability for wrongful dismissal, the notice pay payable by the respondent to the claimant was £2984.96.

2. As to the award for unfair dismissal, it was agreed that, pursuant to the tribunal's decision on liability, the basic award payable by the respondent to the claimant was £5833.80.

3. In respect of the compensatory award, it was agreed that, pursuant to the tribunal's decision on liability, the sum of £500 should be awarded for loss of statutory protection.

4. The issue between the parties was what sum should be awarded for the element of the compensatory award relating to loss of earnings. The issues for the tribunal were as follows:-

    i. For how long would the claimant have been employed by the respondent before he could have been would have been lawfully terminated, or would have left the work in any other circumstances?

    ii. Whether the claimant would have been on the furlough scheme?

    iii. Has the respondent discharged the duty upon it of showing that the claimant had failed to comply with his duty to mitigate?

5. The tribunal heard evidence from the claimant and submissions from the parties. It then made finding on the balance of probabilities as to what would have happened, based on the evidence and the parties' cases.

6. It was not in dispute that, absent the unfair dismissal, the respondent would have placed the claimant on furlough (the Coronavirus Job Retention Scheme) with all other drivers in March 2020. He would have received 80% of his salary under the Corona Virus Job Retention Scheme with all the respondent's other staff.

7. The Tribunal accepted the respondent's evidence that all staff stayed on furlough until August 2020, as this was plausible and unchallenged evidence considering the history of Covid restrictions in the United Kingdom during 2020.

8. The respondent gave unchallenged evidence about what happened next. It said that some drivers were taken off furlough and came back to work in August 2020, as the Covid 19 restrictions started to lift, and the country opened up to a limited extent. These drivers mainly worked on commuter services. The tribunal found that the claimant would not have been one of these drivers for the following reasons.

9. The claimant would have preferred, if possible, to stay on furlough. There seemed no reason the respondent would have insisted that he came off furlough if others were available.

10. The tribunal found that the claimant would not have chosen to return to work if he could remain on furlough, because of his fear of catching Covid and infecting his family. There was no suggestion that the respondent forced any drivers back to work; in effect the respondent was looking for volunteers. The tribunal found that the respondent would have found

enough volunteers without requiring the claimant to return to work because, at this time, it was considering redundancies and therefore there was some motivation to return to working.

11. Accordingly, the claimant would have remained on furlough.

12. The respondent gave unchallenged evidence that it made a number of drivers redundant in August 2020 due to a shortage of work. The tribunal found that the respondent would not have included the claimant in these redundancies because it accepted the respondent's evidence that it selected those who volunteered or who did not have two years' service - as this seemed commercially sensible.

13. Accordingly, the claimant would have remained on furlough.

14. The respondent gave unchallenged evidence that it obtained a contract with Kent County Council in September 2021 for school transport. The schools went back in September 2020. Accordingly, it needed all its drivers to service the schools and commuter work. It therefore brought all its remaining furloughed drivers back into work and took them off furlough during September.

15. There was a shortage of drivers to carry out the available work. The respondent tried to re-employ drivers previously made redundant but was unsuccessful because most had obtained well paid alternative employment in the delivery and retail sectors. There was an industry shortage of drivers by this time. By 26 September 2020 it had managed to take on two new drivers.

16. The respondent's evidence was that it would have brought the claimant off furlough in September 2020 with the rest of its drivers. The Tribunal found that the respondent would have required the claimant to do the same as all its other employees.

17. If the claimant had refused to return, according to the respondent, he would have been dismissed. The tribunal accepted this evidence because the respondent was short of drivers at this time.

18. The claimant, when questioned by the Tribunal, said that if he had been instructed by the respondent to return to work driving in September 2020, he would have reluctantly complied in order to save his job.

19. The Tribunal compared this evidence to the claimant's evidence in his witness statement where he said that he had not tried to get a new job until

September 2021, due to his fears of infecting those at home with Covid. Those at home included his eighty-three year old mother and a daughter with a low white blood cell count.

20. Nevertheless, the Tribunal accepted the claimant's evidence in this regard. The position as to Covid risk was considerably clearer by September 2020 than it had been in the confusing days leading up to the first lockdown in March 2020.

21. On 16 March when the claimant made the decision not to go into work, there was no such thing as shielding and no guidance as to people who might need to avoid all contact.

22. However, GPs started from 23 March to identify those who would need to shield, and letters went out around late March or early April. The daughter did not receive a shielding letter and, therefore, the claimant had more information as to her risk.

23. The tribunal accepted that the situation with Covid 19 had in effect settled down considerably by September 2020. It was a quite different environment for the claimant than March 2020, at the beginning of the lockdown. Covid was no longer a new and unknown risk. A good deal more was known about the risks of Covid and how to reduce them. Schools were returning and a reasonable number of people were returning to work in person.

24. It was true that there were some restrictions being introduced such as the rule of six and a return to working from home by 22 September, but the claimant was nevertheless able and willing to return to work if necessary to save his job.

25. Accordingly, the tribunal found that the claimant would have remained employed by the respondent on furlough and then from September 2020 would have remained employed by the respondent on full pay, having returned to work.

26. The respondent's submission was that the claimant's losses stopped in September 2020 because he had failed to mitigate his loss from September 2020. The tribunal therefore considered if the respondent had discharged the burden upon it of showing that the claimant had failed to mitigate his loss.

27. The tribunal found that the respondent had discharged the duty to show a failure to mitigate from September 2020 for the following reasons.

28. The claimant's evidence, which was not challenged, was that he did not look for work from the date of his dismissal including up to and after September 2020. The tribunal therefore accepted the respondent's case that the claimant had failed to comply with his duty to mitigate his loss in that he had taken no material steps to find other work from September 2020. However, the question for the tribunal was what would have happened if the claimant had complied with his duty to mitigate.

29. The tribunal asked itself if the claimant would have been able to find work in September 2020. In the view of the Tribunal, it would not have taken the claimant no more than a few weeks to obtain employment. The reasons for this were that there were a number of equivalent jobs available.

30. The tribunal noted that the respondent itself had made redundancies in August 2020. However, the respondent's evidence that the redundant drivers were not available for re-hire in September (because they had quickly found alternative work) was not challenged. Neither did the claimant challenge the respondent's evidence that it needed to find new drivers in September 2020 because of the amount of work available and the difficulties in finding drivers. The tribunal did not find this evidence to be implausible in light of the economic situation at the time.

31. The claimant would have been in a similar situation to the drivers the respondent had recently made redundant and who had quickly found alternative well-paid work.

32. The Tribunal found that the claimant would have obtained employment by 1 October 2020.

33. Accordingly, as the claimant had failed in his duty to mitigate from the 1 October 2020, there was no loss of earnings from 30.9.20.

34. For the avoidance of doubt. the Tribunal considered whether the claimant had failed in his duty to mitigate before 1 October 2020. However, the Tribunal accepted that it was, in light of the claimant's home circumstances, reasonable for him to spend five or six months waiting until knowledge about Covid had developed and he would feel more confident in returning to the workplace.

35. The tribunal went on to consider contribution.

36. Section 122(2) Employment Rights Act 1996 applies if any conduct of the complainant before the dismissal was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any

extent. In *Steen v ASP Packaging Ltd 2014 ICR 56,* the EAT held that it is for the tribunal to:

a. identify the conduct which is said to give rise to possible contributory fault
b. decide whether that conduct is culpable or blameworthy, and
c. decide whether it is just and equitable to reduce the amount of the basic award to any extent.

37. The tribunal did not find that there was any conduct which could give rise to a possible contributory fault. The claimant wanted to stop coming to work due to concerns about Covid 19, in a rapidly changing and novel situation. Before this could be discussed in any meaningful way, he was dismissed.

38. The tribunal went on to consider the contributory award. Section 123(6) Employment Rights Act 1996 states that: 'Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.'

39. The tribunal did not find that it would be just and equitable to reduce the compensatory award by any proportion, for the same reason that it determined not to reduce the basic award.

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Employment Judge Nash
Date 16 November 2021