



EMPLOYMENT TRIBUNALS

Claimant: Mr R Minhas

Respondent: Sky Retail Stores Limited

Heard at: Manchester (remotely, by CVP)

On: 18 October 2021

Before: Employment Judge Robinson

REPRESENTATION:

Claimant: Mr McNerney of Counsel

Respondent: Mr Leon, Solicitor

JUDGMENT

The judgment of the Tribunal is as follows:

1. A partial Judgment has already been issued in this remedy matter on 18 October 2021 orally and a short written Judgment sent to the parties thereafter.
2. In that Judgment it was decided that it was not practicable to reinstate the claimant, consequently I have made the following order for compensation.
3. The respondent shall therefore pay forthwith to the claimant the sum of £51,082.13 as per paragraph 38 below.

REASONS

Issues

1. The issues before the tribunal with regard to remedy are as follows:
 - i) Whether the claimant should be reinstated or re-engaged;

- ii) How long should the claimant be compensated for, if the only remedy in issue is compensation;
- iii) How much was the claimant's week's wage?
- iv) As the claimant has been employed elsewhere for some time, to what date should he be entitled to compensation, if at all, with regard to future loss?
- v) Whether the claimant has mitigated his loss.

The Facts

2. The claimant had been employed with the respondent for over two years and there was nothing to suggest that he was not a successful salesman. Indeed his commission figures show that he was good at his job.

3. When the claimant was dismissed, he obtained a job representing an energy firm called Bulb selling gas and electricity packages, but this was a zero hour contract and he worked for only two to three days per week. He obtained the job through an Agency called ODM who were his actual employers. Because of this the claimant obtained another job as a sales advisor with the RAC in December 2019. However, after a short while, it became clear to the claimant that it was not economically viable for him and he decided to concentrate on his job with Bulb.

4. The claimant has applied for jobs with Home Bargains, Wren's Kitchens, Kellogg's, Belmont homes and Bionic Group since he was dismissed.

5. The claimant was absent from the UK for a short period on holiday in order to see his son married. His return to England coincided with the lockdown relating to COVID-19 and he was placed on furlough by Bulb. In June 2020 he returned to work and started to work four days a week. In October 2020, because of the second lockdown, the claimant stopped work again. In total, between 28 November 2019 and 30 September 2021 he has received the net sum of £24,023.88 in pay.

6. From April 2021 the claimant was told that he was not able to resume work for Bulb energy and he was given a months' notice. However, in June 2021 he was given the opportunity to work again when he applied for Sainsbury's credit card work, through ODM. He was about to go to interview, but his son died tragically on the 8 June 2021. He was given compassionate leave by ODM until the 26 July 2021 and he started work again on the 27 July 2021. During August and September 2021 he worked selling Sainsbury's credit cards. The pay was not good so he was offered the job of Sales Executive starting on the 4 October 2021. He continues in that role.

7. The total earnings between 28 November 2019 and 30 September 2021 for the claimant, I accept, is £24,023.88. He has mitigated his loss to the date of this hearing as he obtained a job quickly after his dismissal from Sky, despite the economic woes through the pandemic and despite difficult personal circumstances.

8. When the claimant worked for Sky he earned, during the year 2018 to 2019, the sum of £110,338.40 gross. The claimant also received, during that period, a Sky package worth £2,296.22 per annum, expenses of £45 and pension contributions of £8,027.14. The claimant's net pay from January 2019 until his employment ended in October 2019 amounted to £31,464 which gives an average payment for those 10 months of £3,147. That equates to a weekly sum of £726. It is just and equitable to calculate the claimant's wage on that basis as it takes into account fluctuations over the most recent months of both pay and commission. The claimant, despite being suspended during the last few months of his employment still received in July, August, September and October 2019 his full commission because it is paid in arrears. Therefore the 2019 payslips reflect accurately his weeks' wage. I do not accept the claimant's counsel's submission that I should go back twelve months from the date of the claimant's dismissal. As that would not be a just and equitable way to calculate the loss to the claimant.

9. The claimant is claiming 18 months' future loss.

10. The claimant is also claiming £500 for loss of statutory rights and his basic award of £1,312.50. Both figures are agreed and are acceptable and reasonable sums to award.

11. As a sales advisor with the respondent the claimant was able to earn commission. As the claimant was suspended on 31 July 2019 he was unable to earn any commission for the August, September and October 2019 pay periods leading up to his dismissal but I refer the parties to paragraph 8 above in that regard.

Decision

12. The order of deductions relevant to this case are as follows:

- i) There are no ex gratia payments or payment by the employer to the claimant as a result of his dismissal and therefore this element can be ignored;
- ii) Deductions of sums earned by way of mitigation or to reflect the claimant's failure to take reasonable steps to mitigate;
- iii) A percentage reduction under the principles of Polkey which is not an issue relevant to this case and consequently can also be ignored;
- iv) An increase or reduction where the employer or employee has failed to comply with the ACAS code. In this case I have already ruled that a 25% increase should be given;
- v) A percentage reduction for the employee's contributory fault. I have already ruled that a 33% reduction should be made;
- vi) Finally, application of the statutory cap set out in relation to limits of compensatory award in section 124 of the Employment Rights Act 1996.

13. I have, in setting out the reasons for my decision below, included further pertinent facts upon which I have based my decision for ease of presentation. This judgment should also be read in conjunction with the judgment on liability.

14. With regard to reinstatement and re-engagement I have given my judgment in that regard orally but as I am giving full reasons on the monetary element of remedy, I felt it appropriate to explain to the parties why re-engagement and/or reinstatement was not feasible. I heard from Mr Chris Spence, the Regional Manager of the respondent, and I accepted his evidence that the claimant's former colleagues found what they thought the claimant had said inappropriate. That was clear from the evidence given during the hearing relating to liability. I put on record, however, that Miss Klematti's views as set out by Mr Spence did not find favour with me as I heard her evidence over two hearings. The essence of her evidence on both occasions was that she would have had no difficulty working with Mr Minhas again. However, she has now moved back to her homeland of Finland and consequently her opinion has little weight when considering the issues of re-engagement or reinstatement. Ultimately, the reason why re-engagement or reinstatement would not be feasible relates to the question of practicability. There are two stages to this test. I must consider the position, firstly on a provisional basis, at the time of making this order and, secondly, on a conclusive basis if the employer fails to comply with the order. It is obvious that I am, here, only dealing with the first part of the test.

15. At the date of this hearing it is two years since Mr Minhas worked for Sky and the world generally has moved on not least because of the pandemic and the consequent damage to employment and the economic outlook generally. Employers and employees, over the last two years, have had to grapple with issues such as furlough and redundancies. Those circumstances and the resultant problems they have engendered would make it difficult, if not impossible, from a practical point of view to place the claimant back with Sky and I have to judge all these matters on a broad common sense assessment at a time when an order for reinstatement or re-engagement would take effect. I am also concerned about the clear lack of trust between the parties, not just, from the claimant's point of view but, more importantly, from the respondent's witnesses' position. Although there were many rumours being bandied about second guessing what the claimant said, it was never established by the respondent's disciplinary officers the exact words used by the claimant when discussing the young girl's dress with Ms Klematti. However, the nature of the allegations would make it difficult for the claimant to return. The claimant may not be embarrassed by returning but some of his colleagues may well be and the industrial atmosphere therefore, if not actually poisoned, would not be helpful in a small setting where salesman and sales women have to get along in order to promote Sky's products. It matters not whether Sky have employed someone else in place of Mr Minhas, and it matters not that the national press has had an interest in Mr Minhas' dismissal. Although Sky have accused Mr Minhas of contacting the media, I am satisfied that it was the media that, initially, contacted Mr Minhas. Furthermore, I did not accept Mr Spence's comment that, as he put it, colleagues from all around the UK had contacted him to express condemnation about the comments Mr Minhas had made. Even if that is true it smacks more of gossip rather than the workforce actually knowing what the claimant had said. However, on balance I accept that it would not

be appropriate to send Mr Minhas back to work at Sky and therefore I refuse that application.

16 Turning to the legal issues regarding the financial element of the claimant's remedy claim, I note that the matter which has, mainly, concerned the parties is the definition of a week's pay. It is an important issue as, dependent upon how one interprets the definition set out in sections 220 to 229 of the Employment Rights Act 1996, the difference between the parties' calculations will be wide.

17 Having considered the submissions of both parties and considering, in particular, the wording of section 221(2), a week's pay is the gross contractual remuneration an employee is entitled to be paid when working their normal hours each week. My finding with regard to this issue is that the claimant did have normal working hours, he was not paid, for example piecework, and consequently I conclude that the week's pay for this claimant is the amount payable under his contract of employment. That includes commission. Commission which is a regular part of an employee's earnings will amount to remuneration and it is evident from the claimant's wage slips produced to me that the bulk of his wages each week were in fact commission. Indeed, he was an extremely successful salesman and clearly good at his job. He was able, through his hard work and skill, to earn a considerable amount each week and he must be compensated properly for his consequent loss. In those circumstances it would be right, just and equitable to include commission in the calculation and I have done so.

18 As the claimant was summarily dismissed on 2 October 2019 and received no notice pay, I have made provision for such payment to be given to him. The period of notice he should have been paid is one month. The claimant only received his holiday pay on his dismissal.

19 As set out above, he has also mitigated his loss by, within a month of dismissal, obtaining a job with ODM an agency who placed him with Bulb energy initially. The claimant did not sit on his laurels however and endeavoured to obtain work with the RAC. His explanation as to why he gave up that job was convincing. He had to pay, from his own pocket, various items such as paying for venues and fuel costs. I also accept, that during the course of his employment with Bulb energy, he also looked for other jobs which may have given him greater remuneration than he was earning through ODM. Consequently, it is appropriate that the claimant should be compensated to the date of this hearing. In coming to that conclusion I have also taken into account that the claimant took holiday in order to go abroad for his son's wedding and has had to cope with the death of his son in tragic circumstances.

20 The claimant is now content in his work for ODM. Indeed in his statement he has said that his work colleagues had been "very nice" to him. The claimant should be commended for the way he has looked for other employment whilst the COVID-19 pandemic has been raging and has coped admirably with that situation and with the threat of furlough and redundancy hanging over his head.

21 However it is now two years since the claimant was dismissed by the respondent company and it is right that the compensation should stop at this juncture. The claimant has established himself with ODM, he is clearly a very capable salesman, the economic situation seems to be becoming more favourable with job vacancies at

the highest they have ever been according to the Government's latest statistics. I can take judicial notice of that and that the population, generally, are now beginning to purchase things by using money saved over the course of the lockdowns and therefore salesmen and women are in high demand. I cannot foresee that the claimant will be out of work again in the near future and I can foresee that his earnings will increase over the next few weeks, months and years. It would not be fair to the respondent to allow the claimant to be awarded compensation into the future.

Financial Award

22 The basic award that I order to be made to the claimant is £1,312.50. That sum is agreed but reduced as explained below.

23 The claimant should also receive £45 relating to expenses paid out when endeavouring to find alternative work and £500 for loss of statutory rights.

24 I have based the net weekly calculation of pay at £726 per week (see paragraph 8 above).

25 His notice pay is therefore £3,146 for a calendar month.

26 That means that the calculation for compensation starts from 4 November 2019.

27 The claimant should be compensated for loss of his Sky television and telephone package which amounts to £21.46 per week. The period of compensation is, in this instance, the full 107 weeks amounting to £2,296.22 and his contributions for his pension which had been lost over 107 weeks is £75.02 per week making a total of £8,027.14. I see no necessity to consider a complex actuarial pension calculation and counsel for the claimant did not urge me to do so, despite a comment to that effect set out in the Schedule of Loss.

28 The compensatory award should be made over 107 weeks less four weeks' notice pay being 103 weeks at a net pay of £726 per week. A total of £74,778 due for the compensatory period.

29 The claimant has earned in the last two years £24,023.88. I accept the amount earned set out in the claimant's Schedule of Loss as a true reflection of his earnings.

30 The total compensatory award is therefore £85,646.36 (£45 + £500 + £2296.22 + £8027.14 + £74778).

31 From this sum must be deducted all monies earned by the claimant since his employment with this respondent ended. That sum is, as above, £24,023.88, making a total of £61,622.48 which must be then increased by 25% for breach of the ACAS code. The disciplinary process took too long as explained in the liability judgment and that in itself was unfair. That means that the total due to the claimant is now £77,028.10.

32 That sum must be reduced by 33% because of contributory fault and consequently the figure due to the claimant without the implementation of the statutory cap is £50,838.55. The statutory cap in 2019 was £86,444 or 52 weeks'

gross pay whichever is the lower. I calculate the claimant's gross pay at £965.69 per week based on the ten month wage slips I have calculated his compensatory award on. The appropriate statutory cap is therefore £50,215.88.

33 Added to the compensatory award should be the basic award of £1,312. 50. This sum will also be reduced by 33% for contributory fault so the sum due is £866.25.

34 The total amount due to the claimant therefore is £51,082.13 and this sum must be paid to the claimant forthwith.

35 For the reasons set out above there will be no future loss for a period after this hearing.

36 The recoupment provisions do not apply as the claimant received no state benefit.

Employment Judge Robinson
Date: 7 December 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON
10 December 2021
FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.



NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: **2415040/2019**

Name of case: **Mr R Minhas** v **Sky Retail Stores Limited**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant judgment day" is: 10 December 2021

"the calculation day" is: 11 December 2021

"the stipulated rate of interest" is: **8%**

Mr S Artingstall
For the Employment Tribunal Office

INTEREST ON TRIBUNAL AWARDS

GUIDANCE NOTE

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

2. The Employment Tribunals (Interest) Order 1990 provides for interest to be paid on employment tribunal awards (excluding sums representing costs or expenses) if they remain wholly or partly unpaid more than 14 days after the date on which the Tribunal's judgment is recorded as having been sent to the parties, which is known as "the relevant decision day".
3. The date from which interest starts to accrue is the day immediately following the relevant decision day and is called "the calculation day". The dates of both the relevant decision day and the calculation day that apply in your case are recorded on the Notice attached to the judgment. If you have received a judgment and subsequently request reasons (see 'The Judgment' booklet) the date of the relevant judgment day will remain unchanged.
4. "Interest" means simple interest accruing from day to day on such part of the sum of money awarded by the tribunal for the time being remaining unpaid. Interest does not accrue on deductions such as Tax and/or National Insurance Contributions that are to be paid to the appropriate authorities. Neither does interest accrue on any sums which the Secretary of State has claimed in a recoupment notice (see 'The Judgment' booklet).
5. Where the sum awarded is varied upon a review of the judgment by the Employment Tribunal or upon appeal to the Employment Appeal Tribunal or a higher appellate court, then interest will accrue in the same way (from "the calculation day"), but on the award as varied by the higher court and not on the sum originally awarded by the Tribunal.
6. 'The Judgment' booklet explains how employment tribunal awards are enforced. The interest element of an award is enforced in the same way.

