



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**Mr G Cunningham**

**v**

**Formula One Autocentres Limited**

**Heard at:** Cambridge Employment Tribunal (via CVP)

**On:** 21<sup>st</sup> June 2021

**Before:** Employment Judge King

**Members:** Mr S Holdford  
Miss V Pratley

## **Appearances**

**For the Claimant:** Mr A Mellis (counsel)

**For the Respondent:** Ms S Ismail (counsel)

**JUDGMENT** having been sent to the parties on 6<sup>th</sup> August 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**

1. This is the judgment of the Tribunal in the above matter which was given orally with full reasons on the day. The case was listed for a 1 day commencing 21<sup>st</sup> June 2021 following an earlier liability hearing in the claimant's favour before this Tribunal. The claimant requested written reasons.
2. The claimant was represented by Mr Mellis as before. The respondent was represented by Ms Ismail as before. We heard evidence from the claimante and evidence from Ms Mitchell on behalf of the respondent primarily around the bonus and the jobs market. Both sides gave the Tribunal helpful submissions. The parties exchanged witness statements in advance and an agreed bundle which ran to 228 pages was prepared, to which we had regard in the hearing.

3. The bundle of documents included both a schedule of loss and a counter schedule of loss prepared by the respondent in accordance with the directions given by this Tribunal. This was helpful to narrow the issues between the parties for the hearing as set out below.

### **The issues**

4. The claimant's unfair dismissal claim having been upheld how much compensation should the claimant receive. The specific issues as to remedy to be determined are as follows:

- 4.1 **What basic award is the claimant entitled to?**
- 4.2 **Has the claimant failed to mitigate his losses?**
- 4.3 **Was it reasonable for the claimant to set up his own business?**
- 4.4 **What compensatory award would it be just and equitable to award the claimant including issues of any bonus payable, company car, pension loss?**
- 4.5 **What uplift should be awarded for failing to follow the ACAS COP1?**
- 4.6 **Does grossing up and the statutory cap apply in this case?**

### **The law**

5. The provisions concerning the basic award commence at s119 of the Employment Rights Act 1996 which states as follows:

**119.— Basic award.**

*(1) Subject to the provisions of this section, sections 120 to 122 and section 126, the amount of the basic award shall be calculated by—*

*(a) determining the period, ending with the effective date of termination, during which the employee has been continuously employed,*

*(b) reckoning backwards from the end of that period the number of years of employment falling within that period, and*

*(c) allowing the appropriate amount for each of those years of employment.*

*(2) In subsection (1)(c) "the appropriate amount" means—*

*(a) one and a half weeks' pay for a year of employment in which the employee was not below the age of forty-one,*

*(b) one week's pay for a year of employment (not within paragraph (a)) in which he was not below the age of twenty-two, and*

*(c) half a week's pay for a year of employment not within paragraph (a) or (b).*

*(3) Where twenty years of employment have been reckoned under subsection (1), no account shall be taken under that subsection of any year of employment earlier than those twenty years.*

6. The other provisions of s120-122 of the Employment Rights Act 1996 do not apply in this case.

7. The compensatory award is dealt with at s123 Employment Rights Act 1996 as follows:

**123.— Compensatory award.**

- (1) Subject to the provisions of this section and [sections 124, 124A and 126]<sup>1</sup>, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.
- (2) The loss referred to in subsection (1) shall be taken to include—
- (a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and
- (b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.
- (3) The loss referred to in subsection (1) shall be taken to include in respect of any loss of—
- (a) any entitlement or potential entitlement to a payment on account of dismissal by reason of redundancy (whether in pursuance of Part XI or otherwise), or
- (b) any expectation of such a payment,
- only the loss referable to the amount (if any) by which the amount of that payment would have exceeded the amount of a basic award (apart from any reduction under section 122 in respect of the same dismissal).
- (4) In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.
- (5) In determining, for the purposes of subsection (1), how far any loss sustained by the complainant was attributable to action taken by the employer, no account shall be taken of any pressure which by—
- (a) calling, organising, procuring or financing a strike or other industrial action, or
- (b) threatening to do so,
- was exercised on the employer to dismiss the employee; and that question shall be determined as if no such pressure had been exercised.
- (6) 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.
- (6A) .....
- (7) .....
- (8) Where the amount of the compensatory award falls to be calculated for the purposes of an award under section 117(3)(a), there shall be deducted from the compensatory award any award made under section 112(5) at the time of the order under section 113.

8. The limit on compensatory award provisions are contained in s124 of the Employment Rights Act 1996 and at the relevant time the cap was £86,444 or 52 weeks pay.
9. The compensatory award can be increased for failures to comply with the ACAS COP1 as found in this case under s124A of the Employment Rights Act 1996 which states as follows:

**124A Adjustments under the Employment Act 2002**

*Where an award of compensation for unfair dismissal falls to be—*

*(a) reduced or increased under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 (effect of failure to comply with Code: adjustment of awards) , or  
(b) increased under section 38 of that Act (failure to give statement of employment particulars),  
the adjustment shall be in the amount awarded under section 118(1)(b) and shall be applied immediately before any reduction under section 123(6) or (7).*

10. In addition, the uplift provisions of s207A of the Trade Union and Labour Relations (Consolidation) Act 1992 apply:

**207A Effect of failure to comply with Code: adjustment of awards**

*(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.*

*(2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—*

*(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,*

*(b) the employer has failed to comply with that Code in relation to that matter, and*

*(c) that failure was unreasonable,*

*the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.*

*(3) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—*

*(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,*

*(b) the employee has failed to comply with that Code in relation to that matter, and*

*(c) that failure was unreasonable,*

*the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, reduce any award it makes to the employee by no more than 25%.*

*(4) In subsections (2) and (3), “relevant Code of Practice” means a Code of Practice issued under this Chapter which relates exclusively or primarily to procedure for the resolution of disputes.*

*(5) Where an award falls to be adjusted under this section and under section 38 of the Employment Act 2002, the adjustment under this section shall be made before the adjustment under that section.*

*(6) .....*

Case law

11. There are also a number of cases relevant to the issues which the parties raised as follows:

*Cooper Contracting Ltd v Lindsey UKEAT/0184/15*

*Gardiner-Hill v Roland Berger Technics Ltd [1982] IRLR 498*

*Wilding v British Telecommunications Plc [2002] IRLR 524 (CA)*

*Aon Training Ltd (formerly Totalamber Plc) and another v Dore [2005] IRLR 891 (CA)*

**Findings of fact**

12. The claimant was employed from 23<sup>rd</sup> November 2016 and was dismissed on 1<sup>st</sup> April 2019. We made a number of findings of fact in our liability judgment which are not rehearsed here.
13. The claimant started looking for his next role. He did not want to take a step back too far in his career progression. He had come from a management role with a good salary, company car, pension contributions and bonuses/incentives.
14. The claimant was offered and started work at Motorserv UK in April 2019 on a trial period. This was at branch manager level but he was confident due to growth plans that he could swiftly progress to a higher level. He suffered anxiety and panic attacks at work and had to leave the role. He only worked there about 1.5 weeks. We accepted the unchallenged evidence as to how that role ended.
15. The claimant was offered another role with National Tyres on 6<sup>th</sup> June 2019 as branch manager. This was a step down for the claimant and would have been on around £30,000. He enquired about the possibility of promotion in the future to Regional Manager like his role with the respondent but was told that all of the Regional Managers had been in the role for sometime and it was unlikely they would leave or retire. The claimant found the thought of working for another big company like the respondent difficult and declined the role as he did not think it was right for him.
16. The claimant made calls, sent off his CV and attempted to find comparable work in the industry he knew.
17. The claimant incorporated a Company Cunninghams Autocare on 6<sup>th</sup> November 2019. He started trading in March 2020. This was when the pandemic hit the UK which was not a foreseen circumstance.
18. He provided information from his accountants to show that once he commenced trading his accounts for the period 1<sup>st</sup> April 2020 to 31<sup>st</sup> March 2021 that the turnover was £10,000 as a grant and £122,496 income. He has a gross profit of £58,177 (more than his earnings at the respondent) but he had a net profit of £4,651 for that year. He employed staff and reinvested the money in the business rather than draw a salary. He received local press coverage for growth and having taken on staff and moved to a larger premises.
19. The parties agreed that the relevant statutory cap on a weeks pay was £525 at the time of the dismissal. The claimant sought £1050.00 as a basic award which was agreed by the respondent. This sum is awarded by the Tribunal.

20. The parties were able to agree the gross basic salary of the claimant as £40,698.00 annually and £782.65 per week. They agreed the net weekly pay as £581.42. Having heard evidence the parties also agreed that the claimant earned £600 by way of mitigation from his role with Motorserv UK and in self-employment of £5,952.00 by way of director's loans. The sums for universal credit received were also agreed.
21. The claimant sought a payment for loss of statutory rights in the sum of £500 and the respondent argued this should be a more reasonable £350.00.
22. The claimant sought £61,130.96 as loss of earnings after mitigation to the date of the remedy hearing which was over 2 years after his dismissal. The respondent felt that there was a buoyant jobs market before the pandemic hit and that the claimant should have mitigated his losses within 7-10 months. They submitted that failure to accept the role with National Tyres amounted to a failure to mitigate and that starting up his own business was not reasonable.
23. The claimant claimed a 1% pay rise as the likely annual pay rise had he not been dismissed. The respondent's position was that this was non-contractual and discretionary so should not be awarded. In evidence the claimant accepted that the pay rise was not given in the last year of employment and therefore there cannot be the expectation to receive it. Ms Mitchell gave evidence no pay rise had been awarded in the last two years.
24. The claimant sought a monthly and quarterly bonus but the respondent argued these would not be paid as he was not on target. The evidence was that the claimant had received some payments during employment for bonuses or incentives but it was not clear which payments related to which. It was accepted by the respondent that the claimant earned on average £64pcm for such matters during the relevant period. The claimant having heard the evidence as to targets for the quarterly bonus no longer pursued this element. The issue of monthly bonus/incentives was an issue the Tribunal had to determine.
25. The claimant sought the cost of a replacement car at £4,500. The evidence was that the sum claimed on the P11D was higher for the use of the Audi by the claimant as a company car for business and personal use. The claimant sought the lower amount for the replacement vehicle.
26. Our previous judgment found that there was an unreasonable failure to follow the ACAS COP1 so the issue here is the % uplift that would be appropriate. The claimant sought the maximum at 25% and the respondent did not seek to argue there should be no uplift given our findings but that this should be at 12.5%.

## Conclusions

### **What basic award is the claimant entitled to?**

27. The employment tribunal must consider what is just and equitable in this case as set out in s122 of the Employment Rights Act 1996. The parties had agreed the basic award between them as £1050.00.

### **Has the claimant failed to mitigate his losses?**

28. The claimant sought alternative work. The respondent raised two issues here the first was that the Motorserv role and the National Tyres role meant that the claimant had failed to mitigate his losses.
29. Both roles were at branch manager level and a step down for the claimant on approximately £30,000 although the packages differed. Turning to the Motorserv role first we accept the claimant's evidence as to what happened with this role. We found the claimant to be an honest witness. The evidence he gave about parting ways due to the difficulties he experienced with anxiety and panic attacks was not challenged. We are aware from liability as was the respondent that the claimant had an underlying condition and that on this occasion he received medication to help treat his anxiety. We accept the claimant's evidence as to the reasons why he left the role that it was too much too soon and we do not find that the role which lasted for approximately 1.5 weeks broke the chain of causation. We do however find and the parties agreed that the £600 earned in this role must be deducted from the compensatory award.
30. Turning now to the National Tyres role. This was a role within the same industry but there was no real likelihood of the claimant progressing in that role via promotion back to the level at which he left the respondent any time soon. Regional managers were firmly in place within the organisation. It was not the perfect role and it is unreasonable to say it was comparable. It was only comparable to the lower role the claimant was offered with the respondent.
31. The question is not whether the claimant should have taken it and whether what they did was reasonable rather what steps it is reasonable for the claimant to take is a question of fact for the Tribunal. The standard to be imposed on the claimant should not be overly stringent. The burden of proof is on the respondent and it must show that the claimant acted unreasonably in not taking the role as per *Cooper Contracting Ltd v Lindsey*. The Tribunal can take into account the claimant's view and wishes but it is the Tribunal's assessment of reasonableness that is key.
32. We conclude that at that stage of the job hunt only two months after dismissal which was unfair, given that it was a branch manager role that was at the level he walked away from as a demotion on a lower salary and after a failed attempt to start work too soon, that the claimant did not act unreasonably in turning down that role.

33. The benefit of hindsight now and of course no one could have anticipated the pandemic may have meant that he would not do the same now but we must look at this through the lens at that time. Had the role been turned down later in the process than we may not have reached that conclusion but at the time the claimant declined the role in June 2019 he did not act unreasonably.
34. We do not find that the claimant has failed to mitigate his loss. We should therefore consider whether it was reasonable for him to establish his own business and what it is just and equitable to award him.

**Was it reasonable for the claimant to set up his own business?**

35. The claimant established his business in November 2019. He spent 4-5 months on preparatory work finding premises, getting set up with tools etc. We accept the claimant's counsels submissions that setting up in business was not unreasonable as per *Aon Training Ltd (formerly Totalamber Plc) and another v Dore*. The claimant did not act unreasonably in setting up a business. The business venture was in the same industry as his experience and he was familiar with the market. His personal circumstances meant that this would benefit the claimant as he could be his own boss.
36. At the time the claimant took the decision to set up his own business in November 2019 this was not unreasonable. He had been out of work 6 months and we accept his evidence that it took some time to establish his business.

**What compensatory award would it be just and equitable to award the claimant including issues of any bonus payable, company car, pension loss?**

37. It follows that the claimant should receive his full losses for the period from dismissal to November 2019. The issue that the Tribunal spent considerable time considering was the length of time the claimant should be compensated for should this be to the date of the final hearing or another period in time or ongoing. Any award we make has to be just and equitable.
38. We heard and saw evidence of the claimant's business success. He received press coverage for growth and took on a number of staff. He reinvested in the business and moved to bigger premises. He invested money in the business rather than drawing a salary. It was a profitable business of £58,000 gross profit in the first year and a turnover of £122,496.00. The claimant received Government support due to the pandemic in the form of a grant.
39. We have also had the intervening period of the pandemic and the claimant's evidence was that this disrupted his business as sometimes he



would sit there for long periods without the phone ringing. During that period nevertheless he took on additional staff. We are not clear from the evidence when these were recruited during that period. We have considered whether it is just and equitable that the respondent in essence funds the claimant's competing business through the pandemic and his decisions to invest into the business rather than draw a salary. That is a matter for him but we know he took some director's loans during this period too which we have not deducted from his earnings. In order to be just and equitable we must have regard to justice and equity to both parties.

40. In all the circumstances we consider it just and equitable to award the claimant his full losses for twelve months to April 2020 so 52 weeks losses. By the time this period ends the claimant had a profitable and successful business. There are no deductions for earnings from self employment applicable during this period and the claimant should therefore received this sum less the only deduction for earnings of Motorserv.
41. The parties have agreed the net weekly pay for the claimant to be £581.42 so  $x52 = £30,233.84$ .
42. On the loss of statutory rights figure we have two numbers presented to us of £500 and £350.00. We consider that the claimant had short service and that it is just and equitable to award the middle point in this case of £425.00.
43. The claimant contributed to his pension scheme and the respondent confirmed that this was at the rate of £23.48 per week at the relevant time. This was higher than the claimant's calculation which was based on basic and a % only so we have taken the highest figure and award  $£23.48 \times 52$  to the claimant so £1,220.96.
44. On the car the claimant has requested £4,500.00. Considering he had a company car and the P11D benefit for this over the 12 period we consider it just and equitable that he receive the sum sought. He lost use of the company car for both work and personal use. The sum sought is not unreasonable and is awarded.
45. On the bonus the quarterly bonus was no longer pursued but it was accepted that on average he earned £64.65 pcm towards the bonus/incentives. We consider the sum of £700 to be just and equitable in this regard. When employed by the respondent, he had been taken into an area that was doomed and had come in and failed. Had he survived and not been dismissed when he was then we accept the claimant could have changed things over time but we also have to be aware of the potential for performance management for the reasons set out in our liability judgment. We have decided to award the claimant the sum of £700 which is slightly less than the  $£64.65 \times 12$  to reflect that it was not

awarded every month and taking into account what we consider to be just and equitable.

46. We make no adjustment for the pay rise the claimant sought. This was discretionary and not awarded by the respondent for senior employees during the relevant period. Given the circumstances of this case we do not think that any % pay rise is appropriate.

**What uplift should be awarded for failing to follow the ACAS COP1?**

47. We moved onto consider the % uplift that would be appropriate given our findings at the liability stage in this case. We find the failure to comply was unreasonable. We also have to consider the financial value or impact on the total award and whether this is just and equitable having regard to justice and equity to both parties.
48. In this case the claimant has been awarded a significant award and as such any uplift is likely to be significant. We consider in this case that the respondent is a large employer. We accept Mr Mellis' submission that in this case Mr Keeley was judge, jury and executioner. Whilst the claimant did have meetings and letters the outcome letters bore little relevance to the situation. The meetings were playing lip service to the process as the respondent's mind was made up and the decision was predetermined. The respondent had an inhouse HR practitioner and access to outside advice. We have considered whether this is the sort of case where it would be just and equitable to award the maximum 25% uplift but have taken on board Ms Ismail's submissions that it was not a total failure and the totality of the award already made. We do not however accept that this should be at 12.5% for the reasons given.
49. We conclude that the total uplift in this case should be 20% to reflect these matters.

**Does grossing up and the statutory cap apply in this case?**

50. Due to time constraints on the day of the hearing the Tribunal delivered its judgment on the key figures and asked the parties to agree a calculation of the total award, apply any cap and grossing up and deal with the recoupment provisions. They were able to reach agreement on these figures and this was annexed to the Judgment dated 31<sup>st</sup> July 2021 and sent to the parties on 6<sup>th</sup> August 2021 for the total sum of £48,532.20.

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Employment Judge King

Date: 09.11.21.....

Sent to the parties on: 01.12.2021

For the Tribunal Office