



THE EMPLOYMENT TRIBUNAL

SITTING: BY CVP VIDEO CONFERENCE

BEFORE: EMPLOYMENT JUDGE BALOGUN

MEMBERS: Mr G Mann
Ms H Carter

BETWEEN:

MR JOHN DIGNAM

Claimant

AND

THE CRACKING EGG COMPANY LIMITED

Respondent

ON: 29 November 2021
In Chambers 7 January 2022

Appearances:

For the Claimant: Mr P Neal, Lay Representative
For the Respondent: Rad Kohanzad, Counsel

RESERVED JUDGMENT ON REMEDY

1. The claimant is awarded the following compensation for unfair dismissal and disability discrimination:
 - a. Basic Award - £612
 - b. Loss of statutory rights - £400
 - c. Loss of earnings - £8840
 - d. Pension loss - £202.80
 - e. Injury to Feelings - £12001
 - a. Interest - £4095.74

2. The respondent is ordered to pay the claimant the total sum of **£26,151.54**

REASONS

1. This was a hearing to deal with remedy following the Tribunal's judgment (sent to the parties on 7 July 2021, with separate reasons sent on 8 November 2021) that the claimant was unfairly dismissed and subjected to unlawful disability discrimination by the respondent.
2. The claimant gave evidence at the hearing on matters relating to remedy. The parties presented a joint remedy bundle and from the claimant we received a supplementary bundle and a schedule of loss.

The Issues

3. The issues in the case are as follows:
 - a. Has the Claimant reasonably mitigated his loss
 - b. What financial losses flow from the dismissal
 - c. What award should be made for injury to feelings - Da'Bell v NSPCC [2010] IRLR 19 EAT.
 - d. Should there be an award for aggravated damages
 - e. Should interest be paid on any part of the award and if so;
 - f. At what rate should interest be paid.
 - g. Should there be an award for failure to provide written particulars of employment

The Law

4. Section 123 of the Employment Rights Act 1996 (ERA) provides that the amount of compensation payable for unfair dismissal 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 the action taken by the employer.
5. Under section 124 of the Equality Act 2010, the tribunal, having found discrimination, may make such order - a declaration, award of compensation, a recommendation - as it considers appropriate. Where compensation is ordered, the aim of such compensation is to, as far as possible, put the claimant in the position he would have been, but for the respondent's unlawful discrimination. *Ministry of Defence v Cannock and others [1994] IRLR 509.*
6. The claimant has the burden of proving his loss.

Submissions

7. The parties made oral submissions which we have taken into account.

Mitigation

8. An employee is under a duty to mitigate their loss as a reasonable man or woman unaffected by the hope of compensation. This requires them to take all reasonable steps to mitigate the loss which he or she has sustained as a result of being dismissed. An employee cannot recover compensation for the earnings lost as a result of the dismissal if that loss was avoidable. The onus is on the employer as wrongdoer to show

that a claimant has failed in their duty to mitigate. The test is an objective one based on the totality of the evidence. However, the standard of reasonableness to be expected of an employee in these circumstances is not high and the tribunal should not be too stringent in its expectations of the claimant. Fyfe v Scientific Furnishings Ltd [1989] IRLR 331; Wilding v British Telecommunications plc CA 2002 ICR 1079.

9. In considering what affect failure to mitigate should have on remedy, regard must be had to: Savage v Saxena 1998 ICR 357 EAT which confirms the analysis set out in the earlier case of Gardiner-Hill v Roland Berger Technics Ltd [1982] IRLR 498. The case cautions us not to apply an arbitrary cut off to compensation but instead to:
 - a. Identify what steps should have been taken
 - b. Find the date on which such steps would have produced an alternative income
 - c. Thereafter reduce the amount of compensation by the amount of income which would have been earned.

Has the claimant taken reasonable steps to mitigate his loss?

10. The claimant's dismissal took effect on 3 December 2018. By the time of the remedy hearing on 29 November 2021, just shy of 3 years later, the claimant had still not secured alternative employment.
11. We heard evidence from the claimant as to the steps he had taken to secure alternative work and in his supplemental remedy bundle, he provides in tabular form details of his job search.
12. Following his termination, the claimant registered on multiple job search websites. Despite receiving over 30 emails a day, 7 days a week between December 18 and April 19, he only applied for 2 jobs online during that period.
13. In January 2019, the claimant walked into 2 cafes (Baked Coffee and Café Coho) and handed in his CV. He was interviewed by Baked Coffee in July 2019 but there was nothing available for him at that time. Café Coho required someone to work full time which was the claimant was unable to do because of his diabetes. He made no online applications.
14. In February 2019, completed an online questionnaire for Aldi, Brighton, but did not meet the minimum requirements. He also walked into the Coffee Tree Café in the Lanes, Brighton, and handed in his CV. When the claimant tried to hand in his CV to the manager at Costa Coffee, he was told that all applications had to be filled out online. However, the claimant did not complete the online registration form until January 2021, nearly 2 years later, and did not apply for any positions.
15. In March 2019, the claimant handed in his CV to Oxfam, Brighton, and made one online application for the role of Kitchen Porter at Wahaca in Brighton. No other activity is recorded for March.
16. On 2 April 2019, the claimant walked into Waitrose, Brighton, to enquire about work and was told to apply online. On 23 April he created an online account and set up email alerts for Jobs from Waitrose but did not apply for anything until August 2020. On 30

April 2019, the claimant handed in his CV at Café Nero in Brighton and was again told to apply online. He did not do so until June 2019. The claimant applied for one online job in April (Survey Respondent) but received no response.

17. In May 2019, the claimant made one application, online, for the position of Sales Assistant at the British Heart Foundation.
18. The claimant says that in June 2019, he applied for multiple jobs in printing shops and cafes. That evidence was too general and lacked cogency. We were not prepared to accept it on face value.
19. In July 2019, the claimant made no applications but did attend an interview on 4 July, arising out of his application to Baked Coffee in January.
20. There is then no job search activity recorded until 26 February 2020 when the claimant applied online for the role of Receptionist. No other applications were made during this month.
21. In March 2020 the claimant walked into Tick-Tock Café in Brighton and enquired about Café work.
22. In March 2020, the Covid pandemic occurred.
23. The claimant suffered from ill health between May and July 2020 due to fluid on his lungs. This affected his ability to look for jobs and he was out of action for 2 months.
24. In July 2020 the claimant applied for one job, Care Assistant, and in August 2020 he applied for one job, as a Cat Sitter.
25. There were no other applications made in 2020.
26. The claimant's job search in the first half of 2021 seemed to follow the same pattern and pace as the previous years.
27. In May 2021, the claimant started voluntary unpaid work as a shop worker for Shelter.
28. The claimant's job search seemed to pick up pace from between July and November 2021. This is despite the fact that, by his own admission, his mental health and low mood was at that point worse than it had been in 2019 and 2020. For example, in July, the claimant walked into 6 shops to enquire about jobs and applied for one job online. In September 2021, the claimant records 10 specific job applications. He was similarly active in October 2021. We suspect this increased activity had something to do with the Tribunal cautioning him, after delivering its liability judgment, that he would need to demonstrate the steps he had taken to mitigate at the Remedy hearing.
29. The claimant did not apply to Starbucks even though it is a well-known coffee chain which dominates the High Street.
30. The claimant told us that he would have loved to have worked in Tesco but he made no applications. We take judicial note of the fact that Tesco is renowned for employing mature workers and operating a variety of shifts. Also, supermarkets were one of the few businesses that continued to operate during Covid lockdown.

31. Along Brighton seafront are lots of hotels that serve Breakfast. The claimant told us that a morning job serving Breakfast would have been ideal for him but he only handed in his CV to one such hotel.
32. It seems to us that the claimant's job search has been rather perfunctory. The ability to job hunt online brings with it a vast window into the local job market and the ability to make multiple applications at speed and with minimal exertion. In those circumstances, it is surprising that the claimant was averaging no more than one application a month.
33. Based on the evidence, we find that the claimant has not taken reasonable steps to mitigate his loss.
34. We think there were a number of things he could have done. He could have been making at least 10 online applications per month. He was doing this from September 2021 onwards and we see no reason why he could not have been doing this earlier.
35. He could have applied to Tesco and other supermarkets for jobs. The only supermarket application he made was to Waitrose, and that was not until August 2020, 16 months after he first registered with them online.
36. He could have made enquiries about a breakfast job in the plethora of seafront hotels in Brighton.
37. In our view, had the claimant done these things, he would have secured work, earning at least £8.50 per hour for a 16 hours per week by 2 March 2020 – 65 weeks after his dismissal. In reaching this conclusion, we have taken into account the claimant's age, 63 at the time; the limitations caused by his disability and his limited education, all of which may have put him at a disadvantage in the job market. That said, we also take into account the fact that most jobs that pay minimum wage are unlikely to need qualifications or prior experience.
38. Compensation for loss of earnings has therefore been awarded up to and including 1 March 2020.

Unfair Dismissal Award

BASIC AWARD

39. The claimant had 3 complete years of service, all over the age of 41 and his basic pay was £136 gross per week. His basic award is $3 \times 1.5 \times £136 = \mathbf{£612}$

COMPENSATORY AWARD

Loss of Earnings

40. Loss of earnings from 3.12.18 to 1 March 2020 - 65 weeks @ 136 = **£8840**

Pension loss

41. There was a lack of clarity on the claimant's pension loss. In the schedule of loss, it was said that the respondent contributed an average of £26.99 per week towards the claimant's pension. Then we were told that this was an arithmetical error and that it should have been £13.50 per week. No evidence was produced for either of these figures. The claimant's contract refers to access to a Stakeholder pension provider. No details were provided. We have therefore assumed that the respondent would have contributed the minimum figure of 3% of the proportion of the claimant's earnings over the relevant threshold. On that basis, £13.50 per week is unrealistically high and we consider that the contribution was more likely to be closer to £13.50 per month. We therefore calculate pension loss as follows: $13.50 \times 12/52 = £3.12$ per week $\times 65 =$ **£202.80**

Loss of Statutory Rights

42. We award **£400** for loss of statutory rights.

Benefits in Kind

43. We make no award for the loss of the benefits in kind referred to in the claimant's witness statement as there is either no evidence that such a benefit existed or if it did, there is no evidence of financial loss.
44. The total compensatory award is **£9,442.80**

Disability Discrimination Award

INJURY TO FEELINGS

45. The general principles that apply to assessing an appropriate injury to feelings award have been set out by the EAT in Prison Service v Johnson [1997] IRLR 162, para 27:
- i. Injury to feelings awards are compensatory and should be just to both parties. They should compensate fully without punishing the discriminator. Feelings of indignation at the discriminator's conduct should not be allowed to inflate the award;
 - ii. Awards should not be too low, as that would diminish respect for the policy of the anti-discrimination legislation. Society has condemned discrimination and awards must ensure that it is seen to be wrong. On the other hand, awards should be restrained, as excessive awards could be seen as the way to untaxed riches;
 - iii. Awards should bear some broad general similarity to the range of awards in personal injury cases – not to any particular type of personal injury but to the whole range of such awards;
 - iv. Tribunals should take into account the value in everyday life of the sum they have in mind, by reference to purchasing power or by reference to earnings;
 - v. Tribunals should bear in mind the need for public respect for the level of awards made.

46. The discriminatory dismissal caused the claimant to suffer a great deal of upset, humiliation and anxiety. He had many sleepless nights, panic attacks; and being dismissed and unemployed had an adverse effect on his self-esteem and happiness. Although the claimant had a history of anxiety and depression and was already on medication for this prior to his dismissal, we are satisfied that the dismissal exacerbated his condition.
47. The relevant Vento guidelines (as amended by *Da'Bell v NSPCC*, *UKEAT/0227/09*, [2010] IRLR 19) for claims presented on 4.12.18 were:
- Lower – 900 - 8600
Middle – 8600 - 25700
Upper – 25700 - 42900
48. Taking all the above matters into account, we consider that this matter falls within the lower end of the middle Vento band and we award £10,910 injury to feelings. We add to this a *Simmons v Castle* uplift of 10% (£1091) making the total injury to feelings award **£12001**.

Aggravated damages

49. The classic statement of when aggravated damages are available was made by the Court of Appeal in *Alexander v Home Office 1988 ICR 685, CA*, where it held that aggravated damages can be awarded in a discrimination case where the defendants have behaved 'in a high-handed, malicious, insulting or oppressive manner in committing the act of discrimination'.
50. In *Commissioner of Police of the Metropolis v Shaw 2012 ICR 464, EAT*, Mr Justice Underhill (as he then was) President of the Employment Appeal Tribunal, gave a more detailed exposition, identifying three broad categories of case, though this was not intended to be an exhaustive list:
- a. where the manner in which the wrong was committed was particularly upsetting. This is what the Court of Appeal in *Alexander* meant when referring to acts done in a 'high-handed, malicious, insulting or oppressive manner'
 - b. where there was a discriminatory motive — i.e. the conduct was evidently based on prejudice or animosity, or was spiteful, vindictive or intended to wound. Where such motive is evident, the discrimination will be likely to cause more distress than the same acts would cause if done inadvertently; for example, through ignorance or insensitivity. However, this will only be the case if the claimant was aware of the motive in question - an unknown motive could not cause aggravation of the injury to feelings, and
 - c. where subsequent conduct adds to the injury - for example, where the employer conducts tribunal proceedings in an unnecessarily offensive manner, or 'rubs salt in the wound' by plainly showing that it does not take the claimant's complaint of discrimination seriously.

51. The claimant relies on the matters at paragraphs 16-25 as the basis for claiming this award. However, our view is that much of what is alleged is based on the claimant's perception and to the extent that anything referred to is factual, it does not, in our view, reach the threshold of conduct that would attract such an award. We therefore make no award under this head.

Interest

52. The tribunal awards interest at 8% on the loss of earnings and injury to feelings award as follows:

Date of discrimination (X)	3.12.18		
Date of ET Calculation (Y)	7.1.22		
Number of day bw X & Y	1131		
Mid-point	565.5		
Injury to feelings	£12001	$\frac{12001 \times 1131 \times 0.08}{365}$	2974.93
loss of earnings	£9042.80	$\frac{9042.80 \times 565.5 \times 0.08}{365}$	1,120.81

Failure to provide written particulars

53. The claimant was provided with written particulars dated 8.5 15, which he signed, along with his then employer, Richard Neil on the same date. In the schedule of loss, it states that there was a failure to advise the claimant of changes in writing. No evidence was given by the claimant as to the changes that had occurred since the original statement was provided and whether or not he was notified of these. This complaint is not made out so no award is made.

ACAS Uplift

54. The claimant deals with this at paragraph 26 of his remedy statement. He refers to having made 5 grievances to the employer and references a number of documents in the bundle. However, having looked at those documents, most are requests for information. The closest one that gets to a complaint is the resignation email of 3 December 2018. However, we do not consider that to amount to a grievance. The complaints are presented as reasons why the claimant is resigning rather than a request to resolve matters. As there is no written grievance, the issue of an ACAS uplift does not arise.

Conclusion on Remedy

55. The unanimous judgment of the Tribunal is that the claimant be awarded the following:

- a. Basic Award - £612
- b. Loss of statutory rights - £400

- c. Loss of earnings - £8840
 - d. Pension loss - £202.80
 - e. Injury to Feelings - £12001
 - a. Interest - £4095.74
3. The respondent is ordered to pay the claimant the total sum of **£26,151.54**

Employment Judge Balogun
Date: 8 February 2022