



EMPLOYMENT TRIBUNALS

Claimant: Mr J Jewniewicz
Respondent: Heley International Ltd
Heard at: East London Hearing Centre (by Cloud Video Platform)
On: 6 January 2022
Before: Employment Judge B Elgot
Members: Ms M Legg
Mr L Bowman

Representation

Claimant: Ms L Durlik, lay representative
Respondent: Mr C Plume, HR Advisor

JUDGMENT having been sent to the parties on 10 January 2022 and detailed oral reasons for the judgment having been announced in open tribunal on 6 January 2022 the Respondent, by letter dated 21 January 2022, now requests written reasons under Rule 62(3) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

REASONS

1. The Remedy Judgment having been sent to the parties the Claimant gave evidence relating to remedy with the assistance of a Polish interpreter on oath (Ms Buchan) who, with the agreement of the parties and their representatives, interpreted all direct questions asked of the Claimant and his answers. There were no witnesses for the Respondent.

2. We saw an updated Schedule of Loss calculated as at 5 January 2022. The Claimant was advised that no claim for aggravated damages can be considered in cases of unfair dismissal. There was a revised bundle produced for the Remedy Hearing which consisted of the documents relating to mitigation of loss which had previously been included in the main hearing bundle. The Claimant also submitted some additional supporting evidence relating to remedy issues (23 pages)

3. The liability judgment in this case was sent to the parties on 8 December 2021 following a hearing on 25 and 26 November 2021. Oral reasons for the Tribunal's decision on liability were announced in open tribunal on 26 November 2021.
4. The claim of unfair dismissal succeeded taking into account equity and the substantial merits of the case. The complaint of age discrimination did not succeed and was dismissed.
5. No written reasons for the liability decision were requested by either party but by way of re-cap we found that the Claimant had been unfairly dismissed without notice for alleged gross misconduct. We determined that there were numerous serious flaws in the conduct of the disciplinary process particularly in the almost entirely inadequate investigation to the extent that we concluded that the Respondent in fact had no genuine belief based on reasonable grounds that the misconduct by the Claimant had occurred at all. We noted that the Respondent is a company with over 50 employees and a turnover of £14 million per annum which does not lack administrative resources. In all the circumstances of the case the Respondent acted unreasonably in taking the decision to dismiss the Claimant.
6. There was an equally unfair appeal which was not conducted by any impartial appeal officer of the Respondent. The Claimant had long service and an unblemished disciplinary record. There was no evidence that the Claimant was anything other than a good and efficient employee in reasonable health who worked hard at his job.
7. At the liability hearing we announced our conclusion that it is just and equitable in view of the Respondent's unreasonable failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures to increase the compensatory award for unfair dismissal by 20%.
8. At this remedy hearing the Respondent's representative made it clear that the Respondent seeks no reduction of the basic or compensatory award for any reason relating to the Claimant's contributory conduct. Similarly the Respondent does not contend that the Polkey principle applies or that any reduction of the compensatory award is appropriate to reflect the chance that, although procedurally unfair, the dismissal would have happened in any event.
9. The Claimant was therefore cross-examined only in relation to the steps he has taken to mitigate his financial loss by making reasonable efforts to find new work to replace his lost job with the Respondent.
10. The agreed facts are as follows:-
11. The Claimant was dismissed on 14 November 2019 after 14 years full time continuous employment with the Respondent. He was aged 63 at the effective date of termination of his employment. The multiplier for calculation of the basic award is therefore 21.
12. He was paid £ 397.50 gross per week and the amount of his net weekly wage is agreed as £ 338.30.

13. The Respondent contributed 3% of the Claimant's earnings to a pension scheme by way of employer's contribution. The pension loss is agreed as £11.93 per week.
14. The Claimant is entitled to one week's wage (from which the appropriate amount of tax and national insurance may be deducted) for the period 7 to 14 November 2019 because he was not notified of his dismissal until he received a letter dated 14 November 2019. The Respondent does not dispute it's obligation to pay these wages.
15. The basic award is therefore 21 x £ 397.50 which is **£8347.50**
16. We award £500 for the loss of the Claimant's statutory employment rights.
17. The Employment Protection (Recoupment of Benefits) Regulations 1996 apply to this award because the Claimant has received Universal Credit during the relevant period. The information which the Tribunal is required to give to the Department for Work and Pensions is calculated and set out in the Remedy Judgment to which the parties are referred.
18. Compensatory award. Following his dismissal as notified by letter on 14 November 2019 the Claimant appealed against his dismissal and an appeal meeting took place on 2 December 2019. The outcome of the appeal was not notified to him until seventeen days later on 19 December more than a month after his employment was terminated and only after he sent a written reminder that he was still awaiting the result of the appeal. The delay was caused by the Respondent.
19. We find it reasonable that the Claimant did not take steps to find new work whilst he awaited the appeal outcome until 19 December 2019. It is clear from the letter of appeal at pages 74-76 of the original bundle that he believed that a misunderstanding had occurred in relation to his actions done in good faith, that he was urgently concerned to get his job back and that he was counting on the appeal stage as his last chance to be reinstated. He wanted to remain in the employment of the Respondent. He refers to '*a great deal of stress and grief*' caused by his dismissal.
20. The appeal was unsuccessful and we are satisfied that the Claimant experienced a reactive depression; in his witness statement at paragraph 43 he says he was '*devastated...to be branded a thief*'. The Claimant became financially reliant on his family and felt '*like a useless piece of furniture*'. He did not disclose his GP or other medical notes for this remedy hearing but we have seen at page 9 of his supporting evidence (pages 89-92 of the original bundle) a letter from Inclusion Thurrock dated 2 March 2020 setting out the result of Mr Jewniewicz's gateway assessment for mental health difficulties and recommending counselling. In that letter he is described as having '*problems with a difficult employment situation*' and experiencing a '*depressive episode*' with thoughts of being '*better off back in Poland...not being here in the UK*'. The Tribunal panel's judicial and professional experience informs us that the GAD7 (General Anxiety Disorder) score of 20 and the PHQ9 (Patient Health Questionnaire) score of 24 both indicate severe levels of difficulty.
21. We find it likely that the Claimant's anxiety and depression also contributed to symptoms of physical ill health such as high blood pressure.
22. The Claimant was offered a telephone counselling consultation on 1 April 2020. We conclude that his referral to Inclusion Thurrock and thereafter to a counsellor was likely to

have been preceded by GP consultations and taken some weeks to arrange so that it is more likely than not that he began to experience anxiety and depressive symptoms in December 2019 and January 2020 which hampered his ability to look for work after Christmas 2019.

23. The Claimant has limited English; we find that his lack of spoken and written English skills were very likely to make it difficult for him to find even temporary alternative work especially at a time when his morale and confidence was demonstrably low. On 19 February 2020 he did approach an employment agency A1 Personnel which employed a Polish speaking member of staff but says that he received no job offers. He also gave evidence that he sought work through his personal network of Polish family and friends but without success. No family member or friend gave evidence as to how they were able to intervene or assist although the Claimant says his daughter and son in law with whom he resides did help him make phone calls when they had time.

24. We agree with the Respondent's representative that there is an absence of documented and/or online job applications or rejections, no copy of the Claimant's Job Centre job search log after he claimed UC in May 2020 and no evidence of steps he took, for example, to register with any other temporary or permanent agencies. We find that the Claimant has no IT skills.

25. Consequently although we are satisfied that it was reasonable for the Claimant not to take active steps to find new work whilst he awaited the appeal outcome and whilst we accept that his health difficulties reasonably prevented him from rigorously pursuing employment in the early part of 2020 when he was first unwell we would have expected a more robust attempt to look for a job by the end of March 2020. In the 'claimant commitment' document for Universal Credit which is at pages 93-98 the Claimant agrees with his work coach that he is prepared to seek full time work as a warehouse picker or forklift driver at minimum wage or above and can drive up to 90 minutes to work. There is no requirement by the Job Centre that he seek work in heavy construction. The Claimant has a driving licence (not HGV) and is not restricted from driving.

26. However by February 2020 the serious and highly contagious covid 19 pandemic intervened and the most severe and widespread lockdown restrictions were introduced in England on 23 March 2020. Essential businesses remained open but we are convinced that little or no new recruitment took place and particularly not of employees of the Claimant's age, with developing physical as well as mental health impairments and who spoke little English. The Claimant was prevented from mitigating his loss in these circumstances. He confirms that even after he applied for UC in May 2020 his work coach was unable to find him a new job despite regular phone appointments.

27. Mr Jewniewick's limited attempts to overcome his ill health, cease to be a burden on his family and to get back into work were further defeated by the pandemic and given his lack of success in obtaining a job he claimed Universal Credit (UC) on 12 May 2020. We note that it was not until the following year on 24 July 2021 that he was assessed as entitled to Employment and Support Allowance (ESA) at the higher rate because he is incapable of work or work related activity as recorded on pages 169-70. There is no medical or other evidence that he could not work at all between May 2020 and July 2021.

28. We are satisfied that once the first lockdown was eased at the end of June 2020 with a significant (if temporary) loosening of restrictions on 10 July 2020 the Claimant should

reasonably have redoubled his efforts to find warehouse and forklift driving work as he had committed to do when claiming benefits. He has shown no evidence of any reason why this could not be done and he has produced little or no documentary proof that by June or July 2020 he was taking reasonable steps to mitigate the losses which flowed from his dismissal. His claim for immediate loss of earnings is therefore limited to the period from the effective date of termination on 14 November 2019 until 10 July 2020 which is rounded up to 34 full weeks.

29. 34 x £ 338.30 (net weekly wage) is £11,502.20
30. 34 x £11.93 (weekly pension loss) is £ 405.45
31. Add loss of statutory employment rights =£500
32. The total compensatory award is £ 12,407.65 uplifted by 20% which is £14,889.18
33. The grand total payable by the Respondent to the Claimant is £23,236.68 (8347.5 + 14,889.18)

Employment Judge B Elgot
Dated: 22 February 2022