EMPLOYMENT TRIBUNALS

Claimant: **Mr R Parkinson**

Respondent: **GI Group Recruitment Limited**

Heard at: **Reading (via CVP)**
On: **7 November 2022**

Before: Employment Judge Eeley
Mr P Hough
Mr T Poil

Representation
Claimant: In person
Respondent: Mr I Wheaton, counsel

JUDGMENT having been sent to the parties on 8 December 2022 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. This is the decision and reasons on remedy in this case.

2. The hearing was listed following a reserved decision on liability issued to the parties by my colleague Employment Judge Vowles (who sat with Mr Hough and Mr Poil). The hearing today was listed to determine the appropriate level of compensation. The findings in relation to liability were that the claimant stood to be compensated for unfair dismissal and that his claims for discrimination and victimisation were dismissed (and so no compensation was to be awarded for those.) The unauthorised deduction from wages claim had not been determined and was left open for us to consider today based on the evidence that we heard during this hearing.

3. I deal first of all with the principles that we have applied in relation to the unfair dismissal claim. The first issue was whether the claimant discharged his duty to mitigate his loss in an appropriate way. The principle is that loss of earnings flowing from the unfair dismissal can be awarded as compensation by the Tribunal but the employee has a duty to take reasonable steps to mitigate his loss. The period of loss for which compensation is awarded can be limited to take account of when the claimant could and should (reasonably) have mitigated his loss of earnings.

4. In brief, we have concluded that, whilst the claimant did take *some* steps to attempt to find suitable alternative employment, he did not do enough to discharge his duty to mitigate within a reasonable period. He was not particularly active in his pursuit of alternative employment. He did make *some* applications but there are relatively few evidenced in the bundle before us (although we take on board that the claimant would have had to have applied for a certain number of jobs in order to gain entitlement to Universal Credit and state benefits.)

5. Taking everything in the round, including the nature of the claimant's work and the state of the jobs market at the time in question, we conclude that it would have taken him three months (from the date of dismissal) to obtain a new job if he had taken reasonable steps to mitigate his loss. We also take into account the fact that the jobs which he subsequently obtained have been closer to minimum wage levels of remuneration (£9.50 per hour or something of that order) whereas prior to his dismissal by the respondent he was on approximately double that as an hourly rate. Our conclusion, therefore, is that whilst the claimant should have been able to obtain *some* form of paid employment within three months, he is likely to have needed a further three months in order to fully mitigate his loss and obtain a job at the rate of pay that he had enjoyed with the respondent. Therefore, we award an overall period of loss of earnings of six months. The six months is made up of three months at his full rate of pay with the respondent and three months at half the rate of pay which was paid by the respondent.

6. We looked at the argument that the respondent raised about contributory fault. The respondent asked us to look at the fact that, at the date of dismissal that we are discussing, the claimant would have had a live final written warning on his record. The respondent therefore says that even if the offence for which he was ultimately dismissed did not amount to gross misconduct in itself (entitling the respondent to dismissal on that basis alone), the respondent would still have been entitled to dismiss the claimant straight away by adding the misconduct to the live warning and dismissing on that basis. The respondent says that there was already a live warning, there was subsequent misconduct and the net result is the same, namely that he should be dismissed.

7. In order to follow that argument through we had to consider whether or not there was evidence of blameworthy or culpable conduct in that way. We were limited in the findings that we could make because of the findings that were made at the liability stage. The problem was that, at the liability stage, the Tribunal concluded that the dismissal was not solely unfair on a procedural basis. There were also substantive problems with the fairness of the dismissal. The claimant had put forward a defence to the allegation that he had left the site without authorization and this was not examined by the respondent. They did not look into whether that explanation/defence was reasonable and whether others had in fact done the same thing as the claimant and whether this happened on a regular basis. They had turned a blind eye to any evidence which might have exonerated the claimant and avoided the need to discipline him.

8. The difficulty this Tribunal finds itself in is that we cannot say that there is sufficient evidence that the claimant should reasonably or fairly have been

found guilty of a disciplinary offence which could then be 'totted up' with the earlier offence on the record in order to produce a fair dismissal. This is because the respondent did not follow through and check or test that defence. The respondent cannot then profit from that omission and rely on its own failure to test the evidence and investigate the claimant's explanation. We are not satisfied that we can safely say that, even if the claimant had not been dismissed 'as of right' for *gross* misconduct in 2019, there would have been a reasonable/fair finding of some lesser category of misconduct which could be added to the live written warning and used to dismiss him immediately and fairly.

9. We also looked at the more subtle argument that was put before us by counsel for the respondent. Counsel submitted that, whether or not leaving the workplace during the break (or otherwise) technically amounted to 'misconduct' it was still 'culpable' or 'blameworthy' for the claimant to have done that in circumstances where he had been disciplined previously for similar conduct (which was said to be serious.) Once again, the timeline does not 'stack up' in order to follow this line of argument through to its conclusion. The offence for which the claimant was dismissed took place around 13/14 May 2019. The hearing at which he was first dismissed for the 2018 offence took place the day afterwards, on 15 May 2019. He was then re-instated on 20 June and then suspended when he sought to come back to work after a period of annual leave on 8 July. That timeline shows us that, as at the time he committed the 'dismissal offence' (for the purposes of these proceedings) i.e. 13 and 14 May 2019, he could not have known that he was going to dismissed or disciplined for the 2018 offence. It would not be reasonable to say that he should have been 'on notice' and should have been being extra careful not to 'repeat offend' or risk further disciplinary action. This is not similar to a case where somebody has a live record which they are aware of at the time they commit a second offence. The claimant did not have such awareness or effective forewarning as to how his conduct in 2019 would be viewed by the respondent. It would be wrong to attribute that state of mind to him when he committed the 2019 'offence' when he did not know that the 2018 offence would be treated in that way. We are afraid that we cannot find that there was culpable conduct in that second "offence" in all the circumstances. (Of course he had already received his punishment for the earlier offence.) On that basis, we do not find that there should be a reduction in compensation on the grounds of contributory fault. The claimant should be entitled to his loss of earnings for the period of six months in line with our findings in relation to mitigation of loss.

10. We looked at whether it was possible to apply a 'Polkey' argument and we concluded that it was not (in light of the earlier liability findings which were that the dismissal was not just procedurally unfair but also substantively unfair.) It was too speculative for us to engage in an exercise of trying to work out at what point, and what the percentage chance was, that with a fair procedure, the respondent could and would have dismissed the claimant. So, we make no Polkey reduction.

11. So, as I said at the outset, the period of loss of earnings flowing from the dismissal will be six-months in total: three months at full loss of earnings; three months at half loss of earnings. This is to take account of the fact that the claimant had a duty to find a job and then an ongoing duty to try and fully

mitigate his loss of earnings by achieving a comparable rate of pay to that which he received from the respondent.

12. Turning to the schedule of loss and applying our findings thus far to the sums claimed, the first amount claimed by the claimant is the basic award. That is matter of statutory calculation and is claimed, and awarded, at £2,625.

13. The claimant then, in his pecuniary loss claim, wraps that up with an unauthorised deduction from wages claim. We addressed that stage by stage. We found that, based on what we have been told, the claimant worked a five-day week, 37.5 hours. We refer ourselves back to the documents at pages 255, 261 and 272 of the hearing bundle. We started with the question: what was the claimant's proper hourly rate? We found that the properly payable hourly rate was £16.34, as at the date of termination. This was on the basis that the basic rate of pay for a fixed shift was £16.34. This is derived from the email explanation that when the claimant returned to work from his sickness absence in earlier 2018 he had returned to a fixed, non-rotating shift or a 'Buddy Morning Shift' (as the documents refer to it.) So, that was the starting point. The claimant says he was actually paid at a higher rate, £18.74, when he came back to work. What we find, based on the evidence that we have read, and what we have heard from the claimant, is that his actual *entitlement* was to the lower amount of £16.34. The documents disclose that that was not picked up on by the respondent for some considerable period of time. They continued to pay him at £18.74 even though he was not working the rotating shift which entitled him to that rate of pay.

14. The claimant then says to us that he was working subject to an agreement that he would be paid more than that, as though he *was* working on a rotating shift (even though he was not working a rotating shift). There was some reference to him working to cover a colleague that he referred to (possibly called Lee.) The respondent says, no, there was no such entitlement. It was a mistake which was not rectified. There was no agreement to pay more than the contractual entitlement. The question for us is where is the claimant's evidence of that agreement? He was asked to provide it and he was not able to demonstrate that there was an agreement to pay him at a higher rate. Therefore, we conclude that £16.34 is the correct rate . There is no evidence of a special agreement. We accept that the later payments of £18.70 were an oversight which was subsequently not pursued by the respondent. The higher rate of pay at £18.74 is normally put in place to recognize a rotating shift pattern of mornings, afternoons and nights and there is an element in it to reflect unsociable hours and compensate a worker for that. The reality here is that the claimant had not been working those unsociable hours in the period between his return to work from sick leave and his subsequent dismissal and then the suspension for the second dismissal.

15. During the claimant's suspension we conclude not only was there no evidence that he would have been working on a rotating shift pattern, but also that it is reasonable to conclude that suspension pay would be on the basis of a daytime working pattern given that there is no unsociable hours element to compensate the claimant for during a period of suspension.

16. So, that part of the unauthorised deduction from wages claim must fail, the part where the claimant says "I was underpaid on an hourly rate. It should

have been £18.74 instead it was £16.34." That part of the claim fails.

17. However, in the suspension period we also saw evidence that there were some days on which the claimant was not paid at all, even at the lower rate of £16.34. The argument seems to have been to do with whether the claimant was in fact making himself available when called upon by the respondent. This came to a head when he was unable to attend a meeting during his suspension and asked for it to be rearranged. The claimant says, "I was available in principle, I just could not make that particular meeting. That does not mean that I am not entitled to my full suspension pay." The respondent, on the other hand, says, "no you were not available and if you do not make yourself available you are not entitled to the suspension pay."

18. The conclusion of the Tribunal is that during employment the employee is entitled to their normal rate of pay unless a specified exception applies. We were not taken to any part of the documentation which indicated that the respondent was entitled to withhold pay in its entirely.

19. In any event, we were not satisfied that the respondent acted reasonably in concluding that the claimant was absenting himself entirely. All that the claimant had said was that he was not able to attend a particular meeting. The burden must surely be on the respondent to show that he had made himself completely unavailable during the relevant period. What does this amount to? We went to page 272 where there was a breakdown of the days where the claimant was not paid at all. Based on a five-day working week it appears that there were three weeks over which he did not get the full five days' pay. There were nine days that fell to be paid so nine days at £16.34 an hour, 7.5 hours a day x 9 gives unauthorised deductions during suspension of £1,103.

20. "C2" on the claimant's schedule of loss related to loss of pay during sick leave and seemed to be predicated on an entitlement to being paid more than statutory sick pay during his absence from work on sick leave. Bluntly put, there was no contractual documentation or evidence available to us to indicate that the claimant was entitled to more than statutory sick pay whilst he was off work on sick leave. He had received statutory sick pay and therefore there was no loss, no deduction from what was properly payable during his period of sickness absence. So, that claim falls away and is dismissed.

21. "C3" is highlighted as the respondent demoting the claimant after he was assaulted by a manager and it is said to relate to a period from 28 April 2018 through to well past the end of the employment on 18 January 2021. The burden is on the claimant to show what was properly payable and that there has been a deduction from that properly payable sum. There is no evidence put before this Tribunal of a demotion. There is no evidence to show that he was paid less than he would otherwise have received during this period. We also take on board the fact that it goes back to April of 2018 and yet the tribunal claim form was presented on 24 March 2020. It was presented some considerable period outside the three-month time limit. So, given that there is an absence of evidence to prove the claim and given the age of the claim, we are not satisfied that the claimant has proved that there was an unauthorised deduction from wages during that period. The award claimed at "C3" is not

awarded.

22. The loss of earnings claimed at "C4" is the period that we referred to earlier (the loss of earnings from the date of dismissal for a period of six months.) We have not been able to carry out a 'net' calculation (after tax) based on the documents provided to us by the parties.

23. Following that through we have taken an hourly rate of £16.34, multiplied that up to give us £612.75 gross per week which then multiplied up by 52 and divided by 12 gives us a gross salary of £2,655.25 per month. Given three months at full loss of salary and three months at half loss of salary, that gives us a compensatory award of loss of earnings of £11,948.63.

24. We took on board the claim for the bonus and the respondent's concession that if the claimant had been in employment in March he would have received that. Therefore we award £790 for the bonus as claimed. We also award the loss of statutory rights at £450.

25. So, to summarise, the component parts of the judgment, we have:

    Basic award of £2,625.
    Loss of earnings in the compensatory award of £11,948.63
    Loss of bonus as part of the compensatory award of £790.
    Loss of statutory rights at £450
    Unauthorised deduction from wages of £1,103

    So, that is the total awarded in respect of the various claims.

26. This is a claim where the claimant has sought Job Seekers Allowance and Income Support benefits. Consequently, the recoupment provisions apply up to the date of today's decision. I will therefore be setting out the prescribed element of the award in the written judgment that comes through to the parties. Mr Parkinson, what that means is that the respondent can pay you the other parts of the award straight away, apart from the prescribed element. They then need to be notified by the Department of Work and Pensions whether it is reclaiming any part of the benefits you have received. Once they have received that certificate from the Department of Work and Pensions they can pay you any further outstanding judgment monies. So, I will issue a judgment to that effect.

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Employment Judge Eeley

Date signed: 8 December 2022

Judgment sent to the parties on

15/12/2022

N Gotecha
For the Tribunal office