



EMPLOYMENT TRIBUNALS

Claimant: Mr J Chica Arango

Respondents: Interhigh Education Ltd

Heard at: London Central Employment Tribunal (in public; by CVP)

On: 20 January 2023

Before: Employment Judge Adkin
Ms S Plummer
Mrs J Griffiths

Appearances

For the Claimant: represented himself

For the Respondent: Mr L Menzies, solicitor

JUDGMENT

- (1) The Respondent shall pay the Claimant damages for breach of contract in the sum of **£6,448.60** less deductions for income tax and national insurance.
- (2) The Respondent shall pay the Claimant damages for unfair dismissal assessed at **£7,551.54**, comprised of
 - a. a basic award £6,438.56;
 - b. a compensatory award of £709.82.

WRITTEN REASONS

Procedure

1. This remedy hearing followed on from a judgment in the claimant's favour sent to the parties on 29 September 2022, following a hearing in July 2022.
2. The hearing took place fully remotely using the CVP video system. It worked well.

Evidence

3. We retained documents from the liability hearing.
4. Additionally, we were supplied with a remedy bundle of 92 pages and a 4 page witness statement dated 14 November 2022 from the Claimant. There were no witness statements from the Respondent in relation to remedy.

Breach of contract (notice pay)

Background to claim

5. The Respondent in a counter schedule dated in January 2023 conceded that notice pay was 17 weeks' pay, subject to any deduction reflecting illness on the part of the Claimant and mitigation of loss. This was based on net pay. In fact we have given a judgment based on the agreed gross weekly pay amount, with a deduction to be made for income tax and national insurance by the Respondent before paying the Claimant.
6. As to the Claimant's health, the picture is somewhat mixed. On the one hand he insisted to the Tribunal that he was well enough to work in the period after his dismissal by the Respondent. On the other hand he was suggesting that he was somewhat up and down mentally, lacking confidence, suffering anxiety and suffering from the effect of the termination of his employment.

Mitigation of loss

7. As to mitigation of loss, the Claimant was under a duty to take reasonable steps to mitigate his loss by seeking alternative employment or income. Mitigation of loss is potentially relevant to both the claim for damages for breach of contract and the compensatory award for unfair dismissal.
8. In fact what he did do was earn £393.19 in a series of relatively small amounts in the period September to December 2020. These were generally received by PayPal for *ad hoc* Spanish tuition given to people that he connected with over social media. He also made job applications on 5 and 9 September 2020, 6 and 7 October 2020, 12 January 2021, 7 February 2021.

9. Further job applications were made on 20 January, 7 February, 26 April, 30 June 2021.
10. The Claimant was concerned about a letter sent to him by Mr Menzies on behalf of the Respondent on 18 January 2021 in which the Claimant was warned off using the Respondent's intellectual property in a potential new venture. He further refers to the restrictive covenants in his contract. The Claimant says that this significantly constrained his ability to work. The Respondent's position is that this letter was very limited in scope and the restrictive covenants did not prevent him from going to work for a competitor. While we accept that the Claimant felt concerned about receiving a legal letter, we accept the Respondent's essential submission that the Claimant could not reasonably believe that this amounted to a substantial constraint on him. It is clear that he was being warned off using the Respondent's intellectual property. The restrictive covenants in the Claimant's contract were limited in scope, prohibiting soliciting business, soliciting colleagues, soliciting clients and students rather than working for competitors.
11. Mr Menzies makes the point that in 2020 the Claimant was in the unusual position of having over a decade of experience as an online teacher, which ought to have put him at a great advantage during the pandemic when much teaching was going on online. The Claimant counters that because of the pandemic conventional face-to-face classroom teachers were now all operating online and that it is illusory to believe that there were suddenly a large quantity of unfilled online teaching jobs. We find that the truth lies somewhere between the two positions. The Claimant's experience was not a guarantee of a new role, but it was certainly something that he could flag to prospective employers.
12. The Claimant did not make a large number of formal written applications. We do not consider that in the first 2 – 3 months at least this amounted to a failure to take reasonable steps to mitigate his loss. We accept his evidence that his confidence had been knocked and that he was trying to build up tuition through social media. This was an attempt to mitigate his loss. He did this to some extent, although it would have taken a long time to build this up this piecemeal accumulation of tutoring to an equivalent level to his salary with the Respondent.
13. We find it somewhat surprising that the Claimant did not sign up with any sort of employment or recruitment agency. It seems to us that this would be a natural step to take. He did not appear to have made any use of the *Times Educational Supplement*, which we accept as Mr Menzies put to him is where very many roles in the education sector are advertised.
14. By the end of 2020 going into 2021, it ought to have been clear to the Claimant that he needed to increase the activity of job applications. There were significant gaps between job applications.

Conclusion on mitigation of loss

15. Ultimately the Tribunal has approached the question of mitigation of loss with a broad brush. We find that with reasonable efforts the Claimant, with his extensive experience on online teaching ought to have been able to find a job with equivalent pay by **six months after the date of termination**. It follows that we find that from

1 March 2021 he ought to have been earning an equivalent salary and this marks the end point of his loss.

Health

16. As to the Claimant's health, we accept that the Claimant was substantially fit enough to work, albeit that he was suffering significant ups and downs in mental health and suffering from a disturbed sleep pattern. We do not consider it appropriate to only award damages for sick pay as contended for by the Respondent, since, in our assessment had the unfair dismissal not occurred the Claimant would have been able to work in the period from September 2021 onward.

17. We have awarded damages on the basis of full contractual pay.

Conclusion on breach of contract

18. We find that the Claimant should recover damages for 17 weeks' full contractual pay, less the £393.13 earned.

19. We calculate this as $(17 \times £402.45) - £393.13 = \mathbf{£6,448.60}$ to be awarded gross and paid net of income tax and national insurance as appropriate.

Unfair dismissal

Basic award

20. The correct calculation of the basic award for unfair dismissal, using the agreed gross weekly pay is set out in the Respondent's counter-schedule, which we have adopted. The figure is **£6,438.56**.

Compensatory award

21. The Claimant is not entitled to recover damages for breach of contract and the compensatory award for unfair dismissal in the same period, since this would amount to double recovery.

22. The Claimant has been awarded damages for breach of contract for the period 1 September 2020 to 31 December 2020 (4 months). Based on our finding that he would with reasonable effort have found alternative work after 6 months, he is entitled to recover a compensatory award for a further 2 months for the period 1 January to 28 February 2021, subject to a reduction for *Polkey*.

ACAS increase/reduction

23. We accept Mr Menzies' submission that the ACAS increase/reduction has no application in this case, since the dismissal was for 'some other substantial reason'.

Polkey

24. Following the decision of the House of Lords in *Polkey v AE Dayton Services Ltd* [1987] UKHL 8 we have to consider if the dismissal was procedurally unfair, what

adjustment, if any, should be made to any compensatory award to reflect the possibility that the Claimant would still have been dismissed had a fair and reasonable procedure been followed.

25. The Respondent's primary case is that there was a 100% chance that the Claimant would have been fairly dismissed on 31 August 2020 on the basis that the failure to inform the Claimant correctly about his pay was only one element in the overall picture and there is substantial evidence that the Claimant did not want sign the new contract and by 2020 his experience working at the Respondent was an unhappy one.
26. We accept the Respondent's central submission that there was a high chance that the Claimant would not have signed a new contract had the procedure been handled entirely fairly. He was unhappy about the overtime arrangements introduced the previous year. He was querying many points during the consulting period, even matters that should have been clear to him. We do not find however that this likelihood was as high as 100%. We find that the likelihood of a fair dismissal occurring at 31 August 2020 was **75%**. Accordingly we have reduced the compensatory award by 75%.
27. Based on the Claimant's monthly net pay of £1,419.63, two months is £2,839.26. Less 75% is £709.82.

Employment Judge Adkin

23 January 2023

Sent to the parties on:

23/01/2023

For the Tribunal Office: