EMPLOYMENT TRIBUNALS

Claimant: **Mr A Courtney**

Respondent: **AGTC Ltd**

Heard at: **Reading (by CVP)** **On: 6—7 March 2023**

Before: **Employment Judge Reindorf**
Ms R Watts Davies
Mr D Palmer

Representation

Claimant: In person

Respondent: Ms Asch-D'Souza (solicitor)

JUDGMENT ON REMEDY

1. The judgment of the Tribunal as to remedy is that the Respondent is ordered to pay to the Claimant forthwith the sum of **£2,020.37** in compensation for unfair dismissal.

2. This award is not subject to the recoupment provisions in the Employment Protection (Recoupment of Benefits) Regulations 1996.

REASONS

Introduction

1. In a claim form presented on 30 June 2021 the Claimant brought a claim for unfair dismissal, disability discrimination and "other payments". His complaint related principally to his dismissal for redundancy which took effect from 20 April 2021. The Respondent denied the claims.

2. The issues were clarified at a preliminary hearing on 23 March 2022, at which it was agreed that the Claimant's claim was for unfair dismissal, harassment related to disability, direct disability discrimination and victimisation.

3. A final hearing took place on 26 to 29 September 2022. Judgment was reserved. The Tribunal promulgated its judgment on liability on 13 January 2023. It upheld the unfair dismissal claim and dismissed the discrimination, harassment and victimisation claims.

4. The relevant findings of the Tribunal were, in summary, as follows:

    4.1. The Respondent had not shown that the Claimant was dismissed for a potentially fair reason. He was not dismissed for redundancy.

    4.2. The reasons for the Claimant's dismissal were (1) that the Respondent believed that he was having an adverse impact on workplace relationships; and (2) that the Respondent believed he was underperforming.

    4.3. The decision to dismiss the Claimant was made in the period between August and November 2020.

    4.4. Even if the reason was a fair one, the Respondent did not act reasonably in the circumstances in dismissing the Claimant. It did not undertake reasonable investigations into the Claimant's perceived effect on the workplace or on his perceived underperformance and nor did it make reasonable efforts to remedy these issues before concluding that dismissal was an appropriate response.

    4.5. Even if the reason for dismissal was redundancy, the Respondent did not act reasonably in the circumstances in deciding to dismiss the Claimant for that reason. The Claimant was not properly consulted, no consideration was given to pooling him with any other employees and he was not given any realistic opportunity to apply for the Operations Manager post. His appeal against

dismissal did not remedy these flaws, and the Tribunal was not convinced that the appeal manager was impartial.

5. The Tribunal directed that the question of whether the Claimant would have been dismissed fairly even if the Respondent had adopted a fair procedure ("Polkey") would be decided at the remedy hearing.

The Evidence and Hearing

6. The remedy hearing was conducted remotely by video (CVP).

7. The hearing took place over two days.

8. The parties relied on the original trial bundle. The Claimant produced the following additional documents:

   8.1. A WhatsApp message exchange between himself and a friend relating to the termination of his job with FiS on 12 July 2021.

   8.2. Documentation relating to an offer of employment as an Operations Manager with Curlsmith made to him on 15 October 21 subject to references, which was subsequently withdrawn.

   8.3. A contract of employment for a job he undertook with iD between 9 November 2021 and the end of 2022.

   8.4. An email from the Respondent's solicitors dated 17 January 2023 regarding disclosure for the remedy hearing.

9. During the course of the hearing the Claimant disclosed to the Respondent evidence relating to his search for alternative employment in the period 12 July 2021 to 13 October 2021. On the basis of that documentation the Respondent conceded that the Claimant had taken reasonable steps to mitigate his loss in that period.

10. The Tribunal heard evidence from the Claimant on his own behalf, and from Angelika Waszak (formerly Human Resources Business Partner) and Thomas Cutler (Managing Director and co-founder) for the Respondent. The Claimant relied on his original witness statement and gave additional evidence in chief. The Respondent relied on its original witness statements. All witnesses were subject to cross-examination.

Findings of Fact

11. The Claimant was born on 1 August 1980. He worked for the Respondent from 8 January 2018 until 20 April 2021. At the date of his dismissal he was 40 years old and he had three full years of service.

12. It was agreed between the parties that the Claimant's salary with the Respondent was £48,000 gross per year. This translated to weekly gross

pay of £923.08 and weekly net pay of £665.59. The Respondent made employer's contributions to the Claimant's pension of £104.40 per month.

13. Following his dismissal without notice on 20 April 2021 the Claimant was paid the following sums by the Respondent:

    13.1. a payment which was described as statutory redundancy payment of £2,769.21;

    13.2. pay in lieu of four weeks' notice of £3,692.28.

14. On 18 May 2021 the Claimant started new employment as an Operations Manager with a construction company called FIS. His annual salary in this role was £45,000 gross. It was agreed that this translated into weekly net pay of £582.47. He was not entitled to join a pension scheme until he had been employed in the role for three months. In his starter paperwork he disclosed that he was taking sertraline for low mood.

15. The Claimant resigned from his role at FIS on 12 July 2021, having been called to a formal review meeting to discuss his performance. The Tribunal accepts that his manager had given him the option of resigning or being dismissed. The subsequent WhatsApp exchange between the Claimant and his friend was the only contemporaneous documentary evidence about the specific reasons for which dismissal was threatened against him. This mentioned only the Claimant's failure to remedy a problem with a machine and a request by his manager that he come in at the weekend to repair the machine. In the WhatsApp exchange the Claimant said:

    "If he's going to get rid of someone because of not happy with how dealt with machine breaking down I mean come on"

16. The Tribunal found that this comment showed that at the time the Claimant was of the view that this short series of events was the only reason for the threatened dismissal and, moreover, that his manager's approach to it was unreasonable and disproportionate. The Claimant told us in evidence that he had been underperforming throughout his employment with FIS and that the issue with the machine was the last straw. However this account was inconsistent with the WhatsApp exchange and we saw no evidence to substantiate it.

17. The Claimant has not shown that the reason for which he underperformed in his role at FIS was because he was suffering from mental ill health which was caused by the Respondent. He produced no evidence that he was suffering from mental ill health at this time other than his declaration to his new employer that he was taking sertraline and a prescription list. He produced no medical evidence to the effect that the reason he was taking sertraline was the Respondent's treatment of him. The Occupational Health report of 25 January 2021 was

insufficient for this purpose. The Tribunal was mindful that the Claimant had had an episode of depression in 2006 / 2007, before he worked for the Respondent.

18. Between 12 July 2021 and September 2021 the Claimant applied for numerous jobs. In September he applied for three jobs: one with a company called iD, one with a company called Hydro and one with a company called Curlsmith. He was offered the iD post and the Hydro post at around the same time. He accepted the Hydro job, but the offer was withdrawn. By this time the iD post had been filled. He therefore continued to pursue the Curlsmith post, which he was offered on 15 October subject to two satisfactory references. The job was due to start on or about 1 November.

19. On 15 October 2021 Curlsmith approached Angelika Waszak for a reference for the Claimant. On 26 October she provided a factual reference stating the Claimant's job title and dates of employment, in line with the Respondent's usual practice. On 28 October Curlsmith emailed Angelika Waszak asking if they could have a conversation with her about the Claimant's reference. She did not pick up this email because she was on holiday. They did not contact her again.

20. The Claimant's other referee, Thomas Cook Ltd, sent Curlsmith a reference stating that he was an:

    "excellent team member with a good solid operation and performance of his cluster and no sickness recorded or any out of course absence. Very reliable and a pleasure to work with".

21. The Claimant alleged before us that Adam Gilbourne (Managing Director of the Respondent) spoke to Curlsmith and gave them an unsatisfactory verbal reference for him. The Tribunal has not found it necessary to make a finding on this point, save to say that the Claimant has not established that the contents of any reference that might have been given verbally to Curlsmith were dishonest.

22. On a date after 28 October 2021 the job offer from Curlsmith was revoked on the basis that the Claimant had not received satisfactory references.

23. The Claimant approached iD again, and within a few days they called him to offer him a role to start on 9 November 2021 at a salary of £47,500 per annum. He accepted the job and continued in the role until the end of 2022.

24. The Claimant did not claim benefits in the period 12 July to 9 November 2021.

The law

The basic award

25. By s.119 of the Employment Rights Act 1996 ("ERA") the basic award for unfair dismissal is calculated as follows:

    25.1. half a week's gross pay (subject to the statutory cap) for each year of continuous employment when the employee was below the age of 22;

    25.2. one week's gross pay (subject to the statutory cap) for each year of continuous employment when the employee was below the age of 41 but not below the age of 22; and

    25.3. one and half weeks' gross pay (subject to the statutory cap) for each year of continuous employment when the employee was not below the age of 41.

26. Where the effective date of termination of the employment took place between 6 April 2021 and 5 April 2022 the statutory cap is £544.

27. By s.122(4)(b) ERA the basic award must be reduced by the amount of any payment made by the Respondent to the Claimant on the ground that the dismissal was by reason of redundancy. The dismissal must actually have been by reason of redundancy as a matter of law for this reduction to apply (*Boorman v Allmakes Ltd* [1995] ICR 842 CA).

28. The basic award may not be increased or reduced for failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures.

The compensatory award

29. By s.123(1) ERA the Tribunal must make a compensatory award in such amount as it considers just and equitable in all the circumstances having regard to the loss sustained by the Claimant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer.

30. The Tribunal should first determine the amount of the loss actually suffered by the Claimant in consequence of the dismissal which is attributable to action taken by the Respondent. The Tribunal should determine what the Claimant would have earned had the employment continued and how long it would have continued for. A sum for loss of statutory rights may be included. Credit should be given for:

    30.1. sums paid to the Claimant by the Respondent as compensation for the dismissal, including any pay in lieu of notice (*Heggie v Uniroyal Ltd* [1999] IRLR 802);

30.2. sums earned by way of mitigation of loss; and

30.3. deductions to be made for any failure to mitigate the loss.

31. Next, a reduction may be made on the basis that the employee would have been dismissed even if a fair procedure had been followed (*Polkey v A E Dayton Services Ltd* [1988] ICR 142 HL; *Hill v Governing Body of Great Tey Primary School* [2013] IRLR 274 EAT). This reduction may be made on a percentage basis to reflect the chance that the Claimant would have been dismissed in any event. The question is whether if there had been a fair procedure the result would still have been a dismissal (*Whitehead v The Robertson Partnership* UKEAT/0378/03, [2004] All ER (D) 97 (Aug) (17 August 2004, unreported). The assessment must made by reference to how the particular employer in question would have acted and not by the standards of a hypothetical reasonable employer. The burden is on the Respondent to show that the employment would have ended in any event (*Britool Ltd v Roberts* [1993] IRLR 481).

32. The next adjustment which may be made is an increase or reduction in compensation for failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures (s.207A of the Trade Union and Labour Relations Act 1992).

33. An increase of two weeks' or four weeks' pay may then be applied in respect of any failure by the Respondent to provide a written statement of employment particulars (s.38 of the Employment Act 2002).

34. After this the Tribunal may make a reduction for contributory fault in such amount as the Tribunal considers just and equitable if it finds that the claimant has, by any action, caused or contributed to his dismissal (s.123 ERA). This reduction should be made only if the Claimant was “guilty of improper conduct which gave rise to a situation in which he was dismissed and that conduct was blameworthy” (*Gibson v British Transport Docks Board* [1982] IRLR 228). The Tribunal should take “a broad, commonsense view of the situation” in deciding both whether to make a reduction and if so in what amount (*Maris v Rotherham Corpn* [1974] IRLR 147 NIRC).

35. If the Claimant received a redundancy payment which exceeded the amount of the basic award, the excess should be deducted at this point (s.123(7) ERA).

36. If the total award exceeds £30,000 it will need to be grossed up for tax purposes.

37. Finally, the statutory cap for compensation for unfair dismissal should be applied.

38. It may be just and equitable to make an award for loss of earnings where the employee has been rendered unfit to work by the actions of the employer (*Hilton International Hotels (UK) Ltd v Faraji* [1994] ICR 259).

Conclusions

Basic award

39. The Claimant is entitled to a basic award of **£1,632** calculated on the basis that he had three full years of service and he is entitled to one week's pay for each year of service capped at £544 per week.

40. The basic award is not extinguished by the redundancy payment made to the Claimant by the Respondent, because as a matter of law the Claimant was not dismissed for redundancy. However, the payment described by the Respondent as a redundancy payment still falls to be deducted from the compensatory award, since it amounts to a payment of compensation for loss of employment.

Compensatory award

41. The Tribunal finds that:

    41.1. The Respondent has not shown that the Claimant would have been fairly dismissed for poor performance or for some other substantial reason if he had not been unfairly dismissed on 20 April 2021. As we found at paragraphs 128—130 of the liability judgment, after November 2020 the Respondent took no steps to address the Claimant's perceived poor performance or his problematic relationships with colleagues such as would be likely to result in his dismissal. Even if those matters might ultimately have led to his dismissal, the prospect of that was extremely remote in April 2021.

    41.2. The Respondent has not advanced an argument that the Claimant would have been fairly dismissed for redundancy in light of the move of the Operations Department to Sheffield. The burden being on the Respondent to prove such a proposition, we conclude that it has not been shown.

    41.3. The Claimant took reasonable steps to mitigate his loss by obtaining employment with FIS commencing on 18 May 2021. In that post he suffered a small loss of earnings of £107.21 per week in net pay plus employer's pension contributions.

    41.4. The Respondent cannot be held responsible for the Claimant's resignation from his job with FIS on 12 July 2021. We were satisfied that the Claimant would have been dismissed on that day if he had not resigned. However his evidence did not show that (a) his mental ill health had been caused by the Respondent; and (b) his mental ill health caused him to underperform in his role with FIS; and (c) his underperformance due to mental ill health was the cause of his resignation under threat of dismissal.

41.5. Rather, the Claimant resigned from the post with FIS in order to avoid dismissal for failing to deal with a broken machine. If that incident had not occurred, the Claimant would have remained in the job and the small loss of earnings referred to above would have continued.

41.6. We consider it just and equitable to award the Claimant that ongoing loss until the date on which he obtained employment with iD on 9 November 2021.The Claimant took reasonable steps to mitigate his loss after resigning from FIS, and ultimately obtained a job at a higher rate of pay with iD.

41.7. In reaching this decision we have not considered it necessary to reach any conclusion about whether the Respondent caused the Claimant to lose the job offer from Curlsmith in October 2021 by giving an unsatisfactory reference. The reason why Curlsmith revoked the job offer is not relevant. In any event the Claimant started at iD, at a higher rate of pay, at most eight days after he would have started the job at Curlsmith. This period is of no consequence.

41.8. The Claimant's loss ended on his appointment to the job at iD on 9 November 2021.

42. In light of those conclusions and the amounts paid to the Claimant for pay in lieu of notice and redundancy pay, the Tribunal finds that the Claimant suffered net loss of **£388.37**. The calculation of the compensatory award is as follows:

42.1. £689.68 per week, representing his net pay and employer's pension contributions, for four weeks between his dismissal on 20 April 2021 and the commencement of employment with FIS on 18 May 2021.

= £2,758.72

42.2. This amount is extinguished by the four weeks' pay in lieu of notice given to the Claimant on his dismissal by the Respondent.

= £0.00

42.3. £107.21 per week, representing the difference between the Claimant's net pay and employer's pension contributions with the Respondent (£689.68 per week) and his net pay with FIS (£582.47 per week), for eight weeks between the commencement of his new employment on 18 May 2021 and the termination of that employment on 12 July 2021.

= £857.68

42.4. £127.33 in respect of pension loss in the five week period 12 July until 18 August 2021 on which date he would have become eligible to join FIS's pension scheme, at £24.09 per week.

= £985.01

42.5. £1,822.57 in respect of loss of net pay in the 17 week period between the termination of his employment with FIS on 12 July 2021 and the commencement of his employment with iD on 9 November 2021, at £107.21 per week (the Claimant did not seek compensation for loss beyond 9 November 2021).

= £2,807.58

42.6. £350 for loss of statutory rights.

= £3,157.58

42.7. **Less** redundancy payment of £2,769.21.

TOTAL = £388.37

43. The total of the basic and compensatory award combined is **£2,020.37.**

Employment Judge Reindorf

Date 7 March 2023

JUDGMENT SENT TO THE PARTIES ON

31/3/2023

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FOR THE TRIBUNAL OFFICE