



EMPLOYMENT TRIBUNALS

Claimant: Mr A Russell

Respondent: Blackburn and Darwen Community Transport Limited

Heard at: Manchester (by CVP)

On: 14 April 2023

Before: Employment Judge McDonald

REPRESENTATION:

Claimant: In person

Respondent: Mr D Leach (Counsel)

JUDGMENT ON REMEDY

The judgment of the Tribunal is that:

1. In relation to his successful claim of unfair dismissal the claimant is entitled to compensation and the respondent must pay him a basic award of £1,140 and a compensatory award of £7,325.06. The total compensation payable for unfair dismissal is £8,465.06.
2. In relation to the holiday pay claim, the parties agreed that the amount to be paid was £4,024.80. That is the net amount payable to the claimant after deductions.
3. That means that the total amount payable to the claimant by the respondent, including the holiday pay and the unfair dismissal compensation, is **£12,489.86**.
4. The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 do not apply to this award.

REASONS

Introduction

1. This hearing arises from the Liability Judgment dated 9 March 2023 in which I found that the claimant had been unfairly dismissed and recorded the respondent's

concession that the claimant was entitled to holiday pay under the Working Time Regulations 1998.

2. The hearing was conducted by CVP. The claimant represented himself and the respondent was represented by Mr Leach of counsel.

3. There was a remedy hearing bundle together with a counter Schedule of Loss for the respondent and a witness statement provided for Mr Arnold, a director of the respondent. During the hearing the claimant also provided an additional document, namely an email relating to his dealings with New Ground Together, an organisation which facilitates return to employment.

4. The claimant gave evidence by swearing as to the truth of his Schedule of Loss and providing brief additional evidence in chief. He was then cross examined by Mr Leach and answered my questions. Mr Arnold then gave evidence. He was cross examined by the claimant. As at the previous hearing, the claimant did not have access to the statement for Mr Arnold on his phone. We adopted the same procedure as at the liability hearing, i.e. I read out the statement for Mr Arnold piece by piece asking the claimant to clarify which parts he disputed and then asking Mr Arnold questions about those parts. Mr Arnold was briefly re-examined by Mr Leach. I then heard submissions from Mr Leach and from the claimant.

5. I gave oral reasons and the claimant requested them in writing.

Issues

6. In terms of matters in dispute between the parties, there were a number of matters which the parties had been able to agree by the start of the evidence. In brief, the parties had agreed that the amount of holiday to which the claimant was due was £4,024.80. That is the amount which should be paid to the claimant without deduction in relation to the holiday pay claim for the period up to 19 April 2022.

7. There was also agreement that the maximum period for which a compensatory award could be made was 45 weeks. That is because the claimant found new work at equivalent or higher rate of remuneration from 1 March 2023.

8. There was also agreement as to the gross weekly pay payable to the claimant at the relevant time, namely £190. What that meant was that there was agreement as to the basic award payable to the claimant, which is £1,140. That is £190 per week multiplied by four years multiplied by a factor of 1.5 to take into account the claimant's age.

9. Mr Leach did not disagree that the claimant was also entitled to be paid a sum as part of his compensatory award to reflect the loss of statutory rights. I award the sum of £500 for that.

10. There were two significant matters of dispute. The first was the issue of mitigation, in other words whether the claimant had acted unreasonably in failing to find new employment sooner. The second was as to calculation of the amount due. That is because the claimant was, as he accepted, a term-time employee.

The Law

11. I set out the law relating to compensation for unfair dismissal at paras 65 to 73 of the Liability Judgment.

12. Dealing briefly with the authorities relevant matters in dispute, when it comes to mitigation the principles on mitigation were helpfully summarised in the recent case of **Edwards v Tavistock and Portman NHS Foundation Trust [2023] EAT 33**. Dealing very briefly with those principles, what is clear is that the burden of proof is on the respondent and that what has to be proved is that the claimant acted unreasonably – he does not have to show that what he did was reasonable. As that case emphasised, citing the earlier case of **Cooper Contracting Limited v Lindsey (UKEAT/0184/15)**, there is a difference between “acting reasonably” and “not acting unreasonably”. What is reasonable or unreasonable is a matter of fact. The Tribunal has to, in deciding what is reasonable or unreasonable, take into account the views and wishes of the claimant as one of the circumstances, though it is the Tribunal’s assessment of reasonableness and not the claimant’s that counts.

13. **Cooper Contracting** also makes it clear that the Tribunal is not to apply too demanding a standard to the victim, after all he is the victim of a wrong. He is not to be put on trial as if the losses were his fault when the central cause is the act of the wrongdoer.

14. In terms of the other legal issues, we did discuss the entitlement of the claimant to holiday pay, which has been the subject of the recent Supreme Court decision in **Harpur Trust v Brazel [2022] UKSC 21**. For the reasons I give below, the legal principles from that case were not something that were significantly of relevance in terms of the dispute being in issue: what I take from it is that the claimant's entitlement as a term-time worker is to the full 5.6 weeks' annual leave under the Working Time Regulations 1998. That reflected in the respondent's position when it came to calculation of the amounts due under the holiday pay claim.

Findings of Fact

15. I heard evidence from the claimant and from Mr Arnold. In relation to Mr Arnold, I accepted his evidence (which the claimant did not significantly dispute) that between April 2022 and March 2023 there would be 11½ weeks of school holidays which I need to take into account in calculating the claimant's loss of earnings.

16. When it came to the claimant's evidence, there were times when he was not entirely clear and consistent, however I make the following findings.

17. For the first three months following the dismissal on 19 April 2022 the claimant did not actively seek work. That is because his understanding, as he said, was that there might have been a suspension rather than dismissal and that there were still ongoing discussions via ACAS about what was happening. His evidence was that from September he started looking for work. He said that he was looking for driving jobs. He faced difficulty in finding them because he did not have a Public Service Vehicle (PSV) licence. He said that he was looking for work which was specifically Monday to Friday and many driving jobs were jobs which required weekend working. The claimant is in effect at pensionable age and so he was not looking for a full-time job or one which required him to work at weekends.

18. Around October 2022 the claimant had been interviewed for and accepted for a job as a passenger assistant helping the disabled children for whom he had previously been a driver. He had applied for that job around September 2022. Mr Arnold in his evidence suggested that it was not reasonable for the claimant to apply for such a job as it was not part of his vocation, in any sense. I do find that there were two reasons why the claimant went for that job. First of all, he was familiar with the people who were working on those contracts at the local council, having been for four years a driver of the minibuses which the pupils used to get to school; and secondly his evidence, which was not contradicted by Mr Arnold, was that for the 3 hours the assistants worked they were paid the same if not more than what he earned as a driver for 4 hours.

19. The claimant was successful in obtaining that job and was due to or could have started work in October 2022. The reason he was not able to do so was that the respondent did not provide a reference. I did hear some evidence about the reasons for that. I do not need to make a finding about it. The key point is that it was the failure to provide a reference which led to a delay in, and eventually the claimant not being able to take, the passenger assistance role with the council rather than any unreasonable behaviour on his part.

20. On 18 November 2022 the council confirmed that they would no longer be able to offer the role to the claimant because of the absence of a reference. That was a blow for the claimant for two reasons: firstly, because of his losing the job itself, and secondly because the council had said that they would be willing to put him through PSV driver training.

21. Based on the claimant's evidence I find that he did then contact an agency, the Community Employment Adviser at New Ground Together, which was an agency in the local town which helped to get people back into work. I find that he did apply for work, although his evidence was not clear as to exactly how many jobs he applied for. The clearest evidence was that he had applied for 3 jobs.

22. In February 2023 the claimant was interviewed for a job as a Medications Driver. He obtained that role and started that job in March.

Discussion and Conclusion

23. On the issue of mitigation, I remind myself that the burden of proof in this case is on the respondent. Mr Leach suggested that the claimant was unreasonable in particular in not seeking work immediately after the dismissal on 19 April. In fairness to Mr Leach, it does not seem this his instructing solicitors have provided him with all the documentation from the liability hearing which included the correspondence which made it clear that there was initially some confusion as to whether or not there had been a dismissal on 19 April 2022 or whether the respondent merely suspended the claimant. Although I note that there was a delay in the immediate aftermath of the incident on 19 April, I have decided that the claimant did not act unreasonably in failing to seek work immediately. There was an opportunity potentially to seek to resolve matters with the respondent given the uncertainty about the situation.

24. When it comes to what happened later, I notice that there is potentially a gap from around August to maybe September when the claimant was not making applications. Again, there is a lack of clarity in the claimant's evidence on this point

in terms of dates. What I do find is that certainly from September 2022 the claimant was actively looking for work and (as I have said) actually found work. I do not think the claimant can be criticised for stopping looking for work once he obtained the job at the council as a passenger assist until 18 November 2022 when he was told that that job would no longer be forthcoming.

25. Based on my findings of fact and the evidence I heard, I do find that the claimant was looking for work from November 2022 until the start of the year and then obtained the job that he started in March, applying around January or February 2023 and being interviewed in February 2023.

26. While there are therefore some gaps where it is not absolutely clear from the claimant's own evidence that he was involved either in applications or interview processes, I do bear in mind that the burden of proof is on the respondent in this case.

27. Stepping back and looking at what happened in the round, I find that the respondent has not met the standard required of it, which is to prove that the claimant had acted unreasonably. As **Cooper Contracting Limited** makes clear, the Tribunal should not apply too demanding a standard to the victim. That case also underlines the difference between acting reasonably and not acting unreasonably. I am not saying necessarily that the claimant did everything that he reasonably could to find work sooner, but that is not the test that I am applying – the question is whether he acted unreasonably. On the facts, I find he did not act unreasonably.

28. On the issue of mitigation, therefore, I find that there was no failure to mitigate by the claimant.

29. Moving on then to the amount of compensation which should be awarded, when looking at that calculation, given that I am going to award it for the whole of the period from April 2022 until the start of March 2023, the starting point is the period of 45 weeks and a weekly net pay of £178.20 **[see additional note at paras 40-41 below]**. As I have said, I have accepted the evidence from Mr Arnold, which the claimant did not dispute, that there were 11½ weeks' school holidays during that period. The claimant would not have been paid wages during those periods.

30. In terms of the hours for which he would actually have been paid for working, that I find amounts to 33½ weeks, which at the rate of £178.20 a week amounts to a total of £5,969.70.

31. During that period, I find that the claimant would have also continued to accrue holiday entitlement which the respondent has in these proceedings conceded he was entitled to and entitled to be paid for. Mr Leach made the submission that I must be careful not to double count the compensation due to the claimant. He submitted that the holiday entitlement would have been limited to the relevant portion of the holiday entitlement attributable to non-working weeks. That was on the basis that the claimant would be taking some of his holiday during the working weeks. I do not accept that submission. The evidence I recorded in my liability judgment was that the claimant did not usually take leave during term time. Given the respondent's concession that the claimant was entitled to holiday pay of 28 days per year and my finding that in reality he did not take holidays during his working hours, I do find that

the holiday entitlement should be added on to the pay for the hours he actually worked.

32. The parties had already agreed the calculation of holiday entitlement in the counter schedule prepared by Mr Leach for the respondent. I find (based on that) that for the remainder of 2022 the claimant would have accrued a further 20 days i.e. four weeks' leave. In 2023 I find he would have accrued eight out of 52 weeks' leave, which multiplied by the 28 days of entitlement amounts to four days, i.e. 0.8 weeks.

33. I do not find that adding the holiday leave onto the pay which the claimant would have received for his working hours amounts to double counting, in fact I find that if I did not do so then I would not be compensating the claimant for what he should have been paid.

34. Putting those figures together then, what I arrive at is the following.

35. The claimant would have been paid 33½ weeks, which would be £5,969.70. In addition, I find that he would have accrued and be entitled to be paid for 4.8 weeks' holiday. That is also at the rate of £178.20. That means the compensatory award in terms of loss of earnings amounts to 38.3 weeks at £178.20 which amounts to a total of £6,825.06. To that I add an award of £500 for loss of statutory rights making a total compensatory award of £7,325.06. The total compensation payable for unfair dismissal is £8,465.06.

36. For the avoidance of doubt, the loss of earnings compensation is based on the net figures on the assumption that the claimant would not be taxed on that amount when he receives it. If that is incorrect and the claimant is taxed on that amount he should apply to the Tribunal for reconsideration and that figure will then be grossed up.

37. In relation to the holiday pay claim, the parties agreed that the amount to be paid was £4,024.80. That again is based on the net amount payable to the claimant.

38. That means that the total amount payable to the claimant by the respondent, including the holiday pay and the unfair dismissal compensation, is **£12,489.86**.

39. The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 do not apply to this award.

Additional Note

40. After I had given oral judgment Mr Leach raised a query as to whether the compensation was correctly calculated. Specifically he questioned whether using the net weekly figure of £178.20 was appropriate. I based my calculation of the claimant's loss of earnings for April 2022 to March 2023 on the net weekly pay figure of £178.20. That was the net weekly pay figure used in the calculation of the claimant's holiday pay entitlement for the year 1 January 2022 to 31 December 2022, a figure agreed by the parties. Mr Leach pointed out that that £178.20 net weekly pay figure was based on the relevant National Minimum Wage Rate from 1 April 2021 to 31 March 2022 (£8.91). He pointed out that the NMW figure from 1

April 2022 increased to £9.50 per hour (hence the claimant's relevant gross pay at dismissal being £190 per week). The net weekly figure of £178.20 was, he submitted, based on the previous NMW rate.

41. The evidence from the payslips was clear that despite his earnings from the respondent being below the income tax threshold, the claimant paid tax on those earnings. That is because he is in receipt of a pension from previous employment which takes his taxable income as a whole above the personal tax allowance threshold. Compensation for loss of earnings is calculated on net basis. I based my calculations on the assumption that the claimant would be taxed on his earnings during 2022-2023 on the same basis which applied previously, i.e. that he would be subject to tax on his income from the respondent so would not simply receive the equivalent of the gross amount of £190 per week without deduction. I did not have details of the actual tax the claimant would have paid on a gross wage of £190 per week. In the circumstances, doing the best on the information available to me at the hearing, I considered that using the figure of £178.20 for the claimant's net weekly pay was an appropriate basis for calculating the claimant's loss of earnings. If either party believes that using that weekly figure of £178.20 as the basis for the calculation is inappropriate then they should apply for a reconsideration of the Judgment on the basis it is in the interests of justice, setting out their reasons for their views and providing supporting evidence and alternative calculations.

Employment Judge McDonald
Date: 14 April 2023

JUDGMENT AND REASONS SENT TO THE PARTIES ON
17 April 2023

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.



NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990 ARTICLE 12

Case number: **2403511/2022**

Name of case: **Mr A Russell** v **Blackburn and Darwen
Community Transport
Ltd**

Interest is payable when an Employment Tribunal makes an award or determination requiring one party to proceedings to pay a sum of money to another party, apart from sums representing costs or expenses.

No interest is payable if the sum is paid in full within 14 days after the date the Tribunal sent the written record of the decision to the parties. The date the Tribunal sent the written record of the decision to the parties is called **the relevant decision day**.

Interest starts to accrue from the day immediately after the relevant decision day. That is called **the calculation day**.

The rate of interest payable is the rate specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as **the stipulated rate of interest**.

The Secretary of the Tribunal is required to give you notice of **the relevant decision day**, **the calculation day**, and **the stipulated rate of interest** in your case. They are as follows:

the relevant decision day in this case is: 17 April 2023

the calculation day in this case is: 18 April 2023

the stipulated rate of interest is: **8% per annum**.

Mr S Artingstall
For the Employment Tribunal Office

GUIDANCE NOTE

1. There is more information about Tribunal judgments here, which you should read with this guidance note:
www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

If you do not have access to the internet, you can ask for a paper copy by telephoning the Tribunal office dealing with the claim.

2. The payment of interest on Employment Tribunal awards is governed by The Employment Tribunals (Interest) Order 1990. Interest is payable on Employment Tribunal awards if they remain wholly or partly unpaid more than 14 days after the **relevant decision day**. Sums in the award that represent costs or expenses are excluded. Interest starts to accrue from the day immediately after the **relevant decision day**, which is called **the calculation day**.
3. The date of the **relevant decision day** in your case is set out in the Notice. If the judgment is paid in full by that date, no interest will be payable. If the judgment is not paid in full by that date, interest will start to accrue from the next day.
4. Requesting written reasons after you have received a written judgment does **not** change the date of the **relevant decision day**.
5. Interest will be calculated as simple interest accruing from day to day on any part of the sum of money awarded by the Tribunal that remains unpaid.
6. If the person paying the Tribunal award is required to pay part of it to a public authority by way of tax or National Insurance, no interest is payable on that part.
7. If the Secretary of State has claimed any part of the sum awarded by the Tribunal in a recoupment notice, no interest is payable on that part.
8. If the sum awarded is varied, either because the Tribunal reconsiders its own judgment, or following an appeal to the Employment Appeal Tribunal or a higher court, interest will still be payable from **the calculation day** but it will be payable on the new sum not the sum originally awarded.
9. The online information explains how Employment Tribunal awards are enforced. The interest element of an award is enforced in the same way.