Case No: 3311620/2021

EMPLOYMENT TRIBUNALS

Claimant: Mr W Winczewski

Respondent: M.A.M Transport Services Limited

At: Cambridge (hybrid hearing) **On:** 17-19 October 2022 (in person) and 24 April 2023 (by CVP, panel only)

Before: Employment Judge Dobbie
Members: Mr Vaghela and Mrs Smith

Representation
Claimant: Ms M Wisniewska
Respondent: Mr Abdullah (Director)

RESERVED REMEDY JUDGMENT

1. The Respondent shall pay to the Claimant compensation for unfair dismissal totalling **£11,103.75.** This includes:

   (a) a basic award of £9,792.00

   (b) The compensatory award of £1,311.75 comprising:

   (i) loss of earnings post dismissal of £533.40
   (ii) £500 compensation for loss of statutory rights
   (iii) £16.00 pension loss
   (iv) an uplift of 25% for unreasonable failure to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures, giving a total compensatory award of £1,311.75.

2. The Respondent shall also pay to the Claimant **£2,231.59** as damages for unlawful deduction from wages.

3. There is no separate award for notice pay given that the Compensatory Award covers the same period of loss and there cannot be double recovery of the same loss.

4. In total therefore, the Respondent must pay to the Claimant **£13,335.34**.[1]

[1] £11,103.75 + £2,231.59 = £13,335.34

REASONS

Introduction

1. By a judgment sent to the parties on 25 November 2022, the Tribunal upheld the Claimant's claims for unfair dismissal, notice pay and wages and dismissed the claim for race discrimination. (The claim for holiday pay was dismissed upon withdrawal at the outset of the hearing.) Reasons were given orally on 19 October 2022, but since such time, written Reasons were requested and were duly sent to the parties on 19 January 2023.

2. The Tribunal was unable to determine remedy at the hearing in October 2022 due to lack of time, but it received evidence from the Claimant on that matter, and invited submissions from the parties. The matter was then adjourned for the Claimant to provide payslips for the period of time he worked for the Respondent and for the panel to schedule a further day to meet to deliberate and determine the remedy issues.

3. The payslips were received by the Tribunal on 20 October 2022, but unfortunately they were not passed on to the Tribunal panel until 12 January 2023. Thereafter, the panel members liaised to agree a mutually convenient date and met on 24 April 2023 by CVP to deliberate and decide the remedy issues.

Remedy Issues

4. The issues were as follows:

   (a) What is the correct level for the Basic Award?;

   (b) What level of Compensatory Award would be just and equitable in all the circumstances having regard to the loss sustained in consequence of the dismissal insofar as that loss is attributable to action taken by the Respondent?;

   (c) Had the Claimant taken reasonable steps to mitigate his loss?;

   (d) Should any uplift be awarded in respect of the Compensatory Award for any unreasonable failure to follow the ACAS code of practice on Discipline and Grievance procedures?;

   (e) What damages flow from the unlawful deduction from wages claim?; and

   (f) What damages flow from the claim for notice pay?

Findings of fact

5. The Tribunal made the following findings of fact in addition to those made at the liability stage of the hearing:

6. Following the summary termination of the Claimant's employment on 17 May 2021, he took up work as an HGV driver in the UK, through an

agency, working from 25 May 2021 to mid August 2021, earning more per week than he earned whilst employed by the Respondent.

7. In late August 2021, the Claimant moved to Poland (where he had been born). He appears not to have commenced working there until October 2021, when he started working as an HGV driver. His income from that work is said to have varied from approximately 3533 PLN to 6817 PLN net per month, averaging approximately £1000 net per month (depending on the date the exchange rate is taken from). The Claimant did not give any evidence as to his activities in Poland from late August 2021 until October 2021 when he started working there, which might have been relevant to the question of mitigation.

8. The Claimant stated that the reason he relocated to Poland in late August 2021 was:

   'Because I got depressed and had a discussion with my wife and took a decision to return and we left in August… I was not able to stay in England, all the facts and injustice of the experience kept coming back to me. Had it not been for MAM I would have worked here until today. I feel sad I had to leave my family, my granddaughter.'

9. There was no medical evidence of the Claimant having suffered any clinical mental health condition, nor anything (other than his own testimony) to suggest he had suffered low mood or similar. The Claimant did not give any evidence to suggest he needed medical treatment (counselling for example) or medication in order to manage his symptoms. Whilst we had medical evidence for the period of time when the Claimant was unable to work due to his back condition, we did not have anything in respect of mental health at or after the date of termination of employment.

10. We therefore found that whilst he did experience low mood following his dismissal, he was not suffering from a clinical condition, nor effects or symptoms that were severe enough to prevent or hinder him from being able to seek work or do work as an HGV driver. Indeed, he did work as an HGV driver immediately after the termination of his employment and until mid-August 2021, earning more than he had at the Respondent (therefore suggesting his was not working part time for example).

11. The Claimant was the one that chose to end the relationship with the agency in the UK for whom he worked from May to August 2021, by giving one week's notice. In the UK at that time there was a shortage of HGV drivers and thus a high demand for those with HGV licences.

Conclusion on unlawful deduction from wages damages

12. Per paragraph 106 of the written Reasons sent to the parties on 19 January 2023, the Respondent received a letter from the Claimant's GP on 15 February 2021 stating that the Claimant was fit to return to work. The Respondent received the DVLA letter certifying his fitness to drive on 21 April 2021. Hence, we found that from 22 April 2021, the Claimant was fit, willing, able and lawfully allowed to resume his duties and it was the Respondent that failed to allow him to do so. Hence wages are properly payable from 22 April 2021 date to the date of termination, namely 17 May 2021, which is 3.5 weeks.

13. The sums are calculated on a gross basis, since they will be taxable under s62 ITEPA 2003.The calculation is therefore:

    3.5 weeks x weekly gross pay of £637.59[2] = **£2,231.59**

Conclusion on wrongful dismissal damages for notice pay

14. The Claimant's 12 weeks' statutory notice under s.86 ERA 1996 would have expired on 9 August 2021.

15. The duty to mitigate applies to both wrongful dismissal and unfair dismissal compensation and the Claimant did effectively mitigate his losses from 25 May 2021 onwards, from which time he earned more than he did whilst engaged by the Respondent, thus fully mitigating his losses until mid August 2021. Therefore, any losses as notice pay would be limited to the period 18 to 24 May 2021, namely a week.

16. The period of loss claimed for this claim overlaps with the period claimed as the Compensatory Award and there cannot be double recovery.

17. We have awarded this period of loss (18-24 May 2021) under the unfair dismissal claim, to enable to ACAS uplift (to which the Claimant is entitled) to apply to the loss. Hence there is no separate award under the wrongful dismissal claim.

Conclusion on the unfair dismissal basic award

18. The Claimant was born in March 1964 and was thus aged 44 years by the date he commenced employment in November 2008. He worked for the Respondent until 17 May 2021, namely 12 complete years' service. His Basic Award is thus (using the statutory formula under s.119 ERA 1996):

    12 years x 1.5[3] x £544[4] = **£9,792.00**

Unfair dismissal compensatory award: Law

19. Section 123 ERA 1996 provides that the compensatory award shall be:

    'such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer'.

20. The objective of a compensatory award is 'to compensate, and compensate fully, but not to award a bonus' (**Norton Tool v Tewson [1972] ICR 501).**

21. Per **Tao Herbs & Acupuncture Ltd v Jin [2010] 7 WLUK 412**, it is essential not to lose sight of the three key factors identified in s.123 ERA 1996, namely:
    (a) Is the loss a consequence of the unfair dismissal?

[2] Taking £33,155.00 gross per annum as his gross pay, averaged from the 12 months' payslips for the year 2019 which were the only ones provided
[3] The statutory multiplier under s.119(2)(a) ERA 1996 for those aged over 41 years during each complete year of service
[4] The maximum gross week's pay for the relevant year, which is less than the Claimant received gross per week, such that he can claim the maximum.

(b) Is the loss attributable to the employer's actions?
(c) Is the amount of the compensation just and equitable?

22. Whilst a claimant must account for their earnings in mitigation, taking up temporary employment does not prevent their pre-existing and ongoing losses from being deemed losses 'in consequence of the dismissal' and 'attributable to action taken by the employer' for the purposes of s.123 ERA 1996, provided that is just and equitable in the circumstances. Therefore, taking up temporary employment will not generally constitute an intervening event that would end a respondent's liability for losses arising after the original unfair dismissal (**Whelan v Richardson [1998] ICR 318**).

23. However, a permanent position with equivalent or higher wages is likely to mean that a claimant has no substantial loss beyond the date the new job starts and will not be in a position to recover further compensation. Accordingly, on securing permanent employment, the original employer's ongoing liability to the claimant will be likely to cease and the causal link between future loss and the dismissal will be broken.

24. Section 123(4) ERA 1996 requires a claimant to mitigate their loss. The usual common law rules of mitigation apply. A claimant is expected to take reasonable steps to mitigate their loss.

25. The issue of whether the claimant has taken reasonable steps to mitigate is a question of fact for the Tribunal, and the respondent has the burden of proving that the claimant has not done so. It is not enough for the respondent to show that there were reasonable steps that the claimant could have taken but did not take. It must also show that the claimant acted unreasonably in not taking them. This distinction reflects the fact that there is usually more than one reasonable course of action open to a claimant (**Wilding v British Telecommunications Plc [2002] IRLR 524 (CA)**).

26. When considering mitigation, a Tribunal will look at the claimant's circumstances (including their health and state of mind) to see what reasonable steps would be in the relevant circumstances. If the claimant suffers from ill health this can affect impair their ability to mitigate and this should be considered.

27. In **Cooper Contracting Ltd v Lindsey** [2015] 10 WLUK 609, Mr Justice Langstaff, then President of the EAT, set out the following key principles derived from case law that Tribunals should take into account when considering the issue of mitigation of loss (per paras 11-16):
(a) The burden of proof is on the respondent, as the wrongdoer. The claimant does not have to prove that they have mitigated their loss.
(b) It is not some broad assessment on which the burden of proof is neutral. If the respondent does not put forward evidence to the tribunal that the claimant has failed to mitigate, the tribunal has no obligation to make that finding (**Tandem Bars Ltd v Pilloni UKEAT/0050/12**).
(c) What has to be proved is that the claimant acted unreasonably; they do not have to show that what they did was reasonable (**Waterlow & Sons Ltd v Banco de Portugal [1932] UKHL 1, Wilding and Ministry of Defence v Mutton [1996] ICR 590**).

(d) There is a difference between acting reasonably and not acting unreasonably (**Wilding**).
(e) What is reasonable or unreasonable is a matter of fact.
(f) The claimant's views and wishes are one of the circumstances that the Tribunal should take into account when determining whether the claimant's actions have been reasonable. However, it is the Tribunal's assessment of reasonableness, not the claimant's, that counts.
(g) The tribunal should not apply too demanding a standard on the claimant who is, after all, a victim of a wrong. The claimant is not to be put on trial as if the losses were their fault, when the central cause is the act of the respondent as wrongdoer (**Waterlow, Fyfe v Scientific Furnishings Ltd [1989] ICR 648** and **Wilding v British Telecommunications plc [2002] ICR 1079**).

28. It is not uncommon for a claimant to choose to undertake a course of training, pursue a career change or set up a self-employed business following a dismissal. The extent to which the respondent will be liable for lost earnings depends on the circumstances. Such steps can be reasonable in the circumstances (e.g **Gardiner-Hill v Roland Berger Technics Ltd [1982] IRLR 498 (EAT); Dore v Aon Ltd [2005] IRLR 891 (CA))** and **Orthet Ltd v Vince-Cain [2004] IRLR 857**).

29. Note that where a Tribunal finds that an employee has failed to mitigate his or her loss, it should not necessarily treat that failure as bringing the period of compensation to an end. Thus, where an employee's decision to embark upon a course is held to be unreasonable, the tribunal should judge when the employee ought to have obtained fresh employment at a similar level.

30. In **Mullarkey v Up the Creek Ltd EAT 263/95**, the Tribunal found the employee's decision to embark on a full-time course to be a reasonable act of mitigation. It nevertheless decided to award her no compensation from the date her course started because any losses suffered from that date onwards were a result of her own actions and were not caused by the dismissal. It therefore considered that whilst she had reasonably mitigated, the commencement of the new course was a new supervening act which broke the causal chain. On appeal, the EAT held this to be wrong. If the employee's actions were reasonable mitigation, then they could not have broken the chain of causation. But for the unfair dismissal, the employee would not have embarked on the course and would still have been in salaried employment with the employer.

31. In **Tchoula v ICTS (UK) Ltd 2000 ICR 1191, EAT** a Tribunal found that a security guard had mitigated his loss by retraining in the IT sector. The EAT sympathised with the respondent's argument on appeal that it should not be responsible for funding his change of career. However, the question for the EAT was whether the Tribunal's finding that he had mitigated his loss was perverse. The EAT did not think that it was. It was open to the Tribunal to find that it was reasonable for him to retrain in the IT sector and that it was reasonably foreseeable that such a course would be necessary as a result of the unlawful dismissal. The Tribunal was entitled to accept the claimant's evidence that he did not pursue work in the security field as he would have needed a clean record to do so and because of his dismissal he did not have such a record.

Conclusion on compensatory award

32. The Claimant argued that he should be compensated for losses after he left the UK for Poland, and he claimed eight months' losses being the difference in pay between what he would have earned whilst working for the Respondent and what he did in fact earn from October 2021 onwards, whilst working from Poland.

33. The Respondent did not advance any evidence as to the availability of roles as HGV drivers in the UK at the material time but Mr Abdullah did state that there was a shortage and that such drivers were in high demand. This was widely publicised in the popular press at the time including on the BBC and other media outlets. The Claimant did not dispute that there was a high demand for drivers in the UK and the fact that he obtained work through an agency within days of termination of his employment (at a higher rate of pay) supports this.

34. The Claimant did not suggest that any part of the reason he returned to Poland was due to a shortage of work in the UK or because the specific role he had obtained in late May 2021 had ceased. Indeed, he informed the Tribunal that he had been the party that chose to sever that relationship by serving notice on the agency. He did not give evidence as to whether that role was intended to be permanent or otherwise. In the past, agency arrangements tended to be fixed-term or flexible, but modern working practices show that employees can be engaged through an agency on a permanent or long-term basis (whether they work for the same end-user or not). Therefore, we had no information as to the nature of the agency role and could not draw conclusions as to its permanence. All we were informed was that he had secured such a role and that he had chosen to end it due to his decision to move to Poland.

35. Accordingly, the Tribunal had to determine whether the Claimant's decision to terminate the working relationship with the agency and relocate to Poland was reasonable or whether it amounted to breach of the duty to reasonably mitigate. We also had to consider whether the loss flowing after late August 2021: (1) was a consequence of the unfair dismissal; (2) was attributable to the Respondent's actions; and (3) whether it is just and equitable for the Respondent to compensate the Claimant for the losses.

36. We find that whilst the Claimant's decision to relocate to Poland was perfectly understandable, it did breach the duty to reasonably mitigate his losses and/or it amounted to a supervening act which broke the causal chain and/or the loss was not reasonably foreseeable. We make these findings because:

(a) The Claimant had lived in the UK for approximately 13 years and had family in the UK and was well settled in the UK with his wife and son;
(b) Within a week of his dismissal, he was earning more as an HGV driver in the UK than he had whilst employed by the Respondent;
(c) His earnings as an HGV driver in the UK were considerably higher than the pay he was able to earn as an HGV driver in Poland;
(d) There was a highly-publicised dearth of HGV drivers in the UK at the time and hence there was work available for qualified HGV drivers;

(e) There was no evidence nor any suggestion that the work the Claimant secured through the agency in May 2021 was coming to an end or that it might do so at any particular time or at all;
(f) The Claimant was perfectly fit (physically) to continue working as an HGV driver and did so;
(g) The Claimant moved to Poland at a time when he did not appear to have another role secured (indeed he did not inform the Tribunal of any such role and he did not work from late August to October 2021, indicating he had not lined up a role to move to seamlessly to);
(h) He was not suffering the effects of any condition to such an extent that he was unable to continue working as an HGV driver both immediately after his dismissal (in the UK) and again from October 2021 (in Poland);
(i) There was no medical evidence to suggest that the Claimant had a mental health condition; and
(j) There was no medical advice or evidence to suggest that leaving the UK (or alternatively returning specifically to Poland) would be beneficial to his mental health. It is something that the Claimant discussed with his wife (not a medical advisor) and decided upon between them because they considered it would be good for his mental health.

37. Therefore, whilst we find that the dismissal may have been part of the reason why the Claimant chose to relocate to Poland in late August 2021, that was not a reasonable choice to make in terms of the duty to reasonably mitigate.

38. We are not aware of any similar cases or authorities in respect of claimants who choose to relocate overseas and the impact on mitigation and damages. However, we have considered the principles from cases on career changes and retraining as potentially analogous. We have not found that the Claimant was in some way hampered in his field as a result of the dismissal (as was the case in **Tchoula**), nor that there was a lack of work available to him in the UK, such that relocating was a reasonable act of mitigation.

39. Further, we find that such loss as was caused by relocating to Poland was not a reasonably foreseeable consequence of the dismissal and it was not caused by the dismissal but by a separate life choice.

40. Further and in any event, we do not consider that it would be just and equitable for the Respondent to pay for the losses suffered by the Claimant that flow from the relocation to Poland, when the Claimant could have remained in the UK (where he was well settled) and where there was plenty of work available for him and at a higher rate of pay.

41. Accordingly, we find that the Respondent is not responsible for any losses suffered as a result of the Claimant's decision to relocate to Poland in late August 2021. As such, the loss of income recoverable under the Compensatory Award is one week's pay, being the period between the date of termination (17 May 2021) and obtaining new work through an agency on 25 May 2021, as referred to above.

42. The Claimant's average weekly net pay at the Respondent was £533.40, using the payslips provided for the year 2019 (which gives a slightly lower

rate than the £577 per week claimed in the Claimant's schedule of loss, which was not explained / substantiated in any way).

43. The Claimant was entitled to pension contributions and therefore will be compensated for the losses for pension for that week. Taken from the payslips, the employer's pension contribution that the Claimant received at the Respondent was 3%. Accordingly, he is entitled to £16.00[5] by way of pension loss for that week.

44. We acknowledge that the Claimant had long service and hence his loss of statutory rights includes not only the loss of protection from unfair dismissal and for redundancy pay, but also for the statutory long notice he had accrued (12 years' notice). Accordingly, we award him the higher end of the customary sum for loss of statutory rights, namely £500.00.

45. In total then, the compensatory award is £1049.40.[6]

46. Section 207A(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A 1992) provides that if:

> 'it appears to the employment tribunal that – (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies, (b) the employer has failed to comply with that Code in relation to that matter, and (c) that failure was unreasonable, the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%'.

47. In the present case, we found that the real reason for dismissal was conduct, such that the ACAS Code applies. We also found that the Respondent followed no process whatsoever in dismissing the Claimant despite having taken legal advice before doing so. The Respondent is not a new business and it has 45-50 staff (including 10 office based staff). Therefore, whilst it has no HR department / resource, its failure to follow the ACAS Code is unreasonable. There was no explanation for such failures. We therefore apply the ACAS uplift of the full 25%. Accordingly, the total compensatory award is uplifted to **£1,311.75**.[7]

48. The Claimant indicated in his schedule of loss that he wanted to apply for preparation time costs in the sum of £4,200 plus certain expenses. We did not have time at the hearing for such an application to be made (if indeed the Claimant continues to want to make it). Nor did we hear from the Respondent on this matter. The schedule of loss did not indicate the basis on which the application was advanced, nor did it set out how the 100 hours claimed had been incurred. It is a matter for the Claimant if he wishes to advance any such application. For present purposes, the Tribunal has neither heard nor determined such an application.

[5] 3% of £533.40
[6] £533.40 + £16.00 + £500 = 1,049.40
[7] £1049.40 x 1.25 = £1,311.75

Employment Judge Dobbie

Date 25 April 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

30 April 2023

GDJ
FOR EMPLOYMENT TRIBUNALS