



EMPLOYMENT TRIBUNALS

Claimant

Mr Steven Johnson

Respondent

v James Paget University Hospitals NHS
Foundation Trust

Heard at: Norwich (Face to face) **On:** 3 April 2023 for Remedy

Before: Employment Judge R Wood

Appearances

For the Claimant: In Person

For the Respondent: Miss E Skinner, Counsel

RESERVED REMEDY JUDGMENT

1. The respondent having unfairly dismissed the claimant, shall pay to the claimant the sum of **£22,335.09** by way of damages. This is a net figure.
2. The Tribunal does not order reinstatement or re-engagement.

REASONS

Claims and Issues

1. This is a claim which involves an allegation of unfair dismissal presented on 12th April 2021. The Tribunal's judgment on the merits of the claim having been promulgated on 13th September 2022, the Tribunal conducted a remedy hearing on 6th April 2023. The claimant was found to have been unfairly dismissed by the respondent.
2. The case was heard at a face to face hearing in Norwich. From the respondent, I heard evidence from Mr Jonathan Harrowven (Deputy Divisional Director of Operations). I also heard from the claimant, Mr Steven Johnson. Each of the aforesaid witnesses adopted their witness statements and confirmed that the contents were true. I also had an agreed bundle of

documents which comprises 70 pages. I also had a copy of Miss Skinner's written submissions dated 3rd April 2023. Of course, I also listened carefully to the help oral submissions of the parties at the conclusion of the hearing.

3. The claimant clarified that he wished to pursue reinstatement or reengagement as a remedy. He also sought compensation.
4. At the conclusion of the hearing, I reserved my decision.

The Evidence

5. I first of all heard evidence from Mr Harrowven. In broad terms he stated that he had considered the possibility of reinstatement and re-engagement, but concluded that neither was practicable or appropriate in the circumstances. He explained that the claimant had worked as a Band 5 Orthopaedic Practitioner. Following his dismissal in December 2020, the claimant's post had been advertised on 7th April 2021. The successful applicant started in post on 23rd August 2021. He stated that it was an important role and was a priority in terms of recruitment. There was no capacity to create another similar role in the plaster room.
6. Since the claimant's departure from the Trust, Mr Harrowven identified a 'significant cultural improvement' in the team within the plaster room. His return was likely to cause significant disruption to the overall running of the service. He feared that the claimant would be unable to put historical matters behind him.
7. Mr Harrowven went onto explain that there were no vacant posts in the plaster room currently. Neither were there any suitable Band 5 posts i.e. most require professional registration, which the claimant did not have. The claimant was not suitable for administrative posts. The parties agreed about this.
8. Mr Harrowven was also concerned that the claimant may not be fit to return to work. On 24th January 2023, the claimant had advised the Trust's solicitors that he had resigned from his previous post on 29th June 2022 "due to the stress of the Tribunal and stressful nature of the job whilst suffering from the illness I have" and further that "I am no longer working and am unemployed. The scope of job opportunities while I await surgery is very limited".
9. Mr Harrowven was asked questions during the hearing by the claimant. He said the job which the claimant had previously done at the Trust was one which could be physical and involved patient manual handling. He was not aware of the claimant's condition so as to be able to assess his suitability for posts. There would need to be a risk assessment prior to taking up any post.
10. He went on to state that he had had far fewer complaints from staff or patients since the claimant had left the department. He was not confident that there would not be a repeat of behaviour which was not in line with trust

values. He felt the claimant had shown little insight into the matters leading up to his dismissal.

11. I then heard from the claimant, Mr Johnson. He had provided a written document, which upon examination did not really touch upon the matters relevant to this hearing. I accept that it is challenging for a person representing themselves to produce a witness statement which properly addresses the issues relevant to remedy.
12. The claimant answered questions. He said he had secured a permanent role at the Ormiston Denes Academy on 29th June 2021 as a calm room manager. He agreed that it had not been until January 2023 that he had first notified the respondent that he wished to seek reinstatement/re-engagement. He said he would be well enough now to resume his previous duties at the hospital. The effects of his condition were variable but would still allow him to do his old job. He admitted that he was still waiting for surgery. He did not know when it would take place. Mr Johnson said he had reflected on what had happened and accepted some fault.
13. He was asked why it had taken six months to find a job after he was dismissed by the trust. He said it had been difficult to find work in the current climate. He accepted he had only supplied one job application at page 55 of the bundle, despite being asked for them on a number of occasions by the Trust's solicitors. He did have a driving licence. The claimant said he had not seen any full time driving job vacancies. He had registered with employment agencies but the positions he had been offered were too far away. He explained that he had lost a lot of confidence as a result of what had happened at the Trust. Again, he admitted that he had not provided written evidence of why he had resigned from the Academy. He stated it was due to stress and health issues.
14. I asked Mr Johnson to clarify one or two matters. He said he had not been off work at the Academy due to stress but it had been building up. He had not been referred to occupational health by his employer there. He was not on medication. His conditions had started in January 2022. He had been diagnosed with parathyroidism and had kidney stones. He had been paid by the Academy for July and August 2022. This was at the same rate as paid for April.

Findings and Reasons

15. I turn first to the question of reinstatement. In this respect, I am invited to consider making an order which would treat the claimant in all respects as having not been dismissed (section 114 of the Employment Rights Act 1996 ("ERA")). The claimant wishes to be reinstated. I must further consider whether it was practicable for the employer to comply with such an order, and whether it would be just to make an order where there had been conduct which contributed to the dismissal, as was the case here.

16. In this context, “practicable” means capable of being carried into effect with success” (*Coleman and another v Magnet Joinery Ltd ICR 46, CA*). This issue must be looked at in the light of the circumstances as a whole, at the date when the order would take effect. An order of reinstatement should never necessitate making redundancies.
17. I find that the claimant only very recently indicated that he wished the Tribunal to consider reinstatement/re-engagement. It had not been raised in the claim form, or as recently as correspondence in November 2022. It was first raised as an issue in an email from the claimant dated 24th January 2023 [23]. Until then, the Trust was entitled to assume that the claimant did not wish to return. I accept that the claimant’s former role was advertised and filled and that the new recruit took up the position in August 2021. This was not challenged by the claimant. I also accept that there are no similar posts available at present within the plaster room.
18. The question of the claimant’s health is rather difficult to resolve on the evidence before me. I am satisfied that he had some health conditions which caused him to attend appointments at the Norfolk & Norwich Hospital in December 2022 and January 2023 [53 and 54]. Regrettably, the claimant has chosen not to submit any further independent medical evidence which might enable me to make findings on the nature and severity of his conditions, and as to when he might have first experienced symptoms. He states at page 68 of the bundle that he has been diagnosed with hyperparathyroidism, and that this causes an excess of calcium to build up in his body. He states he is under a urologist at the James Paget Hospital. However, there is no independent corroboration of this. I note that documents at pages 53 and 54 do not support this. There is no supporting evidence of a mental health or stress related condition. The claimant says he is waiting for surgery, but does not now when this might take place. There is nothing from his surgeon in terms of further detail.
19. So far as the claimant’s testimony is concerned, he has stated that he would be fit to resume his role in the plaster room, notwithstanding the physical nature of the work. This is, of course, in stark contrast to his email at page 23 which suggests that his conditions had a significantly limiting impact on the work he could do. Indeed, he suggested that as recently as June 2022, he had been unfit to work due to mental health symptoms. In short, there is inconsistent testimony from the claimant, and a dearth of medical evidence.
20. Accordingly, I agree with Miss Skinner that it would be impossible for me to be satisfied that the claimant would be fit to resume his former role with the Trust. In the light of the issues raised by the claimant, there would be a need for him to engage with a risk assessment, perhaps through occupational health, whereby the Trust could reassure itself that the claimant was capable of performing the role, and whether the pending surgery (if it be the case) was relevant. As such it would be impracticable to reinstate the claimant. In addition, it follows that the terms of section 114(2)(c) and 115(2)(f) cannot be satisfied in that it would be impossible for any order to reinstate (or engage) to say when it must be complied with.

21. Moreover, in relation to reinstatement, I am satisfied that the claimant's previous position is no longer available. Given the nature and importance of the role in relation to the activities of the Trust as a whole, it was reasonable for the post to be advertised and filled within the time period which applied in this case. It was not the case that the claimant was seeking reinstatement. There was no reason to delay the recruitment process. Of course, the claimant had secured alternative employment himself by 29th June 2021. It is not a case where the Trust can be expected to make a redundancy or to create another post to accommodate the claimant.
22. In short, I find that the reinstatement is not practicable in the circumstances.
23. Turning then to the question of re-engagement, I find that many of the same considerations are relevant. In particular, as I have already mentioned, I am satisfied that it is not possible to give a date for re-engagement, by which the order must be complied with, due to the uncertainty of the claimant's health situation.
24. Moreover, I am satisfied that there are no relevant posts within the Trust. I accept Mr Harrowven's evidence on this point. It was unchallenged. It was noteworthy that the claimant was unable to identify an appropriate position. His situation is limited by the fact that he does not have a professional registration; and by the fact that he takes the view that he is not able to take up an administrative role.
25. Accordingly, I find that engagement is not appropriate. Looked at in the context of what happened in the lead up to the dismissal, it is my view that it would have been very challenging, both for the claimant and the Trust, to have resumed an employment relationship.
26. I then consider the question of compensation. There is a measure of agreement between the parties in relation to these issues. The sum for the basic award is agreed at £8,070. This figure must be reduced by 20% in relation to my findings as to contributory fault. This reduces the **basic award to £6,456**.
27. So far as the compensatory award for unfair dismissal is concerned, I must award such amount as I consider just and equitable in all the circumstances (section 123 of the ERA). The claimant did not work for a period of six months after his dismissal. There was no dispute that the claimant was entitled to compensation covering this period. I have adopted a monthly net wage of £1837.82 for the period between December 2020 and June 2021. The figure for loss of net earnings up to finding new employment is therefore $6 \times £1837.82 = \mathbf{£11,026.92}$.
28. The figure for loss of pension rights during the same six month period is agreed between the parties at **£3,624.84**.

29. The main issue for me to decide in relation to the compensatory award is for how long it is just and equitable for the claimant to receive compensation. I find that the claimant commenced a new job in July 2021 at the Ormiston Denes Academy. He continued to be paid for this employment until the end of August 2022.
30. The new salary was £1,295.13 net per month. The monthly rate of compensation is therefore the difference between what the claimant would have received if his employment had continued with the respondent, and the income he actually received working for the Academy. This equates to a net monthly loss of salary between July 2021 and August 2022 of £542.69. The monthly net pension contributions for that period were £342.98. Therefore, the net monthly loss of pension rights was £147.26. Total monthly loss of income for July 2021 to August 2022 was £689.95.
31. It was Miss Skinner's primary argument that the compensatory award should have extended only for a period of 12 months after the termination of the claimant's employment with the trust. It was submitted that he ought to have achieved employment at a similar rate within 12 months. In my view, this approach was too general and was rather arbitrary. Given his age and narrow range of employment related skills, it had been reasonable for him to take on the employment he did, notwithstanding that it was at a lower rate of pay. The continuing losses arising from the disparity in wages did, in my view, flow from the dismissal. In my judgment, it would not have been just and equitable to have imposed a 12 month cut off in this case.
32. In my view, the evidence required damages to extend to the termination of his employment with the Academy. There was very little evidence of the reasons why he had left that employment. The claimant stated that it was medically related. However, as I have already found, there was insufficient evidence of the nature and extent of any medical condition. Further, the claimant had submitted insufficient evidence that he had mitigated his losses post August 2021. There was documentary evidence of only one job application. There ought to have been much more. I agree with Miss Skinner that as of September 2022, it seemed that the claimant was unreasonably limiting the scope of his job searches. For instance, there seemed little if any reason why he could not have performed driving jobs. I did not accept that he would have been unable to find vacancies for full time driving positions, if he had been actively looking.
33. Therefore, it was appropriate to calculate the loss of income limit to the 14 month period he was paid by his new employer i.e. July 2021 to August 2022, was $14 \times £689.95 = \mathbf{£9,659.30}$.
34. Loss of statutory rights = **£500**.
35. Total compensatory award = **£24,811.06**.
36. This figure must then be reduced by 20% pursuant to the 'Polkey' principle:

$$£24,811.06 \times 0.8 = £19,848.85$$

37. The sum must then be reduced by a further 20% to reflect the finding of contributory fault:

$$£19,848.85 \times .8 = £15,879.09.$$

38. The total award is therefore the basic award plus the compensatory award which is £6,456 plus £15,879.09 = £22,335.09

FINAL AWARD OF COMPENSATION =£22,335.09

Employment Judge R Wood

Date: 9 May 2023

Sent to the parties on: 2 June 2023

For the Tribunal Office