



EMPLOYMENT TRIBUNALS

Claimant: John Sutton

Respondent: Sequin Art Limited

Heard via CVP

On: 2nd May 2023

Before: Employment Judge Frazer

Representation

Claimant: Mrs J Bradbury (Counsel)

Respondent: Mr J Feeny (Counsel)

RESERVED JUDGMENT

1. The Respondent shall pay the Claimant the total sum of **£21, 950.57** in compensation for unfair dismissal. This comprises the following amounts:

Basic award	£1, 927.13
Compensatory award	£20, 023.44

2. The Respondent shall pay the Claimant the total sum of **£5, 827.19** for notice pay.
3. The total sum that the Respondent shall pay to the Claimant is **£27, 7777.76**.

REASONS

1. The remedies hearing in this case took place via CVP on the afternoon of 2nd May 2023. The case had been listed for three hours but the morning was taken up with the determination of the Respondent's reconsideration application which is the subject of a separate decision.
2. For this hearing I was provided with a signed statement from the Claimant dated 18th April 2023; a bundle running to 197 pages and the Claimant's

schedule of loss. During the hearing the Respondent provided a counter-schedule of loss. I asked the parties to reach an agreement on anything non-contentious and accordingly the following figures were agreed:

- 2.1 Basic award
- 2.2 Loss of statutory rights
- 2.3 Pension contributions at 3 per cent at £130 per month

3. The following were matters in dispute:

- 3.1 Whether the Claimant had taken reasonable steps to mitigate his loss
- 3.2 The figure and duration for any award for loss of earnings
- 3.3 Whether there should be any uplift for breach of the ACAS Code

4. It was clarified that the Claimant had not claimed any benefits for the purposes of recoupment.

5. I heard evidence from the Claimant who was cross-examined by the Respondent. Both parties made oral submissions in closing and I reserved my decision.

Submissions

Respondent's Submissions

6. On behalf of the Respondent it was submitted that the Claimant had not mitigated his loss by obtaining driving work as he ought to have got another sales role around that time. He did not cast his net wide enough and therefore acted unreasonably. While in his statement he had said that he had applied for 52 jobs he had only provided a snapshot of these applications. He gave evidence that he applied for lower paid positions yet he also said that he did not apply for some roles as they were not on a high enough salary. He could have and should have obtained a lower paid position in 6 months. In the counter-schedule the Respondent had submitted that a reasonable person would have obtained a role paying £40, 000 per annum by 15th September 2022 with employer contributions at 4 per cent. After 12 months, his salary would have increased to £45, 000 and after a further 12 months (by 15th September 2024) he would have mitigated completely. He read out the email from Golden Bear to the tribunal which was written in encouraging terms. He was currently awaiting the outcome of an interview that he had just had at an equivalent salary. He is close to obtaining a new role and is likely to come by one in another month. The other approach that the Tribunal may take is that the Claimant has mitigated to date and will find a job in the near future. Any driver earnings would be set off from the additional period. His pension contributions will be 3 per cent. In any new role he is likely to equalate or better the contributions gained whilst with the Respondent. As for the ACAS Code, this was not followed. Because there was an irretrievable breakdown and Mr Marcus was concerned about what had happened with Ms Cutter there ought to have been a shortcut. It was not unreasonable for the Respondent to have taken that approach to dismissal.

Claimant's Submissions

7. The Claimant has applied for 52 jobs and has applied for 2 more since. The Respondent put applications in the bundle in a scattergun way. In any event the Claimant had applied for many of those. It was not unreasonable for the Claimant to apply for sectors where he had no experience. He knew that he would not get another job in those sectors. He started a business and that was reasonable. He works as a driver and started almost immediately. Sometimes he works seven days a week. He works nights and long hours. Having regard to **Singh v Glass Express Midlands UKEAT 71/18 15th June 2018** the burden of proof is on the wrongdoer to show a failure to mitigate. The Claimant does not have to prove that he has mitigated. The Respondent has to show that the Claimant acted unreasonably and it is not enough to show that the employee has failed to take a step. The employer has to show that jobs were available and that it was unreasonable for the Claimant not to have applied for them. Not seeing an advert does not make you unreasonable. What is unreasonable is a matter of fact. The employment tribunal is not to apply too demanding a standard. As concerned future loss, the Claimant will sustain losses through to retirement. There is no evidence to suggest he is about to get a job at an equivalent salary. The adverts start at £25,000 and some do not even have a salary figure. As for the ACAS reduction, there is no worse example of breaching the ACAS Code than how the Respondent dismissed the Claimant. There was also a failure to deal with his grievance appropriately.

The Law

8. The burden of proving a failure to mitigate is on the wrongdoer – **Wilding v British Telecommunications Ltd [2002] ICR 1079**. In **Cooper Contracting v Lindsey [2016] ICR D3** Per Langstaff J it was held that if evidence as to mitigation was not put before the tribunal by the wrongdoer the tribunal had no obligation to find it. What had to be proved was that the Claimant had acted unreasonably: he did not have to prove that what he did was reasonable.
9. Under **s.207A TULR(C) Act 1992** where an employment tribunal concludes that an employer has unreasonably failed to comply with the **ACAS Code of Practice on Disciplinary and Grievance Procedures** it may increase any award which it makes to the employee by up to 25% if it is just and equitable in all the circumstances. In **Slade v Biggs [2022] IRLR 216** the EAT outlined a four-stage test for the application of s.207A of TULR(C) Act, namely i) is the case such as to make it just and equitable to award an ACAS uplift? i) if so, what is a just and equitable percentage not exceeding but possibly equalling 25%? iii) Does the uplift overlap with general awards such as injury to feelings and should there be an appropriate adjustment to avoid double counting? iv) is the sum of money represented by the uplift disproportionate in absolute terms such that a further adjustment should be made?
10. In **Digital Equipment v Clements (No 2) [1998] IRLR 124** the order of deductions was considered to be as follows:

Calculate the total loss actually suffered by the Claimant.

Deduct amounts received in mitigation and any payment made by the former employer.

Make any adjustment for a failure by employee or employer to follow the statutory procedures.

Make any reduction for contributory fault.

Apply the statutory maximum.

Findings of Fact

11. The Claimant was born on 24th May 1961 and was 60 years old at the date of termination. He was employed by the Respondent from January 2019 and dismissed summarily on 15th March 2022. The Claimant therefore had three years' continuous service. The Claimant's gross monthly salary with the Respondent was £4, 333.33 and his gross weekly salary was £1, 007.75. The Claimant's net monthly salary was £2, 954 and his net weekly salary was £686.98. It was agreed that the monthly pension contributions from the Respondent were £130.

Mitigation of Loss

12. From the beginning of April 2022 the Claimant has been working part time as a contract driver for Driver Hire Contracting. In addition the Claimant has been working as a self-employed chauffer. He set up in business and has provided his own vehicle, insurance and other expenses. He obtained a car loan for the vehicle which he has paid off and the settlement of that loan is shown on the accounts. He has not provided any information for 2023.

13. The Claimant's evidence, which I accept, was that he works as a chauffer when he can and effectively fills in with the driver hire work as this is less well paid. He was asked about the period between 26th August 2022 and 13th January 2023 for which there were no payslips and he stated that he did not do any work for Driver Hire during this period as he was busy chauffeuring. His payslips for March 2023 showed that he was busy doing this work again. He stated that he would do this work on the weekends.

14. The Claimant produced his payslips for his driver work which showed that the hours and therefore pay did indeed fluctuate and that he was paid the national minimum wage. He commenced work on 1st April 2022 so obtained remunerated employment just over two weeks after the termination of his employment by the Respondent. The Claimant worked as a chauffeur and provided his management accounts for this business detailing a total net profit of £1, 720.68 between April and December 2022.

15. I have considered the Claimant's job applications in the bundle. The Claimant applied for a job as a Senior National Account Manager on 30th March 2022 but was rejected for this role. He had applied for and was rejected for a job with Gameplan Europe Ltd on 7th July 2022. On 13th July 2022 he registered

with Reed Employment Agency. On 10th August 2022 he applied for a role as a Sales Director with Busy Bee Recruitment Ltd. He was invited to and attended a first interview for the role of National Account Manager with a Birmingham company but was rejected on 10th August 2022. On 17th August 2022 he applied for a role of Sales Specialist for Engino. On 12th January 2023 he applied for a role with Orchard Toys. On 21st December 2022 he applied for a role as International Account Manager with Holotoyz. On 23rd February 2023 he applied for the role of Senior Business Development Manager – Stationery, Toys and Party Division to Igloo Books. On 12th April 2023 he expressed an interest to Reed in the role of Customer Service Director in Suffolk. On 4th April 2023 he applied for the position as Key Account Manager Toys/ Gifts with a recruiter.

16. The Claimant updated the Tribunal that he had since applied for a jobs and had had interviews. He had applied for a job with Williams Lee on an equivalent salary and was waiting to hear whether he was going to go forwards. He had an interview with a toy bicycle company and was unsuccessful. He had also applied for a job as a sales executive for a garden centre. The other role was slightly out of his region as it covered the South-East. It was put to the Claimant that he could have applied for roles as a business development manager in the Midlands and South-East. His response was that it was off area as you needed to be in locus to cover those accounts. He was asked about a role with Golden Bear, which he said he was rejected from and read out the email. He was asked about a role with Just Play but he said that he had not seen that position. He said that he had applied for the Creative Kids role but had not heard back. He said that he had not applied for the Kap Toys role and that Paper Projects was unsuitable as this had been a sales executive job and he did not have expertise in Amazon. He had applied for the Curious Universe position but had not received any decision. He had been rejected from Clock Europe. He was asked about further positions but stated that anything that was business to business would be unsuitable as he was business to consumer and double glazing was also unsuitable because of the nature of that kind of sales work.
17. In the circumstances I find that the Respondent has not proved that the Claimant acted unreasonably in mitigating his loss. It was reasonable for him to have secured alternative employment driving straight away both as a chauffeur and also as a driver for Driver Hire. Having been dismissed he had to do something to mitigate and was not able to secure employment as a sales representative immediately.
18. I accept that the Claimant has been applying for sales positions, mostly in the area of his expertise but that also he has applied for some roles which were not in his area. He has not focused on applying outside of his area as he says that he would be bound to get rejected as there would be someone with expertise in that area. That explanation is plausible although I accept that he has put some applications in for jobs outside his area of specialism. It would not be reasonable to apply for positions for which he may be perceived to be overqualified or which may be out of his area. He made a calculated risk assessment in applying for positions he may be more likely to get. I find that

the Claimant has not rested on his laurels waiting for compensation to fall into his lap but has in fact been proactive. He has also been proactive in creating an immediate income for himself by driving and setting up in business as a chauffeur. I find that this was a reasonable step to take to bring about an income straight away after he was dismissed and at the same time applying for positions in sales. The Claimant has not produced all of his applications but I find on balance that his approach has been diligent and to that effect, he was able to read out a rejection from Golden Bear that he had on his phone when it was brought to his attention by the Respondent. That also corroborated his account that he has in fact applied for numerous positions and that this was only a snapshot.

19. However I find that in terms of future loss of earnings, the Claimant has given evidence that he has been invited to interviews and is currently awaiting the outcome of one. I do not accept that he will not be able to find equivalent employment until retirement and I find that on the evidence that I have heard about his recent interviews he is likely to find a position at an equivalent salary within the next six months.

ACAS Code of Practice

20. The Respondent breached the ACAS Code of Practice by failing to establish the facts of the case by way of an independent investigation, informing the Claimant of the problem, holding a meeting to discuss the problem and providing the Claimant of an opportunity to appeal. The Respondent's case was that there was an irretrievable breakdown and that Mr Marcus was concerned about the comments that the Claimant had made to Alison Cutter. In my finding the breach was unreasonable. There was nothing which exempted the Respondent as an employer from carrying out due process in relation to the Claimant's dismissal. The Claimant could have been suspended pending any disciplinary hearing if the Respondent had concerns. In the circumstances owing to the extent of the breach warrants a 25 per cent uplift. The matter of dismissal was not approached in any impartial or reasonable manner. I therefore uplift by 25%.

Conclusions

21. The Claimant's earnings details are as follows:

Annual gross salary: £52, 000

Annual net salary: £35, 452

Monthly gross salary: £4, 333

Monthly net salary: £2, 954

Employer pension contributions: £130 per month

22. The Claimant's losses are as follows.

Notice Pay

6 months' salary is £17, 726

(Driver Hire earnings £3, 002.00)

(Chauffeur earnings £8, 896.81)

£5, 827.19 total notice pay

Unfair Dismissal

Basic Award (including 25 per cent reduction for contributory fault)

£1, 927.13

Compensatory Award

Loss of Statutory rights

£500.00

Immediate Loss of Earnings

Pension contributions between
15/03/22 to 15/09/22

£780.00

Pension contributions between
15/09/22 and 02/05/23

£990.00

Loss of earnings between
15/09/22 and 02/05/23
33 weeks @ £686.98 a week

£22, 670.34

(Deduct earnings Driver Hire £3, 533)

(£3, 533.00)

(-3738.13 net profit Chauffeur from 15/09/23 to 12/23)

(£0)

Estimated earnings for chauffeur January to May 2023:

First 6 months average add in car allowance gives a figure of £11, 235.30 + £2, 635.68 on the basis that C has now paid off car gives £13, 870.98. However deduct trading loss -£3, 738.13. £1688.80 per month or £389.72 per week.

17 weeks @ £389.72 per week

(£6, 625.24)

Immediate net loss of earnings

£12, 512.10

Immediate loss of pension contributions	£1,770.00
Statutory rights	<u>£500.00</u>

Total immediate loss of earnings **£14, 782.10**

Future Loss of Earnings

Loss of earnings 02/05/23 – 02/11/23	£17, 861.48
(Driver Hire for year £6535 so average is £125.67/week)	(£3, 267.42)
(Chauffeur estimate 26 weeks @ £389.72 a week)	(£10, 132.72)
	<u>£4, 461.34</u>

Future loss of pension contributions £780.00

Future loss of earnings	<u>£5, 241.34</u>
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Total Loss of Earnings award

£14, 782.10 + £5, 241.34 = **£20, 023.44**

Total compensatory award therefore **£20, 023.44**

ACAS Code Uplift

Apply 25 % uplift for breach of ACAS Code

Reduction for Contributory Fault

Apply 25% to compensatory award for contributory fault

Compensatory award therefore unchanged.

TOTALS

Notice pay	£5, 827.19
Basic award	£1, 927.13
Compensatory award	<u>£20, 023.44</u>
TOTAL AWARD	£27, 7777.76

Employment Judge A Frazer

Dated: 24th May 2023

RESERVED JUDGMENT REASONS SENT TO THE PARTIES
ON

5 June 2023

GDJ
FOR THE SECRETARY TO EMPLOYMENT TRIBUNALS