



EMPLOYMENT TRIBUNALS

Claimant: Mr. M. Strydom

Respondent: Bridge Facilities Engineers Limited

Heard at: Watford (by CVP)

On: 23 June 2023

Before: Employment Judge J Galbraith-Marten (sitting alone)

Appearances

For the Claimant: Mrs. T. Strydom, Claimant's wife

For the Respondent: Mr. P. Nath, Counsel

RESERVED JUDGMENT

It is the Judgment of the Tribunal that the respondent is ordered to pay to the claimant the sum of **£38,758.80** as compensation for unfair dismissal.

REASONS

Introduction

1. The liability Judgment was sent to the parties on 16 April 2023. A remedy hearing was listed to determine the claimant's entitlement to compensation. Both parties provided a small bundle of documents. The claimant provided a written witness statement and Ms. Knights and Ms. Howard produced witness statements for the respondent. They all gave sworn evidence under oath and both parties made submissions.

Findings of Fact

2. The claimant's employment with the respondent was terminated on 18 February 2021 and he was provided with a statutory redundancy payment of £1,614.00. The claimant was employed as a contract manager, and he had a flexible working pattern that enabled him to work one day per week from home whilst employed by the respondent.
3. The claimant's salary was £56,000.00 per annum but at the date of his dismissal his salary had been reduced by £750.00 per month to £47,000.00. The claimant agreed to this reduction on a temporary basis to assist the respondent's business. The claimant's net salary per week prior to the reduction was £791.78 and his temporary net salary per week was £672.00 as set out in the claimant's schedule of loss included in his bundle of documents at pages 1-3.
4. The claimant had his first covid 19 vaccination on 29 February 2021 and his second on 21 May 2021 as set out in his diary included at page 4 of his bundle.

Claimant's evidence

5. At the date of his dismissal the claimant was depressed and was signed off as unfit to work by his GP until 1 March 2021.
6. Notwithstanding his ill health, and from 2 February 2021 onwards, the claimant registered with employment agencies, updated his CV, and started searching for alternative roles during his notice period.
7. On 24 February 2021 he sent his CV to Andrew Barnard (a former colleague) at Fusion Lifestyle and confirmed he was seeking employment as a contract manager or technical manager. The claimant's email was included at page 6 of his bundle of documents. He was informed interviews for a role were taking place that day, but the claimant didn't receive any feedback, nor was he invited for interview.
8. The claimant joined Reed recruitment agency on 4 March 2021, and he searched for facilities management roles in Essex and Southeast England.

9. On 6 March 2021 he sent his CV to Mike Spibey (a referral made by a former colleague) who confirmed his firm was recruiting for a senior engineer at HMP Thameside. This was included at page 11 of the claimant's bundle. This was followed by a telephone conversation on 8 March 2021, but the claimant was unsuccessful for this role.
10. The claimant applied for a role via the agency Avison Young on 7 March 2021 and the email acknowledgment of his application was included at page 9 of the claimant's bundle of documents. He received an email from Avison Young on 20 April 2021 confirming the role had been filled and his application could not be progressed. This was included at page 10 of the claimant's bundle.
11. He also made enquiries of available roles with NHS Property Services Limited on 9 March 2021 and that email exchange was included at page 12 of the claimant's bundle of documents.
12. The claimant joined Indeed employment agency on 26 March 2021. This is confirmed in the email acknowledgement included in the claimant's bundle at page 14. The claimant's search related to maintenance jobs in Essex and Eastern England as set out at page 15 of the claimant's bundle.
13. All the claimant's efforts to find alternative employment were unsuccessful, and he stated in evidence he was informed employers weren't recruiting at that time as they still had staff on furlough as a result of the pandemic. He was however informed there was an abundance of electrical fitting work on new build housing. Therefore, he decided to acquire two new electrical qualifications to increase his chances of acquiring that type of work. Two Gas Logic Training invoices in respect of the electrical courses he completed were included in the claimant's bundle at pages 18 to 21.
14. On 21 April 2021 the claimant spoke with Sheila Ingram at Core Recruitment regarding a role with the Ambassador's Theatre Group and she referred him to the recruiting manager on linked in. Her email was included at page 16 of the claimant's bundle. The claimant was interviewed by her that day, but the role was based in Cornwall and due to his carer responsibilities, the claimant was unable to accept that role as it would have required him to be away from home during the working week. As set out in the liability Judgment the claimant's son has complex medical needs and requires care 24 hours a day, 7 days a week.
15. In May 2021, a close relative supplied the claimant with a start-up loan of £20,000.00 so that he could buy a reliable van, take out appropriate insurance and incur other start-up expenses to enable him to start his own business providing domestic plumbing and electrical services. The claimant started looking for these types of jobs on Facebook and MyBuilder from 22 May 2021 onwards as set out in his diary. The jobs he found were mainly working on new build housing sites undertaking electrical work.
16. In cross examination the respondent reminded the claimant he had started his own company previously using a similar name, but that business had been unsuccessful and the company was dissolved in 2019. Therefore, it was

unreasonable of him to set up the company again. The claimant accepted he had started his own company previously and it hadn't succeeded as he was doing jobs for friends and family at weekends. However, as he struggled to gain an alternative employed position, he felt that was his best option to earn a living and mitigate his losses following his dismissal.

17. The claimant's self-employed tax return schedule was included at pages 25 & 26 of his bundle, and it confirmed he started trading under the business name PPH Domestic Services. In the tax year 2021/22 i.e., 6 April 2021 to 5 April 2022 the claimant's gross business turnover was £55,053.00 and after deducting goods bought expenses and an in-year adjustment in respect of a van he purchased (to be spread across multiple years); the claimant's business net profit was £19,157.00.
18. However, the claimant stated he did not draw any of that profit as an income during the tax year 2021/22. In evidence he confirmed he needed to leave capital in the business in order that he could buy materials such as bathroom/kitchen suites that can cost between £9,000.00 - £15,000.00. The claimant stated his family lived on his wife's income during his first year of trading. He only started drawing an income from his business from January 2023 when he was able to repay the loan provided by his relative.

Respondent's evidence

19. Ms. Howard reached out to the recruitment agencies the respondent regularly works with to ascertain the state of the labour market at the date of the claimant's dismissal on 18 February 2021. She spoke with Toby Kneath at Search who confirmed by email dated 20 June 2023 the agency had various contract manager roles available in 2021 with national facilities management companies but he did not provide any specific examples.
20. Ms. Howard also liaised with Jordan Cook of Alecto Recruitment Limited who confirmed they also had many contract manager roles available between March and May 2021 but again he did not provide any specific examples of roles available at that time. The email exchanges were included at pages 16-18 of the respondent's bundle.
21. Ms. Howard asked both agencies whether it would be possible for a contract manager to work from home full time, and both confirmed they had never heard of such an arrangement.
22. Ms. Howard stated in evidence that at the date the claimant's employment was terminated he was a fully qualified domestic and commercial gas engineer and a copy of the invoice paid by the respondent in respect of the course he completed regarding those qualifications was included in the respondent's bundle at page 23.
23. Ms. Howard's evidence was that even if the claimant could not find work as a contract manager, he could have easily found work as a gas engineer following his dismissal as those roles are in abundance and the respondent's gas

engineers are booked many weeks if not months in advance. Ms. Knights also gave the same evidence regarding the availability of gas engineer roles but neither provided details of any specific vacancies.

24. Furthermore, Ms. Howard suggested the claimant could have found work away from home after his dismissal if he had not been able to source work locally as the government's guidance regarding shielding for those who were clinically extremely vulnerable was removed on 31 March 2021 and therefore from that date, the claimant's job search could have been further afield.
25. The respondent also provided details of various vans that Ms. Howard sourced on auto trader, and they were included in the respondent's bundle at pages 24-28. The mileage on those vehicles varied from 82,000 to 183,000 miles. When questioned about those vehicles the claimant stated he would not have bought a van with such high mileage for his business and nor would the respondent have purchased those types of vehicles. His position was he needed a reliable and respectable vehicle to use and even though he had bought a newer van with lower mileage it had still required £3,000.00 worth of work. The Tribunal accepts the claimant's evidence that he would not have purchased any of the vehicles sourced by Ms. Howard.
26. Finally, Ms. Knights confirmed again the claimant would have been dismissed on the grounds of redundancy even if he hadn't requested to work from home in January 2021 as set out at paragraph 13 of her witness statement. Ms. Knights provided the same evidence during the liability hearing.

The Law

Losses

27. There is no claim for a basic award. The claim for compensation relates to the compensatory award and **s.123(1) Employment Rights Act 1996** states 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.*"
28. The object of the compensatory award is to compensate the employee for their financial losses as if they had not been unfairly dismissed and it is not to punish the employer. In **Norton Tool Co Ltd v Tweson [1973] All ER 183** the court held that compensation is to "*compensate and compensate fully, but not to award a bonus.*"
29. The Tribunal can also only compensate for proven financial loss as confirmed by the Employment Appeal Tribunal in **Morgans v Alpha Plus Security Limited [2005] IRLR 234, EAT**.
30. It is for the claimant to set out full details of their loss. The Tribunal must have "*something to bite on*" in accordance with the Employment Appeal Tribunal decision in **Adda International Ltd v Curcio [1976] ICR 407, EAT**.

31. In **Somerset County Council v Chaloner UKEAT 0063/14** the Employment Appeal Tribunal confirmed there are three stages to the assessment of compensation under s.123: (a) the Tribunal must undertake a factual quantification of the losses claimed, (b) the Tribunal secondly needs to assess the extent to which any or all of the losses are attributable to the dismissal or action taken by the employer i.e. it must determine whether there is a direct link between the losses claimed and the employer's conduct in dismissing and; (c) taking into account the conclusions at stage one and two, the Tribunal must ask what compensation would be just and equitable.
32. The compensatory award is subject to a statutory cap of a year's gross pay or a maximum of £88,519.00 (as it was for dismissals at the date the claimant was dismissed), whichever is the lower.

Mitigation of loss

33. **Section 123(4) Employment Rights Act 1996** states; "*In ascertaining the loss referred to in subsection (1) the Tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.*"
34. The claimant is expected to take reasonable steps to mitigate their losses but the burden of proving a failure to mitigate loss is on the respondent as confirmed in **Fyfe v Scientific Furnishing Limited [1989] IRLR 331**. If a claimant has failed to take a reasonable step it is for the respondent to establish that was unreasonable in accordance with **Wright v Silverline Car Caledonia Ltd UKEATS/0008/16/JW**.
35. When considering mitigation of loss, the Tribunal must adopt a three stage test as set out by the Employment Appeal Tribunal in **Gardiner-Hill v Roland Berger Technics Ltd [1982] IRLR 498, EAT** and endorsed in **Savage v Saxena [1998] ICR 357, EAT**; (1) what steps were reasonable for the claimant to have to take to mitigate his or her losses; (2) whether the claimant did take reasonable steps to mitigate loss and; (3) to what extent if any would the claimant have mitigated his or her loss if she or he had taken those steps.
36. More recently, the Employment Appeal Tribunal summarised the principles Tribunals must follow when considering whether there has been a failure to mitigate loss in **Cooper Contracting Limited v Lindsey [2016] ICR, D3 EAT**. The burden of proof is on the employer. If evidence as to mitigation is not put before the Tribunal by the employer, it is under no duty to look for that evidence or draw inferences. The employer must prove the employee acted unreasonably. The Tribunal should not apply a standard that is too demanding on the claimant. It is for the employer to show the claimant acted unreasonably in failing to mitigate and finally, in a case where it might be reasonable for a claimant to take a better paid job that does not necessarily satisfy the test.

Polkey

37. In **Polkey v AE Dayton Services Ltd [1987] IRLR 503**, the House of Lords stated the compensatory award may be reduced or limited to reflect the chance the claimant would have been dismissed in any event and that the employer's procedural errors made no difference to the outcome. In **Wilkinson v Driver and Vehicle Standards Agency [2022] EAT 23**, the Employment Appeal Tribunal stated the task for the Tribunal is to identify and consider, on the evidence, what would have happened had there been no unfair dismissal. In **Jagex Ltd v McCambridge UKEAT/0041/19** if it is inherent in the Tribunal's reasoning that following a fair procedure would not have made the dismissal fair, there is no requirement to conduct a detailed analysis of what may have happened.
38. The President of the Employment Appeal Tribunal summarised the principles Tribunals must consider regarding the application of polkey in **Software 2000 Ltd v Andrews and others [2007] ICR 825, EAT**. Those principles are: -
- The Employment Tribunal must assess the loss flowing from that dismissal, which will normally involve an assessment of how long the employee would have been employed but for the dismissal.
 - If the employer contends that the employee would or might have ceased to have been employed in any event had fair procedures been adopted, the tribunal must have regard to all relevant evidence, including any evidence from the employee.
 - There will be circumstances where the nature of the evidence for this purpose is so unreliable that the tribunal may reasonably take the view that the exercise of seeking to reconstruct what might have been riddled with uncertainty that no sensible prediction based on the evidence can properly be made. Whether that is the position is a matter of impression and judgment for the Tribunal.
 - However, the tribunal must recognise that it should have regard to any material and reliable evidence that might assist it in fixing just and equitable compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.
 - A finding that an employee would have continued in employment indefinitely on the same terms should only be made where the evidence to the contrary (i.e. that employment might have terminated earlier) is so scant that it can effectively be ignored.
39. Further guidance was provided again by the Employment Appeal Tribunal in **Contract Bottling Ltd v Cave and anor [2015] ICR 146, EAT** who confirmed a tribunal should consider possible future events and a claimant's chance of obtaining alternative employment. Also, if the claimant had not been dismissed would she or he remained in the same role at the same rate of pay.

Loss of statutory rights

40. Finally, a claimant who has been unfairly dismissed loses various statutory employment protections and a Tribunal can award a sum to reflect the fact a claimant will need to accrue 2 year's continuous service in any new role before obtaining those protections again.

Submissions

41. The Tribunal was not referred to any legal authorities by either party.

Respondent's submissions

42. The respondent submitted the claimant did not make sufficient efforts to mitigate his loss. The claimant could have obtained employment as a contract manager as roles were available.
43. Secondly, even if no work as a contract manager was available the claimant should have been able to find work as a gas engineer from 18 February 2021 or at the latest from 1 April 2021 when the restrictions for the clinically extremely vulnerable were lifted.
44. The respondent also submitted it was not reasonable for the claimant to have acquired additional electrical qualifications when he was a fully qualified gas engineer nor, was it reasonable for him to set up his own business when that venture was unsuccessful previously. Furthermore, it was unreasonable for the claimant not to accept the role with the Ambassador's Theatre Group in Cornwall notwithstanding his carer responsibilities.
45. Finally, the respondent asserted the claimant would have been dismissed in any event.

Claimant's submissions

46. The claimant submitted he had no income for 52 weeks from the date of his dismissal and he had made every effort to mitigate his loss. As there were no suitable jobs available, he acquired additional qualifications and started his own business. The respondent has not established he failed to mitigate his loss as it provided no suitable vacancy information.

Conclusion

47. The issues for the Tribunal to determine in respect of the claimant's claim for a compensatory award are:
- What financial losses has the dismissal caused the claimant?
 - Has the claimant taken reasonable steps to replace his lost earnings?
 - If not, for what period of loss should the claimant be compensated?

- Is there a chance the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
- If so, should the claimant's compensation be reduced and if so by how much?
- If the claimant was unfairly dismissed, did he cause or contribute to his dismissal by blameworthy conduct?
- If so, would it be just and equitable to reduce the claimant's compensatory award and by what proportion?
- Does the statutory cap of fifty-two week's pay apply?

Losses

48. As set out in the claimant's schedule of loss included at pages 1-3 of his bundle, there is no claim for a basic award as he received a statutory redundancy payment, but he seeks a compensatory award comprising; 67 week's net loss of earnings (67 x £791.78) and pension loss (67 x £58.50) plus £450 for loss of statutory rights providing a total net sum of £57,312.80.
49. The respondent's counter schedule of loss included at page 7 of the respondent's bundle asserts any compensation awarded should be limited to 4 weeks net loss of earnings at the net rate of £791.78 per week and pension loss at £58.50 per week providing a total net sum of £3,401.12.
50. Both parties used the net weekly pay figure of £791.78 which is based on the claimant's full annual salary of £56,000.00. However, as set out in the liability judgment at paragraph 33, the claimant agreed to a temporary reduction in his salary of £750.00 gross per month when he returned to work in September 2020 and that reduction was still in place at the date of dismissal. The duration of that arrangement was not set out in writing.
51. The claimant's net reduced salary per week at the date of his dismissal was £672.00 as set out in the claimant's schedule of loss and he was planning on asking that his salary be reinstated in January 2021 but that did not happen as he was informed, he was to be dismissed on 18 February 2021.
52. The Tribunal has considered whether the claimant's salary would have been reinstated had he not been dismissed. The Tribunal accepts the claimant would have requested his salary be reinstated if he remained employed, but the tribunal does not believe the respondent would have acceded to that request until the claimant returned to office-based work and adopted his normal working pattern of four days in the office and one day working from home.
53. In evidence the claimant said he began working away from home and on site again after his second covid 19 vaccination on 21 May 2021. Therefore, the Tribunal finds it is likely the claimant would not have returned to his normal working pattern (had he not been dismissed) until the 22 May 2021. Therefore, his rate of pay during the period 18 February 2021 to 21 May 2021 (13.2 weeks) would have been at the reduced rate of £672.00 had he not been dismissed.

54. Thereafter, had the claimant not been dismissed and returned to his normal working pattern it is more than likely the claimant would have insisted that his salary be reinstated to the correct rate of £791.78 net per week from 22 May 2021 onwards and in respect of the remainder of the 67 weeks sought i.e., 53.8 weeks.
55. The pension loss figure of £58.50 per week is agreed by the parties as representing the loss of the claimant's contributions of £33.10 per week and the respondent's contributions of £25.40 per week as set out in both the claimant's schedule of loss and the respondent's counter schedule. The claimant was a member of the NEST pension scheme which is a defined contribution scheme.
56. The claimant's evidence was he had no personal income between the date of his dismissal and January 2023, a period of almost two years. However, his claim relates to a period of 67 weeks. The Tribunal accepts the claimant's immediate loss of earnings and pension contributions claim in respect of the period of 67 weeks are quantified and attributable to the claimant's dismissal and this is the appropriate number of weeks for which compensation should be awarded subject to his rate of pay during the period 18 February 2021 to 21 May 2021 for the reasons given above and mitigation of loss and policy which are dealt with below.
57. In relation to the claim of £450.00 in respect of loss of statutory rights, the Tribunal accepts if the claimant obtains an alternative employed position in future, he will need to acquire 2 years' service before he obtains statutory rights again.

Mitigation of Loss

58. As stated in **Ffye**, the burden was on the respondent, and it was required to prove the claimant acted unreasonably in relation to the steps he took to replace his lost earnings.
59. The respondent adduced evidence from two recruitment agencies that contract manager roles were available at the date the claimant was dismissed but there was no evidence regarding any specific roles. Also, the respondent asserted the claimant should have applied for gas engineer roles if he wasn't able to obtain a contract manager role as they are in abundance but again no job adverts in relation to any specific roles were provided by the respondent.
60. The respondent submitted the claimant also acted unreasonably in setting up his own business and by not accepting the role with the Ambassador's Theatre Group in Cornwall. Beyond asserting those facts, the respondent did not prove why the claimant taking those actions was acting unreasonably. Although the claimant started his own business previously, he was doing so in his free time and the Tribunal accepts that is the reason the business failed initially and therefore it was reasonable to set up his own business as a means of mitigating his loss of earnings.

61. Furthermore, given the claimant's carer responsibilities, it would have been impossible for him to accept a role in Cornwall that would have required him to be away from home during the working week and as such it was not unreasonable to have declined that role.
62. Therefore, the respondent did not discharge the burden of establishing the claimant failed to mitigate his loss in respect of each of those four points.
63. However, in respect of the claimant's decision not to draw an income from his business during the tax year 2021/22, the Tribunal finds it would have been a reasonable step for the claimant to have taken some income from his business to replace his lost earnings. The Tribunal accepts the claimant's business required working capital but does not accept that it was reasonable not to draw any of the profit of £19,157.00 from the business as an income. The Tribunal finds it would have been a reasonable step for the claimant to have drawn 50% of that profit as an income i.e., £9,578.50 to mitigate his loss and even though the start-up loan from his relative remained outstanding.

Polkey

64. Following the guidance in **Software 2000 Ltd** the Tribunal must determine if there was a chance the claimant would have been fairly dismissed if a fair procedure had been followed or, for some other reason.
65. In relation to the procedural point, that issue was determined at paragraph 111 of the liability Judgment and the Tribunal found there was no likelihood the claimant would have been dismissed if a fair process had been followed as there was no fair reason for dismissal in the first instance.
66. Notwithstanding that, the Tribunal must assess how long the claimant would have been employed by the respondent but for the dismissal and the Tribunal must have regard to all the relevant evidence. The respondent's counter schedule of loss suggests the claimant would have at most remained in employment for a further 4 weeks as there was no contract manager work available.
67. Ms. Knights confirmed in her witness statement the number of employees in the business has reduced since the beginning of the pandemic. However, the claimant was the only employee who was made redundant by the respondent, and it recruited another employee Paul McCarthy in June 2022 whose role encompasses the role of contract manager so the requirement for that work continues as set out at paragraph 76 & 77 of the liability Judgment.
68. However, the working relationship between the parties had broken down considerably by the date of the claimant's dismissal and his health had also suffered because of the events that precipitated his dismissal and in particular the fallout from his request to work from home on 5 January 2021 as set out in detail in the liability Judgment.

69. Nevertheless, the chance of the claimant voluntarily seeking alternative employment would have been reduced given his requirement for flexible working and as confirmed by the recruitment agents Ms. Howard approached, that is rare in a contract manager role.

70. Taking all that into consideration, and if the claimant had not been dismissed and if he had returned to work after his first covid-19 vaccination on 29 February 2021, it is not certain he would have remained employed indefinitely by the respondent or during the 67-week period his losses relate to. The Tribunal assesses the probability the claimant's employment would have terminated earlier than 67 weeks at 20% and reduces the compensatory award to reflect that.

Contributory Fault

71. The Tribunal concluded the claimant did not contribute to his dismissal as set out at paragraph 112 of the liability Judgment.

Award

72. In conclusion, the Tribunal finds it is just and equitable to award the claimant the following compensatory award: -

• 13.2 weeks' reduced pay @ £672.00 =	£8,870.04
• 53.8 weeks' basic pay @ £791.78 =	£42,597.76
• 67 weeks pension loss @ £58.50 =	£3,919.50
• Loss of statutory rights =	<u>£450.00</u>
• Less earnings from business	£9,578.50
• Total =	<u>£46,258.80</u>
• Less 20% Polkey reduction	£9,251.76
• Total	£37,007.04

73. As this figure is above £30,000.00 it must be grossed up to ensure the claimant receives the full amount awarded including any tax he may be required to pay above £30,000.00 at the basic rate. The total award £37,007.04 - £30,000.00 = £7,007.04/0.8 = £8,758.80. This must be added to the first £30,000.00 providing a total award after grossing up of **£38,758.80**.

74. The award is below the statutory cap of 52 week's gross pay of £56,000.00 and as such it does not need to be applied. The recoupment provisions also do not apply to this award.

Employment Judge J Galbraith-Marten
30 June 2023

SENT TO THE PARTIES ON 4 July 2023
FOR THE TRIBUNAL OFFICE: GDJ