



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr R Taylor

**Respondent:** The Department for Work and Pensions

**Heard at:** Liverpool

**On:** 17 July 2023

**Before:** Employment Judge Benson  
Mr W Partington  
Mrs J Pennie

## REPRESENTATION:

**Claimant:** In person

**Respondent:** Mr A Lyons, Counsel

**JUDGMENT** having been sent to the parties on 9 August 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

## REASONS

### Issues

1. This hearing was listed for one day to determine the remedy following the judgment that the claimant's claims of unfair dismissal and wrongful dismissal were well founded. The claimant had provided a schedule of loss and the respondent had produced a counter schedule. Both were prepared on the basis that the claimant was seeking compensation as his remedy. An agreed bundle of documents was available for the Tribunal.

### Remedy sought by the claimant

2. Late in the afternoon on the day of the remedy hearing, and after the claimant had given evidence and been cross examined, it was raised by the claimant that he was seeking reinstatement. Although reinstatement was the remedy indicated in his claim form, it was not something that had been raised by the claimant at the end of the liability hearing or indeed at any time during the remedy hearing that day. Nor was it something that the Tribunal had clarified at the outset of the hearing, which

was remiss of it. As reinstatement is the primary remedy within the Employment Tribunals for claims of unfair dismissal, we gave the claimant the opportunity to consider whether he wanted to continue to pursue it or whether he wished to proceed to pursue an award of compensation.

3. The Tribunal explained that as the respondent was not in a position to respond to a request for reinstatement, in that Mr Lyons did not have instructions, and as it was already late in the afternoon, the hearing would need to be adjourned and relisted for a further hearing. The claimant was clear that he did not want to return for another hearing and said that he would seek compensation only. We wished to ensure the claimant had time to consider his position on this and suggested he take advice and that we would break for that purpose. He indicated he would speak to a solicitor he had been in contact with, or to ACAS. Having returned from that break, the claimant advised the Tribunal that he had not been able to speak to his solicitor or to ACAS, but that he was clear he wanted to proceed that day on the basis that he was seeking compensation. The Tribunal again offered to adjourn the hearing if he felt that he wanted to take advice, but he declined.

4. The Tribunal was satisfied that the claimant was no longer seeking reinstatement. As such we proceeded to consider compensation.

### The Law

5. The statutory provisions relating to unfair dismissal remedy are set out in Chapter II of part X of the Employment Rights Act 1996. The calculation of the basic award and damages for breach of contract were agreed. The following principles in relation to the compensatory award were relevant in this case.

### Contributory Fault

6. An award can be reduced by way of contributory fault. It can apply both to the basic award and to the compensatory award by virtue of differently worded provisions in sections 122 and 123 of the Employment Rights Act 1996 respectively:

*“Section 122 (2): Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly....*

*Section 123 (6): Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.”*

7. As to what conduct may fall within these provisions, assistance may be derived from the decision of the Court of Appeal in **Nelson v BBC (No 2) [1980] ICR 110** to the effect that the statutory wording means that some reduction is only just and equitable if the conduct of the claimant was culpable or blameworthy. The Court went on to say:

*“It is necessary, however, to consider what is included in the concept of culpability or blameworthiness in this connection. The concept does not, in my view, necessarily involve any conduct of the complainant amounting to a breach of contract or a tort. It includes, no doubt, conduct of that kind. But it also includes conduct which, while not amounting to a breach of contract or a tort, is nevertheless perverse or foolish, or, if I may use the colloquialism, bloody minded. It may also include action which, though not meriting any of those more pejorative terms, is nevertheless unreasonable in all the circumstances. I should not, however, go as far as to say that all unreasonable conduct is necessarily culpable or blameworthy; it must depend on the degree of unreasonableness involved.”*

#### Mitigation

8. There is duty on the claimant to mitigate his losses. The burden is on the respondent however to show that the claimant has not taken all reasonable steps to mitigate.

#### ACAS Code

9. The ACAS Code of Practice on Disciplinary and Grievance Procedures 2015 sets out basic requirements for fair disciplinary and grievance processes. An unreasonable failure to follow the Code by an employer can result in an increase of up to 25% in the compensatory award: section 207A Trade Union and Labour Relations (Consolidation) Act 1992. An unreasonable failure by a claimant can result in a reduction in compensation also limited to 25%.

#### **Contributory Fault**

#### Facts and Conclusions

10. The Tribunal had found as part of its liability judgment that the claimant had contributed to his dismissal by his conduct and that it was just and equitable to reduce both the compensatory and the basic awards.

11. Our findings and reasons were as follows:

12. We considered whether the claimant contributed to his dismissal. We accepted that the claimant did get legal advice that it was permissible to record meetings covertly provided that recording was only for personal use. Advice which was accurate. His emails at the time seeking to track down the recordings for the purpose of the disciplinary process support that a conversation had taken place. We consider that such a conversation would have been for that purpose and that was the advice he received.

13. The claimant did, however, record Mr Brown and Ms Jamieson and potentially others without their consent which is certainly against the ethos of the DWP policies and code as contended by the respondent. It was not however a fair and sufficient basis upon which to dismiss the claimant, but his actions in taking the decisions he did, even if impacted by his anxiety at the time, contributed to his dismissal.

14. Additionally, he was inconsistent in his version of events at that time, including stating that he notified his managers that he was recording, when it later became clear that such notification was after the two specific recordings of Ms Jamieson and Mr Brown and as such could not be true. His suggestion that Mr Brown consented to being recorded was spurious. We find that that in part the claimant's comments in earlier emails about recording numerous calls sometimes amounted to bravado and were to gain some form of advantage in the process and when putting forward that Mr Brown consented to being recorded, he knew that was untrue. From the findings of the dismissing and appeal officers however, this evidence had no real impact upon their decisions to dismiss and uphold that decision on appeal and as such cannot have contributed to his dismissal. However, we consider it is relevant to take into account when assessing what is just and equitable to award in respect of the basic award.

15. We found that in respect of the compensatory award, as we were only permitted to take into account conduct which is some way caused or contributed to the decision to dismiss, we consider it is just and equitable to reduce the compensatory award by 25%.

16. In respect of the basic award, we decided that it is appropriate to take into account the claimant's wider conduct at that time award and therefore consider that it is just and equitable to reduce it by 50%.

## **Mitigation**

### Facts

17. The claimant was dismissed on 28 November 2019.

18. He was entitled to a notice period of 5 weeks.

19. From 2 January 2020 there was an obligation on the claimant to mitigate his loss.

20. During that period, we accept that the claimant was on ESA. He says that he had the benefit of a fit note to March 2020 and that what a prerequisite of the level of benefit he was receiving. This is not something which we have seen, but it was not challenged by Mr Lyons that the claimant had fit note during this period and was unfit for work. We accept that that was the position. Also, during that period, the claimant was pursuing his appeal with the respondent against the decision to dismiss.

21. We accept that in March 2020 the claimant started to consider looking at a returning to work. He found lockdown difficult for his mental health and wanted to get back into work. This was however at the outset of the Covid lockdowns and there was a hiatus whilst employers sought to assess their employment needs. In approximately June 2020 the claimant began applying for some jobs and at that time he was seeking and applying for permanent positions. The reference that the respondent had provided, which confirmed that the claimant had been dismissed for gross misconduct, did not assist and indeed that resulted in certainly one offer being withdrawn (that being the role at Aldi).

22. The claimant realised that he was not going to get anywhere without a positive reference and therefore in September 2020 made enquiries of the Brook Street Agency, which provides agency workers to organisations and did not have quite the same requirements in respect of references. The claimant obtained his first role through Brook Street on 1 November 2020. He has worked from that date and on 1 May 2021 he obtained a permanent position with HMRC.

### Conclusions

23. In relation to mitigation, the onus is on the respondent to show that the claimant has not taken all reasonable steps to mitigate. We find that during the period to March 2020, the claimant had a sick note. If the respondent disputed that this was the position, they could have requested a copy of the sick notes for that period.

24. We find that it was reasonable for the claimant to not seek work up to March 2020 as he was unfit to do so. We accept that during the period March to June 2020 the employment landscape was uncertain, and it was not unreasonable for the claimant to wait until the job market was clearer.

25. From June 2020, the claimant was looking for new work, but at that stage was only looking for permanent positions. It was reasonable for him to do this and we find that the claimant had not failed to mitigate by looking initially for permanent roles and to only start seeking agency work some three months later in September. He commenced an agency role on 1 November 2020.

26. From that date we find that he has mitigated his loss.

### **ACAS Uplift**

#### Facts

27. We find that the respondent did fail to follow the ACAS Code in three ways. The failure to allow the claimant a proper means to defend himself in the disciplinary hearing by not providing access to the documents or time to access the documents which he wished to rely upon; the failure to adjourning the hearing to allow the claimant to attend in person and insisting upon a date which the claimant said he could not attend. The failure to properly consider the issues raised by the claimant at the appeal. It is all very well just having an appeal, but such the individual who conducts it should give proper considerations to issues which are raised, and in this particular case the appeal officer did not do so, particularly in respect of the documentation the claimant was actioned to provide afterwards.

### Conclusions

28. With that in mind we, having exercised our discretion, consider that an uplift is 15% is appropriate in relation to the ACAS uplift.

29. We then move on to the other elements that are claimed by the claimant.

### Travel Expenses

30. It may well have been that the claimant had travel expenses in seeking new work, but he has not produced any evidence or figures in relation to this. No award is made.

### Universal Credit Loan

31. The claimant says he has suffered losses in respect of a loan he took out from the DWP following his dismissal. We are unclear on the claimant's losses. The claimant was provided with a Universal credit loan, and he repaid it. The claimant has not provided the Tribunal with any clarity on his losses. No award is made.

### Mortgage Interest

32. The claimant is seeking additional interest that he says he will have to pay in respect of his mortgage. The additional interest appears to arise because he took a mortgage holiday which was offered by lenders because of the Covid pandemic. This was an offer which many borrowers took advantage of regardless of their financial situation at the time. We are not satisfied that the claimant has shown that any losses (in respect of additional interest sometime in the future) would be attributed to his dismissal. In any event, we are unable to accept the claimant's calculations. He claims £6862.74. There is nothing which has been produced other than the claimant's own calculations which support that figure. The documents which we have looked within bundle, do not reflect anything like that. Without evidence to support this claim, we made no award.

### Awards and Calculations

33. The following was agreed: The claimant's gross weekly pay from the respondent was £571.15. His weekly net pay was £383.55. The respondent's weekly pension contribution was £140.15. He was dismissed on 28 November 2019 and was 28 years of age at the date of his dismissal. He had 4 years continuous employment. He was entitled to a notice period of 5 weeks. By 30 May 2021 the claimant was earning the same or a higher salary as with the respondent and had comparable pension benefits. From that date the claimant had no ongoing loss of earnings. He earned income of £12,488 from the date of his dismissal to 30 May 2021.

34. He was in receipt of Employment Support Allowance from 3 January 2020 to 1 November 2020.

35. Applying the Tribunal's conclusions above: that any compensatory award should be reduced by 25% and his basic award by 50%; that any award should be uplifted by 15% for a failure to follow the ACAS Code of Practice; that the claimant had mitigated his losses initially by finding temporary work through an agency, and from 1 May 2021 a permanent position with HMRC; that his losses ceased on 30 May 2021.

#### Basic Award:

4 weeks x £517.15 = £2068.62

Less 50%

**£1034.31**

Compensatory Award

Actual financial loss	
3 January 2019 (end of notice period) to 30 May 2021	
69 weeks x £383.55 net pay	£26,464.95
28 November 2019 to 30 May 2021	
74 weeks x £140.14 pension contributions	£10,370.36
Loss of statutory rights	<u>£500.00</u>
	£37,335.13
ACAS Uplift 15%	<u>£5,600.00</u>
	£42,935.00
Less income earned by claimant to 30 May 2021	<u>£12,488.00</u>
	£30,477.00
Less 25% contributory fault (£30,477 x 25%)	<u>£7,611.00</u>
	<b>£22,836.00</b>

36. The prescribed period for the purpose of the recoupment regulations is 2 January 2019, which is when the notice period came to an end, to the date of today's hearing 17 July 2023. The prescribed amount will be the financial award made during that period with a percentage reduction to take account the contributory fault.

Notice Pay

37. The claimant's notice period was agreed at 5 weeks. He was not provided with any notice period. There being no grounds upon which the respondent could summarily dismiss the claimant, the respondent is in breach of contract. At the agreed net pay of £383.55, the claimant is awarded £1917.15 in damages.

Damages for breach of contract – notice period

5 weeks x £383.55	<b>£1917.75</b>
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Employment Judge Benson

Date: 2 October 2023

REASONS SENT TO THE PARTIES ON

10 October 2023

FOR THE TRIBUNAL OFFICE

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