EMPLOYMENT TRIBUNALS

Claimants: Mr V. Lupyna

Respondent: Safe Strip UK Limited

Heard at: Newcastle Employment Tribunal **On: 13 October 2023**

Before:

Employment Judge T.R. Smith

Representation

Claimant: Ms Ismail (counsel)

Respondent: Mr P. Moore (representative)

Judgement

The respondent shall pay the claimant, in addition to the sums awarded on 11 August 2023, the following sums:

(a) A compensatory award of **£3298.03**

Note that these are actual the sums payable to the claimant after any deductions have been applied.

The Employment Protection (Recoupment of Benefits) Regulations 1996 apply:

(a)The total monetary award (i.e. the compensatory award) payable to the claimant for unfair dismissal is **£3298.03**

(b)The prescribed element is **£2359.58**

(c)The period of the prescribed element is from **13 January 2023 to 13 October 2023**.

(d)The difference between (1) and (2) is **£938.45**

Written reasons pursuant to a request from the claimant dated 16 October 2023

Abbreviations

ERA 96. The Employment Rights Act 1996.

EP(RB) Regs 96. The Employment Protection (Recoupment Benefits) Regulations 1996.

The evidence.

1.The tribunal heard oral evidence from :-

- Mr Victor Lupyna (the claimant).
- Mr Peter Loughran (the respondent's managing director).

2.The tribunal also had before it a bundle of documents which consisted of 68 pages.

3.A reference to a number in the judgement is a reference to a page in the bundle.

The issues and concessions.

4.The claimant having indicated he was not pursuing reinstatement or re-engagement, the purpose of the hearing today was to determine what compensatory award should be made in favour of the claimant.

5.It was expressly conceded by the parties that a redundancy payment had been paid which extinguished the basic award.

6.It was further expressly agreed that a payment in lieu of notice had been paid by the respondent to the claimant in the sum of £3670.54 and this was deductible from losses, post termination

7.Both parties agreed that the sum in respect of loss of statutory rights should be £524.35.

Background

8.On the 10 and 11 August 2023 the tribunal determined the claimant was unfairly dismissed, and subjected to an unlawful deduction from wages, although his holiday pay claim was not well-founded (the liability judgement).

9.No request had been made for a review of the liability judgement and the tribunal was not notified that it was subject to appeal by either party.

10.In the liability judgement an award was made in respect of the proven unlawful deduction from wages for the period pursued by the claimant (non-payment of salary from 02 December 2022 until 21 December 2022).

11.Before the tribunal today the claimant sought to pursue a further claim for the period from 21 December 2022 until 27 January 2023.

12.It is appropriate to say the claimant's brother who was also a claimant in the liability proceedings, pursued an unlawful deduction from wages claim from 02 December 2022 to 13 January 2023 and the tribunal upheld that claim.

13.The tribunal declined to permit the claimant to pursue this further claim in full. This was a new unlawful deduction from wages claim, made out of time, without any draft amended particulars, and which could have been pursued far earlier. A time point arose. The tribunal in its liability judgement expressly noted how the claimant had limited his claim. The prejudice to the respondent in respect of this new point, that had not been previously raised with it, outweighed the prejudice to the claimant, especially given the tribunal would be able to (and did) make an award from when dismissal was notified to him, 13 January 2023.

14.This judgement should be read in conjunction with the liability judgement.

15.Relevant to these proceedings are the following findings from the liability judgement: –

16.The respondent is a small employer that undertakes asbestos surveying, and the management and removal of asbestos materials.

17.The claimant commenced employment with the respondent as an asbestos supervisor on 12 October 2015. He was issued with written particulars of employment.

18.The claimant was contracted to work 40 hours per week.

19.At termination the claimant's net weekly pay, absent any overtime or weekend working, was £524.35 net per week.

20.The claimant was laid off on 21 October 2022 and was not required to work until his effective date of termination.

21.The respondent established before the tribunal that the reason or principal reason for the claimant's dismissal was redundancy.

22.The claimant was paid a redundancy payment.

23.The tribunal found that the respondent did not communicate the claimant's termination to him until 13 January 2023, the effective date of termination.

24.Whilst the tribunal found that the dismissal was unfair, for the reasons set out in the liability judgement, it concluded that any award should be reduced by 75% on the principle set out in **Polkey -v- A.E Dayton Services Limited 1988 ICR 142** (**Polkey**).

25.However the tribunal determined that there should be no deduction for a period of two weeks from the effective date of dismissal for the reasons it gave, namely the time a fair and proper selection would have taken, and therefore the **Polkey** deduction would not apply until after 27 January 2023.

Additional findings of fact.

26.The claimant was born on 27 March 1960 and therefore is currently aged 63.

27.The claimant is in good health.

28.The claimant drives and has access to a car.

29.Within the asbestos industry the claimant has a supervisor's certificate, a site supervisor safety certificate and what is known as an IPAC certificate, which,

amongst other things, allows the claimant to utilise cherry pickers. He holds a scaffolding certificate.

30.Prior to working in the asbestos industry the claimant worked in construction. He was a qualified rigger/decker. His qualifications/site tickets have now lapsed. The tribunal accepted that there would be an expense if the claimant sought to renew such qualifications/tickets and he did not have the relevant available funds.

31.It was common ground that the EP(RB) Regs 96 applied.

32.The claimant received universal credit from 07 December to 07 June 2023 totalling £2224.48. The tribunal considered it likely that he received such benefits prior to the effective date of termination as he was laid off.

33. The claimant in his schedule of loss deducted the whole sum. The tribunal considered that was inappropriate. The whole of this sum was not subject to recoupment given the effective date of dismissal did not occur until 13 January 2023 and the claimant obtained alternative employment on 28 May 2023. There was no evidence as to what element of the universal credit may have related to housing costs. Having raised the matter with the parties they agreed that the relevant sum for the period the tribunal identified was £1624.55. The tribunal had no information that would cast doubt upon that agreement, and it accepted the figure.

Mitigation

34.There are a number of relevant factual findings relevant to this issue, which in reality was the principal area of dispute between the parties.

35.The tribunal had no documentary evidence that the claimant had applied for any employment from the effective date of termination, 13 January 2023 until he presented his claim form to the tribunal or about 03 March 2023. The claimant gave unconvincing, vague evidence as to what he did in this period. Whilst it is true that in his statement he made reference to specific applications, a matter the tribunal will return to, these only appear to have taken place after 03 March 2023 according to the diary (30/35) that he produced to the tribunal.

36.However it is proper to note that the respondent did not produce any documentary evidence, and did not give any oral evidence of specific jobs that were available in this period which the claimant could have applied for and did not.

37.The diary prepared by the claimant showed concerted applications for jobs from March 2023 The claimant sought employment outside the asbestos industry including positions as a handyman, customer delivery driver for Asda, maintenance operative, labourer, and working general supervisor. The tribunal accepted that evidence, which was not challenged.

38.Nor was not suggested that any of those applications were inappropriate having regard to the claimant's skill mix.

39.What was surprising was that the claimant had not noted any applications for work in the asbestos industry until May 2023. Although he said he sent a number of emails none of those were produced to the tribunal, yet such evidence, if it existed would have been easily available. Given the claimant's qualifications and the fact this is a niche industry the tribunal found that extremely surprising.

40.However the respondent did not produce any documentary evidence of vacancies within the asbestos industry from dismissal to the date of this hearing. The respondent's case, put at its highest, was that Mr Loughran said that during the course of the hearing he had searched on his mobile phone and there were a number of vacancies available for companies or agencies in the north-east for asbestos operatives. Importantly this was never put to the claimant in cross examination. The searches were not produced to the tribunal.

41.Mr Loughran's evidence was that some of those who had been made redundant along with the claimant, had obtained posts in the asbestos industry and he came to that conclusion because they had been requests for their qualification tickets and medical records, records required to be kept of employees in the asbestosis industry. However when pressed no employers were named and the tribunal considered the evidence vague

42.In March 2023 the claimant attended, after it was brought to his attention by the job centre, a job fair in the manufacturing sector.

43.The claimant participated in the "restart scheme" from about March 2003, a programme run by agents on behalf of the Department of Work and Pensions to assist with a return to work. He appeared to have cooperated to a reasonable extent (17/27) although there were on occasions reference to missed appointments, but

this was not put to the claimant in cross examination so there could have been perfectly good reasons such as sickness for any none attendance.

44.The claimant obtained temporary employment through a recruitment agency as a general labourer on 27 May 2023. He remains in that employment. The claimant contended the employment was likely to end on the site he was working on, and did not know when he would be offered future employment.

45.There was produced to the tribunal, a document (60) from "Search" a recruitment agency dated 09 October 2023 which stated: *"Victor has been working for Search as a temp but due to the time of year this contract is now coming to an end 23"October, due to the time of year long term projects are few and far between. I may be able to place victor into a role* ***which would be 2-3 days per week and week by week basis*** *[tribunal emphasis] but currently contractors are winding down now for Christmas and this will be the case until February March next year.*

46.As a labourer the claimant is working 48-hour is per week at a rate of £10.42 per hour gross. A regular feature of each week's pay was an additional payment of £100.83 shift premium

47.His average take home pay is £537.53.

48.The claimant when expressly asked by the tribunal could not give any evidence at all as to what pension contribution was made by the respondent or what pension contribution was made by his current employer. Neither advocate could assist No evidence was before the tribunal of pension loss, even though the claimant was professionally represented. It was for him to prove any loss; he has to lead some evidence on which a determination could be made, **Adda International Ltd -v- Curcio 1976 ICR 407.** He did not. It is for this reason the judgement makes no reference to pension loss.

The legal principles the tribunal applied.

49.The tribunal reminded itself of the relevant provisions of the ERA 96.

50.The tribunal was only concerned with a compensatory award.

51.The objective of a compensatory award is to compensate the claimant but not to award a bonus. The purpose of a compensatory award is to put the claimant in the position in which he would have been financially had he not been unfairly dismissed.

52.Unlike a basic award the calculation of the compensatory award does not rely on any prescribed formula. The only guidance is in section 123 ERA 96 which provides that the award shall be: –

"Subject to the provisions of this section and section 124, 124A and 126, the amount of the compensatory award shall be such sum as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the Claimant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer"

53.When considering heads of loss it is essential not to lose sight of the key factors identified by Parliament, firstly it must be as a consequence of the dismissal, secondly attributable to the employer and thirdly it must be just and equitable.

54.Whilst a claimant must account for their earnings, taking temporary employment does not prevent there being ongoing losses. The taking of a temporary employment does not generally constitute an intervening event that releases the former employer's liability, see **Whelan -v-Richardson 1998 ICR 318.**

Mitigation

55.Section 123(4) ERA 96 requires a claimant to mitigate the loss and the claimant will be expected to explain to the tribunal what actions they have taken by way of mitigation.

56.Section 123(4) ERA96 reads: –

"In ascertaining the loss referred to in subsection (i) the Tribunal shall apply the same rule concerning a duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales…"

57.The tribunal noted the guidance given by Mr Justice Langstaff (as he then was) in **Cooper Contracting Ltd -v-Lindsay UKEAT/184/15**. The following principles can be extracted from the judgement.

58.Firstly it is for the wrongdoer to show that the claimant acted unreasonably in failing to mitigate.

59.Secondly the burden of proof is on the respondent, as the wrongdoer. The claimant does not have to prove they have mitigated their loss.

60.Thirdly 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**

61.Fourthly what has to be proved is that the claimant acted unreasonably; the claimant does not have to show that what they did was reasonable **Wilding and Ministry of Defence -v- Mutton 1996 ICR 590**

62.Fifthly there is a difference between reasonableness and not acting unreasonably.

63.Sixthly what is reasonable or unreasonable is a matter of fact.

64.Seventhly 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 claimants, that counts.

65.Eighthly the tribunal should not apply too demanding a standard on the claimant who is a victim of a wrong. The claimant is not to be put on trial as if the losses were his fault, when the central cause was the respondent.

66.Ninthly in a case in which it may be perfectly reasonable for a claimant to have taken on a better paid job that fact does not necessarily satisfy the test. It will be important evidence that may assist the tribunal to conclude the employee acted unreasonably, but that it is not in itself sufficient.

67.The tribunal particularly noted the comments in **Wilding -v-British Telecommunications plc 2002 IRLR 524** which further amplified the issue of reasonableness.

68.Even then if the tribunal was satisfied that there were steps that it was unreasonable for the claimant not to have taken to find an alternative income it does not follow that any compensation would be reduced. The tribunal must consider whether the claimant would have mitigated his loss (i.e. obtained an alternative income) if he had taken those steps. That generally involves identifying a date (i.e. a suitable point in time) when such steps would (on the balance of probabilities) have borne fruit in terms of an alternative income (and the amount of such income).

Gardiner-Hill v Roland Berger Technics Ltd [1982] IRLR 498, applied in **Savage v Saxena [1998] IRLR 182, [1998] ICR 357.**

Submissions

69.There were no written submissions and both parties made short oral submissions.

70.Principally Mr Moore asserted there was a total failure to mitigate until 03 March; he questioned the adequacy of mitigation thereafter and submitted the temporary employment ended the respondent's liability.

71.Ms Ismail submitted the respondent had not discharged the burden on it in respect of a failure to mitigate. Whilst the claimant had obtained temporary work he was working longer hours. There was a real risk of a drop in income and a future loss of 12 months was appropriate.

72.There were submission as to the correct weekly wage to utilise which the tribunal has discussed later in its judgement

Discussion

73.A dispute arose as to what figure should be used both for the claimant's pre-dismissal pay and his pay in relation to his temporary employment.

74.The tribunal has reminded itself that it must have regard to what the claimant has lost in consequence of his dismissal

75.The claimant relied upon some pre-layoff wage slips which included, on some (but not all) occasions, elements of overtime and Saturday working. It was common ground that none of these benefits were payable under the claimant's contract

76.The respondent relied upon the claimant's flat net rate.

77.The tribunal preferred the respondent's submissions on this point for the following reasons:

78.Firstly because the claimant, was laid off and there was no work for him and others for over three months. There was clearly insufficient work for even a normal contractual work to be completed. Thus even if he had not been laid off he would not have been working overtime and on Saturdays.

79.Secondly there was no evidence that those that were not laid off earned overtime or a Saturday enhancement whilst the claimant and his colleagues were ;laid off..

80.Thirdly the tribunal found Mr Loughran's evidence on this point persuasive. He accepted there were some enhanced payments to the claimant in the summer of 2022 but a major client was a local authority who wanted asbestos removed from schools. There was a short time frame for this to be done, school holidays, hence why additional payments were made.

81.Fourthly there was the difficulty that the claimant had, just prior to dismissal been barred from a major customers site, which further limited the opportunity for work he could do.

82.It followed in the tribunal's judgement that the appropriate figure was the claimant's net pay of £524.35 per week should be used (04).

83.None of the above should be taken by the parties to assume the tribunal fell into the error of assuming none contractual benefits could not be taken into account when calculating a compensatory award. In many cases they may be. It was simply in these particular and unusual circumstances it was not just and equitable to do so.

84.The tribunal then had to resolve the claimant's net income from his temporary employment. The claimant submitted there should be a straight comparison on base hourly rates. The respondent on what was the claimant's net weekly income. The most representative payslips appeared to show that in the new temporary employment the claimant was earning £537.53 net (51/53).

85.On a base rate the claimant was paid less than with the respondent but he received a contractual enhancement for unsocial hours and worked 48 as opposed to 40 hours per week in his former position. Thus his overall net remuneration was higher than his basic net remuneration with the respondent.

86.Neither party took the tribunal was not taken to any authority on the point and its own research was inconclusive.

87.The tribunal preferred the submission of the respondent.

88.The tribunal considered that the proper approach was to look at what the claimant actually earned in his new employment. The tribunal had to look at the claimant's

actual losses and not would have occurred had the job been only have 40 hours a week and did not attract a contractual enhancement.

89.It follows that whilst the claimant was in temporary employment there was no ongoing financial loss.

90.Much of the evidence before the tribunal focused on a failure to mitigate.

91.As the tribunal has already noted the burden of proof is upon the respondent.

92.Whilst the tribunal did find that from the effective date of termination until early March, a period of just over a month the claimant's evidence as to what he did to look for employment was unconvincing. However that was not the test. The respondent could not identify any posts in this period that the claimant should reasonably have applied for.

93.Thereafter, certainly from March until the claimant obtained his current temporary employment the claimant had taken steps to obtain, and indeed had secured, alternative employment. Again the respondent did not show that there were other jobs the claimant could have applied for but did not do so.

94.Whilst it is true that Mr Loughran had raised mitigation points in his evidence in chief, for the reasons already outlined in its findings of fact the tribunal gave no weight to that evidence given the unfairness to the claimant as it was never put to him.

95.Having applied the legal authorities to which the tribunal has already referred the tribunal preferred the submission of Ms Ismail that this was not a case where there should be any adjustment for a failure to mitigate.

96.The tribunal then went on to consider the issue of future loss.

97.It did not accept that merely because the claimant had obtained alternative employment that should be the end date in any calculation of the compensatory award. It came to this conclusion for two reasons. Firstly the claimant has secured a temporary, not a permanent job and secondly the evidence that the earnings were likely to drop.

98.The tribunal is satisfied the claimants temporary employment, on balance is likely to end on 23 October 2023 Thereafter the claimant's agency appeared to consider that there is a reasonable prospects that it could supply the claimant with 2 to 3 days

per week work and on a week-to-week basis. The tribunal interpreted the brief email from the agency to mean some work might be for a full week and for other weeks it might be 2 or 3 days. Whilst it accepted there was a possible other interpretation , 2 to 3 days a week rather than occasional weeks work the claimant could have called the maker but did not.

99.Doing the best it could, and noting the ambiguity in the agency letter the tribunal took a broad-brush approach and assumed from 23 October that until approximately February 2024 the claimant on average would only obtain about three days work per week.

100.The tribunal determined that rather than making an award for future loss of 12 months as submitted by Ms Ismail ,a period of 4 months would be appropriate. This was on the basis that the agency indicated that was when work, at the latest, would pick up to full time. As has already been observed the claimant was earning more in temporary employment than his former permanent post. A future loss of four months would also allow the claimant, an experienced tradesman, further time to secure permanent employment.

The calculation

Basic award – nil.

Compensatory award

Loss to date, the prescribed element

Full loss from13 January to 27 January 2023 (the tribunal having determined this was the period it would have taken had the respondents utilised a fair process to dismiss the claimant and thus a Polkey reduction should not apply to this element)

£524.35 x 2 weeks = **£1048.70**

27/1/23 to 28/5/23. 17 weeks x £524.35 = £8913.95.

Less agreed payment in lieu £3670.45 = £5243.50

Less 75% Polkey deduction of £3932.62 = £**1310.88**

No loss from 28 May 2023 to today 13/10/23

Prescribed element = £ 1048.70 + £1310.88 = **£2359.58**

Future loss

13 October 2023 to 23 October 2023, no loss.

Loss from 23 October 2023 to 20 February 2024 (16 weeks)

(Weekly net at a rate of £524.35 less three days work the claimant would likely attain via the employment agency namely a sum of £ 322.51. Thus net loss £524.35 - £322.51 = £ 201.84)

£201.84 x 16 weeks = **£3229.44**

Both parties agreed that loss of statutory rights should be awarded with agreed a figure of **£524.35**

Total = £3229.44 + £524.35 + **£3753.79**

A Polkey reduction extends beyond a compensatory award, and may include a loss of statutory rights, **Hope v Jordan Engineering Limited EAT0545/07** and the tribunal is bound by that decision. Unbridled by authority the tribunal may have taken a different position.

Deduct Polkey at 75% on £3753.79, £2815.34

Net future loss **£938.45**

Conclusion

Prescribed element = **£2359.58**

Future loss **£938.45**

Total monetary award **£3298.03**

The Employment Protection (Recoupment of Benefits) Regulations 1996 apply:

The total monetary award (i.e. the compensatory award) payable to the claimant for unfair dismissal is **£3298.03**
The prescribed element is **£2359.58**

The period of the prescribed element is from **13 January 2023 to 13 October 2023**.

The difference between (1) and (2) is **£938.45**

Employment Judge **T.R.Smith**

Date 27 October 2023

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