Case Number: 1401351/2021

EMPLOYMENT TRIBUNALS

Claimant: **Mr A Scammell**

Respondent: **Sovereign Housing Association Ltd**

Heard at: Southampton **On: 20 September 2023**

Before: **Employment Judge Dawson, Mr Knight, Mr Jenkins**

Appearances

For the claimant: **Ms Nicholls, counsel**

For the respondent: **Mrs Headford, solicitor**

REASONS FOR REMEDY JUDGMENT

JUDGMENT ON REMEDY having been sent to the parties 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.

Introduction

1. In this judgment, we are deciding the remedy to which Mr Scammell is entitled following his unfair dismissal by the respondent. Judgment on liability was given at an earlier hearing, written reasons in respect of that judgment were not requested or given.

2. We received a Schedule of Loss from the claimant. All of the details in section 1 were agreed by the respondent.

Issues

3. The claimant claims a basic award (which is agreed), a compensatory award consisting of losses to the date of the hearing and damages for wrongful dismissal.

4. In terms of the compensatory award the issues for us to determine are as follows:

    a. What would have happened if the claimant had not been unfairly dismissed.

    b. What, in fact, happened.

    c. Should the compensatory award be reduced to reflect the fact that the claimant has not mitigated his loss.

    d. Should any other adjustment be made to the compensatory award to reflect the statutory test in section 123(1) Employment Rights Act 1996.

    e. Should there be any adjustment to the award under section 207A Trade Union and Labour Relations Consolidation Act 1992.

The law

5. In respect of the compensatory award, s123 ERA 1996 provides

> (1)Subject to the provisions of this section and sections … , the amount of 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 in so far as that loss is attributable to action taken by the employer.

6. Section 207A(2) Trade Union and Labour Relations (Consolidation) Act 1992 provides:

> If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—
>
> (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,
>
> (b) the employer has failed to comply with that Code in relation to that matter, and
>
> (c) that failure was unreasonable,
>
> the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

7. The ACAS code of practice on Disciplinary and Grievance Procedures provides as follows:

> 41. Where an employee feels that their grievance has not been satisfactorily resolved they should appeal. They should let their employer know the grounds for their appeal without unreasonable delay and in writing.
>
> 42. Appeals should be heard without unreasonable delay and at a time and place which should be notified to the employee in advance.
>
> 43. The appeal should be dealt with impartially and wherever possible by a manager who has not previously been involved in the case.
>
> 44. Workers have a statutory right to be accompanied at any such appeal hearing.
>
> 45. The outcome of the appeal should be communicated to the employee in writing without unreasonable delay.

Findings of Fact

8. We make some further findings in order to give our judgment.

9. We accept the respondent's case that it had been keen to get the claimant back to work in the Empty Homes Team. It had sent a letter on 16 December 2020 setting out what adjustments could be made to accommodate the claimant. However, the claimant wanted to get confirmation from Occupational Health that Occupational Health agreed that those adjustments were sufficient. Occupational Health in turn wanted to know what the claimant's doctors said about the position.

10. That situation continued until 20 January 2021, in circumstances which we set out in the liability judgment. On that day it was agreed that the respondent would get reports from the claimant's GP and consultant and then a report from Occupational Health.

11. The claimant's case is that if those things had been done, then it is likely that it would have been agreed he could go back to work and he would have been back at work in the Empty Homes Team earning money. The claimant's case is that those things would have been done within four weeks. It was agreed that even if the claimant had gone back to work on a phased return or part day basis, he would still have been paid a full day's wage.

12. The respondent's case did not significantly differ in that respect. The respondent accepts that it was intending to get the reports referred to and anticipated that the role which it had created for the claimant was a sufficient one for him. It did not challenge the claimant's time estimate.

13. There is an element of speculation, but we think that given the adjustments which had been made, it is likely that the claimant's doctors would have been happy with the level of work which the claimant was going to be required to do, we make that finding taking into account the fact that the claimant has been able to work as a carpenter since April 2021 and continues to do so

albeit on a self-employed basis. Thus we find that the adjustments that the respondent proposed were likely to be sufficient for the claimant to be able to return to work.

14. Having made those findings, it is also relevant to note that nothing appears to have progressed up to the date of the claimant's resignation on 10 February 2021 and we find, therefore, that it would have taken four weeks from the date of the claimant's resignation to get the GP, consultant and Occupational Health reports, if the claimant had not resigned. We find, therefore, that it is likely that the claimant would have gone back to work on 10 March 2021 at his previous earnings being £411.18 per week.

15. The respondent argues (as it did at the liability hearing) that the claimant would have given up work in any event to set up on a self employed basis, because that is what he wanted to do. We did not find on the last occasion, and we do not find now, that the claimant was keen to leave the respondent and therefore we think had the grievance been handled properly, the likelihood is that the claimant would have returned to work in the Empty Homes Team.

16. If the claimant had returned to work, there is every reason to believe that he would have carried on working satisfactorily, even up to the date of the remedy hearing. He had been with the respondent for twelve years. There was no complaint about the claimant's work and we find that he would have carried on working in that adjusted role at the same salary as he was on before he went off sick.

17. There is an element of speculation in those findings and taking account of that speculation we find that there is a 90% chance that the claimant would have returned to work and stayed at work until, at least, this remedy hearing. We accept there is a small risk which we put at 10% that the claimant would not have returned to work on that date or would have left earlier. If the claimant had not returned to work he would not have been earning anything from the respondent.

18. There is, therefore, a loss of earnings caused by the constructive dismissal of the claimant, the loss runs from 10 March 2021, which is the day that the claimant would have returned to work and started being paid. (The claimant had been on no pay since December 2020).

19. We must then consider what the claimant actually did.

20. The claimant decided that he would become self-employed. There were a number of reasons for that. The claimant told us in his evidence, and we accept, that he had to pick the best solution for him, that he looked at other jobs but those other jobs did not fit him well; he decided he could do better for himself, for his mental health and financially if he became self-employed. Self-employment suited the claimant in that he could take a break if he needed to and he reiterated that he now takes breaks when he needs to. Those are all perfectly sensible reasons for the claimant becoming self-employed.

21. The respondent offered the claimant the same role (with the reasonable adjustments) after his resignation and asked the claimant to reconsider his resignation. The claimant declined to do so. We find that the claimant's

decision was a reasonable one. The respondent was in repudiatory breach of contract for the reasons we set out in our liability judgment and in that judgment we criticised the respondent for some of its actions and inactions. We find that it was reasonable for the claimant not to go back to work for the respondent

22. The respondent argues that if the claimant was not going to return to work for it, he should have taken a job for another company earning the same amount of money which he was earning with the respondent. The respondent's case was that there were plenty of such vacancies. Mr Salmon gave evidence in his witness statement, which was not challenged, that showed there were a large number of jobs available and the claimant accepted in his evidence that there were vacancies in other companies.

23. The claimant did not suggest that he would have any difficulties finding employment with another company (perhaps because of his disability) or that the earnings with another company would have been lower. We have set out above the reasons why the claimant decided to become self-employed, when he was asked why he did not seek a different job with another company he added " I felt failed by the respondent, had lost my benefits with them and this was a better choice for me to be self-employed. My confidence was low and I wasn't prepared to make myself worse"

24. We conclude that the respondent's behaviour with the claimant had not been so bad that the claimant could properly take the view that he should never work for another employer again and we do not find that the claimant did take that view. Although the claimant gave evidence that his confidence was low, that is often the case after someone has been unfairly dismissed, and it does not mean that a person is insulated from needing to look for another job. The claimant adduced no medical evidence to suggest that he was so affected by his dismissal that he was unable to work for another employer and we do not find that he was.

25. Whilst we consider that we can take some judicial notice of the fact that it would probably take the claimant longer to find alternative employment than it would take a non-disabled person, on the evidence presented to us we think it more likely than not that had the claimant wanted to, he could have got alternative employment at the same rate as he was being paid by the respondent.

26. The question then is how long it would have taken the claimant to get another job. There is an element of speculation. As we have said, we consider that we have to take account of the fact that at the point when the claimant was looking for another job he was disabled by reason of his medical condition (although this was not a point made by the claimant). The claimant needed a job which gave him light duties. He was looking for employment in 2021 when there were still Covid issues around. He would have needed to take some time simply to get his thoughts in order and consider what he wanted go do. Therefore we do not think that the claimant should have got another job instantly. Doing the best we can we think that had the claimant decided to become employed by another company it would have taken him about twenty weeks to start work and that work would have been at a comparable wage to that which he was paid before.

Analysis and Conclusions

27. Firstly, the respondent argues that there should be a reduction in the compensatory award because the claimant did not return to work for it.

28. We do not find that it can be said that the claimant behaved unreasonably in refusing to go back to work for the respondent, nor do we think that we should make any adjustment to the compensatory award on the basis that it would be just and equitable to do so because the claimant did not go back to work for the respondent. The respondent was in repudiatory breach of the claimant's contract and it was in breach in circumstances where we have criticised it for certain earlier actions and inactions.

29. Secondly, the respondent says that even if it was reasonable for the claimant to make the choice to become self-employed, the respondent should not be required to compensate the claimant for making that choice, when the claimant could have found acceptable alternative employment at the same pay he was on before within a short period of time.

30. As we have indicated we do not think that was unreasonable for the claimant to do what he did, but when we consider compensation under Section 123 of the Employment Rights Act, we must consider whether the respondent should have to pay for the choice made by the claimant.

31. As we have said, in deciding to become self-employed the claimant took into account a number of factors - his mental health, his finances, his medical condition and that he wanted to take breaks every now and again.

32. Those were all perfectly good reasons for wanting to become self-employed but it is not just and equitable for the respondent to be required to compensate the claimant for the losses which he suffers as a result of that choice. The claimant's case is that he could have gone back and worked for the respondent in the adjusted role if the respondent had not been in repudiatory breach of contract in the way that it handled his grievance. Our finding is that the claimant could have obtained a similar alternative role for a different employer, at a similar wage, within 20 weeks of resignation. At that point the claimant's loss which had been caused by the respondent's repudiatory breach of contract would end. It is not just and equitable for the respondent to have to compensate the claimant beyond that point.

33. Twenty weeks from the date the claimant resigned takes us to 30 June 2021 and we take the view that the respondent should compensate the claimant up to 30 June 2021 but not thereafter.

34. The basic award is not challenged in the sum of £6,096.12.

35. The claimant was entitled to 12 weeks' notice pay but he was only paid for 4 weeks which amounts to £2,032.04 and therefore the respondent owes the claimant notice pay in the amount of £4,064.08. That notice period takes the claimant until 5 May 2021 and from that point the compensatory award is then calculated.

36. The question then is what would the claimant have earned between 5 May 2021 and 30 June 2021 in his role in the Empty Homes Team. That is a

period of eight weeks. The claimant was earning £411.18 net and he would have earned £3,289.44 in that time.

37. In addition he would have received pension contributions from the respondent in the amount of £88.06. 8 weeks at £88.06 is £704.48.

38. The total amount the claimant would have earned between 5 May 2021 – 30 June 2021 in the Empty Homes Team is, therefore, £3,993.92.

39. However, we have said earlier in our judgment that there is an element of speculation. We are ninety percent sure that the claimant would have earned those sums and that figure has to be reduced to 90% of £3,993.92 which is £3,594.53.

40. From that must be deducted the sums which the claimant received in that period. He received carers' allowance of £540.08 which must be deducted and during that period he was also earning in his self-employed business £310.16 per week. 8 weeks at £310.16 = £2,481.28.

41. Thus the actual loss is £573.17[1] which is the loss of earnings figure.

42. In addition, the claimant is entitled to loss of statutory rights in the sum of £500.

43. We must then consider whether to uplift the award in accordance with the ACAS guidelines.

44. Section 207A Trade Union and Labour Relations Consolidation Act 1992 provides that if there has been a breach of the ACAS Code there should be an uplift.

45. Ms Nicholl's relies upon the tribunal's finding that the claimant had not been able to engage in the grievance appeal process. She submits that it must follow that there was a breach of the ACAS Code. Notwithstanding Miss Nicholls' attractive submissions in that respect we are unable to agree. In this case there was a grievance appeal hearing which the claimant attended and participated in. The appeal officer was well prepared even if the claimant found it difficult to keep up. Our criticism of the respondent was that the claimant had asked for the questions, which were considered in the appeal hearing, to be sent to him afterwards so that he could make further submissions. Having agreed to do that the respondent then failed to do so but simply determined the appeal. Our finding was that that amounted to a breach of contract by the respondent. However, the fact that something is a breach of contract does not automatically mean that it is a breach of the ACAS code.

46. The ACAS Code in relation to grievances states that where an employee feels their grievance has not been satisfactorily resolved they should appeal. The claimant was allowed to appeal in this case. Paragraph 42 requires that appeals should be heard without unreasonable delay and at a time and place which should be notified to the employee in advance. That was done.

[1] £3594.53-£540.08-£2481.28 = £573.24

47. Paragraph 43 requires that the appeal should be dealt with impartially and wherever possible by a manager who has not previously been involved in the case. That was done. It is not suggested that there was a breach of paragraph 44.

48. Finally, paragraph 45, requires that the outcome of the appeal should be communicated to the employee in writing, without unreasonable delay. That was also done.

49. In those circumstances we are unable to point any breach of the ACAS code which would enable us to make an uplift. Thus, there can be no uplift to the award.

50. Judgment is entered accordingly.

Employment Judge Dawson
Date: 18 October 2023

Judgment & Reasons sent to the Parties on 13 November 2023

For the Tribunal Office