



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**Mr G Abade**

**v**

**Silverbirch Care Ltd**

**Heard at:** Watford Employment Tribunal

**On:** 7 September 2023

**Before:** Employment Judge Coll

## Appearances

**For the Claimant:** self-representing

**For the Respondent:** Mr Harris, counsel

## RESERVED JUDGMENT

- The respondent shall pay to the claimant compensation for unfair dismissal of **£13,065.23**. This is calculated as follows, net of tax and national insurance contributions.

Heading	65% sum to deduct	Sum in full	Sum after deduction
<b>Basic Award</b>			
4.5 x £544 (agreed)	(1,591.20)	2,448	<b>856.80</b>
<b>Compensatory Award</b>			
29.6.2021 – 29.5.2022 (11 months 1 day)		43,522.95	

(agreed £3,940.10 net of tax and NI per month)			
LESS earnings with alternative work with Integrity Care net of tax and NI 19 – 24.07.2021 25 – 26.07.2021 27 – 31.01.2021 01 – 2.08.2021 Same rate pay as Successful Steps  (total 14 days)	(813.96)		
LESS earnings with alternative work with Successful Steps Recruitment 04.08.2021 – 18.03.2022 net of tax and NI  (See payslips – Mr. Harris' agreed total)	(11,907)		
LESS earnings from alternative work with Social Staffing 1 week April 2022 4 weeks May 2022 (3 payslips provided)	(541.65)		
<b>TOTAL ALTERNATIVE NET EARNINGS</b>	(13,262.61)		
<b>TOTAL LOSS NET EARNINGS</b>	(19,669.22)	30,260.34	<b>10,591.12</b>
Loss of statutory rights			<b>500</b>

Pension (agreed £289 per month)		3,192.33	<b>1,117.31</b>
29.6.2021 – 29.05.2022			

2. The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 apply. The prescribed element is £2,758.07 and the prescribed period is 23 March 2022 to 22 May 2022.
3. I explain for the benefit of the claimant who is representing himself what this means. The respondent shall initially pay £13,065.23 - £2,758.07 (= **£10,307.16**). The Department of Work and Pensions will inform the respondent how much benefit to pay them and then the respondent will pay the claimant the balance.

## REASONS

1. In the hearing on 7 September 2023, there was a remedy bundle which had been provided by the respondent. Pages numbers in these reasons refer to that bundle. During the hearing, the claimant provided three payslips from the agency, Social Staffing. During submissions, the respondent provided 3 emails dated July 6, 2023 - 13 July 2023 in which the claimant's current employer requested a reference, the respondent replied and the current employer asked about the reason for dismissal.
2. I heard from two witnesses: the claimant and Mr Abs Latif, Head of HR, for the respondent, who gave evidence in person at the Tribunal Hearing Centre. Both witnesses had prepared witness statements which they adopted in evidence and upon which they were cross examined.

### The Issues

3. The issues relating to remedy for unfair dismissal were agreed to be:
  - a. What would the claimant have received by way of salary and employer's pension contribution from date of dismissal, had he not been dismissed?
  - b. Has the claimant taken reasonable steps to mitigate his loss? He commenced a new employment on 30 May 2022 and worked as a support worker for most of the period 13 July 2021 to 29 May 2022. His remuneration as a support worker was less than it was with the respondent. Even as a manager from 30 May 2022, his remuneration is less than it was with the respondent, but the claimant did not claim for this.
  - c. What was the figure for his total remuneration from any work obtained after dismissal?
    - i. With Successful Steps Recruitment agency?

- ii. With Integrity Care agency?
- iii. With Social Staffing agency?
- d. What was the total figure for universal credit benefit for being unemployed?
- e. How long will any loss C still suffers which flows from the dismissal continue? The claimant has sought 11 months' loss. The respondent has agreed with this period.
- f. Whether there should be a reduction in the claimant's award due to an alleged failure to comply with ACAS procedures because he did not appeal the decision to dismiss or make a whistle-blowing complaint (whilst still employed)?
- g. Whether there should be an increase in the claimant's award due to an alleged failure to comply with ACAS procedures because of the way in which he was suspended?
- h. Whether there should be a costs order made against the claimant for failing to produce a witness statement by the due date for the final hearing in March 2023, which was then adjourned [27]? Mr Harris sought £930 plus VAT for wasted preparation and £860 plus VAT for his attendance (making a total of £2,148). There was no costs schedule.
- i. Preliminary issue: could the claimant seek holiday pay, given that it was not in his ET1 and he had not made an application to amend?
- j. Preliminary issue: could the claimant seek recovery of his job-hunting expenses (of £2,500) given that this was not in his ET1 and he had not made an application to amend?

## Law applicable to the issues in dispute

### Mitigation

4. In Gardiner-Hill v Roland Berger Technics Ltd [1982] IRLR 498, EAT, the EAT said that where there is a substantial issue as to failure to mitigate, an employment tribunal should ask itself:
  - a. what steps were reasonable for the claimant to have to take in order to mitigate his or her loss;
  - b. whether the claimant did take reasonable steps to mitigate loss; and
  - c. to what extent, if any, the claimant would have actually mitigated his or her loss if he or she had taken those steps.

### Costs

5. The respondent's application for a costs order was made under Rule 76 of the Tribunal's rules of procedure. Rule 76 provides that the Tribunal has a discretion to

make a costs order in circumstances where a party has acted vexatiously, disruptively, or otherwise unreasonably in the bringing or conducting of the proceedings, or a part of them (Rule 76(1)).

6. I remind myself of the test which I must apply when considering a costs order, and that I should look at the whole picture: see paragraph 41 of *Barnsley MBC v Yerrakalva* [2012] IRLR 78: "*The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had.*"
7. I am aware of the test which I must apply when considering a wasted costs order: see *Ridehalgh v Horsefield and another* [1994] Ch 205. I also bear in mind *Mitchells Solicitors v Funkwerk Information Technologies York Ltd* UKEAT/0541/07 for the need to exercise great caution.

### **Preliminary issues**

#### **Holiday pay and job-hunting expenses**

8. The claimant did not claim holiday pay nor job-hunting expense in his ET1. The claimant did not apply to amend his claim to include holiday pay or job-hunting expenses. He had however included both of these as heads of loss in his schedule of loss for the hearing on 12 – 13 June 2023 which had been listed for liability and remedy if appropriate (and time permitted) [107 liability bundle]. As time did not permit, this schedule of loss was not considered. At the hearing Mr Harris argued he should not be allowed to run these heads of loss, having never sought an amendment to include it. I agreed with Mr. Harris for these reasons. The claimant should have drawn the respondent's attention to the fact that he wished to claim for these two types of loss in advance of this hearing and provided documentary detail. Although he stated at the hearing that he was owed 15 days' holiday, he had not mentioned this figure before and there was no documentary evidence as to his job-hunting expenses. The respondent was therefore unable to prepare

### **Findings of Fact**

9. I make my findings of fact on the balance of probabilities taking into account all of the evidence, both documentary and oral, which was admitted at the hearing. I do not set out in this judgement all of the evidence which I heard but only my principal findings of fact, those necessary to enable me to reach conclusions on the remaining issues. Where it was necessary to resolve conflicting factual accounts, I have done so by making a judgment about the credibility or otherwise of the witnesses I have heard based upon their overall consistency and the consistency of accounts given on different occasions when set against contemporaneous documents where they exist.

10. My impression of both witnesses was that, for different reasons, the evidence given by none could be accepted in its entirety without qualification.
- a. Mr. Latif gave evidence to the best of his ability, but the respondent had provided little evidence of vacancies for the relevant period. This meant that in order to answer questions, he had to rely on extrapolation from the number of vacancies advertised by the respondent or speculation that the recruitment market in June and July 2023 was the same as that from the period 29 June 2021 to 30 May 2022.
  - b. The claimant's evidence was supported in many places by contemporaneous documentation and such contractual documents as there was.
11. Having made those general observations, I found the claimant, in general, to be more credible because of the consistency of his evidence with the contemporaneous documents.

## **Mitigation**

### **Integrity Care**

12. The claimant first turned his mind to jobhunting about a week after his dismissal on 28 June 2021. He obtained work with Integrity Care and worked on the following days/periods:
- a. 19 – 24 July 2021 35 hours work
  - b. 25 – 26 July 2021 (a weekend)
  - c. 27 – 31 July 2021 35 hours work
  - d. 1 - 2 August 2021 (a weekend).
13. He had applied for this work on about 6 July 2021 such that the interview was confirmed on 9 July 2021 [84] and was offered this bank worker job on 16 July 2021, 35 hours per week. The job entailed visiting young people's homes where they were living with their parents. His role was to take the young person on a day trip, to college, to school or to a hospital appointment. The young people ranged in age from eight - 16 years old. The work required him to travel around London.
14. The claimant did not provide any payslips from Integrity Care, but I accept his evidence that he was paid at the same rate as in the next work he undertook, which was for successful steps recruitment. Mr Harris agreed that this rate of pay (£10 per hour) could be used. Therefore, in calculating his pay, I have relied on the sum for a week's pay in the Successful Steps Recruitment payslip. The nearest payslip (with approximately the same hours) with Successful Steps Recruitment is for 40.5 hours. Deductions for tax and employee's NI work out as 16.84% of his gross pay. I have to do the best I can in the circumstances and have applied this percentage deduction to that of his gross pay with Integrity Care. His gross for 35 hours would have been £350, resulting in an approximate net income of £291.06 for each full week worked. The weekend work would have resulted in four seven hour days, resulting in approximately net income of £232.84. Total net income with Integrity Care would therefore have been approximately £813.96.

Successful Steps Recruitment

15. The claimant started with Successful Steps Recruitment on 4 August 2021, working 35 hours per week at £10 per hour. He was on a zero hours contract. Mr Harris gave the net total for this work as £11,907 with two weeks of payslips missing (week commencing 19<sup>th</sup> and 26 November 2021). I accept that the claimant did not get work for those two weeks.
16. The claimant ended his work with Successful Steps Recruitment on 18 March 2022 because they did not have sufficient contracts to offer him any work after that date.

Social Staffing

17. The claimant started work for Social Staffing in April 2022 and continued until 29 May 2022, working a total of five weeks. The claimant produced three payslips, for the week commencing 23 May 2022 (net income of £88), the week commencing 2 May 2022 (net income £105) and the week commencing 9 May 2022 (£132). This produces an average weekly net income of £108.33. Five weeks' net income would therefore have been approximately £541.65. I am aware that I have had to do my best because I have not been provided with any more payslips nor did either party offer me a total net figure for the period.

I Aspire – permanent job

18. On 27 May 2022, the claimant was interviewed by I Aspire who offered him a position as the manager of a children's home for young people aged 16 to 18. These children were unaccompanied minor asylum-seekers or children with learning disabilities. He applied directly for the job because one of the managers had worked with him before and called him to ask him to apply. The contract is in the bundle with a start date of 30 May 2022.
19. For the first six months, the claimant was on probation. He was paid for 40 hours under his contract and any additional hours attracted further pay. The claimant has to travel two hours each way to work each day. I note that this was a longer commute than that which the respondent considered necessary (1.5 hours). The salary was less than his job with the respondent, but the claimant did not seek to recover losses for greater than 11 months after dismissal.

Job-hunting for more senior jobs

20. The claimant adopted a pragmatic approach to jobhunting. I accept his evidence that he was very concerned that he would not obtain work equivalent to that which he had had with the respondent because of the likely reference from the respondent. He therefore adopted a dual approach in seeking to obtain some work as quickly as possible, which inevitably was at a more junior level whilst still applying for any more senior jobs on the recruitment market on the recruitment market.
21. The claimant gave an example of a more senior job application (made on 13 July 2021) where he had withdrawn because the field was different to his area of expertise. This was the CA Management Limited team leader position which involved providing

ancillary care to older adults, some of whom had a brain injury. His duties would have been to take care of their personal health by washing them, cooking for them and giving them their medication. Given that this was neither his area of expertise nor with his usual population of young clients, I find that it was reasonable for him not to pursue this application any further. Prior to the interview for team leader, the claimant had worked three shifts as a support worker for the same organisation. The claimant told the organisation at interview that based on his experience of the three shifts, he could not continue.

22. The claimant described to me going through a very difficult time following his dismissal. I accept that evidence.
23. I accept the claimant's evidence that some agencies (Panache, Prospero Voyage and Cardea) required a reference and that he had an interview with each, but nothing came of it for that reason.

#### Universal credit

24. The claimant's entitlement was respectively £754 for the period 23 March - 22 April 2022 and £334.91 for the period 23 April to 22 May 2022. I accept the claimant's evidence that he was out of work for three – four weeks and claimed JSA for those periods. Due to the claimant's reported take-home pay, he was however only paid respectively £84 and £34, making a total of £118. The documents supporting a payment of £34 rather than £334.91 for 23 April to 22 May 2022 are at [37-38]. The documents for the period 23 March – 23 April were not provided.

#### Conclusions on the issues and findings on remedy

25. I now set out my conclusions on the issues, applying the law as set out above to the facts which I have found. I do not repeat all of the facts here since that would add unnecessarily to the length of the judgment, but I have them all in mind in reaching those conclusions.

#### Conclusions about job-hunting

26. It is argued by the respondent that the compensatory award should be limited to eight weeks or at most three months' pay as that is how much time it should have taken the claimant to find a manager's post in the care industry.
27. There is no reliable evidence from the respondent on this.
28. I have before me a table showing positions advertised and recruited by the respondent in the period 1 June 2021 to 3 October 2022. I note that in this 18-month period, there was only one managerial job which was recruited in October 2022 [207 & following]. This evidence cannot be used to support the proposition that there were a number of managerial vacancies in the market, for which the claimant could have applied.



29. The respondent also submitted that the vacancies provided by them outside the organisation show that there were several managerial jobs in the external recruitment market. The respondent seems to have overlooked a considerable number of these jobs were in Birmingham, Telford, Somerset, Dunfermline, Eastbourne etc. and would have required the claimant to relocate to a completely different part of the country. A second difficulty is that the managerial jobs set in London e.g. Acton [152] (of which there were only a handful) are from the recruitment market in June and July 2023. Given the pandemic and emergence from the last lockdown only on a phased basis in July 2021, the respondent would have needed to provide evidence to show why the recruitment market in June and July 2023 was alleged to have been very similar to that in June 2021 to May 2022. The respondent has not done this and therefore I do not accept that these were similar conditions prevailing. For that reason, I do not find that any managerial vacancies in and around London, or within an hour and a half travelling commute could be said to be ones which would have been available to the claimant in the period of his job application.
30. The claimant was entirely frank when he accepted that he had not, to his knowledge, lost a senior job because of failure of the respondent to give him a decent reference for any reference at all. He also admitted that he could not establish that he had failed to obtain a senior job because of having been dismissed. I do not find that tackles the issue before me. The claimant reasonably considered that he would not obtain a better paid job than a support worker because of the fact of having been dismissed. He had a realistic fear that any employer would check with the respondent what had happened in the previous job and find out that he had been dismissed for failure to follow safeguarding procedures. The likely outcome would be that he would not be hired.
31. The claimant was encouraged to apply for his current job, which is more senior than a support worker but not as senior or well-paid as his job with the respondent because he was known by one of the managers in his new organisation. He could reasonably expect that no reference would be required and that no enquiries would be made of the respondent.
32. I note with some concern that his current employer requested a reference from the respondent on 6 July 2023. I find it surprising that they found it necessary belatedly to obtain a reference over a year later. There is nothing before me to explain this unusual request. The claimant was not aware until it was revealed at the hearing by Mr Harris that his current employer had now asked for a reference. I note with additional concern that not satisfied with the respondent's brief reference (position and dates of employment) the current employer asked the respondent for the reason for dismissal. Neither I nor the claimant were provided with the respondent's reply to this second request.
33. It has been argued by the respondent employing the arguments above, that a managerial job should have taken no more than 2 – 3 months to obtain and that therefore the claimant has failed to mitigate his loss. In particular, he should have obtained a job more quickly and it should have been at a level commensurate with his job with the respondent or at least more senior than those jobs which he accepted, and which are reflected in the payslips and other information in the bundle.

*Application of Gardiner-Hill and mitigation*

34. I remind myself of my findings above but do not repeat them and of the guidance to this question in Gardiner-Hill. I am of the view that the steps that it would have been reasonable for the claimant to take in order to mitigate his loss on being dismissed in the circumstances then prevailing, were to seek work within a few weeks in a wide range of care settings even if those roles offered lower pay. This is what he did.
35. He started his job hunting very quickly after his dismissal, in about 6 July 2021, that is a little over a week after dismissal. Although he was criticised for not using certain websites and online agencies (such as LinkedIn, CV Library and Career Builder), the claimant considered LinkedIn was more about networking rather than the advertisement of jobs. He had focused on Indeed which was a source of many jobs and Total Jobs. There are many applications in the bundle and a sizeable number of interviews attended. For this reason, I accept that he used a sufficient number of sources for job hunting. I can well imagine that recruitment in the care industry was not particularly buoyant in June 2021 and through to May 2022, given that there were considerable financial restraints after the expenditure required by the pandemic.
36. As time passes, the ongoing duty on the claimant to mitigate his loss means that, even though he had found permanent and more senior employment on 30 May 2022, in order to take reasonable steps to mitigate his ongoing loss, he should have continued to look for full time work leading to a higher overall salary. This however is not relevant to my considerations since the claimant did not claim beyond 30 May 2022 for the loss arising from a lower salary with his new employer in comparison to his job with the respondent.
37. I now make findings about the level of income which the claimant would have earned, had he not been dismissed. During the period, he would have continued to receive his usual salary. The respondent proposed a net monthly salary of £3,940.10. The claimant agreed with this. The period was not in dispute, being accepted as 29 June 2021 to 29 May 2022.
38. Alternative work: I have set out above his net income from each of the temporary jobs. This totalled £13,262.61.
39. When calculating the compensatory award, the amount of that award is to 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” (s.123(1) of the ERA). The duty to mitigate applies by reason of s.123(4). The period over which the claimant should be compensated is the 11 months (and 1 day) the claimant asked for.

#### Calculation of net pay

40. The compensatory award should be calculated net of tax and NI. The monthly net sum of £3,490.10 was agreed. The total net pay for the period in question was therefore £43,522.95

#### Damages for unfair dismissal

41. Basic Award: This should be calculated in accordance with Chapter II of Part XIV of the ERA. I am of the view that the calculation of the basic award should be at the weekly maximum which at the relevant time was £544 per week and the respondent agreed. The basic award is 4.5 times £544 due to the multiplier of 1.5 (due to his age) x 3. This sum is subject to a deduction under s122(2) ERA of 65% [see paragraph 131 of the judgment dated 18 August 2023].
42. Compensatory award: this is calculated in the table above using the agreed net monthly pay for the agreed period of 11 months and 1 day. It is subject to a deduction under s123(6) ERA of 65% [see paragraph 131 of the judgment dated 18 August 2023].

Uplift/deduction for breach of ACAS code

43. Suspension: I do not consider it appropriate to penalise the respondent for using the same managers to suspend the claimant as to respectively investigate the disciplinary allegations and to conduct the disciplinary hearing. As explained in my findings in the judgment dated 18 August 2023, an employer in the care industry might not have had alternative managers to carry out the suspension. In the same judgment, I have also dealt why HR's preparing the suspension letter after the suspension did not make any significant difference to the fairness of the suspension.
44. Failure to mention the claimant's whistleblowing complaint: I do not consider it appropriate to penalise the claimant for failure to mention this. The events from the failure to follow the safeguarding procedure on 16 June 2021, to suspension on 16 June 2021 to dismissal on 28 June 2021 happened over a short timeframe (16 – 28 June 2021). The claimant did not have full oversight of what had happened, not having all the relevant documentation at his investigation hearing or at his disciplinary hearing. It was therefore to be expected that he did not comprehend in time that his disclosure had been to a third party concerning a criminal offence which had been allegedly committed and was thus a protected qualifying disclosure.
45. Failure to appeal: I do not consider it appropriate to penalise the claimant for failure to appeal. The reference to the possibility of an appeal is in the outcome letter [62 in the liability bundle] in one sentence, giving him one week. I accept the claimant's evidence that he was shocked and upset and did not read the letter carefully. The possibility of an appeal did not therefore register with him.

Conclusions about compensatory and basic awards

46. The compensatory and basis awards will therefore be reduced by 65% but not by any greater percentage. The compensatory award is therefore **£10,591.12**. The basic award is **£856.80**. I award **£500** compensation for loss of statutory rights. The total award for unfair dismissal is therefore  $£10,591.12 + £500 + £856.80 = \mathbf{£11,947.92}$ . The prescribed element is £2,758.07. The prescribed period is 23 March 2022 – 22 May 2022.
47. Pension: £1,117.31 (as calculated in the table above).
48. The total sum to be paid by the respondent to the claimant is £13,065.23 which includes the prescribed element of £2,758.07.

**Costs**

49. I have had regard to Rule 76. The respondent submits that the claimant's conduct in failing to provide a witness statement for the hearing on 6 March 2023, despite directions/written requests from the respondent.

50. I must decide first whether the claimant's conduct was vexatious, disruptive or otherwise unreasonable. I do not find that the claimant's conduct was vexatious, disruptive or otherwise unreasonable for the following reasons. First, the respondent has not identified which of the following apply to the claimant's conduct: vexatious, disruptive or otherwise unreasonable. This means the respondent's case has not been set out in any detail. Secondly, I am aware of what EJ Quill wrote in the CMO dated 6 March 2023 at paragraph 1.8 [31 of the liability bundle] which does not meet the definition of vexatious, disruptive or otherwise unreasonable conduct at first blush:

*"I am satisfied that the Claimant was not deliberately seeking to thwart a fair hearing by his failure to disclose documents on time, or by his failure to produce a written statement"*.

51. If I am wrong about that, although EJ Quill took account of the claimant being a litigant in person, I have more information before me, having conducted both hearings. The claimant displayed at the liability hearing a considerable upset at his situation. He needed to be redirected on many occasions to focus on the point in issue. It is understandable that in March 2023, he was not able fully to digest the directions and act upon them. I remind myself also that I need to exercise great caution in making a costs order (see *Ridehalgh v Horsefield*).

52. The test in Rule 76 is therefore not met and I make no order for costs against the claimant.

**I confirm that this is my Reserved Judgment with reasons in *Abade v Silverbirch Care Ltd*. Case No: 3313865/2021 and that I have approved the Judgment for promulgation.**

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Employment Judge Coll

Date: ... 10 November 2023 .....

Sent to the parties on: 14 November 2023

For the Tribunal Office