



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4102690/2020**

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**Held in the Edinburgh Tribunal on 13 September 2023**

**Employment Judge Murphy**

**Mr T Jeffrey**

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**Claimant  
In person**

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**Avocet Agritech  
Ltd**

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**Respondent  
Not present  
and not  
represented**

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Tribunal is that the respondent is ordered to pay to the claimant  
25 compensation for unfair dismissal in the sum of TWENTY-TWO THOUSAND SIX  
HUNDRED AND TWENTY-FIVE POUNDS STERLING (**£22,625**).

**REASONS**

**Introduction**

1. This final hearing on remedy took place in the Edinburgh Employment  
30 Tribunal by CVP. A hearing on liability was held on 14-16 July 2021. The  
respondent had entered an ET response but did not attend, and was not  
represented at, the hearing in July 2021. Oral judgment was given on 16 July  
2021 and the written record was sent to parties on 12 August 2021. It was  
declared that the claimant had been unfairly dismissed. The question of  
35 remedy in relation to the claimant's unfair dismissal complaint (only) was held

over, save that the Tribunal made the following determinations relevant to remedy for that complaint:

5 i. The claimant has no entitlement to a basic award in this case by operation of s122(4) of ERA (having received a statutory redundancy payment).

ii. The dismissal was neither caused nor contributed to by any action of the claimant for the purposes of s.123 (6) of the Employment Rights Act 1996; and

10 iii. The respondent has not discharged the burden of satisfying the Tribunal that a fair dismissal would have ensued or that the claimant's employment would have ended lawfully within any particular timescale. No *Polkey* reduction therefore falls to be applied to any compensatory award.

15 2. It was found that the claimant was dismissed on 17 April 2020. At the previous hearing in July 2021, the Tribunal made an award of damages for wrongful dismissal in respect of the claimant's losses during the statutory minimum 3-week notice period to which he was entitled.

20 3. On 13 August 2021, before a hearing on remedy had been convened, the respondent was struck off the Register of Companies and on 24 August 2021, the respondent company was dissolved. On 31 May 2023 the respondent was restored to the Register.

25 4. A Notice of Hearing was sent to both parties in respect of the hearing on remedy. It was sent to the respondent's registered office as recorded on Companies House. The respondent did not attend the hearing and was not represented. I decided to proceed with the hearing in the respondent's absence pursuant to Rule 47, in circumstances where the respondent had a history of non-attendance at previous hearings in the proceedings.

5. The claimant gave evidence on his own behalf. Evidence was taken orally. A file of productions was lodged by the claimant running to running to 347 pages. The claimant was permitted to lodge additional documents relevant to his income since dismissal during the course of the hearing.

5 *issues to be determined*

6. The issues for determination at the remedy hearing were as follows:

1) If there is a compensatory award, how much should it be? The Tribunal will decide:

- 10 i. What financial losses has the dismissal caused the claimant?
- ii. Has the claimant taken reasonable steps to mitigate his loss in the period from and after 8 May 2020?
- 15 iii. If not, what period of loss should the claimant be compensated?

### **Findings in Fact**

7. The following facts were found to be proved on the balance of probabilities.

#### *Background*

20 8. The claimant was employed by a predecessor company (Avocet Agriculture Limited) from 1 October 2016. Another group company was named Avocet Agriculture Limited (the respondent in this case). The claimant's employer changed its name to Avocet Farms Limited. The claimant transferred from the employment of that company the employment of associated company, Avocet Agriculture Limited on 19 June 2019. This company (the respondent) changed  
25 its name to Avocet Agritech Limited thereafter. The claimant worked for the respondent until he was dismissed on 17 April 2020.

9. He was employed by the respondent to undertake farmwork, principally cattle husbandry. He was not provided with a written contract of employment or statement of particulars.
10. His agreed annual salary at the time of his dismissal was £70,000 per annum. This equated to £5,833.33 gross per month and to approximately £3,762 net per month. His weekly gross wage was £1,346.15 (gross) and £868.22 (net). He received no benefits from the respondent and no employer pension contributions were paid on his behalf.
11. In the period following his dismissal, the Covid 19 pandemic resulted in Government restrictions and the country was in the first phase of lockdown.
12. Prior to and after his dismissal, the claimant had income from two other employments. He was employed by Sandy Jeffrey Limited, his father's company. Both before and after his dismissal, he was paid approximately £732 per month for office work duties undertaken for this company. This arrangement continued until the claimant's father passed away in or around December 2022. The claimant's income from this employment neither increased nor decreased following his dismissal by the respondent.
13. The claimant also held a job with the fire service (Northumberland County Council (NCC)) while he was employed with the respondent. This also continued after his dismissal. He increased his on-call availability after he was dismissed by the respondent. On average, in the pre-dismissal period from 15 January 2020 to 15 April 2020, the claimant's net monthly income from NCC was £267.64. On average in the post-dismissal period 15 May 2020 to 15 July 2021, his net monthly income from NCC was £397.05. The average net monthly increase after the claimant's dismissal when his on-call availability increased was £129.41.
14. The claimant did not apply for any jobs in the period from 8 May to August 2020. He was greatly affected by stress arising from his relationship with the respondent and its termination in this period. He was also discouraged by the Covid 19 situation and the effects on the labour market. In August 2020, he entered a partnership renting out electric bikes. He has not drawn any income

from the venture which continues at the date of the hearing. The partnership owns 12 electric bikes worth approximately £24,000. It has a modest cash balance in the bank account. All profits generated by the partnership since its inception (approximately £15,000) have been re-invested in the business to purchase more bikes. The claimant worked ,and continues to work, full time hours on this venture.

15. In September 2020, the claimant secured some work for an engineering company called Glendale Engineering. He was engaged on a 'zero hours' contract, and the number of hours and income fluctuated. The work dried up at the end of February 2021. The claimant's average net monthly income from this employment was £276.37. The pattern of payments received over the 7 month-period from September 2020 to February 2021 was:

25 Sep 20	£86.23
26 Oct 20	£286.71
24 Nov 20	£63.51
26 Nov 20	£350.95
7 Dec 20	£50.00
23 Dec 20	£683.81
26 Jan 21	£315.88
26 Feb 21	£96.48

16. When that work ended the claimant did not seek any alternative employment.

- 15 17. The claimant suffered and continues to suffer from stress which he attributes to the conduct of the respondent and its officers / former officers. He has received no medical diagnosis or treatment in relation to his mental health. He has not been in receipt of any state benefits relating to his mental health (or at all).

18. Although experiencing symptoms of stress, the claimant was fit to work immediately following his dismissal at least in the capacity of his pre-existing jobs and, later, in his electric bike venture as well as the period of work undertaken for Glendale Engineering. He has been fit to work since.
- 5 19. The claimant did not seek or secure any other paid employment until 1 May 2023, when he secured work as a manager of a convenience store.

#### Observations on the evidence

20. I found the claimant attempted to give his evidence in an honest and straightforward fashion in order to assist the Tribunal. He showed occasional  
10 lapses in recollection but readily corrected himself where this occurred.

#### Relevant Law

##### *Unfair Dismissal*

21. Section 94 of the Employment Rights Act 1996 (ERA) provides that an employee has the right not to be unfairly dismissed.
- 15 22. The compensatory award is such amount as the Tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the employee as a result of dismissal insofar as attributable to actions of the employer. The compensatory award is to be assessed so as to compensate the employee, not penalise the employer and should not result in a windfall to  
20 either party (*Whelan v Richardson* [1998] IRLR 114).
23. An unfairly dismissed employee is subject to a duty to make reasonable efforts to obtain alternative employment to mitigate his losses and sums earned will generally be set off against losses claimed (*Babcock FATA v Addison* [1987] IRLR 173).
- 25 24. The duty is to act as a reasonable man would do if he had no hope of receiving compensation from his employer (per **Donaldson J in Archibold Freightage Ltd v Wilson** [1974] IRLR 10). It may not be unreasonable for an employee to take himself out of the job market to pursue training or study. However, it will be appropriate for the Tribunal to consider whether that is a matter of

personal choice and whether the loss may be considered to be too remote a consequence of the dismissal (Simrad Ltd v Scott [1997] IRLR 147, EAT, Hibiscus Housing Association Ltd v McIntosh UKEAT/0534/08).

- 5           **25. Likewise, the reasonableness of a decision to set up in business will require to be assessed on the facts and circumstances of the case but relevant factors may be the employee's circumstances, including their experience, contacts and knowledge, as well as the state of the industry they have chosen for their new venture.**
- 10           26. It is similarly a matter of fact and degree for the tribunal to determine whether and when it becomes unreasonable for an employee to decide not to consider lower paid or lower skilled employment in a different sector. It will not commonly be unreasonable for them to lower their sights immediately, but may become so in time, depending on the circumstances of the case.
- 15           27. A qualification to the principle of mitigation is that it will not apply fully to payments earned elsewhere during the notice period. In Norton Tool Co Ltd v Tewson [1972] IRLR 86, it was held that the employee was entitled to full wages in respect of the notice period without mitigation on the basis that this was good industrial relations practice. (This principle does not apply to claims for wrongful dismissal). There may be exceptions to the Norton Tool principle; in Babcock FATA Ltd v Addison [1987] IRLR 177, the Court of Appeal accepted the principle is generally applicable but not as a rule of law entitling the employee in every case to full wages in the notice period. The employer should pay such sums as good industrial relations practice requires and sums earned by way of mitigation should not be offset. Where, however, 25 full wages for the notice period would exceed the sum an employer ought to pay on dismissing in good practice, mitigation will apply to that excess.
- 30           28. There is a cap on the compensatory award for unfair dismissal. This is the lower of one year's pay and the statutory cap which, at the material time, was £88,519.

### Submissions

29. The claimant declined to make a submission, save to explain that he was under significant stress as a result of the conduct of the respondent and to advise that he continued to be in difficult correspondence with former directors of the respondent to this day. in the circumstances, he felt he could not have done more to discharge his duty to mitigate his losses. He also referred to the impact of the Covid 19 pandemic on the job market.

### Discussion and Decision

#### *Basic Award*

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30. The claimant is not entitled to a basic award, having received a statutory redundancy payment from the respondent.

#### *Compensatory Award*

31. The first task is to calculate the loss which the claimant sustained in consequence of the dismissal and in so far as the loss is attributable to action taken by the employer.
32. The claimant has already been compensated by an award of damages for the period from 17 April to 8 May 2020 and no losses are recoverable in respect of that period in accordance with the principle of 'no double recovery'.
33. I am satisfied that, in the months immediately following the claimant's dismissal, he made reasonable endeavours to mitigate his loss. I accepted that, although he received no medical treatment or formal diagnosis, he was greatly affected by stress in the aftermath of the termination of his employment, arising from the dismissal and from matters related to employment. I accepted there was a particularly challenging job market at the material time as a result of the Covid restrictions in place and, in those circumstances, it was not unreasonable for the claimant to seek to replace his income by increasing his on call hours with NCC as well as setting up a business venture and taking on casual work for Glendale Engineering.



34. From 8 May to 1 September 2020 (17 weeks), the claimant's lost net earnings from the respondent were £14,759.74 (17 x £868.22). During that time, he received 'extra' income from NCC which he had not enjoyed while employed by the respondent as a result of the increase to his on-call availability. That  
5 'extra' portion of the NCC income was £129.41 per month or £29.87 per week (£129.41 Z4.333 average weeks in a month). In the material period **from 8 May to 1 September 2020**, the claimant therefore received around £507.79 'extra income' from NCC which falls to be deducted from his losses. His **losses in this period** were, therefore, £14,759.74 LESS £507.79 =  
10 **£14,251.95.**
35. In the period from 1 September 2020 to 8 November 2020, the claimant's net loss of earnings from the respondent were £8,539.74 (2.27 months x £3,762 net per month). He had extra income from NCC in this period of £293.76 (2.27 x £129.41). He also received income from Glendale Engineering in this period  
15 in the total sum of £372.94. The total sum earned in mitigation in the period from 1 September to 8 November 2020 was, therefore, £666.70. When this sum is offset against the loss, the total loss of earnings from **1 September to 8 November 2020** is **£7,873.04.**
36. The claimant's total uncompensated loss of earnings from the date of  
20 dismissal to 8 November 2020 are therefore **£22,125.**
37. I do not find that the claimant's continuing loss from and after 8 November  
25 2020 is recoverable. In that period the claimant had a continuing weekly loss of around £774.52 per week (when credit is given from the extra NCC income and - for as long as it lasted - the Glendale income). However, the claimant has made no attempt to mitigate that loss by finding additional supplementary employment or alternative replacement employment. The claimant was candid in his evidence that he was fit to work throughout and indeed that he was working full time on his electric bike partnership venture. While I do not  
30 consider the claimant was unreasonable in his initial decision to set up in business in his own account given the prevailing circumstances at the time he did so, it has been clear for a considerable period of time that the business is not profitable, yet consumes substantial time on the claimant's part.

38. I find that the continuing loss after the first 3 months or so of trading as a partnership (which expired in November 2020) is too remote from the dismissal to be recoverable. That loss cannot continue to be attributed to the respondent's dismissal of the claimant as opposed to the claimant's career and business choices in circumstances where he did not seek alternative work or choose to take drawings from the venture, instead re-investing any profits. The claimant did not to use reasonable endeavours to mitigate the associated loss of income by seeking additional or replacement employment from and after 8 November 2020. I find that failure was unreasonable in all of the circumstances of the case.

39. The Tribunal awards £500 to the claimant by way of compensation for loss of statutory rights.

40. The total compensatory award is, therefore, **£22,625**.

### Conclusion

41. The Tribunal, having previously declared that the claimant was unfairly dismissed, orders the respondent to pay him a compensatory award in the total sum of **£22,625**.

**Employment Judge:  
Date of Judgment:  
Entered in register:  
and copied to parties**

**Murphy  
19 September 2023  
22 September 2023**

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