



EMPLOYMENT TRIBUNALS

Claimant

Mr J. Richardson

v

Respondent

West Midlands Trains Ltd

Heard at: Watford (by CVP)

On: 19 October 2023

Before: Employment Judge Hunt

Appearances

For the Claimant: Mr A. MacMillan (counsel)

For the Respondent: Mr A. Ohringer (counsel)

JUDGMENT ON REMEDY (FINANCIAL AWARD)

1. The Tribunal orders the Respondent to pay to the Claimant the sum of £22,571.22, representing his loss of earnings until 6 July 2023, plus £704.99 per week from 7 July 2023 until reinstatement.
2. No further award is made in relation to the successful claim for wrongful dismissal.

REASONS

1. This decision on the financial award due to the Claimant pursuant to s.114(2)(a) of the Employment Rights Act 1996 (the "Act") follows on from the Tribunal's judgment of 27 September 2023 that the Claimant was unfairly dismissed by the Respondent, and its judgment of 19 October 2023 that the appropriate remedy was reinstatement. The parties had sought to agree the amount payable but were unable to do so.
2. By letter dated 7 December 2023, the Tribunal directed that the parties file statements outlining the issues agreed and the issues that remained in dispute. The Tribunal proposed to determine the financial award based on the written submissions and evidence. Neither party objected to this approach. It was agreed that the financial award would relate exclusively to pay and pension contributions that the Claimant would otherwise have received from the Respondent had he not been dismissed. It was agreed that income received from alternative employment pursued by the Claimant subsequently to his dismissal should reduce the amount owed by the Respondent. The only issues in dispute were relatively minor: (1) the correct weekly rate of basic pay for the period (the parties diverged by £3.60 per week); and (2) how much overtime

and pay related to safety briefings should be taken into account when calculating the sum the Claimant might reasonably have expected to receive (the sum in dispute was £67.59 per week).

3. I am satisfied that it is sensible and proportionate to determine the financial award on the written submissions and evidence received to date, without a further hearing. The Respondent did not file written submissions further to the Tribunal's correspondence of 7 December 2023. However, the Claimant outlined both parties' positions (as far as he could understand them) and provided a copy of his submissions to the Respondent, who did not provide a response. Both parties filed schedules of loss in advance of the remedy hearing, and the Respondent supplied a revised version alongside its written submissions on the financial award. I am grateful to the parties for their cooperation.
4. As to the first issue in dispute, it was agreed that the Claimant's gross annual basic pay was £57,044. The Claimant divided this by 52 to obtain a gross weekly basic rate of pay of £1,097. The Respondent proposed a figure of £1,093.40. It is not clear how that sum was derived. It may be due to a rounding difference in the way the precise figure for weekly pay was calculated. Alternatively, it may simply have been taken from the Claimant's original schedule of loss, where this is stated as the sum being sought. Either way, the approach the Claimant now proposes is a pragmatic and well-used method of calculating weekly pay. I have no information about how the Respondent arrived at its figure. Accordingly, I find in favour of the Claimant and will adopt the figure of £1,097 as representing his gross basic weekly pay.
5. As to the second issue in dispute, the Claimant proposed to include an estimate of the overtime and pay for safety briefings he submits he would have earned had he remained employed. He calculated this estimate by taking his average income over the six full months of pay he received preceding his suspension from work for the matters that ultimately led to his dismissal. He had been suspended from work for an unrelated incident prior to then, so his pay for preceding periods was not representative of a "normal" working month. His precise pay varied every month, but the Claimant submitted his pay averaged out to £1,049.35 net per week.
6. The Respondent proposed a net weekly pay of £981.16, apparently deriving this from the Claimant's average pay over the twelve months preceding his suspension, which included an unrelated period of suspension.
7. The Act requires me to determine the benefits that the Claimant "*might reasonably be expected to have had but for the dismissal*". There was no dispute that some overtime would be earned, it being the Respondent's policy to offer regular Sunday working and the Claimant habitually taking up that offer. The precise amount of overtime would vary, and for this reason taking an average from previous pay periods seems a sensible approach to take. I accept the Claimant's submission that the most appropriate period to analyse would be the most recent period during which the Claimant was working and earning "normally", i.e. excluding periods of suspension.
8. As I understand it, no further issues are in dispute. Accordingly, I accept the

Claimant's assessment that he reasonably expected to earn £1,049.35 net per week from the Respondent. In addition to this, the parties agree that the Respondent would have made weekly pension contributions of £103.44. Together this amounts to £1,152.79 lost weekly benefit.

9. The parties provided no clear details of any agreed method of calculating the Claimant's financial award up until reinstatement. In light of the Claimant having been employed in various roles since his dismissal, the latest of which is ongoing, it seems appropriate to provide a single sum for financial losses up until the date he commenced that latest employment and a weekly rate from then onwards until reinstatement.
10. According to his witness statement, the Claimant commenced his latest employment on 7 July 2023. The effective date of termination of his employment with the Respondent was 24 November 2022. The difference between the two dates is 32 weeks. 32 weeks' worth of expected earnings from the Respondent, including employer pension contributions, amounts to $£1,152.79 \times 32 = £36,889.28$. The Claimant's earnings from his other employment during that period were agreed to amount to £14,318.06.
11. Accordingly, the appropriate net sum to award for the period until 6 July 2023 is $£36,889.28 - £14,318.06 = £22,571.22$.
12. From that date onwards, the parties agree that the Claimant has been earning £413.03 net per week and benefitting from employer pension contributions of £34.77 per week. That totals £447.80 per week. Taking this sum from the total weekly benefits the Claimant would have expected to receive from the Respondent of £1,152.79 leaves an ongoing net weekly loss of £704.99 from 7 July 2023 until reinstatement.
13. As the award until 6 July 2023 is below the £30,000 threshold to be classified as employment income in accordance with Chapter 3 of Part 6 of the Income Tax (Earnings and Pension) Act 2003, grossing up of this sum is not required. Upon any reinstatement, the remainder of the financial award due to the Claimant is likely to take his total award above the £30,000 threshold. The parties should gross up any sum that exceeds the threshold to account for tax that would be payable.
14. The parties proposed that I deal with the issue of damages for wrongful dismissal separately to that of the financial award under s.114 of the Act. However, as the damages relate to the notice period to which the Claimant was entitled, and the financial award covers that period, there is no need to make a separate determination.
15. Finally, as the Claimant does not appear to have received state benefits recuperable under the Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 (SI 1996/2349), the Regulations do not apply.

**Case No: 3300402/2023
3302080/2023**

Employment Judge Hunt

Date: 18 January 2024

Judgment sent to the parties on
13/02/2024

For the Tribunal office