



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr Kevin Hope

v

WKCIC (t/a Capital City College Group)

Heard at: Watford Employment Tribunal

On: 18 January 2024

Before: Employment Judge Coll

Appearances

For the Claimant: self-representing

For the Respondent: Mr. O. Lawrence, counsel instructed by Bates Wells Solicitors

RESERVED JUDGMENT

- The respondent shall make payment to the claimant for unfair dismissal of **£44,068.33** gross, with the employer first deducting income tax and national insurance (bearing in mind that £30,000 will not be subject to tax or national insurance).
- The table below refers to net figures for pay which have been grossed up to produce the sum above.

Heading	Sum uplift pre	15% uplift	Sum in full post uplift	Comments & up totals
a) Basic Award				
21 x £544 (agreed)	£11,424	£1,713.60	£13,137.60	15.10.2004 - 29.10.2021, 17 years length of

				service. Aged 49 on EDT. 8 years with a multiplier of 1.5.
Compensatory Award = b) + c) + d)				
Pay b)				
29.10.2021 - 30.09.2023 Net monthly salary £2,058.37 agreed. 23 moths £47,342.51 2 days (29.09 - 30.09.2023) £135.34	£47,477.85			Agreed gross monthly salary £2,852.51 [Claimant's WS paragraph 14, P60 20 – 21 Bundle page 30]. Agreed net monthly in hearing. Period 29.10.2021 to 30.09.2023 (after which British Museum ("BM") salary increased such that no loss).
Loss of freelance work during BM (25.01.2023 - 30.09.2023)	£0			
LESS earnings with University of the Arts London ("UAL") 1.11. 2021 – 09.12.2022	(£13,440.25)			[Claimant's WS at paragraph 14 and P60 21 –22 & 22 – 23 Bundle page 31]. Total net loss agreed during hearing, using P60s for 2021 – 2022 & 2022 – 2023. Period agreed.
LESS additional freelance work during UAL	£0			

LESS earnings with BM @ £2,042 net monthly (agreed) (25.01.2023 - 30.09.2023) = 8 months £16,336 6 days £402.80	(£16,738.80)			[Claimant's WS at paragraph 16 and Bundle page 8 – 18 and 35]. From 01.10.2023 net monthly £2,118.86
TOTAL ALTERNATIVE EARNINGS	(£30,179.05)			Grossed up (using 25% rule of thumb) = £26,524.83.
b) TOTAL LOSS NET EARNINGS	£17,298.80	£2,594.82	£19,893.62	
c) Loss of statutory rights	£500	£75	£575	
d) Pension (agreed) 04.01.2006-29.10.2021	£6,039.15	£905.87	£6,945.02	Employer's pension contributions (see explanation below for why this method chosen)
TOTAL COMPENSATORY b) c) & d)			£27,413.64	Total would be £34,044.85 for purposes of statutory cap.

3. I explain for the benefit of the claimant who is representing himself what this means. The respondent shall declare the sum of **£44,068.33** to HMRC. HMRC will inform the respondent how much tax (income tax and national insurance) to pay them, having taken account of the £30,000 exemption and then the respondent will pay the claimant the balance.
4. In the hearing on 18 January 2024, there was a remedy bundle of 133 pages which had been provided by the respondent. Pages numbers in these reasons refer to that bundle. During the hearing, the claimant provided his witness statement which had been sent in advance on 11 January 2024 but had not reached me.
5. I heard from one witness: the claimant who adopted his witness statement and was cross-examined upon it.

THE ISSUES

6. The issues relating to remedy for unfair dismissal were agreed in the Case Management Order. The claimant and Mr. Lawrence both added to these issues at the start of the hearing.
 - 6.1. What would the claimant have received by way of salary and employer's pension contribution from the effective date of termination, had he not resigned?
 - 6.2. Has the claimant taken reasonable steps to mitigate his loss?
 - 6.2.1. He commenced new employment immediately with UAL as a technician at the London College of Fashion and after a brief gap, worked as a production technician for the British Museum. His remuneration and the employer's pension contributions at UAL were significantly less than with the respondent. Should he or could he have obtained higher paid work before his salary increase at BM on 1 October 2023?
 - 6.2.2. Should he have obtained additional freelance work whilst at UAL, given fewer days' contractual work per week?
 - 6.3. What was the figure for his total remuneration from any work obtained after his last day of employment with the respondent?
 - 6.3.1. With UAL?
 - 6.3.2. With BM?
 - 6.3.3. Any additional freelance work whilst at UAL, depending on the answer to the question above in mitigation?
 - 6.4. Should the claimant be compensated for loss of freelance work whilst at the British Museum, due to its being a 5-day and not 4-day week as with the respondent and having shorter holidays?
 - 6.5. Should the claimant be compensated for the loss of income from the decreased ability to produce works of art?
 - 6.6. How long will any loss the claimant still suffers which flows from the constructive dismissal continue? The claimant has sought at least 29 months' loss (to the end of his current BM contract) and beyond that to 2025. The respondent has disagreed with this period considering losses should stop at early 2022 or at the latest at the end of the UAL job in December 2022.
 - 6.7. What method of pension loss calculation should be used?
 - 6.8. Whether there should be an increase in the claimant's award due to an alleged failure to comply with ACAS procedures because of the failure to deal with his grievance?
 - 6.9. If so, what increase?

LAW APPLICABLE TO THE ISSUES IN DISPUTE

Mitigation

7. 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:
 - 7.1. what steps were reasonable for the claimant to have to take in order to mitigate his or her loss;
 - 7.2. whether the claimant did take reasonable steps to mitigate loss; and
 - 7.3. to what extent, if any, the claimant would have actually mitigated his or her loss if he or she had taken those steps.
8. A more recent case, *Edward v Tavistock and Portman NHS Foundation Trust* [2023] IRLR 463, EAT, an Employment Tribunal should remind itself the respondent has to show that the claimant has acted unreasonably not that the claimant has failed to act reasonably. I note that the issues list would seem to have been formulated at the CMR with *Gardiner-Hill* in mind.

Gross v net

9. The amounts in the final calculations are gross not net for the following reasons:
 - 9.1. Regulation 37a of The Income Tax (P.A.Y.E.) Regulations 2003 requires that retrospective employment income (that is income paid after cessation of employment) is taxed.
 - 9.2. The principle established in *British Transport Commission v Gourley* [1955] 3 All ER 796, is that an award should be “grossed up” so as to ensure that a claimant is not left out of pocket when any tax required to be paid on the award has been paid.
10. Nevertheless, initially the calculations must be based on net figures. *Shove v Downs Surgical Ltd* [1984] ICR 532, QBD sets out what steps should be taken in reaching the end figure:
 - 10.1. calculating the employee’s loss on the basis of the net of tax and national insurance contributions value of salary and benefits for which he or she should be compensated.
 - 10.2. deducting any part of the £30,000 exemption that remains available (some of the £30,000 will already have been used up by the basic award and any termination payments received)
 - 10.3. grossing up the resultant figure to reflect the tax due from the employee on the excess over £30,000. The amount should be grossed up at the employee’s marginal rate (see *Yorkshire Housing Ltd v Cuerden* [2010] EAT 0397/09); and then
 - 10.4. adding the grossed-up figure to the compensation payable.

FINDINGS

11. I make my findings of fact on the balance of probabilities, considering all the evidence, both documentary and oral, admitted at the hearing. I do not set out in this judgement all

the evidence I heard but only my principal findings, those necessary to enable me to reach conclusions on the remaining issues. Where it was necessary to resolve conflicting submissions based on factual assertions, I have done so by making a judgment about the credibility of the claimant's oral and written evidence, looking at his overall consistency and I have taken account of the degree to which the respondent has supported their points about mitigation with documentary evidence.

12. My impression of the claimant was that not all the evidence given could be accepted in its entirety without qualification. In most instances, however, his evidence was supported by detailed evidence about the job and freelance market relevant to his expertise.

Mitigation

UAL

13. The claimant turned his mind to job-hunting not long after offering his resignation. The claimant first applied for a mixture of lecturer and technician jobs in August 2021 and continued to apply through October 2021. The lecturer jobs would have required him to relocate to Newcastle or Gloucester. He also applied for fixed-term contracts.
14. Within a few days after leaving the respondent, in or about 1 November 2021, the claimant started work with UAL on a fixed-term contract as a technician during term-time, which is the common situation in Sixth Form and Further Education Colleges. He was engaged to work a combination of 2 and 3 days across each fortnight. At the end of the academic year 2021 – 2022, the claimant was offered a few days of work in the summer holidays. The claimant was offered a slightly different arrangement for the Autumn term of the academic year 2022 – 2023; two days every week. The work with UAL ceased at the end of the Christmas term 2022, in or about 9 December 2022.
15. The claimant provided a combination of P60s and some payslips from UAL. Mr. Lawrence did not dispute the rate of pay or employer's pension contributions and that they were significantly lower than that paid by the respondent.
16. The claimant's total net pay for the period in or about 1 November 2021 to 9 December 2022 was **£13,440.25**. This was calculated in the hearing and was agreed.

British Museum

17. The claimant started with BM on 25 January 2023, contracted to work 5 days per week. This was not a term time only job. His contract was renewed before its expiry, with an end date of 24 March 2024.
18. From January to 30 September 2023, the claimant's rate of pay was a little lower than that with the respondent. The claimant's total gross pay for this period was £21,795.42. This was not disputed. The respondent did not establish that the claimant had acted unreasonably in accepting the British Museum job, despite it having slightly lower pay and being a fixed term contract with no permanence.
19. Due to a pay rise from 1 October 2023, the claimant accepted that he had experienced no loss of pay. The claimant agreed that the employer's pension contributions were identical throughout his period with the British Museum.

20. The job was in part a change from his work as a lecturer as it was practical, physical and detail orientated. It entailed amongst other tasks, starting and completing an inventory of lights and cabinets used for display and the repair of displays, carefully removing and reinserting the exhibit.
21. The claimant's total net pay for the period was **£16,738.80**. This was calculated in the hearing and was agreed.

Job-hunting for lecturer posts

22. The claimant adopted a pragmatic approach to job-hunting. He followed a dual approach in seeking to obtain some work as quickly as possible, which was inevitably at a more junior level (as a technician) and on an insecure basis (being fixed term). At the same time, he applied for lecturer posts; the equivalent to his job with the respondent. He was prepared to relocate considerable distances to obtain these lecturer posts but was not successful.
23. The respondent observed that the claimant had stopped looking for jobs after he started work with UAL and did not start again until May 2022. I accept the claimant's evidence about the market for academic jobs; that there was recruitment for academic jobs only towards the end of the academic year (in about May 2022) or the beginning of the academic year. This was due to turnover at the end of the academic year or to the launching of new courses at the start of the academic year. The respondent therefore did not succeed in showing that the claimant acted unreasonably in any aspect of his job-hunting or in the cessation of job-hunting in November 2021.

Additional freelance work

24. By way of background, the claimant undertook the same amount of freelance work with UAL as he had done, when with the respondent. This roughly equated to 3 or 4 days per month. It was not disputed that he undertook half of this work during the holidays and half during term-time.
25. The respondent contended that the claimant should have used the extra day/2 days per week during term time with UAL to obtain additional freelance work. The respondent did not quantify this but seemed to imply that this could have meant an additional 3 or 4 days per month during term time, since there was at least one extra day per week and sometimes two.
26. I accept the claimant's evidence about the freelance market. Freelance assignments arose through hunting on social media pages dedicated to that kind of work – 3D design of sets for film, tv and events, repair of props for such sets and building of such sets. The claimant gave a long list of social media pages which he regularly trawled, responding to offers of work with minimal delay. He was also contacted on an impromptu basis by past contacts with whom he had worked. Sometimes, the assignment required a block of days which cut across his commitments with UAL, and he had to refuse the work.
27. The claimant worked with two companies (Boxe Du Luxe and Cous De La Construction) whilst at the respondent. He managed to add a new client (Background Props Hire) and

in a new area of expertise. He also dropped his day's wages to increase the number of assignments. Typically, he earned gross £250 to £200 per day. During his time with UAL, he often accepted £100 per day. I therefore accept that the claimant made notable efforts to increase his freelance work.

28. I accept the claimant's view on the matter which was that additional free time did not equal the existence of additional freelance work. Accordingly, I accept that he could not generate additional freelance work. In any event, bearing in mind the relevant test, the respondent has not shown that the claimant acted unreasonably in failing to obtain additional freelance work.

Loss of artistic opportunity

29. The claimant submitted that he had been able to use the respondent's workshop to produce his own works of art and he should be compensated for his reduced ability to produce such works and to exhibit. In making this submission, he provided a chronology of exhibitions in which he had taken part. I do not accept that loss of artistic opportunity flows from his unfair dismissal. The use of the workshop was not a contractual benefit. Rather it was offered to him at the goodwill of the respondent.

CONCLUSIONS ON THE ISSUES AND FINDINGS ON REMEDY

30. 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 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 and freelance work search

31. It has been argued by the respondent that an equivalently paid job should have taken no more than 3 – 14 months to obtain and that therefore the claimant has failed to mitigate his loss. In particular, he should have obtained a job at a level commensurate with his job with the respondent. Relying on that argument, the respondent maintains that the compensatory award should be limited to the period November 2021 to early 2022 or failing that to December 2022. The respondent provided no evidence about alternative posts which the claimant should have applied for in August 2021 – December 2022. For that reason, I do not find that there were any other lecturer or fixed term contracts like the BM post available for the claimant to apply to. Even if there were, there is no likelihood that the claimant would have obtained one of these, given that he had to explain at any selection process why he had resigned from the respondent.

32. The claimant reasonably considered that he would not have obtained a better paid job earlier than January 2023 because there were many suitable applicants and he at 49 – 50 had an age disadvantage. I remind myself however the test is not about whether the claimant acted reasonably but about whether the respondent has shown that he acted unreasonably. The respondent has produced no evidence to establish that the respondent at any time after leaving the respondent acted unreasonably.

33. It has also been argued by the respondent that the claimant should have obtained possibly an additional 3 – 4 days a month of freelance work during term-time whilst at UAL. Term-time duration was from October to mid-December, January to March and May, about 7

months. Applying the respondent's logic, this would have meant an additional 21 – 28 days of freelance income.

34. The respondent produced no evidence that additional freelance opportunities were available during the period November 2021 – December 2022. Nor there was any evidence to show that the claimant would have been successful in winning such additional freelance work, if it had existed. In other words, again the respondent has failed to establish that the claimant acted unreasonably.

Application of Gardiner-Hill and mitigation

35. 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 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 college settings even if those roles offered lower pay and no job security. This is what he did.
36. He started his job hunting very quickly after his employment ended with the respondent. The claimant made a number of applications. The bundle shows several applications for different technician posts in UAL, all within different departments or disciplines. I accept his evidence that he was able to retrieve and download applications made to UAL as their database retains records. I also accept his evidence that he made other applications in this period but could not access these at the date of compiling the bundle.
37. Given the range of specialisms for these technician posts across UAL and the wide geographical area of lecturer posts, I accept that the claimant used enough sources for job-hunting. I can well imagine that recruitment in the academic and museum sectors was not particularly buoyant in October 2021 and through to May 2022, given that there were considerable financial restraints after the expenditure required by the pandemic.
38. As time passes, the ongoing duty on the claimant to mitigate his loss means that, even though he had found almost equivalently paid fixed term employment in January 2023, he should have continued to look for permanent work. There is no evidence of such job hunting from a point at which the claimant could have been said to have settled into his new job. Yet I bear in mind his oral evidence: that this was a fixed term contract in which the pressure was on the claimant to impress his manager consistently to persuade him to extend his contract. The claimant conveyed the pressure of working in a civil service setting where he felt that he could be replaced by anyone whom his manager thought better. In such circumstances, the respondent has not shown that the claimant acted unreasonably in deciding that the burden of job-hunting could not be added to a stressful existence in the British Museum. The claimant did succeed in having his contract extended.
39. The claimant seeks for his compensatory loss to cover the period after 24 March 2024. He provided anecdotal evidence (based on a BM colleague) that one extension was possible but a second unlikely. It is difficult to evaluate that evidence as there is no objective information about this colleague and whether he is a realistic comparator. The claimant also says that as he will have completed the inventory by 24 March 2024, the new contract will be different. He has not explained how and why his track record with BM

and his skillset will not place him at an advantage when applying for the new contract. The claimant provided no evidence about how his performance is regarded at BM. It may be that those on temporary contracts do not get a performance appraisal or any kind of written assessment.

40. Even if I had found that the claimant was very unlikely to get the new BM contract, (which I cannot find due to too little evidence), he has overlooked his ongoing duty to mitigate his loss. If he wishes to obtain an equivalent job or even one like that at UAL, he should have started job-hunting already, since it took him nearly 3 months to get his job with UAL. He admitted that he had not started job-hunting (as of 18 January 2024). When asked about job-hunting, he did not refer to any plans to start job-hunting. He seemed unprepared. This contrasts with his prompt job-hunting efforts in August 2021, some days after resignation. I must ask myself whether his lack of plans concerning job-hunting is because he has confidence in his ability to get a new contract with the British Museum. For all these reasons, I find that his losses should stop at the end of September 2023, the point before he received a salary increase putting his salary with the British Museum on a par with that of his job with the respondent.

Income

41. 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 gross monthly salary of £2,852.51, which was agreed during the hearing to be a net of £2,058.37.

42. The claimant asked me to find that he had lost income because the BM job was full-time, and he could not undertake freelance work. The claimant quantified the loss as about 45 days, since this was what he had undertaken when with the respondent. The claimant did not provide any documentary evidence to show that such opportunities existed and had been suitable e.g. screenshots of social media pages advertising such work. He also provided no receipts or other documentary evidence of past payment for such freelance work to substantiate the amount of financial loss. This was too tentative for me to find in the claimant's favour.

43. Alternative work: I have set out above his net income from UAL and the British Museum. This totalled **£17,298.80**. I do not include a figure for additional freelance work. I find that the claimant could not have obtained additional freelance work during his job with UAL. There is no evidence that this existed or amid the tough competition, the claimant would have been successful in getting it.

44. 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 29 October 2021 to 30 September 2023 for the reasons set out above.

Damages for unfair dismissal

45. 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 both parties agreed. The basic award is 21 times £544 due to the multiplier of 1.5 applying to 8 years of his service (due to his age) and the remaining 9 years having a multiplier of 1.
46. Compensatory award: this is calculated in the table above using the agreed net monthly pay for the period I have decided above is applicable together with the award for loss of statutory rights and pension loss. The compensatory award consists of b) c) and d) in the table above. In other words, the components are loss of income, loss of statutory rights and pension loss.

Uplift/deduction for breach of ACAS code

47. The respondent failed to consider the claimant's grievance [see paragraphs 100 - 106 of my reserved judgment on liability]. The claimant asked for an uplift to represent this failure. The respondent opposed this uplift but if I was to make an uplift, advised a 5 – 10% uplift. Decision: I award an uplift of 15% because of the complete failure to deal with the claimant's grievance and instead to deal only with the grievance of the technician (whose performance formed part of the claimant's grievance).
48. The loss of income before uplift is **£17,298.80** which after uplift is **£19,893.62**. Pension: **£6,039.15** before uplift using the method of employer's pension contributions for the period and after uplift, **£6,945.02**. The basic award is **£11,424**. After uplift, the sum is **£13,137.60**. I award **£500** compensation for loss of statutory rights which after uplift is **£575**. This makes a total of **£27,413.64**.
49. Next, I adopt the steps in the case law set out above.

- 49.1. calculating the employee's loss on the basis of the net of tax and national insurance contributions value of salary and benefits for which he or she should be compensated = $£19,893.62 + £6,945.02 + £575 = £27,413.64$
- 49.2. deducting any part of the £30,000 exemption that remains available (some of the £30,000 will already have been used up by the basic award and any termination payments received). Thus $£30,000 - £13,137.61 = £16,862.39$.
- 49.3. the resultant figure will be $£27,413.64 - £16,862.39 = £10,551.25$
- 49.4. grossing up at the claimant's marginal rate the resultant figure to reflect the tax due from the employee on the excess over £30,000 = $£14,068.33$
- 49.5. and then adding the grossed-up figure to the compensation payable = $£30,000 + £14,068.33 = \mathbf{£44,068.33}$.

CONCLUSIONS ABOUT COMPENSATORY AND THE STATUTORY CAP

50. The statutory cap applies to the compensatory award.
51. The statutory cap from 6 April 2021 (the date applicable to the claimant's last date of employment) was the lower of a year's salary or the maximum statutory limit of £89,493. The claimant's annual salary applies since it is the lower of the two values at £34,230.15.

Under *University of Sunderland v Ms K Drossou*: UKEAT/0341/16/RN, the annual salary figure can include the pension contributions paid by the employer. Given that the respondent's pension contributions were 15% of gross salary, this would produce a statutory cap of **£39,364.67**.

52. I have used the "simple" method of employer's contribution (not the "complex" method) of pension loss calculation. I have before me the Presidential Guidance on Principles for Calculating Pension Loss, fourth edition, third revision dated 2021. The claimant was a member of the Local Government Pension Scheme, a defined benefit scheme. Chapter 5 deals with defined benefit schemes – "simple cases". Paragraph 5.35 states that it will not be proportionate to undertake a complex analysis of pension loss (as in the lost pension rights method) where the cap is nearly exceeded by the compensatory loss.

53. For the purposes of the statutory cap, the income element of the compensatory award should be grossed up to check whether the compensatory award is under the statutory cap. The statutory cap is thus nearly exceeded, justifying this method but nevertheless, £34,044.85 is under the statutory gap of £39,364.67. It follows that I do not need to cap this sum.

I confirm that this is my reserved Judgment with reasons in Hope v WKCIC (t/a Capital City College Group) and that I have approved the Judgment for promulgation.

Employment Judge Coll

Date: ...18 March 2024

Sent to the parties on: 19 March 2024

For the Tribunal Office