



THE EMPLOYMENT TRIBUNALS

Claimant: Mr Valimulla

Respondent: Al-Khair Foundation

Heard at: London South Employment Tribunal (video hearing)

On: 10 May 2024

Before: Employment Judge Robinson

Representation

Claimant: Mr Miller (Assistant Legal Officer)

Respondent: Mr McFarlane (Consultant)

REMEDY JUDGMENT

The judgment of the Tribunal is that the Respondent is ordered to pay the Claimant the sum of £16,789.52 which is calculated as follows:

1. Compensatory award for unfair dismissal in respect of lost earnings for a year following dismissal: £16,289.52
2. Loss of statutory rights: £500

The Employment Protection (Recoupment of Benefits) Regulations 1996 apply to this award – see attached Annex. For the purposes of the Recoupment Regulations:

1. the total award is £16,789.52
2. the “Prescribed Element” is £16,289.52
3. the “Prescribed Period” is 31 October 2020 to 30 October 2021
4. the amount by which the monetary award exceeds the Prescribed Element is £500

The £500 sum payable directly to the Claimant (not subject to recoupment) is now payable and must be made to the Claimant within 28 days of the date of this Judgment.

WRITTEN REASONS

1. I gave the above Judgment on the day of the hearing, together with oral reasons. At the hearing the Respondent requested written reasons under Rule 62 of the Employment Tribunals Rules of Procedure 2013. My reasons were as follows.

Introduction

2. The Claimant, Mr Valimulla, was employed by the Respondent, Al Khair Foundation, from 5 February 2018 until 31 October 2020.
3. The Claimant was dismissed on the grounds of redundancy. At the time of his dismissal, the Claimant's job title was "National Masjid Liaison Officer" (MLO).
4. The Respondent is a religious charity which provides emergency relief and development to impoverished areas.
5. The Claimant presented a claim of unfair dismissal on 18 February 2020. This was heard by Employment Judge Wright on 22 September 2021 and the Claimant lost his claim. The Claimant appealed to the Employment Appeal Tribunal. This was heard by HHJ Tucker on 10 October 2023 and the Claimant was successful, in particular in relation to the question of whether there had been an adequate pooling exercise prior to redundancy.
6. The case was remitted to the Employment Tribunal to undertake a full analysis of the appropriate 'Polkey' reduction to any compensatory award.

List of Issues

7. At a Preliminary Hearing on 8 February 2024, the parties agreed that the List of Issues for today's Remedy Hearing was as follows.

Compensatory award

1. What financial losses were sustained by the Claimant in consequence of the dismissal, insofar as that loss was caused by the Respondent?
2. Should the compensatory award be reduced for any failure by the Claimant to mitigate his loss, and if so, by how much?
3. Should a 'Polkey' deduction be made to reflect the chance that the claimant would have been dismissed in any event had the Respondent acted fairly? How much should be deducted? In particular, the tribunal will consider.
 - a. What was a fair procedure likely to have been?
 - i. Would the Claimant likely have been (i) pooled together with the other Masjid Liaison Officers, (ii) placed in a pool of his own, or (iii) in some other selection pool?
 - ii. How long would a fair consultation procedure have taken?
4. What was the outcome of a fair redundancy procedure likely to have been? What was the percentage chance that a fair procedure would still have resulted in the Claimant's dismissal?
5. Alternatively, if a fair procedure had been adopted, would this have affected when the Claimant would have been dismissed?

Recoupment

6. Given that the Claimant was awarded Universal Credit, a recoupable benefit following his dismissal, what is (i) the amount of the prescribed element, (ii) to what period is that attributable, and (iii) to what extent does the monetary award exceed the prescribed element?

Procedure, documents and evidence heard

8. The parties submitted the following documents as evidence:
 - a. A bundle of documents of 131 pages
 - b. A supplementary bundle of 87 pages

- c. A witness statement from the Claimant dated 3 May 2024
- d. A witness statement from Mr Musa from the Respondent dated 3 May 2024
- e. A Schedule of Loss each

9. I heard oral evidence from Mr Musa for the Respondent and from the Claimant.

10. I have carefully considered the documentary evidence that I was referred to during the hearing, together with the parties' oral evidence and written closing submissions.

Relevant Law

11. Section 123(1) of the Employment Rights Act 1996 provides:

- a. *"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."*

12. I have also relied up on the principles applicable to assessing compensation where a Polkey reduction is being considered, as set out in Software 2000 Limited v Andrews & Ors [2007] ICR 825 at [54]:

- a. *"In assessing compensation the task of the Tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice.*

...

- b. *The Tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been;*

and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.”

Finding of Fact and Conclusions

13. The parties accept that the basic award has been extinguished by payments already made to the Claimant. I therefore need only assess the compensatory award.

14. The compensatory award is the amount I consider just and equitable having regard to the loss sustained by the Claimant in consequence of the dismissal and which is attributable to the actions of the Respondent.

15. This award is to fully compensate the Claimant as if he had not been unfairly dismissed, but not to award a bonus or to punish the Respondent.

Issue 1 - What financial losses were sustained by the Claimant in consequence of the dismissal, insofar as that loss was caused by the Respondent?

16. I accept the Claimant's evidence that he has not had equivalent income to that which he received from the Respondent from the date of his dismissal until 1 July 2022. He did admit that he was in receipt of benefits and had done occasional exam invigilator work during that period, but that the latter was only during exam time and was on a part-time basis.

17. He has therefore claimed 86 weeks of lost earning from his dismissal (31 October 2020) until his full-time carer role began on 1 July 2022. Whilst I accept these losses as being accurate, I do not accept that they are entirely caused by the Respondent. This goes to a need to mitigate loss on which I will now explain my findings.

Issue 2 - Should the compensatory award be reduced for any failure by the Claimant to mitigate his loss, and if so, by how much?

18. As for the mitigation of loss, I find that the Claimant was initially not able to find alternative employment due to health reasons, for the 16 week period from the date of his dismissal (31 October 2020) until 3 March 2021. He had provided evidence of Fit Notes from his GP showing that he was unable to work during that time due to “acute stress reaction.” I accept the Claimant’s evidence that this was due to the stress of having been made redundant. I conclude that this period of loss was attributable to the Claimant’s unfair dismissal caused by the Respondent.
19. I have then considered the period after that initial 16 weeks i.e. from 3 March 2021 onwards. The Claimant provided evidence of job applications he had made in March 2022 but, when questioned about the period from March 2021 (when the Fit Notes expired) until the March 2022 applications, it was not clear to me what the Claimant had been doing. Although I acknowledge that the burden of proof is on the Respondent as regards mitigation of loss, I am permitted to look at all the evidence before me in the round. I find it telling that the Claimant has provided evidence of mitigation for the period from dismissal to March 2021 *and* from March 2022 to July 2022, but nothing as regards mitigation for the one year period in between.
20. The Claimant gave evidence that he was depressed in that period. However, he conceded that he did not have a medical diagnosis of that condition. His only other justification was that he had felt stressed about his original Employment Tribunal claim (which was heard on 22 September 2021) and he had been busy dealing with that case, the reconsideration application and the appeal. However, I do not consider that the impact of having to deal with Tribunal proceedings is a good enough reason to justify not seeking and finding alternative employment for a one year period. The vast majority of Employment Tribunal claimants can (and do) pursue Tribunal proceedings whilst also searching for, or being in, work.
21. I accept the Claimant’s evidence that it was difficult to find alternative work in the same sector and location, partly because of the stigma of having

been made redundant. However, I do not think that reasoning justifies a claim for lost earnings, all attributable to the Respondent, of 86 weeks. That would not be just nor equitable.

22. Although I also appreciate that the Claimant enjoyed his job and would have liked to have found another role in the same sector, it is my conclusion that he could (and should) have been able to find alternative employment in a different sector paying a comparable salary of around £25,000 within a year of his dismissal. I would not expect the Claimant to have changed careers immediately but doing so at some point within 52 weeks of dismissal (even taking account of the 16 weeks when he had an acute stress reaction) would have been reasonable.

23. I therefore consider it just and equitable to make an initial compensatory award to the Claimant of 52 weeks' pay.

Issue 3 - Should a Polkey deduction be made to reflect the chance that the Claimant would have been dismissed in any event had the respondent acted fairly?

24. On the question of pooling, it seems clear to me from the evidence of Mr Musa and the Claimant that there was considerable overlap between the MLO roles and other roles within the Respondent that were described by the parties as "fundraising roles".

25. In addition, from the written evidence of the Claimant's KPIs, it is clear that he had national, as well as local, responsibilities.

26. I did not find it credible for the Respondent to say that the Claimant's role was unique and therefore incapable of consideration for redundancy with others. That appears to me to be too convenient an excuse for avoiding carrying out a proper pooling exercise.

27. For example, there were a number of overlaps between the work of the

Claimant and the work of Mr Musa and Mr Atcha. The written evidence (and the oral evidence of the Claimant and Mr Musa) made it clear that there were a number of potential pools into which the Claimant could have been placed when considering redundancy selection.

28. He could have been in a pool with Mr Musa (both of whom were previously furloughed). Alternatively, the Claimant could have been in a pool of 3 with Mr Musa and Mr Atcha, all of whom I find had partly overlapping responsibilities in the Bolton branch. Alternatively, he could have been pooled with the other Assistant MLOs from all branches, some of whom the Claimant had been training. It was agreed by the parties in their evidence that that some MLOs may have been volunteers. However, I accept the Claimant's evidence most were not. The ones that were employed would have been suitable for forming a national pool with the Claimant. In short, there was a good deal of overlap and interchangeability of roles, both locally and nationally. I do not find evidence that the Claimant's role and responsibilities were so unique as to mean that he could not have been placed in a pool with comparable colleagues.

29. Aside from pooling for redundancy, there was also the question of whether a relocation was an option, for example to the Croydon branch. My finding from the evidence of the Claimant and Mr Musa is that this was not discussed with the Claimant. The Respondent simply made assumptions about the Claimant, based on his caring responsibilities for his parents, and his preference for home working, which meant that relocating was never explored with him. This is a further failing on the part of the Respondent by not considering alternatives to redundancy such as whether a role could be found in another branch.

30. In conclusion I find that a fair procedure was not followed because there were a number of relocation options that were not explored, as well as pooling options ranging from two people (the Claimant and Mr Musa) to around ten people (the Claimant, plus all of the other MLOs nationally).

Issue 4 - What was the outcome of a fair redundancy procedure likely to have been? What was the percentage chance that a fair procedure would still have resulted in the Claimant's dismissal?

31. This question is of course speculative in nature because no such pooling took place. However, in my view, on balance and taking an average of the potential pool sizes, I think there was a 25% chance that the Claimant would have been dismissed, even if he had been pooled correctly and a fair process followed.

Issue 5 - Alternatively, if a fair procedure had been adopted, would this have affected when the Claimant would have been dismissed?

32. The Claimant's redundancy consultation process with the Claimant was reasonably thorough. There were a series of meetings over a 23 day period. In my view, if a pooling exercise had taken place, it would most likely have also run to a similar timetable. I therefore do not conclude that a fair procedure (as regards pooling) would have affected *when* the Claimant would have been dismissed.

Remedy calculation

33. Based on the above conclusions in relation to a 52 week period of loss attributable to the Respondent, and a 25% Polkey reduction, I agreed the following calculations for the compensatory award with the parties' representatives:

- a. 52 weeks x £406.44 net weekly pay = £21,134.88. The weekly net pay was calculated using an online calculator with the Claimant's salary of £25,728 and his tax code of 1250L for the 2020/2021 tax year. The parties agreed that this produced a net weekly pay of £406.44.
- b. The loss of employer pension contributions was agreed at a rate of £11.24 x 52 weeks = £584.48.
- c. Combining the above two amounts gives a total of £21,719.36
- d. 25% of that total is £5,429.84, which needs to be deducted to take account of Polkey.
- e. £21,719.36 minus £5,429.84, gives a compensatory award of £16,289.52.

- f. I also award £500 for loss of the Claimant's statutory rights.
- g. The total award is therefore £16,789.52.

Recoupment

34. The Employment Protection (Recoupment of Benefits) Regulations 1996 apply to this award.

- a. the total award is £16,789.52
- b. the "Prescribed Element" is £16,289.52
- c. the "Prescribed Period" is 31 October 2020 to 30 October 2021.
- d. the amount by which the monetary award exceeds the Prescribed Element is £500.

Employment Judge Robinson

Date 16 May 2024

ANNEX TO THE JUDGMENT (MONETARY AWARDS)

Recoupment of Benefits

The following particulars are given pursuant to the Employment Protection (Recoupment of Benefits) Regulations 1996, SI 1996 No 2349.

The Tribunal has awarded compensation to the claimant, but not all of it should be paid immediately. This is because the Secretary of State has the right to recover (recoup) any jobseeker's allowance, income-related employment and support allowance, universal credit or income support paid to the claimant after dismissal. This will be done by way of a Recoupment Notice, which will be sent to the respondent usually within 21 days after the Tribunal's judgment was sent to the parties.

The Tribunal's judgment states:

- (a) the total monetary award made to the claimant;
- (b) an amount called the prescribed element, if any;
- (c) the dates of the period to which the prescribed element is attributable; and
- (d) the amount, if any, by which the monetary award exceeds the prescribed element.

Only the prescribed element is affected by the Recoupment Notice and that part of the Tribunal's award should not be paid until the Recoupment Notice has been received.

The difference between the monetary award and the prescribed element is payable by the respondent to the claimant immediately.

When the Secretary of State sends the Recoupment Notice, the respondent must pay the amount specified in the Recoupment Notice to the Secretary of State. This amount can never be more than the prescribed element of any monetary award. If the amount is less than the prescribed element, the respondent must pay the balance to the claimant. If the Secretary of State informs the respondent that it is not intended to issue a Recoupment Notice, the respondent must immediately pay the whole of the prescribed element to the claimant.

The claimant will receive a copy of the Recoupment Notice from the Secretary of

State. If the claimant disputes the amount in the Recoupment Notice, the claimant must inform the Secretary of State in writing within 21 days. The Tribunal has no power to resolve such disputes, which must be resolved directly between the claimant and the Secretary of State.