EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms D Clarke	**v**	**General Medical Council**

Heard at: London Central (in chambers)

On: 4 February 2025

Before: Employment Judge **P Klimov** (sitting alone)

JUDGMENT

Any compensatory award to the claimant shall be reduced by 100% to reflect the claimant's unreasonable failure to mitigate her loss.

REASONS

1) By the Judgment dated 1 November 2024, the Tribunal found that the claimant's complaints of discrimination arising from disability, indirect disability discrimination, failure to make reasonable adjustments, and unfair dismissal were well-founded. The Tribunal dismissed the complaint of direct disability discrimination.

2) The Tribunal also found that the claimant's refusal to accept the offered alternative role in the Policy team was unreasonable.

3) The Tribunal listed a remedy hearing on 13 and 14 March 2025 to determine what compensation should be awarded to the claimant.

4) At the end of the liability hearing, the respondent applied for the Tribunal to reconsider its decision that no reduction shall be made to the basic or compensatory award pursuant to Section 122(2) and Section 123(6) of the Employment Rights Act 1996.

5) By its decision, dated 2 November 2024, the Tribunal refused the respondent's application for reconsideration. However, in refusing the application, the Tribunal said (referring to its liability Judgment) that whilst the claimant's conduct in refusing the alternative role could not be said to be culpable or blameworthy within the meaning of Section 122(2) and Section 123(6) of the Employment Rights Act 1996:

   "3. The Tribunal found that although the claimant's refusal in those circumstances "appeared to us irrational", and that if the Tribunal were dealing with the question whether by refusing that offer the claimant acted unreasonably within the meaning of s.141 ERA, thus losing her entitlement to a redundancy payment, we would have found that she had."

6) The Tribunal also decided that:

   "*22. Therefore, the reason for the dismissal (and hence the sole causal link to "the dismissal") remained the same throughout, and what the claimant contributed to by her unreasonable refusal to accept the Policy Administrator role was to the loss she suffered as a result of the dismissal, which is a relevant matter for the purposes of the question of mitigation of loss under s.123(4) ERA, but not for the purposes of contributory fault reduction under s.123(6) ERA*."

7) Neither party appealed or applied for a further reconsideration of the liability Judgment or the decision on the respondent's application for reconsideration.

8) On 18 December 2024, the respondent applied to have the issue of mitigation determined in advance of the remedy hearing on the papers. The respondent relied on the Tribunal's decision in the liability Judgment that the claimant's refusal to accept the offered alternative role in the Policy team was unreasonable, and the Tribunal's pronouncements in its decision on the respondent's reconsideration application, in particular at paragraphs 3 and 22 (quoted above).

9) On 31 December 2024, the claimant's legal representative presented the claimant's submissions, resisting the application.

10) On 6 January 2025, I granted the application and directed the parties to send their written submissions on the issue of mitigation. The claimant presented her submissions on 20 January 2025. The respondent presented its reply on 27 January 2025.

11) Having considered the parties' submissions, I find that the respondent is right that in light of the Tribunal's decision that the claimant's refusal to accept the alternative role was unreasonable, and the Tribunal's further decision, as recorded in paragraph 3 and 22 of the decision on the reconsideration application, the inevitable conclusion is that the claimant has failed to take reasonable steps to mitigate her loss and therefore any compensatory award must be reduced by 100%.

12) The claimant's submissions of 20 January 2025 fail to address the central issue, namely on what basis she says she should be entitled (in addition to a basic award) to be awarded compensation for financial losses flowing from her dismissal, despite the Tribunal's finding that her refusal to accept the Policy Administrator role was unreasonable and further Tribunal's pronouncement on this issue.

13) Instead, in her submissions the claimant impermissibly seeks to reopen the issue of reasonableness of her refusal to accept the Policy Administrator role. As was explained in the Tribunal's orders dated 6 January 2025, *"[t]his issue is res judicata and will not be re-opened at the remedy hearing*".

14) The claimant does not dispute the respondent's submission that "*[p]ursuant to Fyfe v Scientific Furnishings [1989] ICR 648, EAT (and applied by the Court of Appeal in Wilding v British Telecommunications Plc [2002] EWCA Civ 349), a claimant cannot recover damages for any loss which they could have avoided by taking reasonable steps to do so*", as representing the correct legal principle (with which submission I agree).

15) In response the claimant says:

"I submit that I had taken all reasonable steps to reduce and or avoid my losses. The Respondent's redeployment policy said that I had to show an expression an interest in the Policy Administrator role, which I did not show an interest in for good reasons I had given at the time. I exercised my contractual and lawful right. It would now be unfair to penalise me because the Respondent does not like the consequences of its own policy. Therefore, the question to address would be whether I have sought to mitigate my losses since being dismissed? I submit I have for reasons I have already given in these submissions."

16) This, however, is no more than the impermissible attempt to go behind the Tribunal's decision that the claimant's decision to refuse the Policy Administrator role was unreasonable and "*appeared to [the Tribunal] irrational*".

17) For completeness, the claimant's submission that it would be "*unfair to penalise [her] because the Respondent does not like the consequences of its own policy*" is misconceived. It is not a question of penalising the claimant, but applying the well-established legal principle (not disputed by the claimant) that the claimant is not entitled to recover loss, which she has unreasonably failed to mitigate, pursuant to the common law duty to take reasonable steps to mitigate loss.

18) In the present case, had the claimant not unreasonably refused the offer of the Policy Administrator role, she would have remained employed by the respondent on the same salary and benefits, and consequently would not have suffered any financial loss arising from her dismissal. Accordingly, by

refusing that role she has unreasonably failed to mitigate that loss and consequently is not entitled to recover it.

19) It follows, any compensatory award due to the claimant must be reduced by 100%.

20) In light of this Judgment, the parties must consider and write to the Tribunal as soon as possible to confirm whether the remedy hearing is still required, and if so, whether it can be reduced to 1 day.

Employment Judge Klimov

4 February 2025

Sent to the parties on:

12 February 2025

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For the Tribunals Office