

THE INDUSTRIAL TRIBUNALS

CASE REF: 13608/18

CLAIMANT: Boryana Chimbuleva

RESPONDENT: G & C Pubs Ltd

JUDGMENT ON REMEDY

The decision of the tribunal is that the respondent is ordered to pay to the claimant the sum of **£11,666.19** as a remedy for being unfairly dismissed. This is comprised of the following elements:

- (i) **Basic Award - £755.19** (being the figure agreed by the parties at the Remedies Hearing)
- (ii) **Compensatory Award - £10,911.00** for the period from the claimant's dismissal on 15 June 2018 until 31 August 2019 when her continuing loss ceased.

CONSTITUTION OF TRIBUNAL

Employment Judge: Employment Judge Gamble

Members: Mr W Mitchell
Mr B McCreight

APPEARANCES:

The claimant represented herself.

The respondent was represented by Mr P Moore and Ms C L Mooney of Copacetic Business Solutions Ltd.

Background

1. The claimant was dismissed from her position with the respondent in the circumstances described in the Decision on liability issued to the parties on 30 January 2020.
2. The Remedies Hearing was delayed as a consequence of the coronavirus pandemic.
3. The claimant, having had the choice of remedies explained to her as required by Article 147 of the Employment Rights (Northern Ireland) order 1996, confirmed that she wished to receive compensation for her loss.

4. The claimant gave oral evidence in chief and was cross examined as to her losses. The tribunal also considered the documents contained in bundles which had been lodged in the tribunal to which it was referred.

Relevant Law

5. The Employment Rights (Northern Ireland) Order 1996

157.—(1) Subject to the provisions of this Article and Articles 158, 158A, 160 and 161, 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.

...

(4) In ascertaining the loss referred to in paragraph (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of Northern Ireland.

...

(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

6. As noted in **Harvey** on Industrial relations and Employment Law at paragraph 2525.01 the basic function of compensation is to compensate for the loss actually suffered, not to penalise the employer for his actions, nor to give a gratuitous benefit to the employee.
7. In **Bessenden Properties Ltd v Corness [1974] IRLR 338**, the Court of Appeal in England and Wales observed: 'Questions of mitigations are questions of fact. When one party seeks to allege that another party has failed to mitigate a loss, the burden of proof is upon the party making the allegations'.
8. The Court of Appeal in England and Wales held in **Wilding v British Telecommunications plc [2002] EWCA Civ 349**, that (i) it was the duty of the claimant to act in mitigation of his loss as a reasonable man unaffected by the hope of compensation from his former employer; (ii) the onus was on the respondent as the wrongdoer to show that the claimant had failed in his duty to mitigate his loss; (iii) the test of unreasonableness is an objective one based on the totality of the evidence; (iv) in applying the test, all the surrounding circumstances should be taken into account; and (v) the court or tribunal should not be too stringent in its expectations of the injured party.
9. In **Morgan v Alpha Plus Security Ltd [2005] IRLR234** the EAT held that the tribunal concluded that since Incapacity Benefit is not a recoupable benefit under the Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996, the employee must give credit for it in the calculation of his loss. The EAT stated "In the circumstances of this case, it was just and equitable to make a full deduction of the amounts received,

particularly as the applicant would otherwise be in a better position than had he remained in employment.”

The Respondent’s submissions

10. The tenor of the submissions of the respondent can be summarised as follows:
 - a. the claimant failed to mitigate her losses by not seeking alternative employment in the hospitality industry in her town or the surrounding locality;
 - b. the claimant, in anticipation of a successful outcome to her claim, had sold goods online and worked as an interpreter in order to maximise her award;
 - c. the claimant was out of the country, unavailable for work and had failed to mitigate her losses for the periods of 9 to 25 October 2018, 19 December 2018 to 3 January 2019 and 21 May 2019 to 4 June 2019 and had the financial wherewithal to travel abroad;
 - d. that the claimant’s conduct had contributed to her dismissal and that any award should be reduced;
 - e. that the claimant, as a polyglot (speaking Bulgarian, English and Russian) had always intended to resign and pursue a career as an interpreter and that her award should be reduced in light of this;
 - f. that her housing benefit entitlement and amounts received from a small number of sales through an online auction site should be considered as income which mitigated her loss flowing from the dismissal; and
 - g. that the claimant was falsely inflating her losses.

Relevant Findings

11. The claimant sustained loss as a result of her dismissal from the date of the dismissal, namely 15 June 2018 until 31 August 2019, at which point her earnings exceeded what she had been paid when in the respondent’s employment.
12. The amount of a week’s pay had been agreed at £503.46 gross at the Liability Hearing.
13. The claimant has mitigated her losses by pursuing work as a self-employed translator/interpreter/bi lingual advocate. The tribunal accepts the claimant’s evidence that in the circumstances of her suspension and dismissal and their effect upon her that she did not feel able, by reason of depression, to seek work in the hospitality industry, after a lengthy career within it. The tribunal finds, contrary to the respondent’s submission, that the decision by the

claimant to pursue an alternative career does not equate to a failure to mitigate her loss or an attempt to inflate her losses in anticipation of a successful outcome to her tribunal claim. In any event there was no evidence put before the tribunal regarding available jobs which the claimant could have applied for.

14. The tribunal accepts that the claimant was out of the jurisdiction visiting family, including for her son's wedding, on the dates set out at paragraph 10c above. The tribunal accepts the claimant's evidence that she sold a small number of personal items through an online auction site and received a small number of money transfers from family and a friend around this time, which assisted her in funding this travel. The tribunal finds that this was not a business activity and has not treated the amounts received by the claimant as income which should be treated as mitigation of her loss. The tribunal does not find the claimant's travel which occurred over the period of time to be excessive.
15. The tribunal does not accept that there is any basis for any submission of contributory fault on the part of the claimant arising from its findings in the liability decision and for the avoidance of doubt confirms it does not find that the claimant's conduct gives rise to any finding of blameworthy or culpable conduct which caused or contributed to the dismissal, and accordingly, no question of consideration of a reduction of the claimant's compensation arises.
16. The tribunal accepts the claimant's evidence and finds that she would not have pursued a career as an interpreter but for the humiliation she felt as a result of being suspended and dismissed. The tribunal's finding in this regard takes account of the evidence that the claimant had worked for the Inter Ethnic Forum before her dismissal.
17. The claimant applied for a qualification to allow her to undertake further translation work while she was suspended and before she was dismissed and sought to recover the costs associated with undertaking this qualification. The tribunal was not satisfied on the balance of probabilities that the claimant would not have undertaken this qualification, had she not been dismissed and therefore the tribunal declines to award any sum in respect of the costs associated with the claimant undertaking this qualification.
18. The claimant's claim form did not disclose any application for recoupable benefits. The claimant provided a letter which confirmed that she did not receive any recoupable benefits for the purposes of the Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations (Northern Ireland) 1996. The tribunal finds that the claimant applied for and was awarded Housing Benefit following her dismissal. The tribunal was not referred to any authority on the issue of whether this sum should be treated as sums received in mitigation by either party. The sums received are not recoupable. If these are disregarded, the effect will be to punish the respondent and to give the claimant a benefit beyond the actual loss she has sustained. For this reason, the tribunal has treated these sums

as mitigation and has taken them into account in assessing what amount is just and equitable for the claimant to receive. This approach is consistent with the reasoning in **Morgan** (see paragraph 9 above). The figures put forward by the respondent's representative for Housing Benefit are set out at pages 49 to 50 and 52 to 52 of the Remedies Bundle. These figures were not disputed by the claimant. Whilst there are some documents which were not opened or explained to the tribunal which might suggest alternative figures, the tribunal has used the undisputed figures put before the tribunal at the Remedies Hearing.

19. The tribunal has used the figures provided by the claimant in respect of her self-employed earnings to calculate her losses. In the absence of any evidence or explanation as to what her net profit was from that self-employment, as a result of allowable deductions (if any), the tribunal has relied on the gross figures provided by the claimant.
20. The tribunal awards the following sums:

(1) Basic Award –

Gross weekly pay of £503.46 x 1.5 = £755.19

(The tribunal was given two different figures by the respondent, the figure of £755.19 (which is the correct figure, given the claimant's agreed gross weekly wage, her length of service and her age at dismissal) and an alternative figure of £700.00, to which the claimant was also agreeable. The tribunal has awarded the Basic Award calculated using the statutory calculation, based on the agreed figure of for gross weekly wage of £503.46).

(2) Compensatory Award:

Total that the claimant would have earned if not dismissed –

(i) Loss of net earnings from 15 June 2018 to 31 August 2019

63 weeks at net figure of £407.36 = **£25,663.00**

(ii) Loss of Pension contributions 15 June 2018 to 31 August 2019

63 weeks - agreed figure = **£495.00**

(iii) Loss of Statutory Rights (being the figure agreed by the parties)

= **£500.00**

Total loss = £26,658.00

Less

(a) Income earned from claimant's self-employment during 15 June 2018 to 31 August 2019 (including £54.00 omitted from Schedule of Loss)

Less = **£13,675.00**

(b) Housing benefit = **£ 2,072.00**

(received during the period 15 June 2018 to 31 August 2019)

Total Losses **£25,663.00 + £495.00 + £500** = **£26,658.00**

Less Income - **£13,675.00 + £2,072.00** = **(£15,747.00)**

Total Compensatory Loss **£10,911.00**

21. This is a relevant decision for the purposes of the Industrial Tribunals (Interest) Order (Northern Ireland) 1990.

Employment Judge:

Date and place of hearing: 9 October 2019 and 17 December 2019, Belfast.

Date decision recorded in register and issued to parties: