**Case Number: 3200004/2017**

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# EMPLOYMENT TRIBUNALS

**Claimant:** **Mr S Owen**

**Respondent:** **Balfour Beatty Group Ltd**

**Heard at:** **East London Hearing Centre** **On: 24 May 2017**

**Before:** **Employment Judge Prichard**

**Representation**

Claimant: Mr N Caiden (Counsel, instructed by Neves Solicitors, Milton Keynes)

Respondent: Mr C Milsom (Counsel, instructed by Pinsent Masons LLP, Glasgow)

## RESERVED JUDGMENT

**The judgment of the Employment Tribunal is that:-**

**(1) Under section 122 of the Employment Rights Act 1996 there are no deductions from the basic award for the principle of contributory conduct. Section 123(6) of the Employment Rights Act does not apply in this case.**

**(2) No deductions are made under the *Polkey* principle under section 123(1) of the Employment Rights Act 1996.**

**(3) The claimant is awarded a basic award of the agreed amount £6,706 and a compensatory award of £23,294.**

**(4) The Recoupment Regulations 1996 apply to the compensatory award. The prescribed element is £22,944. The period for the prescribed element is Wednesday 23 November 2016 to Tuesday 14 February 2017. The explanatory notes annexed to the judgment explain the effect of the Regulations.**

# REASONS

1 The claimant, Mr Steven Owen, was employed by Balfour Beatty for 16 years from 11 September 2000 when he was 18 years old, until 18 November 2016 when he resigned in circumstances he claimed amounted to constructive dismissal. He is a civil engineer. When he joined he had recently achieved a BTech Higher National Diploma in Civil Engineering studies. Previously he had GCSEs and a GNVQ in construction and the built environment. He has experience in CAD and other technical skills relevant to his profession. He worked on a variety of projects for Balfour Beatty. There were several motorway and road bridge constructions, and early on he worked on the Channel Tunnel Rail Link. He also worked on the Kings Cross Northern Ticket Hall.

2 He lives with his fiancée in a property in Overstone outside Northampton. When working he also lived in Leighton Buzzard, Buckinghamshire. He owns and pays a mortgage on a house on the north side of Anglesey where his parents now live and where he grew up. Welsh is his first language.

3 There had been no problems with the claimant's employment until various payment problems arose in 2015 which led to a grievance and a grievance appeal which was substantially upheld in the claimant's favour. In the end the money that was acknowledged to be due and owing to him was not paid for many months more, by which time he had resigned claiming constructive dismissal. The circumstances reveal chronic inefficiency on the part of the respondent's payroll/HR to a level that was quite dysfunctional. It is on that basis that this is one of the very rare cases where the respondent has admitted liability, in a constructive unfair dismissal claim.

4 The claimant's ETI claim form was presented on 23 December 2016. At the time of the ET3 response, sent on 3 February, all outstanding money, then in excess of £2,000, had been paid to the claimant. This hearing is therefore for remedy only. Unusually in a constructive dismissal case the respondent is taking both *Polkey* points and points of contributory conduct both of which can in principal apply to a constructive dismissal on the right facts. It is not a category error. The most substantial point the respondent takes, however, is on mitigation.

5 For the purposes of this remedy hearing I have therefore heard much of the disputed evidence that related to liability in order to evaluate these contentions. One day has been a tight time schedule to hear all evidence, submissions and give judgment what had been set down for a 3-day hearing when liability was disputed. Liability was only recently conceded. The claimant's witness statement for the hearing was the witness statement for the liability hearing. I therefore have to set out the context.

6 Because of what is now agreed to have been an error, the claimant was overpaid £10,000 gross equating to £5,797.27 net in the April 2015 payroll. Initially the claimant considered this payment was intentional, possibly as a reflection of his Performance Development Review (PDR) which had been finalised by his line manager Mr Phil Willson in January 2015. However the claimant stated to the tribunal today that £10,000 was more than he had expected as a bonus. It was a surprisingly round figure. On the payslip the payment was described simply as "Ex gratia". How

this happened is anybody's guess.

7 Subsequently in June the company sought to recoup the payment. There were two letters first on 16 June, and the second 24 June 2015. The first asked the claimant simply to make a cheque payable to the respondent or to transfer the funds on online banking. The second suggested recouping the sum in eight equal monthly instalments of £1,250 gross to ensure that the payments were recovered in the financial year 2015/16.

8 At the same time as this, the claimant was owed premiums for night work, and also additional subsistence payments which are non taxable. The respondent's payroll conceded that this was due. The amounts were £4,248.53 gross shift premium and also a payment of £422.89 bonus payment. The figures do not match up exactly but I have accepted the respondent's final calculation that they come to £3,883.77. Therefore the difference between what the claimant owed the company and what the company owed the claimant came to £1,913.70. These final figures are apparently agreed.

9 This gave the claimant a cash flow difficulty because he had spent the overpayment money and wished the rate of repayment to be considerably slower than £1,250 per month. Ultimately this was overseen by a manager with whom the claimant had considerable personal issues. It was Mr Kieran McGibbon, Project Director on the project he was then working on. Mr McGibbon proposed writing off the difference between what the company owed the claimant and what the claimant owed the company. This result would have meant the claimant would receive a net extra payment of £1,913.70.

10 Despite the apparent generosity of that offer the claimant was not content. It seems most likely that personal issues between himself and Mr McGibbon were responsible for this. The claimant also says that this matter had gone on far too long with payroll. This offer was made on 27 November 2015, by which time the claimant's written grievance was in an advanced state of preparation. It was sent to the respondent only 10 days later. It was 13 pages containing a detailed chronology. The claimant had objected to the way in which Mr McGibbon had asked him, in an extremely long email, about his personal circumstances, as if he was challenging the claimant's integrity around expense and subsistence claims, and querying his residences and domestic circumstances.

11 The grievance was sent on 7 December 2015. The grievance was heard on 20 January 2016 by another project director Mr George Pargeter. The claimant was represented by staff representative Ms Susan West who attended the hearing via telephone.

12 The outcome letter from Mr Pargeter was on 29 February 2016. He decidedthat Mr McGibbon's offer of writing off the debt of £1,913.70 net was fair and reasonable. He dealt with a deduction of £230 from the August salary and decided it had been wrong and that it should be paid back in full. On the expenses he held that these should have been paid and would be paid without further delay. However, he did not uphold the claimant's request for a transfer to a different part of the business (i.e. away from Mr McGibbon).

13 The claimant exercised his right of appeal on 14 March. The grievance appeal was heard by a different director Mr Julian Lamb. The meeting took place on 12 April 2016 but the outcome did not follow for another 3 months until 11 July 2016. Mr Lamb agreed with the finding on the write-off, £1,913.70 being fair and reasonable and also agreed with Mr Pargeter's decision similarly agreed an amount was owing of £230 and an additional £115.56 making £345.56 which would be payable to the claimant. He also agreed an amount of expenses of £1,892 which had been claimed and which would be non-taxable. He also attached to his letter a detailed schedule of unpaid payments.

14 Meantime the claimant had been off sick since 7 September 2015, with a diagnosis on his Med3 certificate of stress at work. He never returned to work at Balfour Beatty at any stage before his resignation which took effect on 18 November 2016 by letter of 17 October 2016 giving one month's notice. One would have thought that the respondent would have been chastened by the obvious delays in dealing with the grievance and then huge delays in repayments being made, compounded by the initial error of £10,000 overpayment, but despite the finding on the grievance appeal it was not until January 2017 that the final amounts outstanding were paid after the claimant had presented his ETI claim form to the tribunal.

15 That enabled the respondent in its ET3 response to the tribunal to say all outstanding monies had been paid. It is therefore not hard to see why the respondent in this case has chosen not to dispute liability. Apparently there was a long string of tedious correspondence internally between Mr Lamb and payroll/HR.

16 I have described the claimant's sick leave as "elective" during the course of this hearing. Illness should not be voluntary. However the respondent has not tackled it as long-term absence, for whatever reason. There has been no contact with occupational health. The claimant's stance latterly was clear and not unreasonable. He would disengage from efforts to get him to return to work until the sums due to him from the grievance appeal had been paid. He made that clear in an email to Ryan Hunt of HR dated 11 October 2016, shortly preceding his resignation letter of 17 October.

17 Albeit he was signed off work presumably as "should refrain from work" on Med3 medical certificates the respondent was working on a return to work for the claimant. The claimant was asked to provide a CV to show his experience and to see where he would be the best fit in Balfour Beatty's then current projects. There were many. Balfour Beatty is the UK's largest construction company.

18 In these proceedings the claimant, himself a lay person, has described the "last straw" as a letter he received from HR entitled (technically wrongly so): "Unauthorised absence from work – first letter".

19 The respondent had agreed to remove the claimant from the entire sphere of influence of Mr McGibbon. This was why they were trying to allocate him to another project. I make no finding upon whether it was a breach of contract for the respondent to require the claimant to provide a CV, but does not seem an unreasonable step. Eventually a "best fit" was identified in a joint venture between the respondent and Skanska, another construction firm, on one of the M25 projects. If the claimant was to

be allocated to that project his manager would have been the survey manager Mr Mark Lawton. He was a Skanska manager not Balfour Beatty manager. This can happen in joint ventures. The claimant had been on a joint venture before but his manager on that had, as it happens, been a Balfour Beatty manager.

20 On 28 and 29 September 2016, there was a succession of emails with Ryan Hunt of HR and Phil Willson, into which Mark Lawton was then copied and into which the claimant too was then copied. He was able to see the full thread.

21 On 23 August the fifth email in that thread, from Philip Willson to Ryan Hunt said the following:

> "Hi Ryan
>
> Have you made any progress with Steve's placement? In discussions with the A14 team it would seem that they would not like him on the survey team at A14 as the team from the M25 junction 30 are now on the A14 where Steve's issues originated some of them personal and all the available slots are currently allocated."

To which Mr Hunt replied:

> "Hi Philip
>
> Thanks for the email I was unaware of the feelings from Steven's previous work colleagues."

22 On 28 September Mr Willson sent this same thread to Steve Owen and cc Mark Lawton saying:

> "Hi Steve
>
> Short notice but can you go for an interview for the A14 project tomorrow at 2.30 see below. If you contact Mark Lawton he'll be able to give you a location. It is near Swavesey close to St Ives."

He added Mark Lawton's number. Mark Lawton then followed up to with an Steve Owen saying:

> "Hi Steve
>
> I haven't heard anything. Are you coming today?
>
> Regards
> Mark"

23 It was clumsy of Mr Willson. He forwarded the whole thread to the claimant and thus the claimant could read there may have been issues between him and his previous work colleagues. The claimant, understandably, says that is why he would not go to an interview there just to be told that he was not wanted.

24 Ryan Hunt later followed this up with an email asking Mr Lawton if the claimant had been in touch with him to arrange an interview. Mr Lawton replied to say he had not and Mr Lawton listed the occasions on which he had attempted to make contact

with the claimant.

25 There were 2 emails from Philip Willson and an email from Mark Lawton himself as recorded above. They were the subject matter of the "Unauthorised absence from work - first letter", recording all the attempts made to contact the claimant by telephone and by email to which the claimant had not responded. It is likely that Mr Lawton would have found this extremely irritating. His email of 7 October 2016 to Ryan Hunt states:

> "Hi Ryan
>
> It's not my responsibility to chase BB employees. However I believe that Phil has done more than enough from my point of view to get in contact with Steve.
> Even if the interview has been missed I would expect any company employee to follow up the request to contact their line manager / parent company/potential future opportunity."

26 The claimant was saying that he would not engage with the process until he had received the monies he was promised he would be paid in the August pay run.

27 Although he calls the unauthorised absence letter the last straw the claimant did not mention it in his resignation letter at all. The claimant was right to feel upset that Mark Lawton had been copied into emails talking about his issues and that colleagues had not been happy with him.

28 The claimant somehow imagines this has poisoned his name in the entire of the construction business in the UK which the tribunal finds fanciful. It is far from certain that Mr Lawton would have bothered to read that far down the thread anyway.

29 On this evidence I am asked to consider whether the claimant contributed to his dismissal i.e. his constructive dismissal. S 123(6) of the Employment Rights Act 1996 reads as follows:

> "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."

The claimant's conduct has to be causative of the dismissal. The classic case is where some blameworthy conduct of the employee causes the respondent to react in a way which repudiates the contract of employment could give rise easily to a finding of contributory conduct in a constructive dismissal case.

30 In this case where the respondent had still, for no reason, failed to implement the conclusions of his grievance appeal in circumstances which were so extreme that the claimant was not unreasonable in suspecting a bad intention on the respondent's part. I cannot consider that any culpable conduct of his "contributed" to the "dismissal" i.e. to the action which caused his resignation.

31 I examined the claimant myself about why he would jeopardise his future employment with Balfour Beatty all for the sake of £2,000, whatever had happened to it. He responded the same every time. I do not consider the claimant's response to the conducts continuing failure to correct his payments was culpable or foolhardy in these extreme circumstances. I therefore make no finding of any contributory conduct.

32 Nor do I consider for the purposes of a basic award that it is "just and equitable" to reduce the amount of any basic award in this constructive dismissal under s 122(2) of the Employment Rights Act 1996.

33 The respondent's *Polkey* argument is as follows. The claimant had been absent for 14 months in which he had been paid full pay and was paid subsistence to which he was not strictly entitled. He was even paid expenses e.g. for fuel and tolls travelling to North Wales for Christmas to which he was not contractually entitled. Nonetheless the respondent does not seek to set that off against any unfair dismissal awards. The respondent states that the controversial "unauthorised absence from work" letter of 7 October 2016 was really the first step towards a dismissal which would have been for the length of the claimant's absence or his failure to report for duty, i.e. his failure to communicate when off sick and to cooperate in the attempt to re-engage him.

34 This argument is undermined in circumstances where the respondent was in fundamental breach of contract for not paying the claimant the money it was agreed he was owed. That was the reason why he did not engage. It was his stated reason and, I find, his actual reason. I do not consider the claimant was playing a tactical game as was suggested at one stage. There was a continuing string of payroll errors reasonably perceived as deliberate. It was extreme. Judging from the slow pace with which the claimant's grievance was dealt with I have no reason to think that the respondent could fairly and reasonably have dismissed the claimant for one of these two things within 3 months as contended on behalf of the respondent. The final monies were not paid until after the claimant had spent one month in compulsory early conciliation and presented his ET1 claim form.

35 No positive evidence was called by the respondent to support the theory that the claimant would have been dismissed soon after he in fact resigned. The respondent was asking the tribunal to infer it from surrounding circumstances. This was speculative and vague to the point that decided authorities on *Polkey* consider it wholly inadequate where the burden of proof is firmly on the respondent. See *Software 2000 Ltd –v- Andrews* [2007] IRLR, 568, EAT. The burdens of proof on contribution, *Polkey*, and mitigation are all three on the respondent.

36 What has troubled me more is mitigation. The claimant's job search could reasonably have started when he gave notice on 17 October. His termination was inevitable. He could not have unilaterally withdrawn his notice, once given. I do not find legally that it is necessary for the principle of mitigation only to apply once dismissal has taken effect. A person can mitigate so that at the end of the notice period he has a job to go to avoid any loss of earnings at all.

37 I find the claimant's job search to be, in Mr Caiden's word, "scattergun" and somewhat extraordinary. I do not regard his belief that his reputation was sullied in the construction sector as a whole to be in any way realistic. It has also been contradicted by some evidence introduced from the claimant himself for the jobs he did apply for. It is not as if he did not apply for any construction jobs. He applied for some jobs that were unrealistic i.e. project manager roles for which he did not have the age or experience.

38 He applied, extraordinarily, for several other roles for which he had no qualification, proven aptitude, or experience save for in the field of motorcycles which is a major hobby of his. He applied for an unlikely range of jobs including probation officer, social worker, forestry commission recreation ranger. These seemed to be a very long, way from his skill set and qualifications. He applied for some more realistic construction jobs as well but not many. The tribunal cannot accept that there were so few.

39 He is now doing agency work which he obtained starting 15 February 2017. His current work involves quality testing motorcycles. He is paid an hourly rate of £9.61 which is approximately half the hourly rate he was paid by Balfour Beatty. He has no mechanical engineering qualification, just civil engineering, construction, and the built environment. Although the burden of proof is on the respondent, it is not a strictly evidential burden (as opposed to legal). Generally the only real information has to come from the party seeking compensation. Once it is has done, to some effect.

40 At the end of his notice period the claimant had no work. He should certainly be compensated for that. I do not consider it would be just and equitable to compensate him in an open-ended way for a future at half a salary a long way into the future. The claimant is now aged 35.

41 In this case the respondent offered the claimant £20,000 to settle the case; that was an open offer. The open counter offer was £40,000. £20,000 reflects approximately the full basic award and 28 weeks of net loss, that is just over 6 months total loss. At this disputed remedy hearing the respondent is arguing that I should award less than that amount offered. However, I do not consider it just and equitable to award that little.

42 The claimant's schedule of loss asks for differential losses in total until 18 November 2017 which is a full year's loss of earnings. I consider that excessive. Doing the best I can, as the parties never fully calculated the add-ons to the claimant's Balfour Beatty salary (subsistence allowance, bonus, company car etc), I consider that a total global figure of £30,000 to include an award loss of statutory rights of £350 would reflect the justice of the situation. That would equate to approximately 49 weeks of total net loss. Accordingly I make that award.

43 The prescribed element, (that is the compensatory award less the amount for the basic award and the loss of statutory rights), comes to £22,944. The balance, payable immediately, is £7,056.

Employment Judge Prichard

1 August 2017