EMPLOYMENT TRIBUNALS

Claimant: Mr I Potter

Respondent: Aquarius Fitted Bedrooms & Kitchens Limited

HELD AT: Manchester **ON:** 18 September 2017 & 22 September 2017 (in chambers)

BEFORE: Employment Judge Slater

REPRESENTATION:

Claimant: Mr W Parkinson, West Lancashire Law
Respondent: Mr B Henry, counsel

JUDGMENT ON REMEDY

The judgment of the Tribunal is that:

1. The respondent is ordered to pay to the claimant compensation of £12,005.70.

2. The Recoupment Regulations do not apply to this award.

REASONS

Facts

1. The effective date of termination was 30 January 2017 when the claimant resigned with immediate effect.

2. The claimant's date of birth is 23 July 1968. He was 48 years' old at the effective date of termination. He had completed 28 years' continuous service.

3. The claimant's gross weekly pay with the respondent was £420 and his net weekly pay £343.14. This did not vary from week to week. He was not a member of a pension scheme with the respondent and did not have any other contractual benefits.

4. The claimant did not claim job seekers' allowance after leaving the respondent. He gave unchallenged evidence that he spent three weeks, six hours a day, applying for jobs, sending out CVs and attending interviews, by telephone and in person.

5. The claimant received a written offer of new employment on 22 February 2017 and began work for his new employer on 6 March 2017. His gross salary is £19,600 per annum. His net pay varies slightly from month to month. He has worked overtime on one occasion so far; in May 2017, he was paid a gross payment of £62.96 for overtime worked. Every 8 weeks, he is on call and receives an additional gross payment of £150 for that week. The claimant has joined a stakeholder pension scheme with his new employer. The employer matches the contribution up to a limit of 6% of base salary. The claimant could not recall how much he was contributing. From the May 2017 payslip, it appears he may be paying the maximum 6%. On this basis, the employer's monthly contribution is 6% of gross monthly basic pay, £1616.67, which is £97 per month.

6. The claimant produced two payslips from his new employer: one for April and one for May 2017. The April pay slip dates from before the claimant became a member of the pension scheme and includes only basic pay, with no overtime being worked. The monthly net pay for April was £1372.87. The monthly net pay for May, which included the overtime payment referred to above and after deduction of the claimant's pension contribution, was £1346.76.

7. The respondent relies on alleged misconduct of the claimant towards Jenna Smith prior to his resignation in support of its argument that the basic award and any compensatory award for unfair dismissal should be reduced for contributory conduct. I did not make any findings of fact about the claimant's conduct towards Jenna Smith in my decision on liability because I did not need to do so. Mr Henry referred to unchallenged evidence of Mrs Smith about the claimant "badgering" her. Based on Mrs Smith's witness statement, I find that the claimant put many questions to her following receipt of the letter from Mrs Chadwick confirming that he was no longer going to be able to use the company van to travel to and from work. Mrs Smith says she found the claimant intimidating and aggressive. However, Mrs Smith does not give details of what the claimant did to make her feel this way, other than the claimant telling her he would use his mobile phone in company time, as he believed this was his right since he thought he was being made redundant.

8. The claimant said that he did not take Mr Simms' offer of a car as a serious offer and that it would have taken a lot of consideration to decide to take on another car, with all the associated the costs, including insurance.

9. When it was put to the claimant that no solution other than continued use of the van would have been acceptable to him, the claimant said he could not say,

because it never came up. He said that, if there was an acceptable solution, he would have accepted it but could not say what that might have been; he wanted to continue to use the van. He said that, if travel costs were to have been an acceptable alternative, they would have had to be a lot to enable him to buy and run his own vehicle.

10. The agreement the respondent reached with Mr Lawrence was that they would pay him an extra £40 per week when he could no longer use the van. However, unlike the claimant, Mr Lawrence had access to a car he could use to travel to and from work.

11. Mrs Smith's evidence was that continued use of the van was never on the table as an option because they only had one van in working order. However, Mrs Smith and Mrs Chadwick formed this view without knowing that the claimant did not have access to a car and that the removal of the van would mean he could not get to work without a long and difficult journey by public transport.

12. Mr Jason Smith, when asked why it was not feasible for the claimant to take the van home with a clear instruction that he had to be at the respondent's premises by 7.50 a.m. replied that it could have happened but they never had that discussion. Jason Smith also gave evidence that they would have let the claimant have the van for 3 months until he got himself sorted out, if the claimant had said he would try a different approach.

13. The respondent had the van repaired after they had saved sufficient funds to do this. The respondent's witnesses were not able to tell me exactly when it was repaired, but Mrs Chadwick estimated this was two to three months after the claimant left.

14. The claimant was one of only two skilled fitters working for the respondent. The claimant had worked for the respondent and their predecessor in business for a long time before his resignation. There was no evidence which suggested the respondent had any reason to want the claimant to leave. Although the respondent was going through a difficult period, they had gone through difficult periods before, without making anyone redundant. If they were to continue in business, they needed the claimant, or someone in his place. They recruited a replacement after his resignation.

15. The claimant did not submit a formal written grievance before or after his resignation.

Submissions

16. The representatives made brief oral submissions on remedy. I have dealt with their principal arguments in my conclusions. Following the hearing, the claimant's representative, Mr Parkinson, wrote to the tribunal on 22 September 2017 making further arguments relating to why an uplift should apply for failure to comply with an ACAS Code of Practice. These arguments would have made no difference to my decision on this point so I did not consider it necessary to delay concluding my decision to invite submissions in reply from the respondent.

Law

17. Section 118 Employment Rights Act 1996 (ERA) provides that an award of compensation for unfair dismissal shall consist of a basic award and a compensatory award calculated in accordance with the relevant provisions.

18. Section 119 ERA sets out how a basic award is to be calculated. The same statutory formula applies as for the calculation of a statutory redundancy payment.

19. Section 123(1) Employment Rights Act 1996 provides that 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.

20. Section 122(2) Employment Rights Act 1996 provides: "Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly."

21. Section 123(6) Employment Rights Act 1996 provides: "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."

22. For a reduction in either the basic award or the compensatory award due to the claimant's conduct, the conduct must be culpable or blameworthy and the tribunal must consider it just and equitable to reduce the award by the proportion specified. For a reduction to the compensatory award, but not the basic award, the conduct must have actually caused or contributed to the dismissal. In a constructive dismissal case, that means that there must be a connection between the employee's conduct and the fundamental breach.

23. In accordance with principles set out by the House of Lords in *Polkey v AE Dayton Services Limited [1988] ICR 142*, a tribunal may reduce a compensatory award for unfair dismissal by up to 100% if there is evidence to suggest the claimant might have been fairly dismissed, either at the time the claimant was dismissed or at some later date.

24. Section 207A Trade Union and Labour Relations (Consolidation) Act 1992 provides that a compensatory award may be increased or decreased by up to 25%, if the tribunal considers it just and equitable to do so in all the circumstances, where the claim to which the proceedings relate concerns a matter to which a relevant ACAS Code of Practice applies and the employer or employee has failed unreasonably to comply with the Code.

Conclusions

The basic award

25. This is calculated according to a formula which takes into account the claimant's age at the effective date of termination (48), completed years of service capped at a maximum of 20 and weekly pay (£420, which is lower than the cap on a maximum's week pay).

26. The claimant's schedule of loss calculated the basic award as £8400 and the respondent did not take issue with the calculation. However, this calculation does not take account of the additional factor used for the years of service in which the claimant was not below the age of forty-one. The calculation is as follows (taking account of the maximum 20 years allowed):

7 x 1.5 x £420 (the claimant's gross weekly pay) =	4410
13 x 1 x 420 =	5460
Total basic award =	£9870

27. The respondent argues that the basic award should be reduced because of conduct by the claimant prior to his resignation. The respondent relies on the claimant's approach to Jenna Smith in the week of 23 January 2017.

28. I do not consider the conduct about which Jenna Smith gave evidence would meet the hurdle of culpable and blameworthy conduct. The only specific examples she gave of how the claimant behaved, as opposed to how she felt, were that the claimant constantly asked questions after Mrs Chadwick's letter and that he said he was entitled to use his mobile phone at work since he thought he was being made redundant. In the circumstances, I do not consider this to be culpable and blameworthy conduct. I do not consider it would be just and equitable to reduce the basic award by reason of this conduct.

29. The claimant is, therefore, entitled to be paid the full basic award of £9870.

The compensatory award

Loss of earnings

30. The claimant was out of work from 31 January to 5 March 2017 inclusive, a period of 5 weeks. His net earnings during this time with the respondent would have been £1715.70 (5 x £343.14). The respondent has not sought to argue that the claimant did not take reasonable steps to mitigate his loss.

31. The claimant's basic monthly net pay with his new employer is £1372.87 (weekly equivalent 1372.87 x 12/52 = £316.82). Overtime is so occasional that I consider it appropriate not to take account of this. There is a payment every 8 weeks of £150 gross for being on call. The weekly gross equivalent of this on call payment is 150/8 = £18.75. After deductions, this would equate approximately to an average £14 net extra per week. In addition, the claimant has the benefit of £97 per month employer's pension contributions (weekly equivalent 97 x 12/52 =

£22.38). The value of the claimant's net weekly pay with his new employer (including employer's pension contributions which are not subject to deductions) is, therefore:

Basic pay	316.82
On call payment	14.00
Employers' pension contribution	22.38
Total net weekly package	353.20.

32. This is more than the value of the claimant's pay package with the respondent. He does not, therefore, have any loss of earnings from 6 March 2017 onwards.

Loss of statutory rights

33. Mr Parkinson argued, for the claimant, that, because of his very long service, the amount awarded for loss of statutory rights should be much higher than the normal level of award. He argued that it would be hard to get to the same level of protection as the claimant had with his 28 years' service with the respondent. In the schedule of loss, he had put a suggested award of £1000. In submissions, he suggested a figure of £600. Mr Henry, for the respondent, suggested an award of £350 would be more appropriate.

34. Mr Parkinson was not able to point me to any authorities to support his argument. The claimant will have to work for 2 years to acquire the same statutory rights not to be unfairly dismissed and to be entitled to a statutory redundant payment if dismissed by way of redundancy. He will not have any greater statutory rights in respect of unfair dismissal and redundancy after 2 years' service, although the amount payable for a basic award or redundancy payment will increase with greater service. However, by receiving a basic award for this claim, he is receiving payment for the long service he had previously built up. It will take the claimant 12 years to acquire a right to the maximum statutory minimum notice of 12 weeks. I note, in *S H Muffett Ltd v Head [1987] ICR 1,* the EAT commented that only in exceptional cases should the tribunal award pay for half of the statutory notice period as compensation for loss of statutory rights and that less would usually be more appropriate.

35. I do not consider that this is such an exceptional case that I should make an award much greater than the customary level of award. I consider that £420, the claimant's gross weekly pay with the respondent, is an appropriate level of award.

Reduction for contributory conduct?

36. I concluded, when considering the claimant's conduct in relation to the basic award, that the claimant's conduct was not culpable and blameworthy, so no reduction for contributory conduct would be appropriate. A further reason for deciding that no deduction from the compensatory award should be made for contributory conduct is that the claimant's conduct relied upon did not lead to the fundamental breach of contract. The claimant's conduct was in response to the fundamental breach of contract rather than a reason for it.

Polkey type reduction?

37. The respondent argued that the compensatory award should be reduced because the claimant would still have resigned if the respondent had not acted in fundamental breach of contract. Mr Henry submitted that nothing short of providing the claimant with a van would have resolved the situation.

38. In the reasons for my judgment on liability, I concluded that the respondent was in breach of the implied duty of mutual trust and confidence in the manner in which the respondent went about removing the claimant's discretionary use of the van. I concluded that, it may have been that, after proper consideration and discussion with the claimant and Mr Lawrence, the respondent would still have decided that, to ensure they always had a van available when needed for the business, they could not continue to allow the claimant and Mr Lawrence to use this to travel to and from work. However, the respondent made and announced its decision without any consideration of the potential impact on the ability of the claimant to get to and from work and without any discussion with him. In the circumstances, I concluded that it was a breach of the implied duty of mutual trust and confidence to announce a decision to withdraw use of the van without any consideration of the claimant's individual circumstances and discussion with him.

39. To decide what compensation is 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, I must consider whether the evidence suggests there was a chance and, if so, how great a chance, that the claimant would have resigned had the respondent not acted in breach of contract. What would have happened if the respondent had considered the claimant's individual circumstances and discussed the situation with him before deciding what to do about the claimant's use of the van? From the claimant's evidence, it appears unlikely that the claimant would have continued working for the respondent if he was not allowed the use of a van. He did not have the use of a car and was concerned about the cost of buying or even just running a car, if one was given to him. Any contribution to travel costs the respondent was likely to make e.g. £40 as paid to Mr Lawrence, was unlikely to be sufficiently large to pay for the cost to the claimant of being able to use a car. Travelling to and from work by public transport would be long and difficult.

40. What then were the chances that the respondent would, after discussion with the claimant and consideration of his individual circumstances, have allowed the claimant to continue using their only van until they were able to repair the broken down van or buy another one? As I noted in the conclusions for my decision on liability, the fact that the claimant and Mr Lawrence were able to continue using the van until 30 January 2017 indicates that this was not such a crisis situation that the respondent had reasonable and proper cause not to consider and discuss with the claimant the situation before making a definitive decision to withdraw use of the van. Mr Jason Smith gave evidence that, had the claimant said he would try a different approach, the respondent would have let the claimant use the van for a further 3 months. He also accepted the possibility that the claimant could have been allowed to continue using the van on the strict proviso that he had to have the van at the respondent's premises by 7.50 a.m. The fact of the claimant's continued use of the van until 30 January and Jason

Smith's evidence, suggests to me that the respondent could potentially have allowed the claimant to continue using the van whilst they had only one van, had they wished to do so. Discussion with the claimant and Mr Lawrence would have most likely revealed that Mr Lawrence, unlike the claimant, had access to a car. It would not have been impossible, therefore, to continue to allow the claimant to use the van but stop Mr Lawrence using it (when it was not convenient for both to travel together), with Mr Lawrence being compensated, as he was, by a payment for travel costs. The respondent could at least have trialled the continued use of the van. If the claimant had been allowed to use the van for a further 3 months, as Jason Smith suggested in evidence might have been possible, by the end of that period, the other van would, in fact, have been repaired. I consider that the chance that the claimant would not have been allowed to continue using the van, at least on a trial basis, for a further 5 weeks if the respondent had discussed the matter with the claimant and taken his personal circumstances into consideration, was negligible. The claimant would not, therefore, have left the respondent's employment in that period. I reject the respondent's argument that the compensatory award should be reduced because the claimant would have resigned even if the respondent had not been in fundamental breach of contract.

Increase or decrease for failure to follow a relevant ACAS Code?

41. The claimant did not present a written grievance. The respondent's obligations under the ACAS Code of Practice on Discipline and Grievance were not, therefore, triggered and the respondent was not in breach of any relevant ACAS Code of Practice. I conclude that section 207A Trade Union and Labour Relations (Consolidation) Act 1992 does not apply to permit an increase in the compensatory award.

42. The respondent argues that any compensatory award should be reduced because the claimant failed to present a written grievance. The claimant resigned on 30 January 2017 because he was told he could not use the van after that date, having tried to discuss the matter informally with the respondent. He then received his P45 before he had an opportunity to respond to the offer of a meeting. In these circumstances, I do not consider that the claimant unreasonably failed to comply with the ACAS Code of Practice on Discipline and Grievance. Alternatively, it would not be just and equitable to reduce the compensatory award because he had not submitted a written grievance before resigning and did not pursue a written grievance after resigning.

Summary of conclusions in relation to the compensatory award

43. No reductions should be made to the compensatory award for contributory conduct or a *Polkey* type argument or for failure to comply with a relevant ACAS Code.

44. The claimant, therefore, is awarded his full loss of earnings. Since he had no loss continuing after 6 March 2017, when he started his new job on a higher overall package, this loss is limited to 5 weeks' net pay plus loss of statutory rights.

45. The compensatory award is, therefore, £1715.70 + £420 = £2135.70.

46. The claimant did not claim job seekers' allowance so the Recoupment Regulations do not apply.

Injury to feelings

47. The claimant's schedule of loss included a claim for compensation for injury to feelings. It was confirmed at the outset of the hearing that this was a complaint only of unfair dismissal. No award can be made for compensation for injury to feelings for a complaint of unfair dismissal. Mr Parkinson did not pursue an argument for such an award after this had been pointed out.

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Employment Judge Slater

Date: 13 October 2017

RESERVED JUDGMENT & REASONS
SENT TO THE PARTIES ON
16 October 2017

FOR THE TRIBUNAL OFFICE