



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

AND

Respondent

Mr Andrew Day

Compton Fundraising
Consultants Limited

HELD AT Birmingham **ON** 31st October 2017

EMPLOYMENT JUDGE Choudry

Representation:

For the claimant: Mr S O'Brien - Counsel

For the respondent: Mr J Meichen - Counsel

RESERVED JUDGMENT ON REMEDY

1. Following the claimant's successful claim for unfair dismissal the respondent is ordered to pay to the claimant compensation in the sum of £91,895 in accordance with the attached Annex.
2. The Recoupment Regulations do not apply.

REASONS

Background

1. The claimant brought a claim for unfair dismissal following the termination of his contract of employment by the Respondent on 23rd November 2016 by reason of redundancy.
2. By an oral judgment given to the parties on 28th September 2017 and a written judgment dated 30th October 2017 the claimant succeeded in his claim for unfair dismissal. The matter was listed for a remedy hearing before me on 31st October 2017.

Evidence and documents in relation to remedy

3. I was presented with the claimant's revised schedule of loss, skeleton arguments for remedy from the claimant as well as copies of the cases referred to in the skeleton argument. I was also presented with a further witness statement from Mrs Sue Linfield for the respondent as well as a further 34 pages of documents and copies of two cases – **Mr T Glover and others – v- Property Care Ltd [2006] EWCA Civ 286** and **Margaret O'Donoghue –v- Redcar and Cleveland Borough Council [2001] EWCA Civ 701** – on behalf of the respondent.
4. Mr O'Brien objected to the introduction of the new evidence on the basis that the case management orders had not envisaged a split trial and that the issue of remedy should have been dealt with at the last hearing, the claimant had dealt with it in his witness evidence and Mrs Linfield had also touched on the subject at the last hearing but had made no attempt to deal with the issue of mitigation.
5. Mr Meichen submitted that no final decision had been made at the last hearing as to the submission of further documents. The additional documents had been served on the claimant's representatives on 26th October 2017. As such there had been sufficient time for the claimant's representatives to obtain instructions in relation to the additional documentation; the evidence merely expanded on the points already made in relation to mitigation and that the Tribunal in making its decision should have due regard to the balance of prejudice. If the additional information was not included the respondent would suffer greater prejudice than the claimant as it would not be able to deal with the issue of mitigation. This would not be in line with the overriding objective.

6. After giving Mr O'Brien the right of reply I was satisfied that the respondent would suffer greater prejudice than the claimant if the additional evidence was not adduced. As such, in line with the overriding objective I consented to the submission of the respondent's additional evidence.
7. Consequently, I heard further evidence for the respondent from Mrs Sue Linfield (Finance Director). The claimant gave no further evidence but relied on his evidence and witness statement from the liability hearing.

Issues

8. Mr O'Brien confirmed that the claimant was seeking reinstatement. As such, the issues for me to determine were as follows:
 - 8.1 Was it practicable for the respondent to comply with a reinstatement/re-engagement order?
 - 8.2 Is the claimant entitled to a further basic award given the fact that he was not dismissed for a genuine redundancy reason?
 - 8.3 What compensatory award should the claimant be awarded?
 - 8.4 Has the claimant failed to mitigate his losses thereby reducing the compensatory award?
 - 8.5 Should the compensatory award be reduced as a result of *Polkey*?

Facts

9. I make the following findings of fact in relation to remedy in addition to the findings of fact which I made in relation to liability:
 - 9.1 The claimant commenced employment with the respondent on 1st January 1990, originally based in Australia but undertaking work for the UK business.
 - 9.2 On 1st April 2005 the claimant was appointed group chief executive officer based in the United Kingdom.
 - 9.3 The respondent is the UK's leading fundraising consultancy and manages annual, capital and legacy campaigns for charities and not-for-profit organisations. The claimant undertook fundraising work focusing on capital campaigns.
 - 9.4 On 24th November 2015 the claimant was given 12 months' notice of termination of his employment on the grounds of redundancy. The claimant spent 12 months on garden leave and his employment formally ended on 23rd November 2016, after some 26 years' service with the respondent.
 - 9.5 It was agreed between the parties that as at the termination date the claimant earned £187,700 (gross) and had a 6%

- employer pension contribution. His net monthly income was £11,200.
- 9.6 During the Christmas 2015 holidays the claimant discussed with his wife their future work options. As the claimant's wife is also an experienced fundraising consultant she offered to start a new company, potentially with former colleagues, to build up a fundraising consulting business which the claimant could join at the end of his garden leave period. The claimant's wife resigned from her teaching position at Easter 2016, in order to commence full time employment in their new business venture in the summer.
- 9.7 A new company was registered on 26th February 2016 called Gifted Philanthropy Limited ("Gifted"). The directors of this company are the claimant's wife, Chris Goldie and Amy Stevens. The claimant joined Gifted on 1st December 2016 as Managing Director. His services are provided by a company called A&J Day Consulting Limited and he receives a salary of £680.33 per month.
- 9.8 Mrs Linfield in her evidence at the remedy hearing pointed to 9 vacancies that were advertised over the period of June 2016 to October 2016 on the "Third Sector" recruitment website for executive roles within third sector organisations. These included vacancies for Chief Executive Officer of Oxford Radcliffe Hospital's Charitable Funds, Director of Fundraising and Marketing at Pancreatic Cancer UK and chief executive officer of BBC Children in Need. The salaries for these roles ranged from £70,000 to £110,000 per annum although the precise salary figures were not clear. The full details of the 9 vacancies were not available and save for the role with Pancreatic Cancer UK (which had a salary starting at £70,000) - all I had presented to me were announcements of new appointments to some of the vacancies referred to.
- 9.9 I was also referred to a number of vacancies for roles that were available within third sector organisations between August and October 2017, which are contained at pages 245 to 275 of the bundle. These vacancies are predominately for Chief Executives Officer roles for leading charities, educational trusts and museums. The salaries are, in the main, significantly less than the salary earned by the claimant with many of them starting at £70,000 and others being less than £100,000. Whilst the claimant has considerable experience in fundraising he has no experience of running a charity nor is he an expert in education. Mrs Linfield accepted in cross-examination that the claimant had no experience of being a chief executive of a charity. However, she could not say that he had no experience of being a director of fundraising as she said that respondent employees did step into this role from time to time for clients,

although she did not provide a specific instance of the claimant doing so.

9.10 Mrs Linfield also referred to Saxton Bampfylde, who are well known recruiters for executive roles within the sector and indicated that the claimant should have registered with them and due to his personal connections with this organisation he would have been well placed to secure interviews. However, she could not refer to a specific role which was an ideal match to the claimant's experience and background.

Applicable law

10. Section 112 (3) of the Employment Rights Act 1996 provides that where a claimant expresses a wish to be re-instated:

"...the tribunal may make an order under section 113.

(4) If no order is made under section 113, the tribunal shall make an award of compensation for unfair dismissal (calculated in accordance with sections 118 to [126]...to be paid by the employer to the employee."

11. Section 113 provides:

"An order under this section may be -

- (a) an order for re-instatement (in accordance with section 114) or*
- (b) an order for re-engagement (in accordance with section 115,) as the tribunal may decide".*

12. Section 116 of the Employment Rights Act 1996 provides:

"(1) In exercising its discretion under section 114 the tribunal shall first consider whether to make an order for re-instatement and in so doing shall take into account –

- (a) whether the complainant wishes to be re-instated,*
 - (b) whether it is practicable for the employer to comply with an order for reinstatement, and*
 - (c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his reinstatement.*
- (2) If the tribunal decides not to make an order for reinstatement it shall then consider whether to make an order for re-engagement and, if so, on what terms.*
- (3) In so doing the tribunal shall take into account-*
- (a) any wish expressed by the complainant as to the nature of the order to be made,*
 - (b) whether it is practicable for the employer...to comply with an*

*order for re-engagement, and
(c) where the complainant caused or contributed to some extent
to the dismissal, whether it would be just to order his re-
engagement and (if so) on what terms.*

13. Section 122 (4) provides for the reduction of the basic award by the amount of any redundancy payment. However, where an employer fails to satisfy the tribunal that the principal reason for dismissal was in fact redundancy then following the case of **Boorman –v- Allmakes Limited [1995]** no reduction is made to the basic award.

14. Section 123 of the Employment Rights Act 1996 provides that:

“..the amount of 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”.

15. In accordance with Section 124 of the Employment Rights 1996 the compensatory award may not exceed the lower of a year's pay or the statutory cap from time to time. As the claimant's effective date of termination the statutory cap in place was £78,962.

16. The principles upon which the compensatory award is calculated are set out in the case of **Norton Tool –v- Tewson [1972] ICR 501**.

17. In the case of **Polkey –v- AE Dayton Services Ltd [1987] IRLR 503** the House of Lords made it clear that the compensatory award may be reduced or limited to reflect the chance that the claimant may have been dismissed in any event and that the employer's procedural errors accordingly made no difference to the outcome. The EAT provided useful guidance based on previous case law in **Software 2000 Ltd –v- Andrews and others UKEAT/0533/06/DM** :

“The question is not whether the Tribunal can predict with confidence all that would have occurred; rather it is whether it can make any assessment with sufficient confidence about what is likely to have happened, using its common sense, experience and sense of justice.”

18. A reduction may even be made on just and equitable grounds to reflect the chances that the claimant would have been fairly dismissed for reasons other than those relied upon by the respondent [obiter in **Gover and ors –v- Propertycare Ltd [2006] ICR 1073**].

19. A claimant is under a duty to take reasonable steps to mitigate his losses. This is a question of fact for the tribunal. The case of **Wilding – v- British Telecommunications plc [2002] ICR 1079** made it clear that the burden of proof is on the employer and it is not enough for the

employer to show there were other reasonable steps that the claimant could have taken but did not take. An employer must show that the employee acted *unreasonably* in not taking them as there is usually more than one reasonable course of action open to a claimant.

20. In **Window Machinery Sales Ltd t/a Promac Group –v- Luckey UKEAT/0301/14** the EAT indicated that when considering the issue of mitigation a tribunal should ask itself, firstly what steps were reasonable for the claimant to have to take in order to mitigate his or her loss; secondly whether the claimant did take reasonable steps to mitigate loss; and finally, to what extent, if any, the claimant would have actually mitigated his or loss if he or she had taken those steps.

Submissions

21. Mr O'Brien, for the claimant, sought a basic award on behalf of the claimant and submitted that credit should be given for the payment made and off set against the compensatory award. The claimant received a basic award of £13,062.50.
22. In relation to the award of compensation and mitigation Mr O'Brien submitted that the claimant had 26 years experience with the respondent as a fundraiser concentrating on capital fundraising projects working with a few senior executives. As such it was more than reasonable for him to go into business doing the same type of work thereby limiting his loss. Mr O'Brien submitted that it was not reasonable for the claimant to apply to be a Chief Executive Officer of a charity given the fact that this was not in his field of experience. He had line managed around 8 people and being the Chief Executive Officer of the types of charities referred to in the evidence of Mrs Linfield was an entirely different undertaking. The claimant did not have any substantial experience as a senior executive of a charity or commercial organisation or as an in-house fundraising executive. Mr O'Brien further submitted that the respondent had failed to discharge the burden on it to show that the claimant had not mitigated his losses.
23. In relation to the issue of Polkey Mr O'Brien submitted that if a respondent wishes to rely on an alternative, fair reason to dismiss a claimant then it must be pleaded and the burden is on the respondent. The respondent had not pleaded that that the claimant's compensation should be reduced because of an inevitable dismissal for some other substantial reason. Furthermore, no evidence was submitted to show that the claimant would have been dismissed in any event. Whilst the Tribunal had found that relations between the parties were breaking down it did not find that there was some other substantial reason justifying dismissal. The fact that the parties were negotiating an exit did not, of itself, amount to some other substantial reason. Furthermore, even if the failure to reach a mutually agreeable settlement could amount to some other substantial reason the respondent had failed to adduce any evidence of the fair procedure that it would have followed

or of the fact that if a fair procedure had been followed that the claimant would have inevitably been dismissed. The respondent failed to undertake any mediation or effectively carrying on effectively running separate businesses.

24. Mr Meichen for the respondent submitted that the claimant should not receive another basic award as he had already received one. In addition, Mr Meichen submitted that it was entirely unreasonable for the claimant to expect the respondent to welcome him back when the parties had an acrimonious relationship over the last 2 years especially when the claimant had effectively set up in competition with the respondent.
25. In relation to mitigation Mr Meichen argued that it was unreasonable for the claimant not to apply for any jobs given the level of earnings which he had were negligible and potentially less than the recommended rates under the national minimum wage legislation. Mr Meichen was of the view that the claimant would be a seriously attractive candidate.
26. Finally, Mr Meichen submitted that the claimant would have been fairly dismissed in any event for a different reason but within the same timescale.

Conclusions

12. In reaching my conclusions I have considered all the evidence I have heard and considered the pages of the bundle to which I have been referred. I also considered the very helpful oral and written submissions made by the parties' representatives.
13. The first issue I need to consider is whether to make an order for re-instatement or re-engagement. I am not satisfied given the circumstances of the claimant's dismissal, the on-going dispute between the parties in relation to shares which the claimant's wife holds in the respondent business and the fact that the claimant's spouse has set up a competing business that it would be practicable for the respondent do comply with any order for re-instatement or re-engagement. I accept Mr Meichen's submissions in this regard and find that it is not practicable for the respondent to comply with any order for re-instatement or re-engagement.
14. Given the fact that the claimant's redundancy was a sham I am satisfied that he is entitled to a further basic award of £12,933 calculated as set out in the attached Annex.
15. In relation to the issue of mitigation I am not satisfied that the respondent has discharged the burden of proof that the claimant has failed to mitigate his losses by seeking alternative employment instead of going to work with his wife in Gifted. I am also not satisfied that the claimant acted unreasonably by not applying for the types of roles

highlighted by Mrs Linfield given the fact that he did not have experience of being a Chief Executive Officer for a charity nor had he undertaken any other executive roles for a charity. Given the fact that he had almost 30 years' experience working in a consultancy it was reasonable for him to want to work in an area for which he had experience and expertise.

16. Finally, in relation to the issue of *Polkey* whilst it is clear that the relationship between the parties was breaking down the respondent has not submitted any evidence that would enable me to make a finding that it would have been able to effect a fair dismissal as a result of the breakdown in the relationship or for any other reason. As such, I am not satisfied that there should be a *Polkey* reduction in the compensatory award.
17. I am satisfied that the claimant should be entitled to his loss of earnings from the date of his dismissal to the date of the remedy hearing and that the 20 weeks future loss sought by the claimant in his schedule of loss is just and equitable in the circumstances. As such the respondent is ordered to pay the claimant a further basic award of £12,933 and a compensatory award of £78,962 as set out in the attached Annex.

Employment Judge Choudry
28 January 2018

Annex

Date of birth : 13/8/1961
 Date employment started: 1/01/1990
 Effective date of termination: 23/11/2016
 Period of continuous service: 20 years
 Age at Effective date of termination: 55 years

Basic award

14 x 1.5 x 479
 6 x 1 x 479

£12,933

Compensatory Award

Losses from 24.11.16 to 26.10.17

(a) Salary – 48 weeks @ £1,800 per week £86,400

(b) Salary sacrifice pension payment:
 48 weeks @ £761.54 per week £36,554

Less mitigation – 48 weeks @ £470 per week (£22,560)

Sub total £100,394

Future losses

(a) Salary – 20 weeks @ £1,800 per week £36,000

(b) Salary sacrifice pension payment:
 20 weeks @ £761.54 per week £15,230

Less anticipated mitigation (£9,400)

Loss of statutory rights £350

Sub total £42,180

Total loss £142,574

Less basic award already received (£13,062.50)

Apply statutory Cap £78,962