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EMPLOYMENT TRIBUNALS

Claimant: **Mr S Owen**

Respondent: **Balfour Beatty Group Ltd**

Heard at: **East London Hearing Centre** **On: 21 November 2017**

Before: **Employment Judge Prichard (sitting alone)**

Representation

Claimant: In person

Respondent: Mr C Milsom (Counsel instructed by Pinsent Masons LLP, Glasgow)
Ms L Gateley (Employee Relations Business Partner for Balfour Beatty)

JUDGMENT having been sent to the parties on 12 December 2017 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

1 These proceedings were unusual. As I stated to the parties, this is the first case I have ever encountered where a respondent employer admits liability in a constructive unfair dismissal case.

2 I gave judgment in the case on remedy following a hearing on 24 May 2017. Judgment was reserved and sent to the parties on 2 August 2017. The claimant was awarded a basic award of £6,706 and a compensatory award of £23,294. At the time he resigned and was constructively dismissed the claimant was earning approximately £40,000 per annum gross including all add ons (which were never fully calculated i.e. subsistence allowance, bonus, company car). Therefore that was the maximum amount that the tribunal could award for loss of earnings.

3 At the time the hearing commenced the respondent had offered £20,000. I

accept the respondent's evidence that the claimant was often frustratingly slow in coming back with counter offers, if he came back with any at all. Prior to the hearing the counter offer was the full £40,000. If one deducts the basic award and other potential add-ons of (loss of statutory rights) at £7,000 that would represent £23,000 of loss of earnings. The tribunal awarded roughly £30,000 therefore pitching it between the two offers.

4 It is well known in the tribunals that a concession of liability by no means necessarily shortens the hearing. I consider it did in this case, to some extent. The Tribunal usually has to hear all the background evidence in order to evaluate the respondent's arguments for (1) contributory conduct, (2) *Polkey* and (3) mitigation.

5 In hindsight, none of these were hopeless arguments, but they did not succeed before me.

6 The claimant had been on long-term sick leave, sick leave which I described in the judgment, paradoxically, as "elective" (para 16).

7 The respondent's *Polkey* argument was that the claimant would have been fairly dismissed anyway by reason of his continuing absence. The respondent's record of taking action on ongoing problems was extremely poor (hence the constructive dismissal). Therefore the prospect of their having fairly brought the claimant's employment to an end within a short timescale seemed unlikely, at least in the sort of timescales that I was being asked to consider.

8 I then rejected their contributory conduct argument. The argument was principally based on the claimant's unexplained failure to attend an interview to look into a redeployment option. Again in prospect it was not a hopeless argument. My judgment contains a certain amount of legal analysis as to the necessary causation in contribution. Mr Milsom assures me that this would have been a ground of appeal if they had chosen to go to the Employment Appeal Tribunal.

9 Where I was against the claimant was on the matter of mitigation. His job search was described in his own counsel's words as "scatter gun" I described it as "extraordinary" inasmuch as he had applied for some obviously unsuitable jobs and had applied for jobs which were far less well paid than that which he had previously in the engineering field where his qualifications and skills are. The judgment also stated that the claimant's belief that his reputation was somehow sullied in the construction industry, as a whole sector, was unrealistic. I did not consider that to be a good reason for him not to have applied for roles for which he was more qualified which would have commanded a better salary.

10 Here the respondent's arguments found favour with me. Yet, notwithstanding that, I made an award which, according to the calculation in paragraph 42 of the judgment, equated to some 49 weeks of total net loss. I calculated that the £20,000 which had been offered approximately equated to 6 months net loss. The award could have been criticised as being generous. I do not consider it could really be criticised for being mean.

11 The respondent also was right inasmuch as an open concession of liability is a

thing of value in settlement negotiations and I was referred to the *Telephone Information Services v Wilkinson* [1991] IRLR,148, EAT, where it was said an offer of the statutory maximum compensationplus an open admission of liability could not be bettered. (But in *Wilkinson* an offer of the statutory maximum was made without admission of liability, and therefore the claimant was not unreasonable to litigate to obtain a finding of unfair dismissal).

12 In prospect, the respondent's arguments were far from hopeless. I could not say that it was unreasonable for them to pursue those arguments. I do not consider that the late concession of liability was unreasonable. I accept the respondent's explanations now given in a helpful witness statement from Ms Gateley that behind the scenes they were in fact having trouble securing the attendance of the necessary witnesses to deal with liability. In the event only Mr Milsom and Ms Gateley attended the hearing on 24 May. No witnesses. The evidence came from the bundle of documents. The main points are summarised in my subsequent reserved judgment.

13 There has been talk at this hearing of the respondent's continuing non-payment of £22,944. That of course is the amount mentioned in paragraph 43 of the judgment as being the prescribed element after payment of the basic award and the award of £350 for loss of statutory rights which are not affected by recoupment. I was disappointed today that I had to explain to the claimant what is happening here and that no-one has previously explained what the effect of a recoupment order is. The respondent simply has not had their bill from the DWP in order that they can pay it and then release the £22,944. That is what is going on here. It is not the tribunal's business any more. The respondent is doing exactly what it has been ordered to do. Formally if the claimant wishes to break the log jam he may wish to contact the DWP to get the process moving.

14 Indeed, I had mentioned to the parties that it is one of the great incentives to settle an unfair dismissal claim that you can get your settlement monies quickly because the time of payment can be a term of the agreement. Nobody has to pay anything to the DWP. That is a lawful and regular practice. It is only where there is a quantified remedy judgment from the tribunal that the Recoupment Regulations bite, and only where a claimant has been claiming Job Seekers Allowance or Employment and Support Allowance.

15 The threshold condition for making costs under rule 76(1)(a) is as follows:

> "A tribunal may make a costs order … and shall consider whether to do so, where it considers that –
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> (a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted …"

That is the only basis upon which it is argued that I could make an award of costs. The lowest of those threshold criteria is "unreasonable", the other criteria do not apply in this case (or in most others). As stated, above the respondent's arguments, in prospect and in hindsight, were not hopeless. It was not unreasonable of them to pursue them at a hearing, particularly when they had made a substantial settlement offer, and the

claimant's engagement with the negotiation process had been poor.

16 This is simply a case of the respondent having lost 2½ of its 3 arguments. There is no unreasonable conduct.

Employment Judge Prichard

30 January 2018