EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Miss K Chan	and	Royal Mail Group Limited

Remedy Hearing held at Reading on: 29 March 2018

Appearances:

For Claimant: Mr M Green, counsel
For Respondents: Mr C Bailey-Gibbs, solicitor

Employment Judge: Mr SG Vowles

Members: Mrs G Bhatt
Mr P Miller

UNANIMOUS DECISION

1 The parties are to liaise to seek to agree the appropriate award based upon the principles set out below.

2 Reason for this decision are given below.

REASONS

General

1. This is a one day remedy hearing.

2. The task of the Tribunal and that of the representatives has been made more difficult by the lack of documentary evidence which their clients possess but which has not been put before the Tribunal today. We make no criticism of Mr Green or Mr Bailey-Gibbs personally, but it is clear that documentation which could and should have been provided has not been.

3. The parties are in dispute regarding several matters of principle. Accordingly, we shall make decisions on the principles to be applied in

assessing an award of compensation and then make an order that the parties shall liaise to seek to agree the appropriate award in this case.

Reinstatement / Re-engagement

4. The Claimant, although she has previously applied for re-engagement and/or reinstatement, no longer pursues those remedies but wishes to claim compensation.

Contributory Conduct

5. The first matter upon which we have been asked to make a determination is that of contributory conduct and whether the award should be reduced accordingly. Contributory conduct is dealt with in the Employment Rights Act 1996.

6. Section 122(2):

Where the tribunal considers that any conduct of the complainant before the dismissal or where the dismissal was with notice which was 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.

7. Section 123(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.

8. In the case of Nelson v The British Broadcasting Corporation (no.2) [1980] ICR 110 the court said:

"For conduct to be the basis for a finding of contributory fault, it has to have the characteristic of culpability or blameworthiness. Conduct by an employee capable of causing or contributing to dismissal is not limited to actions that amount to breaches of contract or that are illegal in nature, it could also include conduct that was perverse or foolish, bloody-minded or merely unreasonable in all the circumstances. In order for a deduction to be made under section 123(6) of the Act, a causal link between the employee's conduct and the dismissal must be shown to exist."

9. In the case of Hollier v Plysu Ltd [1983] IRLR 260 it was suggested that the contribution should be assessed broadly and should generally fall within the following categories:

Wholly to blame: 100%;
Largely to blame: 75%;

Employer and employee equally to blame: 50%;
Slightly to blame: 25%.

10. In assessing contributory conduct, we must look at the conduct of the Claimant. The conduct of the Respondent or of other employees is not relevant. We have taken into account that in this case the Claimant admitted misconduct. At paragraph 17 of our decision we referred to the interview which took place on 11 March 2016 (page 66 of the bundle) where the Claimant accepted that her training told her that she should only put two Yorks on a tail lift. She had actually put more than that on, on two occasions, and she knew that there was a safe system of work in place and it was to prevent accidents from happening and that she had a qualification to that effect.

11. At paragraph 88 of our decision we found that the Claimant's admissions were sufficient for the Tribunal to conclude that she was guilty of misconduct. In our view, it is clear that the Claimant's misconduct was culpable and blameworthy and that it contributed to the dismissal. The reasons for the dismissal included that misconduct set out in the dismissal letter which is at paragraph 26 of our decision.

12. We find that the Claimant's conduct was not slightly to blame but it was partly to blame for the dismissal. Her misconduct must be set against her unblemished length of service other than this matter for 36 years. We also took account of the fact that at paragraph 62 of our decision we found that the Claimant was not aware and not warned that overloading the tail lift could amount to a dismissible offence. At paragraph 89 we found that it was likely that the overloading of the Yorks was widespread and was being overlooked by management and that the Claimant had been misled into believing that her conduct would be overlooked. In those circumstances, although the Claimant's conduct contributed to the dismissal, we assess contributory conduct at 30%. We find no reason not to apply that to both the compensatory award and the basic award and therefore we would apply it to both.

Polkey

13. The Polkey principle requires the Tribunal assess whether, if a proper procedure had been followed the Claimant would (not could) have been dismissed by this employer. That is, in this case, if a reasonable investigation had been conducted, would a dismissal have followed. We found that the dismissal was both procedurally and substantively unfair. There was insufficient evidence to provide sufficient grounds for a fair dismissal. If a proper and reasonable investigation had been followed, then, as per paragraph 89 of our decision, it is likely that the employer would have found that the overloading of Yorks was widespread, was being overlooked, and that the Claimant had been misled into believing that her conduct would be overlooked. In these circumstances, we find that

this Respondent would not have dismissed her. We therefore find that there should be no Polkey reduction.

Mitigation of Loss

14. Section 123(4) of the Employment Rights Act 1996 states:

"In ascertaining the loss referred to in subsection (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 England and Wales … "

15. In Archbold Freightage v Wilson [1974] IRLR 10 it was said:

"The dismissed employee's duty to mitigate his or her loss will be fulfilled if he or she can be said to have acted as a reasonable person would do if he or she had no hope of seeking compensation from his or her previous employer."

16. In the case of Savage v Saxena [1998] ICR 357 the EAT recommended a three-step approach to determining whether an employee has failed to mitigate their loss. First, identify what steps should have been taken by the Claimant to mitigate her loss. Second, find a date upon which such steps would have produced an alternative income. Three, thereafter reduce the amount of compensation by the amount of income which would have been earned. The burden of proof rests upon the Respondent to show a failure to mitigate by the Claimant.

17. In Tandem Bars Ltd v Pilloni [2012] EAT 0050/12 the EAT stressed that rather than concentrating on what the employee actually did to find work, the Tribunal's focus should be on the steps that were reasonable for her to take in the circumstances.

18. The Tribunal accepted from the Claimant's evidence that she attended the Job Centre during the period August 2016 to May 2017 and that is clear evidence that she was seeking alternative employment. We have seen evidence, although not very well documented, that she did apply for jobs. We also accepted from her that she was disadvantaged by the lack of a reference and that was underlined by the fact that when she did get a reference from a previous manager a job was shortly thereafter forthcoming. We also accepted her evidence that she was disadvantaged by the fact that she had been dismissed summarily by reason of gross misconduct in June 2016.

19. We also found that many of the driving jobs available, and it is clear that they number thousands at the time of her unemployment, were not suitable for the Claimant, requiring additional qualifications or in a location beyond reasonable commuting distance. We also noted that the Respondent had not provided examples of evidence of specific jobs

available which the Claimant could, or should, have applied for during this period. We find that the Claimant acted reasonably in her circumstances, having been told of an available job with Abellio Bus Company to retrain as a bus driver. She failed the company training but then took several further attempts and eventually qualified.

20. The Tribunal found that the Claimant acted reasonably in seeking suitable alternative work during the period July 2016 to May 2017 and that she has adequately and sufficiently mitigated her loss.

Pension Loss

21. So far as pension is concerned, the parties have a difference of opinion which is substantial and significant. Both parties referred to the Employment Tribunal Presidential Guidance which was effective from 10 August 2017 but there is no reason why it should not be applied in this case. It is guidance and not binding upon us.

22. The Respondent says that we should adopt the simplified approach which would result in a payment for lost pension contributions of £11,136.

23. The Claimant says that there should be an assessment based upon the complex approach which would result in an award of £109,835.

24. We have taken account of the Guidance. So far as the simplified approach is concerned, paragraph 4.18 says:

"The contributions method is a broad-brush approach. The precise level of future pension loss the claimant will experience in retirement because of dismissal from a job with defined contribution pension benefits is, at the date of the hearing, very difficult to predict."

25. We find that in this case, it would not be difficult to predict. The precise calculations have been provided by both the Claimant and the Respondent and the figures have been agreed, depending upon which approach we find is appropriate.

26. So far as the complex approach is concerned, there is guidance in the Key Concepts Principles at the start of the Guidance in paragraph 5:

"The principles identify a category of complex cases. These are cases for which the contributions method is not suited. In general, a case will be a complex one if the Claimant's lost pension rights derive from a defined benefit scheme" which is the case here.

27. Also at paragraph 5.41 under the heading "Complex Defined Benefit Cases":

"Many cases featuring a loss of defined benefit pension rights will not be suitable for the contributions method. We call these complex cases. They are those cases where the period of loss cannot be categorised as short or which for some other reason involve a potentially significant quantifiable loss".

28. We find that here the period of loss is not short. It amounts to 7 years, and that there is a significant quantifiable loss. The difference is between £11,000 and £109,000. We take the view therefore that the complex approach to pension loss is the most appropriate one to take in this case.

Loss of Statutory Rights

29. We take account of the fact that the Claimant had previously 36 years' service. There is no direct authority on what sum should be awarded for loss of statutory rights. We think that £500 in these circumstances is an appropriate sum to award.

Loss of Shares

30. It has been agreed between the parties that that is a breach of contract matter and that the sum agreed between the parties is payable.

Pay in Lieu of Notice

31. Pay in lieu of notice has also been agreed between the parties as a breach of contract and accepted that that is payable.

Future Loss of Earnings

32. If the pay statements, which the parties are to examine between them, show that the Claimant's earnings in her new job from 17 May 2017 exceed or equal the earnings in her previous job with the Respondent, then the future loss of earnings would end on 17 May 2017.

33. If it is found that the new earnings are less than the previous earnings, we consider that it would be just and equitable to limit any award for future loss of earnings to the period of one year from the effective date of termination, that is up to 16 June 2017. We consider that the Claimant, working as a bus driver or in some other driving job, could reasonably be expected to increase her earnings if they fall below what she was previously earning by the way that she is rostered, by overtime, by alternative duties, or by other means.

Expenses

34. So far as expenses are concerned, we have been provided with no documentary evidence to support this claim when we are entitled to expect the Claimant to provide such evidence. It would be a simple and obvious

task for her to do so but she has failed to do so. We would make no award for expenses.

Future Conduct of the Proceedings

35. We propose to put what we have just announced in writing and send that as part of our decision on remedy to the parties.

36. We also order that on receipt of that part of our decision the parties are to liaise to agree an award by way of settlement between them or to ask the Tribunal to make an award in a Judgment. The parties shall confirm to the Tribunal, no later than 28 days from the date this decision is sent to them, whether they wish the Tribunal to make an agreed award and, if so, on what terms, and whether any further hearing is necessary.

37. If the Tribunal is asked to make an award of compensation the parties shall identify, by means of a table, how the amount to be paid has been calculated. The Employment Protection (Recoupment of Benefits) Regulations 1996 may apply to an award for loss of earnings and the dates of the period to which the prescribed element is attributable should therefore be stated.

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Employment Judge Vowles

Date: 17 April 2018

Sent to the parties on:

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For the Tribunal Office