EMPLOYMENT TRIBUNALS

Claimant:	**Mr Arwel Davies**	
Respondent:	**Hydraclean Ltd**	
Heard at:	**Cardiff**	**On: 25th, 26th, 27th, 28th and 29th June 2018**
Before:	**Employment Judge A Frazer** **Mr M Walters** **Mrs L Bishop**	

Representation:

Claimant: Mrs E Davies
(Claimant's wife)

Respondent: Mr J Searle
(Counsel)

JUDGMENT ON REMEDY

1. The unanimous decision of the tribunal is that the claimant is entitled to a basic award of **£6,706** for unfair dismissal.

2. There is no compensatory award.

REASONS

Background

1. By way of its decision on liability at Paragraph 75 the Tribunal reached a unanimous finding that the claimant's dismissal was procedurally unfair on the basis that an employer acting reasonably would have carried out an appeal hearing much sooner. The Tribunal also found that had the respondent carried out the appeal sooner it would not have made any difference to the decision to dismiss on grounds of capability since there still existed practical limitations on the claimant's ability to do his job. The Tribunal also found that by the time the respondent dismissed the claimant the dispute between both parties

had become so intractable that there was no realistic prospect of the employment relationship continuing.

2. The Tribunal wrote to both parties following promulgation of the judgment on 27th July 2018 inviting their observations on the proposed *Polkey* reduction to the compensatory award. The Tribunal indicated to both parties that the compensation was likely to be a basic award only because there was a finding that the claimant would have been fairly dismissed in any event if an appeal hearing had taken place sooner. The Tribunal wished to give both parties an opportunity to make any further representations on that finding before issuing the judgment on remedy.

3. On 9th August 2018 the claimant's wife wrote to the Tribunal requesting additional time to provide submissions on the basis that the claimant had been admitted to hospital and was unwell. The respondent did not object to this but requested medical evidence which might at least indicate some prognosis in respect of the claimant's health so that the matter could be finalised. Having regard to the situation, the Tribunal suspended the proceedings and requested the claimant to file medical evidence within 14 days. The Tribunal then received a certificate of the claimant's admission to hospital. The Tribunal requested that the claimant or his wife were to inform the Tribunal of the claimant's position on remedy by way of a short statement on his behalf as soon as he was released from hospital so that the litigation could be brought to a conclusion.

4. On 9th October 2018 the respondent's representative wrote to the Tribunal submitting that it was not in the interests of both parties for the matter to be stayed indefinitely and the Tribunal should proceed to issue the judgment on remedy given the narrowness of the issue involved. The Tribunal wrote to the parties on 11th October 2018 to reiterate that the Tribunal was not proposing to make any award for compensation on the basis that the claimant would have been fairly dismissed if the appeal had been heard sooner. The Tribunal requested that the claimant's representative provided the Tribunal with an update and invited her to make any comments within the next 7 days. Both parties were advised that it was in both of their interests that there was now finality to the litigation.

5. On 17th October 2018 the claimant's representative wrote to the Tribunal. She informed the Tribunal that the claimant's mental health had not improved since his admission to hospital in July. On behalf of her husband she submitted that he felt that if he did not have a face-to-face meeting his representations would not be considered fairly. His psychiatric injury sustained from the workplace meant that skype and phonecalls would not be feasible because of his anxiety. He should not be penalised in compensation as a result of acts which arose directly from his disability. It was submitted that the Tribunal should consider compensation for psychiatric injury. It was further submitted that the

claimant was capable of completing his job but not at a rate of over 60 hours a week. It was open to the respondent to have made reasonable adjustments for him to return to work. The claimant presented a Schedule of Loss detailing a basic award of £7, 335, loss of statutory rights of £300 and compensation for unfair dismissal, disability discrimination and personal injury with a total of £126,152 to £190,000.

6. The respondent's Schedule of Loss was submitted. The respondent contended that the basic award was £6,706 but should be reduced by 50% to reflect the claimant's conduct such that it was £3,353. The respondent submitted that this conduct should reflect the Tribunal's findings that the claimant (or his wife on his behalf) adopted an obstructive and unco-operative approach in respect of obtaining an occupational health report (paragraphs 30 and 80); the claimant was not co-operating with an instruction in relation to his company car (paragraph 86); the claimant's contribution to delays in the appeal process (paragraphs 42, 85 and 91); the 'rather combative nature of the correspondence from the claimant (paragraph 75) and the Tribunal's finding that by the time the claimant was dismissed the dispute between the parties had become so intractable that there was no realistic prospect of the employment relationship ever starting up again (paragraph 75). The Respondent submitted that the compensatory award should be reduced to reflect the Tribunal's finding that the procedural unfairness would have made no difference to the decision to dismiss.

Findings and Conclusions

7. The Tribunal is only concerned with remedy for unfair dismissal. The claims for disability discrimination, whistleblowing and detriment under s.45A of the Employment Rights Act 1996 were dismissed. The sole issues are how much the basic award should be and whether there should be any compensatory award given the findings of the Tribunal at paragraph 75 of the judgment that the claimant would have been dismissed for capability even if a fair procedure had been carried out (that is, even if the appeal hearing had been held sooner).

8. We find that having regard to the overrding objective, it is in the interests of justice to proceed to consider this matter without a hearing given the very straightforward nature of the issue. As I have indicated to both parties, it is in the interest of justice that this litigation is now brought to a conclusion not least for the claimant given his current state of health. The issue before us is a narrow one but we wished to give the parties an opportunity to make any representations before issuing our judgment.

9. Having considered both parties' representations our findings are that the claimant is entitled to a basic award for unfair dismissal. We do not consider that it should be reduced to take into account his conduct. We have noted the level of intractability in the correspondence regarding

the meeting and the claimant's notified difficulties with attending meetings face to face. However the employer had an obligation to hold the meeting and ought to have taken executive action to hold this meeting sooner so that matters were finalised. In the circumstances we appreciate that the respondent was attempting to be fair to the claimant because of his expressed needs but we find that there would have been a point at which the respondent ought to have offered a meeting to the claimant with adjustments on a 'take it or leave it' basis. For example, it is reasonable for the employer to seek advice on what the appropriate adjustments would be and to offer the claimant a meeting having regard to that advice. Therefore we find that the basic award should not be reduced as it was this was primarily a matter of responsibility for the employer.

10. We do find however, given our findings at Paragraph 75 of the judgment, that had the appeal taken place sooner the claimant would still have been dismissed for the reasons that we have given in our judgment on liability. Acting reasonably, the employer was unable to make the adjustments that the claimant required and there was no option but to dismiss him. We also find that the dispute between the parties was so intractable that given the size and administrative resources of the respondent and the fact that it was a family run company, there was no way to restore trust and confidence in the working relationship. We therefore make no compensatory award in line with the principles in **Polkey v AE Dayton Services Ltd [1987] UKHL 8** and in accordance with s.123(1) of the Employment Rights Act 1996.

11. Applying the law to our conclusions, we find that the amount owing to the claimant for the basic award is calculated as follows. The claimant was born on 29th September 1975. He commenced employment on 1st April 2002 and his effective date of termination was on 17th March 2017. Therefore he had fourteen years' continuous service with the respondent. Having regard to s.119 of the Employment Rights Act 1996. He would be subject to the statutory cap of £479 at the effective date of termination. Therefore the multiplicand for the basic award is £479 and the number of years would be 14 multiplied by 1 because he had not worked a full year over the age of 41. Therefore the award owing is £6, 706. We do not award loss of statutory rights because he would have been dismissed fairly in any event and this is part of the compensatory award. We make the order for remedy accordingly.

Employment Judge A Frazer
Dated: 25 October 2018

JUDGMENT SENT TO THE PARTIES ON

……26 October 2018……

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS