EMPLOYMENT TRIBUNALS

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE FRANCES SPENCER**

BETWEEN: **MR P HOWELL** **CLAIMANT**

AND

THE CUPBOARD DOOR COMPANY LTD **RESPONDENT**

ON: **24th July 2018**

Appearances

For the Claimant: Mr R Brandley, friend
For the Respondent: Mr R Morton, solicitor

REASONS FOR JUDGMENT AS TO REMEDY

These written reasons are given at the request of the Respondent, made on 12th August but not passed to the Judge until 1st October 2018.

1. This was a remedies hearing following the judgment of the Tribunal given orally on 12th February 2018 that the Claimant had been unfairly dismissed. Written reasons for the liability Judgment were sent to the parties on 20th June.

2. As agreed at the start of the hearing the issues before the tribunal were:

    a. whether there should be a reduction to the basic and the compensatory awards to reflect contributory conduct on the part of the Claimant;
    b. whether there should be a reduction in any compensatory award to reflect the chance that the Claimant would have been dismissed fairly in any event (a Polkey deduction);
    c. whether the Claimant failed to mitigate his loss and, if so, when he would have been able to obtain an alternative income and how much;

d. whether there should be any uplift to the award for failure to comply with the ACAS Code.

3. I heard evidence from the Claimant, and for the Respondent from Mr Leon Jebb and, via video link, from Ms Brent, who had dismissed the Claimant.

The Relevant Law

4. The relevant statutory provisions are set out in Sections 118-124 of the Employment Rights Act 1996. Where an employee has been unfairly dismissed, Tribunals are required to make an award consisting of a basic award and a compensatory award. The compensatory award is such amount that the Tribunal considers just and equitable, having regard to the loss sustained by the Claimant in consequence of the dismissal, insofar as the loss is attributable to action taken by the employer.

5. The calculation of loss is subject to the duty to mitigate loss. The Claimant is required to take such steps as are reasonable to mitigate the effects of having lost her job. The burden to establish a failure to mitigate loss lies with the employer. Whether an employee has done enough to fulfil the duty to mitigate depends on the circumstances of each case and is to be judged subjectively. If a Tribunal finds that an employee has failed to mitigate his loss, then it should attempt to estimate the time it would have taken to find a job had proper efforts been made and then reduce any compensation by the earnings it thinks the employee would have got from that point.

6. In assessing compensation, a Tribunal has to assess the loss flowing from the dismissal. In a normal case that requires it to assess for how long an employee would have been employed but for the dismissal. If the employer seeks to contend that the employee would have ceased to have been employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, then it is for it to adduce any relevant evidence on which it wishes to rely.

7. Section 122(2) of the Employment Rights Act 1996 provides that:

> "Where the tribunal considers that any conduct of the complainant before the dismissal (or, whether 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."

Section 123 (6) provides that:

> "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 the findings."

8. The tests in these 2 sections are different in that section 122(2) gives the tribunal a discretion to reduce the basic award on the grounds of any kind of (blameworthy) conduct on the employee's part that occurred prior to

dismissal, whereas under section 123(6) the conduct must cause or contribute to the dismissal.

9. In Nelson v BBC (No 2) 1980 ICR 110, the Court of Appeal said that 3 factors must be satisfied if the tribunal is to reduce the compensatory award by a factor to represent the Claimant's contributory conduct. The relevant action must be culpable or blameworthy, secondly the conduct must have actually caused or contributed to the dismissal and thirdly it must be just and equitable to reduce the award by the proportion specified.

10. Section 207A of the Trade Union and Labour Relations Consolidation Act 1992 provides that

> "If in any proceedings to which this Section applies it appears to the Employment Tribunal that
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> (a) the claim to which the proceedings relate concern a matter to which a relevant code of practice applies,
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> (b) the employer has failed to comply with that code in relation to that matter, and
>
> (c) the failure was unreasonable,

the Employment Tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

<u>Findings of fact</u>

11. The principal area in dispute evidentially was what occurred at the disciplinary hearing. Neither Ms Brent, nor Mr Jebb, were present at the liability hearing and neither had prepared a witness statement in time for that hearing. The Respondent had chosen not to call Mr Hewson who, they said, had taken the notes of the disciplinary hearing. For that reason (and as set out in my earlier Judgment) I did not make any findings of disputed fact at the liability hearing about exactly what had occurred at the disciplinary hearing

12. There was a sharp conflict of evidence between that of the Claimant and that of the Respondent's witnesses about what had happened at the disciplinary hearing. Ms Brent said that the Claimant was extremely aggressive, shouting and swearing during the meeting, asking "what the fuck is this all about?". She said that, apart from one incident where she had been involved in an armed robbery, she had never been so scared for her own safety and for that of the others in her life. Mr Hewson had asked the Claimant to calm down. Mr Jebb, who was not present at the disciplinary hearing, had produced a short statement and gave evidence that he was sitting outside Ms Brent's office at the time and heard the Claimant shouting and swearing at Ms Brent from where he was sitting.

13. The Claimant says that he did not swear or shout. He said, "I didn't have my denture in and I was self-conscious". He did accept that he may have raised his voice and that he had said to Ms Brent "what the hell is the meaning of this?" That had been said in response to the letter that he had received only one hour previously asking him to attend a disciplinary hearing which might result in his dismissal. At the liability hearing the Claimant had said much the same. He had accepted that he was frustrated and thought the disciplinary hearing was unfair in the circumstances. He accepted he might have raised his voice but denied swearing. The Claimant said he did not recall being asked any questions at the disciplinary - "we just discussed how ridiculous it was to be told I was to be dismissed for going to the dentist".

14. The evidence of the Respondent's witnesses was not altogether consistent. Mr Jebb said that the meeting before Ms Brent lasted about one minute, whereas Ms Brent said the meeting lasted 25 minutes. In his evidence the Claimant suggested that disciplinary hearing lasted about 10 minutes. Although Mr Jebb came across as a credible witness I did not accept that he was asked to produce the statement produced to the tribunal today at the time. The statement is not dated or signed, nor was it referred to or sent to the Claimant at any time during the disciplinary process.

15. There was produced before me at this remedy hearing (12-13) some notes which were said to be minutes of the disciplinary hearing taken by Mr Hewson at the time. Those notes had not been produced in time for the liability hearing and none of the documentation produced to me today refers to those notes. The Claimant did not accept that they were accurate. For my part, having read those notes, I do not accept that they represent an accurate reflection of what occurred at the meeting.

16. On balance I conclude that the truth as to what occurred at the disciplinary hearing lies somewhere in the middle. I find that Ms Brent has exaggerated the Claimant's behaviour in her witness statement, whereas the Claimant may have underplayed it. In evidence before the tribunal Ms Brent was extremely defensive. I note for example that her witness statement she states that the Claimant told her "if I wanted some respect then I had to fucking earn it". The notes of the disciplinary hearing suggest that the Claimant said, "it's a bloody joke - if you want my respect then I'll tell you now, you haven't got it no one respects you, if you want people's respect you have to earn their respect".

17. I am satisfied that the Claimant was frustrated and angry at the hearing. I do accept that he tried to take over control of the hearing by suggesting that Ms Brent had no right to call him into a disciplinary meeting for an 18 minute absence. I do accept that he was loud and generally behaved in an insubordinate manner by, for example, telling Ms Brent that if she wanted his respect, she had to earn it. I do not accept that he was swearing and shouting or that Ms Brent had cause to be frightened. She was in the office accompanied by Mr Hewson.

18. The Claimant was 67 ½ when he was dismissed. He candidly has told the tribunal that he not tried to find another job, having taken the view that he was extremely unlikely to find one. He had been a French polisher before he became a sprayer with the Respondent and had had trouble finding a job when he was 60. There was no French polishing work in Seaford. He had planned to remain working for the Respondent until the end of 2018 when he would have retired. In his schedule of loss, however, he has only claimed 9 months loss.

Conclusions

19. Mitigation. A dismissed employee has a duty to act in the way a reasonable person would act in the absence of any hope of compensation from his former employer. In assessing how reasonable the Claimant was I have to take him as I find him. If the Claimant does not act in accordance with that duty then what the tribunal has to decide is from what date would an alternative income have been obtained had the Claimant taken reasonable steps to mitigate his loss.

20. The burden to show that an individual has failed to mitigate his loss lies with the Respondent. Mr Morton suggests that the Claimant has failed to mitigate his loss and, had he done so, he could have found work after 12 weeks but that submission was made without producing any evidence about the local job market. There was no evidence to show that the Claimant would have found work after 12 weeks. There was no evidence that he would have found any kind of work before the end of the 9 month period for which compensation has been claimed.

21. The Claimant was 67 when he was dismissed. At that time, he had not taken his state pension but had deferred it. What would a reasonable 67-year-old man have done in similar circumstances? Given his age I consider that the Claimant did not act unreasonably in taking the view that he was unlikely to be able to find alternative work. What is reasonable for a younger person may not necessarily be reasonable for someone who is eligible for the state pension. However, even had I found that the Claimant did not act reasonably in failing to look for alternative work, the issue for me would be when would he have found alternative work.

22. Polkey. In assessing compensation, the task of the tribunal is to assess the loss flowing from dismissal using its common sense, experience and sense of justice. That requires the tribunal to assess how long the employee would have been employed but for the dismissal.

23. The Respondent contends that the Claimant would have ceased to be employed in any event even had there been a fair hearing to consider his conduct at the meeting of 8th May. He had behaved unacceptably and was guilty of gross misconduct.

24. I do not accept that. I have rejected Ms Brent's account of what occurred at the meeting or that he was shouting and swearing in such a way that she was afraid, although I do accept that he was disrespectful.

25. I conclude, on the balance of probabilities, that the Claimant would not have been dismissed had there been a fair disciplinary process. A dismissal for 18 minutes absence is outside the band of reasonable responses. If there had been a fair hearing to at which the Claimant's behaviour on the 8th May was investigated and considered in an open minded and fair way, I find that on the balance of probabilities he would not have been dismissed. I am satisfied that this was a decision taken in haste, and that Ms Brent and Mr Jebb have exaggerated what occurred in an effort to justify a decision in which Ms Brent felt that her authority had been questioned. I make no Polkey deduction.

26. Contribution. A tribunal has power to reduce a basic award where the tribunal "considers that any conduct of the complainant before the dismissal was such that it would be just and equitable to reduce or further reduce the amount of the award to any extent". In respect of the compensatory award, the tribunal has power to reduce the basic award by such proportion as it considers just and equitable "where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the Claimant".

27. On balance I consider that the Claimant's conduct was blameworthy and contributed to his dismissal. I conclude that it would be just and equitable to reduce both the basic and the contributory awards by 25%. He was angry and rude and did not respect Ms Brent as a manager. He had some good grounds to be angry. The Respondent had called a meeting, following a very short absence from work, at which the Claimant's job was at risk, on one hour's notice. If Mr Hewson had done an investigation, that "investigation" had not been shared with the Claimant in advance of the disciplinary. In the circumstances it may not be wholly surprising that the Claimant was aggrieved.

28. As I said in the liability judgment this was a decision made by Ms Brent in haste and without fair process. The Claimant, having been called to a hearing for one offence, was then dismissed for another without being given a chance to respond to the allegations against him. Given that the Respondent denied the Claimant a hearing to consider such conduct, it would not be appropriate to reduce the awards to reflect any contributory conduct of the Claimant by more than 25%.

29. ACAS code of practice. the Tribunal has power to increase the compensatory award by up to 25% for failure to comply with the disciplinary code of practice. In determining the amount by which to increase any award I have considered how culpable was the failure to comply and how much of the ACAS code of practice was complied with.

30. In this case there was an almost total failure to comply with the ACAS Code in respect of the behaviour for which the Respondent now says the Claimant was dismissed, namely “serious insubordination and violent and aggressive behaviour towards Ms Brent during the disciplinary hearing”. In respect of that charge the Respondent:

    a. failed to carry out an investigation
    b. failed to inform the Claimant of the problem
    c. failed to have a disciplinary hearing or allow the Claimant to be accompanied.

31. The Respondent did give the Claimant an opportunity to appeal, though not until it had been chased to do so by the Claimant. As set out in the liability Judgment the appeal was more a question of going through the motions, than allowing the Claimant a genuine opportunity to be heard with an open mind. These failures could not be said to be inadvertent failures and had the effect of denying the Claimant his right to be heard.

32. I am satisfied that Respondent’s failures in this respect means that the uplift should be at the top end of the bracket for such awards. Giving the Respondent credit for having provided an appeal – even if this was largely formulaic – I assess the appropriate uplift at 20%.

33. The amount and calculation of the award has been set out in the Remedy Judgment sent to the parties on 25th July 2018.

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Employment Judge F Spencer
21st November 2018