EMPLOYMENT TRIBUNALS

Claimant: **Mr B Dainton**

Respondent: **Mint Corporation Ltd (trading as Cyberteam)**

HELD AT: **Leeds** **ON:** **31 October 2018**

BEFORE: **Employment Judge J M Wade**
Mr R Stead
Mr M Taj

REPRESENTATION:

Claimant: **Mr S Wyeth (counsel)**
Respondent: **Ms A Jones (counsel)**

Note: The written reasons provided below were provided orally in an extempore Judgment delivered on 31 October 2018, the written record of which was sent to the parties on 31 October 2018. A written request for written reasons was received from the respondent on 7 November 2018. The reasons below are now provided in accordance with Rule 62 and in particular Rule 62(5) which provides: In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how the law has been applied to those findings in order to decide the issues. For convenience the terms of the Judgment given on 31 October 2018 are repeated below:

JUDGMENT

1 Upon the claimant's successful unfair dismissal complaint the Tribunal makes the following awards to be paid by the respondent to the claimant:

Basic Award	**£5868**
Compensatory Award	**£80,541**

2 Upon the respondent's successful contract claim the claimant shall pay to the respondent the sum of **£1190.58.**

3 The recoupment regulations do not apply to this judgment.

REASONS

Introduction, hearing and evidence

1. The Tribunal gave its decision upholding the claimant's unfair constructive dismissal complaint on 4 May 2018. His other complaints were dismissed. By consent the respondent's counterclaim succeeded. This is a case in the IT recruitment and contracting sector where the claimant had previously enjoyed high earnings.

2. Our reasons for the liability judgment were sent to the parties on 26 July 2018 and they included the following at paragraphs 127 and 128:

   "*Weighing all this we consider that there is a fifty percent chance that a reasonable dismissal would have taken place after December 2017, had the claimant remained in employment, because the Dhami allegations about matters could have given rise to a reasonable belief of a reasonable employer that serious misconduct had taken place.*

   That conclusion is not a final determination of remedy, because the parties may require other issues to be determined. Nevertheless, it appears proportionate and just, given matters are fresh in our minds, to give the parties that clarity. There may or may not need to be a remedy hearing."

3. Both sides were represented by experienced counsel at that hearing. A remedy hearing was ordered to be listed upon application within twenty eight days. On 11 May the respondent applied for written reasons to include the Polkey decision above and on 18 May the claimant applied for a remedy hearing. It is fair to say that the acrimony between the parties has also become apparent communications and a lack of cooperation between solicitors. A remedy hearing was listed for 31 October and the claimant's application to postpone on the basis of his advocate's availability was opposed by the respondent and refused. In September the respondent's solicitors came off the record, and on 23 October new solicitors instructed on 11 October applied for a postponement and unless order on the basis of a lack of a sensible schedule of loss and disclosure from the claimant.

4. Those applications were opposed including for fear that Mr Cross was seeking to arrange the affairs of the respondent to make any remedy irrecoverable. On 24 October the respondent indicated for the first time that it was seeking to raise new allegations of potential misconduct by the claimant during his employment and needed time to adduce that evidence.

5. On 26 October the claimant sent to the respondent's solicitors a schedule of loss, list of issues, remedy bundle index and statement from the claimant addressing what he had done to seek new work and his new business after leaving the respondent. On 30 October a letter was sent to the parties recording that I had refused the application to postpone and that "*the Claimant should attend the hearing with copies of IR77 [his new business] invoices to clients from the commencement of trading and a statement of management accounts/ trading for the first trading year or/to date*".

6. Mr Wyeth appeared as he did on the last occasion. The respondent's new solicitors had instructed Ms Jones. She attended the hearing alone, with no evidence to lead on behalf of the respondent, albeit the Tribunal permitted some late relevant documents to be admitted to the bundle concerning the claimant's new business. The bundle also contained the claimant's payslips from IR77, his dividend vouchers and various other documents concerning his earnings at the material time.

Issues

7. This issue list for the claimant was as follows:

   i. What are the losses which flow from the claimant's dismissal?
   ii. Can the respondent prove that the Claimant has unreasonably failed to mitigate his loss?
   iii. What reduction should be made in relation to Polkey and from what date?
   iv. Should an adjustment be applied for the Respondent's failure to follow the ACAS code?

8. After reading in and at the start of the hearing Ms Jones indicated that she proposed to cross examine the claimant about his conduct concerning his mobile phone and linked in account whilst employed, and to put a case that he fully intended to leave the respondent to set up a new business and that his employment would have ended in August 2017 for that reason in any event (and so result in nil compensation) and that those were not matters which had been determined by the Tribunal.

9. Mr Wyeth resisted that position relying on the remedy case which was pleaded by the respondent before the last hearing, and agreed to be determined; and that the Tribunal had determined those matters in full as the parties had agreed. Further Mr Wilson on the last occasion had fully put a case that the claimant's resignation had been in order to pursue his own business and he had not succeeded with that case as part of our findings of a constructive dismissal: our facts were against the respondent and we knew what we had meant in our reasons. It would be a flagrant breach of the overriding objective if the respondent was now to seek to reopen those findings of fact.

10. The Tribunal directed that we would not re-open findings that had been made on the last occasion.

Evidence

11. As indicated we had a core bundle of remedy documents, to which there were some additions, notably in relation to pension contributions made on behalf of the claimant's pension during his employment. We also heard oral evidence from the claimant and he was cross examined by Ms Jones, principally on the issues of mitigation and loss. We made the following further findings of fact. The claimant's oral evidence was again straight forward and struck us as reliable when compared with the relevant documents.

The law

12. The relevant law is to be found in Sections 118 to 124A of the Employment Rights Act 1996. Section 123 relevantly provides: (1)… *the amount of the 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…… (4) 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 or (as the case may be) Scotland." We also had before us Cooper Contracting Limited v Mr L Lindsey [UKEAT/0184/15/JOJ] confirming the relevant principles for us in applying Section 123 (4).

Findings of Fact and conclusions

13. Mitigation

14. After the claimant's resignation in August 2017 he made contact with a number of businesses in the recruitment consultancy sector to seek a new employed position. He had frequent calls, meetings and interviews to that end in both London and Leeds between the end of August and Christmas of 2017. We accept his evidence today that his first preference was employment, as opposed to setting up his own business. We accept that evidence in the context of our previous findings about his circumstances generally (including that he had looked to re-mortgage his house, he had dependents, he had been "stung" in the sense of losing equity in the administration of the previous Cyberteam business, and he had lost, or forfeited, potential equity in the respondent from options when he resigned. It appears to us to be entirely likely that his first preference would be stable, well remunerated employment.

15. We do not accept the case put to the claimant, that in effect, he sabotaged his employment opportunities with prospective consultancies in the sector, largely market leaders, because he was intent on setting up his own business. The reality was far from that: he was frank and open with prospective employers about the covenants that were said to be in place in his contract of employment, and that he was in dispute with Cyberteam having left on bad terms. Again, it was entirely likely in the circumstances of the letters that he had received from Mischon de Reya (paragraphs 73 to 74 of our reasons) in that respect and that he had been refused release from his covenants by the respondent in the early phases of his departure, that he would be frank with future employers.

16. That openness resulted in at least two firms preferring to postpone any discussion about a role that they might have had with the claimant until the covenant matters were resolved. We have found that by December 2017, by which time, despite his efforts, the claimant did not have any other role to undertake, he had agreed to help a friend in some preliminary work to set up a new business which was incorporated in January. That was IR77 Limited ("IR77").

17. He was still pursuing other opportunities with household name firms, consistent with his first preference, but they were not coming to fruition for the reasons we have explained. He became a shareholder, along with his wife, in IR77 in March 2018 after the expiry of the covenants to which the respondent maintained it held him. He did not finally give up on the prospect of an employed role producing earnings of the kind he had previously enjoyed until June of this year, 2018, when he finally signed a shareholders agreement for IR77.

18. The respondent did not adduce any evidence at all of roles for which the claimant might have applied but did not and would, in all likelihood, have secured. Nor did it adduce any employment consultant's evidence about the employability or otherwise of Mr Dainton on which to base a submission of steps the claimant might

reasonably have taken and did not. Nor did any of the questions put to the claimant in cross examination give any evidential basis for us to find that his earnings from IR77 have been suppressed in some way. His evidence about work secured and invoices sent appeared entirely likely to us. We were satisfied that there was nothing which could be characterised as a failure to earn sums the claimant could reasonable have earned, such that we should reduce our award for a failure to mitigate or on the alternative just and equitable basis which was submitted.

19. Our finding in this matter is that the claimant did take reasonable steps to mitigate his loss, first in seeking stable well paid employment (albeit the respondent would openly release covenants) and then by setting up his own business. The respondent has not proven that there were steps that the claimant could have reasonably taken and did not which would have secured him further earnings, either of greater amounts, or earlier than the earnings which did arise from work for IR77.

The respondent's new case on Polkey

20. It was put to the claimant that because the Dhami allegations would have come out in any event (the Tribunal's previous finding), his wife would been keen for him to leave Cyberteam (and therefore his employment would have ended in any event even if he was not dismissed). He did not accept this: his evidence was that his wife did not want him to resign when he did (and by implication would not have wanted it because of Dhami). It was then put to him that his friendship with Mr Elliott, and desire to set up IR77 with him would have led to his employment ending in any event. He did not accept that either; he had invested 12 years in Cyberteam and his share options were due to vest in February 2018 and he wanted to stay. IR77 came about when the Claimant was unable to secure the secure well remunerated post he had sought as his first preference.

21. We accepted the claimant's evidence on this last matter as it was straightforward and coherent with our previous findings. In all the circumstances we do not consider the claimant's employment with Cyberteam would have come to an end absent the respondent's dismissal of him (as we have found there was) because of a desire to set up his own business, be it IR77 or another at this time.

22. We have already determined that there was a fifty percent chance of a reasonable dismissal after December 2017 when the Dhami allegations came to light. The prospect of the Claimant's wife changing her position and seeking his resignation before or instead of such dismissal, such that the chances of employment ending because of Dhami became 100%, is not a finding that the Tribunal can tether to evidence.

23. Ms Jones put it to the claimant and we have recorded his evidence above. She was not present (whereas the Tribunal was) when Mr Wilson put the respondent's case that Mrs Dainton wanted the claimant to leave Cyberteam to Mrs Dainton directly on the last occasion. We did not make a finding then because it added nothing: whatever her position in January 2016 Mr Dainton wanted to stay to access the equity for which he had worked for so many years (and we accept his evidence on that). The spectrum of spousal reaction to allegations of infidelity connected with employment is inherently unpredictable, but given the evidence we heard from Mrs Dainton on the last occasion, there is no basis to suggest that Mr Dainton's assessment of matters is unlikely. We recognise that the claimant is an interested party when giving his evidence on this matter, but we do not consider

there is evidence sufficient to find that employment would certainly have ended because of the Dhami allegations, not just from dismissal but from spousal pressure. We therefore reject that case and maintain our earlier assessment.

Loss

24. What losses then arose from the dismissal? That was our next question and how long were those losses likely to continue?

25. Based on the average sums that the claimant was earning on his departure from Cyberteam, including his pension, he received annual remuneration of approximately £160,000 or thereabouts. His losses to the date of this hearing are therefore a matter of calculation against the sums in mitigation included in his schedule.

26. The claimant gave what we considered to be straightforward and compelling oral evidence about the circumstances of IR77 and to some extent its trading. He did not provide its accounts or trading history in any documentary form as directed the day before the hearing, but we accept that he has dealt with it in his oral evidence and from the documents that were disclosed (payslips and dividend vouchers in relation to those sums appearing in the mitigation section of his schedule). There was no formal application to vary that direction but the Tribunal considers it satisfied in purpose, if not in form.

27. The remuneration that he is currently deriving from IR77 in total amounts to £79,000 or thereabouts on an annual basis. It was clear that that level of remuneration started from 1 June 2018, after the shareholder's agreement had been signed and that seems to us to be entirely likely in the circumstances, when trading was underway.

28. That degree of remuneration in a start-up phase, in our judgment, exhibits a good deal of confidence on his part of the cash flow of this business (which in essence operates as we described Cyberteam operating in our earlier findings). That strikes us as relevant in assessing when it might be that IR77 will deliver the remuneration that the claimant was enjoying from Cyberteam when his employment ended.

29. Given the confidence exhibited in the drawings to date we consider that the claimant will have recovered to his previous earnings in the early part of next year. The amount that we can consider proven in relation to future loss does not extend between beyond 31 January 2019. That takes into account that there might well be a lull in trading over the Christmas period.

30. Those being the relevant findings of fact in relation to assessment of the loss sustained by the claimant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer, the sums are a matter of calculation, including the reduction for Polkey. The claimant's net weekly loss was £1983.40 (net salary and commission) plus £288.46 in employer pension contributions, a total weekly loss of £2271.86, far in excess of the statutory cap for the basic award.

31. There have been nearly sixty one weeks of loss at that rate (£138583), and we consider the claimant has proven he will continue to suffer loss until 31 January 2019, a further three months or 13 weeks (£29,534). The starting point then is net loss of £168, 117. From that we deduct £34657 (net sums received in mitigation), and (3 x 5833) to be received in mitigation (£17499). That reduces the claimant's net loss to £115, 961. From that we set aside the first 17 weeks at 2271.86 (for the period before the Dhami allegations came to light) (£38, 621). We subtract that

from the total to produce a sum of £77340, to which we apply the 50% Dhami reduction of £38670. The claimant's net loss then becomes £77291, from which we properly set aside £30,000 and then apply a grossing up calculation to 47, 291.

32. It then becomes apparent that the sum to be properly awarded to the claimant exceeds the statutory cap of £80, 541 and we duly award that sum by way of compensatory award. The basic award was a matter that was agreed between the parties and that sum is £5,868 and we also award that sum.

33. It will be apparent in that Judgment that we consider an award of £80, 541, standing back and revisiting all our findings in this case, including those above, is the just and equitable sum we consider 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. We were asked by the respondent to find that this employment might well have come to an end in any event notwithstanding the breaches that we found on behalf of the respondent. That case has not succeeded before the Tribunal other than on the limited Dhami basis. The claimant has established on the basis of a full liability Judgment a constructive dismissal. We have addressed the Polkey point that was pleaded and we have addressed, and to some extent permitted the respondent to advance a further and subtly different case on this occasion. We consider the effect of the cap is that the claimant will continue to suffer loss as a result of action taken by the respondent resulting in his employment ending in the way it did.

Employment Judge JM Wade

Date 19 December 2018