THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH

BEFORE: EMPLOYMENT JUDGE BALOGUN

BETWEEN:

ANDREW GHIGLIERI

Claimant

AND

SYSTECH GROUP EMPLOYEES LIMITED

Respondent

ON: 14 November 2018

Appearances:

For the Claimant: Mr G Anderson, Counsel
For the Respondent: Mr R Paines, Counsel

RESERVED REMEDY JUDGMENT

1. The Claimant is awarded **£20374.58** for the concurrent claims of unfair dismissal and wrongful dismissal.

2. Pursuant to Rule 66 of the Employment Tribunal Rules of Procedure 2013, enforcement of this judgment is stayed pending the outcome of the Respondent's appeal.

REASONS

1. This was a hearing to consider remedy following the tribunal's judgment, sent to the parties on 8 August 2018, upholding the claimant's constructive dismissal and wrongful dismissal claims.

2. The claimant gave additional evidence at the hearing on matters relating to remedy and mitigation. I also heard from Robert Chapman, Company Director, on behalf of the respondent.

The Issues

3. The issues in the case were as follows:

    a. Has the claimant reasonably mitigated his loss
    b. Does Polkey apply to the wrongful dismissal claim
    c. What financial losses flow from the dismissal
    d. Should enforcement of remedy be stayed.

The Law

4. Section 123 of the Employment Rights Act 1996 (ERA) provides that the amount of compensation payable for unfair dismissal 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 the action taken by the employer.

5. An employee is under a duty to mitigate their loss as a reasonable man or woman unaffected by the hope of compensation. An employee cannot recover compensation for the earnings lost as a result of the dismissal if that loss was avoidable. The onus is on the employer as wrongdoer to show that a claimant has failed in their duty to mitigate and the test is an objective one based on the totality of the evidence However, the standard of reasonableness to be expected of an employee in these circumstances is not high and the tribunal should not be too stringent in its expectations of the claimant. Fyfe v Scientific Furnishings Ltd [1989] IRLR 331; Wilding v British Telecommunications plc CA 2002 ICR 1079.

6. In considering what affect failure to mitigate should have on remedy, regard must be had to: Savage v Saxena 1998 ICR 357 EAT which confirms the analysis set out in the earlier case of Gardiner-Hill v Roland Berger Technics Ltd [1982] IRLR 498. The case cautions us not to apply an arbitrary cut off to compensation but instead to:

    a. Identify what steps should have been taken
    b. Find the date on which such steps would have produced an alternative income
    c. Thereafter reduce the amount of compensation by the amount of income which would have been earned.

Submissions

7. The parties made oral submissions at the hearing and provided written submissions subsequently. These have been taken into account.

Unfair Dismissal

8. The Claimant's basic award is £4872. This is not subject to a *Polkey* deduction.

Compensatory Award

Mitigation

9. The claimant was under a duty to mitigate his losses by taking proactive steps to find income at a comparable level. He claims the difference between his earnings with the respondent and those with Axima, which he says were lower, up until January 2017. The claimant told the tribunal that for the period of loss in question, he took no proactive steps to seek out alternative employment. He said that he did not go looking for work as he had a job with Axima even though it was not perfect. He said that he received a lot of calls from head-hunters for jobs all around the world but they were in places he did not want to go, so he was selective. He said that the only place he could sensibly work was Europe as he needed to be able to travel back to the UK to see his daughter. When it was put to him that there was nothing stopping him from looking for work in the UK, he said that he did not want to as he was no longer resident. The claimant limited his employment options due, in large part, to his lifestyle choice – i.e. his decision to base himself in France and not to seek work in the UK. That decision pre-dated the dismissal and is therefore not a consequence of it. In those circumstances, the respondent should not have to pay for any losses that flow from that decision, especially as, had the claimant remained in employment, it could lawfully have required him to work in the UK.

10. Whilst there is no criticism of the claimant's initial decision to take the Axima role; given the relatively low salary, he should have treated this as a stop gap until something better came along. It was unreasonable for him to stay there for 2 years without making any attempt to seek alternative employment at a comparable salary to that received with the respondent. I am satisfied based on the claimant's own evidence that he did not take reasonable steps to mitigate his losses.

11. As part of his duty to mitigate, the claimant should have sought employment within and outside France, including in the UK and should have commenced that search, from 6 months of termination, at the latest. He is highly skilled in his field and the fact that he was regularly head-hunted suggests that those skills were very much in demand. Had the claimant actively sought employment, I believe he would have found comparable employment by the end of January 2016. The Claimant is awarded losses up to the end of January 2016, subject to the Polkey deduction.

12. Following the hearing and after I had indicated to the parties which items of loss from the schedule would be allowed, the parties went away and agreed the calculations. They initially agreed a figure calculated from the end of the putative notice period. However, I asked them to re-calculate them from the EDT and a figure of £15,502.58 was agreed.

Wrongful Dismissal

13. Wrongful dismissal is a claim in contract and the purpose of compensation for breach of contract is to put the person back in the position they would have been had the contract

been performed properly. In wrongful dismissal cases, the measure of loss is the contractual notice period. It is common ground that the claimant's employment could be lawfully terminated on six months' notice either side.

14. In my Judgment on remission from the EAT, I made a 60% *Polkey* deduction in relation to the unfair dismissal claim on the basis that this was the percentage chance that the claimant would have resigned in any event. It was submitted by the respondent that the *Polkey* deduction should apply equally to the wrongful dismissal claim. Counsel for the claimant disagreed. I was not directed to any specific authorities on the point but it is addressed in the Employment Tribunal Remedies Handbook 2018-19, page 16 which states that damages for wrongful dismissal are not subject to adjustment for contributory conduct or *Polkey*. On that basis, I have not made a *Polkey* deduction from the wrongful dismissal damages. That said, damages for breach of contract are subject to the principle of causation. If the loss incurred does not flow from the breach then it is not recoverable.

15. For the reasons set out in my liability judgment, I concluded that the claimant would have resigned in any event. The question is at what point during the notice period would that have happened. Although the claimant gave no notice at all, that was in the context of there having been a constructive dismissal. Things may have been different if there had been no repudiatory breach and he had resigned voluntarily. In that event, the claimant would have been obliged to give 6 months' notice, unless released early by mutual agreement. As the respondent ceased to have any work in France, the claimant would have had to work out his notice in the UK. The claimant no longer had a house in the UK and the respondent was unlikely to pay for accommodation given that the UK was his contractual base. That said, the claimant's earnings with Axima were much lower than with the respondent and the difference could have funded temporary accommodation over the notice period. More of a problem was that having secured alternative employment in France, his preferred location, the claimant would not have wanted to jeopardise it by being unavailable to start for 6 months. Given that the respondent had specifically invited Axima to approach the claimant directly with an offer of employment, thereby releasing him from his post termination covenant, it was unlikely to then frustrate that process by holding him to his full notice. It is more likely than not that, by mutual agreement, the claimant would either have been required to work only 3 months' notice of his notice period or been released immediately with payment in lieu of 3 months' notice.

16. The damages for wrongful dismissal are as follows:

Basic net weekly pay –	933.82 x 13 = 12139.66	
Net weekly guaranteed bonus	439.45 x 13 = 5712.85	
10/12th of Net weekly oversees allowance	457.75 x 13 = 5950.75	
		23803.26
Less: Net mitigation income		11914.01
		£11889.25

17. In order to give full effect to the unfair dismissal *Polkey* finding, the approach I have adopted in calculating compensation for the concurrent claims of wrongful and unfair

dismissal, I have deducted the wrongful dismissal damages from the unfair dismissal compensation in accordance with calculation 1 in the said Remedies Handbook.

18. The calculation is as follows:

    11889.25 + **(**15,502.58-11889.25) 15502.58
    Add
    Basic Award – 4872
    Total Award **£20374.58**

<u>Remedy Judgment</u>

19. The respondent is to pay the claimant the total sum of **£20374.58**

<u>Stay of Remedy</u>

20. The respondent applied for a stay of enforcement of the remedy judgment pursuant to Rule 66 on grounds that it is appealing the liability decision (in respect of the *Polkey* finding only). The claimant objected. After considering their submissions, I have decided to grant the respondent's application.

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Employment Judge Balogun
Date: 11 February 2019