THE EMPLOYMENT TRIBUNALS

Between:

Claimant: **Mr N Wingfield**

Respondent: **British Telecommunications plc**

Hearing at London South on 28 February 2019 before Employment Judge Baron

Appearances

For Claimant: **The Claimant was present in person**

For Respondent: **Helen Umpelby - Solicitor**

JUDGMENT AT A REMEDY HEARING

The Tribunal **orders** the Respondent to pay compensation to the Claimant in accordance with section 117 of the Employment Rights Act 1996 in the sum of £54,484.50.

The Employment Protection (Recoupment of Benefits) Regulations 1996 do not apply to this award.

REASONS

1 Following a hearing in May 2018 there was a finding that the Respondent had unfairly dismissed the Claimant.[1] This was a hearing to determine a remedy for the Claimant. The Claimant gave evidence. No evidence was adduced on behalf of the Respondent.

2 The Claimant had elected for compensation. He thus becomes entitled to a basic award. That was agreed as being £12,214.50, and there was no suggestion from the Respondent that it should be reduced in accordance with section 122 of the Employment Rights Act 1996. The compensatory award is to be calculated in accordance with section 123:

> **123 Compensatory award**
> (1) Subject to the provisions of this section and sections 124, 124A and 126,[2] 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.
> (2) The loss referred to in subsection (1) shall be taken to include—

[1] Claims under the Equality Act 2010 failed.
[2] Sections 124A and 126 are not relevant.

> (a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and
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> (b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.
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> (3) The loss referred to in subsection (1) shall be taken to include in respect of any loss of—
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> (a) any entitlement or potential entitlement to a payment on account of dismissal by reason of redundancy (whether in pursuance of Part XI or otherwise), or
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> (b) any expectation of such a payment,
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> only the loss referable to the amount (if any) by which the amount of that payment would have exceeded the amount of a basic award (apart from any reduction under section 122) in respect of the same dismissal.
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> (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.
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> (5) In determining, for the purposes of subsection (1), how far any loss sustained by the complainant was attributable to action taken by the employer, no account shall be taken of any pressure which by—
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> (a) calling, organising, procuring or financing a strike or other industrial action, or
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> (b) threatening to do so,
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> was exercised on the employer to dismiss the employee; and that question shall be determined as if no such pressure had been exercised.
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> (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.

3 The starting point is to assess the Claimant's net loss from the date of dismissal to the date of the hearing, and that should take into account any increases of pay which the Claimant could properly have expected to receive. Determining the net pay has not been straightforward because the contents of such payslips as were produced were somewhat confusing. The payslips I had for October and November 2016 showed net pay of £2,104.45. The December payslip showed net pay of £1,952.29. For reasons not explained there was a deduction from gross pay for December shown as 'Basic Pay Temp Adjustment' and there was also a similar adjustment to the London Weighting allowance. That presumably reflects the date of termination of the Claimants' employment.

4 I am taking the net pay as shown in the two earlier payslips, but adding back in the contribution of 7% made by the Claimant to the Respondent's pension scheme. There ought to be an allowance for the tax which the Claimant would have paid if those pension contributions had not been made. The actual pension contribution was £246.58, which I reduce to £197.64 making a net monthly income of £2,302.09. I am also adding back contributions of £300 made to Sharesave schemes increasing the net income to £2,602.09. On the basis of 52 weeks a year that produces a net weekly income of £600.48.

5 There were 13 complete weeks from the date of dismissal to 31 March 2017 making a net loss of £7,806.24. There was a pay increase of 2.33% from 1 April 2017 according to the Claimant's schedule of loss, and that was not disputed by the Respondent. I will simply increase the weekly net loss by that amount, resulting for 2017/18 in a weekly loss of £614.77 and an annual loss of £31,968.04. There was a further increase of 2.7% from

1 April 2018 making a net weekly loss of £631.37. There were 48 weeks in 2018/19 before this hearing resulting in a loss of £30,305.76.

6 The total of these three periods amounts to £70,080.04.

7 In addition the Claimant is entitled to receive compensation for the loss incurred by reason of no longer being part of the Respondent's defined benefit pension scheme. Both parties accepted that any calculation could properly be made on the basis of the Respondent's contributions to the scheme, rather than any more complex method. Indeed it would not have been possible to undertake any more sophisticated calculation because the information was not before the Tribunal. In his schedule of loss the Claimant suggested compensation representing the employer's contributions at the rate of 15%. At my request Miss Umpelby has provided details of the contributions actually made by the Respondent, which I am content to accept. The rates supplied were 9% to 30 June 2017, and then 9.9% to 30 June 2018. The scheme then closed and a defined contribution scheme was introduced. From documents supplied to me it appears that the contribution rate increased to 10%. I have calculated that the total contributions based on the Claimant's gross salary, the rates of increase mentioned above and the contribution rates as being £9,145. I do not propose to set out the intricate details of the calculations.

8 It was agreed that the Claimant should receive £1,144 in respect of the loss of telephone benefit and also £500 for loss of statutory rights.

9 The Claimant also sought compensation for loss of the death-in-service benefit which he had enjoyed during his employment and he posited a sum of £101.96. I decline to award anything under this heading. I entirely accept that such award may be made in principle. The Third Edition of the Compensation for the loss of Pension Rights provided as follows:

> *Life Assurance Cover.* Many pension schemes provide, or have separate schemes associated with them to provide, life assurance benefits for their members. In appropriate cases it may be just and equitable or otherwise appropriate to compensate former employees for the loss of the benefit of belonging to such schemes by awarding as compensation the average market rate for providing equivalent cover.

10 There was no evidence as to the details of the benefit. There was thus no evidence as to what the market rate would have been to replace that cover. The Claimant had not taken out his own insurance cover and so had not suffered any specific financial loss. There was no evidence of the cost to the Respondent or providing that cover which could have provided an alternative method of calculation.

11 The next item in contention was an alleged loss in relation to two Sharesave schemes. Again I was not provided with full details. As I understand it the Claimant had been paying £250 per month into the 2012 Sharesave scheme and £50 per month into the 2014 scheme, both of which lasted for five years. The Claimant provided two letters from Equiniti, which apparently managed the schemes. One letter which was undated referred to the Claimant having given instructions that 4,012 shares be transferred out of the plan, and that 199 shares had been sold to cover tax and NIC liabilities. It may well be that the Claimant has suffered some loss

in respect of this matter as a result of his dismissal. My position is that without proper evidence of the details of the schemes and of the reasons for and consequences of the transfer of share out of the scheme I am wholly unable to assess the amount of any such loss.

12 At this stage the compensatory award is £70,080.04 for loss of earnings, employer's pensions contributions of £9,145, £500 for loss of statutory rights, and £1,144 for loss of telephone. The total is £80,869.04.

13 There are two matters which in reality form the substance of what I have to decide. The first is whether the Claimant fulfilled his duty to mitigate his loss. The second if whether there should be any reduction of the award in accordance with the *Polkey* principle.

14 It was the position of the Respondent that the Claimant had made insufficient efforts to obtain alternative employment and that if he had done so he would have obtained such employment at an equivalent salary within a period of 12 months, and so his losses ought to be limited to that period. The burden is of course on the Respondent to demonstrate that there has been insufficient mitigation.

15 As I have said, the Respondent did not adduce any evidence at this hearing. Miss Umpelby relied upon the cross-examination of the Claimant. The Claimant provided a witness statement but the amount of evidence in the statement relating to mitigation was modest. He said that he had actively been looking for employment and had applied for countless jobs but had not obtained one interview. The Claimant modified that final point at this hearing and told me that he had been offered one interview on 24 January 2019. That was the date on which this hearing was first listed to be held, but unfortunately the Tribunal administration made an error in not notifying the Respondent of the hearing. The Claimant said that he started looking for jobs at an appropriate level but after one year he in effect broadened his horizons and lowered his expectations. However, he said, that his skills were specialised.

16 There were many documents in the main bundle relating to job applications.[3] They consisted of various documents the Claimant had prepared in applying for jobs and he had used the copy and paste facility to combine the texts. The Claimant also provided a small supplementary bundle at this hearing. There are various applications for project managers, some at least of which appeared to be appropriate for the Claimant's skills as I understand them. However he had also applied for jobs well outside his experience, such as a photographer or a dog walker.

17 The Respondent did not discharge the burden on it of proving a lack of mitigation. Further, I am entirely satisfied that the Claimant has been taking reasonable, and more than reasonable, steps to obtain alternative employment. I had the benefit of hearing him give evidence and of at least scanning the many pages of documents evidencing his efforts. I accept that there was a period at the beginning of 2018 during which the Claimant's efforts were reduced following the death of his mother, but there

[3] Pages 638-710

is nothing which leads me to believe that otherwise during that period he would have been able to find new employment.

18 The final matter is that of a *Polkey* reduction. The principle can be easily stated, although its application is often not so straightforward. I set out part of the judgment of Elias P in *Software 2000 Ltd v Andrews* [2007] IRLR 568 EAT principally for the benefit of the Claimant:[4]

> "(1) In assessing compensation the task of the Tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.
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> (2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the Tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future.)
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> (3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.
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> (4) Whether that is the position is a matter of impression and judgment for the Tribunal. But in reaching that decision the Tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.
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> (5) An appellate court must be wary about interfering with the Tribunal's assessment that the exercise is too speculative. However, it must interfere if the Tribunal has not directed itself properly and has taken too narrow a view of its role.
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> (6) – (7) . . . .

19 I note that in paragraph (2) above Elais P makes reference to the employer adducing evidence as to the possibility of an early termination of the employment of the employee. I have already recorded that the Respondent did not adduce any evidence at this hearing. Miss Umpelby reminded me that at the original hearing the finding of unfair dismissal had been made, in summary, on the basis that Mr Bird had acted in haste. She submitted that if Mr Bird had not acted as hastily but rather had waited for a period of four to six weeks before meeting with the Claimant again then there would still have been a substantial chance that at that time the Respondent would have been able fairly to dismiss the Claimant. Miss Umpelby put the chance at 40%.

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[4] It has been edited to take account of a legislative change.

20 It will be recalled that at the meeting on 19 September 2016 the Claimant's position was that he wanted to return to work, his health was improving, and he was then awaiting for new medication to 'kick in'. I take note of the fact that the Claimant readily accepted that his mental state had deteriorated following his dismissal. However I accept the Claimant's evidence that the effect of the dismissal was 'devastating'.

21 As I have said I had the benefit of hearing the Claimant give evidence both at the original hearing and on this occasion. As pointed out by Eilas P it is very much a matter of impression and judgment. My lay colleagues and I were entirely satisfied at the original hearing that the Claimant was a dedicated employee who was very keen to work. There must of course have been a chance that the Claimant would not return to work at some later and ultimately would have been fairly dismissed. In the absence of any specific evidence from the Respondent on the matter, but looking overall at the information before me I place that chance at no higher than 20%.

22 The loss calculated above is over £80,000. Even taking into account any *Polkey* reduction the amount is well in excess of the statutory cap of 52 weeks' pay contained in section 124(1ZA)(b). The annual gross pay was £42,270, and the compensatory award element of the compensation is capped at that amount.

Employment Judge Baron

Dated 08 March 2019