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EMPLOYMENT TRIBUNALS

Claimant: **Mr B Ikejiaku**

Respondent: **British Institute of Technology Ltd England**

Heard at: **East London Hearing Centre**

On: **Monday 21 January 2019**

Before: **Employment Judge Russell**
Members: **Mrs P Alford**
Ms L Conwell-Tillotson

Representation
Claimant: **In person**
Respondent: **Mr D Smith (Consultant)**

REMEDY JUDGMENT

The unanimous judgment of the Employment Tribunal is that: -

(1) The imposition of a new contract with effect from 1 March 2016 was a single act with continuing consequences. The claim of detriment because of a protected disclosure was presented out of time. It was reasonably practicable to have presented it in time. The Tribunal does not have jurisdiction to make any award in respect of that detriment.

(2) The Claimant is entitled to a basic award of £2,076.90 (four years' continuous service with a multiplier of 1.5 and a weekly wage of £346.15).

(3) There is no adjustment to the awards in respect either of Polkey or contributory fault.

(4) The Claimant is awarded £9,775.80 as compensation for unfair dismissal, comprising:

(i) loss of earnings for the period from 27 July 2017 to 8 January 2018 (24 weeks at £346.15): £8,307.60.

(ii) two weeks' pay for loss of statutory rights: £692.30.
(iii) expenses incurred in finding alternative employment: £775.90.

(5) There is no additional award for breach of contract as the two weeks' notice period is included within the unfair dismissal award.

(6) The Claimant is awarded the agreed sum of £2,000 in respect of holiday.

(7) The Claimant is awarded four weeks' pay for failure to provide a written statement of terms and conditions: £1,384.60.

(8) There is no award for injury to feelings.

(9) There is no ACAS uplift.

(10) The total award to the Claimant is the sum of £15,237.30

REASONS

1 By a Judgment sent to the parties on 6 July 2018, the Tribunal found that the Claimant had at all material times been an employee, had made protected disclosures in October 2015 and on 12 July 2017, had suffered a detriment because of the protected disclosure when a new contract was introduced from 1 March 2016 and that the principal reason for the Claimant's dismissal on 13 July 2017 was the protected disclosure made the day before, his dismissal was therefore automatically unfair. Further, that there had been an unauthorised deduction from wages on termination in respect of holiday pay and that the Claimant had been entitled to four weeks' notice of termination but paid for only two. Other claims brought by the Claimant were found to be out of time and/or failed on the merits, this included the complaints of race discrimination and victimisation.

2 Full reasons were given in writing for the liability Judgment. The Tribunal had regard to these in reaching its decision today. In particular:

(i) on 25 February 2016, the Claimant had signed a new agreement which would start from 1 March 2016 which employed him for three days a week at a fixed sum of £1,500 per month and purported to be a consultancy agreement. The Claimant entered into this agreement of his free choice and had not been tricked or coerced to do so. The reason for the new contract was to resolve an outstanding dispute between the parties as to pay and payslips and to provide clarity to the arrangement. It did not change the legal nature of the employment relationship.

(ii) the complaint from students about the Claimant's timekeeping and performance was not raised with the Claimant before his dismissal. As at the previous hearing, the Claimant today continues to deny that the complaint was genuine or was well founded.

(iii) the Claimant made a protected disclosure on 12 July 2017 about the marking of exams where he believed that students had cheated.

(iv) the Claimant's contract was terminated by email on 13 July 2017. We rejected the Respondent's case that the reason for termination was a diminution in requirement for lecturers due to the decision by the London Metropolitan University to terminate their partnership agreement. We found that at the time of the dismissal, the Claimant had been actively involved in a bid for Suffolk University to validate the Respondent's degrees. Further, the Claimant was part-way through an academic year which would not finish until at least September and his modules continued to be taught thereafter.

(v) any claim for unfair dismissal arising out of the purported dismissal on 28 February 2016 was significantly out of time by the presentation of the claim form of 31 July 2017. At the time of entering into the new agreement, the Claimant was aware of the right to claim unfair dismissal and was aware of time limits. The Claimant chose not to bring a claim at that time as he was concerned that it may jeopardise his job. The Claimant is a law lecturer and a qualified lawyer in Nigeria who holds himself out as providing paid employment law services to the public. On balance, even if the Claimant had been dismissed on 28 February 2016, it would have been reasonably practicable for him to have brought a claim in time (paragraph 99).

(vi) the introduction of the new contract from 1 March 2016 was caused by the Claimant's earlier protected disclosure about payslips and tax status. This claim appeared to be out of time but as the point had not been addressed at the hearing, it was appropriate to permit the parties to make further representations (paragraphs 103 and 115).

(vii) the sole reason for the Claimant's dismissal on 13 July 2017 was his protected disclosure the day before. There had been no warning or discussion with the Claimant that his job may be at risk, there was no documentary evidence to support the Respondent's case that termination had been discussed and agreed at an earlier date. Such discussions were not plausible not least given the bid for Suffolk University to validate. The Respondent's reason was rejected and described as patently untrue (paragraph 112).

(viii) the discrimination claim about removal as Course Leader in November 2016 would otherwise succeed. The complaint was presented out of time and it was not just and equitable to extend time given the Claimant's legal qualifications and being in business advising on employment issues (see paragraph 121).

(ix) the claims for unpaid salary between August 2013 and 1 March 2016 were also out of time. For the same reasons as the February "dismissal" claim, it was reasonably practicable to have presented the claim in time

(paragraph 125).

Time limits and the 1 March 2016 contract

3 The Claimant submitted that the imposition of the new contract from 1 March 2016 was a continuing act and not a single one-off event. The Claimant sought to persuade us that the effect of that new contract was to change his situation in its entirety and encompassed everything that happened thereafter. He submitted that it had had an effect until the very last day of his employment, particularly as the Respondent had relied upon that contract as part of its reasons for summarily dismissing him. For those reasons, the Claimant submitted that his claim for protected disclosure detriment in respect of the introduction of the new contract was not out of time. Mr Smith disagreed on behalf of the Respondent. He submitted that this was not a continuing act, rather it was a single act with continuing consequences.

4 The Tribunal preferred the submissions of Mr Smith. The contract was signed at the end of February and came into force from 1 March 2016. It undoubtedly had a continuing effect as it thereafter regulated the legal relationship between the parties, but this is a continuing consequence rather than being a continuing act or course of conduct. As such, time began to run from 1 March 2016 and the claim was presented on 13 July 2017, considerably out of time. It was reasonably practicable for the Claimant to have presented the claim within time; as with our previous decisions on time, we took into account his legal qualifications, that he holds himself out in business as advising on employment issues and knew his rights and time limits. The Tribunal does not have jurisdiction to uphold the detriment complaint or grant the Claimant any remedy in respect of the same.

Unfair dismissal

5 It was agreed between the parties that the Claimant is entitled to a basic award of £2,076.90 based upon his age, length of service and gross weekly pay.

6 After his dismissal, the Claimant had made strenuous efforts to obtain new employment in an academic setting and was fortunate enough to secure a position with Coventry University from 8 January 2018. There was no claim for loss of earnings after that date. The period of loss is therefore 13 July 2017 to 8 January 2018. However, the Claimant was paid two weeks' notice for which he must give credit and so he in entitled to loss of earnings for 24 weeks subject to the Respondent's submissions about **Polkey.**

7 Guidance for the assessment of loss following dismissal and the correct approach to **Polkey** reductions was given in **Software 2000 Limited v Andrews** [2007] ICR 825, EAT as follows:

- in assessing compensation for unfair dismissal, the Tribunal must assess loss flowing from dismissal; this will normally involve assessing how long the employee would have been employed but for the dismissal;

- in deciding whether the employee would or might have ceased to be employed in any event had fair procedures been adopted, the Tribunal must

have regard to all relevant evidence, including any evidence from the employee;

- there will be circumstances where the nature of the evidence is so unreliable that the Tribunal may reasonably decide that the exercise is so riddled with uncertainty that no sensible prediction based on the evidence can properly be made. However, the Tribunal should have regard to any material and reliable evidence that might assist it in fixing just and equitable compensation. A degree of uncertainty is an inevitable feature of the exercise and the mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence;

- a finding that an employee would have continued in employment indefinitely on the same terms should only be made where the evidence to the contrary, that employment might have terminated sooner, is so scant that it can effectively be ignored.

8 The Respondent's case is that there was a chance, indeed they say a likelihood near certainty, that the employment would have fairly terminated before 8 January 2018 in any event. The Respondent relies upon two particular risks to continued employment: the alleged redundancy situation following the London Metropolitan withdrawal of validation and the Claimant's conduct giving rise to the students' complaint. We do not agree. In the liability Judgment, as summarised above, the Tribunal did not accept that there was any genuine need to reduce staffing levels, referring to the ongoing course and the Claimant's involvement in the Suffolk University validation bid. The asserted redundancy was a patently untrue reason, effectively a sham, and is not a reason why the Claimant could or would have fairly have been dismissed.

9 As for the students' complaint, the complaint is dated 20 June 2017, the Claimant was dismissed on 13 July 2017. The Respondent asserts that this was a genuine complaint giving rise to conduct issues which would need to be investigated. The evidence of Mr Farmer was that had there been such an investigation, he had spoken to the Claimant directly about it, informed him that there would be a disciplinary process and that Mr Peter Robinson was investigating. Mr Farmer claims that he Claimant apologised. Mr Farmer further gave evidence that the investigation was ongoing at the date of dismissal and that the Claimant had an opportunity to make representations as he was contacted by the associate dean and registrar. Finally, Mr Farmer said that the investigation concluded at the end of August 2017 and that the Claimant's conduct was found wanting by Mr Robinson. As a result of the complaint being well founded, the Respondent's case was that the Claimant would have been dismissed before the start of the next academic term in September. The Claimant strongly disputes that the complaint was genuine or well-founded, that it was discussed with him, that he was invited to comment or that it could fairly have led to his dismissal or even a chance of dismissal.

10 Mr Farmer's evidence today that there had been a discussion with the Claimant before dismissal and an ongoing investigation is inconsistent with the Respondent's case at the liability hearing. Based upon that evidence at the liability hearing, the Tribunal found that the complaint had not been raised with the Claimant before his

dismissal. There was no evidence disclosed to support his assertion of an investigation by Mr Robinson, any conclusion drawn by Mr Robinson or any contact by Mr Robinson or Mr Tanveer to seek the Claimant's input. We reject Mr Farmer's evidence about the investigation and disciplinary conclusion as untruthful and implausible. Furthermore, even if the complaint were genuine and had been investigated properly we consider that the Claimant would have strongly defended his conduct (as he has done in this hearing) and adduced evidence in support. Moreover, the substance of the complaint (timekeeping, standard of teaching and late provision of assignments) was not of such magnitude as to permit the Respondent fairly to dismiss the Claimant, who had a clean disciplinary record. In all the circumstances, we do not consider it appropriate to make any reduction for **Polkey** in respect of employment ending fairly before 8 January 2018.

11 The Respondent also submitted that there should be a reduction to both the basic and compensatory awards to reflect the Claimant's contributory fault. Section 122(2) of the Employment Rights Act provides for reduction of the basic award where the Tribunal considered that any conduct of the complainant before the dismissal was such that it would be just and equitable to reduce it. Section 123(6) provides that if 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.

12 The correct approach to reductions was set out in **Steen v ASP Packaging Ltd** [2014] ICR 56. For there to be any reduction, the Tribunal must identify the relevant conduct and find whether or not it is blameworthy. This does not depend upon the Respondent's view of the conduct, but that of the Tribunal. For section 123(6), the Tribunal must find that the conduct caused or contributed to dismissal to some extent. For both sections, it must consider to what extent it is just and equitable to reduce the award. Although not necessarily required, the reduction to each award will typically be the same unless there is a good reason to do otherwise, **Charles Robertson (Developments) Ltd v White** [1995] ICR 349.

13 The Respondent also relied upon the students' complaint as conduct of the Claimant which would warrant an adjustment to both awards. In considering the Respondent's submissions about contributory fault, the Tribunal bore in mind our conclusion that the sole reason for dismissal was the Claimant's protected disclosure. In finding that there was a protected disclosure, the Tribunal accepted that the Claimant reasonably believed that there had been cheating in exams, undermining the academic rigour of the examination process and accepted that this was in the public interest. We do not see that such conduct could possibly be said to give rise to a deduction for contributory fault on either ground.

14 The complaint is vigorously denied by the Claimant, has not been investigated and its validity cannot properly be assessed by the Tribunal due to a lack of evidence. The dismissal came out of the blue and was entirely unconnected with that complaint. We are not satisfied that there was culpable, foolish or blameworthy conduct by the Claimant in relation to the students and, even if there were, it did not cause or contribute to the decision to dismiss in any way at all. For the same reasons, it is not just and equitable to make any adjustment to the basic award in this regard.

15 The Claimant has made strenuous efforts as we say to find alternative work. He has attended a series of interviews at higher education establishments throughout the country, including the University of Coventry and University of Canterbury Christchurch. The Claimant has produced documents in the bundle proving his attendance at interviews and the travel expenses for trains and taxis incurred in the sum of £775.90. The Respondent says that the Claimant has failed to mitigate his losses as he could have travelled by cheaper methods, such as off-peak rail tickets. It also submits that the Claimant may have been reimbursed by the academic institutions directly. The Respondent bears the burden of proving a failure to mitigate but has adduced no evidence of suitable, available cheaper train tickets on the dates in question or offers of reimbursement. It relies upon a mere assertion which we consider falls short of what it is required. The Tribunal accepts the Claimant's evidence that he incurred these expenses in finding a new job and that he was not reimbursed. We are satisfied that they are reasonable and proportionate and accordingly, the full sum of £775.90 is awarded.

16 The Claimant is entitled to an award for loss of statutory rights. Mr Smith suggested one week's gross pay in the sum of £346.15 would be just in the circumstances, appearing to refer to the student complaint and/or possible redundancy. The Tribunal has rejected these submissions and they are not relevant to assessment of this award. The Claimant has secured new employment but has lost the valuable statutory right not to be unfairly dismissed, it will take him until January 2020 to achieve the two years' continuous employment required. In the circumstances, the appropriate award is for two weeks' gross pay in the sum of £692.30.

17 Compensation for unpaid holiday is agreed at £2,000.

18 An employee is entitled to a written statement of terms and conditions of employment and, if successful on other claims, the Tribunal shall consider an award of either two or four weeks' pay if these have not been provided. It is common ground that the contract in place from 1 March 2016 is not fully compliant with what is required by the Employment Rights Act. Mr Smith urges us to find that as there has been partial compliance we should award the lower sum of two weeks' pay. Not unsurprisingly, the Claimant says that the higher award is appropriate.

19 On balance, we agree with the Claimant that four weeks' pay is the appropriate award. Whilst some terms and conditions were provided, they were materially inaccurate and misled the Claimant as to his employment status. So, for example, the written terms did set out pay but as a fixed sum of £1,500 per month upon receipt of an invoice and without deduction of tax or national insurance. Other requirements were ignored, such as entitlement to holiday pay, sick pay or disciplinary procedures. This was a serious failure by the Respondent which in the circumstances warrants the maximum award of four weeks' pay.

20 In addition to the above financial losses, the Claimant seeks an award for injury to feelings of £165,000 for the dismissal because of a protected disclosure and a further award of £133,000 for whistleblowing detriment in respect of the new contract introduced on 1 March 2016.

21 In his Schedule of Loss, the Claimant correctly notes that there is no upper limit

on the award of damages for an automatically unfair protected disclosure dismissal. However, the measure of damages which may be awarded is as set out in Part X of the Employment Rights Act 1996. The Tribunal does not have jurisdiction to make an award for injury to feelings for an unfair dismissal, even if the reason was a protected disclosure. Nor does the Tribunal have jurisdiction to make any form of aggravated, punitive or exemplary damages award for such a dismissal.

22 In his written submissions in support of such an award, the Claimant relied upon three Employment Tribunal claims in which the employee succeeded in a complaint of automatic unfair dismissal because of a protected disclosure and was awarded a six-figure sum by way of remedy. The Claimant did not produce copies of the Judgments and we were unable to find them on the public register as they date back to 2013 and 2014. The Tribunal is aware that some whistle-blowing dismissals can lead to high value awards where the employee has proved significant loss of earnings arising out of the automatically unfair dismissal and because there is no statutory cap on compensation. They are not authority that the Tribunal has jurisdiction to make a punitive award in such cases.

23 As for the detriment of the new contract, as set out above, the claim was presented out of time and it was reasonably practicable to have brought it in time. As such, the Tribunal cannot make any award to the Claimant. The sum sought by the Claimant is far in excess of the **Vento** guidelines which would have guided our discretion in any event. For these reasons, there is no award for injury to feelings.

24 The final issue is whether or not there should be an ACAS uplift. The Tribunal may adjust an award by up to 25% in respect of an unreasonable failure to comply with the requirements of a relevant ACAS Code (here on discipline and grievance procedures). The Code does not apply to all dismissals. It expressly applies to disciplinary and grievance situations in the workplace. Disciplinary situations include misconduct and/or poor performance. It goes on to say that the Code does not apply to redundancy dismissals or the non-renewal of fixed term contracts on their expiry. The Code is silent as to whether or not it applies to automatically unfair dismissals by reason of a protected disclosure.

25 We considered carefully whether and to what extent the Code applied to the Claimant's dismissal, applying the words of the Code to the reason for dismissal found by the Tribunal. The Tribunal took into account that in certain "some other substantial reason" dismissals the Code will apply, for example where the employee faces a complaint which may lead to disciplinary action or where disciplinary proceedings are or ought to be, invoked against an employee. The difficulty in this case is that the sole reason for dismissal was the protected disclosure. That protected disclosure could never be a ground for possible disciplinary action. In those circumstances, there were not (nor could there fairly be) disciplinary proceedings against the Claimant to which the Code could apply.

26 The Tribunal considered it unjust that the ACAS Code is drafted in a way which appears not to apply to an automatically unfair dismissal such as this. The Tribunal did not feel able to broaden the Code's application to include a dismissal without any misconduct but solely for making a protected disclosure as it considered that this would be an unwarranted gloss and expansion on the words of the Code. With some

reluctance, the Tribunal concluded that there should be no ACAS uplift. If we had been able to make an ACAS uplift, we would have awarded 25% given the Respondent's total failure to follow any procedure and flagrant disregard of basic fairness.

Tax

27 The sums awarded to the Claimant are all calculated using gross figures. The Respondent did not make deductions for tax or national insurance during employment and required the Claimant to account to the Revenue himself. The Claimant produced today his records from HMRC to show that he had been submitting tax returns and accounting for his income. For those reasons therefore, we considered it appropriate that the sums awarded to him be made gross and it will be a matter for the Claimant to disclose to the Revenue the sums which he has been given and to pay any tax or national insurance liability which may arise.

Costs

28 At the conclusion of the hearing, the Claimant made an application that the Respondent pay his legal costs pursuant to rules 75 and 76 by reason of its conduct of the proceedings. The application sought legal costs of £18,700, claimed at £90 per hour, for the work done by the Claimant on his own case but through his business, Brian-Vincent Legal Outfit Limited. There was no schedule of costs provided. As the Respondent did not have an opportunity fairly to respond to the application, the Tribunal directed that by 29 January 2019 the Claimant send in a schedule of costs and evidence to support the expenses claimed and his assertion of unreasonable conduct. The Respondent was required to reply by 11 February 2019 to indicate whether it contested the application and, if so, on what grounds and with evidence in support.

29 Both parties complied with these directions. The Respondent has asked that there be a costs hearing listed to consider the application given the issues raised. This is appropriate and proportionate given the amount claimed and the nature of the challenges raised which cannot fairly be determined on paper. The parties are kindly asked to provide by 26 April 2019 their dates to avoid for a hearing (time estimate 3 hours, not one day) within the next three months.

Employment Judge Russell

5 April 2019