EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr M Napper	**v**	The Best Connection Group Limited

Heard at: Cambridge **On:** 18 April 2019

Before: Employment Judge Tynan

Appearances
For the Claimant: Ms Renaud, Free Representation Unit.
For the Respondent: Mr Darley, Solicitor.

JUDGMENT

1. The employment tribunal makes an award of compensation, to be paid by the respondent to the claimant, consisting of:

   (a) a basic award of £467.30; and

   (b) a compensatory award of £11,256.69.

RESERVED REASONS

1. In a reserved judgment following a hearing on 4 January 2019 I upheld the claimant's complaint that he had been unfairly dismissed by the respondent. The case came back before me on 18 April 2019 to determine remedy. The claimant was represented again by Ms Renaud, and the respondent by Mr Darley. In accordance with the case management order dated 18 March 2019 the claimant had updated his schedule of loss and prepared a remedy hearing bundle running to page 92A.

2. I heard evidence from the claimant, who was questioned by Mr Darley.

3. The claimant is now 27 years of age. He told the tribunal that he has suffered with anxiety since he was a teenager albeit he had never sought medical or other professional support for the condition until he became ill in May 2017. By the time the claimant left the respondent's employment in September 2017 he was quite unwell. He was experiencing suicidal ideation, preferred not to leave his home and was having difficulties in his personal relationship. He was on anti-depressant medication by the summer of 2017 and his medication dosage was increased after he left the respondent's employment. The claimant claimed, and was awarded, employment and support allowance ("ESA") in 2017. He attended a medical assessment by Dr Laszlo Buga on 10 January 2018. The medical report from that assessment is at pages 26-49 of the remedy bundle and includes a detailed history. At page 17 of the report (page 42 of the remedy bundle) Dr Buga wrote:

> "The ESA 50, med 3 and medical evidence indicates that there would be substantial mental or physical risk if the client were found capable of work. He takes anti-depressant, he has ongoing suicidal ideas without plan but frequently, he has crisis line contact, GP is aware. He had counselling in the summer. No attempt."

4. Dr Buga's assessment was inevitably focussed on the claimant's then current and likely future fitness to work. Whilst it considered his medical history, Dr Buga was not concerned with whether and, if so, the extent to which the health issues then affecting him were the manifestation of a long-term underlying health condition and to what extent, if at all, they reflected workplace issues (let alone the respondent's treatment of him).

5. The claimant's GP records for the period September 2017 to April 2019 are at pages 52 to 62 of the remedy bundle. At pages 61-62 is form ESA 113 which was completed by the claimant's GP practice and which identified the material aspects of his condition as mixed anxiety and depression, panic attacks, work stress/anxiety, and "Court Case" (which I infer to be these proceedings). I note that form ESA 113 records that the claimant was first seen by his GP in May 2017 but that the "symptoms started a few months prior to that". His medical records also support the evidence he gave at tribunal, namely that he began to feel better into 2018 but that he experienced a setback in his recovery when the original tribunal hearing date was postponed and that his anti-depressant medication dosage increased at this time. The claimant's evidence was that he wanted the case to be over. By October 2018 his health was improving again. By December 2018 he was well enough to take up a short term contract as an Assistant in Training at Marks & Spencer. The claimant had not had to actively apply for the job as his mother works for Marks & Spencer and had alerted him to a temporary Christmas opportunity. The claimant has in fact remained at Marks & Spencer and, at tribunal, expressed the hope that he might secure permanent employment.

6. The claimant continues to be anxious, though said, "I'm getting there". He works from 1.30pm to 9.30pm four days per week and works a further 3 hour shift on a Saturday. He continues to experience difficulty sleeping, but his working hours mean that this presents less of an issue for him, certainly in terms of holding down employment. He is no longer on medication. He works 'back of house' at Marks & Spencer, dealing with deliveries, picking lists etc. It is not a customer-facing role. He does not have to work overtime, or take calls, or deal with work-related matters outside of his contracted working hours. The claimant's evidence at tribunal is that he feels 'safe' in his current working environment and that the job has made him feel good in himself, in particular he has a very positive relationship with his colleagues and supervisors. Questioned briefly by Mr Darley the claimant stated that after his experiences at the respondent he would not want to return to a similar working environment.

7. In my judgment on liability I determined that it would be just and equitable to reduce the basic award and any compensatory award by 55%. In the course of their submissions on remedy the parties' representatives made further submissions on the issue of whether or not there should also be a reduction in accordance with the well established principles in Polkey v AE Dayton Services Ltd 1988 ICR 142 and/or an adjustment pursuant to s.207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULR(C)A").

8. I first remind myself of the order in which any adjustments and deductions should be made. In Digital Equipment Co Limited v Clemence (No 2) [1997] ICR 237 EAT, Morrison J held that the correct approach is first to offset any contractual or ex-gratia termination payments and any sums earned by way of mitigation in order to arrive at an employee's net loss, then to make any reduction to reflect contributory fault or the chance that the employee would have dismissed or left employment in any event. In Rao v Civil Aviation Authority [1994] IRLR 240 the Court of Appeal held that an employment tribunal should first make the *Polkey* reduction under s.123(1) of the Employment Rights Act 1996, as the size of the reduction may have a significant bearing on what further reduction falls to be made for contributory conduct under s.123(6). I have, of course, already determined the size of the s.123(6) reduction. S.124A of the Employment Rights Act 1996 stipulates that any adjustment for failure to comply with a relevant ACAS Code should be made "immediately before any reduction under s.123(6) or (7)" i.e. after any *Polkey* reduction but before any adjustment for contributory fault.

Polkey

9. Mr Darley submitted, in the alternative, that the claimant would have remained on sick leave and been dismissed fairly on grounds of incapacity 6 months after the date of his constructive dismissal; that his erratic behaviour and attendance would have continued had he returned to work leading to his eventual dismissal within 6 months of his constructive dismissal; that he would have resigned his employment in any event within

6 months of his constructive dismissal, partly because he is temperamentally unsuited to working in recruitment but also because he had a very poor perception of the respondent even where its actions did not warrant this. Ms Renaud challenged Mr Darley's various submissions. She submitted on behalf of the claimant that the situation would have worked out very differently had the respondent handled the claimant's health issues appropriately. She highlighted that unfairness was central to the dismissal and that the relationship would not have broken down in the way it did but for that unfairness and had the respondent taken greater care to apprise itself of the health issues the claimant was experiencing. She pointed out that limited support was made available to the claimant when he needed it the most, even once he communicated the full extent of his health issues and the recommendation of a phased return to work was not acted upon. Ms Renaud submitted that had suitable adjustments been put in place the claimant's absences would have greatly diminished.

10. In Software 2000 Limited v Andrews & Others [2007] ICR 825, EAT, Elias J reviewed all the authorities on the application of *Polkey* and summarised the principles to be extracted from them. He confirmed that if an employer contends that an employee would or might have ceased to have been employed in any event had fair procedures been adopted, the tribunal must have regard to all relevant evidence, including any evidence from the employee. He confirmed that there will be circumstances where the nature of the evidence for this purpose is so unreliable that the tribunal may reasonably take the view that the exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on the evidence can properly be made. Nevertheless, tribunals must recognise the need to have regard to material and reliable evidence that will assist it in fixing just and equitable compensation, even if there are limits to the extent to which they can confidently predict what might have been. 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 is so scant that it can effectively be ignored.

11. As I noted in my reserved judgment on liability, in the course of the hearing on 4 January 2019 Mr Maxwell, counsel for the respondent stated that the respondent no longer contended that the claimant would have been dismissed in any event (as had been pleaded at paragraph 43b. of the Grounds of Response). Counsel's apparent concession in this regard also reflected in his skeleton argument. Mr Darley accepted that some form of concession had been made by counsel on 4 January 2019. He had not himself been present at the hearing to hear counsel's submissions. Whilst my recollection, confirmed by the reserved reasons, is that it was in the nature of a general concession and that it is inconsistent with at least the second of Mr Darley's three propositions under *Polkey*, the fact remains that I am under a duty to consider making a *Polkey* reduction whenever there is evidence to support the view that an employee might have been dismissed or otherwise left employment if the respondent had acted fairly.

In the circumstances it seems to me that it would be inappropriate for me to disregard any of Mr Darley's submissions or to hold the respondent to the concession which I consider was made (and intended to be made) on 4 January 2019.

12. In predicting what might have been, it is highly relevant that the respondent failed to apprise itself of the claimant's health issues and failed to put in place even a rudimentary return to work plan. In my judgment had the respondent discharged its responsibilities in an informed and responsible manner it would have put in place a more detailed return to work plan which included adjustments not only to the claimant's days and hours of work but to his job content, performance targets and expectations, possibly with some form of 'emotional' support, even if this just comprised regular catch-ups to see how the claimant was. In my judgment, once the respondent was on notice that the claimant had mental health issues, in particular once it became aware that he had experienced suicidal ideation, it could have communicated its concern for his well-being and readily conveyed that it wished to support him in his recovery. Instead its main focus was his conduct and performance even though these were a manifestation of his ill-health. Had the relatively basic steps above been taken by the respondent I consider that they would have had a significant impact upon the working relationship and the claimant's perception of the respondent, as well as his recovery.

13. The evidence is that the claimant had an underlying health condition and that the episode of anxiety and depression he experienced in 2017 arose independently of the respondent's treatment of him in the period June to September 2017. Nevertheless, I consider that had the respondent acted reasonably the claimant would have returned to work by the end of July 2017, albeit I believe that a phased return, with reduced days and hours of work would have needed to have remained in place for a period of 2 months following his return. I consider that by the end of September 2017, namely when he in fact left the respondent's employment, the claimant would have returned to work full-time, possibly with a long-term adjustment to the performance expectations of him if he was considered to be disabled within the meaning of the Equality Act 2010. I have regard in particular to the fact that prior to May 2017 the claimant had a satisfactory performance and attendance record. As such, I do not accept Mr Darley's submission that the claimant's erratic performance and behaviour would likely have continued into the future and accordingly that he would have been dismissed for misconduct and/or poor performance. Likewise had the respondent been more supportive of the claimant and the claimant perceived it as more understanding of his circumstances, I am confident that he would have maintained a satisfactory level of attendance so that he would not have been dismissed for incapacity. Although he is now employed in a very different role, the fact the claimant was kept on by Marks and Spencer after the Christmas period confirms to me that he is ordinarily capable of holding down a job. In my judgment the claimant's recovery and return to work was avoidably and significantly impacted by the respondent's poor handling of the situation and then exacerbated by

the loss of his employment (caused by the respondent) and the subsequent uncertainty of his situation including the outcome of his employment tribunal claim against the respondent. However, I do have regard to the fact that the claimant has a long history of anxiety, even if he had not previously sought medical or other professional help for the condition. There is weight in Mr Darley's submission that the claimant may have resigned his employment in any event, in my judgment not because he perceived the respondent negatively, but because he may be temperamentally unsuited to working in recruitment and/or a pressured sales environment. On the evidence available to me, I consider that there was a 25% chance that the claimant might have resigned his employment by the end of June 2018 i.e, within 9 months of his constructive dismissal.

S.207A TULR(C)A

14. The disciplinary proceedings against the claimant and his grievances were central to these proceedings. His claim that he was constructively dismissed was largely upheld by reason of how the disciplinary and grievance issues were handled by the respondent. His claim concerns matters to which the ACAS Code of Practice on Disciplinary and Grievance Procedures applies. As I set out in my reserved judgment on liability at paragraphs 38, 46 to 49, 53 to 55, 59 to 61 and 70 the respondent failed to comply with the Code in various material respects. In my judgment those failings were unreasonable. They were not properly explained by the respondent as Mr Thompson and Mr Recci, the two relevant decisions makers, never gave evidence to the tribunal. I am not obliged to increase any award to the claimant, though am empowered to do so where I consider it just and equitable to do so in all the circumstances. I remind myself that it is not an unfettered discretion and that the tribunal may only have regard to circumstances that are related in some way to the failure to comply with the Code. The Code was not ignored altogether, though the failings were in my judgment numerous and serious, in particular the respondent did not meet with him to discuss his grievances. As I say, there has not been a satisfactory explanation by the respondent for its handling of the disciplinary and grievance proceedings. It has certainly not put forward any mitigating circumstances. Form ET3 was not completed to indicate the numbers of staff employed by the respondent in the UK. However, it was not suggested to me that the respondent lacked manpower or resources. In all the circumstances I consider that it would be just and equitable to increase any award to the claimant by 15%.

Basic Award

15. The claimant gave notice and remained in the respondent's employment, albeit on sick leave, through to the end of his notice period. His employment terminated on 29 September 2017. His gross monthly basic pay was £1,500 or £346.15 per week. Page 17 of the remedy bundle evidences that the claimant's net monthly pay, exclusive of any commission, was £1,182.93 or £272.98 per week.

16. A week's pay is a statutory construct used for the purposes of calculating the basic award for unfair dismissal. A week's pay is to be calculated by reference to gross pay. Commission can count as remuneration for the purposes of calculating a week's pay but only where commission varies with the amount of work done. Where, as was the case with the claimant, commission payments varied with the success achieved, a week's pay is to be calculated in accordance with the provisions of s.221(2) of the Employment Right Act 1996, which requires a week's pay to be calculated by reference to basic remuneration only.

17. Using the claimant's basic remuneration of £346.15 per week the starting basic award in this case is £1,038.45, albeit this reduces to £467.30 as a result of the 55% reduction which I previously determined should be made to reflect the claimant's conduct in this matter. There is no adjustment to the basic award to reflect an unreasonable failure to comply with an applicable ACAS Code.

Compensatory Award

18. As regards the compensatory award, the claimant's claimed loss of basic salary to the date of the remedy hearing is £30,600. However, his net weekly pay was £272.98 rather than £382.50 as stated in the claimant's updated schedule of loss. Accordingly, the claimant's loss of basic salary to the date of the remedy hearing is in fact £21,838.40 (80 weeks x £272.98).

19. The claimant claims loss of commission benefits to the date of the remedy hearing on the basis that his average commission payment was £107 per week. In fact, looking at the period January to April 2017, namely before the claimant fell ill, his net earnings were £5,834.16 (after adding back in deductions for his student loan and disregarding re-imbursement of expenses in January 2017). His net basic pay during that 4-month period was £4,731.72 (4 months x £1,182.93), meaning that his net commission was £1,102.44, equating to £275.61 per month or £63.60 per week. I do not accept Mr Darley's submission that the period June to September 2017 should be considered when assessing loss of commission given the claimant's ill health during that period in time. On the basis that the claimant's average commission was £63.60 per week, I calculate that the loss of commission to the date of the remedy hearing is £5,088 (80 weeks x £63.60).

20. On the basis that the total loss of income to the date of the remedy hearing is £26,926.40 (£21,838.40 + £5,088) the claimant has additionally suffered a loss of employer pension contributions of £269.26 (based on a 1% contribution by the respondent on all his earnings).

21. The value of the loss of the claimant's company car was agreed by the parties as being £2,870.40, or £375.82 per month.

22. I calculate therefore that the claimant's total remuneration had he remained in the respondent's employment to the date of the remedy hearing would have been £30,066.06. I calculate that his remuneration in the 39 weeks to 29 June 2018 would have been £14,657.20 and in the period from 30 June 2018 to the date of the remedy hearing £15,408.86. From these two sums is to be deducted £8,209.53 being the total of the sums received by the claimant by way of mitigation of his losses. Of that sum, I calculate that the claimant's ESA payments totalled £2,339.20 in the 32-week period from 20 November 2017 to 29 June 2018. Accordingly, his net loss of remuneration to 29 June 2018 is £12,318. His net loss of remuneration from 30 June 2018 to the date of remedy hearing is £9,538.53 (£15,408.86 - £5,870.33).

23. It is the claimant's case that he will close the gap in terms of his earnings within 12 months of the date of the remedy hearing. The current gap in his earnings according to my calculation is £49.59 per week (£375.82 - £326.23). This period was not actively challenged by Mr Darley. In my judgment it would be just and equitable to award the claimant 12 months' future loss of earnings, namely the sum of £2,578.68.

24. I shall award the claimant 1 week's gross basic pay namely £346.15 in respect of the loss of his statutory rights.

Compensatory award for the period 29 September 2017 to 29 June 2018.

25. The claimant's net loss of remuneration for this period is £12,318, to which I add £346.15 in respect of the loss of his statutory rights. The starting point therefore for the period 29 September 2017 to 29 June 2018 is £12,664.15. After applying the s.207A 15% uplift this sum increases to £14,563.77 but then decreases to £6,553.70 after application of the 55% reduction for contributory fault.

Compensatory award for the period 30 June 2018 to 17 April 2020

26. The claimant's net loss of remuneration for this second period is £12,117.21 (£9,538.53 + £2,578.68). Applying a *Polkey* reduction of 25% to reflect the chance the claimant would have resigned his employment by 30 June 2018, this sum reduces to £9,087.91. After applying the s.207A 15% uplift this sum increases to £10,451.10 but then decreases to £4,702.99 after application of the 55% reduction for contributory fault.

27. I shall therefore make an award of compensation to the claimant in the sum of £11,256.69.

28. There was some brief discussion at tribunal of whether the Recoupment Regulations would apply. Having considered the matter further, I am satisfied that the Regulations do not apply to ESA, which I have therefore taking into account in my calculations above.

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Employment Judge Tynan

Date: 17 June 2019

Sent to the parties on: ..09.07.19.....

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For the Tribunal Office