Case No: 1800170/2020 (V)

EMPLOYMENT TRIBUNALS

Claimant: **Mr A Bettley**

Respondent: **Perry's Motor Sales Limited**

Heard at: **Leeds by CVP** **On: 21 December 2020**

Before: **Employment Judge Maidment**

Representation Claimant: **In person** **Respondent:** **Mr R Quickfall, Counsel**

JUDGMENT AS TO REMEDY having been sent to the parties on 22 December 2020 and written reasons having been requested by the claimant in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Issues and evidence

1. The hearing was to determine the claimant's remedy arising out of the tribunal's declaration, after the previous liability hearing, that the claimant had been unfairly dismissed.

2. The tribunal had before it the bundle of documents and witness statements relied upon at the earlier liability hearing together with an additional statement of Ms Laura Eyre of the respondent, which explained the calculation of the level of employer contributions to the claimant's pension scheme.

3. The tribunal heard evidence at this hearing from the claimant and Ms Eyre.

Factual background

4. The claimant had been employed by the respondent from 4 September 2002 and was constructively dismissed with effect from 3 October 2019. He had attended work up to 31 March 2019 prior to a period of absence due to sickness after treatment he received which the tribunal has found amounted to a fundamental breach of his contract of employment. He confirmed that up to that point he had been earning at his normal capacity. In the 12 months up to 31 March 2019 the claimant's earnings had been the gross sum of £35,777.10.

5. This did represent a reduction in earnings from the previous 12 month period ending 31 March 2017. In that year the claimant's gross earnings had been £41,967.06. His earnings in the 2016 tax year had been £40,266.82 and in 2015 they had been £40,530.34. The claimant attributed the recent drop in his earnings to the respondent having the wrong managers in place, which was why Mr Sidwell had been brought in as the new general manager to seek to improve performance.

6. The claimant accepted that in the current tax year his earnings could well have been adversely affected by the coronavirus epidemic, although he was adamant that he always met the targets he was set. He was prepared to accept that a gross earnings figure of £35,777.10 was a reasonable one to base post dismissal loss of earnings on, given the current climate.

7. Whilst it was put to the claimant that his dealership had been closed to customers from April 2020 with some staff furloughed and others made redundant, there was no evidence as to the precise effects of the coronavirus epidemic on the respondent's business and no evidence that the claimant himself would have been selected for furlough and, if so, over what periods. Vehicle sales had continued on a remote basis.

8. The majority of the claimant's remuneration was derived from commission he earned from his successful sale of vehicles and ancillary products. His contract of employment provided for a basic annual salary of £15,200 per annum. All of his additional earnings were by way of commission on his sales.

9. The claimant was taken through Ms Eyre's statement which explained how the employer pension contributions he was entitled to was based on qualifying salary and not on the total amount earned. The claimant accepted

on the basis of her calculations that, with an annual gross salary of £35,777.10, his qualifying earnings would be £29,641.10 and that an entitlement to pension contributions of 3% on that would have given him annual employer contributions of £889.23.

10. The claimant's contract provided for normal working hours of 9am – 5:30pm, but, with the dealership open 7 days each week, the claimant worked alternate longer and shorter working weeks. He also stayed later on 2 nights each week, until 8pm in summer and until 7pm in winter. The claimant confirmed in cross examination that, whilst complicated by these variations, his normal working hours were 37.5 hours per week and that his working on weekends and his later night working were included in his normal working hours each week. In fact, when Ms Eyre came to give her evidence she said that the normal working hours for senior sales staff were in fact 41 hours each week when taking full account of the varying shift patterns. The tribunal accepts Ms Eyre's evidence, effectively in the claimant's favour.

11. The claimant's employment terminated with effect from 3 October 2019 on his resignation. Whilst he was without work for a period thereafter, he has never been in receipt of any state benefits.

12. The claimant said that he was at first not sufficiently fit to seek alternative work but over time his wife assisted to build his confidence back up such that he was fit to resume work from January 2020, albeit he described himself as still not being 100%.

13. From January 2020 he had been employed in the leisure/children's play centre operated by his wife. He helped with some catering tasks and clearing up. In January he earnt £544, in February £676.87 and in March £533.66. He was then placed on furlough due to the coronavirus epidemic and earned the sum of £446.46 in April, May, June and July. In August he earned £456.56, £482.13 in September and £1050.71 in October, when some additional staff were furloughed and he was able to work more hours. In November he had been paid £446.46. The business ceased to trade in December and it was anticipated that the claimant would be on furlough until the end of April at least receiving £446.46 again on a monthly basis. The situation was unclear after the end of April and depended on the public health situation. The claimant thought it would be difficult for him to obtain work again in the motor trade given his previous absence due to stress and the effect the situation with the respondent had had on his confidence.

14. In cross examination of the claimant reference was made to him having resigned from his employment rather than taking up an opportunity offered of a mediation between him and Mr Sidwell. The claimant's position was that he felt that the respondent would prioritise its own best interests. He had gone through grievance process looking for some form of reassurance and had not received one. He referred to the fact that one suggestion was that he transfer to a different dealership. He said that if he had done so he would have lost his client base from which he derived the majority of his earnings.

Legal principles and conclusions

15. The tribunal heard submissions from both parties regarding the basis upon which the claimant's awards ought to be calculated.

16. The respondent's position was that a week's pay, for any basic award and compensatory award, had to be calculated with reference to the claimant's basic salary of £15,200 per annum only in accordance with the case of **Evans v The Malley Organisation Ltd t/a First Business Support [2003) ICR 432, CA**. Further, there was no authority for a week's pay for basic award purposes including employer pension contributions. The tribunal had raised further how compensation ought to be calculated in circumstances where, had the claimant received his basic salary only, he would have been paid at less than the national minimum wage rate. Mr Quickfall argued that nevertheless the basic and compensatory award calculation had to be based on that actual basic wage. His position was then that the tribunal should reduce any basic and compensatory award by a factor of one third because of the claimant's refusal to mediate. He accepted that it was difficult to expect the claimant to transfer to a different dealership and give away his book of business.

17. The claimant has a basic award entitlement. This is calculated with reference to a formula set out at section 119(2) of the Employment Rights Act 1996 ("ERA") which requires the calculation of a week's pay. For an employee with normal working hours (such as the claimant) a week's pay is calculated then by reference to Section 221 of the ERA. The claimant's remuneration did not vary with the amount of work done but rather with the amount of sales achieved – the total number of vehicles invoiced and delivered and ancillary products sold. A week's pay therefore fell to be determined by reference to the second subsection of section 221. The respondent's submissions as to the effect of the **Evans** decision are correct. Commission earnings were based on the outcome of the work done, whether fortuitous or due to the claimant's good performance. They were not related to the amount of work he did. Such earnings do not therefore count towards a week's pay for the purposes of Section 221. The disapplication of **Evans** when calculating holiday pay is limited to that particular entitlement. This will strike the claimant as unfair and as

preventing him from being compensated for his true losses, but the method of compensation in a claim of unfair dismissal is derived from these statutory provisions which the tribunal must adhere to.

18. Indeed, the greatest significance arises when the tribunal comes to make a compensatory award in respect of the claimant's loss of earnings. Pursuant to Section 124(1ZA)(b) that award is capped at 52 times a week's pay calculated again by reference to Section 221(2).

19. In the case of **University of Sunderland v Drossou 2017 ICR D23 EAT**, it was determined that employer pension contributions count towards the statutory cap applicable to a compensatory award. That case did not deal with how employer pension contributions might have affected any basic award. Often precise calculations do not need to be made of a week's pay for that purpose when the amount of weekly pay is clearly, in any event, in excess of the separate statutory cap on a week's pay. That statutory cap does not however apply when assessing the separate maximum amount of a compensatory award. The tribunal considers that the analysis in the **Drossou** case was with reference to how remuneration be calculated for a week's pay and that analysis therefore applied more widely than simply a consideration of the maximum compensatory award. The claimant's week's pay for the purpose of calculating the basic award should therefore include employer pension contributions. The tribunal derived some support for this approach from commentary in Harvey where it was said: "as an exercise in the interpretation of the statutory definition of a week's pay in the Employment Rights Act 1996 section 221 and 222, the EAT's judgement is equally applicable to that definition as applied in any of the numerous other exercises in computation based on multiples of a week's pay."

20. The tribunal also gave consideration to the case of **Paggetti v Cobb 2002 IRLR 861 EAT** where it was found that if an employer was paying an employee less than the national minimum wage that ought to be taken into account in calculating a week's pay. From April 2019 (and therefore applicable as at the date of the claimant's termination of employment) the national minimum wage stood at £8.21 per hour. The claimant's hourly rate with reference to his basic wages and normal working hours of 41 hours per week equated to only £7.13 per hour. The tribunal accepted Mr Quickfall's submission that the situation in this case was distinguishable from that in the **Paggetti** case, as the claimant had always been paid by the respondent in excess of national minimum wage rates. However, the tribunal considers the principle ought to apply more widely. It cannot be the case that an employee's compensation can be based on an amount lower than that

which an employer could pay to him as a legal minimum. He would not be being compensated for his true losses. If the claimant had for instance achieved no commission earnings at all, the respondent would have been required to make up his remuneration to at least meet national minimum wage levels.

21. The claimant's basic weekly pay was £292.31 per week but this must therefore be uplifted to £336.61 as the minimum the respondent could have paid the claimant for his normal working hours due to the national minimum wage legislation (41 x £8.21). To this must be added weekly pension contributions made by the employer at a rate of £17.10. That gave a figure for a week's pay of £353.71. At the date of his dismissal the claimant was 53 years of age and with 13 years of service not below the age of 41 and 4 years of sevice below it. The claimant was therefore entitled as a basic award to 23.5 weeks' pay (i.e. 13 x 1.5 + 4 = 23.5). That gave a basic award entitlement of £8312.19.

22. The tribunal did not consider it just and equitable to reduce this award to reflect the claimant's unwillingness to mediate. The respondent was in fundamental breach of the claimant's contract of employment. The claimant had not affirmed that breach, was entitled to treat his employment as ended having followed a grievance process and without agreeing to then mediate with Mr Sidwell.

23. As regards the compensatory award, the claimant's loss of earnings to date (wages only) amounted to the sum of £27,593.01 having deducted his earnings from other employment. The period from 3 October 2019 when the claimant was dismissed to the date of the remedy hearing on 20 December 2020 amounted to 63 ½ weeks. Looking at the claimant's March 2019 payslip, a gross salary in that tax year of £35,777.10 equated to a net sum of £27,734.47 having deducted tax of £4863.40 and national insurance contributions of £3179.23. Net weekly pay equated therefore to £533.36 per week. Net loss over the 63 ½ weeks therefore amounted to the total sum of £33,868.36. To be deducted from that were the claimant's total earnings since the termination of his employment of £6273.45.

24. The respondent had not put forward any argument or basis for reducing compensation for a failure to mitigate or the claimant's delay until January 2020 in starting new employment. Indeed, the claimant reasonably needed a period of adjustment and the claimant's inability immediately to seek new employment was due to his ill-health which had been caused by primarily the actions of one of the respondent's managers. There was no evidence that the claimant would have been furloughed if he had stayed with the respondent. As with the tribunal's conclusion in respect of the basic award,

there was no basis for reducing the compensatory award to reflect any blameworthy conduct.

25. In the circumstances it was unnecessary to calculate a further period of future loss which inevitably the claimant will suffer. The claimant cannot recover all of his immediate loss due to the application of the statutory cap on compensatory awards of 52 weeks' pay. The tribunal had assessed that cap. There is no argument that the week's pay figure must include the employer pension contributions. The tribunal has found also that it cannot be based on a figure less than the respondent could have paid him as a minimum entitlement pursuant to the national minimum wage. The week's pay figure to be adopted therefore remains that of £353.71 and multiplying that by 52 weeks gives a maximum compensatory award of £18,392.92 which the claimant is therefore awarded.

Employment Judge Maidment

Date 14 January 2021