Case No: 2500154/2018
2500155/2018
2500156/2018

EMPLOYMENT TRIBUNALS

Claimant: **Denise Harrington**
Michael Harrington
Sharon Casson

Respondent: **Hilco Capital Limited**

CERTIFICATE OF CORRECTION

Employment Tribunals Rules of Procedure 2013

Under the provisions of Rule 69, the Judgment on Remedy sent to the parties on 25 February 2021, is corrected as set out in block type at paragraph 2 of the Judgment.

Employment Judge AEPitt

Date 29th April 2021

Important note to parties:
Any dates for the filing of appeals or reviews are not changed by this certificate of correction and corrected judgment. These time limits still run from the date of the original judgment, or original judgment with reasons, when appealing.

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EMPLOYMENT TRIBUNALS

Claimants: **Denise Harrington**
Michael Harrington
Sharon Casson

Respondent: **Hilco Capital Limited**

Heard at: **Teesside Justice Centre** **On:** 24th November 2020

Before: Employment Judge Pitt
Mr E Euers
Mrs S Don

Representation
Claimants: Mr S Goldberg of Counsel
Respondent: Ms S Garner of Counsel

JUDGMENT

1. The respondent shall pay to claimant one the sum of £244,328.45

2. The respondent shall pay to claimant two the sum of **£46,856.89**

3. The respondent shall pay to claimant three the sum of £59,321.04

REASONS

1. This is a remedy hearing following the claimants' dismissals in October 2017. A liability hearing was held on 7th, 10th, 12th, 13th, September 14th, and October 23rd, 2018. The Judgment was promulgated on 19th February 2019. A Certificate of Correction was issued on dated August 7th, 2019.

2. The findings of the Tribunal were as follows:
Claimant 1 was subject to the following detriments as a result of her disclosure to Mr Smiley and Mr Kaup:

i. her treatment as part of a pool of employees who were based in the Middlesbrough office;
ii. the failure to consult with her in any meaningful sense.

Claimant 1 was not subject to victimisation as a result of any protected acts.
Claimant 1 was unfairly dismissed due to her disclosure to Mr Smiley and Mr Kaup.
All Claimants were unfairly dismissed.
The respondent was in breach of all three claimants' contracts of employment by its failure to pay bonuses for the year ending April 2017.

3. In the intervening period, claimant 1 also settled her Equal Pay claim against the respondent. This is relevant because it established the correct salary for claimant 1 and the statutory maximum award under Section 124 Employment Rights Act 1996.

4. The claimants were represented by Mr Goldberg of Counsel and the respondent by Ms Garner of Counsel, both Counsel having appeared at the liability hearing. The Tribunal was provided with a bundle of documents that included a schedule of loss for each claimant, various job applications, and a spreadsheet setting out positions available in roles each claimant may be qualified to work. A supplemental bundle was provided containing some information from the Equal Pay Claim. In addition, Counsel supplied an Excel document named 'Schedule of Loss Comparison' that set out the parties' respective positions in relation to a week's pay, the level benefits were paid at, and the period over which an award should be made with regard to Claimants 2 and 3.

5. The Tribunal read witness statements and heard evidence from Mr Henry Foster, Chief Executive Officer of the respondent, and each of the claimants.

The Issues

6. There were two issues; first, Polkey the could the respondent argue a Polkey point for each claimant, or had that already been dealt with by the Tribunal. Secondly, had the claimants mitigated their losses.

The Facts

Claimant One

7. The evidence of Claimant 1 was contradictory. In her witness statement, she states she has made significant efforts to find alternative employment (paragraph 2 of her witness statement). However, in her evidence, she told the Tribunal she had made no efforts to find employment. This was for two reasons; first, she thought that she would be prejudiced at an interview when the reason for her dismissal, i.e., the protected disclosure, became public. Therefore, she was waiting until it, i.e., the events leading to her dismissal were in the public domain before applying for any positions. When questioned, she said this would be when she decided to

put it in the public domain at the conclusion of the proceedings. Her second reason was that she was working with two former colleagues who had set up a business similar to Hilco, and it was her intention to join them in the company. She gave evidence of some of the work she had carried out, including networking she had undertaken of behalf of the company. She was not paid for any of this work. As of October 23rd, 2020, the date of her witness statement, the claimant was 'in negotiations to come to terms, and I will come on board as a Director as soon as a deal is secured' (witness statement paragraph 6). In her evidence, she admitted she had not spoken to her colleagues since January 2020.

8. In relation to the figures to be used, it is agreed by both parties that the appropriate salary is that agreed in the Equal Pay Claim as £117,550 per annum. Her gross weekly wage was £1451.28 net, as calculated by Mr Turner of the respondent using the claimant's salary and the tax regime for 2017. The claimant also claims for loss of weekly contributions to her Pension, £158.17; Loss of Contribution to private medical care, BUPA, £76.92; Loss of contribution to Life Insurance, £57.69. In addition, She claims £42,735 per annum for her loss of bonus.

Claimant Two

9. Claimant 2 set out the details of his attempts to find alternative employment in his witness statement. These included registering with Hays Recruitment Agency in October 2017. He joined another agency in January 2019. He joined 'Indeed Jobs' on the internet, from which he received daily email alerts for potential jobs. He was called for five interviews, the last one being 2019. The bundle contains further applications he has made or where recruiters have sent his CV to prospective employers. The Tribunal accepts the claimant's assertion that payroll positions are at a much lower salary than that he had with the respondent. Employers consider him overqualified for some of the roles he is applying for. He had limited his search to the local area, including positions in York and Newcastle. His explanation for limiting his search so that any vacancies would be in a daily commute from his home.

10. Having considered the figures in the Schedule of Comparison of Loss, the Tribunal concluded that the correct figures were calculated by the respondent. These figures are calculated using a specific payslip, whereas it is not clear the basis upon which the claimant's figures are calculated. His weekly wage was £567.84 net, £784.14 gross. In addition, the claimant claims loss of a monthly pension contribution of £39.10, loss of contribution to Private Medical Health care, BUPA, £7.40, and loss of Life Insurance, £2.92. The claimant also claims for loss of his bonus of £6000 per annum.

Claimant Three

11. Claimant 3 set out in detail her attempts to find new employment, which included registering with Reed Recruitment. She has not been called for an interview. She has lowered her sights and is now searching for

positions with less responsibility and a correspondingly lower salary. There was some discussion concerning the evidence she had produced. However, it was accepted, after an enquiry by the respondent, that the claimant had submitted some documents to the respondent's solicitor for an earlier hearing which were not included in the bundle before the Tribunal, Her explanation being that she did not realise she had to resubmit them. The Tribunal accepts this explanation and accepts she was making efforts to obtain employment from an early stage following her dismissal.

12. Using the Schedule of Loss Comparison, her weekly wage was £679.91 net and £1025,40 gross. Loss of Pension £71.78; Loss of Private Medical Insurance Bupa £19.96, Loss of Life Insurance, £3.80.

The Law

Section123 Employment Rights Act 1996, The Act, contains the provisions in relation to a compensatory award.

…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 insofar as that loss is attributable to action taken by the employer.

Section 124 of the Act sets an upper limit in relation to Unfair Dismissal compensation under Section 98 of the Act. This is the lower of £88,519 or 52 multiplied by a week's pay. In effect, a year's salary. The statutory cap does not apply to a person who was unfairly dismissed under section 103 of the Act Section 124(1A).

Submissions

13. Both Counsel submitted written submissions, and it is not intended to rehearse them in full here.

Claimants

14. In relation to the Polkey issue, this should not be reopened. HHJ Griffiths was evident in his Judgment in paragraphs 9,10, 11 when this matter was before him in the EAT.

15. The respondent has the burden of establishing that each claimant acted unreasonably when seeking to mitigate their loss. It is not unreasonable for an employee who has lived and worked in the North East throughout their working of their life, to limit their job search geographically. Claimants 2 and 3 have produced evidence of their respective efforts.

16. In relation to claimant 1, it is argued that she has joined a company set up by former colleagues'. In principle, she should not be criticised for this. Where she has been criticised for failing to supply details, Mr Goldberg describes the respondent as 'ruthless' and that the claimant is merely trying to preserve her opportunities for an income.

Respondent

17. None of the claimants are seeking a basic award. Claimant 1 has only claimed for economic loss, and there is no evidence adduced as to any injury to feelings. She has clearly acted unreasonably as she has not applied for any employed positions. The explanation she gave to the Tribunal, that she did not want to explain to prospective employers why she was looking for work, is naïve as she could simply have stated she was redundant. Following the Judgment, she could have explained that she was unfairly dismissed.

18. Whilst, in principle, the claimant is entitled to set up a new business or company, the evidence adduced by the claimant is lacking in detail. The company is not trading, having only submitted micro or dormant accounts between 2016 – 2020.

    Claimant 2 took a low key approach to his job search. The respondent asserts that there were periods where there is a 'flurry' of activity and then no activity. He should have broadened his scope for work and increased the geographic area he was looking in Claimant 3 is similar to Claimant 2 in her approach. The evidence is that she had applied for a maximum of 66 positions over the whole period

Discussions and Conclusions

The Polkey Point

19. This was dealt with as a preliminary issue. On behalf of the respondent, Ms Garner wishes to argue a Polkey point; Mr Goldberg, in reply, asserts that the Tribunal has already dealt with this in its Liability decision.

20. At paragraph 9.4.9 of the reasons the Tribunal said

    Would the claimants have been dismissed if a fair procedure had been followed? It is impossible to say on the evidence we have before us that they would have been dismissed. A proper procedure would have included written documentation setting out first why it was uneconomic to keep Middlesbrough open; secondly setting out why the claimants were selected for redundancy. That is to say, identifying which part or parts of their roles were no longer required, who else was in the pool, the selection criteria used, how they were applied, alternative roles that were considered, including home working.

21. Ms Garner argues that this is insufficient on the Polkey point. She points out that there is no reference to Polkey in the conclusions in paragraph 11 of the reasons or the Judgment. Further, she relies on the comments of HHJ Stacey from the EAT. HHJ Stacey was the single Judge who considered the respondent's appeal at the sift stage. Rejecting the appeal, she said:

As to the Polkey Reduction, I note that a remedy hearing is yet to take place. The Employment Tribunal has made an observation at paragraph 9.4.9, but it is not recorded in the judgment section. No doubt this is a matter that can be explored further at the remedy hearing if the respondent wishes to pursue a Software 2000 v Andrews type argument.

This, Ms Garner argues, leaves the way open for the Tribunal to hear evidence and further argument of the Polkey issue.

22. Mr Goldberg refers to HHJ Griffiths' Decision, who heard the respondent's application under Rule 3(10) . At paragraphs 9, 10, and 11 of his Judgment, he said:

The third channel within which in oral submission Ms Garner gathered up some of the other of appeals relates to the unfair dismissal claim and she refers (in particular) to Grounds 10,11, and 12 of the Notice of Appeal. It is said that Taylor v OCS Group Ltd [2006] EWCA CIV 702 was not respected, that there was a failure, again, to provide sufficient Reasons in the Decisions and there is criticism of the treatment raised by the House of Lords in Polkey v AE Drayton Services [1988 ICR 142.

In relation to that, the focus is on paragraph 9.34.9 of the Decision…which says, 'Would the claimants have been dismissed if a fair procedure had been followed? It is impossible to say on the evidence we have before us that they would have been dismissed. It seems clear to me that what that is saying is that the Polkey percentage is zero.

The Decision is not saying it is impossible on the evidence whether the Claimant would have been dismissed. It is saying, 'It is impossible to say on the evidence we have before us that they would have been dismissed.' It is therefore saying as a finding on the evidence that they would not have been dismissed had it not been for the failure to follow fair procedures.

23. Ms Garner invites the Tribunal to accept HHJ Stacey's interpretation and revisit the Polkey issue.

24. Having reviewed the two documents from the EAT, we note that the comments from HHJ Stacey are simply that they are contained in a letter, not a judgment, and have no binding authority. At the very most, the Tribunal interpreted it to mean 'it is open to the respondent to raise the issue at the remedy hearing and clarify if it has been dealt with.'

25. In contrast, the comment of HHJ Griffiths is contained within a formal Judgment, and the Tribunal considers itself bound by that Decision and unable to reopen the issue.

26. For the avoidance of doubt, however, the Tribunal did consider the Polkey issue at the liability hearing. It concluded that the claimants would not have been dismissed if a fair procedure had been followed.

Remedy

27. Having read the witness statements and heard the evidence of all the witnesses, the Tribunal concluded as follows;

Claimant One

The Tribunal bore in mind that it is for the respondent to prove that claimant 1 has acted unreasonably in failing to mitigate her loss. In principle, claimant 1 is entitled to look at and actively seek to set up her own business. The claimant's witness statement is lacking in detail in the setting up of the company. The facts are the company was established by the claimant's former colleagues. She has attended 'several recognised retail meetings which are essentially networking events' (paragraph 7 of her witness statement), but there are no dates. Claimant 1 and her colleagues attended a Retail Trust Ball in February 2018. The last date when she appears to have carried out any work or participated in a networking event is 2018 (paragraph 9 of the witness statement). Claimant 1 told us she has not spoken to anyone in the company since January 2020.

28. The Tribunal concluded that the fact that claimant 1 had not had contact with her colleagues in the company since January 2020 is incompatible with her assertion that she 'will come on board as soon as a deal is secured. The Tribunal, therefore, doubt that any effort is being made to establish a viable company. This, coupled with the lack of progress in obtaining contracts and the fact that the company now appears to be dormant, led the Tribunal to conclude that claimant 1 acted unreasonably in not searching out other opportunities, including seeking paid employment.

29. Turning to the efforts by claimant 1 to find alternative employment. Her evidence, although contradictory, was clear; she had never applied for an employed position. Her reason for not wishing to explain why she had lost her last position had some merit during the proceedings. However, by the time the claim was before the Employment Tribunal for a merits hearing in September 2018, the fact that the claimant had made a Protected Disclosure was in the public domain. The Tribunal concluded that as the original Judgment and reasons were not signed until February 10th, 2019, it is unlikely they would be formally in the public domain until that date. That is not to say the claimant would be expected to obtain employment the day after. Instead, the Tribunal considered the claimant 1 should have started actively seeking work from February 2019, and her failure to do so was unreasonable. However, the Tribunal accepts she would not have obtained a position immediately following the hearing and allows a period of three months following from the date of the Judgment. Therefore, the Tribunal concludes that claimant 1 acted unreasonably in not seeking a paid position from February 2019 but that her losses will end as of June 1st, 2019, as it is unlikely she would have obtained employment immediately.

30. The Tribunal concluded she was entitled to 85 weeks loss of earnings and benefits.

Claimant Two

31. The Tribunal accepted the evidence of claimant 2 that he had made efforts to secure new employment and that his actions were reasonable. In particular, the respondent argues that claimant 2 has limited his opportunity geographically, whilst in the liability hearing, he asserted that he might accept a position in London. The Tribunal concluded there is a difference in accepting a move to London to retain a secure and well-paid position and move for a new position at a lower salary. There may be a time when the claimant has to extend his search area further, but the Tribunal considers it reasonable to keep the search area within an hour of home.

Claimant Three

32. The Tribunal accepted the evidence of claimant 3 regarding her job search. She started the search immediately following her dismissal and applied for positions at a reduced salary.

33. The Tribunal accepted that she had not acted unreasonably in mitigating her loss.

The Award

Claimant One

Loss of Earnings date of dismissal to 1/6/19 85 weeks x 1451.28	123,358.80
Loss of Statutory rights	500
Loss of Bonus	7,122.50
Loss of Bupa Contributions	1,696.60
Loss of Life Insurance Contributions	4,903.65
Loss of Pension Contributions	13,444.45
Breach of Contract	42,735.00
Total	193,761.00
Grossing Up	50,567.45
TOTAL AWARD	**193,761.00**

Claimant Two

Loss of Earnings from date of dismissal to date of hearing 154 x 567.84	87,447.36

Loss of Statutory Rights		500
Loss of Pension Contributions		6,038.24
Loss of Bupa Contributions		1,141.14
Loss of Life Insurance Contributions		449.68
Loss of Bonus	2018/19	4,230.14
	2019/20	4,230.14
	2020 @ 8/12	2,820.09
		11,280.37
Total Award for unfair Dismissal		106,409.78
Statutory Cap		40,856.89
Breach of Contract		6000
Total Award		**46,856.89**

Claimant Three

Loss of Earnings 150 x 679.91		101,986.50
Loss of Statutory rights		500
Loss of Pension Contributions		10,767
Loss of Bupa Contributions		2,994
Loss of Life Insurance Contributions		571.70
Loss of Bonus	2018/19	5,588.30
	2019/18	5,588.30
	2020 @8/12	3,725.53
Total Award for unfair Dismissal		131,149.63
Statutory Cap		53,321.04
Breach of contract		6000
TOTAL AWARD		**59,321.04**

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Employment Judge Pitt

Date 25 February 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON

26 February 2021

Miss K Featherstone
FOR THE TRIBUNAL OFFICE