



EMPLOYMENT TRIBUNALS

Claimants: 1) Mr B Bylett
2) Mr P Brocklehurst
3) Mr L Blainey

Respondent: Eurotunnel Services Limited

Heard at: London South Employment Tribunals by CVP
On: 01 December 2020

Before: Regional Employment Judge Freer (sitting alone)

Representation

Claimants: Mr P Powlesland, Counsel

Respondent: Mr J Mitchell, Counsel

RESERVED JUDGMENT ON REMEDY

It is the judgment of the Tribunal that:

- 1) The Respondent shall pay to Mr Bylett the sum of £12,230.06 comprising a Basic Award of £8,802 and a Compensatory Award of £3,428.06 after applying a 25% reduction to the Basic and Compensatory Awards on the basis of the Claimant's conduct/contribution to dismissal and an 80% *Polkey* reduction to the Compensatory Award.
- 2) Of the total award of £12,230.06 the prescribed element is £797.22 for the period from 20 May 2017 to 09 July 2017. The amount of the award exceeding the prescribed element is £11,432.84.
- 3) The Respondent shall pay to Mr Brocklehurst the sum of £15,780.10 comprising a Basic Award of £8,618.63 and a Compensatory Award of £7,161.47 after applying a 25% reduction to the Basic and Compensatory Awards on the basis of the Claimant's conduct/contribution to dismissal and an 80% *Polkey* reduction to the Compensatory Award.
- 4) Of the total award of £15,780.10 the prescribed element is £5,051.92 for the period from 20 May 2017 to 15 January 2018. The amount of the award exceeding the prescribed element is £10,728.18.

- 5) The Respondent shall pay to Mr Blainey the sum of £13,227.66 comprising a Basic Award of £8,802 and a Compensatory Award of £4,425.66 after applying a 25% reduction to the Basic and Compensatory Awards on the basis of the Claimant's conduct/contribution to dismissal and an 80% *Polkey* reduction to the Compensatory Award.
- 6) Of the total award of £13,227.66 the prescribed element is £2,604.71 for the period from 20 May 2017 to 18 March 2018. The amount of the award exceeding the prescribed element is £10,622.95.

REASONS.

1. This is a remedy hearing arising from the Tribunal's judgment promulgated on 19 May 2020 that the claims of unfair dismissal by Mr Bylett, Mr Brocklehurst and Mr Blainey ("the Claimants") are successful. The judgment also held that the claims of wrongful dismissal by those Claimants were unsuccessful.
2. As set out in detail in the earlier decision, on 17 February 2017, T, a Power Supply Technician within the Respondent's Power Supply Team, disclosed to the Respondent that he had been offered a £50 note by a work colleague, C, as part of 'his share' in the proceeds of sale of batteries belonging to the Respondent and identified for disposal as scrap.
3. That disclosure led to an investigation into the surrounding circumstances by the Respondent which resulted in the resignation of two employees directly linked with the theft of batteries, including C, and disciplinary action against nine employees of which eight were dismissed, including the original six claimants to this action. One employee received a final written warning. Two other employees, whilst not involved in the theft disciplinary process, received informal reprimand for their treatment of T.
4. At this hearing the Tribunal was presented with a remedy bundle comprising 231 pages which included the Tribunal's detailed 41 page reserved judgment on liability.
5. All three Claimants gave evidence. Mr Barnes, Train Crew Manager, gave evidence on behalf of the Respondent.

Summary of the relevant law

6. The statutory provisions relating to remedy for unfair dismissal are set out in sections 112 to 127 of the Employment Rights Act 1996 ("the Act"). In essence, if no application for reinstatement or re-engagement is made by the Claimant, an award of compensation shall consist of a Basic Award and a Compensatory Award, subject to statutory limitation on maximum amounts.
7. The Basic Award is calculated according to a statutory formula based on a week's pay (which is subject to a statutory cap), the number of complete years of employment at the date of dismissal and a multiplier based on the

Claimant's age at the date of dismissal.

8. The Compensatory Award is: "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".
9. The Compensatory Award is limited to making good the Claimant's financial loss. The tribunal cannot bring into its calculations any consideration of punishment for the employer or feelings of sympathy for the Claimant. The Compensatory Award is confined to compensating only proven financial loss. (see **Morgans –v- Alpha Plus Security Limited** [2005] IRLR 234, EAT).
10. So far as possible, the tribunal should use the facts at its disposal in order to reach an accurate assessment of compensation, but it is also recognised that a tribunal will often be compelled to adopt a 'broad brush' approach (see **Norton Tool Company Ltd –v- Tewson** [1972] ICR 501, NIRC).
11. Section 123(4) of the Act provides: "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".
12. The judgment in the case of **Savage –v- Saxona** [1998] ICR 357, EAT, recommended a three step approach to determining whether a Claimant has failed to mitigate their loss: (1) identify what steps should have been taken by the Claimant to mitigate their loss; (2) find the date upon which such steps would have produced an alternative income; (3) thereafter reduce the amount of compensation by the amount of income which would have been earned.
13. It may not be reasonable to expect a Claimant to take the first job that comes along, especially one attracting lower pay than the Claimant might reasonably expect to receive.
14. In particular, a Claimant does not necessarily have to lower their sights immediately in seeking new employment with regard to the kind of job for which they are prepared to apply (**Orthet Ltd –v- Vince-Caine** [2005] ICR 374, EAT).
15. On the other hand, undue delay in accepting some type of work on the hope of receiving a better offer may result in compensation being reduced.
16. A Claimant can claim any partial loss arising from the acceptance of suitable, though less well paid, employment,
17. The effect of the dismissal on the Claimant may well be of relevance in determining whether there has been a failure to mitigate.
18. The burden of proof is on the Respondent to show that the Claimant has failed to mitigate loss (**Fyfe –v- Scientific Furnishings Ltd** [1989] ICR 648, EAT). The tribunal is under no duty to consider the question of mitigation unless the Respondent raises it and provides some evidence of a failure to mitigate.

19. It is well-established law that the principle contained in **Polkey –v- A E Dayton Services Ltd** [1987] IRLR 503, HL, applies to the consideration of the just and equitable element of the Compensatory Award. A tribunal may reduce the Compensatory Award where an unfairly dismissed employee may have been dismissed fairly at a later date or if a proper procedure had been followed.
20. There is no need for an 'all or nothing' decision. If the tribunal thinks there is a doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the normal amount of compensation by a percentage representing the chance that the employee would still have lost his employment.
21. In **Software 2000 Ltd -v- Andrews** [2007] IRLR 568, the EAT reviewed the authorities and set out some guidance, such as:

"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".
22. By virtue of section 122(2), a tribunal may reduce the basic award where the conduct of the employee before the dismissal was such that it would be just and equitable to do so. Also, by virtue of section 123(6), the tribunal may reduce the compensatory award by such proportion as it considers just and equitable where the dismissal was to any extent caused or contributed to by any action of the employee.

Findings and Conclusions

23. There is no dispute over the amount of the Basic Awards, save for any percentage reductions. For Mr Bylett it is a sum of £11,736; for Mr Brocklehurst it is a sum of £11,491.50 and for Mr Blainey it is a sum of £11,736.
24. With regard to the Compensatory Award the Tribunal first considers whether there should be any adjustments to the Basic and Compensatory Awards on the ground of the Claimant's conduct/contribution to dismissal or a reduction to the Compensatory Award on the basis of any *Polkey* reduction.
25. The Tribunal concluded at paragraphs 266 and 267 of the liability decision: "The Tribunal received no evidence from Mr Barnes on whether or not he would have dismissed those Claimants in respect of each individual allegation. The Tribunal concludes that it follows in the circumstances relating to Mr Bylett, Mr Brocklehurst and Mr Blainey, where the Tribunal has found above that conclusions on some allegations fell outside the range of reasonable responses, that the decision to dismiss also falls outside the range and is objectively unreasonable. The Tribunal concludes that a sanction of dismissal based on those conclusions is not reasonable in the specific cases of Mr Bylett, Mr Brocklehurst and Mr Blainey, particularly as the Tribunal has found

that in those cases it was not objectively reasonable to believe in the most serious allegations. However, of course, when it comes to the issue of remedy, the *Polkey* principle will be considered, in particular whether or not the Respondent would have dismissed all or any of those Claimants in any event on the allegations on which it was objectively reasonable to hold a belief. Also the issue of whether those Claimants had contributed to any extent towards their dismissal”.

26. The Tribunal refers to the liability decision and concludes with regard to the theft allegations that gave rise to a finding of unfair dismissal that no *Polkey* reduction should be made. The impact was on reasonable belief rather than process.

27. The Tribunal’s individual conclusion regarding the victimisation of T and Mr Bylett is at paragraphs 155 and 156 of the decision:

“The Tribunal concludes that it was reasonable for Mr Barnes to believe that Mr Bylett voiced his disappointment to Mr Beatty that T had made his allegation. Mr Beatty confirmed as much. Also that T felt Mr Bylett was “offish” with him.

It was reasonable for Mr Barnes to believe that it was likely that Mr Bylett voiced disappointment with T within the team. It was also objectively reasonable to believe that Mr Bylett chose to ostracise T and instead to side with C who at the investigation stage Mr Beatty knew had taken the batteries. It was therefore reasonable to believe that this behaviour constituted bullying and harassment”.

28. The Tribunal’s individual conclusion regarding the victimisation of T and Mr Brocklehurst is at paragraphs 183 and 184 of the decision:

“With regard to the third allegation, in the disciplinary hearing Mr Brocklehurst confirmed that he had been upset by T’s email implicating the Team which had alleged he had compromised safety. As a consequence he had felt judged and so avoided talking to T as he considered it was human nature and best in the current situation to keep away from him. He felt T had been standoffish with him too.

The Tribunal concludes, that it was reasonable for Mr Barnes to believe that Mr Brocklehurst took part in victimising an individual who reported certain facts to his line manager to the extent referred to above. The Tribunal further concludes that this finding does not mean that it was reasonable to believe that Mr Brocklehurst was involved in or knew about the thefts. Mr Brocklehurst’s evidence was clear that he was upset at being implicated”.

29. The Tribunal’s individual conclusion regarding the victimisation of T and Mr Blainey is at paragraphs 202, 203, 209 and 210 of the decision:

“With regard to T, Mr Blainey stated how he felt about the e-mail by T and why he thought it was totally wrong to send it whilst the investigation was ongoing and also gave his opinion about Mr Lockyer.

In the investigation meeting Mr Blainey stated that T was vindictive and not a team player and “absolutely hates [Mr Battersby] and [Mr Morris]”.

With regard to the third allegation, Mr Blainey considered T was totally wrong to send the e-mail whilst the investigation was ongoing and in the investigation meeting Mr Blainey stated that T was vindictive and not a team player.

Given that evidence and the evidence before Mr Barnes regarding the other employees in the team on this matter, the Tribunal concludes that it was reasonable for Mr Barnes to conclude that during investigation into the theft of waste batteries Mr Blainey took part in victimising T”.

30. With regard to the wrongful dismissal complaint and the treatment of T, the Tribunal concluded that:

“... Mr Bylett, Mr Brocklehurst and Mr Blainey were not wrongfully dismissed given the evidence regarding their individual and combined treatment of T. T was a whistleblower and raised an issue regarding theft of company property and the distribution of the proceeds of sale. Further the theft of the batteries, particularly on such a scale, had health and safety implications which would have been obvious to the three Claimants. Therefore their subsequent actions regarding T was sufficient to undermine the trust and confidence inherent in their contracts of employment, particularly given the circumstances and their respective positions and experience, such that it amounts to a repudiatory breach of contract. Therefore the wrongful dismissal claims are unsuccessful”.

31. There was nothing in this finding that relied upon evidence or acts discovered after the event, such as the police investigation outcome.

32. As the Tribunal has found that the actions of the three Claimants with regard to their treatment of T amounted to a repudiatory breach of contract, the question remaining with regard to the *Polkey* principle is the chance in all the circumstances that the Respondent would have accepted that repudiatory breach of contract absent the other allegations being made out. What is the chance that the Claimants would have been fairly dismissed for their treatment of T on its own?

33. The evidence of Mr Barnes referred to the Respondent’s Whistleblowing Policy which states:

“We acknowledge that it is not easy to report a concern, particularly one that relates to fraud, corruption, abuse or other aspects of misconduct, criminal behaviour or any other serious matter, which may put individuals or the Company at risk. However, you are urged to come forward with any concerns at an early stage before the problem has a chance to become serious. We are

happy for you to come forward either on your own or with a work colleague if you prefer. The Company will protect you from reprisal or victimisation. You can be confident that reporting any matter will in no way affect your career prospects or advancement in your job. This applies if you come forward in good faith and with reasonable belief, and after investigation it turns out that the matter has a genuine and innocent explanation. We will do all we can to respect your request for confidentiality and/or anonymity if such a request is made. If anyone tries to discourage you from coming forward with any concern, this will be treated as a serious disciplinary offence. This will also apply to anyone who expresses criticism of you". Also: "It is acknowledged that it is not easy to report a concern, particularly one that relates to fraud. However, you are urged to come forward at an early stage before the problem has a chance to become serious".

34. Mr Barnes also referenced the Respondent's Bullying and Harassment Policy which states:

"We are committed to developing a working environment free from harassment, victimisation and bullying; collusion with these is not acceptable. Individuals must feel confident enough to bring forward complaints without fear of ridicule or reprisal. Fair treatment and respect for the dignity of all employees is essential".

35. The list of examples of gross misconduct in the Respondent's Disciplinary Policy specifically mentions "an act of harassment or bullying against any other person". The list of gross misconduct offences is not exhaustive and reasonably covers victimisation of a whistleblower given the terms of the Respondent's whistleblowing policy.

36. Mr Barnes was mindful that the Claimants had long lengths of Service, with Mr Bylett and Mr Blainey each having 16 years' service and Mr Brocklehurst having 21 years' service, and also that summary dismissal is the most serious sanction he could impose.

37. It was the evidence of Mr Barnes that he considered the Claimants' lengths of service indicated to him that they should have known better. He considered that because of the Claimants' treatment of a whistleblower; the importance the Respondent places on protecting whistleblowers; health and safety being central to the Respondent's business; and that the Claimants worked on safety critical and potentially extremely dangerous equipment in remote parts of the Respondent's extensive site, a sanction less than dismissal, including a final written warning, would not have been appropriate in the circumstances.

38. His evidence was that the actions of the Claimants towards the whistleblower amounted to gross misconduct. He was concerned that the Claimants' treatment of the whistleblower would interfere with the safety of their work because they were choosing to compromise their ability to work together as a team because it was necessary for the Claimants to have continued to work closely with the whistleblower.

39. Mr Barnes concluded that he would have dismissed the Claimants had victimisation been the only adverse finding.
40. With regard to Mr Barnes saying that he would have dismissed the Claimants for the victimisation offence only, the Claimants relied on the same observation used by Mandy Rice-Davies about the evidence of Lord Astor: "Well he would, wouldn't he?".
41. In support they rely on the decision reached by Mr Bertrand Findinier with regard to Mr Cory as set out in an e-mail dated 25 April 2017, which also related to the circumstances surrounding T's whistleblowing:
- "The outcome of a recent investigation report has found that you have been part of an agreement to victimise a member of the team for their reporting to the company a criminal act. It has been alleged that you have shunned this technician and played a part in excluding him from any social contact. Your response to this was that you have some difficulty to accept the situation and the suspension of your colleagues: this is an unsettling period that makes you really upset. On the other hand you understand the sensitive and crucial subject of your attitude with and the relationship toward the member(s) of the team who has (have) to be considered as whistleblower(s). . . I believe that you have taken on board my concerns about the team's conduct and I trust that you will act respectfully and professionally going forwards. Please be aware that should there be any concern raised regarding your conduct in the future, following investigation, formal disciplinary action may be considered".
42. A similar outcome was given to Mr Werrey.
43. The Claimants also argued that the Tribunal should assess whether or not the Respondent would have dismissed the Claimants, not whether or not Mr Barnes would have dismissed them. However the Tribunal concludes that the assessment of whether or not the Respondent would have dismissed the Claimants necessarily involves an assessment of whether Mr Barnes would have taken that action. It was Mr Barnes who undertook the disciplinary process with regard to the Claimants on behalf of the Respondent. It is those circumstances that form part of the *Polkey* assessment.
44. Mr Barnes stated in evidence that he would have dismissed the Claimants for the single offence that Mr Findinier had earlier only given an informal warning to Mr Cory and Mr Werrey for a very similar finding.
45. In evidence Mr Barnes confirmed that he considered the circumstances to be collective victimisation, as did Mr Findinier. He believed that the whole team took the decision and the whole team were involved. He stated that Cory and Werrey were not part of his disciplinary remit. The investigation had found that Mr Cory and Mr Werrey were not part of the theft and/or cover-up circumstances and it was not part of his remit to reopen the investigation.
46. Mr Barnes accepted that there was a difference of treatment between the sanction applied to Messrs Cory and Werrey and that which applied to Messrs

Bylett, Brocklehurst and Blainey, but contended that he was not obliged to reach the same conclusion as Mr Findinier. Mr Barnes confirmed that Mr Findinier was at the same management level as himself.

47. Although the Tribunal liability decision confirmed that the claims were not argued on the basis of a disparity of treatment with regard to the unfair dismissal claim, that does not preclude the Claimants from relying on the circumstances relating to Mr Cory and Mr Werrey with regard to a *Polkey* argument. Even if the overall circumstances were not sufficiently identical to sustain a disparity of treatment argument with regard to unfair dismissal liability, it does not preclude the Claimants from relying upon the circumstances relating to Mr Cory and Mr Werrey with regard to identifying the breadth of sanction that the Respondent attached to the victimisation complaint.
48. Mr Barnes raised an argument that the demonstration of contrition by Mr Cory and Mr Werrey was a difference to the circumstances relating to the Claimants. However, he conceded that he was not aware of the circumstances of Mr Cory and Mr Werrey because they were not before him as part of his disciplinary process and therefore this appears to be an after the event rationale.
49. The Tribunal has considered this matter very carefully. The evidence of Mr Barnes, together with the Tribunal finding that there was a repudiatory breach of contract by the Claimants with regard to the victimisation allegation, would suggest a 100% *Polkey* reduction on the basis that the Claimants would have been dismissed on that allegation alone.
50. However, had the *Polkey* assessment circumstances been in place and Mr Barnes not made the unfair and influential findings regarding these Claimants on the main allegations of theft and cover-up and had only made the finding of victimisation of T, the Claimants would have been in a very similar, if not identical, position to Mr Cory and Mr Werrey.
51. The Tribunal concludes that given it was the view of Mr Barnes that there had been collective victimisation, had he reasonably taken notice of Mr Findinier's decision on Mr Cory and Mr Werrey and/or reasonably received advice with regard to sanction in that respect (whether in relation to consistency or otherwise) from Mr Hawley the Respondent's UK HR Director who was assisting Mr Barnes at the time and knew of Mr Findinier's involvement in the overall process with Mr Cory and Mr Werrey as demonstrated by Mr Barnes' first witness statement, there is a chance that Mr Barnes may not have accepted the repudiatory breach on behalf of the Respondent and not dismissed the Claimants when balancing all of the circumstances. However, the Tribunal concludes overall that there was a low chance of this possibility and makes an 80% reduction with regard to the *Polkey* principle.
52. It was recognised by the Claimants that a reduction on the ground of conduct/contributory fault was likely.

53. The Tribunal concludes that it is inevitable that there is contributory fault where the Tribunal has made a finding that the Claimants committed a repudiatory breach of contract with regard to victimising T and which formed part of the reason for their dismissal. It was culpable and blameworthy conduct.
54. The victimisation element was one of three allegations which led to the dismissals of the Claimants, although the Respondent clearly took the theft and cover-up allegations more seriously. The Tribunal concludes in all the circumstances that it is just and equitable to reduce the Basic Award for the Claimants' conduct before their dismissals and the Compensatory Award having regard to the extent to which the Claimants contributed towards their actual dismissal, both to the extent of 25%.
55. There have been no arguments on any adjustment with reference to the ACAS Code on Disciplinary and Grievance Procedures.
56. With regard to mitigation there was an acceptance by the Respondent that the Claimants had mitigated their losses up to the time that they obtained new employment.
57. Mr Bylett was aged 59 at the date of his dismissal and he immediately signed up to three different employment agencies and LinkedIn. He reasonably applied for jobs but was unsuccessful until he was offered a three year contract. He was TUPE transferred to another company and is presently still employed.
58. Mr Brocklehurst made a substantial job search and started working on 07 August 2017 on a 12-month contract which did not match his earnings or level of responsibility with the Respondent. He continued to search for alternative employment and started a new position on 15 January 2018 and is still working for that employer at present.
59. Mr Blainey was successful in securing new work on 11 July 2017 until October 2017, which was then extended until 22 December 2017. He continued to seek alternative employment and finally secured a position from 18 March 2018 until his retirement in August 2020.
60. The Tribunal concludes that the Claimants have reasonably mitigated their losses generally throughout the whole period under review. They took reasonable steps to both find and secure permanent employment given all the circumstances, including their ages, length of absence from the job market and the reason for dismissal.

Calculations

Mr Bylett

61. The Tribunal accepts the Respondent's calculation of £744.37 for net weekly pay whilst employed with the Respondent as set out in the Respondent's

updated counter schedule and the third statement of Mr Barnes. Those sums were not disputed by the Claimants.

62. The Tribunal accepts that the Claimant lost benefits obtained from his employment with the Respondent of £54.75 per week as set out in the Claimant's schedule of loss. The award has to reflect the actual personal loss to the Claimant not just the value of the benefit generally.
63. The Claimant also lost a pension contribution made by the Respondent of £121.56 per week.
64. Mr Bylett commenced new permanent employment on 10 July 2017 earning £751.92 net per week. Which gives no ongoing weekly loss of earnings.
65. The Tribunal awards loss of earning from dismissal to 09 July 2017 of 7.14 weeks at £744.37 which gives a total of **£5,314.80**.
66. The Tribunal awards loss of benefits from dismissal to 09 July 2017 of 7.14 weeks at £54.75 which gives a total of **£390.92**.
67. The Tribunal awards loss of pension from dismissal to 09 July 2017 of 7.14 weeks at £121.56 which gives a total of **£867.94**.
68. The Tribunal considers that it is just and equitable to award a further 12 months' loss of benefits which gives a total of **£2,847**, plus a further 12 months' pension loss of **£6,321.12**.
69. Using a broad brush approach the Tribunal accepts the Claimant's calculation of additional loss in the form of share value as set out in the schedule of loss, giving a total of **£6,611.97**.
70. Therefore the award of compensation is:

Basic Award

£8,802 (£11,736 less 25%)

Compensatory Award

The Claimant was in receipt of benefits.

The prescribed element is: loss of earnings since dismissal of £5,314.80 less 80% *Polkey* reduction which gives £1,062.96 plus a 25% contributory fault reduction which gives a final sum for the prescribed element of **£797.22**.

The non-prescribed element is:

Loss of benefits of £3,237.92
Loss of pension of £7,189.06
Loss of share value of £6,611.97
Loss of statutory rights of £500

Which totals £17,538.95

Less the 80% *Polkey* reduction = £3,507.79

Less 25% for contributory fault, gives a final amount for the non-prescribed element of **£2,630.84**.

71. The total award is £12,230.06 of which the prescribed element is £797.22 for the period from 20 May 2017 to 09 July 2017. The amount of the award exceeding the prescribed element is £11,432.84.

Mr Brocklehurst

72. The Tribunal accepts the Respondent's calculation of £804.29 for net weekly pay whilst employed with the Respondent as set out in the Respondent's updated counter schedule and the third statement of Mr Barnes.
73. The Claimant lost benefits obtained from his employment with the Respondent of £21.67 per week as set out in the Claimant's schedule of loss.
74. The Claimant was not in the Respondent's pension scheme.
75. The Tribunal awards loss of earnings from dismissal to 07 August 2017 of 11.29 weeks at £804.29 which gives a total of **£9,080.43**.
76. Mr Brocklehurst undertook temporary employment on 07 August 2017 to 11 January 2018 (22.43 weeks) and earned £9,354.77 net as opposed to the £18,040.23 he would have earned during that period with the Respondent giving a loss of **£8,685.46**.
77. Mr Brocklehurst commenced new permanent employment on 15 January 2018 earning £498.26 net per week.
78. The Tribunal concludes that it is just and equitable to award a further twelve months loss of earnings differential from starting the permanent job on 15 January 2018, with the differential being £306.03 net per week, which gives a total loss of **£15,913.56**.
79. The Tribunal awards loss of benefits from dismissal to 07 August 2017 of 11.29 weeks at £21.67 which gives a total of **£244.65**.
80. The Tribunal considers that it is just and equitable to award a further loss of benefits for the period of the temporary job plus an additional 12 months, which gives a total of **£1,612.90**.
81. The Tribunal accepts the Claimant's calculation of additional loss in the form of shares as set out in the schedule of loss giving a total of **£11,706.12**.
82. Therefore the award of compensation is:

Basic Award

£8,618.63 (£11,491.50 less 25%)

Compensatory Award

The Claimant was in receipt of benefits.

The prescribed element is: loss of earnings since dismissal of £33,679.45 less 80% *Polkey* reduction which gives £6,735.89 plus a 25% contributory fault reduction which gives a final sum for the prescribed element of **£5,051.92**.

The non-prescribed element is:

Loss of benefits of £1857.55

Loss of share value of £11,706.12

Loss of statutory rights of £500

Which totals £14,063.67

Less the 80% *Polkey* reduction = £2,812.73

Less 25% for contributory fault, gives a final amount for the non-prescribed element of **£2,109.55**.

83. The total award is £15,780.10 of which the prescribed element is £5,051.92 for the period from 20 May 2017 to 15 January 2018. The amount of the award exceeding the prescribed element is £10,728.18.

Mr Blainey

84. The Tribunal accepts the Respondent's calculation of £603.36 for net weekly pay whilst employed with the Respondent as set out in the Respondent's updated counter schedule and the third statement of Mr Barnes.
85. The Claimant lost benefits obtained from his employment with the Respondent of £70 per week as set out in the Claimant's schedule of loss.
86. The Claimant also lost a pension contribution made by the Respondent of £122.20 per week.
87. The Tribunal awards loss of earnings from dismissal to 11 July 2017 of 7.43 weeks at £603.36 which gives a total of **£4,482.96**.
88. Mr Blainey commenced new employment on 11 July 2017 to 11 December 2017 and earned £8,670.21 over that period of 21.86 weeks as opposed to £13,189.45 that he would have earned with the Respondent, creating a loss of **£4,519.24**.
89. The Claimant was out of work until he secured new employment on 18 March 2018 which lasted until his retirement in August 2020.

90. The Tribunal therefore awards loss of earnings for the period 11 December 2017 to 18 March 2018 of 13.86 weeks at £603.36 giving a total of **£8,362.57**.
91. Unfortunately Mr Blainey produced no evidence of his level of earnings in that new job. There is also no credit made for it in his schedule of loss. As a consequence the Tribunal is unable to award any loss of earnings for this period in the absence of the Claimant demonstrating what that loss may be and how it is to be calculated.
92. The Tribunal awards loss of benefits from dismissal to 18 March 2018 of 43.14 weeks at £70 which gives a total of **£3,019.80**.
93. The Tribunal awards loss of pension from dismissal to 18 March 2018 of 43.14 weeks at £122.20 which gives a total of **£5,271.71**.
94. The Tribunal accepts the Claimant's calculation of additional loss in the form of shares as set out in the schedule of loss giving a total of **£3,348.18**.
95. Therefore the award of compensation is:

Basic Award

£8,802 (£11,736 less 25%)

Compensatory Award

The Claimant was in receipt of benefits.

The prescribed element is: loss of earnings since dismissal of £17,364.77 less 80% *Polkey* reduction which gives £3,472.95 plus a 25% contributory fault reduction which gives a final sum for the prescribed element of **£2,604.71**.

The non-prescribed element is:

Loss of benefits of £3,019.80
Loss of pension of £5,271.71
Loss of share value of £3,348.18
Loss of statutory rights of £500

Which totals £12,139.69

Less the 80% *Polkey* reduction = £2,427.94

Less 25% for contributory fault, gives a final amount for the non-prescribed element of **£1,820.95**.

96. The total award is £13,227.66 of which the prescribed element is £2,604.71 for the period from 20 May 2017 to 18 March 2018. The amount of the award exceeding the prescribed element is £10,622.95.

Case Number: 2302351/2017(V)

Regional Employment Judge Freer
Date: 27 May 2021