EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr B Nel	**v**	**Pinnacle Housing Limited**

Heard at: Watford **On**: 21 June 2021

Before: Employment Judge R Lewis
Members: Mr M Bhatti
Mr P English

Appearances

For the Claimant: Mr J Constable, Friend
For the Respondent: Ms A Rokad, Counsel

JUDGMENT

1. The respondent is ordered to pay to the claimant as compensation for unfair dismissal a basic award of £2770.83 and a compensatory award of £2962.88, a total therefore of £5733.71. The recoupment regulations do not apply.

REASONS

Procedure

1. These reasons were requested by Ms Rokad.

2. This was the hearing directed by case management order on 8 April 2021 (sent to the parties on 9 April) following the hearing on 6 to 8 April (reasons sent to the parties on 5 May).

3. The tribunal had a modest remedy bundle, to which reference is made as 'R' so that R27 is page 27 of the remedy bundle. Other number references are to the main bundle used at the April hearing. The remedy bundle included an updated schedule of loss and counter schedule.

4. Neither side had submitted witness evidence. The hearing proceeded by submissions only. Ms Rokad provided written submissions.

Reconsideration

5. On Friday 18 June, for the first time, the Judge saw the claimant's reconsideration application of 12 May. He told the parties that that would be dealt with separately. (By separate letter, a reconsideration hearing has been directed to be listed under rule 72(2)).

Basic award

6. The claimant's schedule of loss at R26 calculated the basic award as follows: 6 x 1.5 x 307.87 = 2770.83. Ms Rokad agreed that the figure was correctly calculated.

7. Ms Rokad submitted that the basic award should be reduced by application of s.122(2) ERA, which provides:

> "Where the tribunal considers that any conduct of the complainant before the dismissal.. was such that it would be just and equitable to reduce.. the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly."

8. She referred, in helpful written submissions, to the authorities of Steen v Asp Packaging UK EAT/0023/13 and Fulton v RMC Russell [2003] 12WL UK45.

9. Those cases were helpful reminders that the focus of this inquiry is on the conduct of the claimant, and on the tribunal's finding of his actual actions; and in the Fulton case, on the possibility that there are circumstances in which failure to apply for other or alternative employment might be a material factor under s.122(2).

10. Ms Rokad submitted that the claimant's failure to engage with an offer of alternative employment at Chalk Hill (see paragraphs 80 and 82 of our first judgment) was blameworthy conduct, such as to give rise to a reduction of at least 50% of the basic award in this case.

11. We remind ourselves that the basic award in principle reflects a reward for past service, in this case six years' service of which little criticism was heard in evidence.

12. Ms Rokad's submission had a basis, but only in isolation. We agree that the claimant would have been in a stronger position, both with his employer and in the tribunal, if he had made a practical attempt to work at Chalk Hill, so that his refusal to work there was based on evidence and experience rather than on assumption. That said, our previous finding was that Chalk Hill was put to the claimant in November 2018 and rejected by him on 16 November (123), and again a little later. From 19 November the claimant was absent from work, either due to sickness or on suspension.

13. Between the claimant's refusal to trial working at Chalk Hill, and the date of his dismissal, nearly five months elapsed. There was in that time, as we have said before, "no record of any or any adequate or reasonable bilateral consideration of relocation at a point when the claimant had been told in terms that that was the sole alternative to dismissal" (emphasis added).

14. We decline in the exercise of our discretion to make any reduction of the basic award in the circumstances set out at paragraphs 87 to 104 of our liability judgment. While those findings should be read in full, we refer in particular to the pre-penultimate sub paragraph of paragraph 104. Taking a broader picture of the matter, in the round, we decline to make any reduction because it does not seem to us just or equitable to do so.

15. The respondent's counter schedule had alternatively raised a point under s.122(1), which would have extinguished the basic award. Ms Rokad, correctly in our view, did not pursue this point.

Compensatory award

16. Consideration of the compensatory award was more complicated, because it was apparent to us that the documentation from the claimant's side was incomplete. We do not by this imply that either the claimant or Mr Constable was seeking to mislead the tribunal. Ms Rokad raised two points: a Polkey reduction, and contribution.

Polkey

17. The point of principle was to explore what would have happened on balance of probabilities if the claimant had not been dismissed on 11 April. In doing so, we should adhere to our existing findings, and to the evidence which we have of what actually did happen, so far as we possibly can. Our task is not to speculate in a vacuum. The task has been called creating 'the world that was not.' In this case, that world was unusually varied.

18. Our starting point is to ask what would have happened next had the claimant had not been dismissed on 11 April 2019. As Mr Constable pointed out, his disciplinary meeting with Mr Walker had concluded with discussion of an Occupational Health referral. If on 11 April it had been decided not to dismiss the claimant, it seems to us that it would then have been realised that the claimant had been off work since 19 November 2018; that he had a history of serious and disabling health conditions; and that updated Occupational Health guidance would be of assistance to manage his return. It might have been noted, perhaps even with some concern, that the most recent OH referral was several years old, and that there were next to no management or supervision records since then.

19. We then ask what would have emerged. There was no medical evidence before us, ie the direct evidence of a qualified or treating clinician, in the period after 11 April 2019. The main bundle contained a single letter (191) of 12 August 2019, in which the claimant's GP set out without comment or

analysis a list of the claimant's medical conditions. It was addressed, To whom it may concern.

20. Could further, relevant medical evidence have been available? On 7 June 2019 the DWP informed the claimant that he had been awarded ESA, backdated with effect from 23 April. The letter stated that he might be called upon to attend an assessment. It said, "You must provide medical certificates until a work capability assessment is carried out" (259). If such medical certificates were obtained, they must have recorded incapability to work, but copies were not in the bundle.

21. Mr Constable said in submission that the claimant attended a DWP assessment (in Mr Constable's company to assist him) on 11 November 2019. Mr Constable was unsure of the qualification of the assessor but did not understand him to have been a doctor. Following the assessment, the claimant remained in receipt of ESA.

22. Mr Constable added that the claimant's health had continued to deteriorate since dismissal, and that he had remained unfit to work at all times since then. This submission was the opinion of a committed friend and medical layman. The claimant was present at the hearing and did not disagree. The submission illustrated a logical problem: in his dealings with the DWP on the claimant's behalf, Mr Constable put a pessimistic picture on the claimant's health and recovery; in his dealings with us, he saw it in the claimant's interest to put a more optimistic picture, which the documentation did not support.

23. We find that we have no evidence, or reason to believe, that the claimant's health after 11 April 2019 has ever been such as would have enabled him to be certificated fit to sustain a return to work. There are indications that the medical evidence indicated the contrary. In submission, Mr Constable's point was in essence that if the claimant's employment had been handled differently and better, his dismissal might have been avoided altogether, and his employment might have been saved. In the absence of cogent medical evidence of fitness to work, we do not agree. We then go on to consider how long it would have taken, after 11 April 2019, to manage the claimant's dismissal for incapability due to ill health.

24. It was common ground that at the time of dismissal the claimant's contractual entitlement (52) was to four weeks sick pay on full pay and 20 weeks on half pay. In our judgment, if the claimant had not been dismissed on 11 April 2019, and had remained off sick, as a result of disabling conditions which were in deterioration, his employment would not and could not have been prolonged beyond expiry of those entitlements. Our finding therefore is that his employment would not have continued more than 24 weeks from 11 April, ie to 26 September 2019, after which there was a 100% prospect of his dismissal arising out of incapability and / or sustained absence from work without a prospect of a return.

25. We then come to the question of what were his losses. In relation to that period, the claimant received 6 weeks' notice (albeit paid inexplicably late). We take that to equate to 4 weeks full pay and 4 weeks half pay, and therefore to leave a period of loss between 6 June and 27 September 2019, a period of 16 weeks at the agreed sum for sick pay of £153.93 per week.

Contribution

26. Ms Rokad reminded us of the wording of s.123(6) and the distinctions to be made between that and s.122(2). She repeated the submissions about the claimant's failure to apply for Chalk Hill, which we do not accept as warranting a reduction in the award (albeit within a different statutory definition) for the reasons set out above.

27. If we are asked to find that the claimant's disagreement with Resident A was blameworthy conduct, we add that in the circumstances as a whole, we do not exercise discretion to reduce the compensatory award because of it, but that if we did the maximum reduction would be 20%. The horse / bicycle phrase was no more than a playground taunt. We must place the claimant's language in the context of six years of service in which there was no other record of disagreement or issue with any resident or colleague, and in the light of the many years of unmanaged behaviour by Resident A which we have described previously.

Other points

28. Ms Rokad kindly researched that applying the authority of Harvey [2703] the claimant's contribution related ESA is not subject to recoupment. Mr Constable agreed.

29. Ms Rokad submitted further that the compensatory award should not attract compensation for loss of statutory rights, as it appeared unlikely that the claimant would return to fresh employment, so that there would not in fact be a period of working without statutory rights. That is an ingenious argument, but we declined to depart from an established practice and authority by disregarding the acquisition of statutory rights as an acquired right and we make an award of £500.00.

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Employment Judge R Lewis
5 July 2021
Date: ……..
9 July 2021
Sent to the parties on: .....

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For the Tribunal Office

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