THE EMPLOYMENT TRIBUNALS

Claimant: **Mr J Shield**

Respondent: **BPDTS Limited**

Heard at: Newcastle Hearing Centre **On: 11 March 2021**
Reconsideration on 20 July 2021

Before: **Employment Judge Morris**

Members: **Ms L Jackson**
Mr S Carter

Representation:

Claimant: **Mrs C Shield, the claimant's mother**
Respondent: **Mr M Brien of Counsel**

RECONSIDERED JUDGMENT ON REMEDY

The unanimous judgment of the Employment Tribunal is as follows:

1. The Tribunal having previously found to be well-founded the claimant's complaint under section 111 of the Employment Rights Act 1996 that his dismissal by the respondent was unfair it makes an award of compensation to the claimant of £4,991.87 comprising the following elements:

    1.1 A basic award of £2,076.92.
    1.2 A compensatory award of £2,914.95.

2. The Recoupment Regulations apply to the above award of compensation in respect of which the Tribunal sets out the following particulars:

    2.1 the monetary award is £4,991.87;
    2.2 the amount of the prescribed element is £2,414.95;
    2.3 the dates of the period to which the prescribed element is attributable are 10 April 2019 to 15 May 2019;
    2.4 the amount by which the monetary award exceeds the prescribed element is £2,576.92.

REASONS

Representation and evidence

1. As at the liability hearing, at the remedy hearing the claimant was represented by his mother, Mrs C Shield, who called the claimant to give evidence. The respondent was again represented by Mr M Brien, of Counsel, who called Mr D Smith, Digital Services Practice Lead, to give evidence on behalf the respondent.

2. The evidence in chief of or on behalf of the parties was given by way of written witness statements: that of the claimant comprising some seventeen pages with a six-page attachment; that of Mr Smith comprising three pages.

3. The claimant is a disabled person as that term is defined in section 6 of the Equality Act 2010. As had been the case at the liability hearing, as an adjustment to ameliorate the effects of one of his impairments, namely autism/Asperger's syndrome, the Tribunal agreed that questions to the claimant would be asked and answered using Mrs Shield as an intermediary.

4. The Tribunal had before it a bundle of documents compiled for the purposes of the remedy hearing, which comprised 76 pages and included the Schedule of Loss that had been submitted by the claimant to the liability hearing (and which was updated by Mrs Shield during a short adjournment) and a Counter-schedule of Loss prepared by the respondent in respect of the remedy hearing.

5. The Tribunal also had before it the bundle of documents compiled for the purposes of the liability hearing. The numbers shown in parenthesis below refer to page numbers in that bundle.

6. At the conclusion of the evidence, the parties' representatives made submissions, Mrs Shield both orally and in writing. The Tribunal fully considered all the submissions made and took them into account in coming to its decision.

Initial decision as to remedy and its reconsideration

7. At the liability hearing the judgment of the Tribunal was that the claimant's complaint under section 111 of the Employment Rights Act 1996 ("the Act") that his dismissal by the respondent was unfair was well-founded. That being so, the Employment Judge explained to the claimant what orders may be made by the Tribunal in his favour and the claimant opted for the remedy of compensation.

8. As such, the Tribunal made such an award of compensation in accordance with section 118 of the Act.

9. Shortly after the Employment Judge began to announce the decision of the Tribunal as to remedy the claimant and his mother left the hearing room. She explained that the claimant was too upset to remain and that they would wait for the written reasons of the Tribunal, which the claimant subsequently requested.

10. As explained more fully below, the Tribunal decided that the claimant would have been fairly dismissed on 10 April 2019, that being the effective date of termination of his employment. That being so, the principal element of the compensatory award that, at the remedy hearing on 11 March, the Tribunal considered making in the claimant's favour related to the pay that he might have received from the respondent in respect of the period of notice of the termination of his employment. At the remedy hearing it appeared that the general rule contained in section 88 of the Act (that if an employee is incapable of work because of sickness he must be paid his normal pay during the notice period notwithstanding that prior to being given notice his pay might have been reduced possibly even to nil, as in this case) did not apply given the exception contained in section 87(4) of the Act.

11. In this case, the claimant had exhausted his entitlement to sick pay from 1 January 2019 and was not receiving any pay either the time of his actual dismissal on 11 March 2019 or the date of the fair dismissal as determined by this Tribunal of 10 April 2019. That being so, at the remedy hearing, it had appeared that the claimant would not have been entitled to receive any pay during his notice period and the Tribunal therefore calculated the compensatory award on that basis. That is to say that as the claimant would not suffer any loss of pay in respect of his notice period following on from his fair dismissal on 10 April 2019 there was no basis for an award of compensation in that respect.

12. In the course of drafting the written reasons for the decision of the Tribunal that the claimant had requested, the Employment Judge identified that the above exception did not apply as the contract of employment between the respondent and the claimant provided that, given that the claimant had four years' continuous employment, he was entitled to four weeks' notice of termination; that equating to the minimum period of statutory notice provided for in section 86 of the Act.

13. In these circumstances, in accordance with rule 73 of the Employment Tribunal Rules of Procedure 2013, the Tribunal wrote to inform the parties that, on its own initiative, it proposed to reconsider the Judgment made on 11 March 2021 as to do so was considered to be necessary in the interests of justice. The above issue was the principal reason by reference to which the Tribunal decided to reconsider its Judgment but the parties were informed that the opportunity was to be taken to review two other aspects of the Judgment. Thus three reasons were given to the parties being as follows:

    13.1 The calculation of compensation by reference to the claimant's loss in respect of his period of notice.

    13.2 Whether the claimant should be compensated for continuing loss, being the difference between the net pay that he received from the respondent and that which he received from his new employer.

    13.3 Whether, if the compensatory award were to be increased beyond that awarded at the remedy hearing, the Recoupment Regulations would be applicable.

14. The Tribunal then engaged in correspondence with the parties during the course of which the principal matters that were addressed included the following:

    14.1 the parties' respectively made submissions in relation to the above three issues;

    14.2 the claimant explained the steps he had taken to mitigate his financial losses and provided a revised Schedule of Loss;

    14.3 the claimant clarified the benefits that he had received since his dismissal by the respondent;

    14.4 both parties stated that they were content for the reconsideration to be undertaken by the Tribunal without the need for a further hearing, the claimant explaining that due to his mental health he was not in a fit state to attend and be subjected to further anxiety and stress.

15. In light of the parties' agreement at paragraph 14.4 above the Tribunal decided that a reconsideration hearing was not necessary in the interests of justice and, in accordance with Rule 72(2), gave the parties a reasonable opportunity to make further written representations.

16. All of the above matters we brought into account by the Tribunal. On a point of detail, in respect of the matter referred to at paragraph 14.2 above, the claimant's evidence was that he had commenced alternative employment with a new employer on 13 May 2019, in respect of which he had actually been approached by that new employer prior to his dismissal by the respondent. That had been temporary employment that had terminated in June 2020. The pay that the claimant received from his new employer was £351 net per week, which is £70.07 net per week less than the £421.07 that he had received from the respondent.

Decision on reconsideration

17. For the reasons set out both above and below, having undertaken its reconsideration the Tribunal decided, in accordance with Rule 70, that in respect of the matters referred to at paragraphs 13.1 and 13.3 above its original decision should be varied whereas, in respect of the matter referred to at paragraph 13.2 above, its original decision should be confirmed.

18. The remainder of these Reasons sets out the reasons for the Tribunal's Judgment as to Remedy as varied upon reconsideration.

Award of compensation

19. As set out above, at the remedy hearing the claimant opted for the remedy of compensation and, therefore, in accordance with section 118 of the Act, the Tribunal makes such an award consisting of a basic award and a compensatory award as particularised below.

Basic Award

20. The parties were agreed as to the calculation of the basic award. At the time of his dismissal, the claimant was 30 years of age and had four years' continuous employment with the respondent. That, therefore, produces a 'multiplier' of 4. His gross weekly wage was £519.23. Thus, his basic award is £2,076.92 (£519.23 x 4). There was no dispute that the claimant is entitled to that basic award without any adjustment by reference to, for example, contributory fault or the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015).

Compensatory Award

21. In this connection the Tribunal first reminds itself that section 123 of the Act provides as follows:

> "…. 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".

22. The Tribunal accepts the evidence given by Mr Smith in the following material respects:

    22.1 Had he accepted as genuine the claimant's indication in his email of 5 March 2019 (1011) that he would return to work on 1 April 2019, he would have begun to prepare for that. Such preparation would have included a back to work plan (including goals, review dates and training) and agreeing a phased return to work. These matters would have been discussed and agreed with all relevant parties including the claimant, his line manager, his task manager and others such as HR. At the liability hearing Mr Smith referred to these matters as being him "undertaking the art of the possible".

    22.2 Mr Smith would not, at that point, have referred the claimant to OH or have undertaken a risk assessment or a well-being assessment as there had been no material change in the claimant's circumstances since the last report.

    22.3 The above process would have taken at most three weeks.

    22.4 As such, the earliest date upon which the claimant would have returned to work would have been that proposed by him of 1 April 2019.

23. All the above is consistent with the Tribunal's findings of fact at the liability hearing.

24. In accepting the above evidence of Mr Smith the Tribunal rejects the alternative evidence given by the claimant at the remedy hearing that although it would have been difficult, he would nevertheless have returned to work on 1 April even if the

above was all that Mr Smith had done and, therefore, that the conditions he set out in his email of 5 March (1011) in respect of a further referral to OH and the respondent undertaking both well-being and stress assessments had not been met. The relevant section of that email is as follows:

> "…. dependent upon OH referral would predict that I should be in a position to return to work around 1st April 2019. However, full well-being, stress risk assessment and OH would need to be completed prior to me committing to a return." (1012)

25. The above evidence given by the claimant at the remedy hearing that he would have returned to work on 1 April even if the respondent had not made a further referral to OH or undertaken both a well-being assessment and a stress assessment was inconsistent with the evidence he gave at the liability hearing and the contemporaneous documents and, therefore, with the Tribunal's findings of fact at that liability hearing. In that respect, an excerpt taken from paragraph 13 of the Tribunal's Judgment on Liability bears restating here:

> "…. the Tribunal considers that after Mr Smith had done everything he said he would have done by way of "the art of the possible" and reverted to the claimant to seek a commitment for a return to work date, the claimant would have remained dissatisfied with the respondent's response to the conditions he had set for his return and would not have actually given such a date or returned to work."

26. The claimant's evidence in this respect at the remedy hearing is also inconsistent with the fact that he did not raise the position that he now adopts at that time, or at any time during his notice period.

27. On the contrary, the claimant's conditions for a return to work on 1 April not having been met by the respondent the Tribunal is satisfied that he would have refused to return to work; not least because the respondent not meeting his conditions would have fuelled his dissatisfaction with and mistrust of the respondent and his managers.

28. Thus, the Tribunal is satisfied that the claimant would either have informed the respondent, in advance of 1 April, that he would not be returning to work on that date or would simply have failed to attend work on that date.

29. In either case, that would have caused the respondent to re-engage the attendance management process, the 'trigger points' in that process already having been met; furthermore, given everything that had gone before, from that point the process would have been quickly concluded.

30. The Tribunal accepts Mr Smith's evidence that the letter inviting the claimant to an attendance review hearing would have been sent fairly soon after that: either that day (1 April) or more likely the following day. That being so, the Tribunal's assessment is that the invitation letter would have been received by the claimant on Wednesday 3 April and would have given him five clear days' notice of the hearing, which would have taken place on 9 April 2019.

31. In all the circumstances, dismissal would have ensued that day and the Tribunal is satisfied, for the reasons set out in its Liability Judgment, that it would have been a fair dismissal. In all the circumstances, the Tribunal is satisfied that, as happened on the last occasion, Mr Smith would not have informed the claimant orally of his decision but would have done so in writing that day. The Tribunal considers, therefore, that the claimant would thus have been informed of his dismissal on 10 April 2019.

32. The Tribunal is satisfied that in all the circumstances surrounding this case that date of 10 April 2019 would have been the effective date of termination of the claimant's employment and that, rather than his employment continuing until the end of the notice period, he would have been paid in lieu of is entitlement to notice.

33. In relation to the dismissal of the claimant by letter of 11 March 2019 (1029) he was given five weeks' notice. As intimated above, that was one week more than the claimant's entitlement, whether by reference to his contract of employment or the statutory minimum. In the written representations submitted on behalf of the respondent in connection with this reconsideration, it is submitted, "It appears to be an anomaly from the Respondent's side as to why the Claimant was provided with more notice than he was entitled to contractually upon his dismissal." Whether it is an anomaly or not, the Tribunal is satisfied that in the same way as the claimant was given five weeks' notice in the letter of 11 March 2019, he would have been regarded as being entitled to the same period of five weeks' notice when Mr Smith would have written his decision letter in April 2019. The Tribunal assesses that period of notice, in respect of which the claimant would have been paid in lieu, as expiring on 15 May 2019, being five weeks after it considers that the claimant would have received the letter of dismissal on 10 April 2019.

34. As indicated above, pursuant to section 88 of the Act, notwithstanding that the claimant's pay had reduced to nil given that he had exhausted his entitlement to sick pay as a consequence of his lengthy absence from work, the payment in lieu of his five weeks' notice period would fall to be calculated by reference to his normal pay.

35. The parties are agreed that the claimant's contractual net weekly pay was £421.07. In respect of the five-week period, therefore, that produces a sub-total of £2,105.35 (£421.07 x 5). Additionally, the respondent's Counter-schedule of Loss disclosed that "the Claimant received a Core Allowance of £125, and a LTD Allowance of £8.33 per month, as a result of his TUPE transfer". Thus, a combined total of those two allowances of £30.77 a week. In respect of the five-week period that produces a further sub-total of £153.85 (£30.77 x 5). In respect of the five-week period, therefore, the Tribunal is satisfied that the claimant would have been paid the combination of those two sub-totals, namely a total payment in lieu of notice of £2,259.20. The Tribunal awards that amount as part of the claimant's compensatory award.

36. In its Counter-schedule of Loss the respondent concedes other elements that would form part of the compensatory award as follows:

36.1 "Employers pension contributions at 6% = £135 per month."

36.2 "Loss of statutory rights £500".

37. The respondent has, however, calculated pension loss by reference to one month whereas, for the same reasons as are outlined above, the Tribunal's approach is to compensate the claimant for such pension loss during the five-week notional notice period; namely, £155.75.

38. A further element that would feature in many cases where a tribunal considers that, as in this case, the employee would have been dismissed fairly soon after the actual date of dismissal is that the employee would typically be compensated for his or her loss of income from the date of the unfair dismissal until the date upon which it is considered that a fair dismissal would have been effected.

39. In this connection, the Tribunal has applied the decisions of the House of Lords in Polkey v AE Dayton Services Ltd [1988] ICR 142 and of the Employment Appeal Tribunal in Young's of Gosport Ltd v Kendell [1977] ICR 907 and Software 2000 Ltd v Andrews [2007] IRLR 568; albeit noting that in respect of that latter decision the statutory Dismissal and Disciplinary Procedures are no longer applicable. In that decision it was stated that if the employer has shown that the employee would have been dismissed if a fair procedure had been followed there were five possible outcomes. The Tribunal is satisfied that the fourth of those outcomes applies in this case, namely, "The tribunal may decide that employment would have continued, but only for a limited period."

40. In this case, the Tribunal is satisfied that such a limited period would have been the time between the date of Mr Smith's actual decision to dismiss the claimant on 11 March 2019 and the date upon which the Tribunal is satisfied that he would have effected a fair dismissal of the claimant on 10 April 2019. In many cases in such circumstances, an employee would then be compensated for his loss of earnings in that period. In this case, however, as stated above, as the claimant had exhausted his entitlement to sick pay from 1 January 2019, and he was therefore not receiving any income from the respondent during that period of approximately one month, there is no loss of earnings in respect of which he can be compensated.

41. As set out above, by the end of the five-week notional notice period the claimant had secured new employment on 13 May 2019 in relation to which his net weekly pay was £70.07 less than that which he had received from the respondent.

42. This gives rise to the second of the matters considered by the Tribunal as part of its reconsideration of whether the claimant should be compensated for continuing loss, being the difference between the net pay that he received from the respondent and that which he received from his new employer; in respect of which it sought and obtained representations from the parties.

43. An important consideration in this regard is that, as set out above, section 123 of the Act provides amongst other things that in assessing the compensatory award

the tribunal must have regard to loss sustained by the claimant "in so far as that loss is attributable to action taken by the employer".

44. As found above, the Tribunal is satisfied that the claimant would have been fairly dismissed on approximately 10 April 2019 and that would have been the effective date of the termination of his employment. That being so, that date would represent the 'cut-off point' for any loss attributable to action taken by the respondent; subject to the claimant receiving a payment in lieu of five weeks' notice calculated up to 15 May 2019 as set out above. That being so, the Tribunal is satisfied that it cannot be said that any loss sustained by the claimant beyond the effective date of the termination of his employment can be attributable to action taken by the respondent. That applies to the principal matter of the difference between the claimant's pay from his new employer and his pay from the respondent. It applies equally to other elements that the claimant had included in his Schedule of Loss such as his pension loss in that new employment or is continuing loss arising since the end of that employment.

45. As such, and having considered the representations from the parties, the Tribunal is satisfied that the original decision it made on 11 March 2021 to the effect that the claimant should not receive an award of compensation in respect of continuing loss should be confirmed. In essence, for the reasons set out in its Liability Judgment and above, the Tribunal is satisfied that the claimant's dismissal on 10 April 2019 would have been a fair dismissal. As such, again applying the decisions in the case authorities set out above, given that this Tribunal has found that the claimant would have been dismissed in any event on 10 April 2019 with a payment being made to him in lieu of his entitlement to notice, the Tribunal is satisfied that he should not be awarded compensation in respect of any future loss beyond the effective date of termination of his employment on 10 April except in relation to the compensation in respect of a payment in lieu of the notional notice period ending on 15 May 2019.

46. Taking the above elements together, therefore, the Tribunal has calculated the total compensatory award to be £2,914.95 that comprising the following:

    46.1 total payment in lieu of notice of £2,259.20;

    46.2 employer's pension contributions of £155.75;

    46.3 loss of statutory rights of £500.

47. Thus, drawing together the basic award of £2,076.92 and the compensatory award of £2,914.95 the total award of compensation that the Tribunal orders the respondent to pay to the claimant is £4,991.87.

48. The third and final reason why the Tribunal considered it appropriate to reconsider its original decision was whether, if the compensatory award were to be increased beyond that awarded at the remedy hearing, as it has been, the Recoupment Regulations would be applicable. The Tribunal did consider those Regulations at the remedy hearing on 11 March 2021 but given that it appeared at that time that the only component parts of the compensatory award were

pension loss of £135 and loss of statutory rights of £500 it was agreed that the Regulation should not apply.

49. That notwithstanding, it is clear from the Regulations that payments under an award of compensation for unfair dismissal such as the Tribunal has made in this case are subject to the Regulations; the matter to which the prescribed element is attributable being described as, "Any amount ordered to be paid and calculated under section 123 [*i.e. of the Act*] in respect of compensation for loss of wages for a period before the conclusion of the tribunal proceedings".

50. Under section 27 of the Act "wages" is defined for the purposes of that Part of the Act as meaning any sum payable to the worker in connection with his employment including "any other emolument referable to his employment". Adopting that approach, the Tribunal is satisfied that the amount referred to in the Regulations comprises the award of compensation in respect of the payment in lieu of notice of £2,259.20 plus the employer's pension contributions of £155.75: a total of £2,414.95.

51. Thus, the Recoupment Regulations apply to the above award of compensation, details of which are set out in the Annexure to this Judgment, in respect of which the Tribunal sets out the following particulars:

    51.1 the monetary award is £4,991.87;
    51.2 the amount of the prescribed element is £2,414.95;
    51.3 the dates of the period to which the prescribed element is attributable are 10 April 2019 to 15 May 2019;
    51.4 the amount by which the monetary award exceeds the prescribed element is £2,576.92.

EMPLOYMENT JUDGE MORRIS

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 21 July 2021