EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr J Chiappe		**GKN Aerospace Services Limited**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL
REMEDY HEARING
(RESERVED JUDGMENT)

HELD AT Birmingham **ON** 29 June 2021

EMPLOYMENT JUDGE GASKELL **MEMBERS:** **Mr S Woodward**
Mr D Faulconbridge

Representation
For the Claimant: **Mr I Wright (Counsel)**
For Respondent: **Mr P Michell (Counsel)**

JUDGMENT

The unanimous judgment of the tribunal is that:

Pursuant to Section 119 of the Employment Rights Act 1996, there is a basic award to the claimant, payable by the respondent, in the sum of £13,650.

REASONS

1 Following a Liability Hearing held over four days in February 2021, on 10 March 2021, the tribunal issued a unanimous reserved judgement (the liability judgment). The panel determined that the claimant's dismissal by the respondent's on 15 August 2019 was not an automatically unfair dismissal pursuant to Section 103A of the Employment Rights Act 1996 (ERA). However, the respondent had conceded that the claimant's dismissal was unfair pursuant to Section 98 ERA; and that the claimant was entitled to a compensatory award pursuant to Section 118(b) ERA in the sum of £86,444 and such an award was made at the time of our liability judgement. £86,444 is the maximum compensatory award which can be made to the claimant in this case pursuant to the provisions of Section 124(b) ERA.

2 At the time of the claimant's dismissal, the respondent paid him the sum of £13,650 which it described as a "*statutory termination payment*". This sum was calculated by reference to the formula for the calculation of a basic award pursuant to Section 119 ERA and is equivalent in amount to the basic award which the claimant could expect to receive on a finding unfair dismissal. In purported compliance with our Judgment for the payment of an agreed compensatory award, in March 2021, the respondent made a further payment to the claimant in the sum of £56,151.70. This equated to payment of the compensatory award of £86,444 subject to a deduction of £30,292.30 for tax and national insurance contributions. In

calculating the deduction, the respondent made an allowance of £16,350, which, when aggregated with *statutory termination payment,* produced a total of £30,000 - being the maximum amount the claimant was entitled to receive without deduction. The deduction was calculated by reference to the balance.

3 At the time of the liability judgement, in addition to the substantive issues arising from the claimant's dismissal, other claims relating to alleged unpaid salary and holiday pay remained outstanding.

4 On 16 April 2021, I conducted a Closed Preliminary Hearing (by telephone) to establish what issues remained to be determined at the Remedy Hearing which had been fixed for today. Four issues were identified:

(a) Whether there is a liability for tax on the compensatory award which was made by concession in favour of the claimant at the conclusion of the Liability Hearing in the statutory maximum sum of £86,444? And, if so whether the tax is payable upon receipt by the claimant or should be deducted and accounted for by the respondent? And what is the correct calculation?
(b) Whether the claimant is entitled to a basic award or whether any entitlement is extinguished by a statutory termination payment made by the respondent when the claimant was dismissed.
(c) In the event that the claimant is entitled to a basic award, the respondent wishes to raise conduct issues pursuant to Section 122(2) of the Employment Rights Act 1996; and will be relying upon the findings of the tribunal set out at Paragraph 62 - 64 of the reserved judgement.
(d) A the claimant maintains an entitlement to an additional 10 day salary and two days holiday pay. I am informed by the respondent that the appropriate payment is likely to be made prior to the Remedy Hearing.

5 By the time of the remedy hearing on 29 June 2021 the outstanding issues had narrowed. The outstanding claims for salary and holiday pay (Paragraph 4(d) above) had been settled to the claimant's satisfaction. And, the respondent now conceded that, as the *statutory termination payment* was not expressed to be a redundancy payment, and the reason for the claimant's dismissal was not said by the respondent to be, or found by the tribunal to be, redundancy, then, applying ***Boorman v. Allmakes Ltd*** **[1995] ICR 842 (CA)** and ***Bowyer v. Siemens Plc*** **UKEAT/0021/05/SM (EAT)**, the payment could not reduce or extinguish any basic award. So, Paragraph 4(b) also falls away.

6 Accordingly, the issues for consideration by the tribunal at the Remedy Hearing were those set out in Paragraphs 4(a) (the tax issue) and 4(c) (the conduct issue) above.

The Tax Issue

7 It is common ground that payments made in connection with the termination of employment, to the extent that they exceed the aggregate of £30,000, are liable to tax and national insurance contributions (Section 401 Income Tax (Earnings & Pensions) Act 2003). Accordingly, a liability to tax would bite in respect of the aggregate of the *statutory termination payment* and any awards made by the tribunal

in respect of the claimant's unfair dismissal claims (Section 98 & 103A ERA). It is also common ground that, where there is a liability to tax, the obligation is on the paying party (the respondent) to deduct the relevant amount, calculated in accordance with statutory tax codes, and account to HMRC (see ***Barden v. Commodities Research Unit International (Holdings) Ltd*** **[2013] EWHC 1633 (Ch)**). Clearly if the claimant believes that too much tax has been deducted this can be rectified through his tax return and the self-assessment process. Likewise, if too little has been deducted claimant will no doubt receive a charge for the excess. There is no dispute between the parties as to the accuracy of the calculation of the sum deducted in this case if £86,444 were to represent the total award after grossing-up for tax purposes.

8 The issue between the parties here is as to the proper interpretation of the provisions of Section 124 ERA which provides a statutory cap for compensatory awards in most unfair dismissal cases. Mr Wright referred us to the cases of ***Shove v Downs Surgical Ltd*** **[1984] ICR 532 (QBD)** and ***PA Finlay and Co Ltd v Finlay*** **EAT 0260/14**. He submits that the correct approach is as follows:

(a) The tribunal should first calculate the employees net loss
(b) After allowing for the sum of £30,000 which can be received tax free, the tribunal should then gross-up the resulting net loss to reflect the tax liability which the award will attract.
(c) The £30,000 allowance should then be added back to produce the total award.
(d) The statutory cap (if any) should then be applied.

Mr Wright submits that the application of the statutory cap as the final step in the process means that, if the net loss is found to exceed the cap, the respondent's obligation is to pay the amount of the award (as capped) and account separately to HMRC for the grossed-up tax liability. Mr Michell accepts that the steps set out at (a) – (d) above are correct. But, he submits that the suggestion that once the net loss exceeds the cap, the tribunal should simply award that sum; and that the respondent should pay the tax in addition is simply absurd. It undermines the setting of a statutory cap in the first place. And, of course, in such a case there would be no useful purpose to be served in the tribunal grossing up the award at all. It would be for a respondent to pay the capped award and then deal with HMRC as to the amount of tax payable.

9 In our judgement, what Mr Wright contends for is for a different approach to Be taken by the tribunal in the calculation of awards as between capped and uncapped cases. And, there is nothing in the statute or any of the case law to which we have been referred which would justify such an approach. It is common ground that, if the claimant was entitled to uncapped compensation (as he would have been if his claim pursuant to Section 103A ERA have been successful), the correct approach would have been as set out at steps (a) – (c) above. The respondent would then have been required to deduct the amount of any tax liability and pay the net amount to the claimant. But the award of the tribunal would have been the grossed-up figure. The tribunal would not have made an award expressed as a net amount.

10 Counsel are agreed that the final step in the calculation is the application of the cap. And the cap applies to the award. The in this case the claimant calculates his net losses at £171,000: the figure is not agreed; but assuming for arguments sake that it is correct, then, in such a case, the tribunal would not progress beyond step (a) if Mr Wright's submission was correct. In fact, in such a case, in round figures, following steps (a) – (c), would produce a total award in the region of £242,000. And, it is to that figure that the cap must be applied.

11 Accordingly, we are satisfied that our award of £86,444 was correctly expressed as the award in this case. That is the amount to which the claimant is entitled by way of a compensatory award - and it seems entirely appropriate for the respondent to deduct tax and account to HMRC accordingly.

12 No further Order or clarification is required from the tribunal. If the claimant believes that he is entitled to receive the full amount of our award without tax, no doubt he will apply to HMRC for an appropriate refund. Alternatively, if he believes that the amount paid by the respondent does not represent payment in full of our award, no doubt he will seek to enforce the award in the civil courts.

The Conduct Issue

13 The respondent relies on the tribunal's findings as to the claimant's conduct as set out in Paragraphs 62 - 64 of the liability judgement:

> *62 In our judgement, the reason for this change of heart was the claimant's attitude and behaviour following his removal. The respondent was entitled to expect that, once the claimant's grievance had been properly investigated and adjudicated upon, his attitude would be more positive this but this was not the case. The claimant would not accept the outcome of the grievance but continued to challenge it. At the meeting on 31 July 2019, the claimant simply wished to concentrate on those same issues again; the claimant acted in an intimidating way towards Ms Cawley after the grievance outcome; and at no stage did he engage with Mr Hewitt with regard to an alternative role in finance.*
>
> *63 We conclude that, by the end of the meeting on 31 July 2019, the respondent had simply concluded that there was no way that it would be possible to move forward in a positive way by the claimant's re-engagement. The appropriate way forward was therefore to terminate his employment.*
>
> *64 Of all that happened after the claimant's removal from post as GM, we find that the claimant's grievances were of least concern to the respondent. By raising the grievances, the claimant was behaving appropriately. This contrasted with so much inappropriate behaviour. The respondent dealt appropriately with the grievances: they were investigated by very senior individuals who were completely independent of what had happened. The respondent was entitled to expect that following the investigation and the outcome the claimant would have responded more positively in terms of his future with the organisation.*

14 These Paragraphs set out our findings as to the reasons why despondent decided to dismiss the claimant. Significantly, it was never the respondent's case that the claimant's conduct was the reason for his dismissal. The respondent was silent as to the reason; and conceded that the dismissal was unfair. The respondent simply advanced the case firstly, that the claimant had not made any disclosures qualifying for protection; and secondly, that the communications upon which the claimant relied were not causative of the dismissal. It appears that, at the Remedy Hearing, the respondent is seeking to argue retrospectively that in fact this was a fair dismissal. This is something which was never tested at the Liability Hearing. The claimant was given no opportunity to deal with the allegations in a meaningful way – he did not need to do so because it was not being asserted that this was why he was dismissed and it was conceded that he had been unfairly dismissed. And, whilst we found that the conduct set out above was the *reason* for the dismissal, it has been unnecessary for us to determine the extent to which such conduct may have been justified; and whether or not dismissal by reason of that conduct was fair or unfair.

15 Section 122(2) ERA provides that where the tribunal considers that "*any conduct of the complainant*" before the dismissal "*was such that it would be just and equitable to reduce or further reduce the amount of the basic award*", the basic award can be reduced by up to 100%.

16 Firstly because we have made no qualitative evaluation of the claimant's conduct in the light of the respondent's concession as to unfairness. And secondly, because the claimant had no opportunity to answer a positive case relating to his conduct. We find that it would not be just and equitable to reduce the claimant's basic award.

17 Accordingly we make a basic award in the agreed sum of £13,650.

Employment Judge Gaskell
15 July 2021