EMPLOYMENT TRIBUNALS

Claimant: Mr R Talman

Respondent: Airbus Operations Limited

Heard: by video **On:** 23 February 2022

Before: Employment Judge S Jenkins
Mrs L Bishop
Mrs M Walters

Representation
Claimant: Mr G Pollitt (Counsel)
Respondent: Mr A Alemoru

RESERVED REMEDY JUDGMENT

1. The Respondent is ordered to pay the Claimant the sum of £10,033.56 by way of wrongful dismissal compensation.

2. The Respondent is ordered to pay the Claimant the sum of £2,567.25 in respect of the unfair dismissal basic award.

3. The Respondent is ordered to pay the Claimant the sum of £43,479.16 in respect of the unfair dismissal compensatory award.

4. The Employment Protection (Recoupment of Benefits) Regulations 1996 apply.

REASONS

Background

1. The hearing was to deal with the compensation to be awarded following our judgment, delivered at the conclusion of the hearing in relation to liability heard over six days ending on 13 May 2021. That judgment confirmed that some of the Claimants claims succeeded, namely his claim of wrongful dismissal and his claim of unfair dismissal pursuant to section 94(1) of the Employment Rights Act 1996 ("ERA").

2. With regard to the unfair dismissal claim, we concluded that the Claimant's

basic award should be reduced by 50% due to his conduct before his dismissal. We also decided that the compensatory award should be reduced by 50%, applying the Polkey principle, with the balance being further reduced by 50% to reflect our conclusion that the dismissal was to an extent caused or contributed to by the actions of the Claimant.

3. With regard to the Polkey reduction, we had concluded that the Claimant's dismissal was unfair due to the Respondent's failure to make explicitly clear that the consequence of the Claimant's refusal to move to a different part of the Respondent's operation would be his dismissal. We considered that, had the position been made clear, then there was a 50% chance that the Claimant would have refused, and that he would then have been dismissed fairly as a result.

4. With regard to contributory conduct, we considered that the Claimant had been guilty of blameworthy conduct in two ways. First, in the form of his initial behaviour in April and May 2017, which had led to the Respondent requiring him to move to a different part of its operation. Secondly, and more significantly, in the form of his indication, albeit not in circumstances where the consequence of the refusal had been made starkly clear, that he would not make the requested move.

5. We heard evidence from the Claimant and from Michaela Buchanan, the Respondent's Head of Social Policies and Industrial Relations, by reference to written witness statements and their answers to cross-examination questions and to questions from the Tribunal. We considered the documents in two small bundles to which our attention was drawn, which included a schedule of loss and a counter-schedule of loss, and we considered the parties' representatives' submissions.

Issues and law

Wrongful dismissal

6. The Claimant was summarily dismissed, but we concluded that the misconduct of which the Claimant was accused was not so serious as to have fundamentally breached the contract and to have justified summary dismissal. We concluded that any dismissal of him should have been with notice.

7. We observed in the Reasons for our Judgment that the amount of notice in the Claimant's case, due to his length of service, had been the maximum statutory amount of twelve weeks. We noted, however, that the Respondent, in its counter-schedule of loss had stated that notice was four weeks. We therefore needed to decide the appropriate period of notice, and to assess whether any mitigation occurred during that period. In the event, the Respondent conceded at the hearing that the notice entitlement was indeed twelve weeks.

Unfair dismissal

8. First, with regard to the basic award, section 119 ERA notes that a basic award is to be calculated by determining the period ending with the effective

date of termination, during which the employee had been continuously employed, and then by reckoning backwards from the end of that period, the number of years of employment falling within the period. The section then provides for the calculation of an appropriate amount for each of those years of employment. We noted in this case that there was an agreed position as to the period of continuous employment and the appropriate amount.

9. With regard to the compensatory award, section 123(1) ERA provides that 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 Claimant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer.

10. Section 124(1ZA) ERA provides that the amount of a compensatory award shall not exceed either a specified maximum, or an amount equivalent to 52 weeks' pay. In this case, it was accepted that the maximum amount of compensation was a sum equivalent to 52 weeks' pay and that that sum was £43,479.16.

11. The key element for us to consider for the purposes of our assessment of the compensatory award under section 123(1) was whether the loss sustained by the Claimant in consequence of the dismissal was loss that was attributable to action taken by the employer. The Claimant has not worked since his dismissal in November 2017, and has not sought work during that period, contending that he was not in a position to do so due to his ill-health, which he says was caused by the dismissal. The Respondent contended that the Claimant's ill-health was not a consequence of the dismissal. Three cases have provided guidance in respect of the approach to be adopted by a tribunal in those circumstances.

12. In Dignity Funerals Ltd v Bruce [2005] IRLR 189, the claimant, who had been dismissed for gross misconduct, was diagnosed with reactive depression, a condition from which he had also suffered for five years before dismissal. The Court of Session noted that the tribunal should have decided "*whether the depression in the period after the dismissal was caused to any material extent by the dismissal itself; whether, if so, it had continued to be so caused for all or part of the period up to the hearing; and, if it was still caused at the date of the hearing, for how long it would continue to be so caused*".

13. in R and M Gaskarth v Mooney and anor (UKEAT/0196/12), an employment tribunal found that the claimant and her husband were unfairly dismissed when their contracts, under which they had been employed as live-in pub managers, were terminated with immediate effect and they, along with their four children, were required to leave the premises. The loss of her job and home caused the claimant to develop depression, rendering her unfit for work. Independently from the depression, the claimant also began to suffer from severe abdominal pain caused by hydronephrosis and gallstones. At the date of the remedies hearing over a year later, the claimant was still unable to work: she was awaiting surgery for her physical conditions and continued to suffer from depression. The tribunal concluded that the claimant's inability to work "*was attributable in no small part to the Respondent's opportunistic and unscrupulous actions*" and awarded her full loss of earnings to the date of the remedies hearing and six months beyond.

14. The EAT upheld the tribunal's award upon appeal. It noted that the medical evidence before the tribunal did not set out the extent to which the claimant's psychiatric symptoms on the one hand and her physical symptoms on the other had caused her absence from work at any particular time. Although 'in a perfect world' or in a case involving 'greater stakes' it might have done so, the EAT held that the evidence supported the tribunal's conclusions that the claimant's depressive condition was caused by the dismissal and that the claimant's absence from work was 'in no small part' attributable to that condition. There was no evidence that the claimant's depression had improved such that she would have been fit for work had it not been for her physical complaints. Although the tribunal had failed to ask whether the claimant's unfitness for work was 'to any material extent' caused by her dismissal, the test established by the Court of Session in Dignity Funerals Ltd, its finding that the claimant's unfitness for work was 'in no small part' so attributable was, if anything, a more stringent application of that test. Therefore the tribunal could not be criticised for failing to apply the correct test.

15. In Acetrip Ltd v Dogra (UKEAT/0238/18), the EAT provided a framework for determining how compensation should be assessed where the Claimant alleges that the employer's actions, including dismissal, have caused, contributed to or exacerbated his or her ill health.

16. The EAT identified a number of different permutations. At one extreme, even if a previous illness had run its course by the time of dismissal, a further illness following dismissal might be found to be wholly attributable to it. At the other extreme, a dismissal might have no additional impact on a previous indisposition or ill health, which might simply continue before and after, exactly as it would have done regardless of the dismissal. That was easy to imagine, for example, in a case where the pre-dismissal absence is caused by a physical injury that merely continues post-dismissal.

17. The EAT went on to note that, between those extremes, there will be cases where the dismissal is found to have exacerbated or prolonged a pre-existing illness. The task of the employment tribunal in such a case is to assess as best it can what difference the dismissal has made, compared with how matters would have unfolded had there been no dismissal, and hence to identify the additional loss or impact attributable to the dismissal itself. It also noted that, in principle, it would make no difference to the tribunal's task that the original illness was caused by earlier conduct by the employer which then goes on to carry out the dismissal. The question is whether the pre-dismissal conduct and the act of dismissal are part of the same indivisible act or are two separate and successive acts with distinct impacts.

Findings

18. Our findings relevant to the remedy issue we had to decide, on balance of probability, were as follows.

19. As we have noted above, the focus was on the Claimant's ill-health, and within the bundle there were three documents which provided medical evidence, the contents of which were not disputed.

20. The first was an internal report from the Respondent's Occupational Health Department, of an assessment of the Claimant on 13 November 2017, a few days before his dismissal. That noted that the Claimant was unfit for work in any capacity, and that, at the time, it was difficult to advise when he would be likely to be fit to resume work. It confirmed, however, that, in the occupational health advisor's opinion, with suitable support in place, the Claimant could return to work on a phased basis to begin with.

21. The second document was a psychiatric report commissioned by the Claimant's solicitors for the purposes, it appeared, of a personal injury claim and not for the specific purposes of his tribunal claim. It was received in March 2020.

22. The report, by a consultant psychiatrist, Professor Turkington, referred to the Claimant making a claim for damages arising out of occupational stress as a result of his employment with the Respondent. The report described the Claimant's symptoms, including; insomnia, feelings of resentment and hatred, inability to switch off, anxiety and low mood.

23. The report noted that the Claimant had become snappy and angry at the start of 2017, and he had been prescribed citalopram and then sertraline, with the dosage being increased to 200 mg per day, and that the Claimant was also prescribed amitriptyline. It also noted that the Claimant had seen a counsellor at that time, but that that had not helped.

24. The report recorded that the Claimant had been extremely emotional since his dismissal, had become very socially avoidant, and that any email contact about the case would cause his anxiety to peak. It noted that the Claimant's anxiety had been helped to a degree by taking diazepam and zopiclone for brief periods.

25. The report recorded the Claimant's description that, for the first eighteen months after his dismissal, he had been extremely tearful, angry and anxious, and since then had developed more in the way of anger and anxiety and less in the way of sadness. The report also described the Claimant's partner as saying that the Claimant was gradually getting worse, and that he would not leave the house in case he met someone from his former work.

26. The report recorded the Claimant's previous medical history and noted that there had been no prior history of mental health, mental illness or treatment of any kind, but that anxiety, low mood and anger had been reported from April 2017 onwards, initially diagnosed as moderately severe depression and moderately severe anxiety.

27. It was recorded that, in April 2019, the Claimant was noted to be more stable in mood and less anxious, it being noted that the medication was working, but, by July 2019, he was noted to be depressed again, being diagnosed with severe depression and severe anxiety. There were suicidal thoughts at the time, and a safety plan was devised by him.

28. Those symptoms persisted and, by the end of 2019, the Claimant was prescribed 200mg sertraline for depression and anxiety, 50mg amitriptyline

for insomnia, and 40mg three times a day propranolol for anxiety. The Claimant's then condition was contrasted with his earlier description as being someone who was happy and sociable.

29. Prof Turkington described the Claimant as being in an extremely emotional state at the time of the interview, with poor self-confidence and limited gaze. He concluded that, in his opinion, the Claimant had suffered a psychiatric injury and that he had suffered a severe adjustment disorder with mixed emotions, anger, sadness and anxiety of three years' duration, and that he had also suffered a generalised anxiety disorder of that duration. He recorded that the two disorders were present from November 2017 at that level of severity. He noted that the Claimant at that time was unable to work or pursue his hobbies and was struggling to fulfil his role as husband and father.

30. With regard to the causation of the injury, Prof Turkington recorded that the psychiatric injuries had been caused by the asserted breaches of the duty of care and, on balance of probabilities, had those not arisen he would not have become psychiatrically ill. He recorded that "*the trigger for the emergence of his injuries was being forced to stamp wing components which he did not believe were safe, and in their current severe form the trigger was his dismissal*". Prof Turkington concluded that, in his opinion, twenty sessions of cognitive behavioural therapy would be successful once the litigation had concluded.

31. The third document was a supplemental report from Prof Turkington dated 1 February 22, commissioned for the purposes of this hearing. The content of the report recorded very similar matters to the March 2020 report. It also noted the Claimant's severe rumination about the fact that he had been unfairly dismissed, which made him extremely angry and upset and tearful, and recorded the Claimant's description of flashbacks to the dismissal meeting and nightmares where he would relive the original dismissal meeting.

32. Prof Turkington also recorded the Claimant's description of severe social anxiety, that he did not want anyone to ask him how he was and therefore simply avoided meeting other people. He recorded the Claimant's description of irritability with his children, severe insomnia and poor memory.

33. As far as treatment was concerned, the report did not record any medical intervention between March 2020 and October 2021. Then, it recorded the Claimant as suffering from low mood and anxiety and PTSD symptoms with passive suicidal thoughts. It noted that the Claimant was asked to self-refer for a psychological treatment assessment, which he did, and that, in November 2021, he was switched from 200mg of sertraline to 225mg of high-dose venlafaxine. He was then placed on the waiting list for EMDR/trauma-focused CBT. He continued to take propranolol and amitriptyline.

34. Prof Turkington noted that the Claimant presented in a deteriorated state from the previous appointment in March 2020. He concluded that, in his opinion, the Claimant had developed an adjustment disorder and generalised anxiety disorder the time of his previous report, and that the Claimant's mental health had deteriorated since the Tribunal hearing in May 2021. He recorded that since that time the Claimant had satisfied criteria for post-traumatic stress

disorder, a moderate depressive episode, and a severe prolonged adjustment disorder with mixed anxiety and anger.

35. He confirmed that he considered that there were no other factors preventing the Claimant from returning to work or seeking employment elsewhere, and concluded that, in his opinion, the Claimant would recover with appropriate treatment. His opinion was that the Claimant would be able to return to work nine months after the remedy hearing and the commencement of treatment, and felt that there would be a graded return to work at that point but that he would be able to get back to full employment.

36. The Respondent did not dispute the facts of the Claimant's illness but questioned the causation, contending that it arose from earlier events within the workplace and not from the dismissal.

37. In that regard, we noted the occasions the Claimant had consulted his GP in relation to his mental health. They commenced in the early part of 2017, when he was still at work, but then peaked in late 2017 at the time of his dismissal with his medication being expanded and increased in dosage at that point. That situation appeared to remain through 2018 and 2019.

38. The Claimant explained the lack of medical consultation through 2020 and for most of 2021 on the impact of the Covid-19 pandemic and on the fact that he was simply taking medication and did not need regular contact with his GP. We noted that the medication had then been changed and increased in late 2021.

39. In terms of the causation of the Claimant's illness, whilst we noted the fact that the onset of the Claimant's mental health conditions had been in the early part of 2017, i.e. before he had been dismissed, we noted the conclusion of Prof Turkington in the March 2020 report that the trigger of the then severe form of the Claimant's injuries had been his dismissal. We saw no reason not to accept that.

40. We also saw no reason not to accept Prof Turkington's opinion in relation to the Claimant's likely recovery i.e. that he would need to get through the remedy hearing and then to start a course of cognitive behavioural therapy, that he would then benefit from that, after a period of some nine months, moving from that point on to a gradual return to work.

41. The Claimant contended that, and it was not disputed by the Respondent, that there was an 18-month waiting list for CBT therapy and that he had been on that list for some two months. We also accepted the Claimant's evidence that the cost of private CBT therapy would be some £3000.

42. In terms of possible mitigation, had the Claimant been able to work, we noted Ms Buchanan's evidence, which was not challenged, that there had been a number of options in the local area in relation to work for which the Claimant had been suited. We also noted however that, until May 2021, the Claimant had had a gross misconduct dismissal on his record.

43. The only income received by the Claimant in the period since his dismissal had been state benefits, initially employment support allowance and then,

additionally, personal independence payment. He had received a total of £32,749.45 in the period from 24 November 2017 to 23 February 2022.

44. As noted the Claimant's gross income at the time of his dismissal had been £43,479.16. It was accepted that there had been increases of 3.2% in May 2018 and May 2019, and that here had been no subsequent pay rises.

45. In addition, the Claimant had been a member of the Respondent's pension scheme, in which benefits accrued on a defined contribution basis, referable to an employer contribution of 2% of the employee's gross basic salary, and on a defined benefit basis, with accrual of 1/100th of final salary for each year of service. Ms Buchanan confirmed that, whilst that pension scheme had been closed to new entrants, it remained open for longer standing employees, which included the Claimant at the time of his dismissal.

Conclusions

46. Taking into account our findings and the applicable law, our conclusions were as follows.

Wrongful dismissal

47. We noted the Respondent's concession that the applicable notice period was twelve weeks. We further noted the Claimant's ill-health at that time, and saw no reason to conclude other than that the Claimant was not capable of mitigating his loss during that period. Consequently, the Respondent was required to pay the Claimant in full in respect of his notice.

48. It was agreed between the parties, on the basis of a net weekly pay of £627.52, that a total net sum of £7,513.28 would need to be paid. However, in view of the fact that the wrongful dismissal compensation falls to be included, along with the unfair dismissal compensation, in the application of the tax-free £30,000 sum, we considered it appropriate to order the payment to be made on a gross basis, i.e. £10,033.56. That will mean that, after the deduction of tax, the Claimant will be left with the appropriate net sum, and there will be no danger of the net sum being further reduced by any application of tax.

Unfair dismissal

Basic award

49. As we have noted, the Claimant's length of service and relevant pay were agreed between the parties, leading to a basic award of £5134.50 which, following the 50% reduction for contributory conduct, led to a basic award of £2,567.25.

Compensatory award

50. We noted the guidance provided by the Dignity Funerals, Gaskarth, and Acetrip cases, that we needed to be satisfied that the dismissal was a material cause of the Claimant's conditions. In our view, the medical reports from Prof Turkington, whilst they noted that there had been some prior issues

and that the Claimant had been unwell before the dismissal, made it clear that the dismissal had a significant, certainly more than material, impact on him. As we have noted, the March 2020 report described the Claimant's injuries, in their then form as having been triggered by his dismissal. We were therefore satisfied that the Claimant's illness flowed from his dismissal to the required material extent.

51. The medical evidence was then clear that the Claimant had been unwell since his dismissal, that he remained unwell, and would continue to be unwell until he had followed the course of CBT and then for a further nine months. That was either going to be after a 16-month wait for the therapy to be provided on the NHS, or would take place fairly promptly, if payment for the therapy privately was factored in. We considered it would be better overall for the Respondent if we applied the latter approach and factored in the expense of £3000 in respect of the CBT on a private basis, as opposed to factoring a further 16 months of no income.

52. We found it somewhat difficult to understand why the Claimant had not gone on to the waiting list for CBT at an earlier date, but that was not explored in evidence. We therefore considered it would be reasonable to proceed on the basis outlined in the medical reports, that the Claimant currently remained unable to work, and even when he followed the course of CBT, would not be in a position to obtain income for a further nine months, i.e. roughly the end of 2022.

53. We also then accepted the Claimant's representative submissions that the Claimant would take a period of time to get back to full earnings. The Claimant's representative suggested that this would be a period of two years with his wages increasing from 25% of his former level, to 50%, and then 75% before reaching the full level, with an average of 50% being applied over that period. We considered that that may potentially be an over-optimistic view, bearing in mind the Claimant's comparatively high level of earnings with the Respondent, and that it may take longer for him to reach that level. However, we were satisfied that the overall approach suggested by the Claimant's representative was reasonable.

54. Overall, factoring in the salary losses, both past and future (nine months of only state benefits and then 50% of his final salary for the following two years), and the amount of past and future pension loss, which the Respondent agreed, we considered that the assessment in the Claimant's schedule of loss of past and future losses, which took into account the Claimant's income from state benefits of £200,924.24 (£233,573.69 before the deduction of state benefits), was accurate. Taking into account that 75% of that figure was to be reduced to reflect the Polkey reduction and the contributory conduct reduction, that still left losses in excess of the statutory maximum. We therefore considered it appropriate to order the Respondent to pay the Claimant the maximum sum possible in respect of the compensatory award, i.e. £43,479.16.

55. The Claimant, in his schedule of loss, contended that that sum needed to be grossed up to reflect the fact that the Claimant will be taxed on the excess over £30,000. However, the Employment Appeal Tribunal, in Hardie Grant London Ltd v Aspden (UKEAT/460/11), noted that to apply the statutory cap

and then gross up would be incorrect. In that case, the EAT said, "*In calculating the loss of earnings flowing from an unfair dismissal, the calculation is based on the Claimant's net (i.e. after tax) earnings. Where the loss exceeds £30,000, the maximum tax-free termination payment figure, it is appropriate to apply the 'reverse-Gourley principle', so as to ensure that the Claimant receives the appropriate net loss figure. However that exercise comes before, not after, the application of the cap imposed by s.124(1)*".

56. In the circumstances, the compensatory award, although partly taxable, will be the maximum permitted amount, in this case £43,479.16.

57. Although the Hardie Grant case related to the compensatory award, bearing in mind that section 119 ERA also, indirectly, operates a cap on the basic award, we considered it appropriate to adopt the same approach, i.e. not to gross up the basic award, even though it will fall to be taken into account for the purposes of the £30,000 exemption. As we have noted above however, in order to avoid any confusion, we have ordered the wrongful dismissal compensation to be paid on a gross basis, i.e. such that, after the deduction of tax, the Claimant will be left with his net entitlement.

Recoupment

58. In view of the fact that the Claimant has been in receipt of state benefits, the Employment Protection (Recoupment of Benefits) Regulations 1996 will apply to the unfair dismissal compensation. For the purposes of those Regulations, the following information is to be noted:

    a. Total monetary award[1] - £53,167.26[2]
    b. Prescribed element - £34,980.02[3]
    c. Prescribed period – 17 November 2017 to 23 February 2022
    d. Excess of total monetary award over prescribed element - £18,187.24

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Employment Judge S Jenkins
Date: 11 March 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 22 March 2022

FOR EMPLOYMENT TRIBUNALS Mr N Roche

[1] Employment support allowance payments (totalling £20,904.65) are not to be taken into account (Reg 4(2)).
[2] £212,660.04 reduced by 75%
[3] £139,920.08 reduced by 75%