EMPLOYMENT TRIBUNALS

Claimant:	**Mr K Ogundiran**
Respondent :	**Aeromet International Limited**
Heard at:	**London South Employment Tribunal (fully remote hearing by CVP)**
On:	**10 and 11 February 2022**
Before:	Employment Judge Dyal, Mrs Louise Lindsay and Mr Colin Rogers
Representation:	
Claimant:	in person
Respondent :	Mr Jones, Consultant

On 18 March 2022 the Claimant requested written reasons for the remedy judgment sent to the parties on 10 March 2022. Written reasons are provided as follows.

REASONS

1. These reasons should be read together with the judgment and reasons we gave at the liability stage of the proceedings.

2. The Claimant indicated in an email dated 16 July 2021 that the remedy he sought for unfair dismissal was compensation only.

The remedy hearing

3. The parties produced an agreed remedy bundle. The tribunal heard further evidence from the Claimant and further evidence from Mr Rogers in relation to remedy. Both witnesses were cross-examined. Both sides made very brief closing submissions to which we had regard.

Basic award

4. The Claimant was paid a statutory a redundancy payment and by s.122(4) Employment Rights Act 1996 this is offset against his entitlement to a basic award. The award is thus nil.

Compensatory award

Law

5. The primary statutory provision is s.124 Employment Rights Act 1996. We reminded ourselves of this provision in full but for economy do not set it out here.

6. The main issues of principle between the parties are:

   (1) Whether a *Polkey* reduction should be made and if so what;
   (2) Whether the Claimant mitigated his loss.

7. In *Polkey v A E Dayton Services Ltd* [1987] IRLR 503, Lord Bridge said this:

> *'If it is held that taking the appropriate steps which the employer failed to take before dismissing the employer would not have affected the outcome, this will often lead to the result that the employee, though unfairly dismissed, will recover no compensation or, in the case of redundancy, no compensation in excess of his redundancy payment. Thus, in Earl v Slater & Wheeler (Airlyne) Ltd [1973] 1 WLR 51 the employee was held to have been unfairly dismissed, but nevertheless lost his appeal to the Industrial Relations Court because his misconduct disentitled him to any award of compensation, which was at that time the only effective remedy. But in spite of this the application of the so-called British Labour Pump principle [British Labour Pump Co Ltd v Byrne [1979] IRLR 94, [1979] ICR 347] tends to distort the operation of the employment protection legislation in two important ways. First, as was pointed out by Browne-Wilkinson J in Sillifant's case, if the [employment] tribunal, in considering whether the employer who has omitted to take the appropriate procedural steps acted reasonably or unreasonably in treating his reason as a sufficient reason for dismissal, poses for itself the hypothetical question whether the result would have been any different if the appropriate procedural steps had been taken, it can only answer that question on a balance of probabilities. Accordingly, applying the British Labour Pump principle, if the answer is that it probably would have made no difference, the employee's unfair dismissal claim fails. But if the likely effect of taking the appropriate procedural steps is only considered, as it should be, at the stage of assessing compensation, the position is quite different. In that situation, as Browne-Wilkinson J puts it in Sillifant's case, at 96:*
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> > *"There is no need for an 'all or nothing' decision. If the [employment] 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."*

An example is provided by the case of Hough and APEX v Leyland DAF Ltd [1991] IRLR 194 where the EAT upheld an [employment] tribunal decision that the compensatory award should be reduced by 50% in circumstances where there was a failure to consult over redundancies but the tribunal concluded that such consultation might have made no difference'.

8. In *Hill v Governing Body of Great Tey Primary School* [2013] IRLR 274*,*

A 'Polkey deduction' has these particular features. First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer would have done so? The chances may be at the extreme (certainty that it would have dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between these two extremes. This is to recognise the uncertainties. A tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer) would have done. Although Ms Darwin at one point in her submissions submitted the question was what a hypothetical fair employer would have done, she accepted on reflection this was not the test: the tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand…

9. Guidance as to the *Polkey* exercise was given in *Software 2000 -v- Andrews* [2007] IRLR 568 which must be read subject to the repeal of Section 98A, but which otherwise speaks for itself. Similarly, in *Scope -v- Thornett [2007] IRLR 155,* Pill LJ said as follows at paragraph 34:

"*... The employment tribunal's task, when deciding what compensation is just and equitable for future loss of earnings will almost inevitably involve consideration of uncertainties. There may be cases in which evidence to the contrary is so sparse that a tribunal should approach the question on the basis that loss of earnings in the employment would have continued indefinitely but, where there is evidence that it may not have been so, that evidence must be taken into account ...*"

10. In *Wilding v British Telecommunications plc [2002] EWCA Civ 349*, *[2002] IRLR 524*, *[2002] ICR 1079,* Potter LJ:

"(i) It was the duty of Mr Wilding [the former employee] to act in mitigation of his loss as a reasonable man unaffected by the hope of compensation from BT as his former employer; (ii) the onus was on BT as the wrongdoer to show that Mr Wilding had failed in his duty to mitigate his loss by unreasonably refusing the offer of re-employment; (iii) the test of unreasonableness is an objective one based on the totality of the evidence; (iv) in applying the test, the circumstances in which the offer was made and refused, the attitude of BT, the way in which Mr Wilding had been treated and all the surrounding

circumstances should be taken into account; and (v) the court or tribunal should not be too stringent in its expectations of the injured party'.'

"It is not enough for the wrongdoer to show that it would have been reasonable to take the steps he has proposed: he must show that it was unreasonable of the innocent party not to take them. This is a real distinction. It reflects the fact that if there is more than one reasonable response open to the wronged party the wrongdoer has no right to determine his choice. It is where and only where the wrongdoer can show affirmatively that the other party has acted unreasonably in his duty to mitigate that the defence will succeed'.'

Polkey: discussion and conclusion

11. The basis on which the tribunal found the dismissal unfair was threefold:

    (1) Lack of consultation in the late provision of the Claimant's employee assessment;
    (2) Deduction of a point on account of a suspension;
    (3) Failing to offer the Claimant an opportunity to return to the role of maintenance engineer at Rochester.

12. If the Respondent had not acted unfairly in relation to the first two matters we are entirely sure that the Claimant would have been dismissed in any event and dismissed at the same point in time. The deduction of 1 point made no difference to the rankings of those in the pool.

13. The lack of consultation did not make a difference either. For the reasons given in our liability decision, save for the deduction of one point, the scores Mr Moses gave those in the pool were well open to him. The arguments the Claimant would have made (save in relation to the deduction of one point) had there been adequate consultation would not have affected the outcome. We are entirely sure that Mr Moses would not have changed his decision and his decision would have been in the band of reasonable responses.

14. If the Claimant had been offered the opportunity to return to Rochester as a maintenance engineer, the offer in our view would certainly have been at his former salary of £25,000 p/a with a 4% employer's pension contribution. In our view, properly construed the contractual term was to return to his old role on his old terms and that is what the Claimant would have been offered.

15. We accept the evidence of Mr Rogers that there had been no pay rises in the interim period since the Claimant's promotion and the Respondent was in money-saving mode and would certainly have been looking to minimise its costs.

16. We are sure that the Claimant would have accepted such an offer, even though he was forewarned that there would likely be a further redundancy situation. That is because this was, at the time, the Claimant's best option. There were no other alternatives with the Respondent and he had nothing else lined up. It would have been entirely rational for him to accept this offer and irrational not to.

17. The next issue is what would have happened had the Claimant returned to Rochester. If the Claimant had returned to Rochester, this is likely to have been at or around the time when in fact he was dismissed on 3 April 2020. That is so he could finish off his work as a Project Manager and hand over.

18. At that time there were two maintenance engineers at Rochester, Mr Wallis and Mr Jacob. The Respondent had no need for a further maintenance engineer and there were no other vacancies at that or any site. Thus it would have immediately have become clear that there was a redundancy situation.

19. Mr Rogers' evidence was that before embarking on a redundancy process, the Claimant would have been given about a three month period to reacclimatise into the maintenance engineer role. We agree that would have been a reasonable course and as such is likely to have happened. At the end of the period something would have needed to have been done about the overmanning situation.

20. Things then become more complex because, in his oral evidence, Mr Rogers said that at some point, he was not sure when, but perhaps towards the end of 2020, both Mr Wallis and Mr Jacob left the Respondent's employment. This was entirely their choice. They did so because they felt that they could make more money upon leaving, having had no pay rise for some years and there being no prospect of one. One of those employees, then set up his own business and began providing maintenance services to the Respondent as a contractor. We accept that evidence.

21. It is therefore not certain that there would have been any compulsory redundancy, because it is possible that either Mr Wallis or Mr Jacob may have simply left upon the Claimant re-joining Rochester or upon a redundancy process being announced.

22. If there had been a redundancy process involving all three of Mr Wallis, Mr Jacob and the Claimant, Mr Rogers' evidence, which is based upon a hypothetical scoring exercise (which we accept was carried out by Mr Mike Twyman, Operations Manager, Rochester), is that the Claimant would have been selected for redundancy, scoring much lower than either Mr Wallis or Mr Jacob.

23. We approach that evidence with a significant amount circumspection for a number of reasons. We did not hear Mr Twyman himself. Mr Rogers was asked questions about Mr Twyman's scoring/reasoning but was unable to explain it. The scoring rationale was hard to discern from the written documents in parts. Further, the scoring assessment has been produced in circumstances in which it is obviously in the Respondent's interests for the Claimant to come last.

24. Nonetheless, we give some weight to Mr Twyman's view and do not consider it to be worthless. He was the right person to make this assessment and had direct knowledge of all of the members of the hypothetical pool's work.

25. We note that in July 2017, when the Claimant was promoted from maintenance engineer to Engineering project manager, Mr Wallis was at that time a handyman carrying out lower level work. Mr Wallis was promoted into the role of maintenance engineer when that role became free upon the Claimant's promotion to project manager. Mr Wallis thus would have had about 3 years experience of the role by the date of this hypothetical scoring exercise. The Claimant had about a year of experience in that role prior to being promoted.

26. Although there were some transferrable skills between the maintenance engineer and project manager roles they were quite different. The essence of the maintenance engineer role was fixing machines rather than project management. Mr Jacob would have had about a year's experience at the date of this hypothetical scoring exercise, however he had some additional skills in that he was an electrical engineer.

27. We further note that the fact that the Claimant was promoted upwards from the maintenance engineer role is an indicator that if anything he was doing well as a maintenance engineer. Moreover, the fact that the Respondent was prepared to agree an unusual contractual clause giving him the right to return to that role, is also indicator that he was good at it.

28. There can be no certainty as to what would have happened had the claimant been offered the role at Rochester but stepping back, looking at matters in the round and engaging in some speculation as we must we find as follows:

    a. The Claimant would have taken the offer of a job at Rochester and remained in the post at least until a redundancy exercise took place.
    b. That exercise would probably have commenced after three months and concluded after four to four and a half months.
    c. If the Claimant had been selected for redundancy we think he would have been given a further notice period which by then would have been a 7 week notice period. We therefore make no *Polkey* reduction for the period 4 April 2020 – 4 October 2020.
    d. Looking at matters in the round we think there is approximately a 50% chance that the Claimant's employment would have continued on a long-term basis after that period and a 50% chance he would have been made fairly redundant at that point. We therefore make a 50% Polkey reduction for losses from 4 October 2020 onwards.

Mitigation of loss

29. After losing his employment the Claimant made strenuous efforts to find alternative work. He applied for very many jobs. He began by looking for work of commensurate seniority but quickly broadened his job search to include work of all manner of kinds. His job search and his willingness to turn his hand to any form of work is impressive and commendable.

30. The only criticism of the Claimant's efforts that the Respondent makes is that he did not make inquiries of a castings company based opposite the Respondent's premises at Sittingbourne. It is not known what actual opportunities there were

there save that this company may have been recruiting at around the time of the Claimant's dismissal.

31. The Claimant did not investigate this potential opportunity because he could not bear to work opposite his old workplace having been unfairly dismissed and he wanted a fresh start.

32. It was clear to us through these proceedings that the Claimant was very significantly affected by his dismissal and that it caused a significant level of emotional upset well beyond what is typical. He was concerned about having flashbacks if he worked near the Sittingbourne site and that gives a measure of the level of symptoms he was having. We do not think it was unreasonable at all for the Clamant to seek a fresh start that was not geographically proximate to his old place of work. It was not a failure to mitigate loss particularly not in the context of the other efforts that the Claimant did make to find work.

33. The Claimant finally found some alternative work in August 2020, working as a labourer. He worked in this role until December 2020 and we accept his evidence about the income that generated as stated in the schedule of loss.

34. The Claimant was then unemployed again for a period of months until he obtained self-employment as a fibre engineer in mid-June 2021. He has provided details of his earnings in that role, which we accept as accurate. He earns about £1,764.12 per month net (deductions are made at source pursuant to the CIS).

35. The Claimant did not fail to mitigate his loss.

36. However, once a *Polkey* reduction of 50% is applied to the wages and employer's pension contributions the Claimant would have received as a maintenance engineer, his losses cease since his self-employed income easily exceeds those sums. Thus there is no loss from mid-June 2021 onwards.

Other losses

37. The Claimant incurred expenses in the form of:

    a. Travel costs associated with attending recruitment agents, interviews and a training course for the labouring role.
    b. The cost of the training course itself.
    c. Additional travel and parking costs when working as a labourer in Brighton.
    d. A lost deposit as result of having to give short notice on his rented flat when he lost his income.

38. We accept that these expenses were incurred and were a reasonable mitigation of losses. They are recoverable in the sum claimed.

Breach of contract

39. In ***Lavarack v Woods of Colchester Ltd*** [1966] 3 All ER 683 the Court of Appeal held that damages for breach of contract must be assessed on the assumption that the defaulting party would have performed the contract in the way most beneficial (or least onerous) to him consistent with the terms of the contract.

40. In this case that simply means giving notice of dismissal and paying the Claimant for the notice period.

41. Losses in BoC claim are limited to a claim for notice pay – since if the Respondent had complied with the Claimant's contract and he had resumed employment in Rochester it could have given him notice of dismissal immediately and terminated the contract lawfully from a contract law perspective.

42. Notice pay is already awarded in full claim in the claim for unfair dismissal, so to avoid double recovery there is no additional award.

Calculations

43. The table below sets out the calculations we used to assess the Claimant's compensation.

Pay data Maintenance Engineer
Annual: £25,000 gross; £20,640 approx. net Monthly: £2083.33 gross; £1,720 approx. net Pension contributions 4% of gross pay thus £83.33 per month

Period 1 04.04.20 - 04.10.20	**Loss per month**	**Months**	**total**	
salary	£1,720.00	£6.00	£10,320.00	
pension	£83.33	£6.00	£499.98	
Sums to set-off: earnings as labourer August - September 2020			*£3,230.83*	
Loss in period				£7,589.15
Period 2: 04.10.20 - 15.06.21				
Salary less 50% Polkey deduction	£860.00	£8.50	£7,310.00	
Pension less 50% Polkey deduction	£41.67	£8.50	£354.15	
Sums to set-off: earnings as labourer in Oct, Nov and Dec			*£3,938.96*	

Loss in period			£3,725.19
Period 3: 15 June 2021 onwards			
Salary less 50% Polkey deduction	£860.00		
Pension less 50% Polkey deduction	£41.67		
Sum to set off: self employed earnings approx. £1,700 pm	£1,700.00		
Loss in period (earnings exceed loss)		£0.00	£0.00
Other losses			
Job seeking expenses			£326.50
Travel and parking expenses when labouring			£1,190.00
Lost deposit			£360.00
Loss of statutory rights			£500.00
Grand total			£13,690.84

Employment Judge Dyal
Date 03 April 2022