EMPLOYMENT TRIBUNALS

Claimant: **Mr Robert Bletcher**

Respondent: **J H Willis Limited**

Heard at: **Cardiff (by video)** **On: 12 May & 13 May 2022**

Before: **Employment Judge E Sutton**

Representation
Claimant: Mr Rushton (counsel)
Respondent: Mr Randall (legal representative)

RESERVED REMEDY JUDGMENT

1. The respondent shall pay the claimant compensation for unfair dismissal in the total sum of £41,538.50 subject to the usual statutory deductions.

2. Recoupment of benefits are necessary under the Employment Protection (Recoupment of Benefits) Regulations 1996 for the claimant.

REASONS

Preliminary

1. These are my reasons following the final hearing on remedy which concluded on 13 May 2022, and should be read in conjunction with my judgment on liability dated 13 May 2022. I explained to the parties at the conclusion of the evidence that I would draft these reasons over the weekend, and they are dated 15 May 2022. References in brackets are to the agreed hearing bundle comprising of 153 pages.

2. The claimant was represented by Mr Rushton of counsel, and the respondent was represented by Mr Randall. I am grateful to them both for their assistance. Both representatives made submissions in relation to remedy, and I also had the benefit of hearing oral evidence from the claimant on this issue on 12 May 2022.

3. The parties agreed a loss of statutory rights payment in the sum of £500. As regards the basic award, whilst the parties provided an agreed figure of £4,282.50, this was based on the current gross statutory weekly cap from April 2022 (£571) as opposed the cap operative at the effective date of termination on 13 November 2020 (£538). Consequently, applying the statutory formula in section 119 ERA (5 years' service x 1.5 (age factor) x £538) the basic award is £4,035.

4. During submissions, it was also agreed between the parties that the respondent did not fail to follow the ACAS Code of Practice on Disciplinary Procedures. I do not (therefore) need to consider reducing the award of compensation in accordance with section 124A(2) of the Employment Rights Act 1996 ('ERA').

5. In terms of loss of earnings, it was 78 weeks from the end of the notice period (13 November 2020) until the remedy hearing (13 May 2020) at an agreed net weekly wage of £609.02. This parties agreed a total loss of earnings in the sum of £47,503.56.

6. In terms of future loss of earnings, the claimant stated (within his schedule of loss, undated, but thought to be around July 2021 from the dates set out therein) [pg 140-142] that he believed it would take him between 3-6 months to secure a job commensurate with the salary he received whilst employed by the respondent. Taking the claimant's case at its highest, 6 months after July 2021 is January 2022 and it is now 4 months beyond that. The claimant remains unemployed. I have not been provided with any evidence regarding why extending the period claimed would be just and equitable. A future loss of earnings 'head' is not, therefore, appropriate in this claim. Mr Rushton did not actively pursue this point.

The issues

7. Having heard the submissions of Mr Rushton and Mr Randall, it would appear that the issues which I need to consider in finalising the compensatory award are:

   (1) Whether the claimant has taken reasonable steps to mitigate his loss of earnings?

   (2) Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason, and

if so, should the claimant's compensation be reduced, and if so, by how much?

(3) As the claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct? If so, would it be just and equitable to reduce the claimant's compensatory award and, if so, by what proportion?

Key legal framework

8. The only remedy for unfair dismissal sought by the claimant is compensation. The legislation provides for basic and compensatory awards and the basic award, as set out above, is agreed. The key parts of the ERA and relevant case law as regards the outstanding issues before me are as follows:

   '118.— General.
   (1) Where a tribunal makes an award of compensation for unfair dismissal under section 112(4) or 117(3)(a) the award shall consist of—
   (a) a basic award (calculated in accordance with sections 119 to 122 and 126, and
   (b) a compensatory award (calculated in accordance with sections 123, 124, 124A and 126)'

9. For the avoidance of doubt, the compensatory award is to fully compensate the claimant as if he had not been unfairly dismissed, but not to award a bonus or punish the respondent.

<u>Mitigation of loss</u>

10. Section 123(4) ERA states that:

    'In ascertaining the loss referred to in subsection (1) the Tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales ...'

11. In *Archbold Freightage v Wilson* [1974] IRLR 10 it was said:

    '*The dismissed employee's duty to mitigate his or her loss will be fulfilled if he or she can be said to have acted as a reasonable person would do if he or she had no hope of seeking compensation from his or her previous employer.'*

12. In the case of *Savage v Saxena* [1998] ICR 357 the EAT recommended a three-step approach to determining whether an employee has failed to mitigate their loss. First, identify what steps should have been taken by the claimant to mitigate her loss. Second, find a date upon which such steps would have produced an alternative income. Three, thereafter reduce the amount of compensation by the amount of income which would have been earned. The burden of proof rests upon the respondent to show a failure to mitigate by the claimant.

13. In *Tandem Bars Ltd v Pilloni* [2012] EAT 0050/12 the EAT stressed that rather than concentrating on what the employee actually did to find work, the Tribunal's focus should be on the steps that were reasonable for her to take in the circumstances.

14. It is important to emphasise that the duty is only to act reasonably and the standard of reasonableness is not high as the respondent is the wrong-doer (*Fyfe v Scientific Furnishings* [1989] ICR 648, EAT).

<u>Contributory conduct</u>

15. Section 122(2) ERA provides that:

    'Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly'

16. Section 123(6) ERA provides that:

    '*Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding'*

17. In the case of *Nelson v The British Broadcasting Corporation (no.2)* [1980] ICR 110, the court said:

    'For conduct to be the basis for a finding of contributory fault, it has to have the characteristic of culpability or blameworthiness. Conduct by an employee capable of causing or contributing to dismissal is not limited to actions that amount to breaches of contract or that are illegal in nature, it could also include conduct that was perverse or foolish, bloody-minded or merely unreasonable in all the circumstances. In order for a deduction to be made under section 123(6) of the Act, a causal link between the employee's conduct and the dismissal must be shown to exist'

18. In the case of *Hollier v Plysu Ltd* [1983] IRLR 260 it was suggested that the contribution should be assessed broadly and should generally fall within the following categories:

    Wholly to blame: 100%;
    Largely to blame: 75%;
    Employer and employee equally to blame: 50%;
    Slightly to blame: 25%.

19. In assessing contributory conduct, I must look at the conduct of the claimant. The conduct of the respondent or of other employees is not relevant.

Findings of fact

20. The relevant facts are as follows. Where I have had to resolve any conflict of evidence, I indicate how I have done so at the material point.

(1) Whether the claimant has taken reasonable steps to mitigate his loss of earnings?

21. As set out above, issues of mitigation are matters of fact and the burden of proof is on the respondent. The claimant does not have to prove he has mitigated his loss. The respondent has to show that the claimant acted unreasonably.

22. In relation to Mr Randall's submission that the claimant could have got another job as a HGV driver as such workers were *'in demand'* during the pandemic, I cannot sensibly place much, if any weight on that assertion. This is a generalised submission for which there is no evidence before me. Whilst the claimant stated in cross examination that he was aware that this had been mentioned on the BBC news, I do not see how this takes the respondent any further.

23. Equally, I do not see how the submission that a failure to seek medical attention (as a consequence of the claimant's stated depression) can equate to a failure to mitigate loss on the particular facts of this case. I have carefully considered the authority of *Wilding v British Telecommunications Plc* [2002] EWCA Civ 3 relied on by Mr Randall. I was not taken to any specific paragraphs during the hearing, and, having reminded myself of the content of this authority following the hearing, I cannot see the relevance.

24. In that case, Mr Wilding (the employee) challenged the Employment Tribunal's finding, upheld by the EAT, that he had not acted reasonably in refusing an offer of re-employment made by his employer. The focus of the appeal (the leading judgment given by Potter LJ), was whether Mr Wilding had failed in his duty to mitigate his loss by unreasonably refusing an offer of re-employment. This was not a relevant issue in the present case.

25. In any event, even if I accept the respondent's contention that it was reasonable for the claimant to take medical advice, the respondent has not shown that it was unreasonable for the claimant not to have done so – particularly as the claimant was clear in his oral evidence as to the reason why he did not want to raise the issue of being depressed with a doctor. He explained that:

'when you are a heavy goods vehicle driver, you don't say you have depression because they would take the heavy goods off you. I wanted to try to work things out myself. I wanted to right it [the depression] *myself'.*

26. I do have evidence that the claimant was looking for work as he was in receipt of JSA. He also told me that he made a number of phonecalls to seek alternative employment, but that his dismissal by reason of gross misconduct was causing him particular difficulty. In all of the circumstances, I do not find that the claimant failed to mitigate his loss.

(2) Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason, and if so, should the claimant's compensation be reduced, and if so, by how much?

27. Mr Randall accepted that this was not a typical *Polkey* deduction issue (by reason of my judgment on liability), however he sought to argue that the claimant would have been dismissed within 6 months as he was prepared to break the DTAS rules regarding milk sampling. Mr Randall relies on the authority of *O'Donoghue v Redcar & Cleveland Borough Council* [2001] EWCA Civ 701 in making this submission; citing §39. I was not provided with a copy of this authority, and having reminded myself of this decision following the conclusion of the hearing, I note §44 in particular, where Potter LJ states the following:

'While we acknowledge its exceptional nature, we do not think that the exercise undertaken by the Industrial Tribunal which led to Decision (4) is necessarily impermissible. An Industrial Tribunal must award such compensation as is "just and equitable". If the facts are such that an Industrial Tribunal, while finding that an employee/applicant has been dismissed unfairly (whether substantively or procedurally), concludes that, but for the dismissal, the applicant would have been bound soon thereafter to be dismissed (fairly) by reason of some course of conduct or characteristic attitude which the employer reasonably regards as unacceptable but which the employee cannot or will not moderate, then it is just and equitable that compensation for the unfair dismissal should be awarded on that basis . We do not read Polkey or King –v Eaton Limited as precluding such an analysis by an Industrial Tribunal and we do not think that the exercise which they performed was self-evidently incorrect given the adverse view which they had formed of this particular appellant …..'

28. Two points arise from that passage; firstly the exceptional nature of such a finding, but secondly, and importantly, there must be evidence that a course of conduct, or unacceptable attitude on the part of the employee, would continue and which would not be tolerated by the employer. The claimant was not cross examined about this and Mrs Bellis was not asked to address this issue. This is not a case where the claimant was considered to be a rude or disobedient employee (for example) and the respondent did not raise concerns regarding the claimant's conduct in his 5 years' employment pre dismissal.

29. Whilst I accept that in some cases a reduction of compensation could be considered for 'non Polkey' reasons, it would not be just and equitable to do so in this case based on the evidence before me.

(3) As the claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct? If so, would it be just and equitable to reduce the claimant's compensatory award and, if so, by what proportion?

30. Mr Randall submits that the claimant *'contributed to his own demise'* as he accepted that he was in breach of the Drivers Handbook and DTAS procedure, and although management had given him permission, this was still a breach of what the company expected. Mr Randall submits that the claimant's compensation should be reduced by 25-50%; emphasising that this should be at the lower end. Mr Rushton says there should be no reduction, but if I am against him on that point, that it should be towards the lower end of the scale.

31. Focusing on the actions of the claimant and not the respondent or other employees, I am satisfied that the claimant's action of allowing a farmer (Mr Shaw) to take his own milk samples was blameworthy in the sense that he was aware of what was expected by the respondent company, and that his conduct caused the dismissal. I have also taken into account the fact that the claimant accepted acting outside the Drivers Handbook and DTAS procedure.

32. Insofar as there was a dichotomy between what was happening 'on the ground', and company policy, it is reasonable to expect the claimant to have at least raised this 'clash' with his managers at the time. Additionally, whilst I acknowledge its limitations (in terms of comprehensiveness), the claimant did have a form of refresher training on 1 September 2020 (the relevant time period) which included the DTAS procedure. This provided another opportunity for the claimant to at least raise the issue of what was happening in practice compared to the expected procedure.

33. This was not, however, a case where the claimant had a stated preference of working (ie, to allow a farmer to collect their own milk sample), and sought to *continue* with that stated preference in the face of opposing information of those working with him/those in management. I am satisfied that it is just and equitable to reduce both the basic and compensatory award, however due to the culture in which he was working, I find that the claimant was only slightly to blame. A reduction of 25% of both the basic and compensatory award would therefore be appropriate in the particular circumstances of this case.

Conclusions

34. By reason of the above, the respondent shall pay the claimant compensation for unfair dismissal in the sum of £41,538.50 comprising of:

(1) Basic award £4,035

5 years' service x 1.5 (age factor) x £538

Less

25% contributory fault (section 122(2) ERA)

(25% of £4,035 = £1,009) **(A) £3,026**

(2) Compensatory award

(a) Loss of wages to date of remedy judgment
Agreed net average wage of £609.02 per week from 13 November 2020 to 13 May 2020 (78 weeks)
£47,503.56

(b) Loss of statutory rights payment £500
(£48,003.56)

Less
25% contributory fault (section 123(6) ERA)
(25% of £48,003.56 = £12,000.89) £36,003

Grossing up at tax rate of 20%
£30,000 - £4,035 = £25,965
£36,003 - £25,965 = £10,038
£10,038 / 0.8 = £12,547.50
£25,965 + £12,547.50 **(B) £38,512.50**

TOTAL (A) + (B) = **£41,538.50**

35. The claimant claimed jobseeker's allowance and the Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 ('the Recoupment Regulations') apply in this case. The grand total is £41,538.50. The prescribed element is £38,512.50. The period of the prescribed element is from the date of dismissal on 13 November 2020 until the remedy judgment on 13 May 2022 (78 weeks). The excess of the grand total over the prescribed element is £3,026.

Employment Judge E Sutton

Date: 15 May 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 25 May 2022

FOR EMPLOYMENT TRIBUNALS Mr N Roche