EMPLOYMENT TRIBUNALS

Claimant: Mr P R Callender

Respondent: British Gas Services Limited

Heard at: Watford (CVP) **On:** 22 July 2022

Before: Employment Judge Maxwell
Ms Elizabeth
Mrs Binks

Appearances
For the Claimant: Mr Zaman, Counsel
For the Respondent: Ms Smith, Counsel

JUDGMENT

1. The Claimant is entitled to:

   1.1 a **basic award** for unfair dismissal of **£10,668**

   1.2 an award of **compensation for discrimination** comprising:

   1.2.1 injury to feeling - £15,000;

   1.2.2 loss of earnings & pension - £5,005.28;

   1.2.3 other losses - £2,800;

   1.2.4 interest £5,139.54

   1.2.5 total of **£27,944.82**

REASONS

Facts

Generally

2. We must begin by noting some surprising and unsatisfactory aspects of the evidence relied upon today.

3. Paragraph 16 of the Claimant's remedy statement refers to his search for a new role as a gas engineer and then includes various page references. The documents referred to were printouts (saved PDFs) of online job advertisements, going back to October 2018. This gave the impression the Claimant had begun to look for new employment almost immediately after his dismissal the previous month. Following cross-examination by Ms Smith on behalf of the Respondent, however, it became apparent this was not the case. She began by drawing his attention to details which suggested these advertisements had not been printed (or saved as PDFs) until after some of the vacancies had expired. Other documents, could be seen to have been found on the Internet only in February 2019. Most unexpectedly, the Claimant said he had never seen any of these documents before.

4. Whilst the liability hearing was mostly conducted in person, some parts were dealt with remotely by CVP. When remote, the Claimant required assistance in order to participate. It seems to us, most unlikely the Claimant would have searched for employment in this way or have saved copies of the relevant adverts. We are driven to the conclusion that someone else has conducted a retrospective trawl for vacant positions to evidence a job search that was not actually carried out by him. We are very concerned about this.

5. Ms Smith also cross-examined the Claimant on his impact statement. Her purpose appeared to be to show that in light of his physical symptoms as then described, he would not have passed a subsequent FCA if the Respondent had carried one out. In the course of this, however, the Claimant was referred to a paragraph which described the difficulty he had interacting with his granddaughter because of the pain in his knee. The Claimant said this was not accurate as at the date of the statement, 8 December 2020, because his granddaughter had not at that point been born.

6. Where the Claimant disagreed with the content of his own witness statements, he was not slow to distance himself from them. His answers to the material questions were direct. More than once, the judge drew the attention of Ms Smith to the fact of the Claimant having agreed with her last question, when it appeared the follow-up (perhaps unsurprisingly) assumed a denial.

7. A number of possibilities emerged from this stark discrepancy. The conclusion most favourable to the Respondent would be that the Claimant had deliberately lied, either in his statement originally or in his evidence at the Tribunal. This was not, however, our finding. We found the Claimant's oral evidence direct and satisfactory. We further noted that whilst all of his witness statements included a declaration of truth and space for him to sign, none actually bore his signature.

We think it most likely the Claimant has relied upon and adopted documents produced by his solicitors without himself subjecting them to careful scrutiny. This does not, however, explain away the paragraph relating to a job search.

8. In light of this we adopted a cautious approach to the Claimant's written evidence. We have accepted only those parts where there are corroborative documents and / or because the content of rings true and is consistent with our assessment of the evidence more generally.

Dismissal and New Employment

9. We find the Claimant was profoundly upset as a result of losing his job. He had been with the Respondent for 14 years. The Claimant believed he could continue in his role, if only he was given the chance. We are quite satisfied the Claimant is an individual with a strong work ethic. Following his dismissal, the Claimant was brought low. While concerned about some aspects of his witness statement, having heard him give oral evidence at two separate hearings, paragraphs 36 and 37 of his remedy statement ring true. This was a dark time in the Claimant's life. At 56 years of age having worked as a gas engineer for a very long time, he found himself unemployed. He felt worthless. He doubted his prospects of finding a similar role in the future but did not know what else he could do. Having just lost his employment because his employer said it could not make the reasonable adjustments he needed, he was fearful about raising this same issue with any prospective employer. This all cast a great shadow over him.

10. We have already referred to the discrepancy between the Claimant's witness statement and oral evidence. The witness statement is also internally inconsistent. Paragraph 16 suggests the Claimant started a vigorous and comprehensive search for new employment almost immediately A different impression is given, however, by paragraph 35. There, the Claimant sets out that just having lost his job, feeling depressed and with not long to go before the Christmas and New Year period, it was difficult for him to look for new work. This latter account, which we accept, was far more consistent with his oral evidence and the facts which can be established with certainty.

11. The Claimant decided to become self-employed as a gas engineer. In order to do so, he had to re-gain the accreditation / licensing he had lost with his last employment. He had to go through this process afresh, in his own right. Ms Smith for the Respondent suggested that if the Claimant had obtained a new position as an employee, his new employer would have taken him through this. We pause to note, irrespective of whether the Claimant did this himself or found a new employer willing to pay for it, the accreditation / licensing was necessary before he could work as a gas engineer and some delay was inevitable.

12. In January 2019, the Claimant registered with an agency through which he might secure work as a gas engineer, on a self-employed/contractor basis, rather than as a direct employee. He then took the steps necessary to regain his accreditation. There will obviously have been a cost to the Claimant in this regard, although we have not been provided with any reliable evidence of it. The Claimant's schedule of loss includes figure of £1000 for his exams. No invoice, nor any other documentary evidence was adduced to support this sum. The

Claimant could not tell us in his oral evidence, where the figure had been obtained from.

13. The Claimant did produce invoices for the renewal of his GasSafe registration. The earliest of these is, however, dated December 2019. This cannot, therefore, be for his initial registration in the early part of 2019.

14. On or about 5 March 2019, the Claimant bought a van. This was necessary for him to obtain work as a self-employed gas engineer. He paid £5,100, mostly in cash but with £200 by way of trading-in his car.

15. Most unfortunately, in March 2020, the Claimant suffered a cardiac event. He believes this was caused by the treatment he received at the hands of his employer. No medical evidence has been produced in this regard. The Claimant's belief is an insufficient basis upon which to prove this issue of medical causation and we make no such finding.

Basic Award

16. The sum due in this regard as agreed as £10,668.

17. This was, very nearly, the only point on which the parties agreed. There was a substantial dispute regarding injury to feeling, the principle of future loss being recoverable at all, the period of loss if it were, and various individual amounts.

Injury to Feeling

18. Some of the things which upset the Claimant were not matters we had found to be discriminatory. The Claimant was upset about the way in which the redeployment process was carried out. He firmly believes the adjustments necessary to accommodate him could have been made. In assessing injury to feeling we have disregarded this. We have focused instead upon the extent to which his feelings were injured by dismissal.

19. As set out above, the Claimant was profoundly upset as a result of losing his job. He had been with the Respondent for 14 years. Whilst there is no evidence of a formal diagnosis of depression, we have no doubt this was exceptionally low time in the Claimant's life. He was unemployed, felt worthless and feared he might not work again. These feelings were not fleeting, they took him down and that is where he stayed for some months. We think the reason he started to take concrete steps to find new work in January 2019 is because that reflects when he felt mentally strong enough to do so. This was not a case of an employee sitting back and letting his losses accumulate. When he started to work again and more especially, when he obtained a permanent position, this is likely to have done a great deal to lift him up and restore his confidence. Whilst it is right to say that the dismissal was a one-off act, the consequences of that lasted for a considerable period. It is also clear that even now, years later, the Claimant still feels bitterly about the way he was treated.

20. We do not agree with the Respondent that this is a lower band case. The significant injury to feelings, both in terms of the strength of this and its duration, takes it above the lower band. We do not, however, agree with the Claimant that this is a higher band case. This is not an instance of the sort of prolonged

campaign of abuse or permanent debility where such award is justified. Our finding is that the middle band is appropriate. Doing our best, we consider that award of £15,000 reflects the injury done by dismissal.

Reduction of Losses

21. Ms Smith argued the Claimant could not recover his subsequent losses. She said the central basis upon which the Claimant succeeded both in his unfair dismissal and discrimination arising claims was the Respondent's failure to obtain an up to date FCA before dismissing him. Her position was the Claimant could not prove that any such assessment would have resulted in his employment continuing.

22. We find the correct starting point is to look at the losses flowing from the Claimant's dismissal. To the extent the Respondent contends the Claimant would have been dismissed (fairly and without discrimination) in any event, this is a question assessed in the usual way. We note the counter-schedule contends for a 75% **Polkey** reduction.

23. On well-established principles, a Tribunal may reduce the compensation payable to an unfairly dismissed claimant where there is a prospect they would have been fairly dismissed in any event; see **Polkey v AE Dayton Services Limited [1988] ICR 142 HL**. The correct approach to determining whether a **Polkey** reduction is appropriate and the amount of the same was considered in **Software 2000 Limited v Andrews [2007] ICR 825 EAT**; per Elias P, as he then was:

> **54. The following principles emerge from these cases. (1) In assessing compensation the task of the tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal. (2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future.) (3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made. (4) Whether that is the position is a matter of impression and judgment for the tribunal. But in reaching that decision the tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence. […]**

24. Similar considerations can arise in discrimination cases. In **Abbey National Plc v Chagger, [2010] ICR 397** the Court of Appeal considered the correct approach to assessing compensation for future loss in a case where the claimant has suffered a discriminatory dismissal; per Elias LJ:

> **66. […] We would accept that, in many cases, the starting point in the case of a discriminatory dismissal will be the period for which the employee would have been employed by the discriminating employer. For example, if the employer can show that the dismissal would have occurred in any event after a specific period of time, for example because of redundancies or the closing down of the business, then this will normally set the limit to the compensation payable. If there is a chance as opposed to a certainty of this occurring, that should be assessed and factored into the calculation of future loss as the answer to the first question indicates. In such a case, the employee would have been on the labour market in any event once the employment had ceased, and the usual effect of the discriminatory dismissal would simply have been to put him on the labour market earlier than would otherwise have been the case.**
>
> **67. Similarly, there may be circumstances—although in practice they will be rare—where the evidence is that the employee would voluntarily have left in the near future in any event, whether or not he had another job to go to. This could occur, for example, if the employee is dismissed shortly before he was due to retire, or if he had already given notice of resignation when the discriminatory dismissal occurred. It would be wrong to award compensation beyond the point when he would have left because there would be no loss with respect to any subsequent period of employment.**
>
> **[…]**
>
> **69. […] The task is to put the employee in the position he would have been in had there been no discrimination; that is not necessarily the same as asking what would have happened to the particular employment relationship had there been no discrimination. The reason is that the features of the labour market are not necessarily equivalent in the two cases. The fact that there has been a discriminatory dismissal means that the employee is on the labour market at a time and in circumstances which are not of his own choosing. It does not follow therefore that his prospects of obtaining a new job are the same as they would have been had he stayed at Abbey. For a start, it is generally easier to obtain employment from a current job than from the status of being unemployed. Further, it may be that the labour market is more difficult in one case compared with another. For example, jobs may be particularly difficult to obtain at the time of dismissal and yet by the time they become more plentiful, when in the usual course of events Mr Chagger might have been expected to have changed jobs had he remained with Abbey, he will have been out of a job and out of the industry for such a period that potential employers will be reluctant to employ him. In addition, he may have been stigmatised by taking proceedings, and that may have some effect on his chances of obtaining future employment.**

25. Ms Smith referred us to a report from a report from the Claimant's orthopaedic surgeon. On 15 March 2018, Dr Rasooly answered a series of questions:

> **1. Please confirm any known medical conditions affecting Mr Callender - Knee osteoathritis**
>
> **2. Would you consider any of these conditions to be permanent i.e chronic? - yes**
>
> **3. flow long has Mr Callender suffered from these medical conditions? - 4 years**
>
> **4. What are the main symptoms and are these constant or relapsing/remitting? - constant**
>
> **5. Has Mr Callender been prescribed medication or other treatment for this condition? - yes**
>
> **6. Has Mr Callender been referred to another clinician? - yes, orthopaedics**
>
> **7. Has Mr Callender's condition improved at all, either subjectively or objectively? - no**
>
> **8. Has Mr Callender reported any specific difficulties with normal activities, for example, self-care, personal hygiene, cooking and domestic activity, personal relationships, hobbies and leisure pursuits? - not known**
>
> **9. Do you anticipate a full recovery, or do you foresee any reason why in this case a full recovery may not occur? - after total knee replacement**
>
> **10. Are you able to indicate the likely time scale for recovery to occur? - ??? (depends on hospital)**
>
> **11. In your opinion, what are the possible causative factors for Mr Callender recent ill health problems? - osteoarthritis**
>
> **12. Do you anticipate future ill health problems due to an existing medical condition and what might these be? - yes**
>
> **13. In your opinion, would it be reasonable for Mr Callender to return to work in some capacity? - yes**

26. Ms Smith contended in light of this medical evidence, it was inevitable that a further FCA would have returned the same result and the Claimant then been dismissed. The Claimant's knee condition was permanent, save unless he had a knee replacement operation. She also put and the Claimant agreed, he had been asked to undergo a further expert assessment in the course of these proceedings and declined.

27. Mr Zaman argued "the proof was in the pudding". He relied upon the fact that by May 2019 the Claimant was back in work. Although Ms Smith said there was no detail about what he was doing, or what adjustments have been made, we were referred to paragraphs 27, 28 and 29 of the remedy statement:

> **27. My knee condition is now stable and my shoulder is better. I have not had cause to see a doctor about my knee but it is under regular review. At**

> **the last MRI it was noted that my knee had built-up fluid in the joint, and the plan was for my doctor to drain this with a needle. I do not have a date for this procedure yet and I am in no rush as my knee is not bothering me and the swelling has now reduced. Sometimes I experience pain in my knee, but I cope with this as and when it arises and I do not take painkillers.**
>
> **28. My role is adjusted at Swales and this is by agreement with my Manager, who is aware of my knee conditions. I have not had any cause to have any time off work due to my knees since I started. I suspect this is because my Manager has supported me with providing any adjustments I need; at present these are to ensure I get sufficient rest/posture breaks so that my knees do not swell and become painful. I find that a regular lunch break helps with reducing any knee pain so I make sure I regularly take one. My manager explained to me that he is happy with my work and the way I carry it out.**
>
> **29. The role I do with Swales is virtually the same work as the role I performed for the Respondent. I can be assigned to do a gas fire which involves having to kneel and walk upstairs, but this is infrequent and so long as I take my breaks I don't experience knee pain. My shoulder is also much better and I have an ok range of movement which doesn't limit me at work in any way.**

Conclusion

28. The Claimant's account appears entirely plausible. He has not gone to work for Swales doing some new esoteric form of gas engineering. Rather, we accept he is servicing the same sort of equipment (mainly domestic boilers, with the occasional appliance such as a fire) he did for the Respondent. It is difficult to see how he could do this, save unless his knee had improved in the way he contends for. The adjustments made for him are modest. Notably these do not include, turning up and then returning difficult jobs. He reiterated in evidence before us, that he has done physio and strength training to support his knee. This sort of self-help is often recommended by clinicians to patients but less often engaged with consistently. We accept that in this case the Claimant has persisted and benefited from so doing.

29. This does not, however, answer the question of what a functional capacity assessment report carried out in September or November 2018 would have provided. We note that, in clear terms, by the appeal stage the Claimant was saying he had experienced an improvement. Given the fact of his subsequent re-employment in a similar role, this is likely to have been more than mere wishful thinking. We are satisfied the Claimant's knee symptoms had improved by this point. Nonetheless, there must still be uncertainty about what a further assessment would have advised. The Claimant was determined to return and continue in work. Whilst he has been successful in this, it is clear he is far from pain-free. Even with the fact of another functional improvement, the assessor may have adopted a more cautious approach. Whereas the Claimant, especially now he is self-employed, may be willing to push himself to the limits, a professional assessor may be far more reluctant to advise an employer to adopt the same course. Now that he is self-employed, if the Claimant overdoes it, he will bear the consequences. In direct employment, the employer may be a risk of a negligence or breach of duty claim in similar circumstances.

30. The evidence in this regard is not as helpful as we might wish. An expert assessment carried out shortly after dismissal would have made this a very straightforward exercise. Even a more recent retrospective expert opinion may have been helpful. As it is we have the pre-existing evidence (medical, FCA, OH), the Claimant's assertions contemporaneously about an improvement and the fact of him being able work in a very similar capacity by May 2019. Although we are faced by difficult task, we do not consider it is one so riddled with uncertainty that no sensible prediction based on that evidence can properly be made. Our finding is that there was a 50% prospect of an improved FCA, allowing him to work with boilers (including those high up, low down, or awkwardly situated) such that he could return to work with either no limitation or one simply with respect to fires and BBUs (which the dismissal and appeal officers accepted could have been accommodated). Such an assessment would have led to the Claimant retaining his employment with the Respondent. We reach this conclusion because we think there was a real and meaningful improvement in the Claimant's condition at the time. We are, however, mindful that a professional adviser might adopt a cautious approach. This makes the outcome of a further FCA, something of a knife edge decision. In those circumstances, a 50% assessment in the compensatory award is not merely splitting the difference, it fairly reflects the evidence before us.

31. For like reasons we consider the Claimant's compensation for losses subsequent to dismissal arising under his discrimination claim should be reduced by 50% to reflect the prospect of a non-discriminatory dismissal.

Double Recovery

32. We go on to assess the Claimant's losses as compensation for discrimination. He cannot recover his losses twice and so we do not make any compensatory award for unfair dismissal.

Period of Loss

33. The parties disagree about the appropriate period of loss. The Claimant contends for losses from the point of dismissal through to 28 May 2019, when he started to earn again and from this point fully mitigated his losses. That represents a period of 36.29 weeks. The counter schedule contends for a 26 week period of loss, on the basis the Claimant unreasonably failed to mitigate his losses. There are two main elements to this argument. The Respondent says the Claimant should have started looking for new employment immediately and furthermore, he should have sought a position as a direct employee rather than setting himself up in self-employment. This course it is also argued, would have avoided the costs incurred by the Claimant in setting himself up as a contractor.

34. In our view, the Respondent has not shown an unreasonable failure by the Claimant to mitigate his losses. This dismissal was traumatic for him, is entirely understandable that it took him until the end of the year to pick himself up and actively seek new work. The Claimant received only a small amount of benefits, which he subsequently repaid when his private pension started to be received. The fact of the Claimant beginning to draw down his pension is a significant step and one we do not think he would have taken lightly. He did this because, in his words he was "broke". If the route to new employment had appeared

straightforward the Claimant would have taken it. As above, he needed some time to recover himself. Nor is it obvious that the Claimant would have found it easy to become an employee in a similar position again. Having just been dismissed because his employer could not make reasonable adjustments for him as a disabled employee, it is entirely understandable that he would be fearful of raising that with a new perspective employer. The position is different, of course, where he is working as a self-employed contractor. In the latter circumstance, if the Claimant cannot work, it is he will suffer. We think it entirely reasonable, in the circumstances, for the Claimant to pursue self-employment. And indeed, his approach has been vindicated. By not very much more than six months after dismissal, the Claimant not only had new employment (contractor/self-employed) he had fully mitigated his losses.

35. We award losses for the period the Claimant seeks, namely 36.29 weeks.

Loss of Earnings & Pension

36. As far as loss of earnings and pension is concerned, the mathematics in this regard are agreed.

    36.1 36.29 weeks x £358.63 = £13,014.68;

    36.2 36.29 weeks x £40 = £1,451.60

37. The Claimant must, however, give credit for the payment in lieu of notice received, in the sum (also agreed) of £4,455.72.

38. The Claimant's loss under this heading is then: £13,014.68 + £1,451.60 - £4,455.72 = £10,010.56.

Other Losses

39. We award £500 for loss of statutory rights. The Claimant had been employed for 14 years. On dismissal he lost his statutory rights. In his current position he will not have the right not to be unfairly dismissed.

40. Given the Claimant did not carry out the purported job search, we do not award the £50 contended for.

41. Whilst we accept the Claimant is likely to have incurred an expense in connection with the exam, no satisfactory evidence of the amount has been put forward. The Claimant could not explain where he obtained the figure of £1000 from and we cannot simply guess. No sum is awarded in this regard.

42. The Claimant spent £5,100 buying a van. This was a necessary step in connection with him becoming a self-employed contractor. Far from it being an unjustified expense, we think it likely sped up the point in time by which he was able to mitigate his losses and, in so doing, reduced the Respondent's potential exposure to an ongoing loss claim. The circumstances of his dismissal would have made him an unattractive prospective employee. The Claimant paid for this purchase mostly in cash but also £200 by way of trading-in his own car. Ms Smith said the Claimant should have sold his car privately to get a better price for it. Whilst it might have been possible for the Claimant to obtain more in this

way, selling a second-hand car is not always a straightforward exercise and there is no guarantee of completing this in a timely fashion or achieving a higher price. Trading-in an old vehicles when buying a new one is a well established practice and this is something it was reasonable to do. The Claimant's loss in this regard is £5,100.

ACAS

43. Although the Claimant's schedule claimed a 25% uplift, this was not developed in argument and we were not satisfied there would have been grounds for any adjustment in this regard.

Total Compensation

44. Injury to feelings:

    44.1 **£15,000**

45. Loss of earnings and pension (50% of £10,010.56):

    45.1 **£5,005.28**

46. Other losses (50% of £500 + £5,1000):

    46.1 **£2,800**

47. We award the compensatory losses for the discrimination claim. The Claimant is entitled to interest.

    47.1 on injury to feelings:

    47.1.1 period from injury (dismissal) until today is 3 years, 9 months & 28 days;

    47.1.2 £15,000 x 8% x 3.827 years = £3,944.40;

    47.2 on loss of earnings, pension and other:

    47.2.1 for the mid-point we take half the multiplier (3.827) 1.914;

    47.2.2 £5,005.28 + £2,800 = £7,805.28;

    47.2.3 £7805.28 x 8% x 1.914 years = £1,195.14

    47.3 Total interest **£5,139.54**

EJ Maxwell

Date: 25 July 2022

Sent to the parties on:

8 August 2022
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For the Tribunal Office:
T Cadman
……..……..