



EMPLOYMENT TRIBUNALS

Claimant: Richard Brown

Respondent: The Church of England Children's Society

Heard at: Manchester **On:** 21 April 2022

Before: Employment Judge Ord

Representation:

Claimant: In Person
Respondent: Mr G Baker (Counsel)

RESERVED JUDGMENT REMEDY

1. As compensation for unfair dismissal, the respondent is ordered to pay the claimant a compensatory award of **£39,867.59** (including £400.00 for loss of statutory rights).
2. The tribunal makes no basic award.
3. The required recoupment information is set out below in the final section of these reasons.

REASONS

Issues

1. The claimant does not seek reinstatement or re-engagement.
2. The issues for the tribunal are:

Polkey

2.1. Whether there was a chance the claimant would have been fairly dismissed anyway if a fair procedure had been followed;

2.2. If so, whether the claimant's compensation should be reduced and if so, by how much;

Contributory Fault

2.3. Whether the claimant contributed to his dismissal by blameworthy conduct;

2.4. If so, whether it would be just and equitable to reduce the claimant's award;

2.5. If so, by how much;

Mitigation

2.6. Whether the claimant took reasonable steps to mitigate his loss;

2.7. If not, what impact this has on his compensatory award.

Basic Award

2.8. What basic award is payable to the claimant, if any?

Compensatory Award

2.9. What compensatory award is payable to the claimant, if any?

There was a dispute about whether or not the claimant should be paid any compensation for loss of earnings.

Statutory Rights

2.10. What award, if any, should be made for loss of statutory rights?

Evidence

1. The tribunal had before it the following documents:

- Bundle from the liability hearing on 14-15 April 2021(lb);
- Bundle from the remedy hearing on 21 April 2022 (rb);
- Witness statement bundle from the liability hearing;
- Witness statement bundle from the remedy hearing.

2. The tribunal heard evidence on oath from the claimant, and from Mr Dickinson for the respondent.

Findings of Fact

Facts relevant to Polkey

Contractual and Policy Documents

The Organisational Change Policy

3. Relevant parts of the Redeployment section (lb 68-70) state:

8.2 The Children's Society will do all that is reasonably practicable to provide staff at risk of redundancy with access to redeployment opportunities and suitable alternative employment. Whether a job is suitable depends on:

- how similar the work is to your current job
- the terms of the job being offered
- your skills, abilities and circumstances in relation to the job
- the pay (including benefits), status, hours and location

8.3.....Employees at risk of redundancy have priority status for available posts within The Children's Society and will be considered in accordance with the Redeployment procedure below.

8.4 Redeployment Procedure

8.4.2 Employees "at risk" will be given preferential consideration in respect of vacant posts within The Children's Society. This means.....departments must interview/consider employees at risk of redundancy before any other candidates, provided that the employee is able to meet the essential criteria for shortlisting for the post.....This must occur before any other candidates are invited for interview.

8.4.4 Employees will be assessed against the essential criteria (as set out within the person specification) for the post. This assessment process will include a behavioural based interview, and may include an assessment..... If the at risk employee meets (or best meets if there is more than one at risk employee being considered) those criteria, they will be appointed to the post subject to a trial period (see below). In the event that the assessment panel concludes that an individual is not suitable, the Chair of the panel will be required to provide objectively justifiable reasons for reaching that decision.

8.4.5 If the interview confirms that the candidate meets all the essential criteria for the post, or could do so with reasonable retraining, they should be offered the post on a trial basis.

8.4.7 Should the selection panel decide for any reason not to offer a vacancy to a candidate in the above categories, the panel must be able to show that the reason for its decision was clearly based on a comparison of a candidate's skills, abilities and experience with those required for the post. Full records of the selection process must be returned to HR.

8.7 Pay protection

8.7.1 Employees who are redeployed to a suitable post on a salary point lower than the post from which they have been made redundant will be eligible for full pay protection of their actual current salary for 12 months from taking the new post.....

8.8 Trial periods

8.8.2 The trial period will give both employee and the manager an opportunity to assess whether the new job is suitable.

Job Evaluation for Relationship Officer - Trusts

4. The respondent's Pay and Grading Validation Panel Toolkit had a grading structure for posts from A to F, with A being the highest (rb pp 209). The skill levels were set out at Factor 1A (rb p212) with 12 being the most demanding.
5. The Job evaluation (rb p 203) shows that the Relationship Officer post was evaluated at Grade D, as it scored 291 points. This was a grade lower than the claimant's outgoing post. The skill level was graded 4, which read:

“ Requires practical (on the job training) to develop experience in order to undertake a broader range of tasks. The work is becoming more detailed and complex, but the job holder is unlikely to be the subject area specialist. Job holders may be required to undertake some supervisory responsibilities at this level.”

Job Description for Relationship Officer - Trusts

6. The Job Description (lb 73-78; rb 134-139) indicated that the Job purpose was to support Relationship Managers across the Philanthropy and Partnerships team with supporter engagement and income generation.
7. There was nothing within the job description that was referenced as “essential criteria”, although the section on “Attainments” and “Key Behaviours” were tantamount to requirements for the job.
8. Within the “Attainment” section there was a list of skills, experience and knowledge which the candidate had to demonstrate they had to be considered for the post.
9. There were 11 skill requirements including:
 - A good working knowledge of using a database to manage the trust, foundation and major donor portfolio and pipeline (Preferably Raisers Edge)
10. There were 7 experience requirements including:
 - Securing funds from trusts, foundations or individuals for a philanthropic cause;

- Developing and successfully managing high quality internal and external relationships.

11. There were 2 knowledge requirements including:

- A working knowledge of how trusts and major donor fundraising works, including all key stages of cultivation: research, approach, relationship management.

12. Within the Key Behaviours sections there were a number of boxes setting out about 19 different behaviours in total. There is no suggestion that the claimant did not meet the behaviour requirements.

13. There was also a section entitled “Key activities” but this did not set out criteria or requirements for the job. It included:

“To develop a solicitation programme of high quality, restricted and unrestricted approaches via proposals and thematic mailings for small-medium sized trusts (under £20k) and major donors (under £5k).”

Job Advertisement for Relationship Officer

14. The advertisement for the job (lb pp 79-80; rb pp140-141) set out what the roles would be. These included:

“Researching a strong portfolio of eligible trusts and foundations; developing a solicitation programme of high quality, restricted and unrestricted approaches via proposals and thematic mailings for small-medium sized trust (under £20k), and major donors (under £5k).”

15. The job requirements were set out as follows:

- Excellent communication skills both written and verbal
- Excellent time management skills and the ability to deliver results on time
- Excellent social skills, being able to pick up conversation with new donors or trusts at any opportune moment
- A keen attention to detail and accurate administrative skills
- Ability to speak with confidence, both in person and via telephone, when seeking information from trusts or major donors and internal colleagues
- Excellent knowledge and literacy of applications including Microsoft Word, PowerPoint and Outlook; and being able to use Excel to manage, manipulate and sort data
- A good working knowledge of using a database to manage the trust, foundation and major donor portfolios and pipeline (Preferably Raisers Edge).

Correspondence

16. After the claimant discovered from the Internal Vacancies Site on 19 February 2020 that he had been unsuccessful in securing the

Relationship Officer position, he asked for reasons for the decision. This resulted in an exchange of e-mails. Initially no reasons were forthcoming.

17. Consequently, on 26 February at 12.01 he wrote to Helen Leadbitter, his line manager, informing her that, as he had received no feedback, he was appealing the decision to make him redundant. He said that, in the event he were forced to leave, he would have been unfairly dismissed. He also indicated that the decision not to explore his application for redeployment and not to give feedback was in breach of the Organisational Change Policy.

Essential criteria

18. In response, Victoria Jones, the HR Business Partner, e-mailed the claimant on 26 February at 17.13 (lb pp 193-195) purporting to set out the "essential criteria" for the role, which she said were:

1. Knowledge of the philanthropic cultivation cycle and structure of a Trust, including research, cultivation, stewardship and relationship management.
2. Evidence of experience of supporter engagement and fundraising.
3. Evidence of experience with a record management system, with working knowledge of using a database to manage the trust, foundation and major donor portfolios and pipeline (Preferably Raisers Edge)
4. Evidence of experience in managing a portfolio of funders, develop a solicitation programme of high quality restricted and unrestricted approaches via proposals and thematic mailings for small-medium sized trusts and major donors

19. This was the first time the claimant had seen or been told of these four criteria and they had not featured in this way in the Job Description or the Job Advert. There were many more criteria in the Job Description than the four that had been selected, and some of the four were worded differently to how they had been set out in the Description and Advert.

20. Whilst criterion 3. (database knowledge) featured in both the Job Description and Job Advert requirements (albeit as a skill in the Job Description rather than an experience), criteria 1, 2 and 4 did not feature in either, but seemed to be created from a mixture of various aspects of the "Attainment" requirements listed above and the "Activities" of the Job Description and Advert .

21. Even then, there was no requirement in the Job Description or Advert for "knowledge of the philanthropic cultivation cycle" as set out in Ms Jones' criterion 1, or "evidence of experience in managing a portfolio of funders", as set out in criterion 4.

22. Ms Jones' email continued by discussing shortlisting. It said there were 16 complete applications, 2 of which were internal. 9 had progressed to interview stage, and 7 did not meet the criteria. From a rating of 0-4, the

top 2 candidates scored 4, the next 7 scored 2 or 3, and the bottom 7 scored 0. The claimant scored 0.

23. The email contained some feed back on the claimant's application, which is the only record available. It said:

"The application focused on senior leadership skills and experience, project delivery management skills and experience, and delivery against organisational strategy, however these are not required for this mainly administrative, systems/data input, prospect research, low financial value application writing position."

24. The other internal candidate, apart from the claimant, was successful in securing the role. There was no suggestion that s/he was at risk of redundancy.

25. On the 27 February the claimant emailed Victoria Jones at 8.45 (lb pp191-192) complaining that his redeployment application had not been considered in accordance with the respondent's obligation to protect the employment of those at risk. He reminded Ms Jones that he had changed roles a number of times within the organisation and adapted quickly each time.

26. He said he had considered the advert and the role description/person spec and the four criteria she had sent him appeared as activities of the role in the advert and not "must haves". Also that her criteria did not leap out as the determining/essential ones in the Job Description. He said it appeared these four elements had been adopted as essential criteria to justify his de-selection, the focus being on what he may not be able to do rather than what he could bring to the role.

27. Ms Jones sent an email to the claimant on 27 February at 14.02 saying she had reviewed the role and she did not think it met the criteria in 8.2 of the Organisational Change Policy in the following ways:

- How similar the work is to your current job – the work is significantly different to your current role
- The terms of the job being offered – the terms are significantly lower than your current role
- Your skills, abilities and circumstances in relation to the job – there are some transferrable soft skills as you have highlighted below, however your application and CV do not demonstrate any evidence of skills or experience across the key and essential criteria for the role
- The pay (including benefits), status, hours and location – the pay and status is significantly less.

28. The claimant responded that day at 16.18 (lb p 189) saying he believed he would have been unfairly dismissed if he left through redundancy and an external candidate or internal candidate (not at risk) were employed. He confirmed he was proceeding with his appeal.

29. Also on 27 February Paul Maher, Director of High Value, reviewed the shortlisting process in relation to the claimant (lb 184) but only on the papers as originally presented. He upheld the original outcome and communicated this to Ms Jones via email that day at 16.18. Ms Jones then wrote to the claimant at 17.12 (lb p 189) confirming the result of the review and their decision that the Relationship Officer role was not a suitable alternative post.
30. The face to face appeal with Nikki Pawsey, Director of Supporter Communities and Groups, took place on 9 March. Immediately thereafter she contacted Rob Dickinson, the head of Philanthropy and Partnerships, who was responsible for recruitment to the role, and he told her the post was already filled.
31. Thereafter, on 13 March Ms Pawsey sent her Redundancy Appeal Outcome letter (lb pp 217-218) to the claimant saying that the job would not be suitable for him because he did not meet the essential criteria. She added that his application did not state how he met the skills, knowledge and experience criteria and that he needed to meet them before proceeding to the next stage.
32. However, this assessment was done in hindsight after the successful candidate had been appointed. The successful candidate was appointed before the claimant was given an opportunity to demonstrate his abilities and what transferable skills he had.

Recruitment Records

33. There were no records of the shortlisting available to the claimant or the tribunal, as the respondent said they were removed by the automated computer system. Neither did the respondent provide any interview notes for the post, despite the claimant asking for them.
34. Consequently, there is no evidence to demonstrate how the job criteria had been used to select candidates, including what questions had been asked of them, and how they were scored.
35. The respondent's Safer Recruitment and Selection Policy at paragraph 9.6 (rb p 990) states that recruitment information for unsuccessful candidates is usually kept for 6 months or until the next planned audit, whichever is longer. For successful candidates, it should be kept for as long as they remain in employment with the respondent. The respondent's electronic "arcu" system (lb p296) indicates that, by default, application data is archived after 365 days.
36. The respondent did not explain why the relevant records had not been kept, despite being put on notice by the claimant early on that he had concerns about the process.

Experience

Previous Incumbent

37. It is not disputed that the previous incumbent to the role had less relevant experience when she was appointed, than the claimant. At that time, she joined the respondent organisation from being a Retail Associate. Nonetheless, she progressed to promotion from Relationship Officer to Philanthropy Manager after 18 months in post (see rb p 969).

Claimant

38. By contrast, the claimant had worked for the respondent for 5 years, initially as an HR Business Partner from March 2015, and then from October 2017 as a Service Manager, which involved learning new skills. From February 2019 he was the Children of Alcohol Dependent Parents (CADeP) Project Lead.

39. The job description for the CADeP role (rb pp 970-973) included the following essential requirements:

- Extensive Partnership Management
- Extensive knowledge of the funder/delivery organisation relationship
- Relationship building within and outside of The Children's Society
- Significant relationship and stakeholder management
- Significant experience of engaging and working with senior staff, politicians and external stakeholders

40. Although the claimant's job application did not set out his full experience (for the reasons set out in the liability judgment of 19 April 2021), he demonstrated to the tribunal that he did actually have significant experience in related areas of work.

41. The claimant's evidence of relevant experience was not disputed and demonstrated qualities required for the Relationship Officer role. Specific examples included instigating a meeting with the Chief Executive Officer of Alcohol Concern and following it up with meetings between the CEO and key stakeholders of the respondent.

42. Another instance was his development of relationship building with Oglesby, and attending face to face reviews during 2017-2018. Even after he had moved on to the CADeP role in February 2019, he was asked to assist with the final evaluation report for the Oglesby Trust, due to his good communication skills and ability to interpret data. The report was well received.

43. In July 2019 he designed and presented a Webinar to over 150 participants, resulting in further interest in the work of the CADeP project and of the respondent in general.

44. The claimant also had experience with databases and had evaluated, purchased, designed and implemented a self service HR database in a large national charity. He designed and developed a range of modules to ensure managers and employees could record and store important and sensitive data. In his previous role as HR Business Partner for the respondent, he became proficient in interrogating the Cascade database.

45. Nevertheless, Robert Dickinson gave evidence that he would not have appointed the claimant to the role of Relationship Officer, even if he had been invited to interview. He said he based his view on the claimant's oral evidence at the tribunal hearing and the evidence in the claimant's witness statement.
46. He did concede that the claimant had relevant experience of relationship management with the Oglesby trust, who was a pre-existing donor. However, he said there was a big difference between that and cultivating relationships with "cold" potential funders.
47. He also agreed that the claimant's experience in networking at the Bournemouth Conference and managing the Children's Society market stall was relevant experience in relation to relationship management. However, he said it did not involve fundraising and was not comparable to researching and cultivating funding organisations.
48. He acknowledged that ,during the claimant's employment with the respondent, the claimant had transferred his skills from a HR role to that of Cape Project Lead. However, he said this did not involve researching new sources of funding.
49. The claimant had experience in Customer Relationship Management (CRM) databases but not Raisers Edge. Mr Dickinson said that experience of Raisers Ede was vital to the role. All candidates had to demonstrate proficiency at using CRM databases.
50. In cross examination and in answer to a question about the claimant's previous work relative to the role, Mr Dickinson said what the claimant had produced was definitely useful. He also admitted that the claimant had a broad range of skills.

Successful Candidate

51. Mr Dickinson said that the successful applicant was able to demonstrate, through his roles with the respondent and work in Tanzania, his experience of supporter engagement and experience writing for a fundraising audience. He went on to say he showed an ability to successfully fundraise from potential donors and had significant experience in Raisers Edge.
52. Mr Dickinson said the claimant would not have scored anywhere as highly as the top two candidates for the role, and therefore he would not have been offered the Relationship Officer role.

Facts relevant to Contributory Fault

53. There was another role the claimant could have applied for at the respondent organisation, namely that of Equality, Diversity and Inclusion Manager. This was casually mentioned to him by Kelly Harding, an HR Business Partner who he was friendly with, whilst waiting to go into his redundancy appeal meeting. There was no formal suggestion by the respondent at the time that he should apply.

54. The claimant did not believe it was a post he could consider for several reasons.
55. First, the Job Description (rb pp81-86) and Job Advert (rb pp87-88) contained specific requirements that he did not possess, namely:
- A thorough and up-to-date knowledge in the field of Equality, Diversity and Inclusion, both from a legislative perspective and trends within the business and media.
 - A good understanding of Equality, Diversity and Inclusion business models, particularly within the third sector.
 - Experience of working within the confines of government legislation and with sensitive information; strong knowledge of GDPR and gender pay reporting.
 - Experience of providing and analysing management information related to ED&I.
56. Secondly, there had been issues with certain members of staff in the Greater Manchester Area and the claimant did not want to return there.
57. Thirdly, the role involved travel across a wide geographical area, which did not suit the claimant as he had child minding responsibilities.
58. For these reasons he chose not to apply for the post.

Mitigation

59. The claimant was made redundant in March 2020, as the Coronavirus pandemic hit the country. During the first few weeks of unemployment, he concentrated on applying for benefits, registering with job agencies and web sites and updating his CV.
60. He also had child minding responsibilities during lockdown when schools were closed, and could not call upon his parents to help, as they were shielding. He shared these responsibilities with his estranged wife, who was a nurse, and under considerable pressure to work during the pandemic.
61. After changing career in 2017 from HR to the Third Sector, he hoped to stay in the Third Sector. However, few suitable jobs of any type were being advertised at this time, and the claimant signed up for alerts for HR posts as well, such as with Total Jobs for HR posts on 1 April 2020.
62. More jobs became available in late summer. He made numerous applications for a range of jobs including HR posts, but there were few responses. He also asked friends for help with his job search.
63. In October 2020, the claimant changed his CV, putting in key words that might promote his applications with agencies that use algorithms. He made many more applications, which resulted in a number of interviews, but no offers of employment.

64. In March 2021, he was offered a contract as an associate Consulting Business Partner with Clover HR, starting April 2021. The work involved building up his own client base. After his appointment on 1 April 2021, he stopped searching for work. Since then, he has been concentrating on building up this work.
65. Since being made redundant, the claimant claimed Universal Credit. He still needed to rely on this benefit whilst building up his work with Clover and was still claiming at the time of this remedy hearing.
66. The respondent did not suggest there were any particular roles the claimant ought to have applied for after being made redundant. There was no evidence of any vacancies available to the claimant with other employers, which, if taken, would have reduced his losses.

Future Loss of Earnings

67. The claimant started work with Clover HR on 1 April 2021 and by July 2021, his schedule of loss suggests he was earning between £1,000 and £1,500 per month. His income would increase as he built up his client base. By the date of the remedy hearing on 21 April 2022, he was still reliant on benefits.
68. However, the claimant now has the opportunity to earn more, as reflected in his schedule of loss, which states on page 4:
69. *“As the volume of my work increases I am receiving less Universal Credit and so at the moment I am finding it difficult to earn more than £1,500 per month.”*

Respondent’s submissions

Polkey

70. There was no chance that the claimant would get the Relationship Officer role. Rob Dickinson, Nikki Pawsy, Paul Maher and Victoria Jones all came to this conclusion. He would have been dismissed in any event. For the tribunal to award a compensatory award, it would have to conclude that there was a chance the claimant would have been appointed to the role over the successful, internal candidate.

Contributory Fault

71. The respondent says the claimant was qualified for the role of Equality, Diversity and Inclusion Manager and should have applied for it. He never enquired about the travel and whether it could be adjusted.

Mitigation

72. The respondent submits that the claimant’s failure to apply for the role of Equality, Diversity and Inclusion Manager, also demonstrates a failure to mitigate his losses.

73. Furthermore, it says the claimant cannot show any job applications from April, May and June 2020 and he stopped applying when he got the position with Clover. Therefore, he started too late and stopped too soon. He was also unreasonably picky about the jobs applied for and should have broadened his search more. He could have fully mitigated his loss and found alternative employment.

The Law

Statute

74. Section 119 of the Employment Rights Act 1996 (ERA) sets out provisions for calculating the **basic award**. For an employee who was not below the age of 41 years throughout his employment, it amounts to one and half week's pay for each year of employment.

75. Section 122 ERA – Basic award reductions

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

(4) The amount of the basic award shall be reduced or further reduced by the amount of –

(b) any payment made by the employer to the employee on the ground that the dismissal was by reason of redundancy.

76. Section 123 ERA deals with the **compensatory award** and provides:

(1) Subject to the provisions of this section and sections 124, 124A and 126, 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 complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

(4) 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...

(6) Where the tribunal finds that the dismissal was to any extent caused or contributed 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.

(7) If the amount of any payment made by the employer to the employee on the ground that the dismissal was by reason of redundancy exceeds the amount of the basic award which would be payable but for section 122(4), that excess goes to reduce the amount of the compensatory award.

77. Section 124 sets out limits of compensatory awards made under section 123. For dismissals between 6 April 2019 and 5 April 2020 the award must not exceed the lower of £86,444 or 52 weeks gross pay.

Case Law

78. Where an employer has failed to follow procedures, the tribunal, when determining any compensatory award under section 123(1) of ERA, must ask itself what would or might have happened if a fair procedure had been followed. This involves an element of speculation. The proposition comes from the case of **Polkey v AE Dayton Services Ltd** [1988] ICR 142, HL, which held that where there is an unfair dismissal on procedural grounds, compensation may be reduced to reflect the likelihood that the employee would have been dismissed in any event had a proper procedure been followed.

Cases relied upon by claimant

79. The claimant referred the tribunal to the following case law, extracts of which are more fully set out in the claimant's closing submissions.
80. **Cooper Contracting Limited v Lindsey**, [2016] ICR D3, EAT which states that the burden of proof in showing a failure to mitigate lies with the employer. Therefore, if no evidence of any failure to take reasonable steps to find another source of income is brought by the employer, the tribunal is under no obligation to (and generally will not) take lost opportunities to mitigate into account against the employee. The employee must be shown to have acted unreasonably. That is a different test from him showing that what he did was reasonable. The tribunal is not to apply too demanding a standard to the victim.
81. **Savoia v Chiltern Herb Farms Ltd** [1981] IRLR 65, EAT – The duty to mitigate only arises after dismissal, so refusing offers made before employment was terminated cannot amount to a failure to mitigate.

82. The respondent says that *Savoia* is distinguishable in cases involving redundancy.

Cases relied upon by respondent

83. The respondent referred the tribunal to the following case law, extracts of which are more fully set out in the respondent's closing submissions.
84. **Software 2000 Ltd v Andrews and others** [2007] ICR 825 where the following principles emerge:
- (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 procedure been followed...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.

- (3) 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. The tribunal 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.

85. **Thornett v Scope** [2007] ICR 236 - the Court of Appeal held that:

“The employment tribunal’s task, when deciding what compensation is just and equitable for future loss of earnings, will almost inevitably involve a 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”.

Discussion, Calculations and Conclusions

Polkey

86. Had the respondent followed its own policy and procedures, it would have given the claimant preferential consideration and interviewed him ahead of all other candidates, as he was the only one at risk of redundancy. This is clearly set out in The Organisational Change Policy at paragraphs 8.3 and 8.4.2. His assessment would not have been restricted to the papers and, at this stage, other candidates would not have been considered.
87. According to the Policy at 8.4.5, if an at risk employee could meet the essential criteria with reasonable training, they should be offered the post on a trial basis. Therefore, even if the successful candidate had been more suitable for the position, he would not have been considered, if the claimant could meet the essential criteria with reasonable training.
88. If the Policy were followed, the claimant would have undergone a behavioural based interview and been assessed against the requirements set out in the Job Description, and as reflected in the Job Advert. He would not have been assessed against the 4 non-transparent criteria, which were only produced after he raised the potential of unfair dismissal.

89. In undertaking his interview, the claimant's relevant experience would have been properly considered. From his time working with the respondent, he would have demonstrated that he had significant relevant experience and transferable skills, as conceded by Rob Dickinson, who was in charge of the recruitment. The respondent did not deny that he had more experience than the previous incumbent when she was appointed.
90. Mr Dickinson would have considered the claimant's transferable skills and whether reasonable training might have resolved any deficiencies. With a face to face interview and a proper assessment, Mr Dickinson would have discovered that the claimant had significant transferable skills, and that he had previously picked up new skills successfully when changing roles within the organisation.
91. Although the respondent said the claimant was unsuitable for the position, nobody gave a full explanation as to why. This is contrary to the Policy, which at 8.4.7 indicates that the reason for not offering an at risk candidate the job must be clearly based on a comparison of the candidate's skills, abilities and experience with those required for the post. The situation is compounded by the absence of any shortlisting or interview records, (apart from the cursory feedback from Ms Jones), which breaches the Safer Recruitment and Selection Policy.
92. Both Victoria Jones and Paul Maher simply based their comments on the claimant's written application, which, for reasons given in my liability judgment, was unfair. Whilst Nikki Pawsey on appeal listened to the claimant face to face, after speaking to Rob Dickinson, she ultimately based her decision on the claimant's written application, once she knew the vacancy had already been filled.
93. At the time, Rob Dickinson also based his decision solely on the application. However, in giving evidence to the tribunal, he said he would not have appointed the claimant, even if he had been invited to interview, based on the claimant's oral evidence at the tribunal and his witness statement. Nonetheless, listening to the claimant in the adversarial forum of the tribunal is not the same as conducting a job interview, and by this time positions had become entrenched in litigation.
94. The main reasons the respondent said he was unsuitable for the job were that he had no experience of developing relationships from cold with new potential fundraisers, and he did not have experience of the Raisers Edge data base. However, there was nothing in the Job Description or Job Advert to suggest that such experience was essential. Whilst a working knowledge of Raisers Edge was preferable, it was not a requirement.
95. The claimant had experience of general fundraising with existing funders and, indeed, an essential requirement for his role as CAdEP Project Lead was to have "extensive knowledge of the funder/delivery organisation relationship". He was also a skilled database user and had designed and developed database modules.

96. The Relationship officer role was a grade lower than the CADeP Project Lead, and at skill grade 4 it envisaged giving on the job practical training to develop experience. Consequently, as he had already held a more highly graded job, and given his ability to pick up and change roles at the organisation, it is likely he would have been able to successfully master this one. The fact that the claimant had pay protection for 12 months at the higher grade was irrelevant to the recruitment decision.
97. Had the respondent properly considered the claimant's experience, knowledge and skills against the requirements for the job, from the evidence before me, it is likely that they would have found he could have met them with reasonable training. Consequently, if the correct procedure had been reasonably followed and his suitability fairly assessed, it is likely he would have been offered the role.
98. However, there is still a chance the respondent would have considered the claimant unsuitable, possibly because of his lack of experience of developing potential relationships with new funders from cold, and/or due to his lack of knowledge of Raisers Edge. I assess this chance at 20%. Consequently, I make a 20% Polkey reduction.

Contributory Fault

99. Whilst the respondent says the claimant should have applied for the role of Equality, Diversity and Inclusion Manager, it was never formally suggested to him at the time.
100. The respondent says the claimant was qualified for the role, yet the claimant did not possess the knowledge and experience of Equality, Diversity and Inclusion, that were specific requirements of the Job Description.
101. Furthermore, the job involved travel and the claimant had child minding responsibilities which would be affected by this.
102. Under these circumstances, the claimant did not act unreasonably in not applying for the role. This was not blameworthy conduct and does not merit any reduction in compensation.

Mitigation

103. As stated above, the claimant did not act unreasonably in not applying for the Equality, Diversity and Inclusion Manager role.
104. After his redundancy, there were few jobs to be had because of lockdown from March 2020 until late summer. Moreover, the claimant had child minding responsibilities during the school shutdown and this impacted on his ability to work. He nonetheless registered with job agencies during this time, and made numerous applications from the summer onwards.
105. He did not restrict his applications to the Third Sector and broadened them out to HR roles from early on in the process. He was not "picky" in what he applied for. It was reasonable for him to stop applying for jobs

once he secured a position with Clover, as he was using his time to build up his client base.

106. There is no evidence to suggest that, by taking reasonable steps, the claimant would have reduced his losses. Therefore, for the reasons given, the claimant adequately mitigated his losses.

Calculations

Preliminary

Employment Start date – 23.3.2015; End date – 30.3.2020;
5 years service.

Aged 52 at Effective Date of Termination (EDT)

Gross annual pay - £36,612.00; Gross weekly pay - £704.08;

Net weekly pay - £508.51

Employer pension contributions per week - £112.66
(Respondent confirmed it could not rebut)

Enhanced redundancy payment received - £7,921.46

The basic award

Cap on gross weekly pay at EDT was £525.00

$1.5 \times 5 \times 525 = 3,937.50$

This is extinguished by the redundancy payment, and so there is no basic award.

The compensatory award

Cap is 52 weeks gross salary or £86,444.00 as at EDT

Cap is $52 \times (704.08 + 112.66) = \text{£}42,470.48$

52 x (weekly gross wage + weekly pension)

University of Sunderland v Drossou 2017 ICR D23 EAT - Employer pension contributions are included in the definition of a week's pay

Immediate loss of earnings between day after EDT and remedy hearing

31.3.20 to 21.4.22 = 751 days or 107 weeks and 2 days

107.286 x 508.51 (net weekly wage) = £54,556.00 net wages

107.286 x 112.66 (weekly pension) = £12,086.84 pension

Total loss - £66,642.82

Future loss of earnings

As at the date of the remedy hearing, the claimant had been working for just over a year with Clover HR, and a year is enough time to build up sufficient work to prevent any further losses. Consequently, I make no award for future earnings.

Deductions

Digital Equipment Co Ltd v Clements (No.2) sets out order of deductions.

First calculate total loss, then adjust. The order of deductions, so far as relevant to this case is:

- 1- Contractual or ex gratia payments
- 2- Mitigation earnings
- 3- Polkey (if procedurally unfair)
- 4- Excess contractual redundancy
- 5- Gross up
- 6- Statutory cap

1- *Contractual*

Payment into Nest pension scheme = £156.98

2- *Mitigation earnings*

Income from work with Clover HR:

Up to 30.6.21 = £9,717.32.

From 1.7.21 to 21.4.22 = 294 days or 42 weeks

@ £1,500 per month or £346.15 per week

42 x 346.15 = £14,538.30

3- *Polkey*

£66,642.82 (total loss) – (14,538.30 + 156.98) = £51,947.54
(14,695.28)

Taking account of 20% reduction:

80% x 51,947.54 = £41,558.03

4- *Excess contractual redundancy*

The excess contractual redundancy payment is then deducted.

Excess = 7,921.46 (total redundancy payment) - 3,937.50 (used to extinguish basic award) = £3,983.96

41,558.03 – 3,983.96 = £37,574.07

5- *Gross Up*

The first £30,000 is tax free. The balance is subject to the claimant's marginal rate of tax, which is 20%. Therefore £7,574.07 is grossed up.

80% = 7,574.07

100% = 7,574.07/80 x 100 = 9,467.59

Total compensatory award 30,000 + 9,467.59 = **£39,467.59**

6- *Cap*

As the compensatory award is below the cap, there is no adjustment in this respect.

Loss of statutory rights

It would be just and equitable to award **£400.00** for loss of statutory rights, to reflect the five years continuous employment the claimant had with the respondent.

Recoupment

The Employment Protection (Recoupment for Jobseeker's Allowance and Income Support) Regulations 1996 take effect because the claimant claimed Jobseeker's Allowance and Universal Credit. Jobcentre Plus will inform the respondent of how much it must deduct from the compensatory award in order to reimburse the state for benefits paid. The balance will then be paid to the claimant.

Only the loss of wages element of the compensatory award forms the prescribed element for recoupment purposes and therefore the pension loss needs to be separated out to obtain the correct figure.

Loss of wages = 54,556.00

Income from subsequent work = 14,695.28

Balance = 39,860.72

Take account of 20% Polkey reduction = 80% x 39,860.72 = 31,888.58

Minus excess redundancy: 31,888.58 - 3,983.96 = 27,904.62

Summary

The Prescribed Element is **£27,904.62**

The total monetary award is **£39,867.59** (£39,467.59 + £400.00)

Case No:2406253/2020

The excess of total monetary award over the prescribed element is:
£11,962.97

The Prescribed Period is 31 March 2020 to 21 April 2022;

Employment Judge Liz Ord

Date 9 September 2022

JUDGMENT SENT TO THE PARTIES ON

14 September 2022

FOR THE TRIBUNAL OFFICE



NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990 ARTICLE 12

Case number: **2406253/2020**

Name of case: **Mr R Brown** v **The Church of England
Children's Society**

Interest is payable when an Employment Tribunal makes an award or determination requiring one party to proceedings to pay a sum of money to another party, apart from sums representing costs or expenses.

No interest is payable if the sum is paid in full within 14 days after the date the Tribunal sent the written record of the decision to the parties. The date the Tribunal sent the written record of the decision to the parties is called **the relevant decision day**.

Interest starts to accrue from the day immediately after the relevant decision day. That is called **the calculation day**.

The rate of interest payable is the rate specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as **the stipulated rate of interest**.

The Secretary of the Tribunal is required to give you notice of **the relevant decision day**, **the calculation day**, and **the stipulated rate of interest** in your case. They are as follows:

the relevant decision day in this case is: 14 September 2022

the calculation day in this case is: 15 September 2022

the stipulated rate of interest is: 8% per annum.

For the Employment Tribunal Office

Claimant: Mr R Brown

Respondent: The Church of England Children's Society

**ANNEX TO THE JUDGMENT
(MONETARY AWARDS)**

Recoupment of Benefits

The following particulars are given pursuant to the Employment Protection (Recoupment of Benefits) Regulations 1996, SI 1996 No 2349.

The Tribunal has awarded compensation to the claimant, but not all of it should be paid immediately. This is because the Secretary of State has the right to recover (recoup) any jobseeker's allowance, income-related employment and support allowance, universal credit or income support paid to the claimant after dismissal. This will be done by way of a Recoupment Notice, which will be sent to the respondent usually within 21 days after the Tribunal's judgment was sent to the parties.

The Tribunal's judgment states: (a) the total monetary award made to the claimant; (b) an amount called the prescribed element, if any; (c) the dates of the period to which the prescribed element is attributable; and (d) the amount, if any, by which the monetary award exceeds the prescribed element. Only the prescribed element is affected by the Recoupment Notice and that part of the Tribunal's award should not be paid until the Recoupment Notice has been received.

The difference between the monetary award and the prescribed element is payable by the respondent to the claimant immediately.

When the Secretary of State sends the Recoupment Notice, the respondent must pay the amount specified in the Recoupment Notice to the Secretary of State. This amount can never be more than the prescribed element of any monetary award. If the amount is less than the prescribed element, the respondent must pay the balance to the claimant. If the Secretary of State informs the respondent that it is not intended to issue a Recoupment Notice, the respondent must immediately pay the whole of the prescribed element to the claimant.

The claimant will receive a copy of the Recoupment Notice from the Secretary of State. If the claimant disputes the amount in the Recoupment Notice, the claimant must inform the Secretary of State in writing within 21 days. The Tribunal has no power to resolve such disputes, which must be resolved directly between the claimant and the Secretary of State.