EMPLOYMENT TRIBUNALS

Claimant: Mr A Lawton

Respondent: Crystal Ball Limited

Heard at: Liverpool (by CVP) **On:** 27 June 2022

Before: Employment Judge Benson
Members: Mr J King
Ms S Moores-Gould

Representation
Claimant: Ms A Travers – the claimant's partner
Respondent: Mr J French - Counsel

JUDGMENT ON REMEDY having been sent to the parties on 7 July 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Issues

1. The hearing listed on 27 June 2022 was to determine the claimant's remedy following the Tribunal's findings of constructive unfair dismissal and disability discrimination in its judgment sent to the parties on 25 May 2021. The claimant seeks compensation for his financial losses, injury to his feeling and personal injury. He has provided an updated schedule of loss. The respondent contends that the claimant has not mitigated his loss, and further that any award should be reduced under the **Polkey** principles set out below and on the basis that the claimant caused or contributed to his dismissal. Mr French contends that in this case any award in respect of financial losses should be assessed under the finding of unfair dismissal as opposed to discrimination. He makes the point that the claimant's dismissal was not pleaded as an act of discrimination and that only some of the claimant's allegations were proved.

Evidence and submissions

2. Evidence was heard from the claimant and he was cross examined by Mr French. The tribunal also had reference to the original witness statements and bundle of documents used at the liability hearing. Submissions were made by both parties.

The Law on Remedy

Unfair Dismissal

3. There were three remedy issues which arose: a Polkey reduction, the ACAS Code of practice, and contributory fault.

Polkey

4. The first arose because of the nature of a compensatory award for unfair dismissal under section 123(1) of the 1996 Act:

> **"(1) Subject to the provisions of this section and sections 124 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."**

5. It has been established since **Polkey v A E Dayton Services Limited [1988] ICR 142** that in considering whether an employee would still have been dismissed even if a fair procedure had been followed, there is no need for an all or nothing decision. If the Tribunal thinks there is doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the normal amount of compensation by a percentage representing the chance that the employee would still have lost his employment. Although this inherently involves a degree of speculation, Tribunals should not shy away from that exercise. A similar exercise was also required by what was then section 98A(2) (part of the now repealed statutory dispute resolution procedures), and the guidance given by the Employment Appeal Tribunal in paragraph 54 of **Software 2000 Limited v Andrews [2007] IRLR 568** remains of assistance, although the burden expressly placed on the employer by section 98A(2) is not to be found in section 123(1):

> **"(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.

(5) An appellate court must be wary about interfering with the Tribunal's assessment that the exercise is too speculative. However, it must interfere if the Tribunal has not directed itself properly and has taken too narrow a view of its role.

(6) The s.98A(2) and Polkey exercises run in parallel and will often involve consideration of the same evidence, but they must not be conflated. It follows that even if a Tribunal considers that some of the evidence or potential evidence to be too speculative to form any sensible view as to whether dismissal would have occurred on the balance of probabilities, it must nevertheless take into account any evidence on which it considers it can properly rely and from which it could in principle conclude that the employment may have come to an end when it did, or alternatively would not have continued indefinitely.

(7) Having considered the evidence, the Tribunal may determine

(a) That if fair procedures had been complied with, the employer has satisfied it - the onus being firmly on the employer - that on the balance of probabilities the dismissal would have occurred when it did in any event. The dismissal is then fair by virtue of s.98A(2).

(b) That there was a chance of dismissal but less than 50%, in which case compensation should be reduced accordingly.

(c) That employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself, as in the O'Donoghue case.

(d) Employment would have continued indefinitely.

However, this last finding should be reached only where the evidence that it might have been terminated earlier is so scant that it can effectively be ignored."

ACAS Code of Practice on Discipline and Grievance Procedures

6. Section 207A(2) TULR(C)A provides that: 'If, in any proceedings to which this section applies, it appears to the employment tribunal that — (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies, (b) the employer has failed to comply with that Code in relation to that matter, and (c) the failure was unreasonable, the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25 per cent.

7. By virtue of S.124A ERA, it is clear that, for the purposes of unfair dismissal compensation, any adjustment made in accordance with S.207A only applies to the compensatory award. In other words, the adjustment — whether taking the form of an uplift in favour of the employee or a reduction in favour of the employer — does not apply to the basic award, protective award or any other type of compensation awardable by a tribunal.

Contributory Fault

8. A reduction because of contributory fault by the employee can apply both to the basic award and to the compensatory award by virtue of differently worded provisions in sections 122 and 123 respectively:

9.

> **"Section 122 (2) 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….**
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> **Section 123 (6) 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."**

10. As to what conduct may fall within these provisions, assistance may be derived from the decision of the Court of Appeal in **Nelson v BBC (No 2) [1980] ICR 110** to the effect that the statutory wording means that some reduction is only just and equitable if the conduct of the claimant was culpable or blameworthy. The Court went on to say (per Brandon LJ at page 121F):

> **"It is necessary, however, to consider what is included in the concept of culpability or blameworthiness in this connection. The concept does not, in my view, necessarily involve any conduct of the complainant amounting to a breach of contract or a tort. It includes, no doubt, conduct of that kind. But it also includes conduct which, while not amounting to a breach of contract or a tort, is nevertheless perverse or foolish, or, if I may use the colloquialism, bloody minded. It may also include action which, though not meriting any of those more pejorative terms, is nevertheless unreasonable in all the circumstances. I should not, however, go as far as to say that all unreasonable conduct is necessarily culpable or blameworthy; it must depend on the degree of unreasonableness involved."**

Discrimination

11. Awards of compensation in claims of discrimination are governed by section 124 of the Equality Act 2010 which provides that:

> **…. (2) The tribunal may—**
>
> **(a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;**
>
> **(b)order the respondent to pay compensation to the complainant;**

(c)make an appropriate recommendation.

12. The Tribunal has the same power to grant any remedy which could be granted in proceedings in tort before the civil courts. Compensation based on tortious principles aims to put the Claimant, so far as possible, into the position that he/she would have been in had the discrimination not occurred, essentially a "but for" test in causation when assessing damages flowing from discriminatory acts. **Ministry of Defence v Cannock [1994] ICR 918**

13. We were referred to the following authorities by Mr French and have considered these to the extent we feel relevant in coming to our decision: **D'Souza v Lambeth LBC [1997] I.R.L.R. 677; Whitehead v Robertson Partnership UKEAT 0378/03; Chapman v Simon [1994] I.R.L.R. 124; Al Jumard v Clywd Leisure Ltd and ors 2008IRLR345, EAT.**

14. Awards may be made for injury to the claimant's feelings arising out of the detriments as found to be proven. The purpose of an award for injury to feelings is to compensate the Claimants for injuries suffered as a result of the discriminatory treatment, not to punish the wrongdoer. **Prison Service and others v Johnson [1997] ICR 275.**

15. In accordance with **Ministry of Defence v Cannock [1994]** above, the aim is to award a sum that, in so far as money can do so, puts the Claimants in the position he or she would have been had the discrimination not taken place.

16. An Employment Tribunal should not allow its feelings of indignation at the employer's conduct to inflate the award made in favour of the Claimants. **Corus Hotels Plc v Woodward [2006] UK EAT/0536/05.**

17. Guidance was given in **Vento v Chief Constable of West Yorkshire [2003] ICR 318** as to the appropriate level of injury to feelings awards. Reference was made to three bands of awards. Sums within the top band should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory treatment. The middle band was to be used for serious cases which did not merit an award in the highest band. Awards in the lower band were appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence.

18. The bands originally set out in Vento have increased in their value due to inflation and, a further uplift of 10% given to general damages pursuant to the case of **Simmons v Castle [2012] EWCA Civ 1039**. This had given rise to Presidential Guidance which re-drew the bands as follows:

19. In respect of claims presented on or after 6 April 2019, the Vento bands were as follows: a lower band of £900 to £8,800 (less serious cases); a middle band of £8,800 to £26,300 (cases that do not merit an award in the upper band); and an upper band of £26,300 to £44,000 (the most serious cases), with the most exceptional cases capable of exceeding £44,000.

Findings and conclusions

20. The parties have agreed that the net monthly pay when the claimant was an employee of the respondent was £2,326.24. The claimant obtained new employment from shortly after his dismissal. His monthly net pay in his new employment was £2,169.82. It was agreed that the difference in the claimant's net earnings per month in his new employment, which he has continued to be employed in to date, is £158.42 per month. The claimant at the time of his dismissal was 40 years old and he had four years' continuous employment, therefore the statutory cap on any basic award applies at £525.

21. The only relevant benefit the claimant received when with the respondent, which he no longer receives was healthcare insurance. The claimant contends that to replace that healthcare cover would be £939.96 per annum. The claimant has done some research and obtained one quote. We accept that that figure is probably a reasonable figure in view of the claimant's medical health issues.

22. We have awarded financial loss as part of the unfair dismissal claim. In view of our findings on remedy, we do not consider this has any significant impact upon the amounts awarded to the claimant for his financial losses.

Financial losses and Mitigation

23. The claimant's new role is very close to his home, and his employer allows him to work from home when necessary. Although his new employment is at a lower salary, the new role has other benefits for the claimant which are valuable to him. He took the role knowing he would need to have time off for the amputation of his leg, which was supposed to be by elective surgery, but the timing of his operation became more uncertain in the Covid pandemic. His new employer is sympathetic to his condition, including in respect of time off for his recent amputation. The claimant did not look for another role once he had settled into that new employment. His reasons were his lack of confidence resulting from the impact his dismissal and his worsening condition had upon him, that it was close to his home, the understanding nature of his new employer and his knowledge that he would need to take time off in the future.

24. Now that the claimant's surgery has taken place, he intends looking for a role which will provide a salary and benefits equivalent to that which he enjoyed at the respondent. In today's job market as an IT professional, he accepts that this should be relatively easy to achieve quickly.

25. The burden is on the respondent to show that the claimant has failed to mitigate his losses. We find that the claimant's decision to take the new role at a lower salary was a reasonable step for him to take at that time and in his particular circumstances for the reasons he has stated. The respondent has not shown a failure to mitigate.

26. We consider however that he will shortly obtain a new role at an equivalent salary and we award no future losses.

27. In summary the claimant's actual loss to today's hearing we calculate at 30 months. The monthly loss is £158.42 which gives a total of £4,752.60.

28. The loss in respect of healthcare for a period of 30 months is £2,459.90.

29. We make an award of £500 in respect of the claimant's loss of his statutory rights.

Polkey

30. The respondent then says that there should be reductions under the **Polkey** principle.

31. As set out in our Judgment, we have found that Mr Singh had a discriminatory reason to remove the claimant from the business. His reasons for doing so flowed from the claimant's disability and his unhappiness with the claimant at having to accommodate adjustments for his disability. We refer to our findings at paragraph 131 of our judgment.

32. We consider that had Mr Singh not been unhappy and frustrated with the claimant for the reasons connected with his disability, and his frustrations at the adjustments he was required by law to make, he would not have gone down any form of formal investigation and disciplinary process with the claimant. Mr Singh was motivated in seeking out issues to remove the claimant from the business, and that is what we found in our Judgment. Had the claimant not had his disability and was not required to have adjustments made for him, we find that Mr Singh would not have commenced the investigations as he would not have gone looking for issues to raise against him. As such he would not have been dismissed and we find that his employment would have continued and been ongoing as at the date of this hearing.

33. If the misconduct issues had come to Mr Singh's attention without him looking for them, we accept that an employer would have good reason to investigate, particularly in view of the claimant being an IT manager and disciplinary action considered. However, we must look at whether this particular employer would have dismissed the claimant (as opposed to a hypothetical reasonable employer). We conclude that it would not have done so. We consider that Mr Singh's approach would have been to speak informally to the claimant about this issue and had he done so no formal investigation or disciplinary action would have been undertaken. As such, the claimant would not have been in the position where he was being subjected to intense and pressurised meetings over disciplinary issues for which he was being asked to provide explanations of things that happened some months ago.

34. In support of these conclusions, we note that the respondent and Mr Singh had no history of raising matters formally with the claimant. Issues such as the claimant's punctuality and indeed the punctuality of a colleague, and the lack of progress by the IT team about the change of server which was costing the respondent some considerable amounts of money, were either not dealt with or not addressed or were only informally addressed. This is evidence of an informal and relaxed approach to issues of concern with employees within the business, and was the position taken by the respondent until Mr Singh decided look for issues to raise with the claimant and to investigate more thoroughly because of the discrimination issues he had raised.

35. We are asked by Mr French to conclude that if there had been a fair disciplinary hearing, the claimant would have been dismissed. For the reasons stated, we conclude that in this case a formal investigation of the type undertaken would not have been commenced, there would have been no disciplinary hearing and the claimant would not have been dismissed. There was no suggestion put forward that his employment would have been ended for any other reason and we find it would have continued. We decline to make any reduction upon the principles set out in **Polkey**.

Contributory Conduct

36. Turning then to whether any compensatory award should be reduced because the claimant by his conduct caused or contributed to his dismissal or whether it is just and equitable to reduce the basic award.

37. In our Judgment on liability, we found that misconduct had occurred. The claimant uploaded his CV to his own personnel file and during the disciplinary process when seeking to provide an explanation, said that Mr Singh had given permission to upload the information when on balance we found that he did not. This is blameworthy conduct, but we must consider whether that caused or contributed to the claimant's dismissal. In a case of constructive dismissal, we consider what the reason was for the claimant resigning and whether his conduct caused or contributed to that. The respondent has not shown that the claimant's conduct was the reason or principal reason he was dismissed.

38. In this case the claimant relies upon the respondent's conduct which he says amounted to a fundamental breach of conduct: one relates to CCTV for which there were no findings of relevance, and the other was the discriminatory conduct being a number of allegations which we found to be proved. Only one of these discriminatory acts is the commencement of the disciplinary investigation for uploading information into the personnel records. We therefore consider to what extent the claimant's behaviour in doing that, which as we have said was blameworthy, in fact contributed to his dismissal.

39. The focus of the respondent's conduct was Mr Singh's decision that he wanted the claimant out of his business. The fact that he went looking for allegations to put to the claimant was a means to an end. His motive was that he wanted the claimant gone. His discriminatory acts and motive were the reasons for the claimant's resignation and therefore the dismissal. Although he may have had cause to investigate this issue, in that it was an allegation of serious misconduct for an IT manager, it was something that he had not pursued for some two months and we consider in any event (for the reasons we have set out) would have dealt with informally, had he not been trying to find a way of removing the claimant from the business. On this occasion Mr Singh used it to put pressure on the claimant by going through a formal disciplinary route. The claimant's conduct did contribute to his dismissal but only to a very limited extent. We assess that at 10%.

40. In respect of the basic award, we must consider to what extent it is just and equitable to reduce the award because of the claimant's conduct before his dismissal. Although the claimant's conduct in uploading the CV was blameworthy conduct and a serious matter for an IT manager, there was a lax approach by the

company to matters such that we consider that the claimant did not think anything of uploading his documents until it was brought up by the respondent. He compounded the issue by then not telling the truth to his employer when questioned about it. As set out about however, this was not the reason he was dismissed. We find that it is just and equitable to reduce the basic award and that the appropriate figure is 20%.

41. The total of the compensatory award before any reduction is £7,602.50. A 10% reduction in respect of contributory conduct is £760.25.

42. The total compensatory award made is £6,842.25.

43. The basic award for unfair dismissal was agreed at £2,100. Applying a reduction of 20% is £420.

44. The basic award made is £1,680.

Injury to Feelings

45. Turning then to an injury to feelings award. Mr French accepts on behalf of the respondent that an award in the middle Vento band is appropriate. He suggests that it should be in the range of £13,500 rather that the £18,000 initially sought by the claimant (though the claimant had increased this to the upper band in the updated schedule of loss). We accept the evidence which was given by the claimant at this hearing and the previous hearing about the impact that the respondent's actions had upon him during this employment and the ongoing issues after he was dismissed. There is contemporaneous evidence from the claimant, for example at page 714 of the bundle, telling the respondent of the impact the relentless disciplinary and investigation meetings were having upon him. He refers to being bombarded and over-whelmed which was impacting his mental health and wellbeing. That his anxiety levels were very high and that he was under referral for mental health therapy. The claimant was contending with this process and the discriminatory behaviour of Mr Singh whilst at the same time in constant pain with his leg. This was a campaign by Mr Singh which lasted a number of months to pressure the claimant, and that campaign had a significant impact upon the claimant and continues to do so. He felt worried paranoid, anxious, stressed and depressed. He had feelings of low worth and it impacted upon his confidence.

46. When assessing an injury to feelings award, we are to seek to compensate the claimant and not punish the respondent. Our focus is on the actual injury suffered by the claimant and not the gravity of the acts of the respondent.

47. In our assessment, this is not an award which merits an award in the higher **Vento** band. This was a campaign against the claimant but over the period of a few months. We agree with Mr French that an award in the middle band is the appropriate level and we consider that award should be one of £18,000 based upon the evidence.

Personal Injury

48. The claimant has been unable to demonstrate any causal link between any personal injury, primarily the exacerbation of the pain and ongoing issues with his leg

and the acts of discrimination. He has produced no medical evidence to support any personal injury claim, and we make no award in this regard.

ACAS Uplift

49. We have considered the issues put forward by Ms Travis in her submissions but find that the claimant has not shown to us where and how there was a breach of the ACAS Code. Of the issues which were raised, they were not supported by any real evidence and the majority of them were not breaches of the Code itself. We make no award in relation to the ACAS uplift.

Interest

50. Interest can be awarded on an injury to feelings award. It is appropriate in this case to award interest from the midpoint of the discriminatory acts. We calculate that midpoint to have been 12 September 2019 on the basis that the first discriminatory act was 19 July 2019 and the last one was 8 November 2019, which was the commencement of the disciplinary investigation. We note and have sympathy with Mr French's submissions that the delay in this hearing taking place caused by the administration of the Tribunal should not result in the respondent having to pay more interest to the claimant. Equally, we note that the claimant has not had the remedy or the awards that he is due in this case and there should be some compensation for that. The original remedy hearing should have taken place in mid-October 2021. For the period between that date and today's date (27 June 2022), we have awarded half of what might otherwise have be awarded.

51. Applying the court rate of 8%, interest from 12 September 2019 to 12 September 2020 is £1,440. From 12 September 2020 to 12 September 2021 is £1,440, and for 5 weeks from 12 September 2021 to 10 October 2021 (the previous remedy hearing date). Awarding half of the period between 10 October 2021 to 27 June 2022 is an additional 17 weeks.

52. We award a total interest payment of £3,489.23.

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Employment Judge Benson

Date: 3 October 2022

REASONS SENT TO THE PARTIES ON
Date: 3 October 2022

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FOR THE TRIBUNAL OFFICE

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