EMPLOYMENT TRIBUNALS

Claimant: **Mr A. Shidane**

Respondent: **Dahabshiil Money Transfer Services**

Heard at: **East London Hearing Centre (by CVP)**

On: **11 August 2021**

Before: **Employment Judge Massarella**

Representation
Claimant: Mr P. Grindley (Solicitor)
Respondent: Mr M. Howson (Consultant)

REASONS

1. The written judgment on remedy was sent to the parties on 16 August 2021. Reasons for the judgment had been given orally at the hearing on 11 August 2021. Neither party asked for written reasons, either at the hearing or subsequently. Written reasons are now provided pursuant to a request from the Employment Appeal Tribunal, by letter dated 2 November 2022.

Procedural history

2. At the liability hearing I had concluded that the Claimant was unfairly dismissed. The Respondent acted unreasonably by not consulting him earlier about the possibility of redundancy; by scoring him against pay scales that did not relate to his role; and by not informing him of its intention to create a new role of Compliance Manager, which he might have asked to be considered for, had he known about it. I concluded that each of these factors was, in itself, sufficient to render the dismissal unfair (para 63).

3. I made orders for preparation for the remedy hearing. The Respondent did not comply with any of them: it did not disclose documents, there was no counter-schedule of loss, and a witness statement was served and lodged only the day before the hearing. The Respondent also ignored correspondence from the Tribunal's legal officer on two occasions, asking if it was fully prepared for the hearing. Other than the statement from Mr Bojang, the Respondent led no documentary evidence.

4. The Claimant had served and lodged a small bundle of documents, and a witness statement, to which was attached a further single document showing

the salary scale for deputy MLROs, printed out from the 'Glassdoor' website. Although that was not the website used by the Respondent at the time (which was payscale.com), Mr Howson confirmed (having taken instruction from his client) that there was no equivalent scale for the deputy MLRO role on the payscale.com website, and that there was no objection by the Respondent to the Glassdoor scale being used for the purposes of this hearing.

The issues before me

5. Mr Howson helpfully indicated at the beginning of the hearing that the Respondent did not dispute any of the figures in the Claimant's schedule. No argument was being made that the Claimant had unreasonably failed to mitigate his losses; the Respondent accepted that his claim for losses over forty-four weeks after termination was reasonable in the circumstances, given the mental health difficulties he described in his witness statement, and the state of the job market during the pandemic. Mr Howson confirmed that the only issue before me was whether there should be a *Polkey* reduction and, if so to what extent.

6. There were two matters I was required to decide in relation to that argument: the first was whether the Claimant would have been appointed to the Compliance Manager role, had he known about it. Mr Bojang accepted that the Claimant would have been interested in the Compliance Manager position but suggested that it was possible that the Head of Compliance, Mr Bennett, who was also made redundant, may also have been interested. He accepted that 'given the decrease in salary this would have been far from certain'. Then there was the employee who was appointed to the role, Mr Abdi Hussain. Other than Mr Bojang's brief observations in his statement, the Respondent led no other evidence as to the likelihood of his appointment, had the Claimant also been considered. There was no direct evidence at all that Mr Bennett would have considered applying for the role.

7. The second question was, if the Claimant was not appointed to the Compliance Manager role, would his scores, rated against the payscale for MLROs, have meant that he would still have been made redundant from his own role?

8. Having regard to both these contingencies, Mr Howson urged upon me a Polkey reduction of 30%. Mr Grindley accepted that some reduction ought to be made to reflect contingencies but submitted that 30% was too high. He left the precise figure for me to determine.

9. Having heard evidence from the Claimant and Mr Bojang, and having read the documents to which I was referred in the remedy bundle, I make the following findings of fact and conclusions. The relevant law is set out under each sub-heading.

Should a *Polkey* deduction be made to reflect the chance the employment would have ended, had there been no unfairness?

10. The relevant principles of law relating to a *Polkey* deduction as set out in *Software v 2000 Limited v Andrews & Others* [2007] IRLR 568 at [54] are as follows, insofar as they are relevant to this case.

10.1. 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.

10.2. 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.

10.3. 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.

10.4. 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.

11. I have already found, in the liability judgment, that the Respondent acted unreasonably by not telling the Claimant about the Compliance Manager role. If he had known about it, I accept his evidence that he would have applied. In my judgment, the Respondent would have been acting unreasonably, had it refused to consider his application fairly alongside those of other employees.

12. Mr Bojang accepted in evidence that, had the Claimant applied, he would (to use his words) have ‘had the edge’ over Mr Hussain. In my judgment, that is an understatement. The Claimant had been working as a senior compliance officer, and as Deputy MLRO, for some time. He had also been deputising for Mr Bennett in his managerial role when Mr Bennett was absent. There was no evidence before me that Mr Hussain could match that experience. Nonetheless, nothing is certain in the context of a competitive interview and I accept that there was a very small possibility (no more than 10%) that Mr Hussain might have been successful.

13. I next considered the likelihood of Mr Bennett’s applying for the Compliance Manager role. I have concluded that it was exceptionally unlikely that he would have done so. Firstly, it would have meant accepting a salary cut of around half. Secondly, as I recorded in the liability judgment, unlike the Claimant, who only discovered that the new role had been created after the termination of his employment, Mr Bennett was still in the Respondent’s employment when the process for appointing the Compliance Manager was carried out. Not only did

he know about it, he remained in employment with the Respondent specifically to carry out a handover to Mr Hussain.

14. Mr Howson submitted that the Compliance Manager role had only been opened up to the pool of surviving compliance officers. I think it almost inevitable that, once Mr Howson had discovered that a new role had been created which might avoid his redundancy, if he had been interested in being considered for it, he would have told the Respondent. Given the ongoing duty on an employer to look for alternative employment during the notice period of an employee who has been selected for redundancy, I consider that the Respondent would have been acting unreasonably, if it had refused to permit him to apply for the role. I think it reasonable to infer from the fact that he did not ask to be considered for the role that he was not interested in it. However, I cannot be certain of that, and I accept that there is an extremely small chance (no higher than 5%) that he might have applied for the role. If he had, I agree with the parties that he would almost certainly have been appointed.

15. I now turn to the second matter, to which Mr Howson invites me to have regard: what would have happened had the Claimant not been appointed to the Compliance Manager role; would he still have been made redundant? That depends largely on what he would have scored in the salary category, had the correct pay scale been used. The scale which I was referred to for a Deputy MLRO showed a range from £31,000-£76,000, with an average of £48,803. The Claimant's salary at the material time was £35,000, in other words almost, but not quite, at the bottom of the scale.

16. I consider that the Respondent could not reasonably have justified assigning to the Claimant anything other than the maximum score of 4 in this category. I reach that conclusion, notwithstanding the fact that no other employee scored the maximum. Looking at the two scales which the Respondent did apply, the guidance criteria indicated that, for the compliance officer role, the highest score was to be assigned to anyone earning up to £3,000 above the bottom of the scale. For the head of compliance role, it was to be assigned to anyone earning up to £5,000 above the bottom of the scale. The Claimant was earning £4,000 above the bottom of the scale which ought to have been applied to him. I have concluded that it would have been unreasonable for the Respondent to drop him down a category in those circumstances.

17. It is accepted by both parties that, with a score of 4 against this criterion, the Claimant would not have been made redundant from his original post. Consequently, I make no reduction for contingency in relation to this argument, which in any event, would only have come into play had the Claimant not been appointed to the Compliance Manager role. As will be apparent from my findings above, I have concluded that the overwhelming likelihood is that he would have been appointed to that role.

18. I agree with Mr Grindley that a *Polkey* reduction of 30%, which is a very substantial reduction, is much too high on the evidence I have heard. Doing the best I can, and taking into account the very small chance (10%) of Mr Hussain's being appointed, and the extremely small chance (5%) of Mr Bennett's even applying for the role, I have concluded that a reduction of 15% is appropriate in the circumstances.

The Claimant's losses

19. The parties have agreed the following figures, should I find (as I have) that the Claimant would probably have been appointed to the position of Compliance Manager on a salary of £45,000 per annum:

- Net weekly salary: £650.07
- 44 weeks x £650.07 = £28,603.08
- Weekly employer pension contribution on this salary: £92.54
- 10 months x £92.54 = £925.40
- Subtotal = £29,528.48
- Between April and July 2021, the Claimant earned (£3,072.10) and he gives credit for that
- Subtotal with credit for earnings = £26,456.38
- Applying a *Polkey* reduction of 15% to that figure, produces a total loss of earnings of £22,487.92
- The Claimant is also entitled to an award for loss of statutory rights of £500
- The grand total of the award is **£22,987.92**.

Other matters

20. The basic award is extinguished by the redundancy payment the Claimant received.

21. Because the first £30,000 of the compensatory award is tax-free, there is no requirement to gross up any part of the award of compensation in this case.

22. The Claimant received job seekers allowance between December 2020 and February 2021. That will be the subject of recoupment, for which see the schedule below.

Employment Judge Massarella
Date: 7 November 2022

APPENDIX 2: (MONETARY AWARDS)

Recoupment of Jobseeker's Allowance, income-related Employment and Support Allowance and Income Support

The following particulars are given pursuant to the Employment Protection (Recoupment of Jobseekers Allowance and Income Support) Regulations 1996, SI 1996 No 2349, Reg 4 and SI 2010 No 2429 Reg 5.

(a) Monetary award: £22,987.92 (the total of the award).

(b) Prescribed element: £22,487.92 (the amount of lost earnings suffered by the Claimant in the prescribed period).

(c) Period to which (b) relates: 9 May 2020 to 13 March 2021 (the period of loss for which the Claimant is being compensated).

(d) Excess of (a) over (b): £500.

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 Support Allowance 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.

Only the prescribed element (item (b) above) 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 (item (d) above) 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.