EMPLOYMENT TRIBUNALS

Claimant: **Mr C Palfrey**

Respondent: **Altrad Employment Services Limited**

Heard at: **Cardiff by video** **On:** **1st June 2022**

Before: **Employment Judge Howden-Evans**

Representation
Claimant: Mr Cross, legal representative
Respondent: Mr Warren-Jones, legal representative

REMEDY JUDGMENT having been sent to the parties on 29th 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

The employment judge's decision was that it was not practicable for the Respondent to re-engage or re-instate the Claimant and the Claimant was awarded compensation for unfair dismissal of £39,330.

1. I am grateful to both representatives for the written closing submissions. I have had the benefit of a bundle of documents of 54 pages and I have heard oral evidence on oath from the Claimant and from Mr Bannister.

Reinstatement

2. Having heard evidence from Mr Bannister, I accept that it is not practicable for the Respondent to comply with an order for reinstatement. In January 2021 the Respondent lost the Dow Heavy Lifting contract (near Barry) that the Claimant had previously been assigned to and this work is now undertaken by Enermech Limited, a company that is wholly unrelated to the Respondent company. The riggers and lift engineers that the Respondent employed at Dow Heavy Lifting were transferred to Enermech Limited. The Respondent does not operate any similar sites nearby.

Reengagement

3. I accept that whilst the Respondent may have Rigger positions available, these are based in Teeside and the Claimant quite reasonably is not prepared to

relocate from South Wales to North England to take up one of these posts. As Enermech Limited is not an associated employer or a successor company, I accept it would not be practicable for the Respondent to comply with an order for reengagement.

Compensation

4. As an Order for Reinstatement or Reengagement is not practicable, I turned to consider a compensation award

5. The Employment Rights Act 1996 ("ERA") provides I can make a "basic award" (see Sections 119 to 122 ERA) and a "compensatory award" (see Sections 123 and 124 ERA). The basic award is calculated by reference to a statutory formula and rewards an employee for their loyal service while the compensatory award is, such amount as I consider *"just and equitable in all the circumstances having regard to the loss sustained by [Mr Palfrey] in consequence of the dismissal insofar as that loss is attributable to action taken by the employer"* (Section 123(1) ERA).

6. Deductions can be made from both the basic award and the compensatory award, for example by reference to the "Polkey principle" and/or a failure to mitigate losses. The principle of "contributory fault" allows, for a deduction from both the basic award (Section 122(2) ERA) and the compensatory award (Section 123(6) ERA).

Polkey

7. I deal first with so-called "Polkey deductions". These are derived from the decision of the House of Lords in *Polkey v. A E Dayton Services Limited [1988] ICR 142*.

8. In seeking a Polkey deduction, employers bear the burden of persuading the Tribunal that they would have dismissed the employee even if they had complied with a fair procedure. There must be a proper evidential basis for this finding; mere assertion is insufficient. This does not preclude an element of speculation, nor does it mean that I cannot adopt a "working hypothesis" about what would have happened if the employer had acted fairly.

9. In the liability judgement I accepted that Mr Humphreys and Mr Trotman both held a genuine belief that the act of misconduct had been committed. I was satisfied that they genuinely believed the claimant had made offensive and inappropriate comments of a racist and threatening nature as they mistakenly believed that more than one person had witnessed the Claimant make offensive comments albeit they wished to remain anonymous.

10. However I found this belief was not based on reasonable grounds. Both Mr Humphreys and Mr Trotman knew that the Claimant was vehemently denying the allegation but had formed a belief in misconduct based upon attendance notes (littered with * rather than identifying witnesses by letter) of meetings with anonymous people and an email reporting someone else's account. The witnesses had not been given an opportunity to approve the accuracy of attendance notes. The decision makers did not have witness statements; each attendance note reported that the witness was not prepared to provide a witness statement. I was satisfied that, in circumstances in which an employee

denied the alleged misconduct had ever occurred and witnesses were not prepared to be identified, a reasonable employer would expect something more by way of grounds on which to form a belief in misconduct. I noted the investigating officer recognised that something more would be required for reasonable grounds on which to form a belief in misconduct as he noted in the attendance note of his discussion with anonymous witness 2 "*CJ explained that effectively without any witness statements it would prove difficult to substantiate that the offensive comments were made"*.

11. I also found the investigation did not fall within the range of reasonable investigations that a reasonable employer could regard as being reasonable in all the circumstances, having regard to the Respondent's size and administrative resources. As the authority of *Linfood Cash & Carry Ltd v Thompson* explains, employers need to take greater care when considering the weight of anonymous evidence. To his credit, Mr Humphreys accepted that he had not made efforts to test the accounts of the anonymous witnesses in any way. He had not looked for evidence which might have supported the Claimant's account, such as checking whether the 60B form had been completed by the Claimant on that day. In the appeal letter, Mr Trotman was told by the Claimant that the accounts relied upon were *"categorically untrue"* and yet he also made no attempt to meet or write questions to the anonymous witnesses or look for further evidence.

12. I was satisfied that the dismissal was not procedurally fair. As the ACAS code explains, procedural fairness requires an employer to listen to the employee's account and look for evidence on both sides. I accepted that the respondent did not look for evidence on both sides – there was no attempt to test the accuracy of the account contained in the attendance notes, which the claimant had told the respondent were "categorically untrue".

13. The question quite properly arises as to what difference it made to the outcome, if any, that the employer didn't make further enquiries to look for evidence on both sides or to test the accuracy of the account in the attendance notes.

14. I accept that if Mr Humphreys or Mr Trotman had made further enquiries, they would have realised that there was only one person, Mr Oliver making these allegations and that even he was not prepared to provide a witness statement. It is highly unlikely that Mr Palfey would have been dismissed in these circumstances– the Respondent has not persuaded me the Claimant would have been dismissed if the Respondent had complied with a fair procedure.

Contributory Conduct

15. As I mentioned above, Sections 122(2) and 123(6) ERA give the Tribunal power to reduce both the basic and compensatory awards for unfair dismissal by such proportion as I consider just and equitable having regard to any finding that the claimant caused or contributed to the dismissal by his conduct. As I explained in the liability judgment in cases of unfair dismissal for alleged gross misconduct, Tribunals do not make findings on whether the act of misconduct did or did not occur; I simply consider whether the respondent formed a genuine belief, based on reasonable grounds and after a reasonable investigation, that the act of misconduct occurred.

16. However, when considering contributory fault, I need to go further: I must ask myself whether there was culpable or blameworthy conduct on the part of the employee, whether it caused or contributed to the dismissal and, if so, whether it would be just and equitable to reduce the awards.

17. Mr Oliver (the only person to allege the Claimant had made racist comments) did not give evidence at the final hearing. In contemporaneous notes I can see he was not prepared to repeat this allegation in a written statement to support disciplinary proceedings. During the final hearing, when he was aware that Mr Oliver was the person making the allegation, the Claimant explained there had been an incident with Mr Oliver shortly before Mr Oliver made his complaint about the Claimant. I accept the Claimant's evidence that during this earlier incident (in front of other work colleagues) the Claimant had told Mr Oliver to stop recording the Claimant on his phone and had told Mr Oliver he could not to share this recording online. During the disciplinary process the Claimant didn't have the opportunity to explain this previous incident had occurred, as at the time the Claimant was unaware of who had made the allegations.

18. In considering whether the Claimant had committed any act of blameworthy conduct, I note that at the time of the alleged "racist comment" the Claimant was in a queue with over a dozen other workers. The Claimant was engaged in a friendly conversation about a film with the W410 permit hut official who happens to be a minority ethnic person. If the Claimant had made a racist comment, there would have been many witnesses to this event, including the W410 officer.

19. At the earlier hearing I had a witness statement from the Claimant's former supervisor who had known the claimant for over 10 years and had witnessed him work with numerous minority ethnic colleagues and support numerous minority ethnic people in the martial arts community – that witness vehemently denied the Claimant could be racist. I accept on a balance of probabilities, that the Claimant never did make a racist comment. I accept there has been no blameworthy conduct on the part of the Claimant. It is not just and equitable to make any reduction for contributory conduct.

Failure to mitigate loss

20. The burden of proof is on the Respondent, and it is not enough for the Respondent to show that there were other reasonable steps that the Claimant could have taken but did not take. It must show that the claimant acted unreasonably in not taking them.

21. The Claimant was summarily dismissed on 24th February 2020, having worked for 2 years with the respondent and 30 years as a Rigger. He was 59 years old at the date of dismissal. In March 2020, the weeks immediately following the Claimant's dismissal, the Covid pandemic resulted in the first national lockdown in the UK. Those in the Claimant's age group were identified as being more vulnerable and at higher risk of adverse effects (including death) if they caught Covid 19.

22. I accept the Claimant's evidence that being dismissed for racist comments had a substantial impact on his mental health, albeit he did not seek help from his GP. For many years he has lived in the same small community, and he

encountered verbal comments when venturing out of his house, about the reason for his dismissal, which meant he became withdrawn. Being dismissed for racist comments, together with his sister's sudden diagnosis with cancer and her subsequently dying alone later in 2020, meant that the Claimant was struggling with his mental health; he lost 2 stone in weight, lost his confidence and withdrew from the community. I accept he had reactive depression, albeit he did not seek help from his GP given the circumstances he was living through, with the pandemic and the burden of being dismissed for racist comments.

23. The Respondent submits the Claimant failed to mitigate his loss as he failed to apply for Job Seekers Allowance; Respondent's counsel referred me to *Secretary of State for Employment v Alexander Stewart 1995 UKEAT/398/95* In evidence, the Claimant explained he understood he would not be eligible to receive Job Seekers Allowance as he had personal savings exceeding £16,000. During today's hearing the Respondent's counsel has submitted the Claimant would have been eligible for 6 months of Job Seekers Allowance before his savings would impact on his eligibility for Job Seekers Allowance.

24. I accept the Claimant's evidence, that his local job centre and library were closed when government restrictions were in place that largely prohibited everyone from leaving their home. At that time, the Claimant was completely inexperienced in using computers; he did not know how to use internet browsers to search for employment or how to use a computer to create his CV and fill in application forms. It was not until restrictions were lifted that family members were able to give him some help in using computers. I accept the Claimant understood he was not eligible for Job Seekers Allowance (because of his savings), and in the highly unusual circumstances that prevailed in 2020 he could not reasonably be expected to find out about his eligibility for Job Seekers Allowance. The Claimant has not acted unreasonably in failing to apply for job seekers allowance.

25. In the alternative, the Respondent argued the Claimant had failed to mitigate his loss as he had not made applications for alternative employment.

26. I accept the Claimant's evidence that being dismissed for racist comments in February 2020, his sister's diagnosis with cancer and her death at the end of 2020 had a substantial impact on his mental health such that he was not well enough to seek employment in 2020 and much of 2021. He only started to regain his confidence later in 2021. His confidence and recovery were helped substantially by the liability judgment which was received by parties at the end of September 2021; until that point in time, the Claimant was viewed as someone that had made racist comments which had a huge impact on his mental health, his confidence and his ability to seek alternative employment.

27. The Respondent has pointed to rigger opportunities that were advertised later in 2021 and suggested the Claimant ought to have made applications for these posts. I accept that at that point in time (given the slur of being dismissed for racist comments) the Claimant would still find it difficult to return to the rigger community. Instead, he found an alternative means of earning a living. In November 2021 when he felt mentally stronger, the Claimant undertook training and started a new venture as a professional sports trader. He turned a hobby that he had enjoyed since the age of 16 into a career. This was not "gambling"; it was an enterprise that the Claimant had undertaken training in and had spent a great deal of time researching to make informed decisions. Whilst the

Claimant is still in the early stages of this new career, he has already started to earn a reasonable and steady income from this.

28. The Respondent must show that the claimant acted unreasonably in not making applications for alternative employment. I accept that the label of having been dismissed for racist comments, the Claimant's mental health and the Covid pandemic did place barriers in front of him in trying to find alternative employment, particularly as he did not yet have IT skills to engage in the new online world and he was of an age that was more vulnerable to the effects of Covid. I find it was reasonable for the Claimant to take 19 months to start looking for alternative employment and start his new career. I am awarding the Claimant 19 months for loss of earnings ie 76 weeks.

S38 Employment Act 2002 claim

29. This was not raised at the previous hearing and did not appear in the earlier Schedule of Loss – for that reason it would be a breach of natural justice for me to allow this claim to be made now, without the Respondent having had the opportunity to call evidence to rebut this assertion. I decline to make an award.

ACAS uplift?

30. I accepted it was appropriate to award a 20% uplift on both the basic award and the compensatory award, as the Respondent had unreasonably failed to comply with the ACAS disciplinary code (s207A Trade Union and Labour Relations (Consolidation) Act 1992; they had substantially departed from the ACAS Code, as there was no attempt to check out the Claimant's account of the incident as noted in liability judgment. Finding the Claimant had made offensive comments of a racist and threatening nature would make it very difficult for the Claimant to get another job. This was a situation where the employee's reputation and ability to work in his chosen field was at stake and therefore it was particularly important that his employers heeded their responsibility to conduct a fair investigation and to look for evidence that might support the Claimant's account.

EMPLOYMENT JUDGE HOWDEN-EVANS

Dated: 21st October 2022

Reasons posted to the parties on 25 October 2022

For Secretary of the Tribunals Mr N Roche

Calculations

Parties agree the Claimant's salary with the Respondent was:

- Net pay: £505 per week
- Gross Pay: £720 per week (exceeding the £525 per week maximum amount of a week's gross pay for calculating the basic award for unfair dismissal).

The Claimant's Effective Date of Termination: 24th February 2020. He was 59 years old at the date of dismissal.

The Employment Judge awarded a 20% uplift to both the Basic Award and the Compensatory Award to reflect the Respondent's unreasonable failure to comply with the ACAS disciplinary code (s207A Trade Union and Labour Relations (Consolidation) Act 1992.

The Employment Judge considered whether it was appropriate to make a *Polkey* deduction; I declined to make such a deduction as it was highly unlikely the Claimant would have been dismissed if there had been a fair procedure.

The Employment Judge considered whether it was appropriate to reduce the basic and/ore compensatory award to reflect any blameworthy conduct on the part of the Claimant. I was satisfied that there had been no blameworthy conduct on the part of the Claimant; there is no reduction for contributory conduct.

The Employment Judge was satisfied there had been no failure to mitigate loss. I accepted it was reasonable for the Claimant to take 19 months (76 weeks) to start his new career, particularly considering the impact the dismissal had upon the Claimant's mental health, his lack of IT skills, the ongoing pandemic and as the Claimant was of an age that was more vulnerable to the effects of Covid.

Basic Award

2 years' service x 1.5 (as the Claimant was aged over 41) x £525 (maximum weekly gross pay) =	**£1,575**
Plus ACAS uplift (20% of £1,575)	**£315**
	£1,890

Compensatory Award (immediate loss)

Loss of Earnings

76 weeks x £505 net pay	**£38,380**
Loss of Statutory Rights	**£500**
	£38,880
Plus ACAS uplift (20% of £38,880)	**£7,776**
	£46,656

Statutory Cap applied (per s124 Employment Rights Act 1996) which limits the total amount of the compensatory award to 52 weeks' gross weekly pay (52 x £720)

= £37,440 for compensatory award plus £1,890 basic award = £39,330